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THE TTAB**

Mailed: November 28, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Atlas Roofing Corporation

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Serial No. 85024217

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Donna J. Bunton of Nixon & Vanderhye PC for Atlas Roofing Corporation

Maureen Dall Lott, Trademark Examining Attorney, Law Office 117 (J. Brett Golden, Managing Attorney).

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Before Zervas, Wellington, and Shaw, Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Atlas Roofing Corporation has filed an application to register on the Principal Register the mark X-PRO, in standard characters, for goods identified as "foam insulation for use in building and construction; insulating materials; expanded polystyrene (EPS) insulation for roofs, walls and floors" in International Class 17.<sup>1</sup>

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<sup>1</sup> Serial No. 85024217 was filed on April 27, 2010, with an allegation of a bona fide intention to use the mark in commerce.

The examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of a likelihood of confusion with the mark in U.S. Registration No. 3715343 for the mark X-PRO, also in standard characters, for, *inter alia*, "consultancy in the fields of building construction and construction," in International Class 37.<sup>2</sup>

After the refusal was made final, applicant appealed. The case is fully briefed. For the reasons discussed below, we affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

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<sup>2</sup> Issued November 24, 2009.

The Marks

We first consider the similarity or dissimilarity of the marks, comparing the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Applicant's X-PRO mark in standard characters is identical in all respects to registrant's X-PRO mark, also in standard characters. This *du Pont* factor heavily favors a finding of likelihood of confusion.

The Goods and Services

We now consider the similarity of the goods and services, keeping in mind that the greater the degree of similarity between the marks at issue, the lesser the degree of similarity between the respective goods and services that is required to support a finding of likelihood of confusion. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). If the marks are identical, as in this case, it is only necessary that there be a viable relationship between the goods and services in order to support a finding of likelihood of confusion. *See In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue remains, of course, not whether

purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to their source. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

The examining attorney argues that applicant's insulation for use in building and construction and for roofs, walls and floors is related to registrant's "consultancy in the fields of building construction and construction" because "the same entity commonly provides both insulation and consulting services in the field of building construction, especially those related to insulation used in building construction." Examining Attorney's Br. at 4. To support the refusal, the examining attorney submitted copies of seven third-party registrations that serve to suggest that insulation products and construction consulting may emanate from a single source:

- Reg. No. 3725935 for the mark ACCELERATED BUILDING TECHNOLOGIES and design for, *inter alia*:  
**Packing, stopping and insulating materials, namely, expanded polystyrene foam**, in International Class 17;  
Installation services, namely, **providing consulting services and advice related to prefabricated, namely, panelized, building systems and parts therefor**, in International Class 37;
- Reg. No. 3661524 for the mark SPREFIX for, *inter alia*:  
Non-conducting compositions within the building industry and the marine industry, namely, **insulation against fire, condensation, acoustics as well as thermal insulation**, in International Class 17;

Construction and erection of buildings and marine construction as well as repair and maintenance of buildings such as insulation against fire, condensation, acoustics and thermal insulation; ship building services regarding insulation against fire, condensation, acoustics and thermal insulation, in International Class 37;

- Reg. No. 3660034 for the mark DRYVIT for, *inter alia*:  
**[I]nsulation material sold in sheet and board form for application to exterior surfaces of a building**, in International Class 17;  
**[C]onsulting services in the installation of wall panel systems for buildings**, in International Class 37;
- Reg. No. 3656703 for the mark AFT and design for, *inter alia*:  
**[I]nsulation with acoustic and thermal properties for use in residential and commercial buildings**, in International Class 17;  
**[C]onsulting services for the construction of insulation manufacturing plants**, in International Class 37;
- Reg. No. 3007575 for the mark PLASTIFAB EPS PRODUCT SOLUTIONS and design for:  
**[I]nsulation materials and parts and accessories therefor for insulating pipes and the like**, namely, insulation jacketing and insulation fitting covers; **sound insulation material, namely, expanded polystyrene insulation and polystyrene foam** for use in sound insulation and building insulation purposes; acoustical insulation for buildings; and building insulation, in International Class 17;  
**[C]onstruction consultation, namely, providing advice and expertise relating to the use of expanded polystyrene products for the construction and building industries**, in International Class 37;
- Reg. No. 3819067 for the mark ARXX for, *inter alia*:  
Wall system consisting of molded **expanded polystyrene (EPS) insulation panels** that are connected by cross ties for use in wall systems; sealing and insulating materials to control moisture for below grade walls, in International Class 17;

**Consulting services in wall and building construction,**  
in International Class 37; and

- Reg. No. 3888991 for the mark ENVIROTROL, INC. for,  
*inter alia*:

**Spray-on insulation for use in all types of process equipment, vessels, tanks, piping and commercial applications,** including food service, HVAC, and electronic enclosures in need of corrosion protection and insulation, in International Class 17;

Technical support services, namely, **technical consultation in the field of application of spray-on insulation and protective coatings,** in International Class 37. Emphasis added.

