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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re XOX Inc.

Serial No. 78095772

Christine Coverdale of Law Offices of Allen Hyman for XOX Inc.

Alice Benmaman, Trademark Examining Attorney, Law Office 116 (Meryl Hershkowitz, Managing Attorney).

Before Seeherman, Chapman and Bottorff, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On November 29, 2001, XOX Inc. (a California corporation) filed an application to register the mark XOX on the Principal Register for goods ultimately amended to read "jewelry 14K and sterling silver jewelry; bracelets, rings being jewelry, watches, pendants, broaches" in International Class 14. The application is based on

applicant's claimed date of first use and first use in commerce of October 20, 1991.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its identified goods, is likely to cause confusion, mistake or deception with the previously registered mark XOXO for "jewelry, watches and other horological instruments, namely clocks"² in International Class 14.

When the refusal was made final, applicant appealed. Briefs have been filed. Applicant did not request an oral hearing.

We affirm the refusal to register. In reaching this conclusion, we have followed the guidance of the Court 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*

¹ Applicant included in its original application a claim that the mark has acquired distinctiveness under Section 2(f) of the Trademark Act based on (i) applicant's assertion of five years substantially exclusive and continuous use, and (ii) applicant's claimed ownership by assignment of Registration No. 1769988, issued May 11, 1993, for the mark XOX for "jewelry 14K and sterling silver; bracelets, rings, watches, pendants, necklaces, broaches." Registration No. 1769988 was cancelled under Section 8 of the Trademark Act in 2000.

The Examining Attorney did not have the claim of ownership of a dead registration and/or the Section 2(f) claims entered into the USPTO's record of the application file.

² Registration No. 2456625, issued June 5, 2001 to XOXO Clothing Co., Inc.

Company, 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 applicant's goods and those of the cited registrant. It is well-settled that the question of likelihood of confusion in Board proceedings regarding the registrability of marks must be determined based on an analysis of the goods or services identified in applicant's application vis-a-vis the goods or services recited in the registration. 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, N. A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, applicant's identification of goods includes the items "jewelry 14K" and "watches" and registrant's identification of goods includes the items "jewelry" and "watches." Thus, the goods are, in part, legally identical, and all of applicant's identified goods

are encompassed within the term "jewelry" in the cited registration.

Likewise, we do not find any differences in the channels of trade or classes of purchasers. We must presume, given the identifications (neither of which is limited), that the goods travel in the same channels of trade, and are purchased by the same classes of purchasers. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, supra.

"When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Turning then to a consideration of the marks, we consider the similarities/dissimilarities between applicant's mark and the cited registered mark in terms of sound, appearance, connotation and commercial impression.

Applicant's mark XOX and the cited registered mark XOXO differ by only one letter -- the additional "O" in registrant's mark. The marks XOX and XOXO would be pronounced as the separate letters, and because they are separate letters, they would be more difficult to remember than words, and thus, more susceptible to confusion or

mistake. The slight difference between the marks may not be recalled by purchasers seeing the marks at separate times. The proper test in determining likelihood of confusion is not on a side-by-side comparison of the marks. Rather the test must be based on the recollection of the average purchaser, who normally retains a general rather than specific impression of the many trademarks encountered; that is, a purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *Spoons Restaurants Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir. June 5, 1992); and *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980).

As to connotation, the Examining Attorney requested in her brief that the Board take judicial notice of an online "Texting Dictionary" definition of "XOXOX" as "hugs and kisses." We decline to take judicial notice of this online dictionary definition. See *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999). However, if we were to view the letters "XO" (in any number of repeated patterns, e.g., "XOXOX") as indicating "hugs and kisses," it would add to the similarity of the involved marks as the connotation would be the same for both marks. Even

assuming that the registered mark consisting of the letters "XOXO" is suggestive in relation to jewelry and thus is not entitled to a broad scope of protection, the protection certainly extends to prohibit registration of applicant's mark, XOX, for identical goods.

We find that the marks are similar in sound, appearance, connotation and overall commercial impression. See *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (confusion found likely in contemporaneous use of TMM and TMS on computer software).

Applicant argues that doubt is to be resolved against the newcomer; and that the cited registrant is the newcomer. First, we have no doubt in this case, and therefore, the legal principles involved where doubt exists do not come into play. Moreover, in an ex parte appeal, when there is doubt as to whether there is a likelihood of confusion, that doubt is resolved in favor of the cited registrant and the application is denied. To whatever extent, if any, applicant is asserting that it has priority of use, that is not an issue in an ex parte appeal. See *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971); and *In re Wilson*, 57 USPQ2d 1863, footnote 9 (TTAB 2001).

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Decision: The refusal to register under Section 2(d)
is affirmed.