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Mailed: November 17, 2005

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re The House Defender, Inc.

Serial No. 78080505

Andrew J. Felser of Andrew J. Felser, P.C. for The House Defender, Inc.

Eugenia K. Martin, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Chapman, Bucher and Walsh, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Applicant filed on August 22, 2001, an application to register on the Principal Register the mark ARTISTIC for goods and services, ultimately amended to read as follows:

"wrought iron products, namely, doors, windows, window guards, window wells, window well grates, fences, railings, and gates" in International Class 6;

"non-metallic building materials, namely, wood doors, vinyl windows, wood fences, wood gates, wood cabinets,

canvas awnings, wood railings, and vinyl siding" in International Class 19;

"mirrors, wrought iron patio furniture" in International Class 20;

"retail store services featuring windows constructed by others; advertising, namely, dissemination of advertising material for others featuring windows constructed by others" in International Class 35; and

"installation services, namely, installation of doors, windows, window guards, window wells, window well grates, fences, railings, gates, carports, cabinets, siding, awnings, gutters and downspouts" in International Class 37.

All five classes of goods and services in the application are based on applicant's assertion of a bona fide intention to use the mark in commerce.

Registration has been refused for all five classes of goods and services applied for by applicant, pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the three previously registered marks listed below:

(1) Registration No. 1949913, issued January 23, 1996, for the mark ARTISTIC DOORS AND WINDOWS ("doors and windows" disclaimed) for "non-metal doors and windows" in International Class 19;<sup>1</sup>

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<sup>1</sup> Registration No. 1949913 issued under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), to Artistic Doors and Windows

(2) Registration No. 2033237, issued January 28, 1997, for the mark ARTISTIC ENCLOSURES ("enclosures" disclaimed) for "pre-manufactured room enclosures composed primarily of non-metallic materials comprising window base, door opening, corner and extension units" in International Class 19;<sup>2</sup> and

(3) Registration No. 2405111, issued November 21, 2000, for the mark ARTISTICA for "furniture" in International Class 20 ("the English translation of 'artistica' is 'artistic'").<sup>3</sup>

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

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(a New Jersey corporation); Section 8 affidavit accepted, Section 15 affidavit acknowledged.

<sup>2</sup> Registration No. 2033237 issued to Edward C. Overberger and was subsequently assigned to Artistic Enclosures, Inc. (a Pennsylvania corporation); Section 8 affidavit accepted, Section 15 affidavit acknowledged.

<sup>3</sup> Registration No. 2405111 issued to Artistica Metal Designs, Inc. (a California corporation).

(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).

Applicant argues as follows (brief, p. 3):

There are ample distinguishing features among the marks and their usage in the marketplace to overcome linguistic similarities and any overlap in the products associated with them. ... While the linguistic similarities are obvious, the Examiner has placed much weight on those similarities while giving little weight to the other *Du Pont* factors, particularly those involving usage in the marketplace. In addition, the Examiner has cited no registrations or applications that are likely to cause confusion with the Applicant's mark in the two service classifications.

Applicant then argues the following du Pont factors:

(i) differences in the trade channels, specifically the cited registrants sell through authorized retailers, or directly from the manufacturer, whereas applicant sells its products directly to customers; (ii) the purchase of these products is not on impulse but is by sophisticated consumers who are selective in their planning to purchase

such goods; (iii) the prevalence of "ARTISTIC" as a mark for various goods and services, making it a weak mark; and (iv) the potential for confusion is de minimus.

The Examining Attorney argues that applicant's mark is similar to each of the marks in the three cited registrations as "ARTISTIC" is the dominant feature of the two cited marks which also include generic terms for the goods ("windows and doors" and "enclosures"); that because the third cited registration includes a statement that "artistica" translates as "artistic," it is similar to applicant's mark under the doctrine of foreign equivalents; that applicant's goods (i.e., wrought iron doors and windows, wood doors and windows, and wrought iron patio furniture) are encompassed within the broader identifications of goods in the cited registrations (i.e., non-metal doors and windows, furniture); that applicant's identified doors and windows could be used in the registrant's pre-manufactured room enclosures with non-metallic window base and door opening; that there are no limitations in any of the identifications of goods and services restricting the channels of trade and/or purchasers; that even if some of the involved goods and services are purchased with some degree of care, such purchasers are not immune from source confusion; that the

third-party registrations referenced by applicant are of little weight as applicant acknowledges that they are not for similar goods and/or services to those involved herein; and that doubt on the issue of likelihood of confusion is resolved in favor of the registrant(s).

