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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ETC of Henderson

Serial No. 76609003

Peter N. Lalos of Stevens, Davis, Miller & Mosher, LLP for
ETC of Henderson.

Julie A. Watson, Trademark Examining Attorney, Law Office
109 (Dan Vavonese, Managing Attorney).

Before Seeherman, Walters, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 27, 2004, ETC of Henderson¹ (applicant)
applied to register the mark JAGUAR (standard character
form) on the Principal Register for goods identified as
"accessories for floor cleaning machines, namely floor
cleaning pads" in Class 7.²

¹ Applicant is sometimes referred to as ETC of Henderson, Inc.
We note that applicant is identified as a North Carolina
corporation.

² Serial No. 76609003. The application contains an allegation of
a date of first use and a date of first use in commerce of August

The examining attorney³ has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a registration for the mark JAGUAR, in typed or standard character form, for "electric vacuum cleaners" in Class 7.⁴ When the refusal was made final, this appeal and a request for reconsideration followed.

The examining attorney argues that the marks are identical and that the goods are highly related because "[s]ingle registrants use the same mark on floor cleaning machines and/or floor cleaning pads on the one hand and on vacuum cleaners on the other hand." Brief at unnumbered p. 5.

Applicant agrees that "the marks in issue are identical" (Reply Brief at 1), but argues that while "a manufacturer of electric vacuum machines may also manufacture electric floor polishing machines and the like, such a manufacturer is not likely to produce and sell a highly competitive, consumable commodity product such as a

31, 1993. Applicant amended the application to make it clear that it was seeking registration for the mark in standard character form instead of in stylized form.

³ The current examining attorney was not the original examining attorney in the case.

⁴ Registration No. 2953206 issued May 17, 2005.

floor pad." Brief at 3. Further, applicant maintains that:

Such cleaners essentially consist of a metal housing, probably a casting, and a suction pump, an electric motor and certain operating devices mounted on such housing. Such cleaners are produced by a group of suppliers separate from pad producing companies, sold either through a set of distributors different from cleaning pad distributors or directly to commercial and domestic consumers, and used by such commercial and domestic consumers.

Brief at 3.⁵

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we

⁵ With its brief, applicant has attached several exhibits for the first time in the prosecution of this application. This untimely evidence will not be further considered. 37 CFR § 2.142(d); *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence"). Similarly, applicant's reference to specific third-party registrations in its reply brief (footnote 3) is not only untimely but, even if it were timely (See applicant's general reference to other registrations in its request for reconsideration at 3), a simple reference to a registration is not adequate to make the registration of record. *In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998) ("The Board does not take judicial notice of third-party registrations, and the mere listing of them is insufficient to make them of record").

must 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).

Regarding the first factor, the similarity of the marks, we note that there is no dispute but that the marks are identical. The fact that the marks are identical results in this factor strongly supporting the examining attorney's position. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("Without a doubt the word portion of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant"). Furthermore, "even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source." *Id.* at 1689. *See also Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981) (When both parties are using or intend to use the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as

close as in the situation where the marks are not identical or strikingly similar").

Next, we look to see whether the goods in this case are related. Applicant's goods are floor cleaning pads and registrant's goods are electric vacuum cleaners.

In order to find that there is a likelihood of confusion, it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources.

McDonald's Corp. v. McKinley, 13 USPQ2d 1895, 1898 (TTAB 1989). See also *In re Opus One Inc.*, 60 USPQ2d 1812, 1814-15 (TTAB 2001).

It is clear that applicant's and registrant's goods are not identical. However, the examining attorney has submitted evidence that suggests that there is a relationship between these goods. See, e.g., Registration No. 0940356⁶ ("domestic type vacuum cleaners ... polishing pads"); No. 1279489 ("dust mops and cleaning and buffing pads" and "vacuum cleaners"); No. 2511561 ("vacuum cleaners ... floor finishing machines, attachments and accessories sold therewith, namely, sanding disks, pads, pad

⁶ The examining attorney attached three other similar registrations from the owner of this registration.

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holders..."); No. 3240257 ("electric vacuum cleaners... pads for carpet and floor scrubbers and burnishers"); No. 3091441 ("vacuum cleaners ... pads for floor polishing machines"); and No. 3144824 ("vacuum cleaners ... steel wool pads sold with the machines [buffers, burnishers, etc.]"). These registrations support the examining attorney's argument that the goods of applicant and registrant are related inasmuch as they are likely to be marketed under the same entity's trademark. *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 goods 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). This evidence also rebuts applicant's argument that the differences in the nature of the goods, e.g., electric, permanent vacuum cleaners as opposed to disposable, "low margin, competitively priced pads," results in non-related goods. Reply Brief at 1.

