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February 3, 2000 HRW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JULY 12, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re First Brands Properties, Inc.

Serial Nos. 75/022,955;
75/022,957 and 75/022,958

Thomas H. Curtin of Nims, Howes, Collison, Hansen & Lackert for First Brands Properties, Inc.

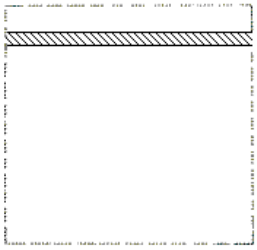
Teresa Rupp, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Hairston, Wendel and Bucher, Administrative Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

First Brands Properties, Inc. has filed three applications to register the mark described as “the color ... as applied to the closure seal on the goods.” The specific color is “green” in Serial No. 75/022,955, “blue” in Serial No. 75/022,957 and “yellow” in Serial No.

75/022,958.[1] The drawing in each application shows the placement of the mark as follows:



The only difference in the drawings is that the color lining in the other two drawings is for blue and yellow, respectively. The goods to which each of the marks is applied are identified as "plastic bags for packaging, namely, food storage, sandwich and freezer bags, sold empty."

Registration has been refused in each application under Section 2(d), on the ground of likelihood of confusion with the mark depicted below, which has been registered[2] for "plastic bags":

[1] Serial Nos. 75/022,955; 75/022,957 and 75/022,958, all filed November 20, 1995, and all claiming a first use date and first use in commerce date of December 19, 1984. Each application has been amended to one seeking registration under Section 2(f).

The description of the mark in the registration reads: The mark consists of a horizontal stripe adjacent the bag top lined for the color red, however, no claim is made to any specific color apart from the mark as shown.

Briefs were filed in each application by applicant and the Examining Attorney.[3] Both participated in an oral hearing which, although only requested for Serial No. 75/022,955, was expanded to cover all three cases. Inasmuch as the cases involve common issues of law and fact, we have found it in the interests of judicial economy to consolidate the cases for purposes of final decision. This one opinion is being issued for all three applications.

The Examining Attorney takes the position that the registered mark consists of a horizontal stripe of any color positioned on the bag in a manner similar to applicant's colored horizontal stripe applied to the

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[2] Registration No. 946,120, issued October 31, 1972. First renewal October 31, 1992.

[3] As background we note that each of the applications was also originally refused under Sections 1, 2 and 45 on the ground that the proposed mark was merely ornamental and failed to function as a trademark. Applicant subsequently amended the applications to ones seeking registration under the provisions of Section 2(f) and submitted evidence in support of its claim of acquired distinctiveness. After the submission of additional evidence of distinctiveness, the Examining Attorney withdrew the refusal under Sections 1, 2 and 45. Thus, only the refusal under Section 2(d) is on appeal.

closure seal. While the drawing in the registration is lined for the color red and a lining statement is made to this effect, she contends that the further statement in the description of the mark that "...however, no claim is made to any specific color," must be interpreted as a claim that the mark is a horizontal stripe, regardless of the particular color of the stripe. On this basis, she argues that registrant's stripe might well be one of the same colors as applicant's closure seal marks and, accordingly, when applicant's marks are similarly used near the upper edge of the bag, confusion would result. Insofar as the goods are concerned, she argues that the "plastic bags" of registrant, being without limitation in the identification of goods, must be presumed to include the particular plastic food storage bags of applicant.

Applicant contends that the Examining Attorney is incorrectly granting registrant broad rights to exclude all others from using a colored horizontal stripe on plastic bags. Applicant insists that the registration covers only a red horizontal stripe in accordance with the lining in the drawing and with the statement that the mark "consists of a horizontal stripe adjacent the bag top lined for the color red." Applicant contends that the remainder of this statement, "however, no claim is made to any specific color

apart from the mark as shown" is a disclaimer of any color other than red. Applicant states that registrant itself refers to its mark as the "red line trademark," as shown by the excerpts from registrant's Web page made of record by applicant, and that there is no evidence that registrant has ever used other colors. Applicant further argues that consumers would be able to differentiate between registrant's red stripe mark which runs along the top of the bag to connote the location of the bag's opening and applicant's mark which is part of a color-change seal which closes the bag's mouth. (The evidence of record shows that applicant's three marks are interrelated, the blue and the yellow stripes being on opposite sides of the closure which upon sealing appears green).

As for the goods, applicant argues that registrant's plastic bags are targeted to a different segment of the market; that registrant's goods may be marketed in hardware stores or the hardware section of supermarkets for storage purposes, whereas applicant's bags are marketed in supermarkets along with other storage products designed specifically for food storage. Applicant also notes that despite applicant's use of its marks for over thirteen years, not one instance of actual confusion has been reported.

Thus, the principal issue before us is the scope of protection to be accorded the mark shown in the drawing of the cited registration, in light of the concurrent description of the mark. In making this determination, we must look to the registration on its face. Although applicant would have us view the registered mark as consisting of a red stripe, the full description of the mark cannot be ignored. The mark is not described simply as a "horizontal stripe adjacent the bag top lined for the color red." Instead, the description goes on to state "...however, no claim is made to any specific color apart from the mark as shown." We view this addendum as disclaiming rights in any one particular color, not in all colors. The "mark as shown" is a colored stripe, otherwise it would be virtually invisible. By making no claim to any "specific color," we are of the opinion that registrant intended to encompass all colors when used in a stripe in this particular location on the goods.

