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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Murray Company

Serial No. 76465812

Thad N. Leach of Lewis, Rice & Fingersh, L.C. for The Murray Company

Kristina Kloiber, Trademark Examining Attorney, Law Office 116 (M. L. Hershkowitz, Managing Attorney).

Before Hohein, Hairston and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

The Murray Company has filed an application to register the mark shown below for "construction management" services in International Class 37.[1]

[1] Application Serial No. 76465812, filed November 8, 2002, alleging a date of first use anywhere and date of first use in commerce of February, 2002, and disclaiming COMPANY apart from the mark as shown.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark shown below, when used on its identified goods, so resembles the registered mark for "industrial, commercial and residential construction and general contractor services" in International Class 37,[2] as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed.[3] Briefs have been filed, but applicant did not request an oral hearing.[4] We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative

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[2] Registration No. 1264473, issued January 17, 1984, Section 9 renewal granted.

[3] Applicant's original notice of appeal, filed on April 13, 2004, was deemed untimely; however, applicant's petition to revive was granted on September 28, 2004 and applicant subsequently filed a timely notice of appeal.

[4] This application was originally examined by another examining attorney, but was subsequently reassigned to the attorney whose name is shown above to prepare the appeal brief.

facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (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).

Similarity of the Marks

In articulating her determination that the marks are similar, the examining attorney focuses on two common elements in the marks, specifically, the name MURRAY and the emphasis on the first letter M in both marks. To explain why her analysis of the marks accords greater weight to the name MURRAY in the involved marks, the examining attorney argues that: when a mark consists of words and design elements, the words tend to dominate; the word COMPANY in applicant’s mark has been disclaimed and therefore may be regarded as less significant; the MURRAY name would be used to call for registrant's and applicant’s services; and, for these reasons, the MURRAY name is the

dominant element of the marks in the application and the cited registration. In contrast, applicant relies on the plumb bob design in its mark, the separate M in registrant's mark and the stylization in both marks, to distinguish the marks.

Examining the marks in terms of their appearance, sound, meaning, and commercial impression, we find the marks to be similar. The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. Visual Information Inst., Inc. v. Vicon Indus. Inc., 209 USPQ 179 (TTAB 1980). While it is true that marks must be considered in their entireties in determining likelihood of confusion, it is also well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); Hilson Research Inc. v. Society for society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1993). We agree that the dominant element in both marks is the name MURRAY. A potential consumer would call for the services by the name MURRAY which is the common literal portion of the marks. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

Moreover, both marks emphasize the first letter of the name MURRAY, which at a minimum, contrary to applicant's argument, does not serve to distinguish the marks, and in fact, as argued by the examining attorney, may increase the likelihood of confusion. The differences in the marks, the plumb bob design and the word COMPANY in applicant's mark, the separate M in registrant's mark and the different stylization, do not create a different commercial impression or distinguish the marks. The portion of the respective marks which would be most likely to be viewed as an indication of source and to be used in referring to the services is the same, namely, the name MURRAY. In view thereof, and for reasons articulated by the examining attorney, we agree that the marks are similar.

Similarity of the Services

The similarity of the services and overlapping trade channels do not appear to be in dispute. Applicant has stated that "[b]oth of the cited services fall within the construction industry, and therefore, are related [and] [a]lthough the services in this case are similar and may travel through the same channels of trade, the importance of the issue of similarity of services is diminished due to the fact that the applicant's mark and the cited mark are so different." (Brief, p. 10) However, for completeness we

note that the examining attorney, in support of her argument that the services are similar, referred to excerpts from the online glossaries Homeglossary.com and National Contractor Referrals and License Bureau Glossary, wherein a general contractor is listed as a party who is hired to oversee a construction project and the duties of a general contractor are to manage construction projects.[5] Homeglossary.com, www.yourwebassistant.net/glossary/g3.htm. Further "construction management" is defined as "activities over and above normal architectural and engineering services, conducted during the predesign, design, and construction phases, that contribute to the control of time and cost." See National Contractor Referrals and License Bureau Glossary, www.contractorreferral.com/-bin/glossary.

The examining attorney also pointed to applicant's specimen of use, a brochure, which includes "general contractor" directly under "construction manager" in its list of capabilities. (Brief, p. 10)

It is well settled that goods or services need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods or services

[5] These excerpts were included in the October 9, 2003 Final action.

themselves, but rather whether purchasers are likely to confuse the source of the goods or services. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Further, we must consider registrant's goods or services as they are described in the registration and we cannot read limitations into those goods or services. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. See In re Linkvest S.A., 24 USPQ2d 1716 (TTAB 1992).

In view of the above and to the extent this is in dispute, we find that the recited services of applicant and registrant, as supported by the evidence of record, are identical or highly similar. In addition, inasmuch as there are no limitations in the respective recitations of services, we presume an overlap in trade channels and that

the services would be offered to all normal classes of purchasers.

Sophisticated Purchasers/Actual Confusion

Applicant relies heavily on its argument that the purchasers of construction management services are highly sophisticated. We have considered applicant's contention that its services are extremely expensive, and its customers are sophisticated and take great care in the purchasing decision, including "individual property owners." While there is no evidence on this point, even assuming such is the case, we find that the substantial similarity of the marks and services clearly outweigh any purchaser sophistication.[6] In re Decombe, 9 USPQ2d 1812 (TTAB 1988); In re Pellerin Milnor Corp., 221 USPQ 558 (TTAB 1983). See also HRL Associates, Inc. v. Weiss Associates, Inc., 12 USPQ2d 1819 (TTAB 1989), aff'd, Weiss Associates, Inc. v. HRL Associates, Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweighed sophisticated purchasers, involved purchasing decision, and expensive goods).

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[6] Applicant's reliance on Perini Corp. v. Perini Const., Incl., 915 F.2d 121 (4th Cir. 1990) is not persuasive of a different result. There, the Fourth Circuit reversed a grant of summary judgment to plaintiff because the district court *failed* to take into account the sophistication of the purchasers and the issue of likelihood of confusion *remained* for trial.

Moreover, the fact that purchasers are sophisticated in a particular field does not necessarily mean that they are knowledgeable in the field of trademarks or immune from source confusion. In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999); In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products.")

Finally, we do not accord significant weight to applicant's contention that there have been no instances of actual confusion despite an asserted two years of concurrent use of the respective marks. The Federal Circuit has recently addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

> With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual

> confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

Majestic Distilling, 65 USPQ2d at 1205.

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

In conclusion, we find that these marks are so similar that, as applied to essentially identical services, confusion would be likely.

Decision: The refusal to register is affirmed.