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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RHR International Company

Serial No. 76303536

Lisa A. Carroll of Bell, Boyd & Lloyd LLC for RHR
International Company.

Charles L. Jenkins, Jr., Trademark Examining Attorney, Law
Office 105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Hanak and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

On August 23, 2001, applicant filed the above-
captioned application, by which it seeks registration on
the Principal Register of the mark CHANGINGWORKS (in typed
form) for services recited in the application (as amended)
as "business consultation services relating to
organizational assessment and improvement," in Class 35.
The application is based on applicant's allegation of a

bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

The Trademark Examining Attorney has refused registration of applicant's mark pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, as applied to applicant's services, so resembles each of two previously-registered marks (which are owned by a single entity) as to be likely to cause confusion. The first cited registration is of the mark depicted below, for services recited in the registration as "business management and consultation," in Class 35.¹



The Change Works

¹ Registration No. 1966359, issued April 9, 1996 pursuant to Trademark Act Section 44. Affidavits under Sections 8 and 15 accepted and acknowledged. The registration includes the following lining and stippling statement: "Although the drawing is lined for color, applicant makes no claim as to color. The stippling is for shading purposes only and is not a feature of the mark." The registration also includes the following description of the mark: "The mark consists, in part, of a stylized 'question mark' and a lower case 'A'."

The second cited registration is of the mark THE CHANGE WORKS (in typed form), for services recited in the registration, in pertinent part, as "business consultancy services; business management and business organizational consultancy services," in Class 35.²

When the refusals were made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney filed main appeal briefs, and applicant filed a reply brief. Applicant did not request an oral hearing.

The evidence of record on appeal (all of which was submitted by applicant) consists of printouts from the Office's TARR database of numerous third-party registrations of marks which end with the word WORKS, for business consulting or related services; printouts from the Office's TARR database of applicant's other registrations and applications covering marks which end in WORKS; printouts from applicant's website offered to show use of applicant's other marks and to further explain the nature

² Registration No. 2562249, issued April 16, 2002. The registration's identification of goods and services includes various goods in Classes 9 and 16, as well as various services in Class 35. However, it is apparent from the Trademark Examining Attorney's Office actions and his appeal brief that his Section 2(d) refusal is based solely on the Class 35 services recited in the registration as "business consultancy services; business management and business organizational consultancy services." We therefore have given no consideration to the remaining goods and services identified in this registration.

of applicant's services; and dictionary definitions of the words "change" and "works."

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

We find that applicant's services, as recited in the application, are encompassed by and legally identical to the services recited in each of the cited registrations. Given the legally identical nature of the respective services, and the absence of any restrictions or limitations in either applicant's or registrant's respective recitations of services, we also find that applicant's and registrant's respective services would be marketed in the same trade channels and to the same classes

of purchasers. These facts support a finding of likelihood of confusion.

We next must determine whether applicant's mark and the cited registered marks, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. 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 services 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 and service marks. 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 be used in connection with legally identical

services, 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 USPQ2d 1698 (Fed. Cir. 1992).

Applying these legal principles in the present case, we find that applicant's mark is similar to each of the cited registered marks.

We first shall compare applicant's mark, CHANGINGWORKS, to the typed-form registered mark, THE CHANGE WORKS. In terms of appearance, we find that these marks are more similar than dissimilar. Purchasers viewing the marks will see in each mark a form of the word CHANGE followed by the word WORKS. The marks are not visually identical, inasmuch as the cited registered mark consists of three words while applicant's mark consists of one word, and because the cited registered mark (but not applicant's mark) includes the word THE, while applicant's mark (but not the cited registered mark) includes the suffix -ING. However, the marks need not be identical in order to be found confusingly similar. We find that these points of visual dissimilarity are outweighed by the basic similarity between the marks which arises from the presence in both marks of a form of the word CHANGE followed by the word WORKS.

In terms of sound, we find that the marks are more similar than dissimilar. Both marks have three syllables, and two of those three syllables are pronounced identically, i.e., "change" and "works." The points of aural dissimilarity between the marks, i.e., the definite article THE in the cited registered mark and the suffix -ING in applicant's mark, are outweighed by the aural identity of the syllables pronounced "change" and "works" in each of the marks.

