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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Treasures & Trinkets, Inc.

v.

Janet Hess and Rod Hess

Opposition No. 91124237
to application Serial No. 75913265
filed on February 8, 2000

Gregg Lallier of Updike, Kelly & Spellacy, P.C. for Treasures & Trinkets, Inc.

Rod Hess and Janet Hess, pro se.

Before Seeherman, Hairston and Drost, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Treasures & Trinkets, Inc. has opposed the application of Janet Hess and Rod Hess, U.S. citizens, (hereafter "applicant"[1]) to register MY ANGEL GUARDIAN and design, as shown below, for "printed materials, namely, printed

[1] Although applicant is obviously two individuals, the parties have referred to applicant in the singular, and we will do likewise. Similarly, when we refer to applicant with a pronoun, we will use the masculine singular form.

certificates, posters, post cards" in Class 16, and "clothing, namely, short and long sleeved shirts, sweatshirts, t-shirts, sweaters, jackets, hats, pajamas, sleepers, nightshirts, rompers, pants, sport shirts, sweat suits, coats, vests, overalls, dresses, pull-overs, warm up suits, tank tops, running suits" in Class 25.[2]

As grounds for opposition, opposer has alleged that it has offered, under the mark GUARDIAN ANGEL, products including greeting cards, stationery and note cards, T-shirts for adults and children, and bibs, bonnets and booties for infants and children; that it began using the mark GUARDIAN ANGEL beginning in 1989, and has continuously used the mark since that time for its various products; that it is the owner of numerous federal registrations for the mark GUARDIAN ANGEL, including registrations for greeting cards, stationery and note cards and textile articles; that opposer has invested several hundreds of thousands of dollars advertising and promoting its GUARDIAN ANGEL

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[2] Application Serial No. 75913265, filed February 8, 2000, and asserting first use on June 22, 1999 and first use in commerce on July 2, 1999.

products, such that the mark has become extremely well-known and recognized among customers; that applicant's mark, when used in connection with his products, is likely to cause confusion or to cause mistake or to deceive; that applicant's mark is likely to dilute the distinctive quality of opposer's mark; and that applicant's use of MY ANGEL GUARDIAN falsely suggests a connection with opposer.

In his answer, applicant has admitted that opposer holds numerous federal registrations for the mark GUARDIAN ANGEL, and has otherwise denied the salient allegations of the notice of opposition.

Applicant "agrees with the description of the record as outlined in the Opposer's Brief in Support of Opposition." Brief, p. 2. Accordingly, the record includes the pleadings; the file of the opposed application; thirteen of opposer's registrations for GUARDIAN ANGEL;[3] the testimony

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[3] The registrations are all for the mark GUARDIAN ANGEL, and are for greeting cards (Registration No. 1974824, issued May 21, 1996, Section 8 and 15 affidavits accepted and acknowledged); greeting cards with guardian angel jewelry pin attached (Registration No. 2629552, issued October 8, 2002); bookmarks (Registration No. 1955772, issued February 13, 1996; Section 8 and 15 affidavits accepted and acknowledged); textile articles, namely T-shirts for adults and children, and bibs, bonnets and booties for infants and children (Registration No. 1962860, issued March 19, 1996; Section 8 and 15 affidavits accepted and acknowledged); handkerchiefs and garter belts (Registration No. 2022885, issued December 17, 1996, Section 8 and 15 affidavits accepted and acknowledged); picture frames and decorative wall plaques (Registration No. 1954352, issued February 6, 1996, Section 8 and 15 affidavits accepted and acknowledged); ceramic statues (Registration No. 1977676, issued June 4, 1996, Section 8 affidavits accepted and acknowledged); magnets (Registration No.

deposition of opposer's executive vice president, Debra Baribault, and exhibits thereto; applicant's responses to opposer's interrogatories Nos. 1-11 and requests for production Nos. 1-7; web pages found on applicant's website; an article referring to applicant's business; an article referring to opposer's products and trademarks; and advertisements and listings taken from various publications in which opposer's marks are featured.[4]

