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THE TTAB

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Minka Lighting, Inc.
v.
Ambiance Imports, Inc.

Opposition No. 91125325
to application Serial No. 75519110
filed on July 15, 1998

Lisa H. Meyerhoff, Susan E Powley and Timothy G. Ackermann
of Jenkens & Gilchrist for Minka Lighting, Inc.

James E. Davis and Robert McCutcheon of Davis Munck, P.C.
for Ambiance Imports, Inc.

Before Quinn, Hairston and Drost, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Minka Lighting, Inc. (opposer) has opposed the
application of Ambiance Imports, Inc. (applicant) to
register the mark AMBIANCE IMPORTS for "wholesale

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distributorships featuring furniture; [and] import agency services featuring furniture."¹

As grounds for opposition, opposer has alleged that since prior to the filing date of applicant's application, opposer has been engaged in the business of importing, distributing and selling a wide variety of products, including electric lighting fixtures, lamps, and home decorative items, including furniture, mirrors, wall art and accessories; that it is the owner of Registration No. 2,225,601 (issued February 23, 1999) for the mark AMBIENCE for "electric lighting fixtures and lamps;" that it is the owner of application Serial No. 75698326 filed May 5, 1999 for the mark AMBIENCE for "furniture, mirrors, wall art and accessories, namely carvings, decorative figures, figurines and sculptures made of foam, wood and resins and decorative furniture corbels and sculpture reliefs made of foam, wood and resin;" that opposer acquired the above registration and application by assignment from L. D. Kichler Co. (Kichler) on July 31, 2001; and that applicant's mark, when used in connection with its services, is likely to cause confusion, or to cause mistake or deceive.

¹ Application Serial No. 75519110, filed July 15, 1998, and asserting first use and first use in commerce on February 28, 1995.

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Applicant, in its answer, has denied the salient allegations of the notice of opposition. In addition, as "affirmative defenses", applicant has asserted that opposer and its predecessor-in-interest knew of applicant's use of the mark AMBIANCE IMPORTS and that "[o]pposer is guilty of acquiescence, estoppel, laches and unclean hands;" and that opposer has used the phrase AMBIENCE LIGHTING, not AMBIENCE per se, and thus opposer's registration for the mark AMBIENCE is a mutilation.

PRELIMINARY MATTERS

Before turning to the record and the merits of the case, there are several preliminary matters, including evidentiary objections, we must discuss.

At the outset, we note that applicant did not pursue at trial its affirmative defenses of acquiescence, estoppel, laches and unclean hands. Thus, we have given no consideration to these defenses.

We note that accompanying applicant's brief is a "Documentary Appendix" that consists of six documents produced by applicant in response to opposer's discovery requests. Materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony. See TBMP §704.05 (2d ed. rev. 2004). Since these documents were not previously made of record during applicant's testimony

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period, they are not properly of record and we have given them no consideration in reaching our decision herein.

Applicant has filed a motion for leave to file a surreply brief along with a surreply brief. Opposer has filed a brief in opposition to applicant's motion. There is no provision in the Trademark Rules of Practice for filing a reply brief by a party in the position of defendant. See TBMP §801.02 (2d ed. rev. 2004). Applicant's motion is accordingly denied and its surreply brief will be given no consideration.

On February 4, 2004, applicant filed a paper styled "Applicant's Objections to Opposer's Trial Evidence," wherein applicant moves to strike the testimony depositions of opposer's witnesses Marguerite Capozzi, Harvey Salgado, and Dee Moss in their entireties; and to strike portions of each of these testimony depositions and the testimony depositions of opposer's witnesses Roy Minoff and Tom Kubek. As grounds for the motion to strike the testimony depositions of Capozzi, Salgado and Moss in their entireties, applicant argues that pursuant to a consented motion for an extension of time, opposer's testimony period was extended until May 13, 2003 for the limited purpose of taking the testimony depositions of opposer and its predecessor-in-interest Kichler; that during this extension opposer took the testimony depositions of Capozzi, Salgado,

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and Moss who are "independent contractors" and not representatives of opposer or Kichler; and that since opposer was not entitled to take the testimony of these "non-party" witnesses during the extension, the testimony depositions should be stricken in their entirety.

Opposer, on the other hand, contends that although Capozzi, Salgado and Moss are not officers or employees of opposer or Kichler, opposer designated the witnesses to testify on its behalf as corporate representatives of opposer; and that the witnesses are independent sales representatives who appeared voluntarily.

