

Oral Hearing:  
July 9, 1998

Paper No. 15  
CEW

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      JUNE 8, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Manufactura de Tabacos

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Serial No. 75/102,761

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Allen M. Krass and Julie A. Greenberg of Gifford, Krass,  
Groh, Sprinkle, Patmore, Anderson & Citkowski for  
applicant.

John Dalier, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).

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Before Cissel, Hohein and Walters, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Manufactura de Tabacos has filed a trademark  
application to register the mark shown below for "cigars."<sup>1</sup>

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<sup>1</sup> Serial No. 75/102,761, in International Class 34, filed May 13, 1996,  
based on an allegation of a bona fide intention to use the mark in  
commerce.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered marks shown below, both owned by Hermes International, that, if applicant's mark were used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Registration No. 1,929,529<sup>2</sup> for "smoking pipes, cigarette holders, cigar holders, ash trays, non-electric cigar and cigarette lighters, cigar cases and cigar cutters all not made of precious metal":

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<sup>2</sup> Registration issued October 24, 1995, in International Class 34. The registration includes a disclaimer of PARIS apart from the mark as a whole; and includes the statement: "The mark is comprised of a horse, carriage and trainer with circle designs while the textual portion is comprised of the words "HERMES-PARIS" and the letter "H." Additionally, the registration contains a color lining statement.

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Registration No. 1,942,235<sup>3</sup> for "pipes, cigarette holders, cigar holders, ash trays, non-electric cigar and cigarette lighters not for land vehicles, cigar cases and cigar cases not made of precious metal, and cigar cutters":

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<sup>3</sup> Registration issued December 19, 1995, in International Class 34. The registration includes a disclaimer of FAUBOURG SAINT-HONORE and PARIS apart from the mark as a whole. Additionally, the registration contains a color lining statement.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and an oral hearing was held. We affirm the refusal to register.

In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the goods.

*Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The Examining Attorney contends that applicant's goods, cigars, are closely related to registrant's goods, which can be described as smoking accessories, and that, in fact, both types of goods can emanate from the same source. In support of this proposition, the Examining Attorney submitted several third-party registrations including both the goods set forth in the application and the goods specified in the cited registration.

Regarding the marks, the Examining Attorney contends that both registrant's marks and applicant's mark contain the identical term HERMES; that HERMES is the dominant portion of each mark herein; that both applicant's mark and registrant's mark in Registration No. 1,929,529 contain the identical additional letter "H"; and, therefore, that the overall commercial impressions of registrant's marks and applicant's mark are substantially similar.

Regarding the goods, applicant contends that its goods "are at most tangentially related" to those of registrant. Regarding the marks, applicant accuses the Examining Attorney of dissecting the marks and contends that "the elaborate drawings are unquestionably the dominant features of each [mark]"; that the design elements of each mark are quite different; that, with respect to Registration No. 1,929,529, the word portion of the mark is significantly smaller than the design portion and barely legible; and, therefore, that the overall commercial impressions of the marks are significantly different.

Applicant contends, further, that HERMES is a weak element of these marks because Hermes is "a well known God of Greek mythology [and] reference to the Greek God Hermes is a common component in numerous trademarks." In support of this statement, applicant lists several third-party registrations of marks registered for a variety of different goods and services. However, in order to make the registrations properly of record, soft copies of the registrations themselves, or the electronic equivalent thereof, i.e., printouts of the registrations taken from the electronic records of the Patent and Trademark Office's (PTO) own data base, should have been submitted. See, *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992).

Therefore, we have not considered this evidence. Further, even if this evidence had been properly of record, we would accord it little probative value in this case as the goods and services identified in the third-party registrations are significantly different from the goods identified in the application and registrations in this case.

Considering, first, the goods, we find the evidence of record sufficient to conclude that applicant's goods are closely related to the goods identified in the cited registrations, and applicant has provided no evidence to the contrary. Consequently, if the respective goods were to be sold under the same or similar marks, confusion as to source or sponsorship would be likely to occur.

Considering, next, the marks, the proper test for determining the issue of likelihood of confusion is the similarity of the general commercial impression engendered by the marks. Due to the consuming public's fallibility of memory, the emphasis is on the likely recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975). Both applicant and the Examining Attorney recognize the

well established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, while the marks are compared in their entireties, including descriptive or disclaimed portions thereof, "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 consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). If both words and a design comprise the mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the goods and/or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

We agree with the Examining Attorney that the word portion of each of the respective marks is clearly dominant and, further, identical. HERMES would appear to be an arbitrary term in relation to the goods identified in both the application and the cited registrations. As also noted

by the Examining Attorney, both applicant's mark and registrant's mark in Registration No. 1,929,529 contain the capital letter "H" within a circle. As "H" is the initial letter in HERMES, this tends to reinforce the dominance of the term HERMES in these two marks. Although we agree with applicant that the design elements of each of the marks herein are not insignificant and that the design elements of applicant's mark differ from the design elements of registrant's marks, we find these differences are insufficient to distinguish these marks.

Therefore, we conclude that the commercial impressions of applicant's mark and registrant's marks are sufficiently similar that their contemporaneous use on the closely related goods involved in this case would be likely to cause confusion as to the source or sponsorship of such goods.

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*Decision:* The refusal under Section 2(d) of the Act  
is affirmed.

R. F. Cissel

G. D. Hohein

C. E. Walters  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board