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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Team Worldwide Corp.

Serial No. 76430485

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(Dan Vavonese, Managing Attorney).

Before Seeherman, Grendel and Kuhlke, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Team Worldwide Corp. seeks registration on the
Principal Register of the mark EZ BED (in standard
character form with the word BED disclaimed) for goods
ultimately identified as "air mattresses for use when
camping; air beds" in International Class 20.¹

¹ Application Serial No. 76430485, filed July 15, 2002, alleging
a bona fide intention to use the mark in commerce under Trademark
Act Section 1(b). 15 U.S.C. §1051(b).

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark EASYBED (in typed form) for "telephone shop-at-home services in the field of mattresses, beds, and bedding; retail stores featuring mattresses, beds and bedding" in International Class 42 as to be likely to cause confusion, mistake or deception.²

When the refusal was made final, applicant filed this appeal. The appeal has been fully briefed. We affirm the refusal to register.

As a preliminary matter, the examining attorney's objection to evidence attached to applicant's brief is sustained. The record should be complete prior to the filing of the appeal; after an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.³

² Registration No. 2128072, issued January 13, 1998; Section 8 affidavit accepted; Section 15 affidavit acknowledged.

³ We realize the Section 8 declaration for the cited registration in exhibit A was not filed until after the final office action issued; however, it is noted that it was available prior to filing the notice of appeal; therefore, upon resumption of examination by the examining attorney, applicant could have entered this declaration into the record by filing a request for

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We begin with the first du Pont factor, i.e., whether applicant's mark EZ BED and registrant's mark EASYBED are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. In making this determination, we must consider the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

reconsideration or, after the filing of the appeal, applicant could have filed a request for remand.

The examining attorney bases her finding that the marks are similar primarily on the identical sound of the first part of the marks EZ and EASY and the identical second part BED combining to "convey the same overall impression, suggesting a bed product with an ease of use." Br. p. 5. The examining attorney further notes that "[s]imilarity in sound alone may be sufficient to support a finding of likelihood of confusion," citing RE/MAX of America, Inc. v. Realty Mart, Inc., 207 USPQ 960, 964 (TTAB 1980). Br. p. 4. In response, applicant argues only that "a]pplicant's mark uses the two letters 'E' and 'Z' to read the word 'easy' [in contrast] the mark of the cited registration uses the spelled out version for the word 'EASY' which creates a distinct appearance from applicant's mark." Br. p. 3.

Examining the marks in terms of their appearance, sound, meaning, and commercial impression, we find the marks to be similar. The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. Visual Information Inst., Inc. v. Vicon Indus. Inc., 209 USPQ 179 (TTAB 1980).

Although there are slight differences in the appearance of the marks in view of the different spelling of easy, overall the marks are very similar, since they both begin with an "e" and end with "BED," and EASY and EZ will be viewed as equivalent. Further, the marks sound the same. RE/MAX, supra. The different spellings for EZ and EASY, and the compound word presentation in registrant's mark, do not affect the identity of the spoken marks. Moreover, because EZ is the well-recognized abbreviation for easy, the marks have the same meaning and connotation in relation to the respective goods and services, i.e., an easy way of obtaining a bed. Finally, the different spelling in applicant's and registrant's marks does not create a different commercial impression or distinguish the marks. With regard to applicant's argument concerning registrant's actual use of the mark as part of a telephone number, the rights associated with a mark in standard character or typed form reside in the wording and not in any particular display. TMEP §1207.01(c)(iii) (4th ed. 2005). Further, the Section 7(b) presumptions emanating from the Trademark Act apply to the mark as it appears in the registration. Therefore, we must make our determination of likelihood of confusion with regard to the mark in the registration. Inasmuch as the mark in the

cited registration is in typed form and does not contain a "numerical prefix," applicant's arguments regarding the registrant's actual use of the mark are irrelevant.

In view of the above, the factor of the similarity of the marks weighs in favor of a finding of likelihood of confusion.

