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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re IQ Hong Kong, Ltd.

Serial No. 78737340

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Anderson & Citkowski for IQ Hong Kong, Ltd.

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Before Quinn, Cataldo and Bergsman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

IQ Hong Kong, Ltd. filed an application to register
the mark ORBIT for the following goods:

lights, namely, dynamo powered
flashlights and dynamo powered
flashlights comprising a keychain sold
as a unit (in International Class 11);
and

toys, namely, remote controlled
vehicles, toy trains, toy robots, and
accessories therefor (in International
Class 28).¹

¹ Application Serial No. 78737340, filed October 20, 2005, based
upon a bona fide intention to use the mark in commerce.

The trademark examining attorney refused registration under Section 2(d) in Class 11 only. As grounds for the refusal, the examining attorney asserts that applicant's mark, if applied to the goods in International Class 11, would so resemble the previously registered mark ORBIT for "lamps in metal"² in International Class 11 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 its goods are different from registrant's goods as evidenced by excerpts from registrant's webpage showing that registrant's goods are decorative or designer metal lamps. In addition, applicant has submitted a photograph of its specific product. Applicant also contends that the trade channels for the respective products will be different inasmuch as applicant's goods are an emergency or novelty item whereas registrant's goods are associated with home décor.

The examining attorney maintains that the marks are identical, a point not disputed by applicant. With respect to the goods, the examining attorney asserts that they "are closely related because they emit light." In support of her finding that the goods are related, the examining

² Registration No. 1950079, issued January 23, 1996; renewed.

attorney submitted numerous third-party registrations showing that each registrant adopted a single mark for goods of the types involved herein, and excerpts from third-party websites to show that both types of goods move in the same trade channels.

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 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 are identical in sound, appearance, meaning and overall commercial impression, and applicant does not contend to the contrary. *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 cited

mark is arbitrary. The identity between the marks weighs heavily in favor of a finding of likelihood of confusion.

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).

In determining the issue of likelihood of confusion in ex parte cases, the Board must compare applicant's goods as set forth in its application with the goods as set forth in the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Where the goods in the cited registration are broadly identified as to their nature and type (as is the case herein), such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in

scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. *Id.*

In view thereof, registrant's identification of goods reading "lamps of metal" covers all types of such lamps, and is not limited to decorator/designer lamps for home décor. Applicant's reliance on registrant's website in an attempt to restrict the scope of registrant's goods is to no avail. An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

The examining attorney submitted numerous use-based third-party registrations showing that each registrant adopted a single mark for the goods of the type involved herein, namely lamps and flashlights. 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). Also of record are

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excerpts of various third-party websites showing that the same on-line retailer sells both lamps and flashlights.

Based on the evidentiary record, we find that the goods are related.

We conclude that consumers familiar with registrant's "lamps of metal" sold under the mark ORBIT would be likely to believe, upon encountering applicant's "lights, namely, dynamo powered flashlights and dynamo powered flashlights comprising a keychain sold as a unit" under the identical mark ORBIT, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register the mark in International Class 11 is affirmed. The application will proceed in International Class 28 only.