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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Trenton Corporation

Serial No. 77555997

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Before Holtzman, Ritchie and Kuczma, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by The Trenton Corporation (applicant) to register the standard character mark GUARD-WRAP on the Principal Register for "coatings and chemical compounds, namely, anti-corrosion and protective coatings for metal structures, pipes, piping, bridges, and aboveground and underground utility structures," in Class 2.¹

¹ Application Serial No. 77002927 was filed on August 26, 2008, originally based on Section 1(a) of the Trademark Act (use), but subsequently amended to assert Section 1(b) of the Act (intent to use)

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The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the registered mark GUARDWRAP in standard characters for "barrier material, namely, flexible plastic sheeting, used in the construction industry to protect structures from wind and moisture," in Class 17, as to be likely to cause confusion.²

When the refusal was made final, applicant appealed. Briefs have been filed.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the marks. In determining the similarity or dissimilarity of marks, we must consider the marks in their entirety in terms of sound, appearance, meaning and commercial impression. See Palm Bay Imports, Inc. v. Veuve Clicquot

as the filing basis in response to the examining attorney's requirement for an acceptable specimen of use.

² Registration No. 3545307; issued December 9, 2008.

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Ponsardin *Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The marks in this case, GUARD-WRAP and GUARDWRAP, are identical in sound, meaning and commercial impression, both consisting of the same words, GUARD and WRAP, in the same order. The marks are essentially identical in appearance. The presence of a hyphen between the words in applicant's mark is an insignificant difference that is not likely to be noticed or remembered by purchasers when encountering these marks at separate times. See *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312, 1313 (TTAB 1987) (marks CROSS-OVER and CROSSOVER "identical in appearance but for the inclusion in applicant's mark of a hyphen, which, for purposes herein, is of no legal significance"); *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 489 n.4 (TTAB 1978) (FAST-FINDER with a hyphen is in legal contemplation substantially identical to the mark FASTFINDER without a hyphen).

The virtual identity of the marks strongly favors a finding of likelihood of confusion. See *In re Shell Oil*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("The identity of words, connotation, and commercial impression weighs heavily against the applicant.").

While GUARDWRAP has a suggestive meaning in relation to registrant's protective barrier materials, that suggestive meaning is the same in both marks. Furthermore, there is no

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evidence that the term is highly suggestive of registrant's goods or that it has been commonly used or registered by others for similar goods. This case is distinguishable from *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992) on which applicant relies. While the Board in that case found no likelihood of confusion between GRAND PRIX for automobiles and the identical mark GRAND PRIX for related automobile replacement parts, that finding was based on the highly suggestive nature of the marks, and most significantly on evidence showing that the marks had coexisted in the marketplace for thirty years with no reported instances of actual confusion.

We recognize that GUARDWRAP, as a suggestive mark, is not entitled to the broadest scope of protection. However, the mark is at least entitled to protection against the registration of a virtually identical mark used on related goods. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

We turn then to a consideration of the goods. Applicant argues that "the differences between the products are significant and the Examining Attorney erred in determining that merely because they may both be used in the same industry, confusion is likely." Brief, p. 5. Applicant contends that whereas its goods "consist of a chemical coating that is applied to metal utility

structures found aboveground or underground to ensure and protect the utility infrastructure from corrosion," registrant's goods, in contrast, are "'flexible plastic sheeting' used as a barrier in the construction industry to protect the structure from wind and moisture while the structure is in the process of being constructed." Applicant thus maintains that "the goods are different in their physical form, their function and purpose, and their [respective] industries." *Id.*, p. 6. While acknowledging that construction projects, in general, will first require the placement of utilities, applicant argues that registrant's goods "would be applied on the exterior of a new home or other building - while it is being constructed - whereas the Applicant's goods would be applied by municipalities and transportation authorities on utility infrastructure," and the goods would not be used for interchangeable purposes. *Id.*, p. 7.

The question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to be confused as to the source of the goods, or as to affiliation, connection or sponsorship of the goods. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1429 (TTAB 1993). Thus, it is not necessary that goods be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner and/or that the conditions surrounding their marketing are such that

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they would be encountered by the same persons under circumstances that could, because of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Moreover, where the marks are virtually identical, as they are here, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Applicant's goods are "coatings and chemical compounds, namely, anti-corrosion and protective coatings for metal structures, pipes, piping, bridges, and aboveground and underground utility structures" and registrant's goods are "barrier material, namely, flexible plastic sheeting, used in the construction industry to protect structures from wind and moisture."

In evaluating the relationship between the goods, it is well settled that we must consider the goods as they are identified in the application and registration and we cannot read limitations into those goods that are not reflected therein. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

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Where the goods are broadly described, and there are no limitations as to their nature or type, it is presumed that the scope of the application and registration encompasses all goods of the nature and type described. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958); see also, *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1992).

