

Opposition No. 97,115

for "wholesale and retail travel services, namely arranging air transportation and ground accommodation travel packages for marketing by retail travel agents."¹

Registration has been opposed by Jet Tours under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used in connection with applicant's services, so resembles opposer's previously used and registered mark shown below



for "catalogs, brochures, folders and posters, all relating to travel" (in International Class 16), "travel agency services, namely conducting tours for others" (in International Class 39), and "hotel and vacation club reservation services, hotel and restaurant services" (in International Class 42)² as to be likely to cause confusion, or to cause mistake, or to deceive.

¹ Application Serial No. 74/500,064, filed March 10, 1994, alleging a bona fide intention to use the mark in commerce.

² Registration No. 1,914,843, issued August 29, 1995. Ownership of this registration was pleaded by way of an amended notice of opposition.

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Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by each party; a certified copy of opposer's pleaded registration, and discovery depositions, with related exhibits, introduced by way of opposer's notice of reliance; and discovery depositions, with related exhibits, and opposer's answers to applicant's interrogatories, made of record in applicant's notice of reliance. The parties have relied upon the discovery depositions pursuant to their stipulation under Trademark Rule 2.120(j)(2). The record also includes the parties' stipulation filed on February 28, 1997. Both opposer and applicant filed briefs on the case and an oral hearing was held.

Opposer, through its wholly owned subsidiary Jet Vacations, Inc. (a travel agency with a single office in New York City), is engaged in the travel business. More specifically, opposer is a tour operator that puts travel packages together, then sells the packages to travelers through travel agents. According to the testimony of Allen Stolz, the former chief executive officer of Jet Vacations, and Suzanne Hall, vice president, sales and marketing, of Jet Vacations, annual sales volume under opposer's mark was around \$50,000, and annual advertising expenditures

approximated \$50,000. Opposer's services were promoted primarily through the distribution of informational brochures, the distribution of which usually ran at 125,000 copies. Ms. Hall testified that opposer's registered design mark was never used alone, but rather always used in conjunction with the words "Jet Tours" or "Jet Vacations." In addition, the mark always appeared in color, with the background in red, the moon in white and the sun in yellow.³ The parties stipulated to the fact that Jet Vacations "has ceased doing business in the United States," and Mr. Stolz confirmed that Jet Vacations closed its operations in October 1996.⁴

Applicant, according to the testimony of William La Macchia, applicant's president and chief executive officer, is also in the travel business, providing vacation packages which typically include lodging and air transportation. According to Mr. La Macchia, opposer consists of several

³ Opposer's "Graphic Design Guidelines" brochure states that the logotype consists of three inseparable elements: a vertical solid red [back]ground with its lower edge in the form of a wave; the Jet Tours typography; and the moon-sun symbol. The guidelines also indicate that the three elements of the logo "must not be modified in any way." Nevertheless, we recognize, of course, that our comparison of applicant's mark with opposer's mark is limited to opposer's registered mark which does not include any words or color claimed as a feature.

⁴ Notwithstanding opposer's apparent cessation of use of the pleaded mark, abandonment has not been raised as an issue in this case. It would appear that the cessation occurred around the time of trial in this case, but applicant has not pressed any claim based thereon. Thus, there is no reason to consider opposer's cessation of use as an issue in this case.

"strategic business units," including one called Funjet Vacations which uses the mark sought to be registered. Annual sales under the mark are approximately \$250 to \$300 million, and annual promotional expenditures are in excess of \$7 million. Applicant's services are marketed primarily through travel agencies. The bulk of applicant's travel packages involve sunny and warm destinations.

In view of opposer's ownership of a valid and subsisting registration for its pleaded mark, there is no issue with respect to opposer's priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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

With respect to the parties' goods and/or services, there is no real dispute that they are substantially similar.⁵ Although applicant points out that it focuses on

⁵ Although the pleaded registration lists both goods and services, opposer has focused its attention on the parties' respective services. Thus, we too have focused our analysis on

travel to relaxed, sunny destinations in North America and the Caribbean, in contrast to opposer's primary market of trips to France, and that opposer admitted that the parties are not direct competitors, these facts do little to distinguish the parties' services. It is settled that in cases such as this one the registrability of an applicant's mark must be evaluated on the basis of the identification of goods and/or services set forth in the involved application and the registration of record, regardless of what the record may reveal about the particular nature of the respective goods and/or services. Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). In the present case, both parties provide travel services involving tour and travel packages. The services move in the same channels of trade to the same classes of purchasers, namely travel agencies and the ultimate user, that is, the person purchasing the trip.

Insofar as the factor of the conditions of the sale of the parties' services is concerned, we agree with applicant that travel agents are relatively sophisticated when presenting and booking vacation packages for clients. We would also agree, therefore, that travel agents are less likely to be confused than the average purchaser of travel

the services. We hasten to add, however, that we view opposer's catalogs, brochures folders and posters, all dealing with

services. With respect to the average consumer who may purchase the services, the cost and nature of the services tend to suggest that a somewhat careful purchasing decision is often involved. The record shows that the involved travel tours and packages cost several hundreds to several thousands of dollars, and it is common knowledge that vacation plans frequently involve a good bit of deliberation before a destination or tour is selected.

