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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shurtech Brands, LLC

Serial No. 85171209

Karl S. Sawyer Jr. of K & L Gates LLP for Shurtech Brands,
LLC.

Kapil K. Bhanot, Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Kuhlke, Taylor and Shaw, Administrative Trademark
Judges.

Opinion by Shaw, Administrative Trademark Judge:

Shurtech Brands filed an application to register on the Principal Register the mark SHAPE, in standard characters, for goods ultimately identified as "painter's masking tapes in roll, sheet and pad form for use in painting interior building walls and woodwork," in International Class 17.¹

¹ Serial No. 85171209 was filed on November 8, 2010, with an allegation of a bona fide intention to use the mark in commerce.

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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. 3892396 for the mark SHAPE, also in standard characters, for "paints and lacquers" in International Class 2.²

After the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. 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).

² Issued December 21, 2010.

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 SHAPE mark in standard characters is identical in all respects to registrant's SHAPE mark in standard characters.

The Goods

We now consider the similarity of the goods, 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 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 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, but rather whether there is a likelihood of confusion as to their source. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

With these principles in mind we compare applicant's "painter's masking tapes in roll, sheet and pad form for use in painting interior building walls and woodwork" with registrant's "paints and lacquers."

The examining attorney argues that the goods are "closely related . . . because they are paint and paint-related accessories likely to travel through the same channels of trade to the same class of purchasers."

Examining Attorney's Br. at 4. The examining attorney has made of record the following excerpts from various third-party websites to show that painter's masking tape is sold alongside paint in a variety of retail stores.

- thepaintstore.com - A retail website offering paint alongside painting supplies such as masking tape.
- sherwin-williams.com - A retail website offering Sherwin-Williams brand paint alongside painting supplies such as masking tape. This website also shows that Sherwin-Williams offers its own brand of paint roller covers.
- lowes.com - A hardware store retail website offering paint alongside painting supplies such as masking tape.
- paint-supplies.gillroys.com - A hardware store retail website offering paint, including interior and exterior paint as well as varnish and shellac, alongside painting supplies such as masking tape.
- homedepot.com - A hardware store retail website offering paint alongside painting supplies such as masking tape. This website also shows that BEHR brand paints are sold alongside BEHR brand paintbrushes and paint roller covers.
- acehardware.com - A hardware store retail website offering paint alongside painting supplies such as

masking tape, and including an article on using masking tape to improve painting results:

"Updating your home can be as simple as applying a fresh coat of paint. . . . Since preparation is as important as the paint job itself, set yourself up with some must-have painting accessories. . . . create clean edges by applying masking tape around windows and doors. . . ."

- painters-toys.com - A retail website offering painting supplies such as masking tape, and stating that masking tape is "necessary for any paint job."
- mysears.com - A retail website offering paint alongside painting supplies such as masking tape.

Examining Attorney's Office Actions of February 17, 2011 and May 25, 2011.

In response to the examining attorney's evidence, applicant first argues that it is "highly uncommon" for goods such as painters masking tape and paints and lacquers to be manufactured and sold by the same party. Moreover, applicant argues that "[c]onsumers of paints and painting accessories necessarily recognize this fact." Applicant's Br at 3. This is simply attorney argument without support. There is no evidence of record showing that manufacturers of paint limit their products to paint only or that consumers recognize such a limitation. The record shows the opposite may be true. The examining attorney's website evidence shows that at least two paint manufacturers, Sherwin-Williams and BEHR, offer both paint and painting accessories such as paint brushes or roller covers under

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the same trademark. This suggests that consumers may be accustomed to seeing paints and at least some painting accessories, such as brushes and roller covers, offered under the same mark.

Applicant next argues that the registrant is the "internationally well-known manufacturer of Mercedes automobiles" and therefore its paints and lacquers "must necessarily and only be automobile paints and lacquers targeted to the automobile industry." Applicant argues, therefore, that since its masking tapes are "for use in painting interior building walls and woodwork" the parties' goods are "neither intended nor adapted to be used together nor are they otherwise related." Applicant's Br. at 3-4.

But this argument must fail inasmuch as the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the cited registration and we cannot read limitations into those goods. See *Hewlett-Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir 2002); and *Octocom Sys. Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the application and registration describe the goods broadly and there is no limitation as to the nature, type, channels of trade, or class of purchasers, it is presumed that the

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registration encompasses all goods of the type described, and that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Based on the record before us, we find that applicant's "painter's masking tapes in roll, sheet and pad form for use in painting interior building walls and woodwork" and registrant's "paints and lacquers" are related and would travel in the same channels of trade and be sold to the same consumers.

Moreover, based on the acehardware.com article and the comments on the painters-toys.com website describing the need to use masking tape to prepare a surface for painting, we find that the goods are complementary and may be used together by the same consumer on the same painting project.

When we consider the entire record and the relevant likelihood of confusion factors we conclude that, in view of the identical nature of the marks, their contemporaneous use on the involved closely-related goods is likely to cause confusion as to the source or sponsorship of such goods.

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