To better understand the nature of applicant's goods, we consider the product information contained in the printouts from applicant's website, trentoncorp.com.³ The website states that GUARD-WRAP "is composed of a plastic mat and film, saturated with microcrystalline wax." The product is packaged in cardboard cartons with 50 square yards of the material per carton, and it is described more fully as follows:

Guard-Wrap consists of a spunbonded polyester mat saturated with microcrystalline wax that is laminated to a polyester film that is coated with microcrystalline wax. Its conformability makes it ideal for wrapping fittings. It also works well on straight pipe.

³ Submitted with applicant's response dated June 9, 2009. We may properly refer to extrinsic evidence to determine or clarify the meaning of terms in an identification of goods. See *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990). Once those meanings are established, we determine the issue of likelihood of confusion based on the description of goods in the application and registration, even if the extrinsic evidence results in a broad scope of goods. See *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009).

We find that there is a viable relationship between the goods. The products are similar in form and function. Applicant's coatings are in the form of a coated polyester mat, which is a barrier material, and the material is used to protect, for example, bridges and metal structures⁴ from moisture and other damaging elements. Registrant's product is also a barrier material and it is used to protect "structures," which we must construe as encompassing bridges and metal structures, from wind and moisture. Thus, the products are not just used in the same general industry, but based on the identifications of goods, they both may be used in the same construction project. Further, applicant's goods are not limited in application to "utility infrastructure." The goods could also be applied, for example, to pipes connecting utilities to the interior pipes of a structure or to the interior pipes themselves.

We find that the respective identifications on their face are sufficient to demonstrate the relationship between

⁴ The term "metal structures" is broad enough to encompass metal building structures and metal frameworks for buildings. We note that the entry for "Building Construction: Low-rise commercial, institutional, and industrial buildings" in the *Encyclopædia Britannica* states that "Steel is a major structural material in these buildings." The reference also notes, under the entry for "Framed Building," that "Steel and reinforced concrete are the most common materials in large contemporary structures." *Encyclopædia Britannica Online Academic Edition* (2012) (Britannica.com). The Board may take judicial notice of reference works (*University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983)), including online reference works which exist in printed format or have regular fixed editions (*In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006)).

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applicant's and registrant's goods. In addition, the examining attorney has made of record several use-based, third-party registrations which further support the relatedness of the goods.⁵ The registrations show, in each instance, that the same mark has been registered for the general types of goods identified in the application and registration, i.e., coatings and barrier materials used in the construction industry. They include the following: Reg. No. 2655329 (SCOFIELD) listing "coatings, namely moisture barriers for construction use and surfaces" and "barriers, namely moisture barriers, and elastomers, for construction use"; Reg. No. 3377504 (ENVIROMAT and design) listing "corrosion protection barrier for steel, concrete or fiberglass tanks or pipes consisting of a top and bottom layer of protective coating and joined by a woven cloth that allows for leak detection"; Reg. No. 3660034 (DRYVIT) listing "coatings in the nature of an adhesive air-barrier base coat for exterior building wall panels" and "insulation material sold in sheet and board form for application to exterior surfaces of a building"; Reg. No. 3048932 (EMISSHIELD) listing "insulating thermal barrier primer and coating for use in industries, including, but not limited to, [the] ceramic/refractory,

⁵ The examining attorney also attached excerpts from several third-party websites to her denial of applicant's request for reconsideration. However, the examining attorney did not reference these materials either in her Office action or in her brief; nor is it clear what these materials purport to show. Consequently, this evidence has been given no consideration.

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structural steel, building material...industries." Third-party registrations, while not evidence of use of the marks therein, serve to suggest that the listed goods are of a type which may emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

The goods would move in similar trade channels in the construction industry and would be purchased by, or come to the attention of, the same persons, such as construction contractors, and they could be purchased for use at the same construction site. Applicant argues that its goods would typically be applied by municipalities and transportation authorities on utility infrastructure whereas the typical consumer of registrant's goods will be general contractors and builders. Again, however, applicant's goods, as identified, are not limited in application to use on "utility infrastructure." Moreover, applicant acknowledges that "consumers of applicant's goods could potentially be consumers of other construction services..." Brief, p. 11.

We agree with applicant that the purchasers of these commercial products are likely to be knowledgeable and discriminating in their purchasing decisions. However, it is well settled that even purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of

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trademarks or immune to source confusion arising from the use of essentially identical marks on or in connection with the goods. See *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990) ("even sophisticated purchasers can be confused by very similar marks"); *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962); *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

In view of the foregoing, and because essentially identical marks are or will be used in connection with related goods, we find that confusion is likely.

To the extent that we have any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

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