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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Serta, Inc.
v.
S Industries, Inc. and Central Mfg. Co.

Opposition No. 112,035
to Application Serial No. 75/228,064

Richard W. Young of Gardner, Carton & Douglas for Serta,
Inc.

Leo Stoller, pro se, for S Industries, Inc. and Central Mfg.
Co.

Before Walters, Bucher, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 6, 1997, S Industries, Inc. (applicant)¹
applied to register the mark SENTRA in typed form on the
Principal Register for: furniture; mirrors; picture frames;
sleeping bags; seat cushions; non-metal trophies; key rings
with plastic fobs; pillows; folding stadium seats; air
cushions; wooden figurines; wall plaques; director's chairs;

¹ In an order dated September 24, 1999, Central Mfg. Co. was also
joined as a party defendant.

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plastic name badges; upholstered furniture; wall mirrors; children's furniture, namely, seats, toy boxes, bedroom furniture, and chests in International Class 20.²

On October 1, 1998, Serta, Inc. (opposer) opposed the registration of applicant's mark alleging that applicant's mark was confusingly similar under Section 2(d) of the Trademark Act to five trademark registrations it owned. 15 U.S.C. § 1052(d). The first registration is for the mark SERTA, in typed form,³ for "mattresses, mattress foundations, mattress pads and pillows" in International Class 20. The second registration is for the mark SERTA with the design shown below⁴ for "mattresses and mattress foundations" in International Class 20.



The third registration is for the mark SERTA in typed form⁵ for "furniture convertible into beds" in International Class 20. The fourth and fifth registrations are for the

² Serial No. 75/228,064. The application contains a date of first use and the date of first use in commerce of January 1986.

³ Registration No. 2,041,918 issued March 4, 1997, affidavits under Sections 8 and 15 accepted or acknowledged.

⁴ Registration No. 1,864,743 issued November 29, 1994, affidavits under Sections 8 and 15 accepted or acknowledged

marks SERTA shown below for "mattresses" in International Class 20.



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Serta

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Applicant denied that its mark and opposer's marks are confusingly similar. Applicant filed a request for an oral hearing, which was held on April 22, 2003. Opposer declined to attend the hearing.

The Record

The record consists of the file of the involved application and opposer's Notice of Reliance on Registration Nos. 2,041,918; 1,864,743; 1,180,198; 582,464; and 582,463 and applicant's responses to interrogatories and requests for production.⁸

Priority

Priority is not an issue here in view of opposer's ownership of five registrations for SERTA marks. See King

⁵ Registration No. 1,180,198 issued December 1, 1981, renewed.

⁶ Registration No. 582,464, issued November 17, 1953, second renewal.

⁷ Registration No. 582,463, issued November 17, 1953, second renewal.

⁸ Applicant attempted to submit a notice of reliance containing copies of registrations it allegedly owns for other goods and services and opposer's responses to interrogatories. The notice was untimely and applicant's request to reopen the testimony

Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Likelihood of Confusion

The issue in this case is whether applicant's mark SENTRA is confusingly similar to opposer's marks SERTA when the marks are used on the parties' respective goods. Our analysis of the issue of likelihood of confusion requires us to consider the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 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 this case, we begin by looking at the goods of both parties. The goods of the parties are identical to the extent that they include "pillows" in their identification of goods, and legally identical to the extent that applicant's identification of goods includes furniture,

period was denied. See orders dated August 24, 2001, and

upholstered furniture, and children's furniture, namely bedroom furniture and opposer's registration includes the term "furniture convertible into beds." In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (Applicant's restaurant services identified as "restaurant services specializing in Southern-style cuisine" legally identical to registrant's restaurant services identified as "hotel, motel, and restaurant services").

We must consider the goods as they are identified in the application and registration. Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). Also, because the goods in part are identical and there are no restrictions in the identification of goods, we must assume that the goods travel in "the normal and usual channels of trade and methods of distribution." CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). See also Kangol Ltd. v. KangaRoos U.S.A. 974 F.2d 161, 23 USPQ2d 1945 1946 (Fed. Cir. 1992).

While applicant attempts to differentiate the products based on applicant's selling its products only through mail orders while opposer's sales of its goods are through ordinary retail channels of distribution, in the absence of a restriction in applicant's identification of goods and in the identification of

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goods in opposer's registrations, the respective goods must be presumed to travel in all channels of trade suitable for goods of that type. Accordingly, in the present case, the goods of applicant and of opposer are presumed to be sold through the same channels of distribution to the same customers and since the goods are, at least in part, virtually identical, the only issue is whether the use of the respective marks on or in connection with these goods would be likely to cause confusion for purposes of Section 2(d) of Trademark Act.

Chesebrough-Pond's Inc. v. Soulful Days, Inc., 228 USPQ 954, 956 (TTAB 1985) (citation omitted). See also In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

Next, we address the issue of whether the mark SENTRA is similar to the registered mark SERTA. SENTRA is the only element in applicant's mark, while SERTA is either the only element or the dominant element in registrant's SERTA typed, stylized, and design marks. Applicant argues that "Opposer's SERTA mark(s) contain a design component that clearly distinguish[es] the marks from each other." Brief at 6. We disagree that the design element in Registration No. 1,864,743 (a swirl) and No. 582,464 (a swirl in a square) would offer "sufficient distinctiveness to create a different commercial impression" from applicant's mark. Dixie Restaurants, 41 USPQ2d at 1533. More importantly, the two most pertinent cited registrations, for pillows (No.

