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Oral Hearing: March 30, 2005

Mailed: July 22, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nikki Stark
v.
Jewelry Design & Repair, Inc.

Opposition No. 91155798

Seth Natter of Natter & Natter for Nikki Stark.

Erik M. Pelton, Esq. for Jewelry Design & Repair, Inc.

Before Seeherman, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Jewelry Design & Repair, Inc., (applicant) has filed an application to register the mark shown below on the Principal Register for "retail store services and online retail store services featuring jewelry and related products; auctioneering services and online auction services featuring jewelry and

related products."¹

Jewelbid

Nikki Stark (opposer) filed an opposition to registration of the above mark.² In the notice of opposition, opposer alleges that since at least as early as January 1998 opposer has used the mark JEWELBIZ in the form shown below for retail sales of jewelry and related products, online retail store services featuring jewelry and related products, and auction sales featuring jewelry and related products.



Opposer alleges that applicant's mark so resembles opposer's previously used mark shown above that, when used in connection with applicant's services, applicant's mark will be likely to cause confusion, mistake or deception.

Applicant, in its answer, denies the salient allegations in the opposition. In addition, applicant affirmatively asserts that the word "JEWELBIZ" in opposer's mark is generic and/or

¹ Application Serial No. 76383548 filed on March 19, 2002, based on an allegation of a bona fide intention to use the mark in commerce.

² Applicant incorrectly argues in its brief on the case that the opposition which was due by a granted extension of time on March 10, 2003 was untimely filed on March 11, 2003. The opposition was filed by a certificate of mailing dated March 6, 2003 and thus was timely.

descriptive, and as such is entitled to a narrower scope of protection.

The record includes the pleadings, the file of the involved application, and opposer's evidence consisting of the testimony depositions (with exhibits) of Nikki Stark, opposer, and Susan Rose, one of opposer's customers; and, by stipulation of the parties, the declarations (with exhibits) of Nikki Stark, Leslie Segal, a principal of Addison Design Company, and John Langone, a website designer. Applicant did not take testimony or introduce any other evidence.

Both parties filed briefs and an oral hearing was held on March 30, 2005.

Opposer has clearly established use of her pleaded JEWELBIZ (and design) mark in connection with online retail store services featuring jewelry and auction sales of jewelry prior to the March 19, 2002 constructive use date of applicant's intent-to-use application. Applicant has not argued otherwise, and moreover specifically stated at the oral hearing that applicant does not dispute opposer's priority. Although applicant asserted in its answer that opposer's mark is descriptive or generic, it did not submit any evidence to support that contention. We find that opposer's mark is suggestive, not descriptive or generic, and therefore that opposer established trademark rights in the mark as of the time she began using it.

Thus, we turn to the question of likelihood of confusion. Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue, including the similarities of the marks and the similarities of the services. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

With respect to the services, as noted above, opposer uses her mark in connection with online retail store services featuring jewelry and auction sales featuring jewelry. These services are identical, or legally identical, to applicant's services which include retail store services and online retail store services featuring jewelry, and online auction services featuring jewelry. Moreover, the purchasers and channels of trade for these services are identical or overlapping. Both parties offer, or will offer, their retail sales and auction services over the Internet to the general public.

Thus, we turn to the marks, keeping in mind that when marks would appear on identical services, as they do here, the degree of similarity between the marks necessary to support a finding of likely confusion declines. Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In support of its position that the marks are not similar, applicant argues that the marks are different in sound, noting

that applicant's mark ends with a "D" and opposer's mark ends with a "Z"; that the marks have different meanings and overall commercial impressions, in that applicant's mark "is of bidding on jewelry to purchase it at auction, and opposer's mark of a generic jewelry business" (Brief, p. 5); and that the marks are different in appearance. In this regard, applicant states:

Opposer's mark is presented in a solid black italicized font. The letters in Opposer's mark are more rounded and fanciful than the letters in Applicant's mark. The "I" in Opposer's mark is dotted with a large gemstone. Opposer's mark ends [in] the letter "Z" which is presented with a curved bottom giving it is [sic] very distinctive appearance.

Applicant's mark is presented in a vertical font with a shadow effect on the letters. The first letter in applicant's mark, "J", drops down below the rest of the mark. The "I" in Applicant's mark is dotted with a small crown.

It is well settled that marks must be compared in their entirety, not dissected into component parts and the minute details of each part compared with other parts. *Genesco Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003). When marks are closely examined on a side-by-side basis, differences in the marks, no matter how insignificant, are easy to discern. However, a side-by-side comparison is not the test. In the normal marketing environment, purchasers would not usually have an opportunity to examine marks in minute detail. Furthermore, the average purchaser is not infallible in his recollection of trademarks and

often retains only a general overall impression of marks that he may previously have seen in the marketplace. In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988). Thus, it is the overall impression of the marks derived from viewing the marks in their entireties that is controlling. See Dan Robbins & Associates, Inc. v. Questor Corporation, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979). See also E.I. Du Pont de Nemours & Co. v. Yoshida Int'l, Inc., 393 F.Supp. 502, 185 USPQ 597, 603 (EDNY 1975) (overly analytical approach with close attention to specific differences is less important than the overall impression of general similarity.)

