THIS DISPOSITION
IS NOT CITABLE AS
PRECEDENT OF THE TTAB

Mailed:
September 5, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L.C. Licensing, Inc.

Serial No. 76424233

David B. Kirschstein of Kirschstein, Ottinger, Israel & Schiffmiller, P.C. for L.C. Licensing, Inc.

Angela Micheli, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Bucher, Drost and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

L.C. Licensing, Inc. has appealed from the final refusal of the trademark examining attorney to register

axcess

as a trademark for goods ultimately amended to "handbags, wallets and leather key chains" in International Class 18.[1] The application contains the following description of the mark: "The mark consists of the word AXCESS in which the letters 'A', 'X', 'E', 'S' and 'S' are written in white and the letter 'C' is written in red and said letter 'C' is underlined."

The examining attorney has finally refused registration 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 previously registered mark ACCESS (in typed form) for "bags, travel bags, tote bags, duffle bags, belt packs, waist packs, back packs, knap sacks, briefcases, briefcase-type portfolios, luggage, suit cases, athletic bags, gym bags, cosmetic bags, wallets, CD ROM carrying bags and cases and floppy disc carrying bags and cases; compact disc carrying bags and cases"[2] in International Class 18, that, as intended to be used on applicant's identified goods, applicant's mark is likely to cause confusion or mistake or to deceive.

---

[1] Application Serial No. 76424233, filed June 24 2002, claiming an intent to use the mark in commerce under Trademark Act 1(b), 15 U.S.C. §1051(b).

[2] Registration No. 2237228, issued April 6, 1999. Section 8 and 15 filings accepted and acknowledged.

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs.

We affirm the Section 2(d) refusal of registration.

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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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).

We initially consider the similarities between applicant’s and registrant’s goods as described in the application and registration. Inasmuch as both applicant’s and registrant’s identifications of goods include “wallets,” applicant's and registrant’s goods are identical in part. Also, applicant's “handbags” are encompassed

within registrant's "bags,"[3] and applicant's "key chains" are otherwise related to opposer's bags and knap sacks because they may be attached to such bags and knap sacks. In view thereof, the first *du Pont* factor involving the similarities of the goods weighs heavily in favor of finding a likelihood of confusion.

We next consider the trade channels of applicant's and registrant's goods. Clearly, a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registration. In such circumstances, if there are no limitations in the identification, we must presume that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Because the goods are described broadly, and there are no trade channel limitations included in the identifications of goods, we must assume that the trade channels overlap. Moreover, we

---

[3] The definition of "bag" from *The American Heritage Dictionary of the English Language* (4th ed. 2000), of which we take judicial notice, includes "**1 … b** A handbag; a purse." See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (the Board may take judicial notice of dictionary definitions).

find that the goods identified in both the application and the cited registration are ordinary consumer goods which are subject to impulse purchases.

We next consider the similarities of the marks in their entireties. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The marks involved in this appeal are identical in sound and connotation. As applicant recognizes, applicant's mark is a misspelling of the word "access," which is registrant's mark. The "X" in applicant's mark is likely to be pronounced the same as the first "C" in ACCESS. Applicant has not argued that there is any difference in pronunciation of the marks.

In terms of appearance, we find that the two marks are highly similar. Applicant has merely taken registrant's

mark and substituted the first "C" for an "X" and underlined the second "C."

Applicant maintains that the marks differ in appearance not only because of the difference in the second letters of each mark, but also because "the second 'C' is written in red and underlined in red." Brief at unnumbered p. 4. Applicant's argument is of no consequence because registrant's mark is in typed form. As such, registrant is not limited to presentation of its mark in any particular color or stylization and may display its mark in various colors, formats or fonts, in upper or lower case letters, and may, in choosing a particular form of display, end up with a mark very similar in appearance to applicant's mark, including with the second "C" in red and the remaining letters in white, depicted in lower case letters. See *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983); 37 C.F.R. §2.52(a). See also *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35 (CCPA 1971) (a mark in typed or standard character form is not limited to the depiction thereof in any special form). Further, the underlining in applicant's mark adds little to the impression of applicant's mark and hence does not function to distinguish the marks in appearance or commercial impression. Additionally, the minor differences

between applicant's marks and the cited mark are not likely to be recalled by purchasers seeing the marks at separate times. The recollection of the average purchaser is normally a general rather than a specific impression of the many trademarks encountered, and the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988); *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255, 259 (TTAB 1980). Thus, we reject applicant's argument and conclude that applicant's and registrant's marks must be considered very similar in their manner of display.[4]

As for commercial impression, we find that the commercial impression of the marks is the same, in that both marks are pronounced the same, and the lettering in the marks only differs by applicant's substitution of one "C" for an "X," which has the same sound as the letter "C" when spoken.

---

[4] We reject applicant's argument too, made at unnumbered p. 2 of its reply, that applicant's "design" is distinctive; that a "consumer is more likely to remember the unique design" than the word portion; and that the "design portion of applicant's mark is at least as dominant as the word portion is."

Thus, in view of the foregoing, we find that applicant's mark and the cited mark are similar or even identical in sound, appearance, connotation and commercial impression.

One additional argument raised by applicant requires comment. Applicant has provided for the first time during the prosecution of its application a copy of three registrations from the Office's TESS database with its appeal brief, one of which on its face shows that it has been cancelled. According to applicant, "[t]he word 'access' has a suggestive connotation which undoubtedly accounts for the co-existence of the four registrations … none of which appear[s] to have been given very broad scope"; and applicant's mark should "coexist" with the three registered marks and registrant's mark in view of these registrations. Brief at unnumbered p. 5. The examining attorney has objected to the submission of the TESS copies of the registrations. There are, however, limited circumstances in which the Board will consider registrations that have not properly been made of record. In particular, if an applicant includes a listing of registrations in a response to an Office action, without also submitting actual copies of the registrations, and the examining attorney does not object or otherwise advise the

applicant that a listing is insufficient to make the registrations of record at a point when the applicant could cure the insufficiency, the examining attorney will be deemed to have waived any objection as to improper form. See TBMP § 1207.03 (2d ed. rev. 2004) and cases cited therein. Here, because the examining attorney did not advise applicant that the listing of the same registrations in its response to the initial Office action was insufficient to make the registrations of record, the examining attorney is deemed to have waived any objection as to improper form, and we have considered the registrations submitted with applicant's brief. Nonetheless, because one registration shows that it has been cancelled, and we have determined through the Office's electronic databases that a second registration has also been cancelled, the remaining registration, even when considered with registrant's registration, does not persuade us that "'access' has a suggestive connotation … [and should not] be given [a] very broad scope."

We conclude by holding that while there are some differences in the marks, when applicant's mark and the registered mark are used on related and/or identical goods, and sold in the same trade channels to general consumers, confusion is likely.

DECISION: The refusal to register the mark under Section 2(d) of the Trademark Act is affirmed.