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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Atico International USA Inc.

Serial No. 76251522

RECONSIDERATION

Peter T. Cobrin, Oren J. Warshavsky and Clyde A. Shuman of
Cobrin & Gittes for Atico International USA Inc.

Won T. Oh, Trademark Examining Attorney, Law Office 104
(Sidney Moskowitz, Managing Attorney).

Before Quinn, Hohein and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Atico International USA Inc. filed an application to
register the mark ALCO on the Principal Register for a
variety of goods in multiple classes.¹

¹ Serial No. 76251522, filed May 4, 2001, based on an allegation of a
bona fide intention to use the mark in commerce.

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The Trademark Examining Attorney issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark ALCO, previously registered for "retail services in connection with variety and discount stores," that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.² Additionally, the Examining Attorney issued a final requirement for amendment to the identification of goods.

Applicant appealed and, on October 29, 2002, the Board issued its decision on the appeal. The Board dismissed as moot the requirement to amend the identification of goods because applicant, in its reply brief, complied with the requirement.³ The Board affirmed the refusal under Section 2(d) of the Act.

² Registration No. 865,520 issued February 25, 1969, to Duckwall-Alco Stores, Inc., in International Class 35. This registration was renewed for a period of twenty years from February 25, 1989.

³ Applicant's goods are identified as follows:

Scissors and utility knives, in International Class 8;

Pocket calculators and protractors, graduated rulers, in International Class 9;

Photograph albums, appointment pads, stationery boxes, crayons, desk caddies, desk organizers, drawing compasses, erasers, memo pads, pens, rubber stamps, score pads, paper staplers, telephone number and address books, art sets comprised of color pens, color pencils, crayons, oil pastels, watercolors pencils, palette, erasers, sharpeners, rulers, cutter, stapler, tacks, sponge, carrying case with handle, white water color, markers, brushes, scissors, glue and paper notepad, binders, book covers, chalk, clip boards, colored pencils, composition books, copy paper, correcting fluid for type, correcting tape for type, day planners, dry

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On November 27, 2002, applicant submitted a request for reconsideration of the Board's affirmance of the Section 2(d) refusal. In its request for reconsideration, applicant contends that the Board "made two errors of law: (1) by failing to review the registrations cited by [applicant]; and (2) by relying on the registrations cited by the [Examining Attorney]." [Reconsideration Brief p. 5.]

Regarding, first, the registrations cited by applicant, applicant states the following [Reconsideration Brief p.6]:

The undisputed record evidence demonstrates that there were third party registrations covering goods identical to [applicant's] proposed goods when the cited registration issued. Though the fact that the prior registrations are now abandoned admittedly deprives them of full weight,

erase markers, envelopes, paper expandable files, filler paper, glue and glue sticks for stationery or household use, highlighter markers, hole punches, index cards, laser paper, markers, math sets consisting primarily of pencil sharpeners, eraser, six-inch ruler, protractor, triangles, pencil, compass, divider, and mechanical pencil, mechanical pencils, multipurpose paper, notebooks, paint brushes, painting sets, vinyl and metal paper clips, paper shredders, pencil cases, pencil grips, pencil pouches, pencil sharpeners, pencils, permanent markers, portfolio folders, push pins, rubber bands, drawing rulers, social stationery, staple removers, stencils, stick-on notes, stickers, adhesive tape for stationery for household use, writing pads, finger paints, in International Class 16;

Tote bags and backpacks, in International Class 18;

Locker accessories, namely, personal organizers, non-metal locks, picture frames, mirrors, in International Class 20;

Locker accessories, namely, lunch boxes, in International Class 21;

Artist aprons, in International Class 25; and

Children's play mats for use in connection with playing, exercise and sleeping, in International Class 28.

they nevertheless are relevant when evaluating likelihood of confusion.

It is simply inexplicable that the prior registrations were insufficient to preclude the issuance of the cited registration, while the cited registration is sufficient to preclude [applicant's] application for goods identical to those claimed in the prior registrations.

The record shows that in its response of January 22, 2002, applicant listed four registrations that applicant stated had been "expressly abandoned," and submitted copies of the letters seeking to "expressly abandon" the registrations. Applicant alleged that these four registrations were all owned by the same third party; that the registrations were all for the mark ALCO for a variety of goods that are the same as or similar to those listed in this application; and that these registrations did not block the issuance of the cited registration.

In the Board's decision on appeal, we stated [in footnote no. 7, p. 6], the following with respect to these four third-party expired registrations:

Each case must be decided on its facts. Therefore, we can draw no conclusions from applicant's allegations regarding the state of the register or examination in another case.

We find no legal error in this statement or in our consideration of the four third-party expired registrations. To the extent that our statement was unclear to applicant, we note several additional points. First, applicant did not properly make of record these registrations. In order to

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make these registrations properly of record, soft copies of the registrations themselves, or the electronic equivalent thereof, i.e., printouts of the registrations taken from the electronic records of the Patent and Trademark Office's (PTO) own database, should have been submitted. See, *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992).

However, even if these expired registrations had been properly of record, they are of little persuasive value. We have absolutely no information in the record before us about the circumstances that led to both the expired registrations and the cited registration coexisting for a time on the register. We obviously are not privy to the record in the files of the third-party registrations, for example, we do not know what other registrations were also on the register, what evidence and arguments were in the application file of the cited registration, or whether the Examining Attorney made an error in allowing the cited registration to issue while the now-expired registrations were alive. Thus, we can draw no conclusions from this evidence that would affect our decision in this case. In any event, the Board is not bound by decisions of Examining Attorneys in other *ex parte* cases. See, *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994).

We turn now to applicant's allegation of error with respect to the Board's consideration of the third-party

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registrations made of record by the Examining Attorney. In the Board's decision, we stated [p. 8] the following:

In this regard, applicant does not seem to dispute that its products may be sold at retail variety and discount stores; and the Examining Attorney's evidence of third-party registrations with goods and services encompassing those in this case suggests that consumers are accustomed to seeing such goods and services emanate from the same source or related sources.

We find no error in our consideration of this evidence or the weight given to it. With regard to the third-party registrations submitted by the Examining Attorney, we note that although third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

We find that the basis for the Board's decision is clearly articulated and we do not find any error in reaching that decision. Therefore, applicant's request for reconsideration is denied and the decision of October 29, 2002 stands.

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Decision: The request for reconsideration is denied and the decision affirming the refusal under Section 2(d) of the Act remains as issued.

