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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Home Pro Systems, Inc.

v.

Personal Home Pro of the Quad Cities, LLC

Cancellation No. 92041408

Robert G. Roomian for Home Pro Systems, Inc.

Robert W. Hoke of Shuttleworth & Ingersoll, PLC for Personal Home Pro of the Quad Cities, LLC.

Before Zervas, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On February 18, 2000, respondent (Personal Home Pro of the Quad Cities, LLC) filed application Serial No. 75940013 to register on the Principal Register the following mark:

for services identified as “home maintenance and improvement services” in International Class 37. On February 12, 2002, respondent's mark issued as Registration No. 2537750. The registration claims a date of first use and first use in commerce of February 17, 2000.

Petitioner (Home Pro Systems, Inc.), on December 26, 2002, filed a petition to cancel respondent's registration on the ground that:

> Petitioner, since 1981, has begun, and is now using the mark “HOMEPRO” in connection with BOOKS, MANUALS AND REPORT FORMS RELATING TO HOUSE AND BUILDING INSPECTION, MAINTENANCE AND REPAIR; PRINTED HANG TAGS CONTAINING INSTRUCTIONS FOR HOUSE AND BUILDING MAINTENANCE; and EDUCATIONAL AND TRAINING SERVICES RELATING TO HOUSE AND BUILDING INSPECTION, MAINTENANCE AND REPAIR; and PROVIDING HOUSE AND BUILDING INSPECTION SERVICES AND SUBSEQUENTLY PRODUCING INSPECTION REPORTS BASED THEREON. Said use by Petitioner predates the first use of February 17, 2000 claimed by Respondent. … In view of the similarity of the respective marks and the related nature of the goods and services of the respective parties, it is alleged that Respondent’s registered mark so resembles Petitioner’s mark previously used in the United States, and not abandoned, as to be likely to cause confusion, or to cause mistake or to deceive. (Capitalization in the original.)

Petitioner adds that it has applied for registration of the mark HOMEPRO for the above goods and services and that it has been refused registration based upon the mark in the registration sought to be cancelled by petitioner.

Respondent has denied the salient allegations of the petition to cancel.

The Record

The record consists of the following items: the file of the involved registration; a status and title copy of two registrations for

owned by petitioner, i.e., Registration No. 1398485 for "books and report forms relating to house and building inspection, maintenance and repair" in International Class 16, and Registration No. 1413760 for "providing house and building inspection services and subsequently producing inspection reports based thereon" in International Class 42,[1] and copies of several registrations, all made of record by petitioner pursuant to a notice of reliance; and copies of numerous registrations made of record by respondent pursuant to a notice of reliance.

Both parties filed briefs. An oral hearing was not requested by either party.

[1] The terms HOMEPRO and SYSTEMS, INC. have been disclaimed in Registration No. 1413760. No wording has been disclaimed in Registration No. 1398485. Section 8 affidavits have been accepted and Section 15 affidavits have been acknowledged for both registrations.

Priority

The Board notes that petitioner did not plead ownership of or assert Registration Nos. 1398485 and 1413760 in its petition to cancel. However, respondent made no objection to the status and title copies of these two registrations included in petitioner's notice of reliance. Accordingly, we hold that the pleadings are considered amended under Fed. R. Civ. P. 15(b) to conform to the evidence, specifically, to claim ownership of and to assert petitioner's Registration Nos. 1398485 and 1413760.

Because both petitioner and respondent own registrations, petitioner does not necessarily have priority simply because it owns a registration. *Brewski Beer Co. v. Brewski Brothers, Inc*., 47 USPQ2d 1281, 1284 (TTAB 1998) (the "Board has taken the position, in essence, that the registrations of each party offset each other; that petitioner as a plaintiff, must, in the first instance, establish prior rights in the same or similar mark …. Of course, petitioner or respondent may rely on its registration for the limited purpose of proving that its mark was in use as of the application filing date."). In this case, because respondent has not submitted any evidence of an earlier priority date, the earliest date upon which it can rely is the filing date of respondent's application (February 18, 2000) in connection with Registration

No. 2537750. *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 n. 5 (TTAB 1985) ("The earliest date of first use upon which Intelsat can rely in the absence of testimony or evidence is the filing date of its application."). Inasmuch as petitioner's underlying applications for registration of the marks depicted in Registration Nos. 1413760 and 1398485 were filed on September 25, 1985 and October 17, 1985, respectively, about fifteen years prior to the filing of respondent's application, petitioner has priority.

