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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re True Value Company

Serial Nos. 78774555 and 78777730¹

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Debra Lee, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

Before Zervas, Cataldo and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

True Value Company has appealed from the final refusal of the trademark examining attorney to register (i) the mark FOUR SEASONS COURTYARD (Serial No. 78774555, in standard character form); and (ii) the mark

¹ On January 24, 2008, the Board granted the examining attorney's motion to consolidate the appeals in application Serial Nos. 78774555 and 78777730.



(Serial No. 78777730),² both on the Principal Register and both for goods ultimately identified as "portable propane heaters and kerosene heaters for home use; low voltage electric lighting fixtures and solar powered lighting fixtures" in International Class 11.

The examining attorney has refused registration of both applications pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's marks so resembles the following two previously registered marks as to be likely to cause confusion or mistake, or to deceive:

(a) Registration No. 2653916 (issued November 26, 2002 to International Development Corporation) for the mark FOUR SEASONS SOLAR LIGHT (in typed form) for "solar powered lighting fixtures for domestic use" in International Class 11, with SOLAR LIGHT disclaimed; and

(b) Registration No. 1468188 (issued September 8, 1987 to Seasons-4, Inc.; renewed November 29, 2007) for the mark

² Both application Serial Nos. 78774555 and 78777730 were filed on December 21, 2005, and claim a bona fide intent to use the mark in commerce under Trademark Act § 1(b), 15 U.S.C. § 1051(b).



for "gas and electric heaters, and air conditioners, and air and water chillers for commercial, industrial and supermarket use and parts therefor" in International Class 11.

When the refusals were made final, applicant filed these appeals and requested reconsideration. The examining attorney denied the requests for reconsideration and the appeals were resumed. Both applicant and the examining attorney have filed briefs. Upon careful consideration of the arguments advanced by applicant and the examining attorney, we conclude that both of applicant's marks are likely to be confused with both of the cited marks and affirm the refusals to register.

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

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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).

The Goods

We consider the *du Pont* factor regarding the similarity or dissimilarity and nature of the goods as described in the applications and registrations, beginning with the FOUR SEASONS SOLAR LIGHT registration. Registrant's goods are "solar powered lighting fixtures for domestic use," and applicant's "solar powered lighting fixtures" include "solar powered lighting fixtures for domestic use." Thus, with regard to this registration, we consider the goods to be in part identical.

As for the SEASONS-4 and design registration, applicant and the examining attorney disagree on the scope of registrant's identification of goods. According to applicant, the phrase "for commercial, industrial and supermarket use" applies to each of the items listed before this phrase, namely "gas and electric heaters, and air conditioners, and air and water chillers." The examining attorney disagrees, arguing that the phrase "for commercial, industrial and supermarket use" applies only to

"air and water chillers." In support of its argument, applicant has submitted several of registrant's web pages which indicate that its goods, including its heaters and air conditioners, are for commercial, industrial and supermarket use, but are silent regarding other uses. We consider the goods as they are identified in the identification of goods in the registration and not as described in applicant's evidence. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 515 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("[T]he identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issue"). Applicant may not restrict the scope of registrant's identification of goods by extrinsic evidence. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763 (TTAB 1986). Thus, we do not further consider applicant's argument regarding actual use of the mark on particular goods.

We do consider that it is not necessary that the goods be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. Rather, it is sufficient for purposes herein that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would

or could be encountered by the same persons under circumstances that could because of the similarity of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). The examining attorney has submitted evidence which establishes that gas heaters for home use, which includes portable propane heaters, are related to gas heaters for commercial or industrial use.³ Specifically, the examining attorney has submitted with her denial of applicant's request for reconsideration several webpages from manufacturers and distributors of heaters that offer both home gas heaters on one hand and commercial or industrial gas heaters on the other. Some of the webpages demonstrate that both home and commercial and/or industrial heaters are sold under the same mark. One webpage demonstrates that certain heaters may be used either in the home or in commercial spaces. See webpage from amazon.com offers a "Dayton U37 Electric Convection Heater" stating, "Warm up any space in your home or workplace with the Dayton U37 portable electric convection heater. With two heat settings, this high-performance unit

