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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Harris Publications, Inc.

Serial No. 78894466

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Before Hairston, Drost and Wellington, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Harris Publications, Inc. has filed an application to register the standard character form mark 0-60 for goods ultimately identified as "magazines featuring information and news in the field of automobiles" in International Class 16.¹

¹ Application Serial No. 78894466, filed May 26, 2006, based on an allegation of a bona fide intention to use the mark in commerce.

The trademark examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d) in view of the previously registered mark ZERO TO SIXTY for "entertainment services in the nature of an ongoing television series concerning automobiles and news relating to automobiles; providing information in the field of entertainment, namely, automobiles and news relating to automobiles rendered via computer by means of a global computer network."²

Applicant has appealed. 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 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).

² Registration No. 2902407 issued November 9, 2004.

Considering first the respective marks 0-60 and ZERO TO SIXTY, applicant maintains that there are obvious differences in the marks in terms of appearance. In addition, applicant argues that in terms of sound, the marks are not similar because the "0" (zero) in its mark may also be pronounced as "the letter 'O' or the British term 'naught' or 'nought.'" (Brief, p. 9) Further, applicant argues that the "-" in its mark 0-60 may be pronounced as the word "dash." Applicant contends that, in any event, any phonetic similarity between the respective marks should be given less weight in our analysis of the marks because the services in the cited registration "rely on visual viewing of the mark and not the pronunciation of the mark." (Id.) Insofar as connotation and commercial impression are concerned, applicant maintains that registrant uses its mark ZERO TO SIXTY as the title of 60-second television updates featuring news from the automobile world. Thus, according to applicant, registrant's mark ZERO TO SIXTY connotes the 60-second nature of the television updates, which differs from the connotation of applicant's mark which is the acceleration rate of an automobile. In this regard, applicant has submitted an Internet printout which discusses registrant's television series.

The examining attorney does not dispute that the marks 0-60 and ZERO TO SIXTY differ in appearance. However, she maintains that in terms of sound, connotation and commercial impression, the marks are identical.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/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).

There is no dispute that the marks 0-60 and ZERO TO SIXTY differ in appearance. However, for confusion to be likely, it is not necessary that the marks be identical or similar in every element. Indeed, similarity in a single element may be a sufficient basis for finding likelihood of

confusion. In re Oil Well Company, 181 USPQ 656 (TTAB 1973).

With respect to sound, we find that the marks are identical. Notwithstanding applicant's arguments, we believe that applicant's mark 0-60, when used on applicant's magazines featuring information and news about automobiles, is likely to be pronounced in the same manner as registrant's mark, namely, "zero to sixty." In the context of applicant's magazines, it would make no sense to pronounce the "0" (zero) in applicant's mark as the letter "O," much less the term "naught" or "nought." Also, contrary to applicant's argument, we do not believe that purchasers are likely to pronounce the "-" in applicant's mark as the word "dash." Again, in the context of applicant's magazines, purchasers are likely to pronounce the "-" in 0-60 as the word "to." In addition, we are not persuaded by applicant's argument that any phonetic similarity in the respective marks should be given less weight in our analysis of the marks because registrant's services "rely on visual viewing of the mark and not the pronunciation of the mark." (Brief, p. 9) The titles of television series are announced during on-air promotions and at commercial breaks during the programming.

In terms of connotation, we find that both marks have the identical meaning of the acceleration rate of an automobile. We are not persuaded by applicant's argument that registrant's mark ZERO TO SIXTY connotes 60-second television updates. Moreover, as discussed infra, registrant's identification of services is not limited to 60-second television updates.

Further, in terms of commercial impression, we find that the two marks are identical in that they both would be viewed as the expression "zero to sixty."

We find, therefore, that the marks are identical when viewed in their entirety in terms of sound, connotation and commercial impression.

Turning next to consider the goods and services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even

competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each party's goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Applicant's goods are identified as "magazines featuring information and news in the field of automobiles." The services in the cited registration are identified as "entertainment services in the nature of an ongoing television series concerning automobiles and news relating to automobiles; providing information in the field of entertainment, namely, automobiles and news relating to automobiles rendered via computer by means of a global computer network." Applicant argues that the respective goods and services are not related because its magazines will present in-depth articles about automobiles, whereas registrant's television series and information services

provide mere snippets of information about automobiles. Further, applicant argues that the respective goods and services are offered in different channels of trade to different classes of purchasers. Specifically, applicant argues that its magazines will be sold at newsstands and/or by subscription to automobile enthusiasts whereas registrant's television series is broadcast on television and its information services are rendered via the Internet to persons with only a casual interest in automobiles.³

