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CITABLE AS PRECEDENT
OF THE TTAB

**Mailed: September 24, 2004**
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Sound International, Incorporated

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Serial No. 76397850

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Lex Mathis of Sound Law Group, PLLC for Sound International, Incorporated.

Alex S. Keam, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Simms, Rogers and Drost, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Sound International, Incorporated (applicant), a Washington corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark HOME BASIX ("HOME" disclaimed) for hand tools, namely, hand saws, utility knives, axes, hammers and screwdrivers, in Class 8; environmental control apparatus, namely, faucets, Roman tub faucets, bidets, shower controls, shower body sprays, hand showers and shower heads, in Class 11; and

bath accessories, namely, towel bars, towel rings, non-metal robe hooks, toothbrush holders, toilet tissue holders, soap dishes and cup holders, in Class 21.[1]

The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,316,531, issued January 29, 1985, partial Section 8 affidavit accepted, for the mark BASIX for plastic sink strainers, paper tissue dispensers, soap dishes, mouse traps, and small hand kitchen utensils, in Class 21; bath and basin stoppers, rubber door stops and rubber cup plungers, in Class 17; and nails, screws, tacks, brads, washers, picture hanging hardware, hooks and eyes, plant hangers, mirror holding hardware, cabinet hardware, door stops, toggle bolts, wall anchors, barrel bolts, locks, latches, hinges, sink strainers and shower curtain rings all made primarily of metal, in Class 6.[2]

Although the Examining Attorney specifically mentioned only some of applicant's goods in the Office actions refusing registration, it was not until the Examining Attorney's appeal brief that the Examining Attorney made clear, in footnote 1, that "The class 8 goods are not the

[1] Application Serial No. 76397850, filed April 17, 2002, based upon applicant's allegation of a bona fide intention to use the mark in commerce.

[2] Goods in Class 8 and in Class 20 were deleted as the result of registrant's Section 8 affidavit.

subject of the likelihood of confusion refusal. The refusal applies to some of the goods in international class 11, namely, the faucets and shower heads as enumerated, and all of the goods in international class 21." Accordingly, and inasmuch as applicant paid appeal fees in all three classes (when refusal was actually being made as to the goods in just two classes), applicant is entitled to registration of the mark for the Class 8 goods for which there is no refusal. However, because applicant did not request a division of its application with respect to those goods in Class 11 when it finally became clear that there was no refusal being made as to them, if we affirm the refusal as to some of the goods in that class referenced by the Examining Attorney, then the application with respect to the remainder of the goods in that class may become abandoned. But see Rule 2.65(a)(November 2, 2003).[3]

Our determination of likelihood of confusion under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See

[3] Of course, the Examining Attorney should have indicated as early as possible in the examination process the specific goods or services as to which the refusal of registration applied. If the Examining Attorney had done so, then applicant could have filed a request to divide at that time in order to create a separate application covering the goods not being refused. See TMEP §1110 (3rd ed. 2003).

*In re Majestic Distilling Co., Inc.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re E.I. du Pont de Nemours and Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations are the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Relying upon third-party registrations and Internet evidence showing that manufacturers may produce such goods as sink strainers, soap dishes and shower curtain rings (which are among registrant's goods), on the one hand, and towel bars, toilet paper holders, toothbrush holders, towel hooks and faucets (which are among applicant's goods), on the other, the Examining Attorney argues that applicant's and registrant's goods are closely related (and in part identical--soap dishes).

We agree with the Examining Attorney with respect to applicant's faucets and shower heads in Class 11 and its bath accessories such as towel bars, towel rings, toothbrush holders, toilet tissue holders, soap dishes and cup holders, that these goods have been shown to be related. The third-party registrations suggest that the

same source may offer these goods under the same mark. See *In re Infinity Broadcasting Corp. of Dallas,* 60 USPQ2d 1214, 1218 (TTAB 2001); and *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783 (TTAB 1993). Also, these goods may be sold in similar channels of trade, such as supermarkets, hardware stores and home improvement stores, so that, if they were sold under similar marks, confusion would be likely.

While applicant argues that its goods are sold only to independent hardware stores and building supply or home improvement stores primarily east of the Mississippi River, and that registrant's goods are sold in grocery stores and to general inventory services companies (and has submitted declarations in support of these facts), we must analyze this case on the basis of the goods set forth in applicant's application and registrant's registration. Because there are no limitations in the respective application and registration relating to the channels of trade or classes of purchasers, we must presume that applicant's and registrant's goods encompass all goods of the type described, and that they move in all normal channels of trade to all potential customers. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank,* 811 F.2d

1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Applicant also argues that its goods are sold in distinctive glass jars with colorful labels displaying a distinctive font. For the same reasons as indicated above, such arguments are irrelevant when the application seeks registration of the mark without special form and without limitations as to packaging.

Turning then to a comparison of the respective marks, applicant argues that the marks are sufficiently different in sound, appearance and commercial impression, and that its mark suggests products that “are not only fundamental, but also evoke domesticity.” Appeal brief, 8. The Examining Attorney argues, on the other hand, that registrant’s mark BASIX and applicant’s mark HOME BASIX have similar overall commercial impressions, with the term “BASIX” being the more significant part of applicant’s mark, and the addition of the merely descriptive and disclaimed word “HOME” not serving to avoid likelihood of confusion. Moreover, the Examining Attorney argues that if the respective goods are identical, as are the soap dishes in the registration and application, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as where the

goods are less related. We agree with this statement. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Moreover, here the word “BASIX” in both marks is spelled identically and, while the descriptive and disclaimed word “HOME” cannot be ignored, applicant has admitted that this word is less significant in creating a commercial impression. Consumers are likely to believe that applicant’s mark is a variant of the BASIX mark. In other words, consumers may believe that applicant’s HOME BASIX products are specifically designed for the home but come from the same source as the BASIX products.

While applicant has argued that the term “BASIX” is descriptive or highly suggestive because of its appearance in numerous third-party registrations and applications, as the Examining Attorney has pointed out, applicant’s mere listing of these registrations cannot be considered because such a listing does not make them of record. See *JT Tobacconists,* 59 USPQ2d 1080, 1081 n.2 (TTAB 2001); and *In re Duofold Inc.,* 184 USPQ 638 (TTAB 1974). As the Examining Attorney noted, copies of those registrations or the electronic equivalent should have been made of record. TMEP §710.03.

We also observe that many of these goods are relatively inexpensive items which may be purchased in supermarkets, hardware stores and home improvement stores by the general public. To the extent that these goods are not purchased with much care, this factor also favors a finding of likelihood of confusion.

Finally, any doubt with respect to the issue of likelihood of confusion must be resolved in favor of the prior user and registrant. See *In re Hyper Shoppes (Ohio) Inc.,* 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.,* 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Accordingly, we conclude that consumers aware of registrant's BASIX soap dishes, paper tissue dispensers, bath and basin stoppers, shower curtain rings and sink strainers, for example, who then encounter applicant's HOME BASIX faucets, shower heads, towel bars, towel rings, robe hooks, toothbrush holders, toilet tissue holders, soap dishes and cup holders are likely to believe that all of these goods come from the same source.

Decision: The refusal of registration under Section 2(d) is affirmed as to Class 11 and Class 21. Because the refusal did not pertain to the goods in Class 8, the mark

will be published for opposition as to the goods in that class.