³ Applicant maintains that this evidence is de minimis. We disagree - the evidence of record is sufficient to establish a

provides rapid warming that [i]s perfect for supplementary garage or shop heating as well as primary heating for areas under 200 square feet." In view of this evidence, we find that even if registrant's goods are limited to "industrial, commercial and supermarket use," as applicant contends, the examining attorney has established that the goods are related to each other. Of course, if they are not so limited, applicant's goods are identical in part to registrant's goods because registrant's "gas heaters" would encompass portable propane heaters for home use.

The *du Pont* factor regarding the goods is resolved in favor of finding a likelihood of confusion in connection with both registrations.

Trade Channels

As for the *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels, we agree with the examining attorney that applicant's trade channels are the same as or similar to registrants' trade channels. First, with respect to the trade channels for the FOUR SEASONS SOLAR LIGHT registration, because applicant's and registrant's goods are in part identical, the trade channels are also in part identical. With respect to the trade channels for the

relationship between applicant's and registrant's goods.

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SEASONS-4 registration, even if we assume that all of registrant's goods are limited to commercial, industrial and supermarket uses, we find that the trade channels overlap. The examining attorney's evidence, although not extensive, sufficiently establishes that some heaters may be used in both the home and in commercial spaces, and that the same retailers sell home, commercial and industrial heaters. See webpages of record from gasoutdoorpatioheaters.com, northstarflameless.com, desalint.com, schaefer.com and air-n-water.com.

The *du Pont* factor regarding trade channels hence is resolved in favor of finding a likelihood of confusion in connection with both registrations.

The Marks

Turning then to a consideration of the marks, we must determine whether applicant's marks and registrants' marks, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Although the marks must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant

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feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, 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 commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Finally, when marks appear on identical goods, the degree of similarity necessary to support a conclusion of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 824, 23 USPQ2d 1698 (Fed. Cir. 1992).

Registration No. 2653916 - FOUR SEASONS SOLAR LIGHT

FOUR SEASONS is the portion of registrant's mark that conveys the strongest impression because SOLAR LIGHT is merely descriptive or even generic for registrant's goods. While SOLAR LIGHT is not ignored, the fact is, that consumers are more likely to rely on the nondescriptive portion of the mark, that is, the words FOUR SEASONS, as an

indication of source. See *In re National Data Corp.*, *supra* at 751 ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark"). As such, FOUR SEASONS is the dominant term in registrant's mark.

FOUR SEASONS is also the dominant portion of applicant's *design* mark. COURTYARD is visually less prominent, appearing in much smaller lettering than FOUR SEASONS and under FOUR SEASONS. Additionally, it is the wording FOUR SEASONS itself, rather than the design in the mark, that is more likely to have a greater impact on purchasers and be remembered by them. See *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"). The word portion of a composite word and design mark is generally accorded greater weight because it would be used to request the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). This is particularly true where, as here, the design element does not significantly add to or change the commercial impression created by the wording

FOUR SEASONS.⁴ In fact, applicant's design, which is a representation of the four seasons of a year, although more prominent than the wording in the mark, merely serves to reinforce the meaning and commercial impression conveyed by FOUR SEASONS.

Similarly, in applicant's word mark, FOUR SEASONS dominates over COURTYARD. As the examining attorney contends at unnumbered p. 6 of her brief, the connotation of COURTYARD is that the goods are intended for outdoor use, such as in a courtyard, or that of a COURTYARD line of FOUR SEASONS brand goods. Thus, we give greater weight to the FOUR SEASONS component of applicant's mark.

When we compare applicant's two marks with registrant's mark in their entireties, giving appropriate weight to the features thereof, we find that applicant's marks are highly similar in sound, connotation and overall commercial impression to registrant's FOUR SEASONS SOLAR LIGHT mark due to their shared term FOUR SEASONS, and that any differences in the marks are far outweighed by the similarities in the marks.

