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Mailed:
June 19, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Emissive Energy Corporation

Serial No. 78351319

Mark E. Tetreault of Barlow, Josephs & Holmes, Ltd. for Emissive Energy Corporation.

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Before Bucher, Cataldo and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Emissive Energy Corporation filed an intent-to-use application to register the mark **20/20**, in standard character format, for "flashlights."[1] Registration was refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), on the ground that **20/20** for flashlights so resembles Registration No. 2,990,217 for the mark **2020 DESIGN STUDIO** for, *inter alia,* "electric lighting fixtures," in Class 11, and "design for others in the

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[1] Application Serial No. 78351319, filed January 13, 2004.

field of general product lines in the field of lighting," in Class 42, as to be likely to cause confusion. The registrant disclaimed the exclusive right to use the words "Design Studio." When the refusal was made final, applicant appealed. Both the applicant and the examining attorney filed briefs. For the reasons set forth below, the refusal to register is affirmed.

Our determination of likelihood of confusion under Section 2(d) of the Lanham Act is based on an analysis of all the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). The only evidence of record are copies of ten (10) use based trademark registrations for marks used to identify and distinguish both flashlights and electric lighting fixtures, including Registration No. 3,088,423 for the mark TIROS owned by applicant.

A. <u>Similarity or dissimilarity and nature of the goods</u>.

It is well settled that it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. Likelihood of confusion may be found if the goods are related in some manner and/or if the circumstances surrounding their marketing are such that

they would be likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they emanate from the same source. *In re Pollio Dairy Products Corp.,* 8 USPQ2d 2012, 2015 (TTAB 1988); *Seaguard Corporation v. Seaward International, Inc.,* 223 USPQ 48, 51 (TTAB 1984).

In this case, the products identified by the registrant's mark are electric lighting fixtures and the products identified by applicant's mark are flashlights. A "flashlight" is "a small, portable electric lamp powered by dry batteries or a tiny generator."[2] An "electric lighting fixture" is an electric light that is permanently, attached or appended to a structure or building.[3] Because both products are electric lights (one portable and one fixed in place), the nature of the goods (*i.e.,* lighting) is related.

In addition, the examining attorney has submitted ten (10) registrations for both electric lighting and flashlights. These registrations have probative value to the extent that they serve to suggest that electric

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[2] Dictionary.com Unabridged (V 1.1) based on the Random House Unabridged Dictionary (2006). *See also* The American Heritage Dictionary of the English Language (2006). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.,* 213 USPQ 594 (TTAB 1982), *aff'd,* 703 F.2d 1372 , 217 USPQ 505 (Fed. Cir. 1983).
[3] *Id* for the definition of "fixture."

lighting fixtures and flashlights may emanate from the same source. *In re Infinity Broadcasting Corporation,* 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Muck Duck Mustard Co., Inc.,* 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The fact that third parties, as well as applicant, have adopted and registered marks for electric lighting fixtures and flashlights is probative of the fact that those products may emanate from a single source.

In view of the foregoing, we find that the similarity and nature of the goods favors a finding of likelihood of confusion.

B. <u>The conditions under which and buyers to whom sales are made</u>.

It is also well settled that the issue of likelihood of confusion between pending applications and registered marks must be determined on the basis of the goods or services as they are identified in the application and registration, rather than on what any evidence may show as to the actual nature of the products, their channels of trade, and/or the classes of purchasers. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank,* 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981). Because there are no restrictions of

any kind in either the applicant's or registrant's description of goods, we must therefore consider the applicant's flashlights and registrant's electrical lighting fixtures as if they were being sold in all of the normal channels of trade to all of the normal purchasers for such goods. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, supra; Toys R Us v. Lamps R Us,* 219 USPQ 340, 343 (TTAB 1983).

As indicated *supra,* neither applicant, nor the examining attorney, submitted any evidence regarding the actual nature of the products, their channels of trade, and/or the classes of purchasers. Nevertheless, applicant contends, without any evidentiary support, that registrant's electric lighting fixtures are typically found at an electrical supply house, in a home lighting section of a home improvement store or at a specialty light fixture retailer, and concludes that registrant's lighting fixtures are purchased by commercial electrical designers, interior designers, architects, electrical contractors, and building products suppliers. (Applicant's Brief, pp. 3-4).

