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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re F.E.D. Proof, Inc.

Serial No. 77089708

Stephen Lesavich, Ph.D of Lesavich High-Tech Law Group,
P.C. for F.E.D. Proof Inc.

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(Chris A. F. Pedersen, Managing Attorney).

Before Quinn, Hairston and Taylor, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

F.E.D. Proof Inc. has filed an application to register
the mark AZ IS (in standard character form) for services
ultimately identified as "entertainment services, namely,
live musical performances for others and studio music
production featuring hip-hop and rap music" in

International Class 41.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with applicant's services, so resembles the mark THE AS-IS ENSEMBLE which is registered for "entertainment services, namely, live performances rendered by a musical group" in International Class 41,² as to be likely to cause confusion, mistake or deception.

Applicant has appealed; applicant and the examining attorney have filed briefs.³

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d

¹ Serial No. 77089708, filed January 24, 2007, alleging a bona fide intention to use the mark in commerce.

² Registration No. 2316785, issued February 8, 2000; Section 8 affidavit accepted. The word ENSEMBLE has been disclaimed apart from the mark as shown.

³ We note applicant's request that the examining attorney's brief be stricken because it does not contain an alphabetical index of cases. Trademark Rule 2.142(b)(2) provides that "[e]ach brief shall contain an alphabetical index of cases." (emphasis added). While it is preferred that a brief contain an alphabetical index of cases, this is not an absolute requirement. In this case, we decline to strike the examining attorney's brief for failure to include such an index of cases.

1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, 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).

It is the examining attorney's position that applicant's and registrant's respective services are legally identical and otherwise closely related. The examining attorney maintains that registrant's services are broadly identified and, therefore, encompass applicant's services of live musical performances featuring hip-hop and rap music. In view of the identical and closely related nature of the services, the examining attorney maintains that the trade channels and purchasers are identical. With respect to the marks, the examining attorney argues that the dominant portion of registrant's mark is AS-IS, that AS-IS is highly similar to applicant's mark AZ IS, and, therefore, the marks in their entireties are similar.

Applicant, in urging reversal of the refusal to register, argues that the respective services are different in nature, and are offered in different channels of trade to different classes of purchasers. Specifically,

applicant argues that its services feature hip-hop and rap music and are directed to young free-spirited audiences, whereas registrant's services feature jazz music and are directed to older more sophisticated audiences.

Applicant submitted an Internet printout of what appears to be the "My Space" profile of applicant's founder and which includes information about registrant's musical performances. With respect to the marks, applicant argues that the examining attorney has improperly dissected the marks, and that when the marks are considered in their entirety, they are dissimilar.

Considering first the services, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than on the basis of what the record reveals the services to be.

Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v.

North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991).

Furthermore, where the services in an application or cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of services encompasses

not only all services of the nature and type described therein, but that the identified services are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential customers thereof. See, e.g., *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

It is true that applicant's live music performances and studio music production services, as identified in its application, are limited in terms of the music genre to hip-hop and rap music. However, registrant's live performances rendered by a musical group, as identified in its registration, are not limited to any particular music genre and, therefore, we must assume that such performances feature hip-hop and rap music. Thus, for purposes of our likelihood of confusion analysis, the services of applicant and registrant are identical, in part, and otherwise closely related. In view of the identity of the services, they must be deemed to travel in the same channels of trade to the same classes of purchasers.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*

Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Although the marks must be considered in their entirety, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, in comparing the marks, we must keep in mind that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 864, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Although there are specific differences between registrant's mark THE AS-IS ENSEMBLE and applicant's mark AZ IS, we find that, on balance, the similarities outweigh the differences.

Insofar as registrant's mark is concerned, it is dominated by the term AS-IS. The word THE in registrant's mark has no source-indicating significance, and the disclaimed word ENSEMBLE is clearly descriptive of registrant's services of live performances by a musical group.⁴ In view thereof, these words are entitled to little weight in our likelihood of confusion analysis.

Furthermore, consumers often use shortened versions of names, and may well refer to registrant and its mark as simply AS-IS. Cf. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) [Rich, J., concurring: "the users of language have a universal habit of shortening

⁴ We note applicant's contention that ENSEMBLE is not descriptive of registrant's services, relying on the following definition of "ensemble:" *"a complete costume of harmonizing or complementary clothing and accessories,"* taken from the Merriam Webster dictionary. It is well-settled, however, that the descriptiveness of a word or mark must be viewed in the context of the identified services, not in the abstract or in relation to any other meaning the word or mark might have. See *In re Brightcrest, Ltd.*, 204 USPQ 591 (TTAB 1979). In the context of registrant's services, ENSEMBLE is clearly descriptive as evidenced by the definition of "ensemble" taken from the Encarta Dictionary and submitted by the examining attorney: *"group of performers - a group of musicians, dancers, or actors who perform together with roughly equal contributions from all members."*

full names--from haste or laziness or just economy of words"].

The dominant portion of registrant's mark, AS-IS, is highly similar to applicant's mark AZ IS. The dash in AS-IS is of little significance, and consumers would be likely to view AZ IS as an alternative spelling of AS IS. Moreover, AZ IS is the phonetic equivalent of AS-IS. When the marks are considered in their entireties, giving appropriate weight to the dominant portion of registrant's mark, we find that the marks are similar in sound and appearance.

In terms of meaning, we find that neither of these marks has any specific meaning or connotation. However, to the extent that applicant's and registrant's marks have any connotation, the connotation would be the same.

Furthermore, when the registrant's mark and applicant's mark are considered in their entireties, the marks engender sufficiently similar overall commercial impressions such that, if identical and closely related services were offered thereunder, confusion would be likely to occur among consumers.

Applicant has cited numerous cases in which this Board and our primary reviewing court have determined that there was no likelihood of confusion. Applicant argues that the

marks in those cases are at least as similar as the marks in the present case. In several of the cited cases, there was significant evidence of third-party use of similar marks; other cases involved goods and/or services that were found not to be related; and still other cases involved marks with different connotations and commercial impressions as applied to the respective goods and/or services. In other words, the facts in each of the cited cases differ from those herein. It is well-settled that each case must be decided on its own set of facts. See, e.g., *Colgate-Palmolive Company v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 USPQ 529, 530-531 (CCPA 1970) ["We are familiar with, and have considered, the array of decided cases cited and relied on by the parties. Except as the decided cases enunciate principles of trademark jurisprudence, they provide but meager assistance in the disposition of varied cases as they arise"].

We conclude that consumers familiar with registrant's live performances rendered by a musical group offered under the mark THE AS-IS ENSEMBLE would be likely to believe, upon encountering applicant's mark AZ IS for live musical performances for others and studio music production featuring hip-hop and rap music, that the services

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originate from or are somehow associated with or sponsored by the same source.

Decision: The refusal to register is affirmed.