

This Opinion Is Not A
Precedent Of The TTAB

Oral Hearing: August 30, 2023

Mailed: October 20, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Four Seasons Brands, LLC

v.

Kirstie L. Crivello
—

Opposition No. 91233211
—

Elizabeth Goldberg, Matthew G. Minder and Steven G. Trubac of Bryan Cave
Leighton Paisner
for Four Seasons Brands, LLC

Jesse London of London & Paris LLP
for Kirstie L. Crivello
—

Before Kuhlke, Shaw and Pologeorgis,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Kirstie L. Crivello, seeks registration of the mark shown below for
“Construction consultation” in International Class 37.¹

¹ Serial No. 87114094, filed July 24, 2016, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The wording OUTDOOR LIVING CO. is disclaimed, the colors brown, black, green and white are claimed as a feature of the mark, and the application includes the following description: “The mark consists of a rounded brown and black patterned square with a green tree in the middle of a white rounded rectangle. The wording ‘FOUR SEASONS OUTDOOR LIVING CO.’ appears in black below the design.”



Opposer, Four Seasons Brands, LLC, has opposed registration of Applicant’s mark on the ground that, as used in connection with Applicant’s services, the mark so resembles Opposer’s various common law and registered FOUR SEASONS marks, for a variety of goods and services, including FOUR SEASONS for custom installation of greenhouses and solariums in homes, and design and construction services for sunrooms, solariums conservatories, patios and decks, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).² By its answer, Applicant generally denies the salient allegations.³

On October 14, 2021, the Board granted summary judgment on the issues of entitlement, the validity and ownership of Opposer’s pleaded registrations, and that priority is not at issue with regard to the marks, goods and services in those

² Not. of Opp., 1 TTABVUE.

³ The answer also includes several “affirmative defenses” the bulk of which are simply amplifications of the denials. The “affirmative defense” that Opposer failed to state a claim upon which relief can be granted is not a true affirmative defense. *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1101 n.6 (TTAB 2018). Moreover, because Applicant did not pursue the purported insufficiency in Opposer’s pleading in its brief, Applicant has waived it. *Alcatraz Media v. Chesapeake Marine Tours*, 107 USPQ2d at 1753 n.63), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014).

registrations.⁴ The proceeding went forward only on the issue of likelihood of confusion.

I. RECORD

On November 15, 2023,⁵ the Board approved the parties' ACR stipulation filed on November 9, 2023.⁶ Among other stipulations, the parties stipulated that evidence be filed with the briefs. The record includes the pleadings and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file of the application subject to the notice of opposition. In addition the record includes:

- Opposer's Testimony Declarations of Benjamin Soule, Opposer's Chief Financial Officer, with exhibit (Soule Decl.);⁷ Richard Harris, Opposer's Chief Marketing Officer, with exhibits (Harris Decl.);⁸ Brian Fabian, President and Chief Executive Officer, with exhibits (Fabian Decl.);⁹ Elizabeth Goldberg, Opposer's outside counsel, with exhibits (Goldberg Decl.);¹⁰ and printouts from the USPTO database TSDR of Opposer's pleaded registrations and an application.¹¹

⁴ 58 TTABVUE.

⁵ 71 TTABVUE.

⁶ 70 TTABVUE.

⁷ 72 TTABVUE (public), 73 TTABVUE (confidential).

⁸ 75 TTABVUE (public), 76 TTABVUE (confidential), 87 TTABVUE. (confidential).

⁹ 78 TTABVUE (public), 79 TTABVUE (confidential).

¹⁰ 81 TTABVUE (public), 83 TTABVUE (confidential), 86 TTABVUE (confidential).

¹¹ 84 TTABVUE (public), 85 TTABVUE (confidential).

Applicant did not submit evidence or a brief, but did request and appear at the oral hearing.

II. SECTION 2(d) CLAIM

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d).

To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that Applicant’s use of its mark in connection with the services identified in its application is likely to cause confusion, mistake, or deception as to the source or sponsorship of those goods. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). In addition, Opposer was left to prove priority to any common law rights.

