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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Flexo Solutions, LLC

Serial No. 78692676

Brian G. Gilpin and Antonia M. Holland of Godfrey & Kahn
for Flexo Solutions, LLC.

W. Wendy Jun, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Quinn, Kuhlke and Cataldo, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Flexo Solutions, LLC to
register the mark SYMMETRY (standard character form) for
"window coverings, namely cellular shades, pleated shades,
roman shades, woven shades, grass shades, roller shades,
soft fabric shades, Y-pleat shades, double shades, and soft
fabric vertical blinds; and rails for supporting window

coverings, namely bracket rails, head rails, intermediate rails, and bottom rails" in International Class 20.¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark SYMMETRY (typed form) for "vinyl windows and doors" in International Class 19² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant, in urging that the refusal be reversed, points to differences between the goods and the trade channels therefor, as well as to the classes of purchasers. Applicant further contends that the purchasers are sophisticated. In an attempt to narrow the scope of protection afforded the cited registration, applicant submitted twenty third-party registrations of the mark SYMMETRY covering a wide range of products.

The examining attorney maintains that the marks are identical and that goods are complementary. In support of the refusal, the examining attorney introduced several

¹ Application Serial No. 78692676, filed August 15, 2005, based on an allegation of a bona fide intention to use the mark in commerce.

² Registration No. 3007603, issued October 18, 2005.

third-party registrations covering both types of the goods involved herein.

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 Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. 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).

The marks are identical in sound, appearance, meaning and overall commercial impression, and applicant does not contend to the contrary. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). To the extent that the marks are suggestive, they suggest the same idea, namely that the goods offer a well-balanced or harmonious arrangement. The identity between the marks weighs heavily in favor of a finding of likelihood of confusion.

Applicant's evidence of twenty third-party registrations is entitled to limited probative value. The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Moreover, the probative value of the third-party registrations is significantly diminished by virtue of the fact that the trademarks cover a wide variety of goods (including breakfast cereal, wines, cologne and tires), none of which are even remotely related to the types of goods involved herein. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992). In any event, even if we were to find, based on applicant's evidence, that registrant's mark is weak and entitled to a narrow scope of protection, the scope is still broad enough to prevent the registration of an identical mark for related goods. See *In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

We next turn to a consideration of the goods. We note, at the outset of considering this du Pont factor, that the greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between applicant's goods and registrant's goods 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, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

Insofar as the goods are concerned, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels

of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefore, and that they would be purchased by all potential buyers thereof. In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Applicant's goods are window coverings whereas registrant's goods include vinyl windows. Although there are specific differences between the goods, we agree with the examining attorney that they are complementary, they are used together, and they are sold at the same types of stores to the same classes of purchasers.

The goods are complementary in the respect that, to state the obvious, window coverings are used for windows. In connection with this du Pont factor, the examining attorney introduced several use-based third-party registrations showing that each entity adopted a single mark for goods of the type involved herein, namely windows and window coverings. Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods and/or services are of a type that may emanate from a

single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Contrary to the gist of applicant's arguments, there are no trade channel restrictions in the identifications of goods. Thus, as indicated above, we must presume that the goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. Thus, we must presume that the respective goods would be sold in home improvement stores directly to the homeowner. We agree with the examining attorney's assessment:

While it may be true that homebuilders, when building new homes, are often entrusted with the responsibility of purchasing the windows, this is not the case in replacement windows, which account for a large percentage of windows sold. Generally, when a homeowner replaces a window, or even during the course of remodeling, homeowners are likely to be intimately involved in the decision making process of purchasing the window. In fact, it would not be unusual for homeowners to be the ultimate decision maker with respect to the type and brand of windows installed.

Applicant also contends that purchasers of the involved goods are sophisticated. Even assuming arguendo that purchases of applicant's and registrant's goods would

involve a deliberate decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective goods, especially when, as we view the present case, the identity of the marks and the similarity between the goods outweigh any sophisticated purchasing decision. See *HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) [similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods]. See also *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are not infallible."].

We conclude that consumers familiar with registrant's windows sold under the mark SYMMETRY would be likely to believe, if they were to encounter applicant's mark SYMMETRY for window coverings, that the goods originated from or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior

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registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.