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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Boyer Refrigeration, Heating & A/C., Inc.

Serial No. 76699557

Floyd B Carothers of Carothers and Carothers for Boyer Refrigeration, Heating & A/C., Inc.

Charisma Hampton, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

Before Holtzman, Cataldo, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Boyer Refrigeration, Heating & A/C., Inc. filed an application to register the mark B Boyer and design, as shown below, for services ultimately identified as "commercial and residential installation, replacement service and maintenance of heating, refrigeration, and air conditioning units, namely, gas and oil furnaces, gas and oil heat pumps, gas and oil boilers, geothermal units, air

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conditioning, air conditioning units, chillers, walk-in coolers and walk-in freezers," in International class 37¹:



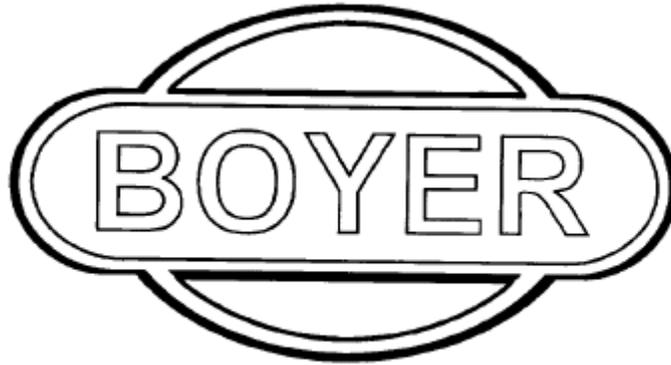
The trademark examining attorney refused registration of the mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark BOYER, registered in typed drawing format, for, among other things, "construction services, namely, civil construction and tunneling; installation and maintenance of electrical systems; mechanical equipment installation; marine construction; and house and building demolition," in International Class 37,² as well as the following two marks registered to the same registrant for the same services, that when used in

¹ Application Serial No. 76699557, filed September 21, 2009, pursuant to Section 1(a) of the Trademark Act, 15 USC §1051(a), alleging dates of first use and first use in commerce on December 31, 1995, and including the following description of the mark: The mark consists of a stylized "b" appearing inside a square with round edges featured adjacent to the wording BOYER.

² Registration No. 2555146, issued April 2, 2002. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

connection with applicant's identified services, it will be likely to cause confusion, mistake, or to deceive:

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CONTRACTORS ENGINEERS INVENTORS

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. After careful consideration of the arguments and evidence of record, we affirm the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de*

³ Registration No. 2535883, issued February 5, 2002. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

⁴ Registration No. 3613090, issued April 28, 2009, with no claim to the exclusive right use the term "CONTRACTORS ENGINEERS INVENTORS" apart from the mark as shown.

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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 or services. See *Federated Foods, Inc. v. Fort Howard 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"). We consider each of the factors as to which applicant or the examining attorney presented arguments or evidence.

For purposes of our likelihood of confusion analysis, we focus on the most relevant cited registration, Registration No. 2555146. If we find a likelihood of confusion with the mark and the services in this registration, then the analysis as to the other cited registrations is moot. Similarly, if we do not, then we would not find it as to the others.

The Marks

In comparing the marks, we are mindful that 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 so that confusion as to the source of the goods and/or services offered under the

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respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration consists solely of the word "BOYER," in typed drawing format. Applicant's mark is as follows:



The literal portion of applicant's mark, i.e., the term "BOYER," is in sight and sound identical to the mark in the cited registration. With a mark registered in typed form, the registrant is entitled to present its mark in any of a number of different formats, including one resembling that presented by applicant's mark. See *Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d 1253, 1259 (Fed.

Cir. 2011) ("If the registrant ... obtains a standard character mark without claim to 'any particular font style, size or color,' the registrant is entitled to depictions of the standard character mark regardless of font, style, size, or color).⁵

There is nothing to indicate that the term "BOYER" in the cited registration would have a different commercial impression from the term "BOYER," or "B BOYER," with design element in the application. Generally, it is the words and not the design that will be used by consumers to call for or refer to the goods or services, particularly where, as here, the design merely serves to emphasize the literal element of the mark. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Since applicant's design consists of a drawing of a letter "B," the first letter of the mark, it does not change the commercial impression created by the term "BOYER."⁶

On balance, we find that the marks are highly similar in appearance, pronunciation and meaning, and project very similar commercial impressions. Accordingly, we find this

⁵ Trademark Rule 2.52(a) was amended in 2003 to refer to "typed drawings" as "standard character" drawings. See Trademark Rule 2.52(a); 37 C.F.R. 2.52(a).

⁶ Applicant did not argue that the cited registration is weak. Even if it had, we note that, were it relevant here, even weak marks are entitled to protection against registration of a confusingly similar mark. See *Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521 (TTAB 1982).

du Pont factor to weigh in favor of finding a likelihood of consumer confusion.

