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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Caroline Furlong**

Serial No. 78/021,895

John C. Cain of **Howrey Simon Arnold & White, LLP** for
Caroline Furlong.

Cheryl Clayton, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before **Simms, Seeherman and Bottorff**, Administrative
Trademark Judges.

Opinion by **Bottorff**, Administrative Trademark Judge:

Applicant seeks registration of the mark RADIO ANGEL
(in typed form; RADIO disclaimed) for goods and services
identified in the application as "musical sound recordings;
series of pre-recorded audio cassettes, and laser discs,
all featuring music," in Class 9; and "audio recording and

production, record production; entertainment, namely live performances by a musical band," in Class 41.

The Trademark Examining Attorney has issued a final refusal to register on the ground that applicant's mark, as applied to applicant's goods and services, so resembles the mark depicted below, previously registered¹ for "musical sound recordings and video recordings featuring music," as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).



Applicant has appealed the final refusal. Applicant and the Trademark Examining Attorney filed main appeal briefs, but applicant did not file a reply brief and did

¹ Registration No. 2,094,897, issued September 9, 1997. The following statement appears in the registration: "The lining in the drawing is a feature of the mark and is not intended to indicate color."

not request an oral hearing. We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We find that the goods and services identified in applicant's application and the goods identified in the cited registration are legally identical in part ("musical sound recordings"), and otherwise are sufficiently related that confusion is likely to result if similar marks are used on or in connection therewith. Moreover, in view of the identical and/or closely related nature of the respective goods and services, we find that those goods and services move in the same or similar trade channels and are sold to the same or similar classes of purchasers. Thus,

the second and third *du Pont* factors weigh in favor of a finding of likelihood of confusion. Applicant does not contend otherwise.

We next must determine, under the first *du Pont* factor, whether applicant's mark and the cited registered mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. 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 and/or services 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 than a specific impression of marks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, where, as in the

present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ 1698 (Fed. Cir. 1992).

Applying these principles in the present case, we find that the dominant feature in the commercial impression created by both marks is the distinctive term ANGEL, and that the similarity between the marks which results from the appearance of that distinctive term in both marks outweighs any differences between the marks which may result from the presence of the word RADIO in applicant's mark and the presence of the cherub design element in the registered mark.

More specifically, we are not persuaded by applicant's argument that the cherub design element dominates the commercial impression of the registered mark; if anything, that design element supports and reinforces the dominant significance of the word ANGEL in the mark. Likewise, the stylization of the lettering of the word ANGEL in the registered mark is too minimal to have any significant effect on the commercial impression of the registered mark, and it does not suffice to legally distinguish that mark from applicant's typed-form mark. *See Squirtco v. Tomy*

Corporation, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983)(typed-form mark may be displayed in all reasonable manners).

As for applicant's mark, the disclaimed word RADIO is merely descriptive and therefore is of lesser source-indicating significance than the word ANGEL, even though it appears first in the mark. Applicant argues that her mark

evokes a specific image in that its [sic - her] goods and services relate to music. Specifically, when viewing applicant's mark as a whole, one portion of the mark is "RADIO" which describes one venue for the performance of applicant's goods and services. Moreover, because a radio only transmits sounds, as opposed to other forms of multimedia, the mark suggests an image of angelic musical sounds. ...Thus, applicant is highlighting that its [sic] goods and services relate specifically to music by use of this mark.

This argument is unpersuasive because registrant's ANGEL mark, as applied to registrant's music-related goods and services, likewise connotes "angelic musical sounds." That registrant's mark does not include a specific descriptor of the medium by which those angelic musical sounds may be transmitted is of less significance, in our comparison of the connotations and commercial impressions of the marks, than the fact that both marks feature the distinctive term ANGEL.

For these reasons, we find that the respective marks, although not identical, are more similar than dissimilar when viewed in their entireties, and that the first *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Having carefully considered the evidence of record pertaining to the *du Pont* factors, we conclude that a likelihood of confusion exists. That is, we find that applicant's mark is sufficiently similar to the cited registered mark that confusion is likely to result if the marks are used on or in connection with the identical and/or closely related goods and services at issue here. We have considered applicant's arguments to the contrary (including any arguments not specifically discussed in this opinion), but find them to be unpersuasive of a different result.² To the extent that any doubt as to this result exists, such doubt must be resolved against applicant. See

² However, we have given no consideration to applicant's argument that the cited registered mark is a weak mark which is entitled to a limited scope of protection, because applicant has presented no evidence to support that argument. Third-party registrations are not made of record merely by listing them in a party's brief, see *In re Duofold, Inc.*, 184 USPQ 638 (TTAB 1974), and they are not probative evidence (under the sixth *du Pont* factor) of weakness in any event. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Moreover, even assuming *arguendo* that the cited registered mark is not famous, such lack of fame does not preclude a finding of likelihood of confusion. *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

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In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).³

Decision: The refusal to register is affirmed.

³ *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972), cited by applicant for the contrary proposition that doubts as to the mark's registrability must be resolved in applicant's favor, is inapposite to this case because it involved a mere descriptiveness refusal under Trademark Act Section 2(e)(1), not a likelihood of confusion refusal under Section 2(d).