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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ralph Whitworth

Application No. 78816413

Thomas D. Foster, TDFoster for applicant.

Thomas M. Manor, Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Quinn, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Ralph Whitworth filed an application to register the mark FLYING A GARAGE (in standard characters)¹ on the Principal Register for

clothing, namely, denim shirts, jackets, polo shirts, sweat shirts, sweatsuits, and T-shirts, skirts, pants, dresses, belts, neckties, footwear; headwear, namely, hats and caps

in International Class 25 (as amended).

¹ Filed December 16, 2006, based on a bona fide intent to use the mark in commerce. This application originally included "vehicle repair, restoration and maintenance services[;] providing of food and drink, namely, cafe and restaurant services." Pursuant to the examining attorney's requirement, applicant submitted a disclaimer of "garage" with respect to the vehicle repair, restoration and maintenance services. As the refusal to register pertained only to the clothing items at issue here, applicant divided those goods from the rest of the application.

The examining attorney issued a final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark FLYING A (typed), previously registered for "shirts, pants, shorts and slacks,"² that it would, if used on or in connection with the identified goods, be likely to cause confusion, to cause mistake, or to deceive.

Applicant appealed. Both applicant and the examining attorney have filed briefs.

We affirm.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. 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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *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

² Registration No. 1932346, issued October 31, 1995. Filings under Trademark Act §§ 8, 9 & 15, accepted, acknowledged, and granted.

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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); *In re Azteca Rest. Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Record on Appeal

Applicant submitted the following evidence in support of registration:

- Ten records from the USPTO's TESS database of applications and registrations comprising the words "FLYING A."
- Copies of seven web pages indicating use of the term "flying A."
- Copies of what appear to be two California state trademark registrations comprising the words "FLYING A" from an unknown database.

III. Discussion

A. Similarity of the Goods/Channels of Trade

Applicant's goods are in part identical with the goods set out in the cited registration to the extent that both include "shirts and pants." The remainder of applicant's goods are also related to those of the cited registrant in that they are all items of clothing, likely to be purchased by the same customers, for the same purpose, and sold in the same clothing stores or departments.

Nonetheless, applicant points out that

the CCPA found that there is no per se rule requiring a finding of a likelihood of confusion

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when items in a single channel ... are sold under similar marks - rather, the CCPA noted that this factor, while relevant, is really an area of "peripheral inquiry."

Applicant's Br. at 9, citing *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 927, 198 USPQ 151 (CCPA 1978). The principle is of course correct, although it is inapplicable here.

In *Interstate Brands*, the CCPA, affirming the Board, rejected the notion that herbal tea (RED ZINGER) and cakes (ZINGER) were necessarily related merely because they were both food items and sold in supermarkets. Unlike *Interstate Brands*, applicant's goods here are identical in part (and otherwise closely related) to the cited registrant's goods. Neither the application nor the registration is limited in its channels of trade or the classes of customers to whom the goods would be sold, and we must accordingly presume that the goods move in the same channels of trade and would be sold to the same classes of consumers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958). This is not the type of *per se* rule that both the Board and the CCPA rejected in *Interstate Brands*; on the contrary, we merely recognize that where goods are identical in an application and registration, they must be considered as such for registration purposes.

The identical goods, channels of trade, and classes of purchasers are all factors which strongly support the refusal to register.

B. Similarity of the Marks

In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enter. Corp.*, 212 USPQ 957, 959 (TTAB 1981); *ECI Div. of E-Syst., Inc. v. Env'tl. Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

[I]t is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of memory over a period of time. That is to say, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.

Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975) (citations omitted).

Although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper

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to give more weight to this feature in determining the commercial impression created by the mark. "Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark is FLYING A GARAGE, while the mark in the cited registrations is FLYING A. The first two words of applicant's mark are identical to the whole of the mark in the cited registration; applicant has simply appended the word GARAGE to the cited mark. As we have noted previously, "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." *Presto Prod. Inc. v. Nice-Pak Prod. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Moreover, "we cannot ignore the propensity of consumers to often shorten trademarks." *Big M. Inc. v. United States Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985). As such, FLYING A is likely to be the part of the mark which makes the greatest impression on the consumer, and the way consumers will likely speak of and remember applicant's mark.

Moreover, the construction of the mark itself lends the impression that the brand - reminiscent of a brand for livestock used as a trademark - is "FLYING A" and that what is branded is a garage. Thus, while the arbitrary term "GARAGE" is not descriptive or even suggestive of the clothing items in this application, it naturally would have

a somewhat lesser significance to the consumer than the fanciful term "FLYING A."

Applicant argues that the marks, considered as a whole, carry different commercial impressions:

Registrant's mark, when viewed, seems somewhat incomplete. The public see [sic] "FLYING A" and are [sic] invariably left thinking, "Flying a 'what'?" Applicant's mark, however, contains the answer to that question within the mark - "Flying a 'garage'".

....

[D]espite the fact that the marks at issue both contain the term "FLYING A," the marks taken as a whole have different meanings. When used on clothing, "FLYING A GARAGE" is distinct in its connotation. Though the Examining attorney suggests "the average consumer could not be expected to extrapolate the un-common impression, as suggested by Applicant, of a garage being piloted and flown as if an aircraft," Applicant respectfully disagrees. The very absurdity of piloting a garage as if it were a plane, or of maintaining a garage in an airborne state by means of a tether as if it were a kite, is precisely what makes the mark so distinct. No one encounters flying garages outside Applicant's mark. On the other hand, Registrant's mark "FLYING A," as used on clothing, gives the impression of a letter A with wings, exactly as Registrant uses in their Design logo^[3] and others have used in logos past.