We now turn to a consideration of the goods identified in the application and the cited registration. It is well settled that goods and services need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods and services, but rather whether purchasers are likely to confuse the source of the goods and services. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the applicant's goods and the cited registrant's services as they are described in the application and registration. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). Finally, "the greater degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and

Serial No. 76430485

the registrant's goods or services that is required to support a finding of likelihood of confusion." In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

The examining attorney argues that the identification of services in registrant's mark includes all types of mattresses and that "companies providing 'stationary home mattresses' also provide inflatable portable mattresses." Br. p. 8. In support of her position, the examining attorney submitted excerpts from several websites selling "traditional" mattresses and air mattresses. See, e.g., abed.com (offering, inter alia, foam beds, air beds, adjustable beds and mattress pads); emattress.com (listing air mattresses, foam mattresses and king coil mattresses); a webpage titled Furniture Zone (listing furniture and bedding including air beds, air mattresses and air mattresses for camping); a webpage titled AEROBED (advising that the air bed can be used daily or can be taken when traveling); and a webpage titled Quality Trading, Inc. (offering SERTA inflatable air mattresses; traditional beds are also sold under the mark SERTA in other examples in the record, e.g., mattressgiant.com). This evidence shows that "air bed" is a term used for inflatable mattresses.

In response, applicant argues that "applicant's product is a unique, portable, electrically blown up mattress used for travel and/or camping purposes" whereas the "services of the cited registration are telephone shop-at-home services in the field of mattresses, beds and bedding and retail stores featuring mattresses, beds, and bedding." Br. p. 3. (emphasis in original) Applicant asserts that "[c]onsumers would be unlikely to confuse portable air mattresses with registrant's 'shop-at-home phone' number that can be used to purchase various home furniture." Br. p. 4. (emphasis in original) Applicant also contends that the trade channels differ inasmuch as applicant's goods are "primarily sold through sporting goods stores or camping retailers [and] applicant's portable air mattresses are cheaper in price and are not sold in the same retail outlets." Br. p. 5. Applicant states that "Internet searches of retail sellers of beds, mattresses and bedding did not reveal any such retailers that also sold air mattresses for camping and air beds." Br. p. 5. Finally, applicant states that registrant's goods are expensive and concludes that "the sophisticated consumers for registrant's expensive stationary home furniture are unlikely to confuse applicant's inexpensive and portable camping mattresses and the channels of trade

Serial No. 76430485

for air mattresses for camping and air beds are entirely distinct from the trade channels for beds, mattresses and bedding." *Id.* In support of its arguments applicant timely submitted excerpts from several websites offering different types of mattresses for sale. See, e.g., camping-equipment-now.com (offering camping equipment including air mattresses); tents-tents-now.com (offering camping equipment including air mattresses); rockawaybedding.com (search result on website notes "air bed" could not be found); and sleepys.com (offering a variety of traditional mattresses).

We begin by noting that confusion can occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. See, e.g., *In re Hyper Shoppes (Ohio) inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Further, we are not persuaded by applicant's argument that registrant's identification excludes the sale of air beds. The evidence of record shows air beds and traditional mattresses sold on the same websites. In addition, the evidence shows air beds and traditional mattresses sold under the same mark (SERTA). Thus, registrant's identification of the goods, mattresses and beds, provided by its services, encompasses applicant's air beds. While the record is not as clear as

to whether air mattresses for camping fall within the "mattresses, beds and bedding" listed in registrant's identification, i.e., whether air mattresses that are used specifically for camping would be sold in a retail or shop-at-home outlet for mattresses, beds, and beddings, in view of our findings with respect to applicant's air beds, we need not make a determination as to the relationship between applicant's air mattresses for camping and registrant's services. See, e.g., *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981). The du Pont factor of the similarity of the goods favors a finding of likelihood of confusion.

Considering the channels of trade, the examining attorney correctly states that absent limitations in the identifications we must consider all normal channels of trade. Applicant's arguments seek to impermissibly limit the trade channels for its goods by asserting that they are primarily sold in sporting goods stores or camping retailers. However, the identification in its application is not restricted by trade channels. As shown in the record, air beds and traditional mattresses are sold on the same websites.⁴ Further, as noted above, although the

⁴ The dissent suggests that we must presume that applicant's goods will not be sold through registrant's services; therefore,

evidence of record does tend to show that air mattresses for camping are sold on different websites from other mattresses, we need not find likelihood of confusion with respect to all of applicant's identified goods. In view thereof, the overlap in the channels of trade favors a finding of likelihood of confusion.