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2,041,918) and furniture convertible into beds (No. 1,180,198), are in typed form and no difference in the style of the mark can be asserted. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). Also, inasmuch as applicant's mark is depicted as a typed drawing, no difference in type style can be maintained with the stylized SERTA mark in Registration No. 582,463.

Therefore, the only significant difference between the marks is the spelling. Applicant has not pointed to any differences in meaning that the two marks would have. Nor are we aware of any. They appear to be coined terms. As an arbitrary or coined term, registrant's mark is entitled to a broad scope of protection. TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44 USPQ2d 1315, 1317 (Fed. Cir. 1997) (Board's finding of no likelihood of confusion reversed. "GRAND SLAM is wholly arbitrary, i.e., it has no meaning at all. It is neither descriptive nor suggestive of the goods or any of their properties and its dictionary definitions in the fields of games and sports are of no help in solving the problem of the likelihood of confusion if the two marks are used on automobile tires"); In re Wilson, 57 USPQ2d 1863, 1865 (TTAB 2001) ("PINE CONE is an arbitrary and strong mark entitled to a broad scope of protection"); In re Opus One Inc., 60 USPQ2d 1812, 1814 (TTAB 2001) (OPUS ONE is a

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"strong mark which is entitled to a broad scope of protection").

In addition to there being no difference in meaning, we find that, while the marks would not be pronounced identically, they would be pronounced similarly. See TBC Corp., 44 USPQ2d at 1318 (Court found that there was a "close similarity in sound between GRAND SLAM and GRAND AM"). See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977) ("Each syllable of each mark generates an 'impact,' but the only impact to be considered is that of the whole... MONOCERAM and MICROCERAM are not sufficiently different in their total impacts to eliminate likelihood of confusion as to source").

Also, the marks have similar appearances. All the letters of the registered mark are found in applicant's mark in the same order except that applicant transposes the "R" and "T" and adds an "N." While there are certainly differences between the appearances of the marks, there are also similarities.

When we view the marks in their entirety, a "[s]ide-by-side comparison is not the test. The focus must be on the 'general recollection' reasonably produced by appellant's mark and a comparison of appellee's mark therewith." Johann Maria Farina Gegenuber Dem Julichs-Platz

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v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) (citation omitted). Furthermore, “[i]f the [goods or] services are identical, ‘the degree of similarity necessary to support a conclusion of likelihood of confusion declines.’” Dixie Restaurants, 41 USPQ2d at 1534, quoting, Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, the marks are used in part on legally identical goods, that we must assume are sold to the same customers, in the same channels of trade. Applicant’s mark SENTRA is similar to the arbitrary registered mark SERTA. Therefore, we conclude that the overall commercial impression of each of opposer’s marks is substantially similar to applicant’s mark, and therefore, confusion is likely in this case. TBC Corp., 44 USPQ2d at 1318 (“[I]n this age of business over the telephone and advertising on TV and radio the close similarity in sound between GRAND SLAM and GRAND AM would be likely to result in mistake if not confusion”).

We address some additional arguments applicant has made. The first of which concerns the allegation of a lack of actual confusion. Even if applicant’s untimely notice of reliance were properly of record,⁹ the lack of actual

⁹ Applicant’s untimely notice of reliance also contained copies of other SENTRA registrations applicant owns for different goods. Even if these registrations were of record, they would not permit applicant to register a confusingly similar mark for the goods in this case.

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confusion would not change the result here. The absence of actual confusion does not mean that there is no likelihood of confusion. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). Because there is no evidence of sales volume or marketing strategies, we have no basis to find that there were opportunities for actual confusion to occur.

Applicant also alleges that "Opposer, other than submitting its said copies of Registrations, has not presented one scintilla of evidence showing that Opposer's marks are actually in use. The Applicant asserts that the Opposer has shown no right to relief in this case." Brief at 6 (footnote omitted). However, an opposer, "by virtue of its registrations pleaded and made of record herein, has sufficiently shown that it has prior rights in its registered marks for the goods and services recited therein." Ups 'N Downs, Inc. v. The Downery, 212 USPQ 387, 388 (TTAB 1981).¹⁰

¹⁰ Applicant also refers to 37 CFR § 2.132(b) concerning a party in the position of defendant's right to move to dismiss if the only evidence submitted by a party in the position of plaintiff consists of copies of Patent and Trademark Office records. This rule does not apply here. First, 27 CFR 2.132(c) makes it clear that a motion under Rule 132(b) "must be filed before the opening of the testimony period of the moving party." Second, opposer did more than put in copies of its registrations. It also submitted portions of applicant's response to interrogatories and requests for production.

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Finally, under the well-established rule in trademark cases, we must resolve doubts about confusion in favor of the registrant and against the newcomer, which we do here. Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992); TBC Corp., 44 USPQ2d at 1318.

Decision: The opposition is sustained and registration to applicant of its mark SENTRA is refused.