In the present case, we find that the respective goods and services are commercially related. Applicant's magazines and registrant's television series and information services obviously are similar in that the

³ We note applicant's reliance on *Parenting Unlimited Inc. v. Columbia Pictures Television Inc.*, 743 F.Supp. 221, 16 USPQ2d 1171 (S.D.N.Y. 1990). Upon consideration of this decision, we cannot agree with applicant that the situation in that case is comparable to the present one. This case was an infringement suit involving plaintiff's mark BABY TALK for magazines and defendant's identical mark BABY TALK for a television series. The court found plaintiff's mark to be merely descriptive and lacking secondary meaning. In addition, the court considered specific distinctions in the content of plaintiff's magazines and defendant's television series. Thus, no likelihood of confusion was found. Here, there has been no showing by applicant that the registered mark ZERO TO SIXTY is descriptive. Also, as discussed infra, we find no distinctions in the subject matter of the involved goods and services.

subject matter thereof is automobiles. Here, under very similar marks, applicant intends to sell magazines with news and information about automobiles and registrant renders a television series and information services about the identical subject.

We recognize that the channels of trade for the respective goods and services are different. However, neither applicant's identification of goods nor registrant's identification of services is restricted in any way as to the substantive nature of the news/information about automobiles or the classes of purchasers. We therefore must assume that applicant's magazines and registrant's television series and information services will include both in-depth and superficial news/information about automobiles, and that such goods and services will be marketed to all the usual classes of purchasers. This would include automobile enthusiasts as well as persons with only a casual interest in automobiles. In short, we cannot draw the distinctions urged by applicant with respect to the nature of the goods and services and the classes of purchasers. Instead, we find the subject matter of the respective goods and services and the classes of purchasers to be identical.

To establish a relationship between applicant's magazines and registrant's television series, in particular, the examining attorney has submitted copies of several pairs of third-party registrations for marks that cover both television programs and magazines. Each pair of registrations is owned by the same registrant: (1) Registration No. 1794538 for television programming and Registration No. 2046874 for magazines, both for THE HISTORY CHANNEL; (2) Registration No. 1345096 for television entertainment programs and Registration No. 2147722 for magazines, both for ESPN; (3) Registration No. 2455590 for a television program series and Registration No. 2172031 for magazines, both for DISCOVERY CHANNEL SCHOOL; and (4) Registration No. 1709962 for magazines and Registration No. 1947885 for television programs, both for MARTHA STEWART LIVING. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"]. See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

Under the facts of this case, we conclude that applicant's "magazines featuring information and news in the field of automobiles" and registrant's "entertainment services in the nature of an ongoing television series concerning automobiles and news relating to automobiles; providing information in the field of entertainment, namely, automobiles and news relating to automobiles rendered via computer by means of a global computer network" are related goods and services. Consumers, upon encountering the marks and these related goods and services offered thereunder, are likely to think that registrant has expanded into a magazine format featuring information and news about automobiles.

Applicant argues that consumers exercise greater care when purchasing automobile-related magazines and, therefore, will be able to distinguish between the sources of applicant's magazine and registrant's television series and information services. Apart from the fact that there is nothing in this record to support applicant's argument, magazines are classic impulse items because they are relatively inexpensive and purchased off the shelf. In any event, even assuming that purchasers of automobile-related magazines are discriminating purchasers, we note that "even careful purchasers are not immune from source confusion."

In re Total Quality Group, Inc., 51 USPQ2d 1474, 1477 (TTAB 1999).

Finally, applicant points to Registration No. 3197480 for the mark ZERO TO SIXTY and Registration No. 3249531 for the mark ZTS ZERO TO SIXTY and design, both for, inter alia, "providing music for use in the production of television shows." Third-party registrations cannot be used to justify the registration of another confusingly similar mark. In re J.M. Originals Ind., 6 USPQ2d 1393, 1394 (TTAB 1987). These two registrations, which are owned by the same entity, do not establish that there is no likelihood of confusion in this case. Moreover, we observe that the services of "providing music for use in the production of television shows," are far removed from the goods and services involved herein.

We accordingly conclude that consumers who are familiar with registrant's mark ZERO TO SIXTY for either entertainment services in the nature of an ongoing television series concerning automobiles and news relating to automobiles or the services of providing information in the field of entertainment, namely, automobiles and news relating to automobiles rendered via computer by means of a global computer network, would be likely to believe, upon encountering applicant's very similar mark 0-60 for

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magazines featuring information and news in the field of automobiles, that such goods and services emanate from, or are sponsored by or associated with, the same source.

To the extent that any of the points argued by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved against applicant as the newcomer. In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal under Section 2(d) is affirmed.