Opposer and applicant filed briefs on the case; neither party requested an oral hearing.[5]

1951276, issued January 23, 1996, Section 8 and 15 affidavits accepted and acknowledged); candles (Registration No. 2285716, issued October 12, 1999); Christmas tree ornaments (Registration No. 1996219, issued August 20, 1996, Section 8 and 15 affidavits accepted and acknowledged); electronic night light (Registration No. 2067423, issued June 3, 1997, Section 8 and 15 affidavits accepted and acknowledged); cat and dog leather, imitation leather and nylon collars (Registration No. 2157055, issued May 12, 1998); and pet clothing (Registration No. 2153959, issued April 28, 1998). Opposer submitted, under a notice of reliance, copies of its registrations, but these copies were obtained from the Patent and Trademark Office database, and therefore were not copies prepared by the Office as required by Trademark Rule 2.122(d)(2). However, opposer also made these registrations of record through appropriate identification and authentication of ownership and status during the testimony deposition of Debra Baribault, and therefore they are properly of record. Opposer also made of record Registration No. 2012258 for stationery and note cards, Registration No. 2065430 for pens and pencils, Registration No. 2056157 for non-monetary coins of precious metals, and Registration No. 2055782 for metal tags for dog and cat collars. However, these registrations were cancelled subsequent to opposer's submitting copies of them in this proceeding, and therefore they have not been considered.

[4] Excerpts from websites and responses to document production requests cannot normally be made of record by submitting them under a notice of reliance, as opposer has herein. However, because applicant has stated that they are of record, we will treat them as having been stipulated into the record.

[5] Applicant attached several exhibits to his brief. However, most of these exhibits were not made of record during the trial

Opposer commenced business operations in 1989, and has used the trademark GUARDIAN ANGEL for its products since that time. It is most well known for its angel products and angel pins, but has expanded into such items as bracelets, jewelry, stationery, greeting cards and bridal products. The GUARDIAN ANGEL mark is used for all its products.

Opposer sells its goods to various retail outlets, including individual gift shops, drugstores, museum and airport gift shops and Hallmark stores. The ultimate consumers generally purchase the goods from retail stores, although some order through opposer's website. Opposer sells to stores throughout the United States, and also has foreign sales. It promotes its goods primarily through trade shows, and attends many such shows each year. These trade shows include large national shows, small regional shows and shows geared to Hallmark stores. It prepares an annual catalog which it distributes at such shows, and also distributes through its sales representatives and mails

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period (in fact, Exhibit H appears to have been printed from the Internet on August 15, 2003, five days before applicant filed his brief. Thus, only those exhibits which were previously made of record (Exhibits C, D, E and I) have been considered. In addition, the Board has considered Exhibit G, which is an excerpt from the Patent and Trademark Office publication "Basic Facts about Trademarks." We point out that, even if all of the attachments were considered, it would not affect our decision in this proceeding. It is also noted that applicant's brief includes many "factual" statements that are not supported by the record, e.g., that applicant commissioned Thompson & Thompson to conduct an availability search for MY ANGEL GUARDIAN. Factual statements which do not have any evidentiary support have not been considered.

directly to customers and upon request. Opposer advertises its GUARDIAN ANGEL products in trade journals such as "Giftware News" and "Gifts and Decorative Accessories." Opposer also has a PR person who prepares press releases in order to get publicity in trade journals and consumers publications. Such efforts have resulted in mentions in the trade paper "Party & Paper" and the consumer magazine "Modern Bride."