When opposer's mark JEWELBIZ (and design) and applicant's mark JEWELBID (and design) are considered in their entireties and as they would be encountered in the marketplace, we find that the overall similarities in the marks far outweigh the differences.

The terms JEWELBID and JEWELBIZ are similar in sound. In fact, the sound is identical up to the last letter of the last syllable in these three-syllable marks. Moreover, the letters "D" and "Z" sound similar when the marks are spoken, and if they are not clearly and distinctly pronounced, the difference may not be noticed at all.

It has been held that similarity in sound alone may be sufficient to support a finding of likelihood of confusion. See

Krim-Ko Corp. v. Coca-Cola Co., 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968). Nevertheless, these marks are also similar in appearance. The marks are constructed the same way. JEWEL is the first word in each mark. That word is combined with "BIZ" or a visually similar term "BID" to form a single term. The design formats are also similar. Both marks have modestly stylized lettering with the first letter "J" appearing in upper case form and the remaining letters in lower case form. Neither mark is so dramatically stylized that it stands out from the other in any memorable way. The most noticeable difference is the design component. In applicant's mark that design is a relatively small size crown and in opposer's mark a relatively large size gemstone. But when these designs are viewed in the context of the marks as a whole, the differences become less significant. The designs appear in the same place in each mark, above the second word "BIZ" in opposer's mark and the second word "BID" in applicant's mark, and they are both used in place of a dot over the "I" in those words. It is this overall visual image that is likely to be remembered by purchasers when seeing the marks at different times in connection with identical services, not the specific differences in the designs.

As to meaning, the words "bid" and "biz" have related connotations, particularly in relation to the parties' auction services. The word "biz" is defined as a slang or shortened term

for "business" which in turn is broadly defined as "commercial activity involving the exchange of money for goods or services."³ The term "bid" refers to a specific type of commercial activity, that is, the "offer of a particular amount of money for something at an auction."⁴ Thus, JEWELBIZ and JEWELBID would be perceived as conceptually similar terms in relation to these identical services and the crown and gemstone designs, both suggestive of "jewels," would reinforce that concept.

The marks convey similar overall commercial impressions, and if the specific differences in applicant's mark are noted or remembered at all, they are likely to suggest a different version of opposer's mark rather than a different source for the services.

Opposer has not demonstrated that her mark JEWELBIZ (and design) is strong or well known. Opposer argues that the mark has been in use for at least five years. However, evidence of use alone, particularly use for the relatively short period of five years, is insufficient to show public recognition of the mark.

On the other hand, applicant has not submitted any evidence of third-party uses of similar marks, or any other evidence to

³ We take judicial notice of the definitions of "biz" and "business" appearing in the *Microsoft Encarta College Dictionary* (2001) at pages 143 and 190.

⁴ *Id.* at page 135.

show that the mark is weak in the relevant market or entitled to only a narrow scope of protection.⁵

We recognize that opposer's mark JEWELBIZ (and design) is suggestive of opposer's services, and therefore not entitled to the broadest scope of protection. However, the mark is at least entitled to protection from registration of applicant's very similar mark for identical services. See, e.g., *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

Applicant argues that because jewelry is expensive, purchasers of these goods are likely to be sophisticated and exercise a great degree of care in their purchasing decisions. We note Ms. Stark's testimony that most, if not all, of the

⁵ Applicant submitted for the first time with its brief copies of a number of third-party registrations for marks that include "biz" and "bid." Applicant argues that this evidence "demonstrate[s] that marks which contain a common element and are for similar goods and services can co-exist on the trademark register if one mark contains -BID and the other contains -BIZ." (Brief, p. 6.) Opposer has properly objected to this evidence as untimely and we sustain the objection. Furthermore, even if these registrations were of record they would not be probative on the question of whether the marks herein are likely to cause confusion. Third-party registrations are not evidence of the use of the marks therein, or that the marks co-exist without confusion in the marketplace. See *Conde Nast Publications Inc. v. Miss Quality Inc.*, 507 F.2d 1404, 184 USPQ 422 (CCPA 1975); and *AMF Inc. v. American Leisure Products Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). We also note that none of the marks in these third-party registrations is similar to the marks herein, and some are not even constructed the same way. Moreover, for the most part, the "pairs" of "biz" and "bid" marks in these registrations are not even for goods and services that are similar to each other, let alone the same.

jewelry items she sells cost more than \$100, and that about half of the items sell for more than \$500.

There are two problems with applicant's argument. One is that its identification is not restricted to sales of expensive jewelry. "Jewelry" includes costume items which may be priced very inexpensively, and therefore might well be purchased on impulse. Second, applicant seeks to register its mark for retail and online retail store services and auction services, not for jewelry per se. Even if consumers deliberate in making their jewelry purchases, they may not exercise the same degree of care when it comes to the store or website where they shop or bid. In any event, even careful purchasers of expensive goods can be confused as to source where, as here, the marks are very similar and the services are identical. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible.").

In view of the similarity of the marks, and because the services as well as the trade channels and purchasers for the services are identical, we find that confusion is likely.

Decision: The opposition is sustained and registration to applicant is refused.