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TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Maax Canada Inc.

Application No. 78873141

George A. Pelletier, Jr., Cantor Colburn LLP;¹ Audra Kemp, Collen IP Intellectual Property Law, PC (on the brief) for applicant.

James W. MacFarlane, Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

Before Seeherman, Zervas, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Maax Canada Inc. filed an application to register the mark KUBIC (in standard characters) on the Principal Register for "shower doors" in International Class 11.²

The examining attorney issued a final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark CUBIX (typed mark), previously registered for the goods in the

¹ After Ms. Kemp briefed this appeal, applicant filed a power of attorney appointing Mr. Pelletier, and revoking its previous power of attorney to Collen IP.

² Filed May 4, 2005, alleging a bona fide intent to use the mark in commerce.

three registrations set out below³ that it would, if used on or in connection with the identified goods, be likely to cause confusion.

Registration	Class	Goods
3094080	6	Plumbing fixtures, namely, water supply pipe elbows of metal, metal bath grab bars, metal shower grab bars, metal robe hooks, and adjustable metal wall brackets
3094078	11	Plumbing fixtures and plumbing hardware, namely, handshowers, adjustable handshower slide bars, showerheads, thermostatic shower control valves, wall mounted water volume control valves for showers, tub spouts and faucets
3094079	21	Towel rings, towel bars, and toilet tissue holders

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

³ All three registrations, owned by the same party, issued June 15, 2004, and were based upon allegations of use and first use in commerce as of May 2004.

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Restaurant Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Record on Appeal

The examining attorney submitted the following evidence in support of the refusal to register:

- Fifteen use-based registrations covering "shower doors,"⁴ as well as one or more of the cited registrant's goods.
- Pages from four websites offering for sale shower doors as well as one or more of the cited registrant's goods.

Applicant has submitted the following evidence in support of registration:

- A list of 21 registrations and applications from the USPTO's TESS database for marks consisting of or including the term "CUBIX," which applicant asserts show that "the word CUBIX could be

⁴ Several additional registrations covered "shower enclosures," but not shower doors. Because these do not appear to be the same goods, they have not been included in this total. Two registrations covered "retail store services" and "importing services," respectively, in the field of shower doors and one or more of the cited registrant's goods. While these registrations may suggest that such goods move in the same channels of trade, they have likewise not been counted because they do not indicate that the goods themselves are sold under the same marks. Finally, we note that one of the registrations (covering "shower doors" and "bathtub doors and faucets") is owned by applicant. Because it is not a third-party registration, it has also not been counted for this purpose.

registered several times by more than one owner, therefore reducing the scope of protection of this mark."

- Copies of third-party registrations and applications which applicant asserts shows that refusal of applicant's registration would be inconsistent and inequitable:
 - Registration No. 2526467 for UBIC for "business management and business consulting in the food and biochemical industries;
 - Registration No. 2184027 for UBICS for "personnel placement services, namely to provide next-generation technical expertise to MIS departments";
 - Application No. 78591902 for RUBIK for "online computer games...", "computer game software; ... computer peripherals....";
 - Registration No. 1368694 for RUBIX for "computer programs for database management ... excluding games and entertainment software."
 - Registration No. 3154522 for CUBE for "glass used for manufacturing shower doors."
 - Registration No. 2721796 for CUBIST for "bath and plumbing fittings, namely, ... faucets; showers; shower plumbing and fittings...."
 - Registration No. 2869322 for QWC QBIX (under Trademark Act § 44) for "plumbing supplies, namely faucets for showers, bathtubs...; handshowers and spray-heads for ... showers; plumbing fittings, namely, valves and mixing valves...."
- An excerpt from the introduction to Freedonia Group, Inc., Industry Study 2045 (2006), which applicant asserts shows the difference between "plumbing fixtures" and "plumbing fittings"
- Pages from applicant's web site and registrant's catalog, which applicant asserts shows that applicant's business is mainly in the plumbing

fixtures arena, while the registrant is mainly in the plumbing fittings business.

- A press release, which applicant asserts shows that registrant's products "are custom made products sold to luxury commercial consumers," unlike applicant's goods which are standard goods sold to "bathroom products boutiques." Response to Office Action, p. 8 (November 28, 2006).

