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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re No-Burn Investments, L.L.C.

Serial No. 76529667

Christopher John Rudy, Esq. for No-Burn Investments, L.L.C.

Justine D. Parker, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Quinn, Kuhlke and Taylor, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by No-Burn Investments, L.L.C. to register the mark FABRIC FIRE GARD ("FABRIC FIRE" disclaimed) for "water-based fire-retardants, and such fire-retardants especially for absorptive application to fabrics and textiles and cloth, paper, wood and other porous materials including on or in couches, mattresses,

carpets, drapes, camping equipment, homes, autos, boats, and recreational vehicles."[1]

The examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used in connection with applicant's goods, so resembles the previously registered mark FABRIC GUARD ("FABRIC" disclaimed) for "fabric protective coating"[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.[3]

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. 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, however, two key considerations are the similarities between the marks and the similarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: In re Dixie

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[1] Application Serial No. 76529667, filed July 7, 2003, alleging first use anywhere and first use in commerce on June 6, 2003.
[2] Registration No. 966358, issued August 21, 1973; renewed.
[3] The examining attorney named in the caption was newly assigned to this application shortly before the appeal brief was filed.

Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first turn to consider the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 their entireties that confusion as to the source of the goods 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. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

Applicant concedes that the marks "bear some superficial or general similarities," but goes on to focus on what it perceives to be "significant dissimilarities," namely the presence of the word "FIRE" in its mark and its use of "GARD" rather than "GUARD."

The marks are similarly constructed in that both begin with the identical term "FABRIC" and end with the phonetic

equivalents "GUARD" and "GARD." Because of this similar construction, the marks look alike and sound alike. The presence of "FIRE" in the middle of applicant's mark does not appreciably change the appearance or sound of applicant's mark.

The marks also have similar meanings in that both convey the idea that the respective products serve to protect or "guard" fabrics. We recognize, however, that applicant's mark further imparts more specific information, namely that its product protects against fire. Nevertheless, the idea conveyed by registrant's mark is broad enough to cover the protection of fabric against anything, including fire. In re M. Serman & Company, Inc., 223 USPQ 52 (TTAB 1984).

Taking into account all of the similarities between the marks FABRIC FIRE GARD and FABRIC GUARD, we find that the marks engender similar overall commercial impressions. The mere addition of a term (especially when it is merely descriptive as in the case of "FIRE") to a registered mark does not avoid a similarity between the marks. See In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); In re El Torito Restaurants Inc., 9 USPQ2d 2002 (TTAB 1988); and In re Corning Glass Works, 229 USPQ 65 (TTAB 1985). Likewise, applicant's use of the

phonetic equivalent "GARD" does not serve to distinguish its mark from registrant's mark. In re Great Lakes Canning, Inc., 227 USPQ 483 (TTAB 1985).

The first du Pont factor, the similarity between the marks, weighs in favor of finding a likelihood of confusion.

As just noted, the marks have similar meanings. Notwithstanding the clearly suggestive meanings of the involved marks as applied to fabric protective coatings, the record is devoid of any evidence of third-party uses or registrations of the same or similar mark in the fabric coatings field. This sixth du Pont factor weighs in favor of finding a likelihood of confusion.

We next turn to a consideration of the goods. It is not necessary that the respective goods be identical or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they

originated from the same producer. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991).

Applicant focuses its argument on the specific differences between the goods in reality, that is, applicant's product protects against fire whereas registrant's product protects against stains (and even renders a fabric more flammable).

Insofar as the goods are concerned, however, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the cited registration are broadly identified as to their nature and type (as is the case herein), such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential

buyers thereof. In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

In view thereof, registrant's broadly worded identification "fabric protective coating" encompasses all types of such goods. The identification is not limited to a stain protective coating; rather, and contrary to applicant's arguments, it is presumed that registrant's coating protects fabrics from a variety of harms, including fire.[4]

Applicant, relying on certain materials about registrant's product, contends that registrant's product protects against stains only, and that it is not fire retardant, but rather that it actually accelerates flammability. Applicant's attempt to essentially limit the scope of registrant's goods is to no avail. An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence. In re Bercut-Vandervoort & Co., 229 USPQ 763, 764 (TTAB 1986).

Lest there be any doubt about the relatedness of the goods, the examining attorney's evidence shows that the

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[4] We note that applicant amended its identification of goods to more specifically define its goods. However, if a cited registration has a broad identification of goods, an applicant does not avoid likelihood of confusion merely by more narrowly identifying its related goods. See In re Diet Center Inc., 4 USPQ2d 1975 (TTAB 1987); and In re Uncle Sam Chemical Co., Inc., 229 USPQ 233 (TTAB 1986).

same entities manufacture both stain-resistant fabric coatings and fire-resistant fabric coatings.

We agree with the examining attorney's assessment that consumers familiar with registrant's FABRIC GUARD for fabric protective coatings would be likely to mistakenly believe that applicant's mark FABRIC FIRE GARD identifies a fire resistant product line originating from registrant.[5] The similarity between the goods weighs in favor of finding a likelihood of confusion.

Applicant argues that the relevant purchasers of the goods are sophisticated. Neither applicant's nor registrant's identification of goods is so limited. Further, as evidenced by the information on applicant's website, its product may be used by do-it-yourself consumers. Even assuming arguendo that purchases are carefully made, we find that the substantial similarity of the marks and the similarity between the goods clearly outweigh any sophisticated purchasing decision. See 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.

[5] In this connection it is interesting to note that applicant uses both FABRIC FIRE GARD and FABRIC GARD in connection with its product. On its website, applicant indicates that its FABRIC FIRE GARD brand product is the retail version of its FABRIC GARD brand product.

1990) [similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods]. The fact that consumers may be careful in their purchases does not necessarily mean that they are sophisticated in the field of trademarks or immune from source confusion. See In re Research Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are not infallible."].

The two declarations of William Kish, applicant's president, do not compel a different result in this case. In addition to his statements pertaining to other du Pont factors, Mr. Kish states that there have been no instances of actual confusion between applicant's and registrant's marks. Based on the use dates set forth in the application and registration, there have been a few years of contemporaneous use; however, there is no additional evidence relating to the extent of the respective uses. Thus, we are unable to ascertain whether there has been a meaningful opportunity for confusion to occur in the marketplace. The applicable test under Section 2(d) is, in any event, likelihood of confusion. Giant Food, Inc. v.

Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). Accordingly, this factor is neutral.

We conclude that purchasers familiar with registrant's "fabric protective coating" sold under its mark FABRIC GUARD would be likely to believe, upon encountering applicant's mark FABRIC FIRE GARD for "water-based fire-retardants, and such fire-retardants especially for absorptive application to fabrics and textiles and cloth, paper, wood and other porous materials including on or in couches, mattresses, carpets, drapes, camping equipment, homes, autos, boats, and recreational vehicles," that the goods originate with or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register in each class is affirmed.