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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
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Paper No. 10
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Santa Barbara Promotions, Inc.*

Serial No. 75/674,206

Richard T. Lyon of *Lyon, Harr & DeFrank, LLP* for *Santa Barbara Promotions, Inc.*

Cheryl Clayton, Trademark Examining Attorney, Law Office 102 (*Thomas V. Shaw*, Managing Attorney).

Before *Hairston, Walters and Bottorff*, Administrative Trademark Judges.

Opinion by *Bottorff*, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark MAGIC WALLET (in typed form) for "wallets."¹ Applicant has disclaimed the exclusive right to use WALLET apart from the mark as shown.

The Trademark Examining Attorney has issued two separate Section 2(d) refusals to register applicant's

¹ Serial No. 75/674,206, filed April 5, 1999. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and January 1999 is alleged as the date of first use and the date of first use in commerce.

mark, based on two registrations owned by different registrants. The first cited registration is of the mark MAGIC CARD HOLDER (in typed form; CARD HOLDER is disclaimed), for "wallets and credit card cases."² The second cited registration is of the mark MAGIC PAK (in typed form; PAK is disclaimed), for "backpacks, cloth travel bags, and cloth overnight bags."³

When the refusals were made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed appeal briefs, but no oral hearing was requested. We affirm both refusals to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §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.*

² Registration No. 2,346,556, issued May 2, 2000.

³ Registration No. 1,914,949, issued August 29, 1995.

Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to the Section 2(d) refusal based on Registration No. 2,346,556, which is of the mark MAGIC CARD HOLDER for "wallets and credit card cases." We find that the goods identified in applicant's application are identical to the goods identified in the cited registration insofar as both include "wallets." We also find that applicant's "wallets" and registrant's "credit card holders," to the extent that they are not identical, nonetheless are closely related goods. Applicant's arguments to the contrary are not persuasive. The Trademark Examining Attorney has submitted a dictionary definition of "wallet" which reads: "a flat pocket-sized folding case, usually made of leather, for holding paper money, **cards**, or photographs; a billfold" (emphasis added).⁴ The Trademark Examining Attorney also has submitted printouts of five third-party use-based registrations which include in their identifications of goods both "wallets" and various types of card holders, including "credit card cases." Although these registrations are not evidence that the marks shown therein are in commercial use, or that the

⁴ American Heritage Dictionary of the English Language (1992).

public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods or services identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

In view of the identical and closely related nature of the respective goods, and given the absence of any restrictions or limitations in either applicant's or registrant's identification of goods, we must presume that applicant's and registrant's respective goods are marketed in all normal trade channels for such goods, including each other's trade channels, and to all normal classes of purchasers for such goods, including to each other's purchasers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

In determining whether the marks are dissimilar or similar, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains

a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, where, as in the present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ 1698 (Fed. Cir. 1992).

Applying these principles to the present case, we find that applicant's MAGIC WALLET mark and registrant's MAGIC CARD HOLDER mark, when compared in their entireties in terms of appearance, sound and connotation, are similar rather than dissimilar in their overall commercial impressions. Each mark is comprised of the word MAGIC followed by the generic name of the respective goods, i.e., WALLET or CARD HOLDER. We find that MAGIC is an arbitrary (or at most, suggestive) term as applied to the respective goods, and that it therefore dominates the commercial

impression created by each mark and is entitled to greater weight in our comparison of the marks. Applicant's arguments to the contrary are unpersuasive and are unsupported by the record.

Although the marks are dissimilar to the extent that the generic word WALLET does not look like, sound like or mean exactly the same thing as the generic word CARD HOLDER, the marks look alike, sound alike and mean the same thing to the extent that they both begin with the distinctive word MAGIC. We find that the similarity between the marks which arises from their shared use of the distinctive and dominant word MAGIC outweighs the dissimilarities between the marks which arise from the differences in the non-distinctive, non-source-indicating portions of the marks, i.e., WALLET and CARD HOLDER. That is, purchasers are likely to believe (based on the presence of MAGIC in both marks) that a source relationship exists, and are unlikely to believe, based solely on the differences between the generic words WALLET and CARD HOLDER and despite the presence of MAGIC in both marks, that no source relationship exists.

For these reasons, we find that purchasers are likely to believe that the source of MAGIC WALLET wallets is the same as, or related to, the source of MAGIC CARD HOLDER

wallets and credit card cases. Accordingly, we find that a likelihood of confusion exists, and that the Trademark Examining Attorney's Section 2(d) refusal based on the previously-registered mark MAGIC CARD HOLDER is proper.

For essentially the same reasons, we also find that applicant's MAGIC WALLET mark, as applied to applicant's "wallets," is confusingly similar to the second cited registration, Registration No. 1,914,949, which is of the mark MAGIC PAK for "backpacks, cloth travel bags, and cloth overnight bags." Again, the term MAGIC dominates both marks, and is therefore more likely to be perceived and recalled as the primary source-indicating feature of the marks. The differences between the marks arise solely from the differences between the generic, non-source-indicating words WALLET and PAK. We find that those differences are greatly outweighed by the essential similarity between the marks which arises from the fact that they both begin with the distinctive word MAGIC. Thus, considering the marks in their entireties in terms of appearance, sound, and connotation, we conclude that they are similar, rather than dissimilar, in their overall commercial impressions.

Applicant argues that its goods, "wallets," and registrant's goods, "backpacks, cloth travel bags, and cloth overnight bags," are different products with

different uses. However, it is settled that it is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

The Trademark Examining Attorney has submitted printouts of nine third-party use-based registrations in which the identifications of goods include both "wallets" and one or more of the items included in the MAGIC PAK registration's identification of goods. As noted above, although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are

probative evidence to the extent that they suggest that the goods or services identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co., supra*; *In re Mucky Duck Mustard Co., Inc., supra*. Based on this evidence, we find that applicant's goods are related to the goods identified in the cited registration and that use of the confusingly similar marks MAGIC WALLET and MAGIC PAK on these respective goods is likely to cause confusion. We accordingly conclude that the Trademark Examining Attorney's Section 2(d) refusal based on the MAGIC PAK registration is proper.

Decision: Each of the Section 2(d) refusals to register is affirmed.