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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Carrier Corporation

Serial No. 78329277

Terrence J. McAllister of Ohlandt, Greeley, Ruggiero & Perle, LLP for Carrier Corporation.¹

Carol Spils, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

Before, Quinn, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Carrier Corporation has filed an application to register the mark INFINITY in standard character form for goods ultimately identified as:

heating, ventilation and air conditioning systems, namely, air conditioners, heat pumps, furnaces, fan coils, evaporation coils, air handling units and

¹ After briefs on the case were filed, applicant filed a revocation and power of attorney appointing Mr. McAllister. Under the circumstances, a courtesy copy of this decision will be forwarded to applicant's prior attorney, Dana F. Bigelow of Wall Marjama & Bilinski LLP.

boilers, all for residential use in International Class 11.²

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark so resembles the mark INFINITI, previously registered for "electric circulating and ventilating fans; namely, ceiling fans,"³ that, when used on or in connection with applicant's goods, it is likely to cause confusion or mistake, or to deceive.⁴

When the refusal was made final, applicant appealed. Briefs have been filed.

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 1357, 177 USPQ 563 (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

² Serial No. 78329277, filed on November 18, 2003, which alleges dates of first use of April 1, 1987.

³ Registration No. 1758207 issued March 16, 1993; renewed. This registration is owned by Hunter Fan Company.

⁴ The examining attorney initially cited several additional registrations as bars to registration of applicant's mark. These registrations were subsequently withdrawn.

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 Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The examining attorney contends that applicant's mark INFINITY and the cited mark INFINITI are highly similar. The examining attorney also contends that the "fan coils" identified in applicant's application and the "ceiling fans" identified in the cited registration are related goods. In support of her position that these goods are related, the examining attorney has submitted copies of third-party registrations which she maintains show that companies have registered their marks for fan coils and ceiling fans.

Applicant, in urging reversal of the refusal to register, argues that the marks are not similar because they are spelled differently. Further, applicant states that it uses the INFINITY mark "in combination with the use of a house mark such as 'Carrier'" and therefore "the likelihood of confusion to the consumer will be substantially lessened." (Brief at 2). Applicant also argues that fan coils are different in nature from ceiling fans. Specifically, applicant argues that:

[C]eiling fans and fan coils both involve a fan but are otherwise substantially different in function, structure and purpose. A ceiling fan is used to circulate and mix air that would otherwise be stagnant in a room, whereas a fan coil acts to introduce a heating or cooling medium into a coil over which a fan is caused to pass air so as to transfer the cooled or heated air into a room to be conditioned. (Reply brief at 2).

Insofar as the trade channels are concerned, applicant contends that its goods are sold by HVAC (heating, ventilation and air conditioning) distributors and dealers whereas registrant's ceiling fans are sold primarily by home improvement stores. Also, applicant argues that the purchasers of both its goods and registrant's goods are sophisticated. Applicant states that it has used the INFINITY mark in connection with the involved goods since April 1987 and there have been no instances of actual confusion. Finally, applicant maintains that marks consisting of or containing the word INFINITY/INFINITI are weak marks which are therefore entitled to only a limited scope of protection.

We turn, first, to a determination of 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. Although the marks must be considered in their entireties,

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). Furthermore, 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.

We find that the marks INFINITY and INFINITI are substantially similar in terms of appearance, differing only by one letter. We also find that the marks are identical, in terms of sound. With respect to connotation, it is likely that the cited mark INFINITI would be perceived as a mere misspelling of the word "infinity" and, thus it would have the same connotation as applicant's mark INFINITY. Similarly, in terms of overall commercial impression, we find that INFINITY and INFINITI are substantially similar. In sum, when we consider the marks in their entireties, we find that they are identical in sound and substantially similar in terms of appearance, connotation and commercial impression.

We turn next to the similarity or dissimilarity of the respective goods, and the similarity or dissimilarity of the trade channels and classes of purchasers for the respective goods. It is well established that the question of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or asserted to actually be. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Thus, where applicant's and registrant's goods are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Further, it is a general rule that the goods or services need be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner, or that the

circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods or services. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978). Moreover, the greater the degree of similarity between the applicant's mark and the cited mark, the lesser the degree of similarity between the applicant's goods and the registrant's goods that is required to support a finding of likelihood of confusion. In re Concordia International Forwarding Corp., 222 USPQ 35 (TTAB 1983).

Applying these principles to the present case, we find that the trademark examining attorney has failed to establish that applicant's fan coils and registrant's ceiling fans are similar or related in a way which would result in source confusion, even when they are marketed under the substantially similar marks involved in this case.

It is true that fan coils and ceiling fans may be broadly characterized as goods for circulating air. The mere fact that one may employ broad descriptive terms in conjunction with two types of goods does not demonstrate that they are related. See *General Electric Company v. Graham Magnetics Incorporated*, 197 USPQ 690 (TTAB 1977); *Harvey Hubbell Incorporated v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517 (TTAB 1975). When we examine the involved goods, they do not appear to be related in a manner that would be likely to cause confusion. Fan coils are components of heating, ventilation and air conditioning (HVAC) systems and units; they do not appear to be consumer items; rather they are the types of products that would be offered by dealers and distributors of HVAC systems for use by installers and repair personnel. On the other hand, the cited registration is for ceiling fans. This is the type of product that would be offered in home improvement stores to the general public for use in their residences.

It appears to us that, because of the nature of the goods, they would be offered to different purchasers through different channels of trade. As such, it is unlikely that there would be any opportunity for confusion to occur.

In an attempt to show a relationship between the respective goods, the examining attorney made of record third-party registrations which she maintains show that companies have registered their marks for both fan coils and ceiling fans. Third-party registrations which individually cover a number of different goods and which are based on use in commerce serve to suggest that the listed goods are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Upon closer examination of the evidence submitted by the examining attorney, we find that only one use-based third-party registration includes fan coils and ceiling fans; that is, Registration No 2928079 for the mark PANASONIC which includes "fan coil units" and "ceiling fans."⁵ This single registration is insufficient to show that applicant's fan coils and registrant's ceiling fans

⁵ The examining attorney submitted over forty third-party registrations in this case. The overwhelming majority appear to relate to the registrations which were initially cited as bars to registration of applicant's mark but were subsequently withdrawn. It would have been helpful if the examining attorney had specified the third-party registrations on which she was still relying to support her position that fan coils and ceiling fans are related goods.

are of a type which may emanate from a single source.⁶

In view of the differences in the goods, the different customers to whom they are sold, and the different trade channels through which they are sold, we find that the Office has not met its burden of proving that applicant's use of the mark INFINITY for applicant's identified goods is likely to cause confusion or mistake, or to deceive with the registered mark INFINITI for ceiling fans.

Decision: The refusal to register under Section 2(d) is reversed.

⁶ Also of record are two third-party applications for marks that cover, inter alia, fan coils and ceiling fans. However, applications are not probative of anything except that they were filed.