Applicant did not submit any evidence, so the only information we have about him comes from the material that opposer made of record, specifically responses to discovery requests and excerpts from applicant's website. Applicant uses his MY ANGEL GUARDIAN mark on 8x10 printed certificates next to poems written by the applicant, and on infant rompers, youth and adult t-shirts, hats, denim shirts, youth and adult sweatshirts and polo shirts.[6] Advertising and promotion that uses the mark is primarily done via the Internet. Applicant's website was launched in October 2002. The target for promotions of MY ANGEL GUARDIAN products is "a national market via word of mouth advertising through

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[6] It is noted that applicant's identification of goods includes many items that are not included in the list of goods on which applicant has stated that he uses the mark, e.g., post cards, posters, jackets, pajamas, coats, vests and dresses. Applicant's application is based on a claim of use in commerce. Therefore, should applicant ultimately prevail in this proceeding, the application will be remanded to the Trademark Examining Attorney pursuant to Trademark Rule 2.131 to determine if applicant is

friends and family and mailings of flyers and a newspaper article to specific target groups." Response to Interrogatory No. 6. An advertisement, headed "Teacher Appreciation," describes a gift set which "features an 8x10, suitable for framing certificate, with a gold-foil Angel Guardian logo, and a beautiful angel poem written especially for teachers. Each certificate can be personalized with your own 'personal message' to the recipient. In addition to the certificate, the gift set comes with a beautifully embroidered, metallic gold, My Angel Guardian logo on an article of clothing of your choice." A page from applicant's website has similar language:

> Looking for a *unique* gift for a baby? A child? A good friend? Or, for someone on a special occasion? Rod and Janet Hess, developers of the "My Angel Guardian" gift set, have created a gift that truly, *will always be remembered.* It features an 8x10, suitable for framing, certificate with a gold-foil Angel Guardian logo, and a beautiful angel poem for that special occasion. You can personalize your gift with your own "personal message" to the recipient. Unlike a greeting card that will eventually be discarded, the certificate can be framed and displayed by the recipient. The poem, and your personal message, can then serve as a continual source of solace, inspiration or support as the need arises.

(emphasis in original).

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entitled to a registration for all of the goods currently identified in the application.

At page 2 of his brief, applicant makes the following statements:

> The Applicant agrees that the Opposer is the owner of the "GUARDIAN ANGEL" trademark for the greeting card and gift industry.
>
> The Applicant agrees that the Opposer's use of the "GUARDIAN ANGEL" trademark preceded the filing date and use of the Applicant's applied for "MY ANGEL GUARDIAN" mark and design.

Applicant also states, at page 5 of his brief, that:

> "Applicant does not dispute the fact that the Opposer:
> 1) Used the registered "GUARDIAN ANGEL" mark in various classifications since 1989.
>
> 2) Used the mark with a variety of products.
>
> 3 Sells its products and services to both retailers and public consumer groups.
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> 4) Spends thousands of dollars annually to promote their products.
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> 5) Has had gross sales annually ranging from $1.8 million to over approximately $6.2 million dollars annually.[7] (Opposer does not distinguish whether these figures are for the products in Classes 16 and 25 or the entire product line of all classes registered with the "GUARDIAN ANGEL" mark.)

[7] Information as to opposer's gross sales and advertising were submitted under seal. However, opposer recited the above figures in its brief, and therefore applicant apparently believed, as we do, that opposer has no objection to making this information public.

In view of these statements, as well as the evidence regarding opposer's use and registration of its marks, we find that opposer has established its standing in this proceeding. We further find that opposer's priority is not in issue. Opposer has made of record thirteen of its currently-existing registrations for GUARDIAN ANGEL. See King Candy Company v. Eunice King’s Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Turning to the issue of likelihood of confusion, our determination 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 Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

We first consider the similarity or dissimilarity of the respective goods. With respect to the Class 25 goods, opposer owns a registration for GUARDIAN ANGEL for, inter alia, T-shirts for adults and children. These goods are legally identical to the t-shirts identified in applicant's application. Thus, the parties' goods are deemed to travel in the same channels of trade, and to be sold to the same classes of consumers. It is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined based on an analysis of the

mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in an opposer's registration, rather than what the evidence shows the goods and/or services to be. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, NA, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). We also note that opposer's t-shirts are closely related to several of the other clothing items in applicant's application, in particular, short sleeved shirts, sweatshirts and tank tops. These goods, too, are likely to be sold in the same channels of trade to the same classes of consumers.

