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THE TTAB**

Mailed: March 25, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AirZone S.L.

Serial Nos. 78798127 and 78798198

Michael J. Buchenheimer, Esq. for AirZone S.L.

Edward Fennessy, Trademark Examining Attorney, Law Office
114 (K. Margaret Le, Managing Attorney).

Before Seeherman, Walters and Rogers, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

AirZone S.L has filed two applications, one to register the standard character mark AIRZONE¹ ("the '127 application"), and the other to register the design mark² ("the '198 application") shown below. Both applications seek registration on the Principal Register for "Climate control systems consisting of digital thermostats, air

¹ Serial No. 78798127, filed January 24, 2006, based on an allegation of a bona fide intention to use the mark in commerce.

² Serial No. 78798198, filed January 24, 2006, based on an allegation of a bona fide intention to use the mark in commerce.

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conditioning, heating, ventilation and drying control devices," in International Class 9.



The examining attorney has issued a final refusal to register in each application under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's marks so resemble the previously registered marks shown below, and owned by the same party, that, if used on or in connection with applicant's goods, they would be likely to cause confusion or mistake or to deceive.

Basis for refusal in both applications:

Registration No. 1594083 ("the '083 registration")
Registered 5/1/1990; renewed as of 5/1/2000; Section 15 affidavit filed and acknowledged.
Owned by Friedrich Air Conditioning Company, Div. of U.S. Natural Resources, Inc.
Mark:



Goods:
"Air conditioning units, furnaces, heat pumps, heaters and package terminal air conditioning units," in International Class 11.

Registration No. 1701090 ("the '090 registration")
Registered 7/14/1992; renewed; Section 15 affidavit filed and acknowledged.

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Owned by Friedrich Air Conditioning Company, Div. of U.S. Natural Resources, Inc.
The drawing is lined for the colors red, purple, and blue in descending vertical order.

Mark:

The logo for ZoneAire features a stylized graphic of three wavy, horizontal lines above the word "ZoneAire" in a bold, serif font.

Goods:

"Air conditioning units, gas, oil and electric furnaces, heat pumps, gas, oil and electric heaters and package terminal air conditioning units," in International Class 11.

Additional basis for refusal in only the '198 application (words and design mark):

Registration No. 1550071 ("the 071 registration")
Registered 8/1/1989; Sections 8 and 15 affidavits accepted and acknowledged, respectively.
Owned by Friedrich Air Conditioning Company, Div. of U.S. Natural Resources, Inc.
Standard Character Mark:

ZONEAIRE

Goods:

Air conditioners, heat pumps, heaters and package terminal air conditioners, in International Class 11.

In each application, applicant has appealed. Both applicant and the examining attorney have filed briefs.

The appeals in these two applications present similar issues of fact and law and, therefore, we have considered the appeals together and we have issued a single decision pertaining to both applications.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

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relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The examining attorney contends that the respective goods are the same or very similar, noting third-party registrations he submitted showing that registrations include both thermostats and air conditioning units, furnaces and heaters. The examining attorney also submitted excerpts from Internet websites showing that thermostats are sold both separately and as an integral part of air conditioning and heating systems.

Applicant does not dispute that the goods are closely related and, in fact, offers no argument in this regard. We agree that the evidence of record establishes that applicant's identified goods and the goods in the cited registrations are closely related, if not overlapping, i.e., we can assume that registrant's goods include thermostats or systems control devices and/or that such goods can be added to registrant's identified goods.

Further, inasmuch as the identifications of goods in both the involved application and the cited registrations are not limited to any specific channels of trade, we presume that the goods would be offered in all ordinary trade channels for these goods and to all normal classes of purchasers. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). In other words, we find the channels of trade and classes of purchasers of the respective goods to be at least overlapping, if not the same. And, while the classes of purchasers for applicant's and registrant's goods may include builders and other trade professionals, they are equally likely to include the ordinary consumer.

We turn, next, to a determination of whether applicant's marks and the respective registered marks, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when

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subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services 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).

Regarding the marks, the examining attorney contends that "air" and "aire" are phonetic equivalents; that both "air/aire" and "zone" are suggestive in connection with the respective goods; and that the transposition of the words in the respective marks is insufficient to distinguish applicant's marks from the registered marks because the connotation of the marks is not changed. Regarding the respective design elements in the cited registrations, the examining attorney contends that the "wavy lines" are suggestive of moving air and, thus, reinforce the word "aire" in each mark and, further, that these design elements are minimal and the words predominate. Regarding the sphere design in the mark in the '198 application, the examining attorney finds it less significant than the wording because it is "an ordinary geometric shape" and, as such, it would not be recognized as a source indicator.