Applicant's Br. at 7-9.

³ Applicant's mention of registrant's logo is an apparent reference to the mark as shown in the specimen in registrant's registration file. However, we note that the cited mark is registered without claim to any particular font style, size, or color, and that applicant also seeks registration for a standard character mark. See Trademark Rule 2.52(a). Whatever the manner of registrant's actual current use of its mark, we cannot restrict the scope of its registration to any particular display. Likewise, applicant's mark, if registered, would not be restricted to any particular stylization.

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We agree with the examining attorney, however, that applicant's argument is implausible. We find it highly unlikely that purchasers encountering applicant's mark on clothing would think primarily of a building for the repair or storage of automobiles, which refuses to obey the rules of gravity. The very absurdity of this notion argues against a strained construction of the mark as a sentence fragment about a flying building, and in favor of the simpler connotation we have already discussed, namely that of a garage (fictional or otherwise) that bears the mark "FLYING A."

Finally, applicant argues that the marks are pronounced differently and have different appearances. While applicant is correct, the same could be said of any two marks which differ in any respect. Needless to say, there is no rule that a prior registration will only bar registration of an identical mark. Here, the marks are far more visually and aurally similar than they are different. Both marks begin with the same wording - FLYING A - to which applicant has appended the word "garage." While we do not ignore the last part of applicant's mark, we nonetheless find it unlikely that the word "garage" will distinguish these two marks and prevent any confusion. Although applicant places emphasis on the term "GARAGE" in its mark, "[w]hen one incorporates the entire arbitrary registered mark of another into a

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composite mark, inclusion in the composite mark of a significant nonsuggestive element does not necessarily preclude the marks from being so similar as to cause a likelihood of confusion." *Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (affirming sustained opposition against BENGAL LANCER for club soda, quinine water, and ginger ale in view of prior registration of BENGAL for gin). Likewise, we find that in this case, the addition of "GARAGE" to the prior registrant's mark does not avoid a likelihood of confusion. Prospective purchasers seeing applicant's FLYING A GARAGE mark on clothing may well assume that the makers of FLYING A clothing have simply expanded their FLYING A line.

Viewing the marks in their entireties, we find that applicant's mark is substantially similar to that of the prior registrant, and that this factor supports the examining attorney's refusal to register.

C. Strength of the Mark

Applicant has submitted various evidence in an attempt to show that "the mark is in a 'crowded field'" on the trademark register and in the marketplace, and that "the public has been trained to look to the variations of the marks to determine their source and to arrive at a distinct

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connotation for the mark." Applicant's Br. at 4-6. We find this evidence inconclusive at best, and largely irrelevant.

As noted, applicant submitted the records of ten applications and registrations comprising the term "FLYING A." Of these, five are either applications or cancelled or abandoned registrations, and are therefore of no probative value. Two of the five cover unrelated goods and services (entertainment services and breeding and stud services). Of the remaining three, two (for FLYING A and FLYING A and design) are for retail store services, and are owned by the same party, and the last is the cited registration.

Third-party registrations are not evidence of the use of a mark. *AMF Inc. v. Am. Leisure Prod., Inc.*, 177 USPQ 268, 269-70 (CCPA 1973) (third-party registrations are not evidence that such marks are in use or that consumers are familiar with them). But even if they were, given that there is only one other registrant of "FLYING A" marks with any possible relevance, we cannot say that this term is so ubiquitous that consumers are accustomed to making fine distinctions among them.

Applicant's Internet evidence fares no better. Of the seven pages submitted, six of them use the term "FLYING A" in connection with unrelated services (farm, trailer and truck business, cars, film production, and horse breeding). The one remaining shows use of FLYING A as "Mount Allison

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University's official clothes line." The web page indicates that Mount Allison University is located in Sackville, New Brunswick, and the page bears a URL with a ".ca" TLD, indicating a Canadian website. Based on this evidence, we cannot say that this one use in Canada indicates that U.S. consumers would find the registrant's mark weak, or readily distinguish applicant's mark from it.

Finally, applicant has submitted what appear to be two California state trademark registrations, owned by the same entity, and incorporating the term "FLYING A" (covering "gasoline, lube oils and greases," and "automotive batteries.") Like most of the proffered federal registrations, these registrations are far afield of the clothing items at issue here, and thus of no relevance. Moreover, state registrations do not establish use of a trademark, *Faultless Starch Co. v. Sales Producers Assoc., Inc.*, 530 F.2d 1400, 189 USPQ 141 (CCPA 1976).

In sum, considering all of the third-party registrations, both state and federal, and the Internet evidence, we are unable to say that FLYING A marks have been so frequently adopted in the clothing field, or that consumers have become inured to seeing many "FLYING A" marks, such that the cited registration is entitled to a limited scope of protection.

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We conclude that the mark in the cited registration is strong, and not diluted. Again, this factor supports the refusal to register.

IV. Conclusion

After careful consideration of the briefs and the evidence of record, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and that of the registrant, their contemporaneous use on applicant's identical and related goods 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.