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CITABLE AS PRECEDENT OF
THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cambridge Engineering, Inc.

Serial No. 76432423

Paul M. Denk, Esq. for Cambridge Engineering, Inc.

Verna Beth Ririe, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hairston, Chapman and Bucher, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Cambridge Engineering, Inc. has appealed from the
final refusal of the trademark examining attorney to
register the mark shown below for "installation of heating
systems for others."¹

¹ Serial No. 76432423, filed July 19, 2002, and asserting a bona fide intention to use the mark in commerce. The words SERVICES and A SUBSIDIARY OF CAMBRIDGE ENGINEERING have been disclaimed apart from the mark as shown.



Registration has been refused 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 mark CCENERGY previously registered for "retail store services in the field of renewable energy equipment; energy efficiency auditing, energy contractor referrals; and energy permit processing,"² as to be likely, when used on applicant's identified services, to cause confusion or mistake or to deceive.³

Applicant and the examining attorney have filed briefs, but an oral hearing was not requested.

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. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

² Registration No. 2,747,152 issued August 5, 2003.

³ Because the examining attorney's arguments and evidence focus on applicant's services and registrant's retail store services in the field of renewable energy equipment, in particular, the Board will do likewise.

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(Fed. Cir. 2003). In any likelihood of confusion analysis, 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).

Insofar as the respective services are concerned, the examining attorney maintains that applicant's recitation of services, i.e., installation of heating systems for others, is broad and encompasses the installation of renewable energy equipment, such as solar energy heating systems. Further, the examining attorney argues that it is common for companies which sell energy equipment to also offer the services of installing heating systems. In this regard, the examining attorney submitted copies of third-party registrations of marks that she maintains show that these types of services emanate from a single source under the same mark. Additionally, the examining attorney submitted printouts from registrant's website wherein registrant describes itself as a cooperative for "purchasing and installing renewable energy systems." The examining attorney argues that this evidence shows the relatedness of the services of installing heating systems, on the one

hand, and retail store services in the field of renewable energy equipment, on the other hand.

Applicant, however, contends that its services and registrant's services are very different. Specifically, applicant maintains that it "manufactures these large industrial heaters, that fit upon the roof of industrial manufacturing plants, and generate and blow heated air directly into the plant, to provide heating. It is submitted that this is far different from the conduct of retail store services, under which the mark of the cited registration, No. 2,747,152, represents, and that the mark of the cited registration appears to be some type of a [sic] environmental group, that conducts a retail store service, in California, for encouraging the use of renewable energy equipment, energy efficiency auditing, energy contractor referrals, and energy permit processing." (Brief, p. 4).

Applicant argues that in view of the above differences, the channels of trade for applicant's and registrant's services are different, i.e., registrant's services are rendered by way of a retail store whereas applicant's services are not. Also, applicant contends that the purchasers of its services "are not impulse buyers" and "they know exactly who they are dealing with."

(Brief, p. 6). Applicant maintains that purchasers of registrant's services would also know with whom they are dealing because the purchasers would have to come to registrant's retail store.

The question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or

services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

We agree with the examining attorney that, based on the recitations of services, applicant's installation of heating systems for others and registrant's retail store services in the field of renewable energy equipment are related. Applicant's arguments to the contrary are not persuasive. Applicant's services are broadly identified and, thus, must be presumed to encompass the installation of all types of heating systems, including heating systems consisting of renewable energy equipment. Moreover, the respective recitations of services are not restricted as to the purchasers. Because neither party's recitation restricts the purchasers, the Board must consider that the parties' respective services could be offered to and sold to the same classes of purchasers, e.g., industrial manufacturing plants, as well as large and small businesses, and homeowners. In this case, purchasers of renewable energy equipment would likely also be in the market for installation services.

