

**THIS OPINION IS NOT A  
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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 Mannington Carpets, Inc.

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Serial No. 76617521

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Sherry H. Flax of Saul Ewing LLP for Mannington Carpets, Inc.

Martha Santomartino, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

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Before Seeherman, Quinn and Hairston, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Mannington Carpets, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register ART WITH A HEART (in standard characters) for "charitable fundraising services" (Class 36).<sup>1</sup> Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15

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<sup>1</sup> Application Serial No.76617521, filed October 21, 2004, and asserting first use and first use in commerce as early as November 1, 2003.

U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark ART WITH A HEART and design, as shown below, previously registered for "providing visual art classes to underserved and disadvantaged people,"<sup>2</sup> that, when used in connection with applicant's services, it is likely to cause confusion or mistake or to deceive.<sup>3</sup>



We affirm the refusal of registration.

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*

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<sup>2</sup> Registration No. 3078119, issued April 11, 2006.

<sup>3</sup> In the first Office action the Examining Attorney refused registration on the basis of Registration, No. 1894068, owned by a third party for ART FROM THE HEART for "paintings" (Class 16) and "charitable fund raising services" (Class 36), and advised applicant of two pending applications that might be cited against applicant's application if they were to mature into registrations. One was the application that did eventually mature into the registration that forms the basis for the current refusal. The second application, Serial No. 78331266, for BIG FEST ART WITH A HEART and design for "event management, conducting art exhibits," was abandoned. The Examining Attorney later withdrew the refusal based on Registration 1804068, presumably because when this registration was renewed the Class 36 services (charitable fund raising services) were deleted from it, and it is now only for "paintings."

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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).

We turn first to a consideration of the marks. Applicant has not discussed the factor of the similarity or dissimilarity of the marks in its brief. Nor did applicant make any comment about this factor in its reply brief, even though the Examining Attorney stated in her brief that "applicant does not even dispute the fact that the marks themselves are virtually identical in appearance, sound and meaning," and "it may be assumed from the record, therefore, and from applicant's lack of any argument to the contrary, that applicant concedes that the marks are indeed virtually identical from a likelihood of confusion standpoint". Brief, p. 4.

We agree with the Examining Attorney that the marks are virtually identical. In terms of appearance, the type font and the design element in the registrant's mark do not serve to distinguish them. Because applicant seeks to

register its mark in standard character format, it could use its mark in the same type font in which the registrant's mark is displayed. The design element of the heart with paint brush design in the registrant's mark merely reinforces the words in the mark. We further note that, as shown in the specimens submitted with applicant's application, applicant's mark is accompanied by a heart design. Further, the marks are identical in pronunciation, connotation and commercial impression. This factor strongly favors a finding of likelihood of confusion, as the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion. In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001). If the marks are the same or almost so, as is the case here, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion. In re Corcordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

We next consider the services and the channels of trade. Applicant argues that the services are different, and that, while applicant's service of raising charitable

funds "may involve the sale of works of art," brief p. 1, it has nothing whatsoever to do with art classes.

Applicant also contends that the consumers/channels of trade of the services are different, asserting that applicant's consumers are institutions and individuals who make donations, while the registrant's consumers would be disadvantaged or underserved people who take art classes. Thus, applicant asserts that the Examining Attorney has erroneously compared the consumers of the registrant's services with the putative beneficiaries of applicant's services, rather than its consumers.

The Examining Attorney does not claim that applicant's charitable fund raising services and the registrant's service of providing visual art classes is the same. However, she points out that it is not necessary that the goods or services of applicant and the registrant be similar 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 or services 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 originate from the same producer. See In

re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

It is the Examining Attorney's position that the Office has shown the necessary degree of relatedness because "it is likely that the relevant consumer would believe that applicant's charitable fundraising was to benefit registrant's visual art classes for underserved and disadvantaged people." Office action mailed March 7, 2007. Essentially, she contends that the registrant's art classes for the underserved and disadvantaged would be viewed as a charitable cause, and that applicant's charitable fund raising would be viewed as being for the benefit of that cause.

