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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Christopher J. Vitito

Serial No. 76561548

Howard N. Flaxman of Welsh & Flaxman LLC for Christopher J. Vitito.

Elizabeth J. Winter, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Holtzman, Rogers and Walsh, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

On November 20, 2003, Christopher J. Vitito (applicant), applied to register the mark INVISION in standard-character form for goods now identified as "electronic audio and video equipment systems for vehicles, which consist of audio speakers, audio receivers, video monitors, video tape recorders, video tape players and video disk players" in International Class 9. Applicant

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claims both first use and first use in commerce on September 18, 2003.

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of Reg. No. 2721987, which issued on June 3, 2003, for the mark INV2ISION in standard-character form for the following goods:

computer notebooks, mobile phones, personal digital assistants, electronic dictionaries, video display monitors and manual control panels comprising high resolution display monitors or flat panel displays, circuit cards, wire and harness cable assemblies, power switches, and power supplies, that process acoustic, video and audio data, hi-fi speaker system comprised of audio speakers, subwoofers, tweeters, amplifiers, preamplifiers, speaker enclosures, and components thereof, PA speaker system comprised of amplifiers, microphones and audio speakers, car audio system comprised of audio speakers, radios, audio cassette players and compact disc players, antennas, video and audio modules, audio airplane speaker system comprised of loudspeakers and components, in International Class 9.

The registration claims both first use and first use in commerce in November 2000.

The examining attorney issued a final refusal and applicant appealed. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing. We affirm.

APPLICANT'S EVIDENCE

Before turning to the refusal we must address the evidence applicant provided with his brief. Applicant did not submit any evidence before he filed his appeal, but with his brief he provided copies of literature concerning his own products and copies of web pages allegedly related to the goods of the owner of the cited registration. And for the first time in his brief applicant also referred to a number of third-party registrations, but applicant did not provide any records related to those registrations. The examining attorney has objected to all of the evidence as untimely and otherwise improper.

First with regard to timeliness, all of the evidence applicant submitted or referenced in his brief is untimely. Trademark Rule 2.142(d) requires that the record in the application be complete prior to the filing of the appeal subject to certain exceptions not relevant here. The rule warns that, "The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or the examiner after the appeal is filed." Accordingly, we will not consider any of applicant's evidence because it was submitted after the filing of the appeal.

Furthermore, even if applicant had filed the evidence at the proper time, we would not consider either the web pages allegedly related to the registrant or the third-party-registration information.

First, with regard to the web pages which applicant alleges relate to the registrant and its products, we must consider the goods as identified in a cited registration and cannot consider extrinsic evidence regarding a registrant's actual use of its mark. In re Bercut-Vandervoort & Co., 229 USPQ 763, 764 (TTAB 1986) (extrinsic evidence and argument suggesting trade-channel restrictions not specified in application rejected).

Next, as to the information regarding the third-party registrations, as the examining attorney correctly points out, the Board does not take judicial notice of registration records. Furthermore, the Board will only consider registrations when they are submitted in proper form, that is, copies of actual registrations or copies of registration records directly from the Patent and Trademark Office's electronic data bases. In re JT Tobacconists, 59 USPQ2d 1080, 1081 n2 (TTAB 2001). See generally TBMP § 710.03 (2d ed. rev. 2004). In this case applicant has only provided limited information regarding the registrations, registration numbers, marks and goods, and

no records. Therefore, even if this information had been provided before the appeal was filed, we would not consider it because it is not in an acceptable form.

LIKELIHOOD OF CONFUSION

Turning to the refusal, Section 2(d) of the Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion . . ." 15 U.S.C. § 1052(d). To determine whether there is a likelihood of confusion, we must consider all evidence of record bearing on the factors delineated in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977). Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the applicant and registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In addition to those factors, we will also address applicant's and the examining attorney's arguments relating to other factors.

Comparison of the Marks

In comparing the marks we must consider the sound, appearance, connotation and commercial impression of both

marks. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Applicant's mark is INVISION; the cited mark is INV2ISION. Both marks are in standard-character form.

Applicant argues that, "When one considers the highly distinctive lettering, numbering and wording of the '987 registration when compared to the single word mark of the present application, it is readily apparent the first prong of the test is not met. That is, they do not sound alike, look the same or have the same meaning." The examining attorney argues that, "Applicant's mark is virtually identical to registrant's mark."

Sound - Applicant posits that the registered mark "should be pronounced 'Inv-Squared-Ision,' ultimately sounding nothing like 'invision.'" Applicant bases this suggestion on his review of a display of the registered mark on web pages, allegedly related to the registrant, which he provided with his brief. Those pages show a mark displayed as "InV²ision." He also refers to some accompanying text to bolster his pronunciation theory. Applicant also allows that other pronunciations are possible, including "Inv-Two-Ision" or "In-V-Two-Ision" or "I-N-T-Two-Ision." Applicant concludes by arguing that,

"None of these potential pronunciations even remotely sound like Applicant's mark INVISION. In fact, they sound more like 'intuition' which is not close to 'invision.'"