Before turning to the merits of the case, we note the examining attorney's objection in its brief to consideration of applicant's list of CUBIX marks. The examining attorney is generally correct as to the admissibility of a list of registrations. *In re Carolina Apparel*, 48 USPQ2d 1542, 1543 n.2 (TTAB 1998) ("The Board does not take judicial notice of third-party registrations, and the mere listing of them is insufficient to make them of record."). However, it does not appear that he objected to the list when it was submitted in response to his first office action or at any time prior to briefing, *i.e.*, at a point when applicant could have remedied any deficiency in the form of its evidence. Accordingly, we overrule the examining attorney's objection, and we have considered the list for whatever probative value it may have.

III. Discussion

A. Similarity of the Marks

Applicant's mark is KUBIC, while the mark in the cited registrations is CUBIX. The marks would be pronounced almost the same, with the only difference between them

consisting of a phonetic "-s" ending, which is absent in applicant's mark. While neither mark is spelled with an "-s" ending, the presence or absence of this sound creates very little distinction between the two, as this sound is ubiquitously used in pronouncing plurals. *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985) (SEYCOS is "virtually the phonetic equivalent of" SEIKO).

As for the meaning of the marks, the examining attorney argues that the marks "share the same basic root word" *i.e.*, "cubic." While spelled differently, we agree that because of their pronunciation, both marks convey the impression of a cube.

Focusing on the marks' appearance, applicant argues strenuously that "[i]t is not intuitive to purchasers who visualize the mark[] CUBIX to infer that the owner would alter the spelling and market impression of its brand by changing the initial 'C' to a 'K' and as well as the ending 'X' to a 'C.' Confusion as the source for these two different marks is highly unlikely." Applicant's Brief at 5.

Applicant's argument misses the point. The question in determining whether a likelihood of confusion exists is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods they

identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972).

Moreover, as has often been reiterated,

[t]he 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 their entirety 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. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang, 84 USPQ2d 1323 (TTAB 2007).

Notwithstanding the differences in their appearance, we nonetheless find that the overall commercial impression of KUBIC and CUBIX is substantially similar because of their almost identical pronunciation and identical meaning, which outweigh the difference in their appearance. This factor supports the examining attorney's refusal.

B. Similarity of the Goods

Applicant argues that the differences between its goods and those of the cited registrant indicate that confusion is not likely.

The goods are entirely different: Applicant has limited its goods to a very narrow, specific industry within an industry, namely, shower doors. The applicant is not active in the plumbing fittings market, whereas the registrant specializes in the plumbing fittings market. A consumer is unlikely to see these two goods together and be confused as to the source of the

goods because the goods are sufficiently distinguishable and sold in different stores.

Applicant's Brief at 6-7.

The Industry Study excerpt submitted by applicant speaks about plumbing fixtures and fittings:

This study analyzes supply and demand for plumbing fixtures and fittings in the US. Plumbing fixtures include bathtubs, showers, toilets, sinks, bidets, drinking fountains, and hot tubs and spas. Plumbing fittings include lavatory fittings, kitchen and other sink fittings, bathtub and shower controls, and miscellaneous fittings such as flush valves and controls. ... The entire report is framed within the plumbing product industry's economic, technological and market environments.

Freedonia Group, Inc., Industry Study 2045 xii (2006).

The examining attorney questions the relevance of this evidence, Examining Attorney's Brief at 10-11, and we agree that it is entitled to little, if any, weight. From the small excerpt of record, the Freedonia study seems to be an analysis of the supply and demand for such products, and not a study of the goods, their channels of trade, or consumer perception. Notably, the excerpt does not indicate that plumbing fittings are sold in different channels of trade.