The Services and Channels of Trade

Preliminarily, we note that the more similar the marks at issue, the less similar the goods or services need to be for the Board to find a likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). Moreover, goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

The examining attorney has submitted numerous copies of use-based, third-party registrations covering services of the type in both the application and the cited registration. Examples are Registration No. 2382062 ("installation, repair and maintenance of heating and

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cooling equipment" as identified by applicant and "installation of electrical systems" as identified by registrant); Registration No. 2948538 ("heating equipment installation and repair" and "air conditioning apparatus installation and repair" as identified by applicant and "electric appliance installation and repair" as identified by registrant); Registration No. 3140830 ("maintenance, installation and servicing of air conditioning, heating," as identified by applicant, and "installation of electrical systems and equipment" as identified by registrant); Registration No. 3706419 ("installation of heating, cooling" as identified by applicant, and "installation of electrical systems" as identified by registrant); Registration No. 2818370 ("installation of air conditioners" and "repair of air conditioners" as identified by applicant, and "installation of electrical equipment" as identified by registrant); Registration No. 2719505 ("installation and repair of air conditioning apparatus" and "installation, repair, and maintenance of heating equipment" as identified by applicant, and "installation of electrical systems" as identified by registrant); and Registration No. 3336302 ("installation, repair and maintenance of heating, cooling, and refrigerating equipment" as identified by applicant, and

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"installation of automated electronic, lighting" as identified by registrant). Copies of use-based, third-party registrations may serve to suggest that the services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

The examining attorney also submitted evidence of websites showing various companies offering services in both "air conditioning and heating" (or HVAC) as identified in the application and "electrical" or "mechanical" equipment installation as identified in the cited registration, for example by Rock Creek Heating & Cooling at www.rockspringhvacr.com; by The Johnson Companies at www.johnsoncont.com; by Nesma & Partners at www.nesma-partners.com; and by Michael & Sons at www.michaelandson.leads.com.

Applicant argues that the actual services rendered by registrant are "immense construction projects and have no relationship whatsoever to the services rendered by Appellant." (appl's brief at 6). To support this argument, applicant submitted a page from the website of registrant's website, showing some of the services rendered by registrant. It is well-established, however, that we must compare the services *as described* in the application

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with those *as described* in the cited registration.

Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding likelihood of confusion "as a matter of law" based on a comparison of the parties' identifications, although they involved different goods and services within the fields of technology); *see also Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed." (citations omitted)). Since we find the recitals of services to be quite clear, this is not a situation where we would need to resort to extrinsic evidence to clarify them. *Compare In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990).

Accordingly, we consider only the identifications and not the evidence of actual usage by either applicant or registrant. *See Octocom, supra*, 16 USPQ2d at 1787.

In this regard, we note that the issue is not whether consumers would confuse the services but whether consumers

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would be confused into believing that the services emanate from a single source. Here, there is evidence that both applicant's installation, replacement and maintenance of "heating, refrigeration, and air conditioning" and registrant's "installation and maintenance of electrical systems" and of "mechanical equipment" is likely to be offered by the same company under the same mark to the same consumer in need of improvements in his or her home.

With regard to channels of trade, the services in the cited registration, as recited, include "installation and maintenance of electrical systems" and "mechanical equipment installation" while the services in the application are recited as "commercial and residential installation, replacement service and maintenance of heating, refrigeration, and air conditioning units," which is a subset thereof. Accordingly, they are likely to travel through the same trade channels and be purchased by the same classes of purchasers. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). In other words, as identified, both applicant's and registrant's services could be offered to the same customers and indeed via the same contractors or companies. Accordingly, the second and third *du Pont* factors also weigh in favor of finding a likelihood of confusion.

Consumer Sophistication

Applicant argues that its consumers or those of registrant are "specialized customers" who "cannot be confused." (appl's brief at 6-7). As discussed above, the services identified by applicant and registrant both include installation and maintenance of electrical and mechanical equipment. The relevant services do not contain limitations on the conditions of sale or classes of purchasers, other than, in the application, to say "commercial and residential," which may include homeowners themselves. See *Octocom*, supra 16 USPQ2d at 1787. However, even if we are to assume that the services identified by both the cited registration and the application may be marketed to professionals, who would be presumed to exercise a higher degree of care in their purchase than would ordinary consumers, with such highly similar marks and related services, even a careful, sophisticated consumer of such services is not likely to note the difference of source. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). Accordingly, the fourth *du Pont* factor is neutral.

Balancing the Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that the marks are highly similar; the services are related; and, as identified, they would be offered through the same channels of trade to the same classes of purchasers. As our precedent dictates, we resolve doubt in favor of the prior registrant. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *see also In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Accordingly, we find a likelihood of confusion between applicant's mark and the mark in the cited registration for the services sought.

Decision: The refusal to register is affirmed.