In terms of connotation or meaning, we find that the marks are highly similar if not identical. We agree with the Trademark Examining Attorney's contention that both marks convey the meaning "change does work" or "change can work." "Change" and "changing" are essentially synonymous; we take judicial notice that Webster's Ninth New Collegiate Dictionary (1990) at p. 226 defines "change" as a noun meaning "the act, process, or result of changing."³ (Emphasis added.) So to say that "change works" is essentially the same as saying that "changing works." The presence of the definite article THE in the cited registered mark does not negate this essential similarity

³ The Board may take judicial notice of dictionary definitions. See, e.g., *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); see also TBMP §704.12(a)(2d ed. 1st rev. March 2004).

in the two marks' meanings. Although it gives the cited registered mark the connotation of a particular "change" that works, as opposed to the less specific sense conveyed by applicant's mark that "changing" in general works, this difference is so subtle and slight as to be inconsequential, and it is greatly outweighed by the overall similarity in meaning conveyed by the marks. This is especially so when we remember that purchasers are likely to retain a general rather than a specific impression of trademarks and service marks. See *Sealed Air Corp. v. Scott Paper Co.*, *supra*. The subtle differences which result from applicant's careful parsing of the marks are not likely to be perceived, understood or recalled by purchasers, who are not likely to engage in such an exercise when confronting the marks.

In its reply brief, applicant argues that the word "works" in its mark is a noun which conveys the meaning of a plant or factory, as in the word "steelworks," and that its mark therefore connotes a factory or "works" where "change" is produced.⁴ Even if we accept this construction

⁴ We note that this argument in applicant's reply brief as to the meaning of its mark, i.e., that the words "changing" and "works" in its mark are both nouns, such that the mark connotes a "works" where "change" is produced," and its related reply brief argument that, unlike the cited registered marks, "Applicant's mark does not indicate that Applicant causes businesses to change," are quite different from (and contradictory to) the argument

of applicant's mark, this does not help applicant, because we find that the cited registered mark THE CHANGE WORKS can connote the same thing, i.e., a works (or "the" works) where change is produced. Again, "change" and "changing" are essentially synonymous, so if "changing works" connotes a factory where change is produced, "the change works" can connote the same thing. Indeed, whatever construction applicant's mark might be given, the cited registered mark can be construed to have the same or a similar meaning.

In short, we find that the marks are similar rather than dissimilar in terms of appearance, sound and connotation, and that they have similar overall commercial impressions. Moreover, given the legal identity of applicant's and registrant's services and the resulting lesser degree of similarity between the marks which is

applicant made in its main appeal brief as to the connotation of its mark. There, applicant argued that its mark is made up of the gerund form of the verb "to change" and the third-person form of the verb "to work," namely, "works," such that "Applicant's mark creatively communicates the notion that the Applicant is engaged in the act or process of 'changing' the way one 'works'," and that "the impression of Applicant's mark is that Applicant is always in the process of moving or 'changing' the work habits and practices of companies or organizations." The fact that applicant itself appears to have no fixed conception of the meaning (and grammatical construction) of its mark suggests that purchasers are likely to be similarly uncertain and confused, or at least flexible, in their understanding of the meaning of applicant's mark, and in their understanding of the meaning of registrant's mark as well. They therefore could understand the marks to have the same or a similar meaning.

required to support a finding of likelihood of confusion, see *Century 21 Real Estate Corp. v. Century Life of America, supra*, we find that applicant's mark is sufficiently similar to the cited registered mark that confusion is likely.

We also find that applicant's mark is similar to the other cited registered mark, which includes certain design elements in addition to the words THE CHANGE WORKS. In terms of appearance, we find that the marks are similar as to their wording, for the reasons discussed above in connection with the typed-form registered mark. Although the design element of this registered mark is large in comparison to the wording in the mark, we nonetheless find that it is still the wording that functions as the dominant feature in the mark's commercial impression. The background shading, the question mark and the small letter "a" in the registered mark are likely to be viewed more as decorative elements than as source indicators. It is the wording in the mark that purchasers are likely to perceive, recall and use in calling for or referring to the services. See, e.g., *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553 (TTAB 1987).