We turn first to a consideration of applicant's goods and services and the cited registrants' goods. It is well settled that goods and/or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and/or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods and/or services. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Confusion in trade can occur from the use of similar marks for products on the one hand and for services involving those products on the other hand. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025

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(Fed. Cir. 1988); Safety-Klean Corporation v. Dresser Industries, Inc., 518 F.2d 1399, 186 USPQ 476 (CCPA 1975); In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988); and Steelcase Inc. v. Steelcare Inc., 219 USPQ 433 (TTAB 1983).

Of course, it has been repeatedly held that in determining the registrability of a mark, this Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration(s). See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, applicant asserts that it has a bona fide intention to offer for sale, inter alia, "wrought iron doors and windows," "wrought iron patio furniture," "wood doors," "vinyl windows," "retail store services featuring windows," and "installation of doors, windows." The three cited registrations cover "non-metal doors and windows," "furniture," and "pre-manufactured room enclosures composed primarily of non-metallic materials comprising window base, door opening,..." Thus, applicant's identified goods are generally encompassed in the broader identifications in the

cited registrations. Applicant acknowledges that there is "some overlap of products." (Brief, p. 1.) Applicant's services of retail store featuring windows and installation of windows and doors are clearly related to the goods in the cited registration covering windows and doors.

Based on the identifications, we find that applicant's goods and services are closely related to the "non-metal doors and windows" and the "furniture" in two of the cited registrations; and that applicant's goods are related to the "pre-manufactured room enclosures..." in the third cited registration. See *Hewlett-Packard Company v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services"); and *Recot Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.").

Applicant's arguments regarding the marketplace realities of channels of trade and/or purchasers are not persuasive because neither the cited registrants' nor applicant's identifications of goods/services are limited or restricted as to any particular channels of trade and/or purchasers. That is, any entity (from construction companies to a homeowner) seeking to purchase windows and doors, and/or applicant's services relating thereto, or patio furniture, could potentially seek applicant's goods and services or the cited registrants' goods. Therefore, we must presume in this administrative proceeding that the involved goods and services are offered through all the normal channels of trade to all the usual classes of purchasers. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, supra; and *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, supra.

Applicant's evidence (i.e., contracts to purchase its goods) indicates that its goods and services would involve some degree of care and sophistication in purchasing. However, assuming sophistication of and care taken by the purchasers of applicant's goods and services, "even careful purchasers are not immune from source confusion." In re *Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999). See also, *Wincharger Corporation v. Rinco, Inc.*, 297 F.2d

261, 132 USPQ 289 (CCPA 1962); and In re Decombe, 9 USPQ2d 1812 (TTAB 1988). That is, even sophisticated purchasers of these related goods and services are likely to believe that they emanate from the same source, when offered under similar marks. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840, 1841-1842 (Fed. Cir. 1990); and Aries Systems Corp. v. World Book Inc., 23 USPQ2d 1742, footnote 17 (TTAB 1992).

Here we find that the involved goods and services are closely related or related, would be sold through the same or overlapping channels of trade, and could be sold to similar classes of purchasers, so that if sold or marketed under similar marks, confusion as to source by consumers would be likely.

Turning now to the marks, when analyzing applicant's mark and each of the registered marks, it is not improper to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. See In re Dixie Restaurants Inc., supra; In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and In re Appetito Provisions Co. Inc., 3 USPQ2d 1553 (TTAB 1987).

Applicant's mark is ARTISTIC. The cited registered marks are ARTISTIC DOORS AND WINDOWS, ARTISTIC ENCLOSURES

and ARTISTICA. The first two registrations include disclaimed generic terms for the respective goods and the latter registration includes a translation of the word "artistica" as "artistic." The secondary terms "doors and windows" and "enclosures" do not serve to distinguish the marks in any meaningful way. Thus, we find that applicant's mark and the dominant portion of two of the cited registrant's multiple-word marks is the word "ARTISTIC." That is, purchasers are unlikely to distinguish the marks based on the generic additional wording, when the suggestive word ARTISTIC is identical in those marks.

