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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Carrier Corporation

Serial No. 78329286

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:

thermostats and electronic controls for residential heating, ventilation and air conditioning units; electric fan coils in International Class 9; and air filters for air conditioning units; air filters

¹ After briefs on this 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.

for domestic use; humidifiers, ventilators for heating, ventilation and air conditioning units 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 marks in the following registrations, that, if used in connection with applicant's goods, it is likely to cause confusion or mistake or to deceive:

Registration No. 1758207 for the mark INFINITI in typed form for "electric circulating and ventilating fans; namely, ceiling fans;"³

Registration No. 2123282 for the mark INFINITY in typed form for, in relevant part, "controllers for measuring, controlling, and/or regulating temperature;"⁴ and

Registration No. 2126935 for the mark INFINITY and design shown below,



for, in relevant part, "controllers for

² Serial No. 78329286, filed November 18, 2003, based on applicant's allegation of a bona fide intention to use the mark in commerce.

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

⁴ Issued December 23, 1997; renewed.

measuring, controlling, and/or regulating temperature.”⁵

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 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 Marks

We begin our analysis with a comparison of applicant's mark INFINITY and registrants' marks INFINITI (Registration

⁵ Issued January 6, 1998; renewed. The latter two registrations are owned by Newport Electronics, Inc. The examining attorney initially cited several additional registrations as bars to registration of applicant's mark. These registrations were subsequently withdrawn.

No. 1758207), INFINITY (Registration No. 2123282) and INFINITY and design (Registration No. 2126935).

With respect to the marks, we are required to determine the similarity of dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, 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 offered under the respective marks is likely to result.

We find that applicant's mark INFINITY and the cited mark INFINITI (Registration No. 1758207) 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 these marks in their entireties, we find that they are identical in sound and substantially similar in terms of appearance, connotation and commercial impression.

Insofar as applicant's mark INFINITY and the cited mark INFINITY (Registration No. 2123282) are concerned, it is readily apparent that they are identical in terms of appearance, sound, connotation and commercial impression.

The cited mark INFINITY and design (Registration No. 2126935) contains the word INFINITY and the infinity symbol. The presence, however, of the infinity symbol does not serve to distinguish this mark from applicant's INFINITY mark. A design element such as that appearing in the cited mark is generally less important than the word portion of the mark in creating an impression. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Moreover, in the case of the cited mark, the infinity symbol simply reinforces the word INFINITY. Further, the font style in the cited mark is certainly not unique, and because applicant's mark is in standard character form it

may be displayed in the same font style. In sum, because both marks are dominated by the term INFINITY, we find that when considered in their entirety, they are substantially similar in terms of appearance, sound, connotation and commercial impression.

Applicant argues that marks consisting of or containing the word INFINITY/INFINITI are weak marks which are therefore entitled to only a limited scope of protection. In support of its contention, applicant submitted a list of third-party applications and registrations taken from the USPTO TESS database. The list consists simply of the registration/application number, the word mark, and the status of the registration/application, i.e., whether it is "live" or "dead." Such a listing of registration/application numbers and marks is generally insufficient to make the registrations and applications of record. See Trademark Board Manual of Procedure Section 1208.02 (5th ed. 2007) and cases cited therein. The trademark examining attorney, however, did not object to this list and we therefore consider the list of registrations and applications of record.

This list does not indicate the particular goods in connection with which the marks are registered or sought to be registered. Therefore, it is of limited probative

value, since we cannot determine whether the marks are for goods similar to those of the applicant and any of the registrants. In this regard, even copies of third-party registrations covering goods far removed from the goods of the applicant and the registrants would be irrelevant to the present likelihood of confusion analysis. See *Conde Nast Publications, Inc. v. America Greetings Corp.*, 329 F.2d 1012, 141 USPQ 249, 252 (CCPA 1964). Also, copies of third-party applications are irrelevant because they are not probative of anything except that the applications were filed.

Nevertheless, even if marks which consist of or contain the word INFINITY/INFINITI are considered to be weak due to a high degree of suggestiveness conveyed by such term, even weak marks are entitled to protection where confusion is likely. Here, notwithstanding any alleged weakness in the term INFINITY/INFINITI, applicant's mark is still identical/substantially similar to each of the registered marks in appearance, sound, connotation and commercial impression.

Further, to the extent that applicant contends that the cited marks are entitled to a limited scope of protection because they are not famous, such contention is without merit. The absence of fame is not a consideration

in our likelihood of confusion determination. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Applicant also maintains that confusion is not likely because it will use the mark INFINITY with a house mark. In determining applicant's right to registration, only the mark as set forth in the application may be considered; whether or not INFINITY will be used in combination with a house mark is of no significance. See *Frances Denny v. Elizabeth Arden Sales Corporation*, 120 USPQ 480 (CCPA 1959).

The Goods

With respect to the 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 each of the cited registrations, 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 any of the 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 need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods 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. 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 any of the cited marks, 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).

Registration No. 1758207

The goods in this registration are identified as "electric circulating and ventilating fans; namely; ceiling fans." The examining attorney contends that applicant's Class 9 electric fan coils and Class 11 air conditioning units are related to registrant's ceiling fans. 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 electric fan coils and air conditioning units, on the one hand, and ceiling fans, on the other hand.

Applicant, however, argues that the respective goods are different in nature. Insofar as the trade channels are concerned, applicant contends that its goods are of a type that are sold by HVAC 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.

