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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Siemens Aktiengesellschaft**

Serial No. 75/559,756

Lawrence E. Abelman of Abelman, Frayne & Schwab for Siemens Aktiengesellschaft.

Gina M. Fink, Trademark Examining Attorney, Law Office 103
(Daniel P. Vavonese, Acting Managing Attorney).

Before Simms, Wendel and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Siemens Aktiengesellschaft has filed an application to register the mark ABM in International Class 9 for goods identified as "electronic components, namely integrated circuits."¹ The Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act,

¹ Application No. 75/559,756, filed September 25, 1998, claiming priority under Section 44(d) of the Trademark Act and seeking registration under Section 44(e), based on applicant's ownership of a German registration for the mark.

15 U.S.C. § 1052(d), because of the prior registration of ABM2, in class 9 for "optical fiber cables."²

When the Examining Attorney made the refusal of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral argument was not requested. We affirm the refusal.

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. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the virtually identical nature of the marks, the related nature of the goods, and the presumptively similar classes of consumers for these goods and services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The marks appear and are pronounced the same, but for registrant's addition of a "2" to the letters "ABM." Registrant's mark appears to be an arbitrary alpha-numeric combination and applicant's combination of letters also appears to be arbitrary.

² Registration No. 2,184,985, issued August 25, 1998, based on claimed dates of first use for both classes of April 1997.

We note applicant's argument that the number 2 in registrant's mark makes "a strong impact on the eye and ear," but we disagree with applicant's conclusion. Its placement as the last element in registrant's mark may lessen its significance, as compared to the leading letters "ABM," for many that see or hear the mark. Moreover, we find merit in the Examining Attorney's argument that many may simply view the number as indicating registrant's goods are the second in a series or of a second generation. We also note applicant's argument that, when the marks are considered in conjunction with the respective goods for which they are used, they would be perceived as acronyms and have different connotations. There is, however, no support for the argument that registrant's mark would be considered as an acronym. Applicant's only proffered support is the observation that A is the first letter in registrant's mark and in its name. This is insufficient basis to conclude that the entirety of registrant's mark would be perceived as an acronym with a specific connotation different from any connotation that may be associated with applicant's ABM.³

³ We are skeptical, too, of applicant's assertion that its use of ABM would be perceived as an acronym for Asynchronous Transfer Mode Network Buffer Manager.

In our consideration of the similarity of the involved marks, we are mindful of the wide scope of protection that has often been accorded arbitrary arrangements of letters. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Section 23.33 (4th ed. 2000). Indeed, the Board has stated that it is a "well-established principle of our trademark law that confusion is more likely between [similar combinations of] arbitrarily arranged letters than between other types of marks." See Edison Brothers Stores, Inc. v. Brutting E.B. Sport-International GmbH, 230 USPQ 530, 533 (TTAB 1986) (involving marks EB and EBS).

The great similarity of the marks makes it likely that, if the marks were used in connection with related goods, confusion would result. In this regard, the Board has stated that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion." In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

Turning to the involved goods, the Examining Attorney contends that these goods can and do emanate from sources utilizing the same mark for both goods; that applicant has, at least until a recent divestiture of its fiber optic systems business, produced both of the involved goods; that

the goods can be ordered from the same catalogs; and that there are numerous NEXIS articles which discuss both applicant's and registrant's goods and establish that they are complementary.

Evidence introduced by the Examining Attorney in support of the refusal includes: third-party registrations showing that the same mark has been registered for "integrated circuits" and "optical fiber connectors," or "fiber optic cable" or "optical cables ... optical fibers" or "fiber optic connectors and cables"; registrations of applicant for marks for "integrated circuits" or for "optical fiber cables" or for "cables containing fiber optic filaments"; a press release retrieved from applicant's web site, and various news reports retrieved from NEXIS, discussing applicant's divestiture of its fiber optics business; photocopies of pages from the 1999 "electronic engineers master catalog" and from "Computer Shopper" magazine; and various articles retrieved from NEXIS which include either "integrated circuit" or "chip"⁴ and "optical fiber."

⁴ The Examining Attorney also made of record a computer dictionary definition that defines "integrated circuit" as "[t]he formal name for chip."

Applicant distinguishes the third-party registrations as covering "company names or house marks" and asserts that its mark and registrant's mark "are not house marks and are not likely to be perceived as such." In regard to the evidence that applicant has marketed both of the involved products, applicant notes that none of its registered marks covers both goods; rather each registration lists only integrated circuits or fiber optic goods, but not both. Applicant also contends that integrated circuits and optical fiber cables differ "in form and function" and generally would be purchased by different companies or, even if purchased by the same companies, "would be purchased by different individuals or divisions." Further, applicant contends that "it is unlikely that consumers would encounter the marks together. Even if the goods ... are both used in telecommunication networks ... [t]he Applicant's integrated circuits would already be incorporated into an end product before that product [would] be combined with optical fiber cables in a telecommunication system." Finally, applicant contends that purchasers of the involved goods would be sophisticated and "less likely to be confused than ordinary consumers."

