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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Victor B. Mason

Serial No. 78618286

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David Elton, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Seeherman, Quinn and Wellington, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Victor B. Mason to register the mark SCORPION for "custom built, made-to-order, amplifiers, namely, vacuum tube musical instrument amplifiers" in International Class 9.¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so

¹ Application Serial No. 78618286, filed April 27, 2005, alleging first use anywhere and first use in commerce on January 4, 2004.

resembles the previously registered mark SCORPION for "loudspeakers"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant argues that inasmuch as he and registrant both prominently use their corporate names in conjunction with their trademarks, any likelihood of confusion is mitigated. Further, applicant asserts that the goods are distinctly different, the trade channels for the goods are dissimilar, and the customers for his goods are careful in making their purchase. In connection with his arguments, Mr. Mason submitted his declaration.

The examining attorney maintains that the involved marks are identical in every respect, and that the goods sold thereunder are highly related, complementary goods. In support of the refusal, the examining attorney introduced several third-party registrations based on use showing that the same entity has registered the same mark for both loudspeakers and amplifiers. Also of record are excerpts of websites of online retailers showing that they sell both types of goods. Other Internet evidence shows that applicant and registrant themselves manufacture and sell both loudspeakers and amplifiers.

² Registration No. 1349001, issued July 16, 1985; renewed.

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 considerations are the similarities between the marks and the similarities between the goods. 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 are identical in every respect, that is, in sound, appearance, meaning and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Further, the marks appear to be arbitrary as applied to the goods. The identity between these arbitrary marks weighs heavily in favor of a finding of likelihood of confusion.

The fact that the respective marks are used in conjunction with applicant's and registrant's trade names is irrelevant to our comparison of the marks. The trade

names do not appear as part of the marks, and it is presumed that either applicant's or registrant's SCORPION mark may be used at any time without the respective trade name. See *Sealy, Inc. v. Simmons Co.*, 265 F.2d 934, 121 USPQ 456, 459 (CCPA 1959); and *ITT Canteen Corp. v. Haven Homes Inc.*, 174 USPQ 539, 540 (TTAB 1972).

We next turn to a consideration of the goods. We note, at the outset of considering this *du Pont* factor, that the greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). If the marks are the same, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

As the examining attorney readily concedes, the involved goods "differ." Nevertheless, the examining attorney's evidence shows that amplifiers and loudspeakers are related and complementary goods, and applicant has

confirmed that “[l]oudspeakers require the use of amplifiers.” (Response, April 27, 2006).

In connection with this *du Pont* factor, the examining attorney introduced several use-based third-party registrations showing that each entity adopted a single mark for goods of the type involved herein, namely amplifiers and loudspeakers. Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). The examining attorney also submitted excerpts from various websites showing that the same online retailers sell both amplifiers and loudspeakers. Lest there be any doubt about the relatedness of the goods, excerpts from applicant’s and registrant’s websites show that each manufactures and sells both amplifiers and loudspeakers. In point of fact, one of registrant’s amplifiers appears to be of the specific type made by applicant, that is, a vacuum tube amplifier. The websites, including pictures thereon, establish that amplifiers and loudspeakers are closely related, complementary components that may be used in close

proximity to one another (with an amplifier sitting on top of a loudspeaker or the two components integrated into a combination amplifier/loudspeaker cabinet). The fact that applicant's amplifiers are custom built, made-to-order is not enough to sufficiently distinguish the goods when sold under identical, arbitrary marks.

Mr. Mason states in his declaration that 100% of sales are "from customer orders placed directly with [applicant]." Although there is no such specific limitation in applicant's identification of goods, it is reasonable to find, based on the identification of goods indicating that applicant's amplifiers are custom built, made-to-order, that the trade channels therefor may be somewhat limited. Nevertheless, registrant's loudspeakers are not limited in any respect, so we presume that they are available in all trade channels normal for such goods, including those in which custom built, made-to-order musical components move. In any event, the goods are bought by the same classes of purchasers (e.g., musicians).

The similarities in the goods, the trade channels and the classes of purchasers weigh in favor of a finding of a likelihood of confusion.

Applicant contends that purchasers of the involved goods are sophisticated. In this connection, Mr. Mason

states that 98% of applicant's sales are "from customers that have researched the marketplace to locate the one-of-a-kind custom built-to-order vacuum tube amplifiers offered by [applicant]." We accept that, due to the nature of applicant's custom built, made-to-order equipment, his customers will be knowledgeable and careful. We also assume that, in general, loudspeakers and amplifiers will be purchased with some degree of care. However, even assuming that the purchase of applicant's and registrant's goods would involve a deliberate decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective goods, especially when, as we view the present case, the identity of the marks and the similarity between the goods outweigh any sophisticated purchasing decision. See *HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) [similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods]. See also *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are

not infallible."]. Specifically, because the marks are identical, even purchasers who examine the marks carefully will not be able to distinguish between SCORPION and SCORPION, and because the evidence shows that amplifiers and loudspeakers are sold by the same companies under a single mark, they are likely to believe that the goods emanate from the same source.

We conclude that consumers familiar with registrant's loudspeakers sold under the mark SCORPION would be likely to believe, upon encountering applicant's mark SCORPION for custom built, made-to-order vacuum tube musical instrument amplifiers, that the goods originate from or are associated with or sponsored by the same source.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.