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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

China Healthways Institute, Inc. dba Chi Institute

v.

Xiaoming Wang

Opposition No. 91157392
against Serial No. 76435273

David Z. Ribakoff of the Law Office of David Z. Ribakoff for
China Healthways Institute, Inc. dba Chi Institute.

Xiaoming Wang, *pro se*.

Before Walters, Bucher and Walsh, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Xiaoming Wang seeks registration on the Principal
Register of the following mark:

Chi PLUS

for "electric massage apparatus" in International Class 10.¹

¹ Application Serial No. 76435273 was filed on July 26, 2002 based upon applicant's allegation of first use anywhere and first use in commerce at least as early as May 31, 2002. Applicant has disclaimed the word "Chi" apart from the mark as shown.

Registration has been opposed by China Healthways Institute, Inc. dba Chi Institute. As its ground for opposition, opposer asserts that applicant's mark when used in connection with

applicant's goods so

resembles opposer's

previously used mark,

which opposer refers to

as its "Chi logo," as to



be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Lanham Act.

Applicant, in its answer, has denied the salient allegations in the opposition.

The Record

By operation of the rules, the record includes the pleadings and the file of the opposed application. Opposer, as part of its case-in-chief, has also made of record the testimonial deposition of Richard H. Lee, president of China Healthways Institute, Inc., and exhibits thereto.

Although applicant failed to introduce any evidence during his assigned testimony period, he attempted to use his brief as a vehicle for the introduction of evidence.

Accordingly, in an order dated February 16, 2006, the Board granted opposer's motion to strike applicant's declaration and other exhibits attached to his brief, as well as any factual statements contained in applicant's main brief that rely upon this stricken material. Additionally, any of the materials previously submitted by applicant with his answer or in support of his response to opposer's motion for summary judgment are not of record for the purpose of this final determination and, therefore, have not been considered herein.

Procedural Matters

Before turning to the record and the merits of this case, we must discuss several preliminary matters.

In his answer, applicant asserted numerous "affirmative defenses," the majority of which are essentially amplifications of his denials.² Applicant also asserted as affirmative defenses that opposer has committed fraud on the United States Patent and Trademark Office in several proceedings/prosecutions (¶ 19), and that opposer has been trying to obtain an illegal monopoly in this field, and as part of this attempt, has been guilty of intimidation

² This includes applicant's assertion that "chi" is a generic term.

against its competitors who are also marketing electric massage apparatus (§ 20). Neither of these affirmative defenses has been considered because neither defense is acceptable as pleaded. Rule 9(b) of the Federal Rules of Civil Procedure requires that the circumstances constituting fraud be stated "with particularity." Hence, applicant's pleading of fraud is deficient because it is not stated with particularity. Applicant's pleading regarding an "illegal monopoly" is essentially a claim of unfair competition, which is not within the scope of the Board to determine. See TBMP 309.03(a)(1). Furthermore, applicant submitted no evidence in support of any of his claims. Therefore, applicant's allegations as to opposer's alleged fraud on the USPTO and its alleged acts of unfair competition have not been considered.

Both parties have also alluded to prior litigation between opposer herein and companies allegedly associated in some way with applicant. For example, copies of court documents correctly entered into this record by opposer show that opposer was the plaintiff in Civil Action No. CV02-03137 LGB (JWJx) filed in the United States District Court for the Central District of California, complaining of copyright infringement, trademark infringement, false

advertising and unfair competition, brought against more than a dozen parties. While opposer did submit the court's order of April 1, 2005 from that proceeding, opposer did not plead collateral estoppel or res judicata in its notice of opposition, nor has any such issue been tried herein. Also, applicant is not listed among the defendants in this court proceeding. Therefore, we find this evidence to have no relevance in this opposition proceeding and we have not considered opposer's allegations that applicant is the owner of one or more of the defendant companies in the civil proceeding, or that the court reached certain factual findings that should be applicable herein.

Factual Findings

China Healthways Institute, Inc. develops and manufactures therapeutic massagers that produce an infrasonic signal transmitted to the body through a transducer apparatus. This field of mind-body interventions is a form of alternative medicine growing out of traditional Chinese medicine. Opposer's literature discusses how the involved device acts on biofield forces, and hence, is able to reduce inflammation and the impacts of trauma; and that following in the tradition of QiGong masters who claim to

cure a wide variety of diseases with energy released from their fingertips, this electronic device offers external QiGong, or energy practice, for patients who seek to improve the flow and balance of energy in a beneficial way. Opposer has developed a nationwide customer base, including professionals in fields of complementary and alternative medicine such as chiropractors, massage therapists, physicians in practice of pain medicine, as well as chronic pain patients. Opposer has sold 2,000 to 3,000 massager units each year since 1993.

