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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Panasonic Corporation of North America, by
assignment from Matsushita Electric Corporation of America¹

Serial No. 76349852

Holly Pekowsky and Morton Amster of Amster Rothstein and
Ebenstein LLP for Panasonic Corporation of North
America.

John D. Dwyer, Trademark Examining Attorney, Law Office
116 (Meryl L. Hershkowitz, Managing Attorney).

Before Seeherman, Bucher and Holtzman, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Panasonic Corporation of North America, seeks
registration on the Principal Register of the mark E-WEAR
for goods identified in the application, as amended, as
follows:

"wearable portable audio/video products,
namely, digital camcorders, digital still
cameras, digital audio players and digital
voice recorder; liquid crystal display

¹ This transfer was executed on November 1, 2004, and was
then recorded with the Assignment Division of the United States
Patent and Trademark Office at Reel 3016, Frame 0418.

viewers for the viewing of videos, namely, video monitors and dot-matrix SD-enabled printers for printing digitally recorded video images, none of the above products to be featured in or as part of a cellular telephone or cellular telephone accessory" in International Class 9.²

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).³ The Trademark Examining Attorney has taken the position that applicant's mark, when used in connection with the identified goods, so resembles the mark **ELECTRONIC WEAR** registered for goods, also in International Class 9, and identified as follows:

"electronic cordless telephone accessories, namely, antennas, backup batteries, phone batteries, battery eliminators, electrical cables, carrying cases and protectors, cellular phones, electrical cigarette lighter socket adapters, electrical cellular connectors, electrical coaxial connectors, digital display units, telephone headsets, telephone microphones,

² Application Serial No. 76349852 was filed by Matsushita Electric Corporation of America on December 17, 2001 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. On August 6, 2004, applicant filed an amendment alleging use first use and first use in commerce at least as early as January 29, 2001.

³ During the course of prosecution of this application, there have been refusals under Section 2(e)(1) (mere descriptiveness and deceptive misdescriptiveness) as well as additional citations under Section 2(d), all of which have now been withdrawn.

power supplies, voice storage circuits, electrical cellular wire connectors and telephone mounts" in International Class 9,⁴

as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney each submitted a brief on appeal. Applicant did not request an oral hearing.

We affirm the refusal to register.

In arguing for registrability, applicant contends that confusion is unlikely due to differences in the sight, sound and meaning of the respective marks, to the differences between the goods covered by the respective marks and to the high degree of consumer sophistication.

By contrast, the Trademark Examining Attorney takes the position that the overall commercial impression created by applicant's mark, E-WEAR, is the same as that created by registrant's mark, ELECTRONIC WEAR, and that the evidence in the record (e.g., LEXIS/NEXIS evidence, Internet evidence, and third-party registrations) demonstrates that these goods are highly related.

⁴ Registration No. 2293127 issued on November 16, 1999 reciting January 11, 1999 as the date of first use anywhere and as the date of first use in commerce.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing upon the issue of likelihood of confusion. 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 relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Accordingly, we turn first to the du Pont factor focusing on the relatedness of the goods as described in the involved application and the goods identified in the cited registration. As correctly argued by applicant, the goods are not identical. To make this perfectly clear, during the course of prosecution, applicant amended its identification of goods with a specific limitation, namely, " ... none of the above products to be featured in or as part of a cellular telephone or cellular telephone accessory." Accordingly, the critical question before us is whether the evidence of record demonstrates that these respective goods are related, such that, if they were sold under similar marks, consumers would assume they emanated from the same source.

The Trademark Examining Attorney submitted for the record excerpted articles from the LEXIS/NEXIS computerized database referencing the inclusion in wireless mobile devices such as cellular telephones, of cameras, audio players and voice recorders, which are among the items for which applicant seeks registration:

"Students with cell phone cameras" ⁵

"As cell phone camera usage becomes more popular" ⁶

" ... wireless mobile devices that combine cell phones with audio players are the future" ⁷

"Sales hit a three-year high as people bought cell phones with features such as cameras and audio players." ⁸

"Samsung was one of the first companies to introduce 'converged' consumer devices, such as Uproar, its cell phone with a built-in MP3 audio player." ⁹

" ... cell phones that have digital voice recorders, cameras and computer access devices." ¹⁰

The Trademark Examining Attorney also makes reference to a sampling of articles obtained from a search of the Internet using the Google computerized search engine. Much like the NEXIS excerpts, these advertisements and

⁵ Akron Beacon Journal (Ohio), January 29, 2004.

⁶ Argus Leader (Sioux Falls, SD), January 24, 2004.

⁷ Newsday (New York), July 13, 2001.

⁸ CBS News Transcripts, January 27, 2004.

⁹ Electronic Business, August 1, 2001.

¹⁰ Buffalo News (New York), January 26, 2003.

articles make reference to cameras, camcorders and voice recorders as key features of cellular telephones:

"Tens of millions of these less-than-perfect pictures were snapped and emailed from cell phones in the United States during 2003, the first full year such services were available."¹¹

"Global sales of mobile phones that can take, send, and receive pictures rose 65 percent in the last quarter from 5.2 million units to 8.6 million phones sold, according to market research firm Strategy Analysts."¹²

"Camera equipped cell phones, according to marketing research firm IDC, are likely to outsell digital still cameras this year and may even surpass all cameras, film and digital, by the end of next year."¹³

"Nokia 8910 ... a phone packed with such standard functions as ... voice recorder"¹⁴

The Nokia 7650 features include an integrated digital camera and voice recorder.¹⁵

"The Motorola Timesport series ... features on this cellular phone include ... a voice recorder"¹⁶

