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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bertch Mfg., Inc.

Serial No. 78777649

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Florentina Blandu, Trademark Examining Attorney, Law Office
117 (Loretta Beck, Managing Attorney).

Before Bucher, Zervas and Walsh, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On December 20, 2005, Bertch Mfg., Inc. ("applicant")
filed an application (Serial No. 78777649) for registration
on the Principal Register of the mark LEGACY (in standard
character form) for goods identified as "cabinets, kitchen
cabinets, bathroom cabinets, vanities, medicine cabinets,
hutches, bookcases, shelves, beds, bedroom furniture,
chests for clothing, desks, wood countertops, appliance
enclosures, TV stands and shelf units, wood range hood
enclosures, cabinet end panels, chopping blocks, casework,

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also known as trim, moldings and paneling, and kitchen accessories, namely knife blocks, bread boards and cutlery dividers, all for household use" in International Class 20. Applicant claimed first use anywhere and first use in commerce of its mark on August 1, 1992.

The examining attorney has finally refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), in view of Registration No. 2596713 for the mark LEGACY (in typed form) for "furniture particularly for use in a library, namely atlas stands, desks, dictionary stands, file drawers, shelves, study carrels, and tables" in International Class 20.¹

Applicant has appealed the final refusal of its application. Both applicant and the examining attorney have filed briefs. The refusal to register is affirmed.

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.

¹ The examining attorney had also refused registration in view of Registration No. 2849037 for the mark LEGACY for "laboratory furniture." In her appeal brief, the examining attorney withdrew her refusal based on this registration. The refusal to register in view of Registration No. 2849037 is therefore moot.

Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, 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).

There is no dispute that the marks are identical. See applicant's brief at p. 5 ("Applicant concedes that its mark is identical to the ... Registrant[']s mark[].") The *du Pont* factor regarding the similarity of the marks therefore is resolved against applicant.

We next consider the *du Pont* factor regarding the similarity or dissimilarity and nature of the goods. We consider those of applicant's and registrant's goods which are identified in both applicant's and registrant's identifications of goods, namely, desks and shelves. In order to affirm a refusal, it is only necessary that we find likelihood of confusion with respect to at least one item in each class of applicant's goods or services; see *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) ("[L]ikelihood of confusion must be found if the public, being familiar with [opposer's] use of MONOPOLY for board games and seeing the

mark on any item that comes within the description of goods set forth by appellant in its application").

Applicant's shelves and desks are limited to household use and registrant's shelves and desks are limited to use in a library. Registrant's use restriction does not specify a type of library, thus, we presume that its goods may be used in any kind of library, including small libraries in offices or businesses. We consider, as we must, that the registration is presumed to encompass all goods of the type described, and that they move in all normal channels of trade and that they are available to all potential customers. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, the terms "desks" and "shelves" encompass a variety of styles, models and materials, including those that may be used in both homes and libraries. Just as the same refrigerator may be used in a home and an office, some shelves and desks may be used in both a home and a library.

We therefore find that certain goods, despite their use restrictions, to be legally identical.² The *du Pont* factor regarding the goods is therefore resolved against applicant.

² The examining attorney essentially takes the position that the uses of the goods are identical because libraries are also in the home. We are not persuaded by this argument; it ignores the essence of registrant's identification of goods.

We now consider the *du Pont* factor regarding the similarity or dissimilarity of established, likely-to-continue trade channels. Applicant argues that while registrant's goods are commercial in nature and sold through commercial trade channels involving libraries, applicant's goods are household in nature and sold through trade channels more closely associated with home furnishings rather than commercial trade channels. Applicant has submitted the declaration of John J. Curtis, President of Curtis Construction Company, Inc., which provides construction services to schools, colleges and churches. Mr. Curtis states in his declaration that library furniture is "distributed by dealers oriented to providing equipment to schools and libraries"; that furniture and furnishings used for libraries have to be especially sturdy and long-lived; and that the channels of trade for household use such as applicant's are different from the channels of trade of library furniture. Applicant also submitted the declaration of Tom Reidy, President of Forest Glen Construction Company which is in the business of home additions and remodeling. Mr. Reidy states, *inter alia*, that residential contractors introduce customers to the products that they represent, in contrast to commercial or institutional contractors who are referred to product

manufacturers by the engineer and architects involved with the projects. Both Mr. Curtis and Mr. Reidy state that applicant's goods are not marketed to buyers of library furniture; and that there is no likelihood of confusion between applicant's goods and those of registrant.

Both Messrs. Curtis' and Reidy's statements are based on the assumption that registrant's goods are offered to large libraries such as those found in universities or central libraries in major metropolitan areas and ignore smaller libraries such as those in small businesses. Their declarations therefore have limited probative value.

Because the same shelves and desks may be used in libraries and homes, we find that the trade channels overlap for such goods. We resolve this *du Pont* factor against applicant.

As to the *du Pont* factor focusing on the conditions under which and buyers to whom sales are made, applicant's arguments are premised on the assumption that purchasers of registrant's goods are "commercial or institutional contractors who are referred to product manufacturers by the engineers and architects involved with the projects." Brief at p. 11. The purchasers of registrant's goods need not be sophisticated and may even be the same individuals, for example, who are purchasing shelving for small offices

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and for their homes. There is no evidence in the record regarding the cost of any shelves or desks, or the other goods in the identifications of goods. Also, applicant's identification of goods does include a common kitchen item, a cutlery divider, which would not be purchased with any heightened care. The *du Pont* factor regarding the conditions under which and buyers to whom sales are made therefore is neutral.

Additionally, applicant states that there have been no instances of actual confusion between the marks. Brief at p. 7. In support, applicant relies on the declaration of Rebecca L. Bertch, applicant's vice president. It is not necessary to show actual confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). On the record before us there is no evidence as to whether there has been any opportunity for confusion to occur - we have no information as to the extent of applicant's use, or that of registrant. Applicant's argument regarding a lack of actual confusion therefore is unpersuasive, and the *du Pont* factor regarding actual confusion is neutral.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's

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arguments relating thereto, we conclude that, when potential purchasers of applicant's and registrant's goods encounter the applied-for and registered marks for their respective goods, they are likely to believe that the sources of these goods are in some way related or associated with one another. As a result, there is a likelihood of confusion.

DECISION: The refusal to register under Section 2(d) of the Trademark Act is affirmed.