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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hytex Industries, Inc.

Serial No. 75/771,324

Charles Hieken of Fish & Richardson P.C. for Hytex
Industries, Inc.

Jennifer Stiver Chicoski, Trademark Examining Attorney, Law
Office 115 (Tomas V. Vlcek, Managing Attorney).

Before Simms, Hairston and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Hytex Industries, Inc. seeks to register the mark HYTEX
on the Principal Register for "decorative vertical textiles;
namely, wallcoverings sold to the commercial interiors
market sold through a distribution network of professionals
who are with interior designers, facility managers and
contractors," in International Class 24.¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground

¹ Application Serial No. 75/771,324, filed on August 9, 1999,
is based upon applicant's allegation of use in commerce since at
least as early as 1959.

that applicant's mark, when applied to its goods, so resembles the mark HITEX which is registered for "woven goods and textiles, namely, covering textile for use on furniture, pillows, curtains, textile household products, tablecloths and bed linen and sheets,"² as to be likely to cause confusion, to cause mistake or to deceive.

When the Trademark Examining Attorney made the refusal final, applicant appealed. Applicant and the Trademark Examining Attorney have filed briefs, and both appeared at an oral hearing before the Board.

We reverse the refusal to register.

In the course of rendering this decision, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The du Pont case sets forth the factors that should be considered, if relevant, in determining likelihood of confusion.

The Examining Attorney maintains that the marks are confusingly similar in overall commercial impression and that applicant's textile wallcoverings are companion goods that will often be coordinated with the fabrics used, for

² Registration No. 1,517,224, issued on December 20, 1988. Section 8 affidavit accepted and Section 15 affidavit acknowledged.

example, to upholster furniture, cover pillows and/or make curtains. In connection with the refusal, the Trademark Examining Attorney submitted more than twenty-five third-party registrations of marks registered in connection with wallcoverings, on the one hand, and covering textiles for use on furniture, pillows, curtains, textile and/or other household products, on the other hand.

Applicant, in urging reversal of the refusal to register, contends that the marks are dissimilar; that the goods are different; that any common users of registrant's and of applicant's goods are all sophisticated purchasers; and that because the marks are highly suggestive, registrant's mark is entitled to a narrow scope of protection.

We turn first to a consideration of the respective marks. Although HITEX and HYTEX will likely be pronounced identically, and may well have the same suggestive connotation (hi-techs or hi-textiles), the differences in the second letter of the respective marks ("I" vs. "Y") does result in marks having a somewhat different appearance. This difference would not be determinative if one were dealing with identical goods and/or casual purchasers. However, when this slight difference in overall appearance

is combined with other critical du Pont factors (e.g., the cumulative differences in the marks and in the goods), we are convinced that there will not be a likelihood of confusion in the instant case.

We turn next to a consideration of the respective goods. Applicant's goods are heavy, decorative, textile wallcoverings for the commercial interiors market. At oral hearing, applicant argued that these industrial strength materials are sold in very large quantities to the hospitality, corporate, retail, industrial and healthcare markets. It would be expected that before a deal is consummated, applicant's products will be compared closely with other similar textile wallcoverings on price, material composition, durability, acoustical features, fire retardment, etc.

Moreover, in a related du Pont factor, the distribution of applicant's goods is explicitly restricted to a specific network of professionals, further identified as being employed by "interior designers, facility managers and contractors." As a result of this limitation, we find that the consumers who must be presumed to know of the goods of applicant and of registrant are all sophisticated purchasers working in commercial settings.

While average consumers making casual purchasing decisions may be prospective purchasers of registrant's goods, they are not included in the population of applicant's users. Hence, we find that the decision to purchase applicant's goods is made by sophisticated professionals after careful deliberations.

In light of the difference in the goods and the sophistication of the purchasers, we conclude that the extent of potential confusion is *de minimis*. In this regard, applicant urges us, in effect, not to be "like a cat watching the wrong rat hole." See In re Nat'l Distillers & Chem. Corp., 297 F.2d 941, 948, 132 USPQ 271, 277 (CCPA 1962) (Rich, J., concurring). This does indeed appear to be a case where the role of the United States Patent and Trademark Office is to protect owners of trademarks by allowing them to register their marks. Certainly, our denial of registration herein would not deny applicant the right to continue using the mark it has been using continuously since 1959.

