

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
August 18, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

---

**Trademark Trial and Appeal Board**

---

Wallflowers, Inc.  
v.  
Jacqueline S. Ponder

---

Opposition No. 91169407  
to application Serial No. 778575954  
filed on February 27, 2005

---

Christopher D. Keirs of Wong Cabello Lutsch Rutherford &  
Bruculeri LLP for Wallflowers, Inc.

Jacqueline S. Ponder, *pro se*.

---

Before Seeherman, Grendel and Bergsman, Administrative  
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Jacqueline S. Ponder ("applicant") filed an intent-to-use application for the mark "Wallflowers," in standard character format, for "soft sculpture wall decorations made of fabric," in Class 20.

Wallflowers, Inc. ("opposer") opposed the registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d). Specifically, opposer alleged that applicant's mark is likely to cause confusion with opposer's mark WALLFLOWERS for "wall furnishings, namely,

decorative articles to be hung on a wall, including, particularly, soft sculpture wall decorations made of fabric.”<sup>1</sup>

Applicant, in her answer, denied the salient allegations in the notice of opposition. Both parties introduced testimony. Opposer filed a brief, but applicant did not.

#### The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the application file for applicant’s mark. The record also includes the following testimony and evidence:

A. Opposer’s evidence.

Opposer introduced the testimony of Amanda Ann Coveler, opposer’s President, with attached exhibits.

B. Applicant’s evidence.

Applicant introduced the “Testimonial Evidence Affidavit of Jacqueline S. Ponder,” with attached exhibits.<sup>2</sup>

#### Standing

“A party may establish its standing to oppose . . . by showing that it has a ‘real interest’ in the case, that is, a personal interest in the outcome of the proceeding and

---

<sup>1</sup> Notice of opposition ¶1.

<sup>2</sup> On January 8, 2008, the parties filed a stipulation permitting applicant to present her testimony by way of an affidavit pursuant to Trademark Rule 2.123(b).

reasonable basis for its belief in damage." TBMP §303.03 (2<sup>nd</sup> ed. rev. 2004), *citing Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). *See also* TBMP §309.03. In other words, the opposer must have a direct and personal interest in the outcome of the opposition.

Ms. Coveler, opposer's President, testified that as of November 14, 2004, opposer began using the mark WALLFLOWERS to identify its soft sculpture wall decorations,<sup>3</sup> and that opposer has been continuously using the mark in connection with those products.<sup>4</sup> The testimony establishes that opposer, as owner of the mark WALLFLOWERS used to identify soft sculpture wall decorations, has a real interest in preventing applicant from registering the mark "Wallflowers" for "soft sculpture wall decorations made of fabric." *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ2d 185, 189 (CCPA 1982); *Marmark Ltd. v. Nutraexpa S.A.*, 12 USPQ2d 1843, 1844 (TTAB 1989). Accordingly, opposer has proved its standing.

#### Priority

As indicated above, Ms. Coveler testified that opposer first sold WALLFLOWER soft sculpture wall decorations on November 14, 2004, and she also introduced the associated

---

<sup>3</sup> Coveler Dep., pp. 17, 27-28; Exhibits 14 and 15.

<sup>4</sup> Coveler Dep., p. 18 (opposer has been offering to sell products under its mark on the Internet since 2005) and p. 35. *See also* Coveler Dep. Exhibits 25-38.

invoices for those sales.<sup>5</sup> On the other hand, applicant filed her application on February 27, 2005, and made her first sale of "Wallflowers" soft sculpture wall decorations on April 7, 2006.<sup>6</sup> Because the earliest date on which applicant may rely is the February 27, 2005 filing date of her application, opposer has priority of use.

Applicant devotes 12 paragraphs of her affidavit to describing the steps she took to bring her product to market from the time she conceived her "Wallflowers" trademark. While we recognize that applicant expended time and effort to create her business, trademark rights are acquired when the mark is used in the sale of goods, not by the mere adoption of the mark and the preparation to do business. *La Maur Inc. v. International Pharmaceutical Corp.*, 199 USPQ 612, 616 (TTAB 1978); *Computer Food Stores Inc. v. Corner Store Franchises, Inc.*, 176 USPQ 535, 538 (TTAB 1973). See also *In re Cedar Point, Inc.*, 220 UPSQ 533, 535-536 (TTAB 1983) (advertising of a service, without performance of a service, will not support registration).

#### Likelihood of Confusion

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing

---

<sup>5</sup> Coveler Dep., pp. 17, 27-28; Exhibits 14 and 15.

<sup>6</sup> Ponder Affidavit ¶15.

on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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").

The marks are essentially identical. Applicant is seeking to register the mark "Wallflowers," and opposer is using the mark WALLFLOWERS in the form shown below:



The products identified by the marks are also identical: "soft sculpture wall decorations made of fabric" (*i.e.*, stuffed flowers made of fabric to hang on walls).

With respect to the channels of trade, applicant testified that the first sale of her "Wallflowers" wall hangings was to a baby and child's furniture store in Denver, Colorado. Subsequently, applicant was an exhibitor at the Juvenile Products Manufacturers Association trade

show in Orlando, Florida. Applicant continues to make sales to furniture stores specializing in children's furniture. In addition, applicant has made proposals to several major "big box stores" and smaller independent stores.<sup>7</sup> On the other hand, Ms. Coveler testified that opposer has displayed its products at trade shows, that opposer sells to boutiques, and that opposer sells directly through the Internet.<sup>8</sup>

Because the parties use their marks on identical products, and because, as identified, applicant's goods are not limited as to her potential markets, we find that the goods of the parties move in the same channels of trade and are sold to the same classes of consumers.

Because the marks are essentially identical and the goods are, in fact, identical, and because the goods of the parties move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's use of the mark "Wallflowers" for "soft sculpture wall decorations made of fabric" is likely to cause confusion with opposer's use of the mark WALLFLOWERS for the same goods.

---

<sup>7</sup> Applicant's Affidavit ¶15-16, and 18-19; Exhibit 11.

<sup>8</sup> Coveler Dep., pp. 17-19, and 35. Applicant testified that she has registered the domain name "wallflowersdecor.com," and will launch a website upon the conclusion of the opposition. (Applicant's Affidavit ¶11).

Opposition No. 91169407

Decision: The opposition is sustained and registration to the applicant is refused.