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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tibban

Serial No. 76639252

Edwin D. Schindler, Esq. for James A. Tibban.

Amy C. McMenammin, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

Before Drost, Zervas and Kuhlke, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On May 23, 2005, James A. Tibben ("applicant") filed
an application (Serial No. 76639252) to register the mark
SAND GUZZLER (in standard character form) on the Principal
Register for the following goods in International Class 7,
as amended:

Earth moving and sand sorting machinery, namely,
mud pumps, well drilling machines, and mud and
sand separator tanks.

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The application claims first use anywhere and first use in commerce in April 2004. On June 22, 2006, applicant entered a disclaimer of the term SAND.

The examining attorney has issued a final Office action which refuses registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, as used in connection with his goods, so resembles (i) the mark "GUZZLER" (in standard character form) of Registration No. 1284986 (registered on July 10, 1984 and renewed); and (ii) the mark



of Registration No. 2871627 (registered on August 10, 2004), as to be likely to cause confusion. Both registrations issued to the same registrant and recite the following goods; "vehicle-mounted vacuum loading, transporting and dumping machines."

Applicant has appealed the final refusal, and both applicant and the examining attorney have filed briefs. We affirm.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act bars registration of a mark when that mark so resembles a registered mark that

it is likely, when applied to the goods, to cause confusion or mistake or to deceive potential consumers as to the source of the goods. 15 U.S.C. § 1052(d). The question in a Section 2(d) analysis is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods they identify come from the same source. In re West Point-Pepperell, Inc., 468 F.2d 200, 201, 175 USPQ 558, 559 (CCPA 1972).

Our determination of the examining attorney's refusal to register the mark under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also, In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Rests., Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity of the Marks

In considering the similarity or dissimilarity of the marks, our focus is on whether the marks, when compared in their entireties, are similar or dissimilar as to appearance, sound, connotation, and commercial impression. du Pont, 476 F.2d at 1361, 177 USPQ at 567; Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

Applicant's two-word mark consists of the term SAND followed by the term GUZZLER. While a mark is to be considered as a whole in determining likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." Packard Press, Inc. v. Hewlett-Packard Co., 227 F.3d 1352, 1357, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000); In re National Data Corp., 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1566, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); In re Appetito Provisions Co., Inc., 3 USPQ2d 1553, 1554 (TTAB 1987). Because SAND is a merely descriptive term that identifies the material which

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applicant's machines sort and a term which applicant has disclaimed, GUZZLER is the dominant part of applicant's mark. While a mark must be considered in its entirety, greater weight may be given to the dominant portion of a mark in determining whether there is a likelihood of confusion. See National Data Corp., 753 F.2d at 1060, 224 USPQ at 752.

GUZZLER is the only term in the mark of Registration No. 1284986. With regards to Registration No. 2871627 for the mark GUZZLER NX, because GUZZLER is an English language word and NX is not a word at all, and the record does not indicate that NX is a recognized abbreviation, we find that GUZZLER is the dominant term in this mark.

Applicant contends that GUZZLER is suggestive and therefore not entitled to the same scope of protection as would be accorded to a fanciful or arbitrary mark. According to applicant, "'GUZZLER' is suggestive of an 'excess,' such as that of an excess to consume"; and that "[a]s it pertains to 'earth moving' equipment and related machinery, ... would be suggestive of an ability to move large quantities of sand and other materials." Applicant's brief at 5. (Emphasis in the original.) In support of his argument, applicant relies on the following dictionary definition of "guzzle" from The American Heritage

Dictionary of English Language (4th ed. 2000), submitted with its response to the first Office action; "[t]o drink greedily or habitually; [t]o consume to excess; [t]o drink, especially alcoholic beverages, greedily or habitually." The examining attorney counters with the observation that "applicant's machinery cannot 'drink greedily' or 'consume to excess,' thus, the term 'GUZZLER,' when applied to the identified goods, is fanciful, invoking vividly personified visualizations of greedy eating machines gobbling up earth and mud." Brief at pp. 4 - 5.

We are not persuaded that the term GUZZLER when used in connection with the goods involved in this appeal should be accorded a reduced level of protection so as to allow the registration of applicant's mark. While the term GUZZLER used as a mark or as part of a mark in connection with such goods evokes an image of the goods processing large amounts of earth, even if it is somewhat suggestive of a feature of applicant's machinery, it is not, however, so suggestive as to permit the registration of applicant's mark. Moreover, suggestive marks are entitled to protection under Section 2(d) of the Trademark Act just as are arbitrary or fanciful marks. In re Am. Beauty Prods. Co., Inc., 223 USPQ 828, 829 (TTAB 1984); McCarthy, Trademark & Unfair Competition § 11:20A (2d ed. 1984).