We find that the trademark examining attorney has failed to establish that applicant's Class 9 electric fan

coils and registrant's ceiling fans are similar or related in a way which would result in source confusion, even if they are marketed under the substantially similar marks involved in this case.

It is true that electric 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. Electric fan coils are components of heating, ventilation and air conditioning (HVAC) equipment 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 and units 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 classes of 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 electric fans 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 electric fan coils and ceiling fans; that is Registration No. 2928079 for the mark PANASONIC which includes "fan coil units" and "ceiling fans." This single registration is insufficient to show that applicant's electric fan coils and registrant's

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

Insofar as applicant's Class 11 air conditioning units and registrant's ceiling fans are concerned, we find that these goods are sufficiently related that confusion is likely to result from the use of the substantially similar marks INFINITY and INFINITI. In this regard, the examining attorney submitted the following use-based third-party registrations which include in their respective identifications both of these types of goods: Registration No. 2429757 for the mark BLUE TECHNOLOGY for "air conditioners," "air conditioning units," and "ceiling fans;" Registration No. 2521116 for the mark GENUIN and design for "air conditioners" air conditioning units," and "ceiling fans;" Registration No. 2634811 for the mark HARBOR BREEZE for "ceiling fans" and "air conditioning units;" Registration No. 2719978 for the mark MAICA for "air conditioners" and "ceiling fans"; Registration No. 2928079 for the mark PANASONIC for "air conditioners" "ceiling fans" and "air conditioning units;" Registration

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

No. 2813887 for the mark ACA for "air conditioners" and "ceiling fans;" Registration No. 2835244 for the mark ALWAYS QUIET. ALWAYS IN STYLE. for "ceiling fans" and "air conditioning units;" Registration No. 2905847 for the mark ICECO HEATING AND COOLING THE WORLD and design for "window air conditioning units" and "ceiling mount fans"; Registration No. 2921647 for the mark PAVILLON for air conditioners" "air conditioning units" and "ceiling fans;" and Registration No. 2830243 for the mark HARBOR BREEZE and design for "ceiling fans" and "air conditioning units."⁷

Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under the same mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). This evidence demonstrates the existence of at least a viable

⁷ The examining attorney submitted over fifty 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 relying to support her position with respect to the relatedness of applicant's electric fan coils and air conditioning units and registrant's ceiling fans.

relationship between air conditioning units and ceiling fans.

We also find that these types of goods may be sold in overlapping trade channels and to the same classes of purchasers. Applicant argues that its goods are of a type that are sold through HVAC dealers and distributors. However, no limitation or restriction appears in applicant's identification of goods, and therefore it can be given no consideration. We must presume that applicant's air conditioning units include all the usual types, including window air conditioners and portable air conditioners. Such air conditioning units and ceiling fans would be marketed in home improvement stores to the general public. Nor can we accept applicant's argument that purchasers of the involved goods are sophisticated. This argument is unsupported by any evidence in the record. Moreover, as indicated, air conditioning units and ceiling fans are purchased by the general public who would exercise nothing more than normal care in purchasing the goods.

Registration Nos. 2123282 and 2126935

The pertinent goods in these registrations are "controllers for measuring, controlling, and/or regulating

temperature." The examining attorney argues that such goods are identical, or at the very least closely related, to registrant's identified "controllers for measuring, controlling, and/or regulating temperature."

Applicant, however, contends that the involved goods are not related because the registrant's controllers are not for use in heating, ventilation and air conditioning systems. In this regard, applicant submitted excerpts from registrant's Internet homepage. Applicant further contends that the involved goods are offered in different channels of trade and that the purchasers of the goods are sophisticated.

The identified "controllers for measuring, controlling, and/or regulating temperature" in the cited registrations are not limited to a particular application. As previously noted, the question of likelihood of confusion must be determined on the basis of registrant's goods as they are set forth in the registrations, and not in light of what such goods are shown or asserted to actually be. Thus, for purposes of our likelihood of confusion analysis herein, we must presume that registrant's controllers are for use in heating, ventilation, and air conditioning systems. In other words, we cannot limit registrant's goods in the manner urged by

applicant. Applicant's goods, therefore, must be considered as identical in part, or at a minimum closely related to registrant's goods.

Applicant's argument about the differences in trade channels also is unavailing. Again, in the absence of any limitations in registrant's identifications of goods, we must presume that the registrant's goods are sold in all of the normal channels of trade for goods of that type, including HVAC dealers and distributors.

With respect to applicant's arguments that the purchasers of the involved goods are sophisticated, we note that applicant has not offered any evidence to support this assertion. In any event, we note that even careful purchasers are not immune from source confusion, particularly here where the marks are identical/substantially similar and the goods are, at a minimum, closely related. In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999).

A final argument made by applicant requires comment. Applicant contends that there have been no instances of actual confusion occurring as a result of the contemporaneous use of the marks of applicant and the registrants. Although this is an intent-to-use application, applicant states that it has used the INFINITY

mark in connection with its identified goods since 2004.

We are not persuaded by applicant's argument. As the Board stated in *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027

(TTAB 1984):

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. (citations omitted)

Decision: The refusal to register applicant's Class 9 goods in view of Registration No. 1758207 is reversed. The refusal to register applicant's Class 11 goods in view of Registration is 1758207 is affirmed. The refusal to register applicant's Class 9 goods in view of Registration Nos. 2123282 and 2126935 is affirmed.