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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Flipside Vision Ltd.

Serial No. 78896726

Andrew S. Ehard of Merchant & Gould P.C. for Flipside Vision Ltd.

Karen Bracey, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

Before Kuhlke, Cataldo and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Flipside Vision Ltd. to register the mark shown below on the Principal Register for the following goods, as amended: "Books, namely, anthology of calendar page designs; photographs; posters; stationery; postcards; greeting cards; diaries; desk diaries; calendars" in International Class 16.¹

¹ Application Serial No. 78896726 was filed on May 31, 2006, based upon applicant's assertion of its bona fide intent to use the mark in commerce on the goods. In addition, applicant



The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used on or in connection with its goods, so resembles the mark FLIPSIDE, previously registered on the Principal Register in typed or standard character form for "greeting cards, calendars, gift wrap paper, paper gift bags" in International Class 16,² as to be likely to cause confusion.

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

Likelihood of Confusion

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

submitted the following color statement: "Color is not claimed as a feature of the mark."

² Registration No. 2693852 issued on March 4, 2003.

1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key, though not exclusive, 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, 27 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

We turn to the first *du Pont* factor, i.e., whether applicant's mark and registrant's mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We note initially that the test under the first *du Pont* factor 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 overall commercial impression 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). We further note that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. See *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980).

In this case, applicant's mark, FLIP SIDE and the design of a split globe is similar to the registered mark FLIPSIDE in that both contain wording that is identical in appearance and sound. The mere presence of a space between the words FLIP SIDE in applicant's mark is insufficient to create a commercial impression that is separate from the words FLIPSIDE that comprise registrant's mark. The presence or absence of a space between virtually the same words is not a significant difference. See *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); and *In re Best Western Family Steak House, Inc.*, 222 USPQ 827,

827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical").

In addition, applicant's mark contains the design element of a split globe. Applicant strenuously argues that the presence of the design in its mark results in a "highly distinctive composite" that is "very different in appearance, meaning and overall commercial impression from the cited mark" (brief, p. 6). However, the split globe design, while visually prominent, is hardly the dominant feature of applicant's mark. The split globe is approximately the same size as the wording FLIP SIDE in applicant's mark, and the wording and design are positioned diagonally to each other such that the words respectively appear above and below the split halves of the globe. Such positioning of the split globe appears to visually reinforce the wording FLIP SIDE. Indeed, it is impossible to view the split globe design without also viewing the words comprising the mark.

We find, therefore, that the words FLIP SIDE, displayed in bold capital letters, is the most visually prominent portion of applicant's mark, and accordingly it is entitled to more weight in our analysis. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of

confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Further, when a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

The presence of the design in applicant's mark, particularly inasmuch as it is inextricably entwined with the words FLIP SIDE, is insufficient to create a commercial impression that is separate from that of registrant's FLIPSIDE mark. We are not persuaded by applicant's argument that consumers will view its mark as meaning "flip side of the world" such that it conveys a different meaning from that of registrant's mark. Applicant has presented no evidence of consumer perception of its mark. Rather, applicant submitted with its response to the examining attorney's first Office action printed screen shots from third-party Internet web pages displaying the term "flip side of the world" in connection with goods unrelated to those in its application. Such evidence fails to support

its rather speculative contention regarding the manner in which consumers will perceive its applied-for mark in connection with its recited goods.

Based upon the above analysis, we find that when the marks FLIPSIDE and FLIP SIDE and split globe design are viewed in their entireties, the similarities in appearance, sound, connotation and commercial impression outweigh the differences. *See Palm Bay Imports, Inc. v. Veuve Clicquot, supra.*

The Goods

We next compare applicant's goods with those of registrant. In making our determination under the second *du Pont* factor, we look to the goods as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ

76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.")

In this case, the recitations of both applicant's and registrant's goods include "greeting cards" and "calendars." Thus, the goods in the application and cited registration are identical in part. In addition, we find that applicant's "books, namely, anthology of calendar page designs" would appear on their face to be related to "calendars" inasmuch as the former may be used to design or decorate the latter. We are not persuaded by applicant's argument that because some of the identified goods are different, confusion as to the source of those goods is unlikely. The identity of "greeting cards" and "calendars" is not lessened by the fact that applicant and registrant offer additional paper products under their respective marks.

Channels of Trade

We are not persuaded by applicant's unsupported argument that "the conditions surrounding the marketing of the goods is not such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that they come from a common source"

(brief, p. 9). As noted above, we must look to the identification of goods in the involved application and cited registration to determine whether any recited limitations in trade or marketing channels suggest that such goods will be encountered by different consumers. See *Octocom Systems, Inc., supra*; and *Paula Payne Products, supra*. In this case, neither applicant's nor registrant's identification of goods contains any limitations regarding the channels of trade therefor or the consumers to whom the goods are marketed. Accordingly, both applicant's and registrant's goods are presumed to be suitable for any use that is normal therefor, and also to move in all normal channels of trade and be available to all classes of potential consumers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Strength of the Registered Mark

Finally, applicant, with its response to the first Office action, submitted copies of third-party registrations from the United States Patent and Trademark Office's Trademark Electronic Search System (TESS) search engine for various FLIPSIDE marks. Applicant argues that these registrations illustrate "that consumers are used to seeing this wording used in the marketplace by unrelated parties, and that small differences between the marks, the

goods and services, or the channels of trade through which they travel are sufficient to avoid a likelihood of confusion" (brief, p. 10). In this case, and as discussed above, applicant's goods are identical in part to those of registrant and are presumed to move in the same channels of trade. Further, applicant's evidence of third-party registrations is entitled to limited probative value.³ The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Moreover, the probative value of the third-party registrations is significantly diminished by virtue of the fact that the trademarks cover a wide variety of goods and services (including manipulable puzzles, retail clothing stores,

³ Applicant has included several marks that have not registered. These applications are irrelevant. See *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) ("While applicant also submitted a copy of a third-party application ..., such has no probative value other than as evidence that the application was filed"); and *Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 62, 65 n.5 (TTAB 1981) ("Introduction of the record of a pending application is competent to prove only the filing thereof"). See also *Glamorene Products Corp. v. Earl Grissmer Co., Inc.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979).

video projection screens, and self-mounting desktop organizers), none of which are related to the types of goods involved herein. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992). In any event, even if we were to find, based on applicant's evidence, that registrant's mark is weak and entitled to a narrow scope of protection, the scope is still broad enough to prevent the registration of a highly similar mark for goods that are identical in part. See *In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

Summary

In light of the foregoing, we conclude that consumers familiar with registrant's goods sold under its above-referenced mark would be likely to believe, upon encountering applicant's goods rendered under its mark that the goods originated with or are associated with or sponsored by the same entity.

Decision: The refusal of registration is affirmed.