A review of the agreed-upon extension reveals that it was for the purpose of "conducting additional depositions of Minka Lighting, Inc. and Kichler Lighting" We do not view this extension as limiting opposer to taking the depositions of officers or employees of opposer or Kichler. Moreover, it does not appear that applicant raised this objection at the time of the depositions. In fact, applicant's counsel cross-examined each of the witnesses. Under the circumstances, applicant's motion to strike the Capozzi, Salgado and Moss depositions in their entirety on this basis is denied. Thus, we consider the depositions to be properly of record.

As noted above, applicant also has objected to specific portions of the testimony of opposer's witnesses.

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The objections are simply too numerous to allow individual rulings thereon. In reading the record, we have considered the testimony and exhibits in light of applicant's objections. Where we have relied on testimony or evidence to which applicant raised an objection, it should be apparent to the parties that in doing so we implicitly have deemed the material to be admissible.

There are, however, several objections we specifically address here. Applicant has objected to the testimony of Ms. Capozzi regarding the purchase of Ambience Lighting & Accessories by Kichler and the transfer of the rights to the AMBIENCE mark on the ground that the testimony violates Fed. R. Evid. 1002 because the actual purchase agreement was not produced.

We do not find applicant's objection to the testimony based on Fed. R. Evid. 1002 to be well-taken. This rule provides as follows:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by an Act of Congress.

None of Ms. Capozzi's testimony purported to recite the content of the written agreement between Ambience Lighting & Accessories and Kichler. In any event, as noted in the Advisory Committee Notes with respect to Fed. R. Evid. 1002, "an event may be proved by nondocumentary evidence, even though a written record of it was made."

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Applicant also has objected to the testimony of Roy Minoff concerning the transfer of the assets of Ambience Lighting & Accessories to Kichler and from Kichler to opposer. Applicant complains that Mr. Minoff lacks personal knowledge concerning the actual negotiations between the parties and that his testimony likewise violates Fed. R. Evid. 1002. Mr. Minoff did not testify about the content of any particular document, rather he testified to the fact that the transfer of assets and records from Ambience Lighting & Accessories to Kichler and from Kichler to opposer occurred. For the reasons stated above, we find that the testimony does not violate Fed. R. Evid. 1002. Also, as Kichler's Chief Administrative Officer, Mr. Minoff was certainly in a position to have the requisite knowledge of the transfers. Thus, applicant's objection to Mr. Minoff's testimony on the ground of lack of personal knowledge is not well taken.

Further, applicant objects to the testimony of opposer's witnesses Minoff, Moss, Salgado, and Kubek concerning purported instances of actual confusion. Applicant's objections are based on hearsay and are discussed infra in our likelihood of confusion analysis.

We note that Exhibit 4 to opposer's notice of reliance consists of two of opposer's invoices. Invoices generally are not proper subject matter for a notice of reliance and

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thus we have not considered them in reaching our decision herein. See Trademark Rule 2.122(e).

THE RECORD

The record thus consists of the file of the involved application; and opposer's first notice of reliance on applicant's responses to certain of opposer's interrogatories and request for production of documents, and the discovery deposition of the president and owner of applicant, George Moussa. In addition, opposer submitted the testimony depositions of its witnesses Roy Minoff, Ron Rotenberg, Marguerite Capozzi, Tom Kubek, Dee Moss, and Harvey Salgado (with exhibits).

Applicant did not take testimony. The only evidence properly made of record by applicant is a notice of reliance on its certificate of incorporation and copies of notices issued by the Department of Treasury advising applicant that it has been assigned an employee identification number and accepted as an "S" corporation.

Both parties filed briefs on the case, but an oral hearing was not requested.

PRIORITY

We turn first to the question of priority. Opposer's witness Marguerite Capozzi, a designer and manufacturer of home accessories, testified that she began working for Ambience Lighting & Accessories in 1986. In 1988 she and

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Zoltan Kovacs became co-owners of Ambience Lighting & Accessories. The company, which was headquartered in California, subsequently incorporated in 1994, with Mr. Kovacs and Ms. Capozzi each owning 50% of the stock. Ms. Capozzi testified that during her association with Ambience Lighting & Accessories, the company continuously used the mark AMBIENCE in connection with lighting, home accessories and furniture. In particular, the AMBIENCE mark appeared on hang tags for furniture, on boxes in which products were shipped, in catalogs, on invoices, and on signs in the windows of the Ambience Lighting & Accessories showrooms. The company did business throughout the United States and had wholesale showrooms in both Dallas, Texas and High Point, North Carolina.