As noted, other than the involved application, applicant has offered no evidence for the record.

China Healthways Institute, Inc. has standing

Opposer's standing is a threshold inquiry made by the Board in every *inter partes* case. In Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), the Federal Circuit has enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be (is) damaged by the registration is reasonable and reflects a real interest in the case. See also Jewelers Vigilance Committee Inc. v. Ullenberg Corp., 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); and Lipton Industries, Inc. v.

Ralston Purina Company, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Opposer's evidence of use of its CHI logo in connection with the sale and marketing of an electric massage apparatus for therapeutic use as well as with related accessories and replacement parts is sufficient to establish opposer's interest and, therefore, standing in this proceeding.

Priority

In the absence of any evidence of use, the earliest date that applicant can rely on is his constructive use date, his filing date herein, of July 26, 2002.

According to the testimony of Mr. Lee, opposer started selling massagers having the CHI logo in 1993. Opposer introduced into the record invoices from 1993 to 2005. These invoices identify the involved goods as "Infratonic QGM Med Device," "Infratonic QGM Ther Massagr" and "Infratonic QGM Therapeutic." However, none of the invoices contains the CHI logo, or even the word "Chi." (Exhibits 3 - 5 to Lee testimony).

Nonetheless, Mr. Lee testified that all of opposer's various massagers, as the device has evolved over the past dozen years, had the CHI logo in the upper right hand corner

of the faceplate. Lee testimony at p. 14. There is no basis in the record for the Board to question the accuracy of Mr. Lee's testimony. We note, however, from the copies of photographs of opposer's evolving machine (Exhibit 2 to Lee testimony), the first model where the CHI logo is clearly visible to us is the Infratonic 8 model, which opposer testified it started marketing in 2001 (Exhibit 2e). In any event, this date still precedes the filing date of the opposed application. In view thereof, opposer has established its priority of use of its CHI and design mark.

Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Act. Our determination of likelihood of confusion is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See 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 considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 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 (CCPA 1976). See also In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999), and the cases cited therein.

The goods

We turn first to a consideration of the relationship of the goods as described in the application and in connection with which the prior mark is in use.

In its answer, applicant argues that his product is different from opposer's in appearance, characteristics and technology, that his devices are sold directly to health care consumers rather than to professionals such as chiropractors, massage therapists or physicians, and that his massagers are used in ways quite different from the way professionals use opposer's massagers. Although opposer argues that the parties' respective massagers are closely related, it makes several arguments not unlike those made by applicant about the differences in the parties' current products. For example, in order to support its arguments about the severe damages it suffers when applicant tries to pass off his products as opposer's products, opposer discusses its continuous advances into patented digital

technology, and alleges that applicant currently markets massagers having the technology, appearance and functionalities of its ten-year-old analog models.

However, for our purposes in determining likelihood of confusion, we note that the identification of goods in the application is not limited in any way, and therefore, we must conclude that both parties are involved in marketing devices correctly characterized as electric massage apparatus. As a result, we find that the goods involved herein are legally identical. This factor favors opposer. Similarly, as to two related du Pont factors, we must presume these respective parties' goods will move through all the same channels of trade to the same classes of ordinary consumers.

The Marks

We turn next to a consideration of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

As to appearance, both marks contain the word "chi." However, opposer's mark also contains a prominent, non-

literal image.³ This image is accentuated elsewhere on the trade dress of the goods and on opposer's website, where it sometimes appears on its own, apart from the literal element. By contrast, applicant's mark has the additional word "PLUS." As to sound, the difference will be the single syllable term "Chi" versus the two-word term, "Chi Plus."

As to connotation, opposer argues that the letters C·H·I in its mark represents an acronym or initialism for opposer's trade name, namely, "China Healthways Institute." Further, opposer's mark is described by its president as including "hands over the 'I' of the logo represent[ing] a person sitting up healthy (sic) in a hospital bed."