With regard to sound the examining attorney argues, "Basically, the marks can easily be pronounced the same, with the potential and actual purchasers of the goods ignoring the numeral '2'." The examining attorney argues that people are more likely to do as she suggests rather than adopt any of the pronunciations suggested by applicant.

We begin with the simple axiom that there is no "correct" pronunciation of a trademark, as the examining attorney argues. In re Great Lakes Canning, Inc., 227 USPQ 483, 484 (TTAB 1985). We also reject applicant's arguments urging the "squared" pronunciation of the registered mark based on the web pages he provided with his brief. The evidence is both untimely and otherwise unacceptable, as we noted above. Here applicant attempts to use the evidence to show how the registrant purportedly displays the mark. Even if the evidence were properly of record, we could not use it for this purpose. The mark is registered in standard-character form. As such we must assume that it could be displayed in any manner within reason, and not restrict our consideration to the version applicant

suggests. In re Melville Corp., 18 USPQ2d 1386, 1387-1388 (TTAB 1991).

Overall, we find applicant's suggestions as to how the registered mark might be pronounced less plausible than the examining attorney's position that people would simply disregard the intervening numeral and pronounce only the letters which form a common word, INVISION. Cf. In re Who? Vision Systems Inc., 57 USPQ2d 1211, 1217 (TTAB 2000). We find it more plausible that the mark would be pronounced "invision" even if it were displayed as "InV²ision." The suggestion that people will adopt the awkward pronunciations inserting either a "squared" or "two" in the middle of a recognized word because of the numeral is not credible. Accordingly, we conclude that applicant's mark and the registered mark are similar in sound in that they could, and most likely would, be pronounced the same.

Appearance - As to appearance, applicant argues that, "The '2', or any number in the middle of a word, is highly unusual and quite distinctive in appearance." On the other hand, the examining attorney argues that, "The appearance of the mark is virtually identical in that the marks are comprised of the same letters and the '2' in the middle of registrant's mark can be easily overlooked. The difference in the marks is insubstantial."

The fact that the letters in both marks are the same and that they spell the same word is inescapable. The insertion of a single numeral in the middle, while unusual, in no way overrides the similarity in appearance of the letters. Anyone familiar with English will have no difficulty in "finding the word" in the mark. Therefore, we conclude that the marks are highly similar in appearance.

Connotation and Commercial Impression - The dominant connotation and commercial impression projected by both marks, when viewed in their entirety, is of the word "invision." The word is not only easily recognizable but dominant in the registered mark in spite of the presence of the "2." We also find applicant's argument that the registered mark would be viewed as a mathematical formula unpersuasive. Accordingly, we conclude that applicant's mark and the registered mark are highly similar in both connotation and commercial impression.

Finally, we conclude that the marks, when viewed in their entirety, are highly similar due to the similarities in sound, appearance, connotation and commercial impression.

Comparison of the Goods and Channels of Trade

With respect to the goods, applicant argues:

While Applicant's mark INVISION is specifically for use in conjunction with vehicle audio and video systems the '987 registration is directed at a "laundry list" of electronic components. In fact, the '987 registration nowhere mentions utilization in conjunction with an (sic) vehicle audio and video system, but rather lists a variety of individual components which may or may not be used together in the creation of an integrated system.

The rest of applicant's arguments as to the goods focuses on the materials he submitted with his brief, materials we have excluded from consideration. Specifically, applicant alleges that certain web pages he provided are from a site associated with the registrant and that they show that registrant uses its mark only in conjunction with a limited group of the goods identified in the registration. As we indicated above, we have not considered this evidence both because it is untimely and because applicant attempts to use this extrinsic evidence improperly to limit the scope of the goods identified in the cited registration. In re Bercut-Vandervoort & Co., 229 USPQ at 764.

As to the channels of trade, applicant contends that its products are "directed primarily at automotive dealers and vehicle customizing shops, whereas Registrant is likely focused on high end customers buying through audiophile type retail stores." On this basis applicant asserts that there is "virtually no overlap" in trade channels.

On the other hand, the examining attorney argues that we must consider the goods of applicant and registrant "as they are identified in the involved application and registration," and that "the goods of the parties are virtually identical inasmuch both goods function as entertainment systems for cars and both comprise one or more of the same audio devices." The examining attorney likewise argues that neither the application nor the cited registration include any restrictions as to trade channels, and therefore, we must assume that the goods travel in all normal trade channels for such products.

As the examining attorney correctly points out, in considering the goods, and the channels of trade, we must consider the goods as identified in the application and registration and, in the absence of any restrictions, assume that the goods include all goods identified and that those goods travel in all trade channels appropriate for such goods. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); In re Melville Corp., 18 USPQ2d at 1388.