We next turn to consider the marks. Although the marks share some similarities, we nonetheless find that the marks are sufficiently different in terms of appearance and connotation that confusion is unlikely to occur. Opposer characterized its mark as follows: "Its bright red banner shape is the signal of its presence. Its symbol, the sun and the moon clearly joined together, expresses the fullness of the precious time we spend holidaying or traveling, and evokes freedom, new encounters and special moments." (Ex. no. 23) In Mr. Stolz's words, "I mean, it [opposer's design mark] obviously is the moon and the sun." (November 30, 1995 dep., p. 27) Mr. La Macchia has stated that applicant's mark communicates vacation, fun and relaxation in warm, sunny destinations. Stephanie Hart, applicant's public relations manager in corporate communications, described applicant's mark as "represent[ing] everything [applicant's] about, sunny, relaxing places, vacation travel, to be related to the travel services of applicant.

packages offering land, sand, and sea...." In a letter from applicant, when applicant was introducing its involved mark, to various individuals in the trade, applicant described the mark as "a sun placed above three separately colored waves, representing land, sand and sea." (ex. no. 19) Michael Voss, president of the advertising agency that handles applicant's account, who was involved in the development of applicant's mark, described the mark as follows (dep., p. 7):

So what you see is a sun representing the warm weather destinations. The swirling pattern was designed to be fun because we are selling a vacation package. You see the sand. The beach is representing warm weather destination, the sea because many of them are oriented towards the ocean, and the land representing the land packages that are inclusive of what we sell.

Our own "eyeball" test in comparing the marks, buttressed by the parties' own differing descriptions of their respective marks as set forth above, leads us to find that the marks are specifically different in appearance and are sufficiently different in connotation that there is no likelihood of confusion between them. See: Johann Maria Farina Gegenuber Dem Julicho-Platz v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199 (CCPA 1972); and In re Giordano, 200 USPQ 52 (TTAB 1978).

An important factor in finding that there is no likelihood of confusion in this case is the evidence of

third-party uses of sun designs in the travel industry. The Board has in the past given weight to evidence of use by third parties of marks containing elements in common with the mark being opposed on grounds of likelihood of confusion to demonstrate that confusion is not, in reality, likely to occur in the marketplace. See, e.g., *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1462 (TTAB 1987). In the present case, applicant contends that consumers are accustomed to the use of sun design marks in the travel industry and that, therefore, the consumers are able to discern variations in these marks such that confusion as to source is not likely to occur.

In connection with applicant's argument, the record includes at least twenty exhibits showing third-party uses of sun designs in the travel industry in connection with travel agency services and tours and travel packages. Further, Mr. Stolz testified that "it's fairly common" for various depictions of the sun to appear in marks used in the travel industry. (Stolz April 22, 1997 dep., p. 10) Likewise, Mr. La Macchia and Ms. Hart testified regarding the frequent use of sun designs by others in the industry. There also is the testimony of Mr. Voss who stated that "[t]he sun is very frequently used in the travel industry, obviously because many people are going to sunny destinations." In light of the evidence of record, coupled

with the obvious suggestiveness of sun designs when used in connection with travel services (that is, suggesting sunny destinations), we do not believe there is any doubt but that the field of sun designs for travel related services is a crowded field. That is to say, the record supports the proposition that opposer's mark is entitled to only a narrow scope of protection. See: Colgate-Palmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400, 167 USPQ 529 (CCPA 1970).

In comparing the parties' marks, we have considered the testimony of Mr. Stolz on this very point. Mr. Stolz, the chief executive officer of Jet Vacations (opposer's wholly owned subsidiary who used the mark when it was in business), testified that he does not believe that the contemporaneous use of the parties' marks is likely to cause confusion among travel agents or the consuming public. Mr. Stolz further testified that opposer had never made any prior attempts to police its mark, and that he was surprised to learn that the present opposition was filed against registration of applicant's mark. Messrs. Stolz and La Macchia both testified about their conversation with each other wherein Mr. Stolz expressed his surprise to Mr. La Macchia, Mr. Stolz indicating that opposer did not consult him before the filing of the opposition, and that Mr. Stolz did not view the marks as being confusingly similar. Although some of

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Mr. Stolz's testimony was taken after his separation from opposer's employ,⁶ Mr. Stolz was at one time intimately involved with opposer's business in the travel industry. We view Mr. Stolz's testimony on this point to be akin to an admission against interest and, thus, we have accorded probative value thereto. See: *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978)[a party's earlier contrary opinion may be considered relevant and competent to a limited extent, that is, this fact is "merely illuminative of shade and tone in the total picture confronting the decision maker"] Cf.: *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 842 F.2d 1270, 6 USPQ2d 1305 (Fed. Cir. 1988); *Bongrain International (American) Corp. v. Delice de France Inc.*, 811 F.2d 1479, 1 USPQ2d 1775 (Fed. Cir. 1987); and *In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969 (Fed. Cir. 1985)[parties' views on likelihood of confusion must be considered since businessmen are in a better position to know the real life situation than bureaucrats or judges].

Applicant also directs our attention to the absence of evidence of any instances of actual confusion. The parties' lack of awareness of actual confusion is a factor to be considered here inasmuch as the parties both are engaged in

⁶ We should point out that Mr. Stolz's testimony that he was surprised to learn of the present opposition was given while still in opposer's employ. (November 30, 1995 dep., p. 40)

arranging travel packages. The parties have used their marks contemporaneously since 1994, and from that time until March 1996, applicant received over ten million telephone calls from travel agents and interested consumers without any reported instances of actual confusion.⁷

Based on the record before us, we see the likelihood of confusion claim asserted by opposer as amounting to only a speculative, theoretical possibility in a purchase often made with care. Language by our primary reviewing court is helpful in resolving the likelihood of confusion controversy in this case:

We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), citing Witco Chemical Co. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), aff'g 153 USPQ 412 (TTAB 1967).

Decision: The opposition is dismissed.

R. L. Simms

⁷ In finding this factor to be in applicant's favor, we recognize that the lack of actual confusion may be due as much to the fact that the parties' travel packages involve different

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destinations as to the differences between the marks. We also
acknowledge that evidence of actual confusion is hard to obtain.