Likelihood of Confusion

We now consider the central issue in this appeal, i.e., whether respondent's PERSONAL HOME PRO and design mark when used on home maintenance and improvement services is confusingly similar to petitioner's HOMEPRO SYSTEMS, INC. and design mark used on house and building inspection services and subsequently producing inspection reports based thereon, and books and report forms relating to house and building inspection, maintenance and repair. In arriving at a conclusion in likelihood of confusion cases, we consider the facts as they relate to the relevant factors set out in such cases as *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir.

2000); and *In re E. I. du Pont de Nemours & Co*., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

The first factor we will consider concerns the relatedness of the petitioner's and registrant's services, and their goods and services. We must consider the goods and services as they are identified in the involved registrations. *Paula Payne Products v. Johnson Publishing Co*., 473 F.2d 901, 177 USPQ 76 (CCPA 1973).

Petitioner has introduced several third-party registrations which include services of the type respondent identifies as well as services of the type identified in petitioner's registrations to support its contention that the services are related. These registrations have some probative value; specifically, they may indicate that the services are the types of services which may emanate from the same source. *In re TSI Brands Inc*., 67 USPQ2d 1657 (TTAB 2002); *In re Albert Trostel & Sons Co*., 29 USPQ2d 1783 (TTAB 1993).

The third-party registrations show that the same mark has been registered in connection with both (a) home maintenance and/or improvement services, and (b) house and building inspection services. See Registration No. 2769171 for ALLABOUTHOME for "home repair services" and "home inspection services"; Registration No. 2676618 for SERVICEMASTER HOME SERVICE CENTER for "new home building

inspection services … [and] home repair services”; Registration No. 2391868 for THOSE GUYS for “electrical services, namely … electrical repair and installation of electrical wiring; residential and commercial building construction services … and home building inspection”; Registration No. 2023057 for MAINTAINED DOMAIN and design for “building inspection … [and] building and house renovations and additions”; and Registration No. 1956992 for AMERICAN HOME SHIELD for “home repair and home inspection services.”

These registrations demonstrate that the same mark has been registered, based on use, for both home inspection and home repair services. We therefore may conclude that consumers – who in this case, are homeowners and those in the market for a new home - could believe that petitioner’s and registrant’s services emanate from the same source.

In view of the foregoing, we conclude that the parties’ services are related. We also conclude that respondent’s “home maintenance and improvement services” are commercially related to petitioner's “books and report forms relating to house and building inspection, maintenance and repair,” identified in petitioner's Registration No. 1398485, inasmuch as both concern the subject of home maintenance and repair and are directed to the same prospective purchaser.

Additionally, we find that the parties' respective goods and services are or could be marketed in the same trade channels, such as in local newspapers and/or on local television, to the same classes of purchasers, i.e., to homeowners and persons seeking homes of their own. Such purchasers do not necessarily have any special expertise in home maintenance and repair and would not be expected to exercise more than ordinary care in purchasing the goods and services. In fact, they may make purchasing decisions regarding home inspection services and home repair services solely on recommendations or input from colleagues, neighbors, friends and relatives, or even based on an advertisement in a newspaper, and not on any research of their own.[2] As for petitioner's books and report forms relating to house and building inspection, maintenance and repair, they may be purchased by ordinary consumers who are home owners or home buyers, and may be subject to purchase without a great degree of thought or care.

[2] In this regard, respondent's contention that “books are typically purchased in a retail setting or over the Internet, [and] actual home maintenance and improvement services are typically purchased face to face or over the telephone after due consideration for the services requested and the specific services available from the provider,” brief at p. 6, is not persuasive. It may well be the case that a prospective purchaser may believe that after reading a HOMEPRO book on home maintenance and repair and, even months later, coming across an advertisement for respondent's PERSONAL HOME PRO services, that the sponsor of the book also provides home maintenance and improvement services.

Next, we consider the similarities or dissimilarities between the parties' marks, looking to whether the marks in their entireties are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 overall commercial impression that confusion as to the source of the goods 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 a specific impression of trademarks. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *Sealed Air Corp. v. Scott Paper Co*., 190 USPQ 106 (TTAB 1975).

Both petitioner's and registrant's marks are composite marks with design and word components. In such cases, the word component is normally accorded greater weight because it would be used by purchasers to request the goods or services. *Giant Food, Inc. v. Nation's Foodservice, Inc*., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983); *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A*., 32 USPQ2d 1192 (TTAB 1994); *In re Appetito Provisions Co*., 3 USPQ2d 1553 (TTAB 1987). "This is particularly true when a mark

appears in textual material, such as catalog descriptions, in which it is often impossible or impractical to include the design feature of the mark." *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (CAFC 1983). Thus, while we consider the marks as a whole, we accord greater weight to the wording in the marks than the design components.