To establish a relationship between applicant's services of installing heating systems for others and registrant's retail store services in the field of renewable energy equipment, the examining attorney has

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submitted copies of third-party registrations for marks that cover the installation of heating systems and retail store services which feature heating equipment. Registration No. 2,428,750 includes retail services in the field of heating and installation of heating equipment. Registration No. 2,361,893 includes retail store services featuring commercial-residential heating and cooling systems and installation of commercial-residential heating and cooling systems. Registration No. 2,729,169 includes retail store services featuring heating equipment and installation of heating equipment. Registration No. 2,591,190 includes installation of heating equipment and retail services featuring heating equipment. Registration No. 2,567,172 includes retail services featuring heating products and installation of heating products. Registration No. 2,657,815 includes retail store services in the field of heating and installation of heating equipment. These registrations suggest that applicant's type of services and registrant's type of services emanate from the same source. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value

to the extent that they may serve to suggest that such good or services are the type which may emanate from a single source"]. See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993). Under the facts of this case, we conclude that applicant's services of installation of heating systems for others and registrant's retail store services in the field renewable energy equipment are related.

Considering next the marks, the examining attorney argues that the dominant portion of applicant's mark is the term CENERGY which is highly similar to registrant's mark CCENERGY. The examining attorney maintains that the disclaimed wording in applicant's mark SERVICES and A SUBSIDIARY OF CAMBRIDGE ENGINEEING is subordinate matter. Further, the examining attorney argues that the design element in applicant's mark does not obviate the similarity between applicant's and registrant's marks.

Applicant, in urging reversal of the refusal to register, argues that:

Applicant's mark, as stated, has a different design for the word CEnergy, it is intended to being (sic) out the word Energy, within the mark, by capitalizing the E in addition to the arrowed C. Furthermore, there is a flame design that exits the E, to give the appearance of the generation of heat, as from a forced air type of heater. Furthermore, the word SERVICES is combined with the mark, as is the statement

regarding the subsidiary of Cambridge Engineering. This composite mark, in its entirety, it is submitted, is entirely different, whether it be as to appearance, sound, connotation, and commercial impression, from the cited registration CCENERGY. (Brief, pp. 4-5).

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties are similar or dissimilar, in terms of sound, appearance, connotation and commercial impression. Although the marks 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). Furthermore, 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 commercial impression that confusion as to the source of the goods and/or 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. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Insofar as applicant's mark is concerned, it is the term CENERGY that is the dominant portion thereof. The disclaimed word SERVICES is a generic term and thus plays a subordinate role in our likelihood of confusion analysis. Further, CENERGY appears in much larger letters than A SUBSIDIARY OF CAMBRIDGE ENGINEERING, and CENERGY dominates over the flame design in applicant's mark. The dominant element CENERGY is the portion of applicant's mark that purchasers are most likely to remember and use in calling for applicant's services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). This dominant portion of applicant's mark is highly similar to registrant's mark CCENERGY. In short, neither the disclaimed word SERVICES, the wording A SUBSIDIARY OF CAMBRIDGE ENGINEERING, nor the flame design is sufficient to distinguish the marks. The similarities between the mark outweigh the differences. In sum, we find that applicant's mark and registrant's mark, when viewed in their entireties, are similar in sound, appearance and connotation, and that they create similar commercial impressions.

We recognize that the purchase of the involved services may involve a degree of care. This, however, does not require a finding of no likelihood of confusion. Even assuming that the purchasers of these services exercise

care, this does not mean that such purchasers are immune from confusion as to the origin of the respective services, especially when sold under similar marks. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289 (CCPA 1962); and In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999).

Finally, according to applicant, there have been no instances of actual confusion in three years of coexistence of applicant's mark and the mark in the cited registration.⁴ However, there is no evidence of applicant's and registrant's geographic areas of sales, or the amount of the sales under the respective marks. Further, there is no information from the registrant. In any event, the test is likelihood of confusion, not actual confusion. See Weiss Associated Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and In re Kangaroos U.S.A., 223 USPQ 1025 (TTAB 1984).

We conclude that purchasers familiar with registrant's retail store services in the field of renewable energy equipment offered under the mark CCENERGY would be likely to believe, upon encountering applicant's mark CENERGY SERVICES A SUBSIDIARY OF CAMBRIDGE ENGINEERING and design

⁴ Although this is an intent-to-use application, applicant states that it has used its mark for approximately three years.

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for installation of heating systems for others, that the services originated with or are somehow associated with or sponsored by the same entity.

To the extent we have any doubt, we resolve it as we must, in favor of the registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

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