Applicant argues that registrant's purchasers would be sophisticated in view of the expensive nature of those goods. We point out, again, that there is no such limitation in the broad identification of services in the registration, which would include the sale of air beds/inflatable mattresses. Moreover, applicant has acknowledged that its goods are inexpensive, and therefore they might well be purchased without a great deal of deliberation. Thus, we find this factor favors a finding of likelihood of confusion.

consumers will not encounter applicant's goods in registrant's venues. However, in cases involving goods and services, an overlap in trade channels is found given that the type of goods in the identification would be sold in the type of store in the identification; there is no acknowledgment of an implied limitation to applicant's specific goods not being sold in registrant's specific store. See, e.g., *In re The United States Shoe Corp.*, 229 USPQ 707, 708 (TTAB 1985) ("Absent a specific limitation in the registration certificate, we must assume registrant's uniforms move in all of the normal channels of trade for such goods which certainly includes retail stores in the case of uniforms. Even if registrant sold only to the trade, garments bearing the mark are ultimately purchased by ordinary consumers, such as waitresses or hospital workers, who buy their uniforms at retail." Citation omitted). Thus, the majority does not find

In conclusion, we find that because of the close similarities in the marks, the relatedness of the goods and services, and the overlap in trade channels, confusion is likely between applicant's mark and the mark in the cited registration. Finally, to the extent we have any doubts, we resolve them, as we must, in registrant's favor. In re Hyper Shoppes (Ohio), Inc., supra.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.

Seeherman, Administrative Trademark Judge, dissenting:

I respectfully dissent. The registered mark, EASYBED, is obviously highly suggestive for "telephone shop-at-home services in the field of mattresses, beds, and bedding; retail stores featuring mattresses, beds and bedding," in that it suggests that it is easy to obtain or purchase a bed by using the registrant's services. Suggestive marks are entitled to a more limited scope of protection.

Applicant's mark, although similar in appearance and identical in pronunciation to the cited mark, has a distinctly different connotation when used in connection with "air mattresses for use when camping; air beds."

Namely, it suggests that the air mattresses or air beds are

this implied limitation a factor to be considered in the analysis.

Serial No. 76430485

easy to inflate and use. I believe that consumers will readily recognize these different connotations, and because of this, will view the marks as indicating different sources for the respective goods and services. See *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (no likelihood of confusion found between PLAYERS in stylized form for men's underwear and PLAYERS for shoes, based in part on the different connotations the marks have when used in connection with the respective goods); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) (no likelihood of confusion found between BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's suits, coats and trousers).

Nor is there clear evidence that the channels of trade for applicant's goods and the registrant's services are the same. The website evidence submitted by the examining attorney shows only that air mattresses or air beds and traditional mattresses may be sold on the same website. However, the cited registration is not for goods, it is for telephone and retail store sales. The channels of trade for registrant's telephone and retail store services are, obviously, telephone sales and retail store sales. Although air beds and air mattresses can be sold through such channels of trade, it is not appropriate to assume

Serial No. 76430485

that applicant's goods would actually be sold by the registrant in the registrant's stores or through the registrant's telephone sales; a registrant cannot deliberately cause confusion by its own actions. Thus, while applicant's goods must be considered to be sold in all stores that would sell air beds, including retail stores that sell traditional mattresses, applicant's own goods would not be sold through the registrant's own telephone shop-at-home services or in its retail stores. I do not suggest that consumers of air beds and air mattresses for camping would not also encounter telephone shop-at-home services for mattresses, beds and bedding, or retail stores that sell such goods. However, consumers would not encounter applicant's air beds and air mattresses in the same venue that the registrant offers its retail store and telephone shop-at-home services, nor would customers at the registrant's retail stores or those using the registrant's telephone shopping services encounter applicant's goods. Thus, I am not persuaded, given the highly suggestive nature of the marks and their different connotations as used for the respective goods and services, that consumers would assume that there is a connection in source or sponsorship between applicant's identified goods

Serial No. 76430485

and the registrant's services if they were encountered in different arenas.

Accordingly, I would reverse the refusal of registration.