"Samsung's Anycall SCH-V330, a mobile phone with a camcorder function. ... Camcorder phones allow users to shoot video clips with audio in addition to shooting still pictures."¹⁷

¹¹ http://www.usatoday.com/tech/news/2004-01-16-cam-phone-quality_x.htm

¹² <http://www.wired.com/news/business/0,1367,57692,00.htm>

¹³ http://www.videosystems.primediabusiness.com/ar/video_sound_bells/

¹⁴ http://www.telestial.com/products/n_8910_gsm_cell_phone.htm

¹⁵ <http://www.cellularabroad.com/nokia7860gsm.html>

¹⁶ http://www.telestial.com/products/m_p7389_gsm_cell_Phone.htm

¹⁷ http://www.forbes.com/infoimaging/2003/07/16/ex_ik_0716tentech.htm

Finally, in order to demonstrate that applicant's and registrant's respective goods may be expected to emanate from a single source, the Trademark Examining Attorney has referenced a number of third-party registrations where cell telephones are registered under the same mark as are various types of cameras and audio equipment, including representative registrations such as the following:

REGISTRATION No. 2578879

SOFTECH

by The Softech Audio Inc.

for " ... cameras, ... digital cameras, ... cellular telephones"

REGISTRATION No. 2598648

Digitally yours

by LG Electronics Inc.

for " ... cellular telephones, ... liquid crystal displays, ... digital voice recorders."

REGISTRATION No. 2684369



by Vianix, LC

for " ... digital audio recorders, ... digital cameras and/or camcorders, ... cellular telephones, ... audio tape and/or digital players"

REGISTRATION No. 2701005

MASC by Vianix, LC

for " ... digital audio recorders, ... digital cameras and/or camcorders, ... cellular telephones, ... audio tape and/or digital players"

REGISTRATION No. 2709682

CONNECT AND CREATE

SOMETHING by BellSouth

Intellectual Property Corp.

for " ... cellular and digital phones, ... video camcorders, digital still cameras, digital voice recorders"

REGISTRATION No. 2778270

BESTSHOT

by Casio

Keisanki Kabushiki Kaisha

for " ... digital cameras, printers for digital cameras, ... cellular telephones, ... digital audio players"

REGISTRATION NO. 2778320 **POCKET MANAGER** by Casio
Keisanki Kabushiki Kaisha
for " ... digital cameras, printers for digital cameras, ...
cellular telephones, ... digital audio players"

REGISTRATION NO. 2753781 **StarSpeed** by Micro-
Star International Co.
for " ... digital still cameras, ... digital video and audio
recorders, ... cellular telephones"

REGISTRATION NO. 2735350 **VIZUFON** by C&S Technology
Co., Ltd.
for " ... cellular telephones, ... video monitors... ."

Based upon the totality of this evidence, we conclude that there is a close relationship between cellular telephones and cameras/camcorders/audio equipment, such that consumers would assume that both emanated from a single source if sold under the same or very similar marks.

As to the du Pont factor focusing on the similarity or dissimilarity of established, likely-to-continue trade channels, there are no limitations on the trade channels of registrant's goods or of applicant's goods. Hence, we must presume that both registrant's and applicant's goods will travel in all channels of trade that would be normal for such goods, and they must be treated as suitable for sale to all potential purchasers of such goods. See In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Although applicant argues that these goods are directed to sophisticated consumers, there is no evidence in the record to support this conclusion. Indeed, the Internet and NEXIS excerpts suggest that with each passing year, more and more of these goods are directed to ordinary classes of consumers who are not necessarily well informed, sophisticated, technically trained, or a discriminating group of consumers.

Moreover, even if we were convinced by applicant's arguments to conclude that many of the relevant purchasers of these products are relatively sophisticated, it does not mean that they are immune from confusing the source of the products when the marks applied thereto are quite similar. Matsushita Electric Industrial Co., Ltd. v. Sanders Associates, Inc., 177 USPQ 720 (TTAB 1973).

We turn then to the du Pont factor focusing on the similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

As to connotation, the Trademark Examining Attorney argues that inasmuch as applicant's goods are consumer electronic products, the letter "E" prefix in its mark "would be understood by potential purchasers as meaning 'electronic.'" Trademark Examining Attorney's appeal

brief. By contrast, applicant argues that "[a]s applied to the portable audio/video products, such as digital camcorders and digital still cameras, covered by Applicant's Mark, the letter E brings to mind the word ENTERTAINMENT." Applicant's brief, p. 6.

Applicant has provided no evidentiary support for its contention that the letter "E" in this context will be seen as suggesting the word "Entertainment." On the other hand, the Trademark Examining Attorney has shown that in a similar context, "E-wear" has been recognized as the equivalent of "wearable electronics":

"It's being called wearable electronics, or '**e-wear**.'"¹⁸

"Developments in textile technology and fibre industry are other components of the design concept of **ewear** (wearable electronics) for health care workers."¹⁹

Accordingly, despite the obvious differences in the appearance and sound of E-WEAR and ELECTRONIC WEAR, these designations have virtually identical connotations of "wearable electronics" as applied to wearable, portable, electronic products, and are similar enough in appearance to create the same overall commercial impressions.

¹⁸ St. Petersburg Times, June 11, 2001.

¹⁹ <http://www.telemed.no/cparticle69113-4361.html>

In summary, we find that these marks create the same overall commercial impressions, that the goods are related, and that the respective goods will move through identical channels of trade to the same classes of ordinary purchasers.

Decision: The refusal to register under Section 2(d) of the Lanham Act is hereby affirmed.