Although such third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent they are based on use in commerce and serve to suggest that the goods and services identified therein are of a kind which may emanate from a single source under a single mark. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The examining attorney also has made of record a number of excerpts from various third-party websites to show that foam and insulation products used in the construction field are sometimes offered in conjunction with consulting services. The most relevant websites are:

- **crinsulators.com** - The website of a New Jersey business offering "complete insulation service[s]" and featuring "Affordable Rates with Free Consultation;"
- **thermafiber.com** - A website providing information about "Thermafiber" brand insulation products and stating "[w]e collaborate with you to manage insulation details at every step by offering engineering judgments, recommendations for specific products, CAD drawings, and consultation on good design practices;" and
- **plymouthfoam.com** - A website of a company purporting to be "one of the nation's leading EPS and soft foam manufacturers" and offering a variety of foam products and services, including an "experienced design consultation staff."

Applicant argues that this evidence is insufficient because it shows "at most that the same entity sometimes manufactures a product such as 'insulation' and also provides consulting services relating to 'insulation'" but does not show that an entity such as registrant which manufactures metallurgical machinery and metallurgical plants also provides consulting services relating to "completely unrelated products such as insulation." Applicant's Br. at 6.

Instead, applicant argues that the nature of registrant's consultancy services is "relatively unclear" and thus the services must be considered in the larger context of registrant's business which gives these consulting services "a particular meaning and understanding to its customers and others in the metallurgical Industry."

Applicant's Br. at 8-9. Relying on *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990), applicant argues that printouts from registrant's website suggest that registrant's services should be "defined with respect to the metallurgical industry." *Id.*

We disagree. *Trackmobile* stands for the proposition that when the nature of the goods or services is unclear (e.g., mobile railcar movers v. light railway motor tractors), extrinsic evidence may be used to demonstrate what a specific term means in an industry to understand whether or not one is encompassed by the other. The meaning of registrant's services, "consultancy in the fields of building construction and construction," is not in any way unusual or unclear so as to require clarification from extrinsic evidence under *Trackmobile*.

Despite its arguments to the contrary, applicant is seeking to improperly limit the scope of a broad identification rather than provide clarity to an unclear identification. The law is clear that the question of likelihood of confusion must be determined based on the identification of goods and services in the application and cited registration, regardless of what the record may reveal as to the actual nature of the goods and services, the particular channels of trade or the class of purchasers



to which the goods and services are directed. *Octocom Sys., Inc. v. Houston Computers Servs. 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 [and registration].").

If, as here, the application and registration describe the goods and services broadly and there is no limitation as to the nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all services of the type described, and that they move in all channels of trade normal for these services, and that they are available to all classes of purchasers for the described services. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Thus, registrant's "consultancy in the fields of building construction and construction" must not be limited to particular channels of trade such as the metallurgical industry.

Applicant also argues that the goods and services occupy "completely different fields" (Applicant's Br. at 10) but both applicant's goods and registrant's services are related to the building construction industry. Moreover, given that some of registrant's goods and

services involve high temperature metallurgical furnaces and machines for production of raw steel, it is certainly possible that some forms of insulation could be used or otherwise recommended by registrant to mitigate excessive heat or loud sounds associated with steel mills.

Accordingly, we find that the third-party registrations and internet website evidence demonstrate that insulation products for building construction and consulting services may emanate from a single source.

Consumer Sophistication

Finally, applicant argues that there is no likelihood of confusion because consumers of registrant's services are "sophisticated, knowledgeable people in the metallurgical industry who would be well aware what equipment and machinery they are looking for and who they are dealing with." Applicant's Br. at 10. Leaving aside the fact that the registrant's consulting services are not limited to the metallurgical industry as discussed above, this argument is unavailing. It is well-settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as this appeal involving identical marks.

*See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), *citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110,

112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible."). *See also In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988) (being knowledgeable and/or sophisticated in a particular field does guarantee that one knows the range of products of the parties with whom one is dealing).

Moreover, even assuming, arguendo, that registrant's consumers are sophisticated, there is no evidence that applicant's consumers are sophisticated. This raises the possibility of reverse confusion, which is no less a problem. Thus, consumers who become familiar with applicant's X-PRO insulation products for use in building and construction, upon seeing the registrant's X-PRO mark in connection with consultancy in the fields of building construction and construction, are likely to believe that registrant's services are associated with the applicant.

We find that the similarities between the marks and the goods sold thereunder outweigh any sophisticated purchasing decision. *See HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

Finally, we must resolve doubt in favor of the senior user of the mark, which in an ex parte proceeding is presumed to be the one who registered first (particularly as, we note, applicant has filed an intent-to-use application). *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

We conclude that purchasers familiar with registrant's "consultancy in the fields of building construction and construction" offered under the mark X-PRO would be likely to mistakenly believe, upon encountering applicant's identical mark, X-PRO for "foam insulation for use in building and construction; insulating materials; expanded polystyrene (EPS) insulation for roofs, walls and floors," that the goods and services originated from or are associated with or sponsored by the same entity.

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