Despite the fact that there are no restrictions in applicant's description of goods and that no evidence has been presented as to the nature of applicant's flashlights, applicant asserts that applicant's products are specialty

flashlights used for rugged military and law enforcement applications (*i.e.,* a high precision and high cost item). Applicant's products are, therefore, sold in specialty supply catalogs that carry military and law enforcement equipment, catalogs in the field of rugged outdoor use and by specialty retailers such as Sharper Image and the Discovery Stores. Thus, the typical customer for applicant's products include law enforcement officers, members of the military, and persons who participate in rugged outdoor activities. (Applicant's Brief, p. 4).[4]

However, as indicated above, there are no restrictions as to the channels of trade or classes of consumers in either applicant's description of goods or registrant's description of goods. Therefore, we must presume that registrant's electrical lighting fixtures and applicant's flashlights are sold in all channels of trade and to all classes of consumers who would normally purchase such products. Since both electric lighting fixtures and

[4] While applicant has argued that registrant's products and applicant's products move in different channels of trade, there is no evidence of record regarding the channels of trade. Without any restrictions in the descriptions of goods and without any evidence as to channels of trade, we cannot make a finding of fact as to the similarity or dissimilarity of the likely-to-continue channels of trade.

flashlights are products that are purchased by ordinary consumers, the classes of consumers overlap.

In view of the foregoing, the class of purchasers is a factor that favors finding a likelihood of confusion.

C. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *In re E. I. du Pont de Nemours & Co., supra.* 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 overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 USPQ2d 1835, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992). In making this determination, we must consider the recollection of the average purchaser who normally retains only a general, rather than a specific, impression of the marks. *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975).

While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corp.,* 753 F.2d 1056, 24 USPQ2d 749, 751 (Fed. Cir. 1983). That a particular feature of a mark is descriptive with respect to the products at issue justifies giving less weight to that portion of the mark. *Id.* In Registration No. 2,990,217, the term "Design Studio" is descriptive and the exclusive right to use "Design Studio" has been disclaimed. Thus, because the term "Design Studio" is descriptive, it will not be regarded as the dominant portion of the mark **2020 DESIGN STUDIO** and "Design Studio" will generally be given less weight than the more arbitrary **2020**. In any event, we are not persuaded that the term "Design Studio" offers sufficient distinctiveness to create a different commercial impression between **20/20** and **2020 DESIGN STUDIO**.

Moreover, the significance of the number **2020** in registrant's mark **2020 DESIGN STUDIO** is reinforced by its location as the first word in the mark. *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897)TTAB 1988)("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered"). *See also Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698, 1700

(Fed. Cir. 1992)(upon encountering the marks, consumers must first notice the identical lead word).

In comparing the two marks, we note that the registrant's mark incorporates the entirety of applicant's mark. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi,* 225 USPQ 624, 626 (TTAB 1985)(PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd.,* 221 USPQ 155, 156 (TTAB 1982)(EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.,* 218 USPQ 479, 480 (TTAB 1983)(LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

We do not find persuasive applicant's argument that the **2020** portion of registrant's mark engenders the commercial impression of a year designation. First, there is no evidence regarding how registrant uses its mark and, therefore, what commercial impression it is trying to convey.[5] Second, we believe that it is just as likely that

[5] This argument might have carried more weight and been more persuasive had applicant submitted evidence of registrant's use of its mark to show the commercial impression engendered thereby.

consumers will perceive **2020** as **20-20,** rather than 2,020, thereby creating the same commercial impression as applicant's mark. Finally, since both marks are used in connection with lighting, it reasonable that the numbers **2020** in registrant's mark **2020 DESIGN STUDIO** and applicant's mark **20/20** will engender the same commercial impression.

While there are obvious differences between applicant's mark **20/20** and registrant's mark **2020 DESIGN STUDIO**, the slash in applicant's mark and the descriptive words "Design Studio" do not detract from the similarity created by the use of the number **2020**. We are satisfied that when the marks are taken as whole, they are similar in sound, appearance, meaning, and commercial impression. Accordingly, the similarity or dissimilarity of the marks is a factor that favors finding that there is a likelihood of confusion.

D. Balancing the factors.

We find that because of the similarity of the marks, the similarity of the goods, and the overlapping class of consumers, there is a likelihood of confusion between applicant's mark **20/20** proposed for use in connection with flashlights and registrant's mark **2020 DESIGN STUDIO** for electrical lighting fixtures.

Decision: The refusal to register under Section 2(d) of the Lanham Act is affirmed.