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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Koncept Technologies Inc.

Serial No. 78556295

Karl M. Steins of Steins & Associates for Koncept
Technologies Inc.

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

Before Walters, Zervas and Walsh, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On January 28, 2005, Koncept Technologies Inc. applied
to register the trademark KONCEPT (in standard character
form) on the Principal Register for "lighting lamps" in
International Class 11. The application (Serial
No. 78556295) was filed under Trademark Act Section 1(a),
15 U.S.C. § 1051(a), and claims first use anywhere and
first use in commerce on January 1, 2005.

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The examining attorney issued a final refusal of registration of applicant's mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles Registration No. 1697505, which issued on June 30, 1992 (renewed), for the mark LIGHT CONCEPTS (in typed form) for "electric lighting fixtures," in International Class 11, that, as used on applicant's identified goods, applicant's mark is likely to cause confusion or mistake or to deceive. Registrant has disclaimed the term LIGHT.

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

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, however, two key, although not exclusive, 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).

In considering the similarity or dissimilarity of applicant's and registrant's goods, we find that applicant's goods are encompassed within registrant's goods.¹ Thus, applicant's goods are legally identical to the same goods encompassed within registrant's identification of goods.

Applicant has argued at p. 8 of its brief that registrant's goods should be limited to the goods which were the subject of the specimen registrant filed in June 2002 in connection with "the then-recent Assignee's June 2002 Assignment filing," i.e., light bulbs. According to applicant, the specimen relates to goods which are not within registrant's identification of goods; the Office accepted the specimens; and "the most equitable resolution to the parties is to conclude that the ... Registrant's goods are limited to those supported by the specimen filed in June 2002." *Id.*

The first problem with applicant's argument is that it ignores a long established and fundamental tenant of trademark law, i.e., that the question of likelihood of

¹ We note the identification of goods in Registration No. 1359082, which was cited by the examining attorney but has

confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in registrant's registration, rather than what the evidence shows the goods and/or services to be. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods ..."). Thus, we will not consider registrant's identification of goods as "light bulbs" rather than "electric lighting fixtures," as applicant in essence urges us to do, and we resolve the *du Pont* factor regarding the similarity of the goods against applicant. The second problem with applicant's argument is that it is essentially an impermissible attack, in the absence of a petition to cancel, on the validity of the registration.

With respect to the similarity or dissimilarity of trade channels, because applicant's goods are legally

since been abandoned, is "electric lighting fixtures - namely, floor lamps, desk lamps and portable lamps."

identical to the same goods encompassed within registrant's identification of goods, and there are no trade channel restrictions in the identifications of goods, we find that the trade channels too are identical and also resolve this *du Pont* factor against applicant.

Turning now to the *du Pont* factor regarding the conditions under which and buyers to whom sales are made, we note that because there are no restrictions in the identifications of goods, both applicant's and registrant's goods may be purchased by members of the general public. As applicant's and registrant's identifications of goods include potentially inexpensive lighting, such goods are subject to impulse purchases. We therefore reject applicant's arguments at p. 9 of its brief that "a purchaser of electrical products should be considered to have more traits of a sophisticated purchaser than of an impulse purchaser," and resolve the *du Pont* factor regarding the conditions under which and buyers to whom sales are made against applicant.

We next consider the similarities or dissimilarities of the marks in their entireties. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73

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USPQ2d 1689 (Fed. Cir. 2005). We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods 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).

We first consider registrant's mark consisting of the two terms LIGHT and CONCEPTS. It is well established that although the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, to give more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, we accord the term LIGHT in registrant's mark less weight as a source indicator than CONCEPTS because LIGHT merely describes the general area in which registrant's goods lie. See the definition of "light" from the online version of *The American Heritage Dictionary of the English Language* (2006) which states in part; "A source of light, especially a lamp, a lantern, or an electric lighting fixture: *Turn out*

the lights when you leave."² Indeed, registrant has disclaimed LIGHT, and descriptive terms which have been disclaimed are often less significant in creating a mark's commercial impression and may be given little weight in reaching a conclusion on the issue of likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *In re Code Consultants, Inc.*, 60 USPQ2d 1699 (TTAB 2001). See also, *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) ("When comparing the similarity of marks, a disclaimed term, here 'COMMUNICATIONS,' may be given little weight, but it may not be ignored"). Thus, we find that CONCEPTS is the dominant term in applicant's mark.

Applicant's mark consists of the single term KONCEPT, which is phonetically the same as the word "concept" and visually substantially similar because it is merely substitutes the letter "k" for the initial letter "c." Applicant contends that the mark imparts a "'high-tech' or 'high fashion' theme ... by exchanging a K for a C," brief at

² From the website credreference.com. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

p. 10, but applicant has not offered any evidence in support of its contention. Further, KONCEPT on applicant's specimen appears to be in rather ordinary script on a rather ordinary lamp, and we are not persuaded that purchasers would view KONCEPT as imparting a "high-tech" or "high fashion" theme which would distinguish applicant's mark from registrant's mark. Rather, we find that purchasers would merely view KONCEPT as a misspelling of "concept."

When we consider the marks as a whole, we consider them to be more similar than dissimilar. LIGHT CONCEPTS and KONCEPT have similar meanings in the context of the involved goods. Both marks refer to "thoughts or notions"; registrant's mark simply specifies that those "thoughts or notions" are within the lighting field. See definition of "concept," i.e., "[s]omething formed in the mind; a thought or notion," from the online version of *The American Heritage Dictionary of the English Language*, of which we also take judicial notice. Due to this similarity in meaning, the commercial impressions of the marks are similar. Also, while we acknowledge that there are differences in the sound and appearance of the marks taken as a whole, these differences are far outweighed by the similarity in meaning and commercial impression. We

therefore resolve the *du Pont* factor regarding the similarity of the marks against applicant.

Applicant has noted that the Office has registered other marks containing the term KONCEPT or CONCEPTS, listing a number of registrations and noting the general fields in which they lie. See brief at p. 7 and response to first Office action. Applicant has not submitted copies of these registrations. To make third-party registrations of record, applicant must submit a copy of the registration or a printout from the Office's electronic database prior to the briefing stage of the case. *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record"). However, the examining attorney has not objected to applicant's reliance on these registrations or advised applicant that listing them is insufficient to make the registrations of record at a point when applicant could have corrected the error. See TBMP § 1208.02 (2d ed. rev. 2004). We therefore have considered the list of registrations, but only to the extent of the information provided.

Applicant maintains that because the Office has registered these marks, the Office must have determined that there was no likelihood of confusion among these

marks, and that, because "there must be some predictability in the PTO's examination of Applications," these registrations "should be given great weight in support of [applicant's] position of there being no likelihood of confusion." Brief at p. 7. But, because we do not know the precise identifications of goods recited in the registrations, and the product categories provided by applicant do not concern lighting, the registrations have very little probative value. Therefore, applicant's argument regarding the registrations is not persuasive.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that, when potential purchasers of applicant's "lighting lamps" and registrant's "electric lighting fixtures" encounter the marks KONCEPT and LIGHT CONCEPTS for these goods, they are likely to believe that the sources of these goods are the same or in some way related or associated. As a result, there is a likelihood of confusion.

DECISION: The refusal to register the mark under Section 2(d) of the Trademark Act is affirmed.