Applicant identifies his goods as "electronic audio and video equipment systems for vehicles, which consist of audio speakers, audio receivers, video monitors, video tape recorders, video tape players and video disk players."

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Among other things, the goods in the cited registration include "car audio system comprised of audio speakers, radios, audio cassette players and compact disc players, antennas, video and audio modules."

A simple comparison of the goods of applicant and registrant demonstrates that the goods of the applicant and registrant are either virtually identical and overlapping or otherwise closely related. Applicant's goods are "electronic audio and video equipment systems for vehicles," and registrant's goods include a "car audio system." As to the components, both identifications include "audio speakers"; the application identifies "audio receivers" and the registration identifies "radios" and "audio and video modules." (Emphasis provided.) The application identifies several video components, and the registration again identifies "audio and video modules." (Emphasis provided.)

We reject applicant's strained reading of the respective identifications of goods, in particular, applicant's assertion that his products are sold as a "system" and registrant's goods are not. While the applicant's goods may be sold only as a multi-component system, registrant's goods, as identified, could also be sold as a system.

Even if we accepted applicant's contention that the registrant's goods would not be sold as a system, registrant's goods could also fulfill the same function as specific components within applicant's system, and therefore, may be interchangeable with specific goods identified in the application. Thus, a consumer familiar with the registrant's use of its mark on its audio speakers, for example, seeing applicant's mark on applicant's audio and video system, is likely to believe that registrant is now selling a full system which includes the speakers. Applicant would have us ignore the forest and only see the trees. After all, both applicant and registrant identify goods which function as entertainment sources in vehicles, as the examining attorney argues.

Accordingly, we conclude that the goods of the applicant and registrant are virtually identical and otherwise closely related. We also conclude, on the same basis, that the goods of applicant and registrant could travel in the same trade channels and reach the same purchasers. There are no restrictions as to trade channels in either the application or registration. Therefore, the fact that the goods are virtually identical and otherwise closely related dictates the conclusion that the channels of trade for the products are also the same, or at least

overlapping, and that the goods of applicant and registrant could reach the same purchasers.

Sophistication of Purchasers/Cost of the Goods

Applicant also asserts that, "the customers for electronic goods are generally sophisticated when spending discretionary income" and that the goods of both applicant and registrant involve "spending a substantial sum of money." Applicant has not provided any evidence to support the proposition that the purchasers of the goods identified in either the application or the registration are sophisticated. Accordingly, we have no reason to assume that the potential purchasers could not include any purchaser of or owner of a vehicle, a rather large segment of the population including persons of varying levels of sophistication. Furthermore, even sophisticated purchasers, such as those identified by applicant, are not immune from trademark confusion. In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

Likewise, neither the application nor the registration is restricted to more expensive products. Although the goods identified in the application and the registration are not truly inexpensive impulse items, even complete audio and video systems for vehicles may vary significantly in cost. In view of the fact that purchasers for these

products could include consumers of varying levels of sophistication, we are not persuaded that high cost would preclude confusion.

Accordingly, we conclude that the sophistication of relevant purchasers and the cost of the goods in this case do not preclude confusion.

Similar Marks in Use on Similar Goods

As we indicated above, applicant refers to certain information regarding third-party registrations for the first time in his brief. Applicant argues that, ". . . this term [invision] is present in an exceptional number of registered marks. It is well established the frequency with which a term is used in other trademark registrations is relevant to the distinctiveness inquiry." As explained above, we have excluded the third-party-registration information from consideration both because it was untimely and because it is not in proper form.

Nonetheless, even if we had considered the evidence it would not persuade us that the registered mark is weak, and therefore, only entitled to a limited scope of protection as applicant argues. Registration alone does not establish that a term is weak. The probative value of third-party trademarks depends entirely upon their usage. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En

1772, 73 USPQ2d at 1693. Applicant has not provided any evidence that the third-party marks it references are in use. Furthermore, seven of the nine registrations applicant references appear to cover specialized computer programs or computer hardware unrelated to the goods at issue here. Neither of the other two referenced registrations cover vehicle entertainment systems or their components. This evidence would be utterly insufficient to show that INVISION is a weak mark as applied to vehicle entertainment systems or their component parts.

Actual Confusion

Applicant also argues that “no actual confusion has been established” without saying anything further. There is no evidence that there has been an opportunity for confusion to occur in this case. Furthermore, particularly in an ex parte proceeding, “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). See also In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984). Therefore, we find applicant’s argument regarding actual confusion unpersuasive.

CONCLUSION

In sum, after considering all evidence of record bearing on the du Pont factors, we conclude that there is a likelihood of confusion in this case. We conclude so principally because the marks of applicant and registrant are highly similar and because the goods of applicant and registrant are overlapping or closely related.

Decision: The refusal to register applicant's mark under Section 2(d) of the Act is affirmed.