The registered mark ARTISTICA and applicant's mark ARTISTIC are different by only one letter, the last letter being a soft vowel, which may not be heard when spoken. In terms of meaning or connotation, under the doctrine of foreign equivalents, "artistica" is translated as the English word "artistic." See *In re American Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987).

The differences in each of the cited marks vis-a-vis applicant's mark do not serve to distinguish the marks here in issue. That is, purchasers are unlikely to remember the specific differences between the marks, focusing more on the word ARTISTIC, due to the recollection of the average

purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Purchasers seeing the marks at separate times may not recall these differences between the marks. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992).

We find that, when considered in their entirety, each of the cited registered marks ARTISTIC DOORS AND WINDOWS, ARTISTIC ENCLOSURES and ARTISTICA, on the one hand, and ARTISTIC on the other, are similar in sound, appearance, connotation and commercial impression. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

Applicant argues that "there are many uses and registrations of the mark ARTISTIC, alone and in combination with other words. As such, the word is a weak mark, susceptible of protection when minor variations exist" (brief, p. 5); that in 2002 applicant conducted a

search of www.switchboard.com revealing "100+ businesses with that name" (brief, p. 5);<sup>4</sup> and that there are about 67 live trademark applications "for varied products" "containing some form of the word ARTISTIC" (brief, p. 5). The evidence submitted into the record to support the assertion of 67 live applications is applicant's Exhibit B which is a printout of four pages from the USPTO's TESS records listing the serial number, the registration number (if relevant), the word mark and a live/dead indicator. The list does not include actual marks (i.e., those with design features, stylized lettering), nor any goods or services, nor the register the mark is on, Principal or Supplemental.

It is well settled that the Board does not take judicial notice of third-party applications and registrations. See *In re Wada*, 48 USPQ2d 1689, footnote 2 (TTAB 1998), *aff'd* 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999); and *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974).<sup>5</sup> Rather, the interested party must properly make any third-party application(s) and/or registration(s) of record

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<sup>4</sup> Applicant's attorney's mere reference to a search of ARTISTIC on www.switchboard.com does not make the results of that search of record in this case.

<sup>5</sup> Third-party applications are of extremely limited probative value being evidence only that the application was filed on a particular date, and third-party registrations are generally of limited probative value.

by submitting either a photocopy of the official record itself (that is, each individual third-party application/registration) or a printout from the USPTO database of each one (not a printout of a list -- see *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992)). See generally, TBMP §§1208.02 and 1208.04 (2d ed. rev. 2004).

In addition, whether a term is a weak mark must be determined in the context of the particular line or field of merchandise or services on or in connection with which the mark is used. See *In re Bayuk Cigars Incorporated*, 197 USPQ 627 (TTAB 1977). Thus, while a term may be weak or commonly used in one field, the same word may be unique and possess strong trademark significance in another field.

In any event, as often noted by the Board and the Courts, each case must be decided on its own merits. The determination of registrability of another mark by another Trademark Examining Attorney cannot control the merits in the case now before us. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Even if applicant had shown that the cited marks are weak (which it has not done), such marks are still entitled to protection against registration by a subsequent user of the same or similar mark for the same or related goods or

services. See *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976).

In view of the similarities between applicant's mark and each of the cited registered marks; the closely related, or at least related, goods and services; and the same or overlapping channels of trade and the same purchasers, we find that consumers seeing applicant's mark ARTISTIC, may likely assume that applicant's goods and services emanate from or are associated with or sponsored by the cited registrants.

While we do not have doubt on the question of likelihood of confusion in this case, if there were such doubt, it must be resolved against applicant as the newcomer, as applicant has the opportunity of avoiding confusion, and is obligated to do so. See *TBC Corp. v. Holsa Inc.*, 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997); and *In re Hyper Shoppes (Ohio) Inc.*, supra.

**Decision:** The refusal to register the mark as to all five classes of applicant's goods and services under Section 2(d) of the Trademark Act is affirmed.