⁴ Applicant has pointed out that applicant's mark displays partial images while registrant's mark displays complete images of the items depicted in the marks. This distinction is of no moment because consumers will not make a side by side comparison

Registration No. 1468188 - SEASONS-4 AND DESIGN

Much of the foregoing also holds true for the SEASONS-4 mark. The word portion of this mark is the dominant term of registrant's mark because it is the term that consumers will use to call for the goods. SEASONS-4 certainly is a reference to the four seasons of the year and consumers would perceive it as such. To the extent there is any ambiguity, the design component of the mark, which includes depictions of the sun, a snowflake, a leaf and a flower, focuses the consumer on the "four seasons" connotation of the mark. We point out too that both marks include depictions of the exact same four elements; flower, sun, snowflake and leaf. In view of these similarities in the marks, we find that applicant's marks taken as a whole are similar to registrant's SEASONS-4 mark taken as a whole in appearance, connotation and commercial impression.⁵

We find, therefore, that when applicant's marks and the cited SEASONS-4 mark are considered in their entirety, they are similar in sound, appearance, connotation, and commercial impression.

of the marks and will not likely recall these subtle differences in the marks.

⁵ Applicant's argument regarding "reverse combinations of the same words" is not persuasive because FOUR SEASONS and SEASONS-4 do not create distinctly different commercial impressions. The connotation of applicant's marks to the consumer is not "a patio

Third Party Uses and the Strength of Registrants' Marks

In support of its contention that FOUR SEASONS is "diluted" and "not strong," applicant has introduced into the record numerous U.S. registrations for marks containing the term FOUR SEASONS.⁶ However, "third-party applications and registrations are not evidence that the marks shown therein are in use, or that the public is familiar with them." *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007). Also, most of the registrations are for goods which are unrelated to registrants' goods. Thus, such registrations have limited probative value.

Applicant has also made of record hundreds of pages from what appears to be a trademark search report. This document contains listings of federal and state trademark registrations and information from a variety of sources such as "Name Protect," "Dun & Bradstreet" and "US Business Directory." Trademark search reports from a third party have limited probative value. However, even if we were to consider the search report, we would not be persuaded that third parties are using FOUR SEASONS or that registrants' marks are weak. Specifically, the federal and state

for use all year round" but rather is of an outdoor line of FOUR SEASONS brand goods.

⁶ We do not consider those registrations which are for dissimilar marks, e.g., the registration for SEASONMAKER.

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registrations in the search report do not establish use of a trademark and therefore have limited probative value. *Faultless Starch Co. v. Sales Producers Assoc., Inc.*, 530 F.2d 1400, 189 USPQ 141 (CCPA 1976). So do the listings of marks and business names; alone, they do not reveal the extent of the use made by the listed third-party businesses; some of the businesses may never have gotten off the ground, or may have gone out of business; and some of the businesses may be small enterprises, in remote locations, that have affected only a minuscule portion of the general purchasing public for the goods involved in this appeal. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559 (TTAB 1996); *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). With regards to the remaining information in the search reports such as the Internet addresses and webpages, they too have limited probative value because there is no evidence that the websites are still active and because many of the products or services which are the subjects of the webpages are unrelated to those set forth in applicant's and registrants' identifications of goods.

In view of the foregoing, we find that applicant has not established that registrants' marks are weak or that FOUR SEASONS is commonly used by third parties for similar goods and/or services. To the extent that the registered marks suggest a characteristic or feature of the identified goods, namely, that they are suitable for outdoor use in all four seasons, the scope of protection to be afforded such marks is sufficient to prevent the registration of highly similar marks for goods that are identical in part or otherwise related.

Conclusion

Upon consideration of the relevant *du Pont* factors discussed above, as well as the evidence of record and the arguments of the examining attorney and applicant, we conclude that when purchasers who are familiar with registrants' marks for its claimed goods encounter applicant's similar marks on related or partially identical goods, they are likely to be confused. Also, to the extent that we have any doubts, we have resolved them, as we must, in favor of the prior registrants. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

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Decision: The refusals to register under Section 2(d) of the Trademark Act are affirmed for both applications.