Ms. Capozzi testified that in late 1997 Kichler purchased Ambience Lighting & Accessories. The sale included the entire AMBIENCE product line as well as the rights to the AMBIENCE mark.

Ron Rotenberg was General Manager of Kichler at the time of Kichler's purchase of Ambience Lighting & Accessories. Mr. Rotenberg testified that Kichler continued to sell many of the products that Ambience Lighting & Accessories had sold under the AMBIENCE mark. In particular, Kichler used the AMBIENCE mark on lamps, chandeliers, home accessories, statues, mirrors and

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furniture such as benches, tables, end tables, and accent tables. In addition, Kichler used independent sales representatives to market its products and continued to do business with many of the same customers. Mr. Rotenberg testified that Kichler used the AMBIENCE mark in catalogs distributed nationwide to lighting and furniture showrooms, on hang tags and cartons in which products were sold, and on invoices and other business documents.²

Roy Minoff is the Chief Administrative Officer of Kichler. Mr. Minoff testified that Kichler used independent sales representatives to sell its products and that such products were sold throughout the United States. Kichler's customers included furniture retailers of all sizes and lighting showrooms. In July 2001, Kichler sold the AMBIENCE product line, including all rights to the AMBIENCE mark to opposer.

Tom Kubek is vice president of sales and marketing for the Ambience Division of opposer, Minka Lighting, Inc. Opposer is headquartered in Corona, California and opposer conducts business throughout the United States. Opposer itself first used the AMBIENCE mark in September 2001 after it acquired the AMBIENCE product line and mark from Kichler. Opposer primarily uses independent sales representatives to

² The sales and advertising figures of Kichler were submitted under seal.

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sell its AMBIENCE products which include lighting fixtures, chandeliers, fans, furniture, decorative accessories and mirrors.

Opposer sells its AMBIENCE products through independent sales representatives to retail furniture stores, lighting showrooms, designers and interior decorators. Opposer advertises its AMBIENCE products in trade magazines, through invitations to retailers to visit opposer's product showrooms, and at its wholesale showrooms where the products are displayed.³ The AMBIENCE mark appears on hangtags, packaging, on signs at the showrooms, and in opposer's catalogs. Opposer also promotes its products through attendance at trade shows in Dallas, Texas and High Point, North Carolina.

The information we have about applicant comes from the discovery deposition of its president and owner, George Moussa, and applicant's responses to opposer's interrogatories. Applicant is headquartered in Dallas, Texas and is an importer/wholesaler of furniture. Applicant sells furniture to furniture retailers, designers and design studios throughout the continental United States. Applicant uses independent sales representatives to market its

³ Opposer's sales and advertising figures also were submitted under seal.

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products. Applicant presently markets its goods and services through its showroom in Dallas, Texas, and by way of catalogs, attendance at trade shows and advertisements in trade publications.

For purposes of priority, opposer claims that it and its predecessors in interest have used the AMBIENCE mark since as early as 1986 for furniture and the services of distributing furniture. In particular, opposer claims "[t]he record evidence establishes an unbroken chain of use of the "AMBIENCE" mark in connection with furniture products and the distribution of furniture products starting with Ambience Lighting & Accessories (from 1986-1997); continuing with Kichler (from 1997-2001); and continuing with Minka (from 2001 through the present)." Brief at 8.⁴

With respect to applicant, it claims that it first used the mark AMBIANCE IMPORTS in February 1995. Further, applicant argues that the earliest date of first use on which opposer may rely is 1997, the date on which Kichler

⁴ We note that in discussing priority in its brief, opposer includes a reference to its pleaded Registration No. 2,225,601: "Minka also owns the federal '601 Registration for "AMBIENCE" for "electric lighting fixtures and lamps." (Brief, p. 29). Opposer attached a plain copy of the registration to the notice of opposition. However, opposer failed to make the registration properly of record during its testimony period. That is, opposer did not submit a status and title copy of the registration under notice of reliance, and although a plain copy of the registration is part of opposer's exhibit 17, opposer did not offer evidence that the registration is still subsisting and owned by opposer. See TBMP §704.03(b)(1)(A) (2d ed. rev. 2004). Under the circumstances, opposer may not rely on this registration for

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began use of the AMBIENCE mark. Applicant argues that opposer may not rely on any use of AMBIENCE by Ambience Lighting & Accessories because opposer did not make of record the assignment of the AMBIENCE mark from Ambience Lighting & Accessories to Kichler. Moreover, applicant argues that there is no evidence that Ambience Lighting & Accessories used the mark AMBIENCE per se. Rather, according to applicant, the record shows that Ambience Lighting & Accessories only used the mark "Ambience Lighting & Accessories" which is not the legal equivalent of AMBIENCE; and thus opposer may not tack Ambience Lighting & Accessories to AMBIENCE.