We turn briefly to consider the number and nature of similar marks in use on similar goods. Applicant argues throughout the prosecution of this application that the registered mark "should be afforded a narrow penumbra of

exclusive use about the goods identified in the registration." In this regard, based upon common sense, we have noted that the term appears to be highly suggestive and hence we accord it a narrowed scope of protection. However, with its reply brief, applicant submitted copies of a single third-party (Hill-Rom / SSI) having a registration and two applications for marks including the word HYTEX, registered (or to be registered) in connection with mattress pads/covers (also in International Class 24) specifically designed for hospitals and others in the healthcare industry. As pointed out by the Trademark Examining Attorney, however, the printouts of these three records attached to applicant's reply brief were untimely, and have not been considered herein. Trademark Rule 2.142(d). The record must be complete prior to the time of the appeal. See 37 CFR §2.142(d) and In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994). The Trademark Examining Attorney correctly objected to this tardy submission of third-party registrations/applications, and we have not considered them in reaching our decision herein.

In conclusion, we find that the cumulative differences in the appearance of these two highly suggestive marks, differences in the goods themselves, and the fact that all

common purchasers will be sophisticated professionals are sufficient to avoid a likelihood of confusion.

Decision: The refusal to register is reversed.

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Simms, Administrative Trademark Judge, dissenting:

I respectfully dissent from the majority's conclusion that confusion is unlikely in this case. I would find that, in view of the near identity of the marks and the close relationship of the goods, confusion is likely.

First, applicant's mark HYTEX and registrant's mark HITEX are identical in pronunciation and commercial impression or meaning and almost identical in appearance. When the respective marks are the same or almost the same, this is a strong factor supporting the conclusion that confusion is likely. That is to say, the first *du Pont*³ "factor weighs heavily against applicant" because applicant's mark is nearly identical to the registered mark. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

³ *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973).

With respect to the goods, I believe that they are closely related. Registrant's goods are woven goods and textiles, namely, covering textiles for use on furniture, pillows, curtains, textile household products, tablecloths and bed linen and sheets, while applicant's goods are decorative vertical textiles, namely, wall coverings sold to the commercial interiors market through a distribution network of professionals. Because registrant's description of goods is unlimited, we must presume that registrant's textiles encompass textiles sold in commercial channels of trade and that they are or would be available to the same commercial purchasers as would be applicant's goods. Therefore, registrant's goods could include textiles for use on furniture, pillows, curtains, and tablecloths, all for commercial interiors. Registrant's goods, like applicant's, may therefore be used for interior decoration.

A further important consideration in this case is the evidence of approximately 25 third-party registrations of marks identifying wall coverings on the one hand and such goods as linens and other textile products as curtains, tablecloths and pillows on the other. This evidence tends to demonstrate that potential purchasers may be accustomed to seeing the same mark on goods of the nature of those

produced by both applicant and registrant. While a commercial purchaser may be assumed to be more sophisticated than a homeowner, for example, whether even a commercial purchaser may be able to distinguish the source of such closely related textile products when they are identified by such similar marks as HYTEX and HITEX is very problematical.

A further factor, which the majority has not taken into consideration, at least explicitly, is the variety of goods covered in registrant's registration. This is also a *du Pont* factor which may be considered where appropriate. The fact that a registrant uses its mark on a variety of goods (textiles for use on furniture, pillows, curtains, textile household products, tablecloths and bed linen and sheets) makes it more likely that a purchaser may assume that a somewhat different but related product (textile wall coverings) identified by a very similar mark emanates from the same source. The evidence of record here demonstrates that the goods of applicant and registrant are certainly companion products. And it is well established that confusion may be likely where the goods are related in some manner or the conditions surrounding the marketing of the goods are such that the respective products could be encountered by the same purchasers under circumstances that

could give rise to the mistaken belief that they come from the same source. *In re Martin's Famous Pastry Shoppe, Inc., supra.*

Finally, if there should be any doubt on the question of likelihood of confusion, that doubt must be resolved in favor of the registrant. Applicant had a legal duty to select a mark sufficiently dissimilar from a registered mark so as to avoid any likelihood of confusion.

I also observe that applicant has failed to introduce any evidence whatsoever relating to the lack of actual confusion. The fact that there may have been no instances of actual confusion despite years of contemporaneous use is a factor to be considered only when there is appropriate evidence relating to this factor. In order for us to consider this factor, it was incumbent on applicant to have provided such evidence, by way of an affidavit or declaration from a knowledgeable employee of applicant, for example, attesting to the lack of actual confusion. Applicant has not done so.

I would affirm the refusal of registration.