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NOT CITABLE AS
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Oral Hearing:
02 August 2005

Mailed
21 September 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nissan North America, Inc. and
Nissan Jidosha Kabushiki Kaisha trading as
Nissan Motor Company, Ltd.

v.

Zimmer Neo-Classic Motor Car Company

Opposition No. 91155117
to Application Serial No. 76247396

Gary D. Krugman of Sughrue Mion, PLLC for Nissan North America, Inc. and Nissan Jidosha Kabushiki Kaisha trading as Nissan Motor Company, Ltd.¹

August E. Roehrig, Jr. of Luedeka, Neely & Graham, P.C. for applicant.

Before Holtzman, Drost, and Walsh, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 30, 2001, Zimmer Neo-Classic Motor Car Company (applicant) applied to register the mark shown below on the Principal Register for "motor car and structural components thereof" in Class 12.

¹ Opposers' current counsel was appointed after the original briefing period.



The application (Serial No. 76247396) contained an allegation of a date of first use and a date of use in commerce of November 1997.

Nissan Jidosha Kabushiki Kaisha trading as Nissan Motor Company, Ltd. (opposer or Nissan)² is the owner of the following two registrations: No. 1,595,222 for the mark Z in standard character form for "automobiles and structural parts thereof" in Class 12³ and No. 1,547,275 for the mark 300ZX also in standard character form for "automobiles and structural parts thereof" in Class 12.⁴ Nissan maintains that "Applicant's assertion, through the Application of ... exclusive rights to a mark whose predominant element is the single letter Z, and its use as an indicator of source for automobiles, is likely to cause confusion and mistake in the

² Opposers have not proven that Nissan North America, Inc. (NNA), who is alleged to be the authorized licensee of the marks, has standing. "Each claimant must be able to establish its standing and grounds for opposition." SDT Inc. v. Patterson Dental Co., 30 USPQ2d 1707, 1709 (TTAB 1994). Therefore, inasmuch as it has not shown that it has standing, the opposition as to NNA is dismissed.

³ Issued May 8, 1990. Renewed.

⁴ Issued July 11, 1989. Affidavits under Section 8 and 15 accepted or acknowledged.

minds of the purchasing public as to the source of the products." Notice of Opposition at 6.

Applicant denied the likelihood of confusion allegations in the notice of opposition.

Background

After the notice of opposition and answer were filed, neither party submitted any evidence during the testimony period. In addition, Nissan did not submit a timely opening brief. Subsequently, Nissan filed a motion seeking to file their brief late. In an order dated March 18, 2005 (p. 4), the board denied the motion to accept the late filed brief but it did hold that the response established that Nissan had "not lost interest in this matter." See TBMP § 801.02(a) (2d ed. rev. 2004) ("It is the policy of the Board not to enter judgment against a plaintiff, for failure to file a main brief on the case, where the plaintiff, in its response to the show cause order, indicates that it has not lost interest in the case"). No other briefs were filed in this case although Nissan's counsel did appear for oral argument on August 2, 2005.

The Record

The record consists of the notice of opposition with status and title copies of Nissan's registrations, the answer, the involved application, and other papers filed by the parties in this proceeding.

Priority

Priority is not an issue here in view of Nissan's ownership of registrations for the Z and 300ZX marks. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Discussion

The only issue remaining for decision in this case is whether there is a likelihood of confusion. Nissan, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, that there is a likelihood of confusion. See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

In likelihood of confusion cases, we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We begin our analysis by looking at the parties' goods. Applicant's goods are motor cars and structural parts

thereof. Nissan's goods are automobiles and structural parts thereof. A "motor car" is defined⁵ as "*Chiefly Brit. An automobile.*" Therefore, applicant's and Nissan's goods are identical inasmuch as both identifications of goods would include automobiles and structural parts for automobiles. As in this case, when the parties' goods are identical, the Court of Appeals for the Federal Circuit has held that "the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Furthermore, because applicant's and Nissan's goods are both automobiles and structural parts for automobiles, we must presume that the prospective channels of trade and prospective purchasers are identical. See Genesco Inc. v. Martz, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade").

⁵ *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Next, we consider the similarities and dissimilarities of the marks. Nissan's mark consists of the letter "Z."⁶ Because Nissan's Z mark is depicted in typed or standard character form, Nissan's mark consists only of the letter Z. A standard character or typed drawing is not limited to any particular display. A party with a typed or standard character drawing is claiming rights in the mark "regardless of type styles, proportions, or other possible variations." Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). On the other hand, applicant is seeking registration for a mark that contains the letter "Z" but the "Z" is stylized and applicant's mark contains a design element.