With respect to applicant's Class 16 goods, opposer owns registrations for GUARDIAN ANGEL for greeting cards and for picture frames. Applicant's identified post cards are closely related to greeting cards. Moreover, applicant's printed certificates are similar in nature to greeting cards. As noted above, the description of applicant's certificates on his website states that the certificates can be personalized "with your own 'personal message' to the recipient." The website also makes clear that the certificate can be used as an alternative to a greeting card. "Unlike a greeting card that will eventually be discarded the certificate can be framed.... The poem, <u>and your personal message</u>...." (emphasis added). An article about applicant's business describes the certificates as "an

alternative to greeting cards." Moreover, because the certificates are touted as something to be framed, they are clearly complementary in nature to the picture frames identified in opposer's Registration No. 1954352. Thus, we find that applicant's certificates are closely related to opposer's greeting cards and picture frames. The certificates are the type of product that can be sold in gift and card shops, where opposer's goods are sold, and can also be sold to the same classes of consumers.

Thus, the factors of the similarity of the goods and channels of trade favor opposer.

Both parties' goods are relatively inexpensive and are purchased by the general public rather than by sophisticated purchasers. In 1993, opposer's GUARDIAN ANGEL pins were listed in the "$5 or less" category" and were ranked in a gift industry poll as the "#1 register-area item," an indication that they are an impulse purchase. Exhibit 31 to Baribault dep. Greeting cards and t-shirts are also inexpensive. Applicant's certificates are listed on his website as selling for $6, while t-shirts and hats cost $14.95. As a result, both parties' goods are likely to be purchased without great care or deliberation, or with careful inspection of the trademarks. This factor favors opposer.

The marks, too, are very similar. The word portion of applicant's mark, MY ANGEL GUARDIAN, essentially is just a reversal of the word order of opposer's mark GUARDIAN ANGEL. The additional word MY and the design in applicant's mark do little to distinguish the marks. Opposer's mark is registered as a "typed" drawing and, therefore, the protection provided by the registrations would entitle opposer to use, or to prevent the use by others, of the slight stylization of the upper and lower case typestyle used in applicant's mark. As for the design element in applicant's mark, when a mark comprises both a word and a design the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). Here the design, which has a halo, reinforces the "ANGEL" in the word mark, and would be seen as a pictorial representation of the word mark. Although applicant's mark transposes the words in opposer's mark, the words GUARDIAN and ANGEL in each mark are identical, and therefore the marks bear a strong similarity in appearance and pronunciation. The connotations of the marks are virtually identical. Again, although applicant has transposed the words of the well-known phrase "guardian angel," the meaning of MY ANGEL GUARDIAN is the same as

GUARDIAN ANGEL, since the mark still refers to an angel that is one's guardian, or one's guardian angel.

Accordingly, we find that the marks convey similar commercial impressions. Although the marks can be distinguished when viewed side by side, 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. Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980).

Applicant has asserted that the parties' advertising materials identify the owners of the respective marks, pointing out that the home page of applicant's website begins "Rod and Janet Hess present..." followed by the trademark. Applicant also notes that opposer's catalog prominently features opposer's company name, Treasures & Trinkets, Inc. However, if applicant were to obtain a registration for MY ANGEL GUARDIAN and design, he would not be limited to displaying the mark with his name, nor is opposer required to display its company name whenever it uses its mark. Thus, we must determine the issue of likelihood of confusion with respect to the marks themselves, and not in connection with any personal or company names that may currently appear on the parties' advertising materials.

The factor of the similarity of the marks favors opposer.