Applicant contends that the marks are dissimilar, noting, in relation to its design mark, the different design elements in the registered marks, the transposition of the words, and, the asserted different pronunciations of "air" and "aire." Applicant also states that the examining attorney has improperly dissected and transposed the words in the marks in reaching his conclusion that the marks are similar.

It is well established that, although the marks at issue must be considered in their entirety, 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).

We consider, first, the registered design marks, which consist of the word ZONEAIRE in minimally stylized letters. The two component words, "zone" and "aire," are emphasized by the capitalization of the initial "Z" and "A" of the respective words. The wavy line design is likely to be perceived as suggesting flowing air, which reinforces the word "aire" in the marks. The wavy line design, both in the mark in which color is claimed and the one in which it is not, is much smaller than, and above, the wording. Moreover, it is the wording ZONEAIRE that would be used by

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purchasers to call for registrant's goods. Thus, the wording is likely to make a greater impression on purchasers and is the portion that is more likely to be remembered as the dominant and source-signifying portion of the registered mark. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593 (TTAB 2001) ("words are normally accorded greater weight because they would be used by purchasers to request the goods"). See also, e.g., *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (1987). Additionally, we do not find the minimal stylization of the lettering in registrant's marks to be a distinguishing factor. Applicant seeks to register its mark in standard character format in the '127 application and, thus, applicant could conceivably display its mark in any lettering style, including that of the word ZONEAIRE in registrant's mark. 37 C.F.R. § 2.52(a); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988) (when registering mark in block letters, registrant remains free to change the display of its mark at any time). See also *Sunnen Products Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744 (TTAB 1987) (stylization of letters is irrelevant to the issue of confusion where applicant seeks to register mark without any special form of lettering or design). Therefore, we agree with the examining attorney that, in the registered design marks, the wording ZONEAIRE predominates.

Applicant has argued that "aire" is the Spanish word for "air" and that, as such, it has a pronunciation different from the English word "air." However, because ZONE is an English word, we do not think it likely that consumers would view the AIRE portion of the mark as being in the Spanish language. Rather, we think that consumers would view "aire" in the mark as the English word "air" with a fanciful spelling.

In the '198 application, we find the circle design to be of less significance than the wording in determining the overall commercial impression of this mark. Not only is it merely a circle, but the wording is superimposed over the circle and, thus, it appears primarily as a background design or carrier for the larger initial "A" in AIRZONE. Additionally, as noted above in connection with the registered marks, "words are normally accorded greater weight because they would be used by purchasers to request the goods." *In re Dakin's Miniatures, Inc., supra.*

The only question remaining with respect to the marks is whether the transposition of the words sufficiently distinguishes the respective marks so that, when considered in their entireties, confusion as to source is unlikely. Both applicant and the examining attorney cite cases concerning the transposition of two words in a mark in support of their respective positions. However, each case

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must be decided on its own facts. *In re Nett Designs Inc.*, 236 F3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

Moreover, the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions. *See Bank of America National Trust and Savings Assn. v. American National Bank of St. Joseph*, 201 USPQ 842 (TTAB 1978), and cases cited therein. Here, where the goods in question are closely related, if not overlapping, and where both marks, when applied to the goods in question, are likely to be perceived by purchasers as signifying that the product sold thereunder regulates air, i.e., heat or cool air, in zones, we agree with the Examining Attorney that the marks create substantially similar commercial impressions, especially when viewed apart from one another in time and place, as they are likely to be. *See In re Inco*, 154 USPQ 629 (TTAB 1967) ["GUARDIAN OF POSTURE for mattresses versus "POSTURGUARD" for mattresses - registration refused], and *McNamee Coach Corp. v. Kamp-A-While Industries, Inc.* v. 148 USPQ 765 (TTAB 1965) ["KING KAMPER" for camping trailers versus "KAMP KING KOACHES" for campers - registration refused]. *See In re Nationwide Industries, Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) [RUST BUSTER for rust-penetrating

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spray lubricants confusingly similar to BUST RUST for penetrating oil].

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 the commercial impressions of applicant's marks and registrant's marks are sufficiently similar that their contemporaneous use on the closely related, if not overlapping goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed in each application.