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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Viwinco, Inc.

Serial No. 77057102

Michael Leonard of Pepper Hamilton LLP for Viwinco, Inc.

Steven Fine, Trademark Examining Attorney, Law Office 110
(Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Bergsman and Ritchie, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Viwinco, Inc. ("applicant") filed a use-based
application on the Principal Register for the mark VIWINCO,
in standard character form, for the following goods and
services:

Vinyl windows and doors, replacement parts and
accessories, namely, casings, j-channel pocket
fillers, fixes and trimboards, in Class 19; and,

Custom manufacture of windows and doors, replacement
parts and accessories, namely, casings, j-channel
pocket fillers, fixes and trimboards to the order and
specification of others, in Class 40.

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The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the registered mark ViWinTech WINDOWS & DOORS A QUALITY MANUFACTURER OF HIGH PERFORMANCE VINYL WINDOWS & DOORS and design, shown below, for "vinyl windows and doors and parts therefor," in Class 19.¹



Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion

¹ Registration No. 2472326, issued July 24, 2001; Sections 8 and 15 affidavits accepted and acknowledged. Registrant disclaimed the exclusive right to use "Windows & Doors" and "A Quality Manufacturer Of High Performance Windows & Doors."

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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, 29 (CCPA 1976) ("The 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").

A. The similarity or dissimilarity and nature of the goods and services described in the application and registration.

Applicant contends that its vinyl windows and doors are different from the registrant's vinyl windows and doors because applicant's vinyl windows and doors are custom manufactured. "The custom manufacture of anything implies the manufacture of individualized and/or unique goods, thus [they are] incapable of competing with ordinary and common vinyl windows."² However, likelihood of confusion is determined on the basis of the goods and services as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Octocom Systems, Inc. v. Houston*

² Applicant's Brief, p. 13.

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Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

As the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court, explained in *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981):

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this appeal prevent likelihood of confusion. We cannot take such facts into consideration unless set forth in its application.

Likewise, in this case, we must also analyze the similarity or dissimilarity and nature of the goods and services based on the description of the goods and services set forth in the application and the cited registration. In other words, we may not limit applicant's vinyl doors and windows to custom made vinyl doors and windows; rather, the identification must be deemed to include all vinyl

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doors and windows including pre-made as well as custom made doors and windows.

Under this standard, we find that applicant's "vinyl windows and doors, replacement parts and accessories, namely, casings, j-channel pocket fillers, fixes and trimboards" are legally identical to registrant's "vinyl windows and doors and parts therefor."

With respect to applicant's custom manufacturing of windows and doors, it is well recognized that confusion is likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. See, e.g., *Dresser Industries, Inc. v. Safety-Kleen Corp.*, 181 USPQ 726, 729 (TTAB 1974), *aff'd*, 518 F.2d 1399, 186 USPQ 476 (CCPA 1975) (the use of similar marks for cleaning equipment components and cleaning apparatus leasing services is likely to cause confusion); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433, 435 (TTAB 1983) (STEELCARE for refinishing of furniture, office equipment and machinery is likely to cause confusion with STEELCASE for office furniture and accessories); *In re Solar Energy Corp.*, 217 USPQ 744, 745 (TTAB 1983) (manuals for designing solar heating systems are related to solar energy engineering and consulting services).

In this case, there is a clear relationship between vinyl windows and doors and replacement parts therefor, and the custom manufacture of windows and doors and parts therefor, as the service results in the production of the goods.

In addition, we note that applicant, itself, uses the mark at issue to identify vinyl windows and doors and the custom manufacturing of those products. Moreover, the Examining Attorney has submitted three (3) use-based, third-party registrations for windows and/or doors and the custom manufacture of windows and doors as evidence that a single source may use one mark to identify windows and doors and the custom manufacture of those products. Although use-based, third-party registrations are not evidence that the marks shown therein are in commercial use, they have some probative value to the extent that they may serve to suggest that the listed services are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).³ We acknowledge that three such registrations is a

³ The Examining Attorney also submitted a copy of an intent-to-use application and an application based on a foreign application under Section 44(d) of the Trademark Act of 1946. These applications have no probative value because they are not based on use, see *In re Mucky Duck Mustard Co.*, 6 USPQ2d at 1470 n.6,

limited number, but taken together with the other evidence and the nature of the goods and services, they provide further support that applicant's custom manufacture of windows, doors, and replacement parts are closely related to vinyl windows, doors, and parts therefor. Purchasers encountering these goods and services under the same or similar marks may reasonably conclude that they originate from a single source.

In view of the foregoing, we find that applicant's goods are identical to registrant's goods and that applicant's services are closely related to registrant's goods.

B. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Applicant argues that because its vinyl windows and doors are custom manufactured, they are not sold to "mass-market big-box home improvement retail store type[s] found at a local Home Depot," but to the individual purchaser,⁴ and that, on the other hand, the vinyl windows and doors manufactured by the registrant are sold through professional installers.⁵ However, both applicant's and

and because third-party applications are evidence only of the fact that they have been filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992).

⁴ Applicant's Brief, p. 13.

⁵ *Id.*

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registrant's vinyl windows, doors, and parts therefor are identified without any limitations as to the channels of trade or classes of consumers. Likewise, applicant's custom manufacturing of windows, doors, and parts therefor is not restricted as to any channels of trade or classes of consumers. Moreover, as indicated above, applicant's custom manufacture of windows and doors and parts therefor results in the production of those products. Because there are no restrictions in the description of services, applicant's services and the resulting products may be sold to end-users, professional installers, or retailers as may registrant's products. When there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the goods and services move in all channels of trade normal for those goods and services, and that the goods and services are available to all classes of purchasers for the listed goods and services. See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Accordingly, because there are no limitations in either applicant's description of goods and services or registrant's description of goods, we must presume that the goods and services move in the same channels of trade and that they are sold to the same classes of consumers.

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Moreover, specifically with respect to the goods at issue, because the vinyl windows, doors and parts identified in the application and the cited registration are identical, we must presume that the channels of trade and classes of purchasers are the same. See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

Accordingly, there is a presumption that applicant's vinyl windows and doors and custom manufacture of windows and doors and registrant's vinyl windows and doors move in the same channels of trade and are sold to the same classes of purchasers.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated*, 207 USPQ 443, 449 (TTAB 1980).

In addition, in comparing the marks, 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 overall commercial

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impression so that confusion as to the source of the goods and services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Thus, we find that the name ViWinTech is that part of registrant's mark that consumers will remember and use to call for registrant's vinyl windows and doors. In other words,

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ViWinTech, which is the largest word element in the mark, is the dominant portion of the registered mark.

The other elements of the registrant's mark are not as significant because they are descriptive and will not be used or perceived as source indicators. The term "Windows & Doors" is generic for the products, and the phrase "A quality manufacturer of high performance vinyl windows & doors" is a highly descriptive, informational statement. The window design is at the very least highly suggestive of registrant's goods. Moreover, when a mark consists of words and a design, the words are normally given greater weight because they would be used by purchasers to request the goods or services. *In re Dakin's Miniatures Inc.*, 59 USPQ 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). In view of the foregoing, it is the ViWinTech part of the registrant's mark that consumers will remember.

ViWinTech, which is the dominant part of the registrant's mark, and VIWINCO are similar to the extent that they share the same first two syllables VI and WIN, but differ because of the different suffixes "Tech" and CO. However, we find that the similarities outweigh the differences. Both marks suggest "vinyl windows," and therefore have the same connotation. The terms "tech" and

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CO signify the descriptive words "technology" and "company," and do not alter the meaning or commercial impression of the marks. Although the registrant's mark would appear to be derived from the words "vinyl window technology," there is no evidence of third-party use of similar marks. Moreover, even suggestive marks are entitled to protection against the likelihood of confusion, and here applicant's mark has a similar suggestive significance and is used for identical goods and related services. See *Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747, 750 (TTAB 1986) ("there is nothing in our trademark law which prescribes any different protection for suggestive, nondescriptive marks than that which is accorded arbitrary and fanciful marks"); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("the fact that a mark may be somewhat suggestive does not mean that it is a 'weak' mark entitled to a limited scope of protection"). Accordingly, we find that the marks are similar in appearance and pronunciation to the extent that they both begin with the same syllables VI WIN.

As indicated above, the marks also have similar meanings and engender similar commercial impressions: ViWinTech suggests vinyl window technology while VIWINCO suggests vinyl window company.

In view of the foregoing, we find that when the marks are compared in their entireties, they are similar in terms of appearance, sound, meaning and commercial impression.

D. Balancing the factors.

When we consider that the marks are similar, that applicant's goods and registrant's goods are identical, that applicant's services and registrant's goods are closely related, and the presumption that the goods and services move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's mark VIWINCO for vinyl windows and doors and replacement parts and the custom manufacture of those products is likely to cause confusion with the mark ViWinTech WINDOWS & DOORS A QUALITY MANUFACTURER OF HIGH PERFORMANCE VINYL WINDOWS AND DOORS and design for "vinyl windows and doors and parts therefor."

Decision: The refusal to register is affirmed.