We also find that applicant's mark is similar to the second cited registered mark in terms of sound, for the

reasons discussed above in connection with the typed-form word mark. This registered mark is likely to be pronounced simply as THE CHANGE WORKS. As noted above, the design portions of the mark are likely to serve merely as decorative features of the mark. The question mark and the small "a" in the design portion of this registered mark are not likely to be pronounced.

We further find that this registered mark, like the typed-form registered mark, is similar to applicant's mark in terms of connotation. It is not immediately apparent what, if anything, the design features of the registered mark contribute to the meaning of the mark; it is the wording in the mark, i.e., THE CHANGE WORKS, which creates the mark's connotation, and that connotation is similar to the connotation of applicant's mark.

In short, we find that applicant's mark is sufficiently similar to this second cited registered mark that, when the marks are used on the legally identical services involved herein, confusion is likely.

Applicant has presented evidence of numerous third-party registrations of marks which end in -WORKS, for business consulting and related services. Applicant argues that this evidence shows that WORKS is so commonly used in marks for these services that purchasers are accustomed to

distinguishing such marks by looking to other features of the marks. Even if these third-party registrations were probative evidence of third-party use under the sixth *du Pont* factor ("the number and nature of similar marks in use on similar goods [or services]"), which they are not, applicant's argument would not be persuasive.⁵ If purchasers were to look beyond the presence of the word WORKS in applicant's mark and each of registrant's marks, they would find that the marks also include a variant of

⁵ Nor are we persuaded by applicant's argument that purchasers are not likely to be confused because they will perceive applicant's CHANGINGWORKS mark as one of applicant's family of -WORKS marks. First, we cannot conclude on this record that applicant in fact owns a "family" of -WORKS marks. It is settled that

A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods... (Emphasis added.)

J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). Second, even if applicant had established ownership of a family of -WORKS marks, our likelihood of confusion determination under Section 2(d) requires a comparison of the mark applicant presently seeks to register and the previously-registered mark(s) cited as a Section 2(d) bar to registration. If the marks at issue are confusingly similar, then applicant's ownership of a family of other marks which may not be as similar to the cited registered mark avails applicant nothing. See *In re Ald, Inc.*, 148 USPQ 520 (TTAB 1965).

the word CHANGE. Indeed, on this record, applicant's mark and the cited registered marks are the only marks which consist of the word WORKS and some form of the word CHANGE. In this respect, no two of the third-party registered marks cited by applicant are as similar to each other as applicant's mark is to registrant's marks. The examples cited by applicant in its reply brief, i.e., LEANWORKS, THE LEAD WORKS, and LEARNWORKS, each combine WORKS with words that have completely different meanings, no matter how similar their spelling. In short, the presence on the register of these third-party registrations does not persuade us that applicant's mark is not confusingly similar to the cited registered mark, as used in connection with these legally identical services.

Applicant also argues that its consulting services are expensive, and that the decision to purchase the services would be made by experienced and sophisticated upper-level management personnel of companies and organizations who would exercise great care in making the purchasing decision. Even if we assume that this is true with respect to applicant's actual services, we find that applicant's services, as recited in the application, are not limited or restricted in such a way. That is, it is not apparent from the face of applicant's recitation of services that such

services necessarily are expensive, or that they necessarily are purchased by knowledgeable, careful purchasers. Rather, applicant's business consulting services must be presumed to include services marketed to businesses of all sizes, including small businesses, whose decision-making personnel could be expected to vary widely in terms of experience, care and sophistication. Moreover, we find it likely that even sophisticated purchasers encountering these similar marks used in connection with these legally identical services will assume the existence of a source connection or affiliation.

Having considered all of the evidence of record as it pertains to the *du Pont* evidentiary factors, we conclude that a likelihood of confusion exists as between applicant's mark and each of the cited registered marks. We have carefully considered applicant's arguments to the contrary, but are not persuaded. Moreover, if we had any doubt as to the existence of a likelihood of confusion (and we do not), it is settled that such doubt must be resolved against applicant and in favor of the prior registrant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.