With the foregoing in mind, we now consider the similarity and dissimilarity of the sound, meaning, appearance and commercial impressions of the marks, beginning with the mark of Registration No. 1284986. Registrant's single word mark is identical to the dominant term in applicant's mark. Because both marks contain the term GUZZLER, and applicant's mark only differs by the addition of the merely descriptive word SAND, the two marks are similar in appearance and sound. Further, applicant's addition of the term SAND does not change the meaning of the marks - the disclaimed term SAND merely identifies the material which applicant's goods process. Finally, the commercial impression of the marks are the same, with both marks evoking the same image of machinery processing sizable amounts of material.

With regards to GUZZLER NX, as noted above, GUZZLER is identical to the dominant term in applicant's mark. In view of this shared term, the marks are similar in sound. The marks are also similar in overall appearance. Applicant's mark is depicted in standard character form; applicant hence is not limited to presentation of his mark in any particular stylization, and may end up with stylization very similar in appearance to that shown in registrant's mark. See Squirtco v. Tomy Corp., 697 F.2d

1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983); 37 C.F.R. § 2.52(a). Further, applicant may adopt a stylization where SAND appears in smaller lettering than GUZZLER, thereby enhancing the prominence of GUZZLER. As for the commercial impression and the meaning of the marks, we find them to be similar too for the reasons mentioned above - the addition of NX does not change the commercial impression or the meaning.

In sum, we find that applicant's mark and the two cited marks are more similar than dissimilar. We thus resolve the first du Pont factor against applicant.

B. Similarity of the Goods

We next consider the similarity or dissimilarity of applicant's "earth moving and sand sorting machinery, namely, mud pumps, well drilling machines, and mud and sand separator tanks" and registrant's "vehicle-mounted vacuum loading, transporting and dumping machines." The goods or services of an applicant and a registrant need not be similar or competitive to result in a likelihood of confusion. In re Int'l Tel. & Tel. Corp., 197 USPQ 910, 911 (TTAB 1978). It is sufficient that the respective services are such that they would or could be encountered by the same persons under circumstances that could, because

of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. Id.

Here, registrant has identified its goods broadly without any field of use limitations. There is, consequently, an apparent relationship between applicant's goods and registrant's goods in that they both involve the movement of soil, including mud and sand. Additionally, both goods may be used in the construction industry. In fact, applicant's goods could be used in tandem with registrant's goods; applicant's goods may be employed in drilling wells or extracting mud, and registrant's goods may be employed to remove the resulting loose soil or mud.

Additionally, the examining attorney has affirmatively established that consumers would mistakenly believe applicant's and registrant's goods originated from a common source. The examining attorney submitted with his final Office action third-party registrations that each cover goods like those identified by applicant and registrant.¹ These registrations are probative in that they suggest that

¹ The examining attorney also submitted webpages from various manufacturers, distributors and Internet sellers with his first Office action as evidence that consumers would expect that goods of the type specified by Applicant and registrant originate from a common source. These webpages have extremely limited probative value because they do not show goods of the type identified in both applicant's and registrant's identification of goods or do not show such goods under the same or similar marks.

the goods listed therein may come from a single source.

See In re Infinity Broad. Corp., 60 USPQ2d 1214, 1218 (TTAB 2001). The registrations include the following:

- (1) Registration No. 2375448; "PENTEX CORPORATION" for, inter alia, earth moving machines equipped with parts for excavating dirt, loading, lifting, and transporting materials and drilling holes into the earth;
- (2) Registration No. 2467407; "TRIC" for, inter alia, excavating equipment, underground boring machines, earth moving machines, mud pumps, and vacuum pumps;
- (3) Registration No. 2593606; "VERMEER" for, inter alia, earth moving and earth boring machines, underground boring machines, vacuum equipment such as vacuum evacuation systems consisting primarily of vacuum pumps and structural parts therefor for use on horizontal boring and directional drilling machines;
- (4) Registration No. 2773869; "GEKKO SYSTEMS" for, inter alia, borers, excavators, bulldozers, graders, and earth moving machines;
- (5) Registration No. 76290109; "JOY" for, inter alia, drilling machines and machinery for loading, hauling, and dumping of minerals;
- (6) Registration No. 3058484; "AMKODOR" for, inter alia, bulldozers and earth drilling machines; and
- (7) Registration No. 3019926; "MULTIONE" for, inter alia, earth moving machines and dumpers.

The third party registrations show that consumers, familiar with registrant's goods, are likely to conclude that applicant's goods sold under a similar mark are from the same source. Accordingly, we find the second du Pont

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factor regarding the similarity of the goods weighs against applicant.

II. Conclusion

After considering all the evidence of record and the arguments in this case, we conclude that applicant's mark SAND GUZZLER when used in connection with "earth moving and sand sorting machinery, namely, mud pumps, well drilling machines, and mud and sand separator tanks," is likely to be confused with registrant's marks GUZZLER and GUZZLER NX both for "vehicle-mounted vacuum loading, transporting and dumping machines" so as to be likely to cause confusion as to the source of the goods.

Decision: The examining attorney's refusal to register applicant's mark for the identified goods on the ground that it is likely to cause confusion under Section 2(d) of the Trademark Act with Registration Nos. 1284986 and 2871627 is affirmed.