Contrary to applicant's contention, the record establishes that Ambience Lighting & Accessories did use AMBIENCE per se in a trademark manner. In this regard, we note the following use of AMBIENCE in Ambience Lighting & Accessories' 1989 catalog:

Dear Ambience Customer:

It is our pleasure to present our 1989 Catalogue.

Each lamp and accessory has been created for Ambience by the Capozzi Kovacs Design Firm, carefully crafted and hand finished in our studio.

Our aim is to provide you with the best Quality, Design, Service and Selection.

The results are beautifully appealing. Make Ambience the pride of your store and for your

purposes of priority, but rather must rely on its common law rights in the AMBIENCE mark.

customer.

We look forward to serving you.

Thank you.

Marguerite Capozzi

Also, reproduced below is an example of a hangtag which was placed on furniture, lighting and accessories that Ambience Lighting & Accessories sold from 1986 through 1997. As used on these hangtags, AMBIENCE projects a separate and distinct commercial impression from "Ambience Lighting Accessories".



With respect to the assignment of the AMBIENCE mark from Ambience Lighting & Accessories to Kichler, we observe that "[a]n assignment in writing, however, is not necessary to pass common law rights to trademarks." Gaylord Bros. v. Strobel Products Co., 149 USPQ 72, 74 (TTAB 1963). See also Hi-Lo Manufacturing Corp. v. Winegard Co., 167 USPQ 295, 296

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(TTAB 1970). In the event that there is no written assignment:

[A]n assignment or transfer of interest in a trade designation may be established by clear and uncontradicted testimony by a person or persons in a position to have knowledge of the transactions affecting said designations; and the common law rights in a mark will be presumed to have passed, absent contrary evidence, with the sale and transfer of the business with which the mark has been identified.

Sun Valley Co. v. Sun Valley Manufacturing Co., 167 USPQ 304, 309 (TTAB 1970).

In this case, the testimony of opposer's witnesses is sufficient to establish that Ambience Lighting & Accessories assigned the AMBIENCE mark to Kichler. In this regard, Marguerite Capozzi testified as follows:

Q. Okay. So in 1997 you and Mr. Kovacs sold the company to Kichler and you sold the assets of the company to them?

A. Yes.

Q. And you also sold the Ambience mark and the goodwill associated with that mark to Kichler?

A. Yes.
(Dep., p. 31).

Also, in this regard, Roy Minoff testified as follows:

Q. Who did Kichler acquire the Ambience product line from in the 1997-98 time frame?

A. We bought the assets from two individuals, I believe. I don't think there was a corporate entity there. Marguerite Kapozi [sic] and Zoltan Kovacs.

Q. At the time Kichler acquired the mark and product

line from those two individuals, did they, in fact, transfer all of their rights in the mark to Kichler.

A. Yes, I believe so.
(Dep., pp. 11-12).⁵

Further, there is no dispute and the record establishes that Kichler assigned its rights in the AMBIENCE mark to opposer. In this regard, we note the following testimony of Mr. Minoff:

Q. Up to a certain point in time, did Kichler have a product line that it offered and sold under the mark Ambience?

A. Yes, it did.

Q. And was that up to the time of approximately July 2001?

A. Yes.

Q. I'd like to focus our remaining questions on Kichler's Ambience product line. Did you sell that product line, including the mark to Minka?

A. Yes, we did.

Q. In July of 2001.

A. Yes, we did. Approximately late in 2001. I'm not sure of the exact date, maybe July, might be a few months later.

⁵ Mr. Minoff's belief that the assets and mark were purchased from Capozzi and Kovacs rather than the corporate entity Ambience Lighting & Accessories is understandable inasmuch as these two individuals were the sole stockholders of the corporation.

Q. To your understanding, did Kichler transfer all of its rights in the Ambience mark to Minka in connection with that asset sale?

