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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vipower Inc.

Serial No. 76425400

Bruce H. Troxell of Troxell Law Office PLLC for Vipower Inc.

Anne Madden, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Simms, Seeherman and Drost, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Vipower Inc. has appealed from the final refusal of the Trademark Examining Attorney to register ViPower¹ in the stylized form shown below for goods identified as:

External electrical relay distribution boxes for computer peripherals, external controller of burning record for compact disks, Electrical cable with connector, CD-ROM writers, DVD ROM

¹ We have used upper and lower case letters in referring to applicant's mark and the cited registered mark in an attempt to convey their stylization.

machines, flash memory reader, ac/dc power supply, 7-port system external cable, IDE interface adapter, mobile rack adapter, keyboard mouse, monitor, Computer network hubs, CD duplicator, Blank smart cards, mp3player, DVD player and computer mainframe computer."²

VIPOWER

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark VIPOWER, in the stylized form shown below, and registered for "semiconductors, transistors, integrated circuits, hybrids circuits"³ that as used on applicant's goods, it is likely to cause confusion or mistake or to deceive.

VIPOWER

Applicant and the Examining Attorney have filed appeal briefs. Applicant did not request an oral hearing.

² Application Serial No. 76425400, filed June 26, 2002, asserting first use on June 1, 1997 and first use in commerce on October 29, 1997. The identification, with its capitalization and pluralization of some items and not others, is as it was submitted by applicant.

³ Registration No. 1647224, issued June 11, 1991; Section 8 and 15 affidavits accepted and received, respectively; renewed.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the marks, they are identical in pronunciation⁴ and connotation. Although there are some differences in their appearances, we find that overall they convey the same commercial impression. In this connection, we are not persuaded by applicant's argument that, because of the stylization, its mark gives the impression of the

⁴ Applicant has noted that the Office records list "VIP POWER" as a "pseudo mark" for the cited registration, and argues from this that the pseudo mark has a different pronunciation from its mark. Listing something as a pseudo mark is a convenience created by the Office for searching purposes. The actual mark is not affected by the Office's characterization, and it does not affect the pronunciation of the mark. Thus, applicant's mark and the cited mark, being composed of the identical letter string, would be pronounced the same.

word VIPER. Although the letters "ow" in the mark are in lower case, while V, P and ER are in upper case, because of the distance between "ViP" and "ER," we do not believe that consumers will view the mark as containing or signifying the word "VIPER."⁵ Moreover, because of the prominence of "ViP" caused by both the upper case letters and the relative tightness of the letters due to the narrowness of the letter "i," consumers are likely to take note of the "ViP" portion of the mark. This, of course, is the same portion which stands out in the cited mark. Although we hasten to add that we have compared the marks in their entireties, it is permissible to give greater weight to a particular feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Here, the VIP portion of both is prominent, giving rise to a similarity in appearance that is even greater than the fact that they consist of the same term "VIPOWER." The identity of the term, pronunciation, connotation, and commercial impression weighs heavily against the applicant. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566, 223 USPQ 1289, 1289-90 (Fed. Cir. 1984).

⁵ The "i" is depicted as a lower case letter, so it cannot even be said that the VIPER is in all capital letters.

We turn next to a consideration of the goods, keeping in mind that the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion. In re Opus One Inc., 60 USPQ2d 1812 (TTAB 2001). If 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 (TTAB 1983).

Both applicant's and the registrant's goods include computer components. Applicant argues that its mark is used on a variety of computer and computer peripheral devices, and is not utilized on individual electronic components, which it asserts are the goods identified in the cited registration. Applicant has asked the Board to take judicial notice "of the realities of the electronic industry in which it is extremely rare for a single source to manufacture and market both computer and peripheral hardware, and individual electronic components." Brief, p. 4. We decline to take such notice. We cannot say that applicant's characterization of the realities of the

electronic industry is generally known or cannot reasonably be questioned.

Further, the third-party registrations made of record by the Examining Attorney suggest otherwise. For example, the mark RAPIER is registered for, inter alia, computer hardware, routers, hubs, media converters, and integrated circuits (Reg. No. 2735173), and PLEXMASTER is registered for, inter alia, computer peripherals, integrated circuits, compact disc players, and CD-ROM, CD-R and CD-RW drives.

Although applicant's goods are not the same as the goods identified in the cited registration, it is not necessary that the goods be identical in order to support a finding of likelihood of confusion. In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978). As the Court said in Recot Inc. v. M.C. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000), "even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis."

Here, the goods are all computer hardware components which can be and are used together. This, and the evidence of the third-party registrations, which indicates that some

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of the goods identified in both the application and the cited registration are sold by the same entities, is sufficient to demonstrate the requisite relatedness of the goods, when viewed in the context of the other duPont factors discussed herein. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Further, the Examining Attorney has stated that there are no third-party registrations for "VIPOWER" marks for computer-related goods which would suggest that the term "VIPOWER" has a meaning or significance for such goods. Nor is there any evidence of third-party use of similar marks. Thus, the registered mark VIPower must be regarded as an arbitrary and strong mark, which is entitled to a broad scope of protection. That protection extends to prevent the registration of applicant's virtually identical mark for its identified computer hardware products.

We recognize that the registrant's goods are for internal computer parts, such that the common purchasers of applicant's and the registrant's goods are sophisticated. However, in prior cases we have stated that even sophisticated purchasers are not immune from confusion. See *In re Pierce Foods Corporation*, 230 USPQ 307 (TTAB 1986). That is particularly true in situations like the

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present, where the marks are virtually identical. Even a sophisticated purchaser is not likely to differentiate between two trademarks which consist of the same arbitrary term, and have only minor stylistic differences, but will assume that the marks identify goods emanating from a single source.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is a well-established principle that doubt must be resolved against the newcomer and in favor of the prior user or registrant. See *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973). See also *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal of registration is affirmed.