Applicant's charitable fund raising services essentially have two groups of consumers: 1) the charitable organizations themselves for which applicant raises money, such as organizations that would directly engage applicant to perform fund raising services for them or to which applicant would give funds that applicant had collected for their benefit; and 2) the people who would make donations to those charitable organizations as a result of applicant's fund raising efforts. Neither of these groups is likely to be the same consumers of the registrant's services, since those services are directed to people who

are underserved and disadvantaged. On the other hand, the fact that applicant's and the registrant's "consumers" do not directly overlap does not mean that one group will have no contact with the other's mark or services, such that, as is the case when goods are sold in separate channels of trade, there is no opportunity for confusion to occur. The consumers for charitable fund raising services are members of the general public who donate to charity, in effect, the public at large. They also may be aware of programs that help underserved and disadvantaged people, particularly because of the public-service/charitable aspect of such a service. The Examining Attorney provides the example of a person who

volunteers at the registrant's ART WITH A HEART program for the disadvantaged and underserved, or sees literature for such program, or attends a fund raiser for such program, and then one day comes across ART WITH A HEART charitable fund raisers.

Brief, p. 9.

Thus, even though the channels of trade and the direct consumers of the services are different, the consumers of applicant's charitable fund raising services are likely to encounter both services under conditions that could, because of the similarity of the marks, give rise to the

mistaken belief that they are associated with or sponsored by the same entity.

We note applicant's argument that "there are countless charitable organizations that provide assistance to other causes [than those identified in the cited registration], such as environmental, conservationist, museums, performing arts, medical research, leadership, religious, and so on, to which Applicant might provide its fundraising services." Brief, p. 2. This argument is not persuasive. Applicant has identified its services as "charitable fundraising services," without limitation as to any particular type of charity. Accordingly, we must construe the identification to include any type of charity, including one that provides art classes to underserved and disadvantaged people.

Although not discussed by applicant or the Examining Attorney, we also consider the du Pont factor of the conditions of purchase to favor a finding of likelihood of confusion. As noted, the consumers of applicant's services include anyone who donates to charities. Charitable fundraising may involve not only soliciting large donations from wealthy individuals and foundations, but door-to-door requests in which individuals are requested to give small amounts of money. The latter group may not study the promotional materials, or exercise great deliberation or

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care in deciding to make their donation. Rather, they may simply hear that the solicitor is doing ART WITH A HEART fund raising and assume that the fund raising is connected with or on behalf of the registrant's service of providing art classes to the underserved or disadvantaged.

In making our decision we have considered the two third-party registrations submitted by applicant, namely, Registration No. 2691000 for ART FROM THE HEART for "education in the field of music, dance, singing and acting" and Registration No. 2737117 for ART OF THE HEART for "educational programs, namely, conducting etiquette classes for children." Applicant argues that these registrations "indicate the willingness of the USPTO to register similar marks for similar services." Brief, p. 2. We cannot conclude from these two registrations, however, that there can be no likelihood of confusion between applicant's and the registrant's marks. Aside from the fact that two registrations hardly shows a pattern by the Patent and Trademark Office of registering such marks, the subject matter of the third-party educational services, particularly the etiquette classes, is very different from the art classes which are the subject of the registrant's services. We also point out that third-party registrations do not prove that the marks shown therein are in use. See

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In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). Therefore we cannot say that the public has been so conditioned to seeing third-party marks that rhyme ART and HEART that they would distinguish applicant's and the registrant's mark based on the differences in the services. We recognize that third-party registrations can be used in the manner of dictionary definitions, to show that a term has a significance in a particular industry. Here, we do not need these registrations to show that ART WITH A HEART for both the registrant's and applicant's services has a suggestive connotation. However, as indicated previously, both marks convey the same suggestive connotation.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is a well-established principle that such doubt must be resolved in favor of the registrant and prior user. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.