The examining attorney also submitted evidence to show that the vacuum cleaners and floor cleaning machines were

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related. See, e.g., Registration No. 1587455 ("floor cleaning machines ... industrial vacuum cleaners"); No. 2748976 ("combination floor cleaning machines, namely, combination floor scrubbers and vacuum cleaners"); No. 3125030 ("vacuum cleaners ... floor scrubbing machines"); and No. 2863724 ("vacuum cleaners, carpet extractors, bare floor cleaning machines, carpet shampooers, floor polishers"). The relationship between vacuum cleaners and other floor cleaning machines⁷ supports the examining attorney's position that the pads for these floor cleaning machines will likely be viewed as goods that are related to vacuum cleaners.

We add that we must consider the goods as they are identified in the application's and registration's identifications of goods. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Therefore, even if applicant's evidence on this point were of record, we would not limit our consideration of the goods to applicant's or registrant's current specific types

⁷ Vacuum cleaners are also referred to as "floor cleaning machines." See Registration No. 2898228 ("floor cleaning machine, namely a cordless vacuum cleaner") and No. 2823537 ("carpet and floor cleaning machines, namely, commercial wet/dry vacuums").

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of goods or their current marketing practices. Rather, we must consider that registrant is using its mark on all types of electric vacuum cleaners and similarly that applicant's goods encompass all types of floor cleaning pads for floor cleaning machines. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) ("[W]here the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers"). *See also In re Sawyer of Napa Inc.*, 222 USPQ 923, 924 (TTAB 1983) ("Moreover, neither the application nor the registration limits the channels of trade through which the goods move. In the absence of such a limitation we must assume that the goods move through the normal channels for such goods, and that with respect to these particular goods, these channels are the same").

Applying these principles, most of applicant's arguments are not relevant. Applicant's goods are not limited to goods sold to companies in the "commercial

cleaning and janitorial trades." Brief at 4. Indeed, it is not clear why vacuum cleaners and floor cleaning pads would not be purchased by both commercial and ordinary purchasers. Homeowners interested in maintaining their floors could use floor cleaning machines and therefore be in the market for floor cleaning pads as well as vacuum cleaners. In addition, nothing restricts the sale of registrant's goods to "mass retail accounts" anymore than applicant's goods are limited to "commercial cleaning and janitorial trades." Brief at 5. Without any restrictions in the identification of goods, we have no reason to conclude that electric vacuum cleaners would not be purchased by both commercial and consumer purchasers. Regardless of how applicant or registrant is currently marketing its goods, the purchasers of vacuum cleaners would overlap with the purchasers of floor cleaning pads for floor cleaning machines.

While we certainly do not hold that the purchasers of either of these goods are limited to sophisticated purchasers, we add that even were we to assume this to be a fact, these purchasers are still subject to being confused when identical marks are used on vacuum cleaners and floor cleaning pads. *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999) ("We recognize applicant's

attorney's point that its software is expensive and that purchasers of it are likely to be sophisticated. Suffice it to say that no evidence in support of these assertions was submitted. In any event, even careful purchasers are not immune from source confusion"). A business purchaser who is familiar with JAGUAR vacuum cleaners is likely to assume that JAGUAR floor cleaning pads in some fashion emanate from the source of the vacuum cleaners.

When we consider that the marks in this case are identical (JAGUAR) and the goods, vacuum cleaners and floor cleaning pads, are related, we conclude that there is a likelihood of confusion.

We also note that in its request for reconsideration (p. 3), applicant refers to a prior registration that lapsed. Such an expired registration does not support applicant's position that confusion is not likely. As the examining attorney has pointed out, "there was never any coexistence of these two marks on the Register." Brief at unnumbered p.7, n.3. See also *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006) ("To begin with, the fact that the cited mark and MARCHE NOIR at one time coexisted on the register does not prove that they coexisted during that time without confusion in the marketplace. Further, our

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determination of likelihood of confusion must be based on the facts and record before us").

We add that to the extent that we had any doubts about the likelihood of confusion in this case, we have resolved them in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act is affirmed.