As support for this interpretation of the scope of the registration, we look to the decision of the Trademark Trial and Appeal Board issued January 23, 1968 in connection with Serial No. 72/198,472. The Examining Attorney attached this unpublished decision to her second Office action herein. Applicant is correct that the

application involved in the 1968 decision by the Board matured into Registration No. 853,436, which then was cancelled in resolution of a cancellation proceeding. Nonetheless, upon review of the file history of the registration cited herein, we note that it was a subsequent application (Serial No. 72/374,045) filed by the same entity for the identical mark which matured into Registration No. 946,120. Accordingly, we consider the statements made by the Board with respect to the mark of the earlier application equally applicable to the mark of the cited registration.

In the aforesaid appeal, the issue was whether the matter sought to be registered functioned as a trademark. The Board, in reversing the Examiner's ruling that the stripe was mere ornamentation, referred to an affidavit filed by applicant's president to the effect that applicant "applies a colored stripe as a mark to identify the source of its goods" and that "a substantial amount of money has been expended in advertising and sales promotions of products having the colored horizontal stripe." The Board found that "as indicated by the affidavit the stripe is recognized as a mark." As pointed out by the Examining Attorney in her brief herein, in no place does the Board refer to the stripe as being red in color or that its

distinctiveness was limited to this color. Even the specimens are described as “bags which show a horizontal stripe in black or in red.” Thus, we are led to the conclusion that the Board at that time construed the trademark as being a colored horizontal stripe, without regard to the particular color.

Applicant’s argument that no one entity is entitled to ownership of all colors in connection with an ordinary design such as a stripe is to no avail. In the first place, if viewed as a challenge to the validity of the registration, such argument will not be considered in an ex parte proceeding. See In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Even if viewed only as a challenge to our interpretation of the scope of the registration, we find applicant’s argument unpersuasive. Our principle reviewing court specifically held in In re Data Packaging Corp., 453 F.2d 1300, 172 USPQ 396, 397 (CCPA 1972) that “there is no reason why an applicant should not be able to obtain a single registration of a design mark covering all the different colors in which it may appear, that is to say, not limited to a particular color.” The only requirement imposed by the court was that the applicant in its application designate exactly what the design was which it regarded as

the mark, including a definite description of the manner of application or placement of the color, so as to preclude inadvertent infringement. In the cited registration, as we view it, the design regarded as the mark has been designated as a colored horizontal stripe placed near the top of a bag.

Applicant's additional argument that registrant's Web page indicates that registrant is only using a red stripe or a "red line" is irrelevant. Registrant's present manner of use cannot sua sponte restrict the scope of the registration. If applicant believes that registrant is no longer, or never has been, entitled to a registration covering a horizontal stripe of any color, applicant is free to file a petition for partial cancellation of the registration on the grounds of abandonment or non-use under Section 18 of the Trademark Act.

Accordingly, we must make our determination of likelihood of confusion on the basis that the mark of the cited registration encompasses a horizontal stripe of any color positioned adjacent to the top of the bag. The colors of this stripe may well be the same as applicant's colors, namely, green, yellow or blue. We agree with the Examining Attorney that the placement of registrant's and applicant's marks is very nearly the same. While

applicant's color marks are described as being part of a closure seal, we find the visual impression of the marks to be highly similar to applicant's colored stripe. All in all, the commercial impressions created by the respective marks are highly similar.

Insofar as the goods are concerned, we can draw no viable distinction between registrant's plastic bags per se and applicant's plastic bags for food storage. It is well established that likelihood of confusion must be determined on the basis of the goods as identified in the application and in the cited registration. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Furthermore, if there are no restrictions in the application or registration as to channels of trade, the parties' goods must be assumed to travel in all the normal channels of trade for goods of this nature. See Kangol Ltd. v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Thus, registrant's plastic bags must be presumed to include food storage bags and to travel in the same channels of trade and be available to the same purchasers as applicant's plastic food storage bags. This is sufficient in itself to find the goods legally identical. The fact that registrant indicates on its Web page that its bags are "great for

parts, hardware, crafts, foods, photographs, stationery" [emphasis added] is merely cumulative evidence of the identical nature of the goods.

Finally, although applicant argues that there have no reported instances of actual confusion despite thirteen years of co-existent use, we find this to be of minimal significance. This being an ex parte proceeding, there has been no opportunity for registrant to be heard from on the matter. See In re Jeep Corp., 222 USPQ 333 (TTAB 1984). Moreover, the test under Section 2(d) is likelihood of confusion, not actual confusion.

Accordingly, in view of the high degree of similarity of the respective marks and the use thereon on goods which are legally identical, we find confusion likely.

Decision: The refusal to register under Section 2(d) is affirmed in each application.

P. T. Hairston

H. R. Wendel

D. E. Bucher

Administrative Trademark Judges,
Trademark Trial and Appeal Board