With respect to the factor of fame, we note that in his brief applicant made the statement that "Opposer [sic] mark 'became famous' prior to the filing date and use of the Applicants' applied for mark...." p. 2. However, later in the brief applicant states that it is "by their [opposer's] belief" that the mark is famous. p. 9. We do not regard applicant's first statement as a concession of the fame of opposer's mark. More importantly, we find that the evidence submitted by opposer is not sufficient to demonstrate that its mark is famous. Although opposer has used its mark for a substantial period of time, since 1989, its sales and advertising figures are not of the degree that would normally establish fame.[8] Applicant's gross sales between 1989 and 2002 were $31.4 million, and its advertising and promotion expenditures during that time are somewhat over $1.2 million.[9] The bulk of the advertising and promotion figures relate to trade show expenses, and all of the advertisements made of record by opposer are in trade

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[8] We recognize, of course, that what are significant sales and advertising in one industry may not be in another. However, in this case opposer has not given any context for its sales and advertising figures, e.g., by showing how they compare with other companies' sales and advertising expenses, in order to show that these figures would be considered significant in opposer's industry.

[9] Although these figures are taken from a confidential exhibit, opposer has provided them in its brief and we thereby consider it appropriate to repeat them here.

journals. Such advertising and promotion is directed to the trade, and therefore do not show that the mark has been promoted to the ultimate consumers, the general public. Opposer does distribute its catalogs to anyone who requests them, including the public at large, but there is no evidence of the numbers of catalogs that reach the general public.

There is some evidence of popularity of opposer's products with the public, specifically the report in the April 1993 issue of the trade journal "Gift Beat" that its GUARDIAN ANGEL pins were a top-selling item at that time. Opposer's witness also testified that its products have been acknowledged in "Gift Beat" "many times over the years," although she provided no information as to the particular products. There was also testimony that opposer's (unspecified) product was mentioned in "Modern Bride" magazine, and there is a newspaper article discussing opposer's business and the GUARDIAN ANGEL mark which appeared in the "Hartford Courant" after the Oklahoma City bombing.

The evidence of advertising and promotion that is directed to or reaches the general public is not sufficient to establish that opposer's mark is famous. Therefore, this duPont factor is neutral.

There is no evidence of the use of similar marks on similar goods. This factor, thus, favors opposer.

The factor of the variety of the goods on which opposer's mark is used favors opposer. The record establishes that opposer uses its mark on a wide variety of goods. As previously stated, the certificates, posters and postcards identified in applicant's application are similar to opposer's greeting cards and other gift shop items, and are likely to be viewed as an extension of opposer's product line. Similarly, the items of apparel listed in applicant's application are likely to be viewed as an extension of the clothing items on which opposer uses its mark.

There is no evidence of actual confusion. However, this Board and the courts recognize that such evidence is notoriously difficult to obtain. Moreover, we have no information as to the extent of applicant's sales or advertising from which we could conclude that there has been an opportunity for such confusion to arise. Thus, this duPont factor is neutral.

Applicant asserts that he adopted his mark in good faith. Although an intent to deliberately trade on the mark of another is strong evidence of likelihood of confusion, since it is presumed that such an intention is successful, the converse is not true, i.e., good faith adoption does not necessarily mean that confusion is not likely. Thus, even

if there were evidence that applicant had conducted a trademark search, and believed that his variation of MY ANGEL GUARDIAN and design was sufficient to avoid confusion with opposer's use of GUARDIAN ANGEL, this would not persuade us that there is no likelihood of confusion.

Accordingly, we find that the relevant duPont factors either favor opposer or are neutral and that opposer has proven that applicant's mark, as used on his identified goods, is likely to cause confusion.

In addition to the likelihood of confusion ground, opposer has asserted a ground of dilution.[10] In view of our finding that the opposition should be sustained on the ground of likelihood of confusion, we decline to address this additional ground.

Decision: The opposition is sustained. As noted in footnote 6, should applicant appeal from our decision and ultimately prevail, the application will be remanded under the provisions of Trademark Rule 2.131 so that the Examining Attorney can consider whether registration should be refused on the basis of non-use of the mark for all of the goods identified in the application.

[10] In its notice of opposition opposer also pleaded the ground of false suggestion of a connection, Section 2(a). However, opposer has not argued this ground in its brief, nor does it appear that opposer submitted any evidence in support of it.