Applicant's focus on the difference between "plumbing fittings" and bathroom or plumbing "fixtures" is misplaced. The various labels that the industry places on such products is not particularly relevant, because it has not been shown that the relevant consumers are familiar with such classifications. Further, the distinctions that applicant

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has drawn between plumbing fixtures and plumbing fittings is undercut by its own Registration No. 3106206 which - as noted above - was submitted by the examining attorney. The '206 registration covers "bathtubs, showers and shower-baths, ... shower doors, bathtub doors and faucets," indicating that applicant itself has adopted the same mark for both plumbing fixtures and plumbing fittings. More importantly, the examining attorney's evidence demonstrates that - notwithstanding any such distinction - the goods are nonetheless related and the market for their sale is far from being separate.

The examining attorney has submitted a number of third-party registrations covering both "shower doors" and one or more of the goods identified in cited Registration Nos. 3094078 and 3094079.⁵ For instance, fifteen of the registrations included shower doors and shower heads, sprayers or hand held showers. Ten registrations included both shower doors and faucets or faucet spouts. Eight of the registrations included shower doors and shower control valves or thermostatic shower valves, and eight identified shower doors and towel bars or towel rings. Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to

⁵ None of the third party registrations shows goods in common with cited Reg. No. 3094080.

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suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988). Consumers encountering applicant's goods are thus likely to assume that they emanate from the same source as the cited registrant's goods.

Moreover, it cannot escape notice that "shower doors" are complementary to many of the goods listed in the cited registrations. Applicant's goods and several of those in the cited registrations are explicitly related to showers, e.g., shower doors and items such as showerheads (Reg. No. 3094078) and shower grab bars (Reg. No. 3094080), while there is an inherent relationship between shower doors and towel rings and towel bars (Reg. No. 3094079), with consumers wanting such items to match or be complementary. Thus, the ordinary consumer who is choosing fittings and fixtures to be used in remodeling a bathroom is likely to encounter both shower doors and the other items, listed above, which are used in connection with showers.

We find that the goods are related, a conclusion which supports the refusal of registration.

C. Channels of Trade

As demonstrated by Internet evidence submitted by the examining attorney, there is a significant overlap in the channels of trade for shower doors and the goods identified in the '078 and '079 Registrations. For instance, in addition to shower doors, eShower Door offers towel bars; Bathroom Heaven offers shower heads and towel racks; Sterling Plumbing offers tub faucets; and Kohler offers towel rings, showerheads, and faucets.⁶

Nonetheless, applicant argues it and the registrant are involved in different and distinct lines of business: "The Applicant's shower doors do not travel in the same channel of trade as the Registrant's products. Applicant's shower doors are custom made products sold to luxury commercial customers."⁷ Applicant's brief at 7-8.

Applicant has submitted pages from its web site and from the registrant's catalog in an effort to show the true nature of their respective businesses. However, such

⁶ We acknowledge that the Internet evidence does not show that shower grab bars and shower doors are sold through the same websites. Although we cannot conclude based on this evidence that these particular goods are sold in the same channels of trade, they could certainly be encountered by the same consumers as they choose items for a new or replacement shower.

⁷ We note that applicant had previously characterized the press release it introduced in evidence as stating that it is registrant's goods that are custom made products sold to luxury commercial customers. See page 5. As discussed infra, whether it is applicant's or registrant's goods that are custom made and sold to luxury commercial customers is irrelevant to our decision herein.

evidence is not persuasive for this purpose. It is long-settled that our analysis in this regard must be limited to the goods as they are set out in an application and in any cited registrations. Where those goods or services are identified broadly, we must construe them as such, despite evidence that the applicant or registrant is engaged in more limited activities than would be covered by its application or registration. See, e.g., *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1717 (TTAB 1992). As a corollary, when the identification is not limited, the goods must be construed to (1) move in all of the usual channels of trade for such goods; and (2) be purchased by the full range of potential purchasers of the goods of that type. *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139, 139-40 (CCPA 1958). Accordingly, extrinsic evidence may not be used to limit the scope of broadly identified goods or services or the natural channels of trade for such goods.

Applicant's argument that its goods and those of the prior registrant are actually narrower, and move in different channels of trade, asks us to narrow the scope of the application and the cited registration, which we may not do. Instead, we find that such goods may be sold through

the same channels of trade, such as the websites submitted by the examining attorney, as well as the "brick and mortar" equivalents of such sites, including bathroom and plumbing supply outlets.