It is well settled that the third-party registrations made of record by the Examining Attorney have probative value to the extent that they suggest that the goods listed therein and which are relevant to this case ("integrated circuits" and "optical fiber connectors," or "fiber optic cable" or "optical cables ... optical fibers" or "fiber optic connectors and cables") are of a type which may emanate from a single source under the same mark. In re Albert Trostel & Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

Applicant's argument that the marks in these registrations are house marks does not persuade us that the principle does not apply. The argument presumes that the goods listed in the registrations would have their own product marks, apart from the house marks, and that the owners of these registrations, like applicant, would not use the same product mark for these different products. There is no evidence in the record, however, to support the presumption; house marks or not, the evidence suggests that the identified goods emanate from a single source with the same mark.

We do not disagree with the applicant's argument that its goods and those of registrant differ in form and function. Indeed, apart from an initial characterization of the goods as related items of computer hardware, the

Examining Attorney has not argued that the goods perform the same function or are interchangeable. Rather, the argument is that they are complementary and would, therefore, be marketed to the same class of consumers. Though the photocopies of pages from the 1999 "electronic engineers master catalog" and from "Computer Shopper" magazine do not support this argument, excerpts retrieved from NEXIS do. We note, in particular, the following⁵:

JDS Uniphase makes chips that allow companies to send more info over optical fiber without having to lay more cable.
Fortune, December 20, 1999.

And JDS Uniphase is picking up nicely. It has gained 10 3/8. That's a gain of 4 1/2 percent. It makes chips for increasing the carrying capacity of optical fibers.

⁵ Each of these NEXIS references includes the term "chip" rather than integrated circuit; however, the evidence establishes that "chip" is merely a less formal name for an integrated circuit.

In addition, though applicant attempts to discount this evidence by observing that the articles refer to "optical fibers" rather than "optical fiber cables," we do not find the difference significant. To be sure, other NEXIS references make clear that "optical fibers" can be minuscule enough to fit on the surface of a chip or integrated circuit. The references we have set out, however, clearly employ "optical fiber" as a means of referencing a broader panoply of fiber optic material. See also, in this regard, the following dictionary definition, of which we take judicial notice, and which evidences that some of the terms in this industry are somewhat interchangeable:

fiber optic, fiber optics, fiber optic cable, optical fiber
These are cables constructed of parallel, bundled, slender, transparent fibers of glass or plastic, encased in a lesser refractive material, which carry transmitted light through the length of the cable through internal reflection. ... The unenhanced capacity of fiber optic is about 2.5 Gbps... Fiber optic cables have far greater bandwidth... than traditional copper phone wires...
Data & Telecommunications Dictionary 288 (1999).

Transcript #99112425FN-119 from CNNFN [*Cable News Network Financial*], for the show "Market Coverage," November 24, 1999.

JDS Uniphase gets 60% of its sales from fiber-optic telecom equipment. It also makes chips to increase carrying capacity of optical fibers.

Investor's Business Daily, July 16, 1999.

HEADLINE: OFFER TO RAZE FORMER HESS'S IN PACKAGE TO WOO LUCENT; CITY WOULD TEAR DOWN OLD HESS'S TO MAKE WAY FOR LUCENT OFFICES; AEDC WOULD OWN NEW BUILDING, LEASE IT TO TELECOMMUNICATIONS GIANT

...Microelectronics Group, which has facilities in Allentown, Salisbury Township and Breinigsville, makes components and systems for the telecommunications and computer markets.

Breinigsville is home to part of the company's opto-electronics--optical fiber--group.

A Reading facility, employing about 2,000, makes parts for optical fiber communications systems as well as integrated chips using exotic materials. ...

The Morning Call (Allentown), February 28, 1998.

Applicant's argument that even if the involved goods were purchased by the same companies, they "would be purchased by different individuals or divisions" is not persuasive and is without support in the record. The same is true of applicant's argument that even if the goods are complementary, its "integrated circuits would already be incorporated into an end product before that product

[would] be combined with optical fiber cables in a telecommunication system."

Applicant's last argument is that the consumers of the involved goods are sophisticated and, therefore, less likely to be confused. We do not find the argument persuasive. There are no limitations on channels of trade in the registration or applicant's application. Therefore, we consider all possible channels of trade for the involved goods. Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). This would include the possibility that consumers might be purchasing applicant's integrated circuits and registrant's optical fiber cables from resellers, rather than directly from applicant and registrant. Under such circumstances, the likelihood of confusion, even among sophisticated consumers is increased. Moreover, it is well settled that even technically knowledgeable purchasers are not necessarily immune from source confusion when goods are sold under similar marks. Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (Even discriminating purchasers of products costing thousands of dollars held likely to be confused by contemporaneous use of marks TMS

and TMM), and Aries Systems Corp. v. World Book Inc., 23 USPQ2d 1742, n.17 (TTAB 1992).

Finally, we note that if there were any doubt on the question of likelihood of confusion, it would have to be resolved against the newcomer, as the newcomer has the opportunity of avoiding confusion and is obligated to do so. See TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997).

Decision: The refusal to register under Section 2(d) is affirmed.