By contrast, applicant's mark is **ChiPLUS**, with the word "chi" disclaimed. Although applicant has disclaimed the word "chi," we cannot consider this as evidence that the term is merely descriptive or generic. An applicant cannot avoid a likelihood of confusion claim by disclaiming a portion of its mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 672,

³ While opposer has not affirmatively established that its mark is inherently distinctive, we find that the prominent design element is sufficiently distinctive to render the mark inherently distinctive in relation to opposer's goods, regardless of any alleged weakness or lack of inherent distinctiveness in the term "chi" alone.

223 USPQ 1281, 1282 (Fed. Cir. 1984); Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 1570, 218 USPQ 390, 395 (Fed. Cir. 1983); Schwarzkopf v. John H. Breck, Inc., 340 F.2d 978, 144 USPQ 433 (CCPA 1965); and In re MCI Communications Corp., 21 USPQ2d 1534, 1538-39 (Comm'r Pats. 1991).

While applicant has failed properly to place his evidence into the record, we can take judicial notice of dictionary entries defining the word "chi":

chi [Ch (Beijing) *qi*, lit., air, breath] vital energy that is held to animate the body internally and is of central importance in some systems of Eastern medical treatment (as acupuncture) and of exercise or self-defense (as *tai chi*)⁴

chi also ch'i or Qi or qi(che) n. The vital force believed in Taoism and other Chinese thought to be inherent in all things. The unimpeded circulation of chi and a balance of its negative and positive forms in the body are held to be essential to good health in traditional Chinese medicine. [Chinese (Mandarin) qi, air, spirit, energy of life.]⁵

This connotation of the word "chi" is most relevant as applied to opposer's and applicant's therapeutic infrasonic

⁴ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (Eleventh Ed. 2003). It is settled that the Board may properly take judicial notice of dictionary definitions. See Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Fourth Edition).

massagers. We note, for example, that in discussions of putative energy fields that surround and penetrate the human body, "chi" is the equivalent of "Qi," and opposer's invoices of more than a dozen years identify the involved goods as "QGM" therapeutic medical devices, where the letters QGM stand for "QiGong Machine." Further, opposer's literature touts the incredible cures caused by the capacity of its therapeutic massager's transducer to change the flows of vital energy within the patient's body.

Hence, while the letters "CHI" may also function as an acronym or initialism for opposer's trade name, China Healthways Institute, we find that the word "chi" has a well-known meaning among those knowledgeable about Eastern medical treatments, and it is this connection that provides the more likely connotation of the term "chi" in both parties' marks. Specifically, the "chi" portion of both marks is at the very least highly suggestive, if not merely descriptive, when used in connection with the involved goods.

While we must consider the similarity or dissimilarity of the marks when viewed in their entirety, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the

mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., *supra* at 751. We note that the only common element between the marks is the highly suggestive or merely descriptive term "chi." Therefore, we find that the marks are distinguished by their respective additional matter, and conclude that their overall commercial impressions are not similar.

Renown of the prior mark

Finally, we turn to the du Pont factor focusing on the fame of opposer's prior mark. In its notice of opposition, opposer refers to its "famous CHI ... trademark" We have concluded that cumulatively, opposer has indeed sold tens of thousands of these massager units since 1993. Each unit retails for prices that have ranged over the years from several hundred dollars to current prices approaching a thousand dollars. Nonetheless, we are not able to conclude that its CHI logo is famous, or even well-known. For example, we do not know what market share opposer's sales of therapeutic massage machines represent, the extent to which the pleaded mark is used on the machines comprising opposer's total sales, or the prominence of the pleaded mark in opposer's advertising and promotion. Nor can we

extrapolate from the evidence the relevant purchasers' perceptions of the mark.

Summary of Likelihood of Confusion Determination

In conclusion, while these goods must be deemed to be identical, given the relative weakness of the "Chi" component of opposer's composite mark and opposer's failure to establish that its mark is either famous or well known, we find there is no likelihood of confusion herein. Kellogg Co. v. Pack'em Enterprises Inc., 951 F.2d 330, 21 USPQ 1142, 1143-44 (Fed. Cir. 1991) [FROOTEE ICE and elephant design is so different from FROOT LOOPS, that even if goods were closely related, and opposer's mark were famous, there was no likelihood of confusion].

Decision: The opposition is hereby dismissed and the application will be forwarded for the issuance of a registration.