Accordingly, we find the channels of trade for the respective goods to at least overlap, a factor which supports the refusal to register.

D. Degree of Care/Sophistication of Purchasers

Applicant argues that its "goods are sold to commercial consumers who will demonstrate a high degree of care and knowledge in purchasing their goods" and that the "Registrant's goods are generally sold to experts or individuals seeking to restore or replace their own bathroom fittings." Applicant's brief at 8. But again, we may not import extrinsic limitations into an identification. Regardless of what may be otherwise shown, we must consider the goods to be sold to all usual purchasers for goods of this type. These purchasers would include not only the commercial customers whom applicant has identified as its consumers, but individuals who wish to remodel their bathrooms and would purchase both shower doors and, *inter alia*, handshowers, slide bars, (Reg. No 3094078) towel rings and towel bars (Reg. No. 3094079), and shower grab bars (Reg. No. 3094080). These customers include the general public.

There is little evidence in the record of the usual price of the goods at issue. The pages submitted by the examining attorney from the Kohler website show shower doors costing between \$322.75 and \$2,564.00, and showerheads ranging from \$54.75 to \$125.10. However, it is not clear whether these prices are representative. Goods such as showerheads, towel rings, towel bars and grab bars may be relatively inexpensive. While such items are unlikely to be purchased on impulse, we are not convinced that they involve the kind of deliberation and investigation which would mitigate source confusion. In any case, even consumers who exercise care in making their purchasing decisions are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion. *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods related, confusion may be likely even among sophisticated purchasers); *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988) ("Being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks.").

Accordingly, we consider this factor neutral in our analysis.

E. Third-party Marks

Applicant makes several arguments regarding third-party applications and registrations. As noted, applicant submitted a list of twenty-one registrations and pending applications for marks comprising or including the term CUBIX to show that it has been registered "several times by more than one owner, therefore reducing the scope of protection of this mark." Of this list, only nine registrations are entitled to any probative value. Pending applications are evidence only of the fact that they have been filed, and expired or cancelled registrations are of no evidentiary value.

While we have considered applicant's list, it is entitled to little or no weight in our analysis. Applicant's list does not include the goods associated with the registrations, nor does it include the identity of their owners (the cited registrant owns at least three of the nine "live" registrations). Although third-party registrations can be used to show that a term has some significance in a particular industry, because the list submitted by applicant does not indicate the goods or services for the respective marks, we cannot ascertain whether the term has any significance as applied to the applicant's or the registrant's goods.

Applicant further argues that the registration (or pending application) of UBIC and UBICS, RUBIK and RUBIX, and CUBE, CUBIST and QWC QBIX demonstrate that refusal of applicant's registration would be inconsistent and inequitable. Again, the third-party application has no probative value, nor do the registrations for UBIC and UBICS and RUBIK and RUBIX, which are for very different marks and goods. We acknowledge that the registrations for CUBIST and QWC QBIX are for goods similar to those at issue herein.⁸ However, there are differences between a recognized word, CUBIST, and an invented term QBIX, which also contains the letters QWC, and we regard these differences as being greater than those between KUBIC and CUBIX. In any event, "[t]he Board must decide each case on its own merits. Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court." *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (citations omitted). In summary, we cannot conclude from the third-party registrations that that KUBIC has any descriptive or suggestive meaning with respect to the identified goods, we consider the mark to be arbitrary, and thus strong.

⁸ The registration for CUBE is for glass used in manufacturing shower doors, and therefore would be sold to a different class of consumers than the goods identified in the registrations for

IV. Conclusion

After careful consideration of the briefs and the evidence of record, we conclude that applicant's mark is likely to cause confusion as to the source or sponsorship of such goods with the marks in each of the cited registrations. While we admit that our decision is not entirely free of doubt, we must resolve that doubt in favor of opposer, the prior registrant. *See Hard Rock Cafe Int'l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1514 (TTAB 2000); *W.R. Grace & Co. v. Herbert J. Meyer Indus., Inc.*, 190 USPQ 308, 311 (TTAB 1976).

Decision: The refusal under Trademark Act § 2(d) is affirmed.