A. That is my understanding.
(Dep., pp. 10-11).

In view of the foregoing, we find that Ambience Lighting & Accessories used the mark AMBIENCE at least as early as 1986 in connection with furniture and distributing furniture. Further, the record establishes that Ambience Lighting & Accessories assigned the mark to Kichler in 1997 and that Kichler assigned the mark to opposer in 2001. Moreover, there is no dispute and the record establishes that since 2001 opposer has continuously used the mark AMBIENCE in connection with furniture and distributing furniture. Thus, for purposes of priority, opposer is entitled to rely on use of the mark AMBIENCE in connection with furniture and distributing furniture at least as early as 1986.

In the absence of any testimony or evidence, the earliest date of use upon which an applicant may rely is the filing date of its application. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974) and Chicago Corp. v. North America Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). As previously noted, applicant did not take testimony herein nor did it properly make any other evidence of record concerning its claimed

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date of first use. The only evidence of record concerning applicant's claimed date of first use, namely, February 28, 1995, comes from the discovery deposition of applicant's president George Moussa. When asked about its first use of the AMBIANCE IMPORTS mark, Mr. Moussa testified as follows:

Q. And you first offered goods and services under the mark for sale in October of '95, correct?

A. We traveled in the Philippines in February of '95, so that's when we first started marketing our name of Ambiance Imports. We did not actually have any product to sell until October of '95 when we present--when we showed at the High Point Furniture Show.

Q. So February '95 was the first date of use of Ambiance Imports mark?

A. Yes, you could say that.
(Moussa discovery dep., pp. 30-31).

This testimony, however, is conclusory and it is unclear as to the services in connection with which the AMBIANCE IMPORTS mark was purportedly used. Thus, the earliest date of use upon which applicant may rely for purposes of priority is July 15, 1998.

Opposer, therefore, clearly has priority in this proceeding.

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*,

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476 F.2d 1357, 177 USPQ 563 (CCPA 1973). 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 the differences in the essential characteristics of the goods [and services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

First, we turn to a determination of whether applicant's mark and opposer's mark, when compared in their entirety in terms of appearance, sound, and connotation, are such that they create similar overall commercial impressions. 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 overall commercial impression that confusion as to the source of the goods and services offered under the respective marks is likely to result. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Opposer contends that its AMBIENCE mark and applicant's AMBIANCE IMPORTS mark are highly similar in commercial impression.

Applicant, on the other hand, argues that the inclusion of the word IMPORTS in its mark serves to distinguish the parties' marks. Further, applicant contends that opposer's AMBIENCE mark is "a commonly-used, generic word and as such,

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it is a very weak mark that is entitled to little protection." Brief, at 12.

Based on the evidence in this record, we cannot agree with applicant that opposer's AMBIENCE mark is weak. There is no credible evidence of third-party use or registration of similar marks and there is no evidence suggesting that AMBIENCE is generic in connection with furniture and the services of distributing furniture. Rather, the evidence establishes that opposer and its predecessors in interest have used the AMBIENCE mark for over ten years; that a good amount of money has been spent over the years on advertising and promotion; and that sales under the mark are fairly significant. Thus, opposer's AMBIENCE mark is entitled to the normal scope of protection in opposer's field.

We find that opposer's AMBIENCE mark and applicant's AMBIANCE IMPORTS mark are highly similar in sound, appearance, meaning and overall commercial impression. In considering opposer's mark vis-à-vis applicant's mark, we recognize that the highly descriptive, if not generic, (and disclaimed) IMPORTS portion of applicant's mark cannot be ignored. *Giant Food, Inc. v. National Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1993). However, although we have resolved the issue of likelihood of confusion by a consideration of the marks in their entirety, there is nothing improper in giving more weight,

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for rational reasons, to a particular feature of a mark. In this case, we have given more weight to the AMBIANCE portion of applicant's mark which is virtually identical to the entirety of opposer's AMBIENCE mark.⁶ This is so because of the highly descriptive, if not generic, nature of the disclaimed word IMPORTS. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). See also Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2 1842, 1845 (Fed. Cir. 2000) [Court held that the addition of the descriptive word "swing" to registrant's LASER mark still resulted in a likelihood of confusion].

We turn then to the parties' goods and services. Opposer argues that its goods and services, namely, furniture and distributing furniture are identical and otherwise closely related to the services identified in applicant's application, namely "wholesale distributorships featuring furniture" and "import agency services featuring furniture."