Applicant has admitted in its Answer (p. 2) "the allegations of Paragraph 9" of the notice of opposition. Paragraph 9 reads: "Applicant has applied for registration of a logo whose predominant feature consists of the single letter Z, flanked by wings." Based on our review of the

⁶ We do not separately address Nissan's other registration for the mark 300ZX.

marks and this admission, we agree that the letter "Z" is the predominant or dominant element in applicant's mark.

Therefore, the question is whether applicant's "Z" mark and design and Nissan's typed "Z" mark are similar in sound, appearance, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Both marks are admittedly for the letter "Z." The board has previously addressed the issue of likelihood of confusion in a case in which applicant sought registration of a stylized letter J and opposer relied on a registration for the typed letter J and another registration for a stylized letter J. Textron Inc. v. Maquinas Agricolas "Jacto" S.A., 215 USPQ 162 (TTAB 1982). The board analyzed the case law involving other single letter marks and observed that "highly stylized, highly contrasting letter/design combinations tend to fall on the 'no likelihood' side of the adjudicative balance and rather clear portrayals of the letters involved in the compared marks tend to result in 'likelihood of confusion' findings." Id. at 164. One reason confusion is less likely between two highly stylized marks for the same letter is that they become symbol marks and their "appearance is most significant. Symbols of this kind do not sound." Diamond Alkali Co. v. Dundee Cement Co., 343 F.2d 781, 145 USPQ 211, 213 (CCPA 1965) (internal quotation

marks omitted) (No likelihood of confusion between two highly stylized "d" designs).

In this case, Nissan's mark is certainly not stylized at all and applicant's mark is not highly stylized. Indeed, as applicant admits, the "Z" is the predominant feature of applicant's mark.

In the Textron case, the board held that a non-stylized letter "tends to reduce the contrast that would otherwise reinforce an impression of distinctly different marks.. Applicant's 'J' is in script form but, as against a non-stylized 'J," it would seem quite likely to confuse those familiar with the non-stylized mark when applied on applicant's related equipment products." Textron, 215 USPQ at 164. In the present case, Nissan's non-styled letter Z also reduces the contrast between the marks and reinforces the Z portion that is the common element of both marks.

As indicated above, when the differences are not highly stylized, confusion is more likely. Textron, 215 USPQ at 165 ("Board finds that it is the letter "J" in applicant's and opposers' marks that forms the dominant feature and which is most likely to create a lasting impression on purchasers. While there are some subordinate differences in design, we must conclude that when the marks are visually compared in their entirety, the similarities predominate over the differences and that confusion, mistake, or

deception of purchasers is likely to arise from their contemporaneous use in commerce"); Hurst Performance, Inc. v. Hendrickson Manufacturing Co., 199 USPQ 48 (TTAB 1978) (Different H designs held to be confusingly similar).

In this case, because the design in applicant's mark is not highly stylized and both marks contain the letter "Z," they are capable of being pronounced. To the extent that these marks are pronounced, they would be pronounced the same. Their meanings would also be identical, i.e., the letter Z. While the marks are not identical in appearance, inasmuch as Nissan does not claim a particular stylization of the letter, it may be displayed in a style somewhat similar to applicant's. Furthermore, the wings design is unlikely to change the appearance to such a degree that confusion would be unlikely. Therefore, we conclude that the commercial impressions of the marks would be similar.

At this point, we also note that there is no evidence that Nissan's mark is weak or that it is famous so these factors do not favor either party. Also, inasmuch as Nissan's and applicant's goods are automobiles and automobile structural parts, the purchasers would obviously exercise some care when making these purchases and that these goods would not normally be considered to be impulse purchases. This factor would support applicant. No other factor significantly favors either party.

When we consider this limited record, we are persuaded that there is a likelihood of confusion. The goods are identical and both marks consist of a prominent letter "Z." We conclude that purchasers of automobiles and automobile structural parts are likely to believe that the goods are associated with a common source if the marks in this case are used on the identical goods.

We add that if we had any doubts about whether there is a likelihood of confusion, we resolve that doubt, as we must, in favor of the opposer. Hewlett-Packard Co. v. Packard Press, Inc., 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) ("This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks"); In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The opposition is sustained.