In considering the wording in the marks, we find that both marks emphasize HOMEPRO or HOME PRO. In petitioner's mark, HOMEPRO is at the top of the mark and SYSTEMS, INC. is at the bottom of the mark. SYSTEMS, in petitioner's mark merely means that petitioner's services constitute a "method … or procedure." *Random House Dictionary of the English Language* (2nd ed. 1987).[3] As such, SYSTEMS is not accorded much weight in identifying the source of registrant's goods and services. See *In re National Data Corp*., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) ("That a particular feature is descriptive … with respect to the relevant goods or services is one commonly accepted rationale for giving less weight to a portion of the mark."). INC. does not function as a source indicator. In registrant's mark, HOME and PRO are several times larger than PERSONAL the only other wording in the mark, and hence have a stronger commercial impression

[3] We take judicial notice of the dictionary definition of "system." *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc*., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

than PERSONAL. Thus, we conclude that HOMEPRO and HOME PRO are the dominant portions of each mark.[4]

While the marks have obvious differences in their appearances and pronunciations due in part to the inclusion of the other wording in the marks and the differences in the depictions of the homes in the marks, these differences are not as significant as the similarities created by the identical common dominant term. In view of the shared dominant term, we find that the meanings of the marks and their commercial impressions are not dissimilar – the additional wording in the marks does not alter the overall meaning and commercial impression of the marks and the differences in the meanings and commercial impressions of the marks are not very significant. We conclude that, when we consider these marks in their entireties, the differences in appearance, pronunciation, meaning, and commercial impression are eclipsed by the similarities of the marks.

Registrant has argued that "a great number of marks including the words HOME and PRO have been previously registered in the United States Patent and Trademark Office for a variety of products and services"; that "these

[4] As noted earlier in this decision, Registration No. 1413760 involving petitioner's services contains a disclaimer of HOMEPRO. We do not give HOMEPRO any lesser weight in our analysis due to its disclaimer because prospective purchasers will not know that this term has been disclaimed, and because there is no evidence in the record, or even any argument by respondent, that HOMEPRO is merely descriptive or highly suggestive of petitioner's services.

registrations prove that the words HOME and PRO are relatively common words in marks for goods and services relating to professional services for home owners"; and that HOME and PRO "are relatively weak and should not be afforded broad protection in a determination of a likelihood of confusion as to source or origin." Brief at p. 7.

The third-party 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 similar marks in the marketplace, and as a result would be able to distinguish between petitioner's and registrant's marks based on slight differences between them and/or on their design components. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982).

Additionally, many of the registrations made of record by respondent are for marks that are dissimilar to the marks in issue in this case, or recite goods or services that are dissimilar to the goods and services in issue in this case, and hence have limited probative value. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992). For example, Registration No. 1411199 for HOME PRO is for "volumetric infusion pump"; Registration No. 1471267

for TAKE HOME A PRO is for “pre-recorded video tapes”; Registration No. 2869458 for THE HOME DEPOT PRO PERKS PROGRAM and design is for “promoting the sale of credit card accounts through the administration of incentive award programs for home improvement customers”; Registration No. 2710485 for HOME PRO is for “ceiling fans”; Registration No. 2822080 for HOME PRO is for “computer services, namely, providing an on-line computer database for making hotel reservations for others”; and Registration No. 2446090 for PET & HOME PRO’S and design is for “pet sitting, home sitting and dog walking services.”

Further, “third party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection.” *In re J.M. Originals Inc*., 6 USPQ2d 1393, 1394 (TTAB 1987). Regarding the “strength of a mark, however, registration evidence may not be given any weight.” *Olde Tyme Foods Inc. v. Roundy's Inc*., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992).

Thus, for the foregoing reasons, respondent’s arguments regarding third party registrations are not persuasive.

After considering the similarities between petitioner’s goods and services and respondent’s services, as well as the similarities between the marks, trade channels and purchasers, we find that there is a likelihood of confusion

when petitioner’s mark for “house and building inspection services and subsequently producing inspection reports based thereon” and “books and report forms relating to house and building inspection, maintenance and repair” is used concurrently with respondent’s mark for “home maintenance and improvement services.”

DECISION: The petition for cancellation is granted and respondent's Registration No. 2537750 shall be cancelled in due course.