Applicant, on the other hand, argues that:

Moreover, Applicant and Opposer deal in substantially different types of goods, with only minimal overlap. Specifically, applicant deals mainly in large furniture or "case goods", such as

⁶ We take judicial notice that "ambience" is an alternative spelling of "ambiance" and that "ambiance" is defined as "[t]he atmosphere surrounding one; environment." The American Heritage Dictionary of the English Language (1976). The Board may take judicial notice of dictionary entries. See, e.g., *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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armoires, chests of drawers, vanities and fireplace mantles and does not sell lighting and decorative accessories, whereas, in contrast, Minka sells primarily lighting and decorative accessories and does not sell large furniture or "case goods."

(Brief, p. 12)

It is well settled that the issue of likelihood of confusion in a proceeding such as this must be determined on the basis of the goods or services specified in the subject application vis-à-vis those set forth in opposer's registration and/or those to which opposer has proved prior use of its pleaded mark. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *CTS Corp. v. Cronstoms Manufacturing, Inc.*, 514 F.2d 780, 185 USPQ 773 (CCPA 1975); and *Tony Lama Co., Inc. v. Anthony Di Stefano*, 206 USPQ 176 (TTAB 1980).

In the present case, opposer has proved prior use of its AMBIENCE mark in connection with furniture and the distribution of furniture. The recitation of services in applicant's application reads: "wholesale distributorships featuring furniture; [and] import agency services featuring furniture", without any restrictions as to the type of furniture which applicant features. Thus, we must presume that applicant's services include the distribution and importation of all kinds of furniture, including the types

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of furniture marketed and sold by opposer, e.g., occasional tables and end tables.

Moreover, the record shows that opposer and applicant market their goods and services in the same manner, namely by way of independent sales representatives and showrooms. Also, the parties offer their goods and services to the some of the same classes of customers, namely retail furniture stores and interior designers.

There is no question that opposer's services consisting of distributing furniture are virtually identical to applicant's wholesale distributorships featuring furniture and otherwise closely related to applicant's import agency services featuring furniture. Further, we find that opposer's furniture itself is closely related to applicant's identified services.

We recognize that owners of retail furniture stores and interior designers would exercise a degree of care in their purchasing decisions. However, because of the substantial similarity in the marks and the virtual identity/close relationship of the parties' goods and services, even careful purchasers are likely to be confused.

Opposer points to many instances of what it contends is actual confusion. One instance involves Harvey Salgado, opposer's northern California and northern Nevada sales representative. Mr. Salgado testified that when he visited

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his customer Ellie Berman in her showroom, she took out her AMBIENCE catalog binder to update opposer's product line catalog. Upon inspecting the binder, Mr. Salgado found that it contained not only opposer's catalogs but one of applicant's catalogs as well. When Mr. Salgado asked Ms. Berman why applicant's catalog was in the binder with opposer's catalog, she indicated that she thought they were the same.

Dee Moss, another one of opposer's sales representatives, testified that when she made a sales call on one of her customer's shops and stated that she was an AMBIENCE representative, the customer told her that there was a damaged piece of furniture to show her. Upon inspection, Ms. Moss recognized that the damaged piece of furniture was not part of opposer's AMBIENCE line, but rather was a piece from applicant's line of furniture.

In addition, Ms. Moss testified that a furniture retailer in High Point, North Carolina called her asking whether she had a particular piece of AMBIANCE furniture available. Mr. Moss advised him that the piece was not one of opposer's products. According to Ms. Moss, he indicated that he obviously was confused.

Further, opposer's vice president of sales and marketing Tom Kubek testified that three individuals came into opposer's AMBIENCE showroom at the High Point, North

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Carolina furniture show in 2002 thinking that they were in applicant's AMBIANCE IMPORTS showroom. Additionally, Mr. Kubek testified that he has had sales representatives ask him if Ambiance Imports was another company that Kichler had purchased and why there were two Ambiances.

The weight of the testimony tends to suggest that there has been some actual confusion. In any event, actual confusion is but one factor in a likelihood of confusion analysis and an opposer is not required to prove actual confusion in order to prevail in an inter partes proceeding. We would find a likelihood of confusion in this case independent of alleged actual confusion.

We conclude that in view of the substantial similarity in the sound, appearance, meaning and overall commercial impression of applicant's mark and opposer's mark, their contemporaneous use on the virtually identical and closely related goods and services in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

Decision: The opposition is sustained.