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MARCH 31, 99

Paper No. 15
RFC

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Florida Leisure Acquisition Corporation**

Serial No. 74/**041,823**

Mary Dalton Baril of McGuire, Woods, Battle & Boothe,
L.L.P. for Florida Leisure Acquisition Corporation.

Andrew D. Lawrence, Trademark Examining Attorney, Law
Office 108 (David Shallant, Managing Attorney).

Before **Cissel**, Hanak and Wendel, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 11, 1996, applicant filed a multi-class
application to register the mark "WILD WATERS" on the
Principal Register for, among other things, "amusement
parks, recreation services in the nature of water slides,
swimming pools, a beach, volleyball courts, playgrounds,
floating docks and picnic grounds." In Class 41. The other
classes were subsequently divided out, with this

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application going forward for only the above-referenced services. The basis for the filing of the application is applicant's claim of first use of the mark and first use of it in interstate commerce in March of 1978.

With its response to the first Office Action, applicant claimed ownership of Reg. No. 1,578,214. That registration issued on May 11, 1990, based on claimed use since April 29, 1978. The mark in that registration is



and the services are identified in it as "recreation services in the nature of a beach, volleyball courts, slides, swings, floating docks and picnic grounds."

The Examining Attorney refused to register applicant's mark under Section 2(d) of the Act on the ground that the mark, as used in connection with the amusement park and recreation services set forth in the application, so resembles the mark "WILD WATER WILDERNESS," which is

registered¹ for "amusement parks services," that confusion is likely.

When the refusal was made final, applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed briefs, but applicant did not request an oral hearing before the Board. Accordingly, we have resolved this matter based on consideration of the record in the application and the written arguments of applicant and the Examining Attorney. We find that the refusal to register in this case is well taken.

The test for determining whether confusion is likely was set forth by our primary reviewing court in *In re E.I. duPont deNemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), wherein the Court identified thirteen factors which should be considered if there is evidence related to them in a particular case.

The Examining Attorney bases his conclusion that confusion is likely on a comparison of the marks and the services set forth in the application and the registration, respectively. Applicant argues that the Examining Attorney failed to consider the marks in their entireties in

¹ Reg. No. 1,539,685, issued on the Principal Register to Knott's Berry Farm, a California partnership, on May 16, 1989. A combined affidavit under Sections 8 and 15 was submitted.

comparing their appearances, pronunciations, connotations and commercial impressions; that he failed to take into account evidence of the use of similar marks in connection with similar services; that he failed to consider the extent to which applicant has a right to exclude others from the use of its mark, the length of use of the marks, and the market interface between applicant and the owner of the cited registered mark; and that any doubt on the issue of likelihood of confusion must be resolved in favor of applicant because applicant used its mark before the owner of the cited registration used the registered mark in connection with the services specified in the registration.

When we consider the marks at issue here in their entirety, we find them to be quite similar. They create similar commercial impressions because they are similar in appearance, pronunciation and connotation.

It is well settled that "in articulating reasons for reaching a conclusion on the issue 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 the consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp. 224 USPQ 749, 751 (Fed. Cir. 1985).

When this is done in the instant case, we conclude that the marks are similar, notwithstanding the fact that applicant's "WILD WATERS" mark is not identical to the registered mark, "WILD WATER WILDERNESS." Applicant's mark essentially appropriates the first two words in the registered mark. Registrant's mark also includes the related word, "WILDERNESS." The difference between "WATER" and "WATERS" is not likely to even be perceived by many prospective purchasers of amusement park services, but even if it were, the technical distinction is not likely to play a significant role in distinguishing between the two marks.

Contrary to applicant's technical argument based on language structure and applicant's perception of the connotations the words are likely to evoke, these two marks do look like each other, they sound similar when they are spoken, and they have similar meanings. The commercial impression applicant's mark creates in connection with applicant's amusement park services is very similar to the commercial impression created by the registered mark for the same services. As pointed out by the Examining Attorney, "...what these words evince, as a prospective purchaser will no doubt notice, are references to waters or water that are wild and, in one case, somehow involve a wilderness." As he also notes, the marks are only short

word combinations which suggest something about the services, and these allusions, which we characterize as commercial impressions, are essentially the same. An ordinary consumer who has heard of, read about, or in some other way been exposed to "WILD WATER WILDERNESS" amusement park services, would be likely, upon being presented, at some other time, with reference to "WILD WATERS" in connection with the identical services, to assume that such services were being provided by the same entity, or that there is a relationship between the entities rendering the services under these marks. One could be seen as a shortened version of the other, with both being provided by a single entity or by related entities.

With respect to applicant's contention in its brief that other businesses have registered similar marks for similar services, as the Examining Attorney points out, there is no evidence properly of record in support of this argument. Reference to registrations in a brief or other argument does not make such registrations of record, and even if they were of record, such registrations would not establish use of the marks therein, or that the consuming public is familiar with the use of the such marks.

National Aeronautics and Space Administration v. Record Chemical Co., 185 USPQ 563 (TTAB 1975).

Applicant's argument with regard to the resolution of doubt fails has no bearing on the resolution of this appeal. We have no doubt that confusion is likely when such similar marks are used in connection with identical services.

With regard to applicant's argument that the Examining Attorney fails to take into account the extent to which applicant has a right to exclude others from use of its mark on its goods, the length of use of the marks, and the market interface between applicant and the owner of the registered mark, we agree with the Examining Attorney that this record does not include evidence on which either the Examining Attorney or the Board could determine these facts.

In a similar sense, that applicant is not aware of any incidents of actual confusion because of these two marks is not determinative of the issue in applicant's favor. It is well settled that the question is not whether confusion has occurred, but rather whether it is likely. In an ex parte proceeding such as this, we do not necessarily have enough information relative to the use and promotion of the marks to reach a reasoned conclusion regarding the reason why applicant is unaware of any actual confusion. See *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984).

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In summary, for the reasons set forth above, we hold that confusion is likely, and therefore affirm the refusal to register under Section 2(d) of the Act.

R. F. Cissel

H. R. Wendel
Administrative Trademark Judges
Trademark Trial and Appeal Board

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