A. PRIORITY

As noted above, it is already determined that priority is not in issue with respect to the marks, and goods and services in the registrations. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and *King Candy Co., Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). However, Opposer also asserted common law rights in the mark FOUR SEASONS

for construction services; specifically, that it “directly and through its authorized dealers and franchisees provides construction and installation services under the FOUR SEASONS Marks for all the FOUR SEASONS Goods.” Opp. Brief, 84 TTABVUE 12; Fabian Decl. ¶ 32, Exhs. PO33-038 & PO40, 78 TTABVUE 14-15, 86-305. The evidence of record shows that the FOUR SEASONS mark is used in connection with design and construction services which includes consultation regarding construction. *Id.* For example, Opposer provided testimony that it has “offered custom design consultation services in connection with the FOUR SEASONS Goods and Services” and that these services include “in-home design consultation” which involves “coming up with an agreed plan or design as to what the homeowner wants with respect to Four Seasons. This can include a sunrooms [sic] or greenhouse or can be more limited to an outdoor product such as decking, pergolas, or patio covers.” *Id.* ¶¶33-35, at 15. It has provided these services since at least 1995, well before Applicant’s filing date. Fabian Decl. ¶ 33, 78 TTABVUE 15. In view thereof, Opposer has established priority in connection with these services.

B. Likelihood of Confusion Factors

We turn to consider the likelihood of confusion factors for which we have evidence and argument.

1. Relatedness of Goods and Services, Channels of Trade, Conditions of Purchase

Opposer pleaded several registrations and common law rights. While we consider all of the pleaded registrations and proven common law uses, we focus our analysis on Opposer’s registered standard character mark FOUR SEASONS for “custom

installation of greenhouses and solariums in homes” in Class 37 (Reg. No. 1372107) and the common law mark FOUR SEASONS for design and construction consulting services because the services are, in part, legally identical and otherwise closely related to Applicant’s “construction consultation” services. If we do not find a likelihood of confusion with respect to these marks and their services, then there would be no likelihood of confusion with the marks and services in Opposer’s other registrations. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Opposer’s design and construction consulting services are, at minimum, legally identical because they are encompassed by Applicant’s broadly worded “construction consultation” services. Applicant has not provided evidence as to its intended use and the full scope and meaning of “construction consultation.” We take judicial notice of the dictionary definitions of the following words:¹²

- Construction: the act or art of constructing
- Consultation: the act of consulting; conference
- Consulting: to give professional or expert advice

Installation is an act of constructing and consultation on the act of constructing would include consultation on installation. Therefore, Opposer’s identification of services in Opposer’s registration “custom installation of greenhouses and solariums in homes” are part of the subject matter encompassed by Applicant’s “construction

¹² Dictionary.com based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2023). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

consultation.” The close relationship between “installation” and “construction consultation” services is demonstrated by several third-party registrations, submitted by Opposer, that include both services. *See, e.g.*, Goldberg Decl. ¶¶ 9, 11, Exhs. PO56-PO83, 81 TTABVUE 4-5, 99-276. Applicant also explained in her discovery deposition that part of her service includes overseeing the installation of outdoor living spaces, which can be done by third-party contractors or through Applicant’s company directly. Opp. Brief., 84 TTABVUE 34; Goldberg Decl. ¶ 3, Exh. PO50 (Applicant’s Disc. Depo.) 81 TTABVUE 3, 8, 22, 51.

Opposer’s common law rights to the mark FOUR SEASONS in connection with design and construction consulting services are, in part, identical to Applicant’s identified services. Fabian ¶¶ 33-34, 78 TTABVUE 15; Soule Decl. ¶7, 72 TTABVUE 3 (“Four seasons has continuously offered goods and service in U.S. Commerce to homeowners related to outdoor living spaces under the FOUR SEASSONS Marks, including in connection with the manufacture, sale, custom design, construction, and installation of outdoor living products and solutions.”)

Further, where, as here, the services in the asserted registration and subject application are legally identical and there are no limitations as to channels of trade or classes of purchasers in either the application or Opposer’s registrations, we must presume that Applicant’s and Opposer’s services will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Opposer’s identification

is limited to residential uses, but this is encompassed by Applicant's identification. Further, as to both the installation services and design and construction consulting services, the record shows that Opposer offers its services through the internet, social media, and print catalogs, all targeting relevant consumers, those seeking home improvements, and these would be the ordinary channels of trade attributed to Applicant's broad identification. Harris Decl. ¶ 15, 72 TTABVUE 6. That these services are provided by Opposer's licensees or franchisees does not alter the analysis. All uses of the mark FOUR SEASONS by licensees and franchisees, even in connection with their own separate marks, inure to the benefit of Opposer as the licensor. *See, e.g.*, Fabian Decl. Exh. 33, 78 TTABVUE 81 (website depicting Tulsa Four Seasons offering design, build and installation services of sunrooms, solariums, conservatories, greenhouses, patio enclosures).

We consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing," *DuPont*, 177 USPQ at 567, also based on the identifications of services in the pleaded Registration and subject Application, as that determines the scope of the benefit of registration. *Stone Lion Capital v. Lion Capital*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). The identifications of services in the application and registration include all services of the type identified, without limitation as to their nature or price. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013). Nonetheless, by their very nature,

installation of greenhouses and solariums and construction consultation services, consumers would apply at least some care to their purchase. There is no evidence of record, however, to better understand how such care may obviate likely confusion, where the services are identical, legally identical, or closely related, and, as discussed below, where the marks are similar. We find the conditions of sale factor to be neutral. The factors regarding the relatedness of the services and channels of trade weigh strongly in favor of a likelihood of confusion.

2. Strength of Opposer's Mark FOUR SEASONS

Before we make our comparison of the marks, we consider the strength, including any fame, of Opposer's FOUR SEASONS mark. We do so because a determination of the strength of this mark helps inform us as to its scope of protection. In doing so, we consider the fifth *DuPont* factor which enables Opposer to expand the scope of protection that should be given to its mark through evidence showing "[t]he fame of the prior mark (sales, advertising, length of use)." *DuPont*, 177 USPQ at 567.

When evaluating the strength, we look at the mark's inherent strength based on the nature of the term itself and its commercial strength in the marketplace, *Spireon Inc. v. Flex Ltd.*, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023), citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength), as well as "[t]he number and nature of similar marks in use on similar goods." See *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *17 (TTAB 2022) (quoting *DuPont*, 177 USPQ at 567). See also *New Era Cap v. Pro Era*, 2020 USPQ2d 10596 at *10; *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured

both by its conceptual strength ... and its marketplace strength ...”). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). *See also Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

a. Conceptual Strength

There is no argument or evidence on the level of conceptual distinctiveness; however, because Opposer’s Registration is on the Principal Register, without a claim of acquired distinctiveness, the mark FOUR SEASONS is presumed to be inherently distinctive for those services. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).

b. Commercial Strength

Commercial strength is “based on marketplace recognition of the mark [],” *Made in Nature*, 2022 USPQ2d 557, at *21, and “may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the [services] traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689-90 (Fed. Cir. 2018) (quoting *Bose Corp. v. QSC Audio*

Prods., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (internal citations omitted)). Commercial strength may also be measured by “widespread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the products and services.” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *22 (TTAB 2023) (quotation marks and quotations omitted).

“Fame for confusion purposes arises as long as a significant portion of the relevant consuming public recognizes the mark as a source indicator.” *Id.* (citing *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). Here, the “relevant consuming public” consists of purchasers of the installation and construction consultation services.

“[W]e must determine where to place Opposer’s mark on the ‘spectrum’ of marks, which ranges from ‘very strong to very weak.’” *Id.* (quoting *Joseph Phelps Vineyards*, 122 USPQ2d at 1734). “Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use,” *id.* (citing *Bose*, 63 USPQ2d at 1305), and, as a result, it is incumbent on Opposer to clearly prove that its FOUR SEASONS mark is famous. *Made in Nature*, 2022 USPQ2d 557, at *31 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012)).

To prove the commercial strength of its FOUR SEASONS mark, Opposer relies on the length of use of the mark; sales; advertising and promotional expenditures; commercial impressions; recognition and awards; and enforcement activity.

Length of Time and Amount of Sales

Opposer has rendered its installation services since 1975 and design and construction consultation services since 1995 under the mark FOUR SEASONS. Fabian Decl. ¶¶ 7, 33, 78 TTABVUE 3, 15. The revenue figures were submitted under seal but in general terms they have increased steadily over the years and have been substantial. Soule Decl. ¶¶ 9, 12, 72 TTABVUE 4-5. However, there is no information to place these numbers in the context of the industry.

Advertising and Promotion

Opposer's annual advertising costs were submitted under seal but may be characterized as substantial. Soule Decl. ¶¶ 13-15, 72 TTABVUE 5-6. Opposer advertises online through its website, YouTube channels, Facebook, television and catalogs. Harris ¶¶ 10, 12, 14-18, 21, 23-26, 31-32, 35-36, Exhs. PO2, PO4, PO14, PO22, PO23; Fabian Decl. ¶ 15, 78 TTABVUE 4. In 2022, there were over a million unique visitors to its website. Harris Dec. ¶¶ 23-26, Exh. PO14.

Recognition

Opposer has received recognition and awards from third parties, including the National Sunroom Awards. Fabian Decl. ¶ 39, Exhs. PO44-45, 78 TTABVUE 17, 386-406.

Enforcement Action

Opposer actively enforces its trademark rights in FOUR SEASONS. This includes taking action before the Board against registration of third-party applications for FOUR SEASONS marks for conflicting goods and services and in Federal Court,


along with issuing cease and desist letters to common law users. Fabian Decl. ¶¶ 41-48, Exhs. PO47-49, 78 TTABVUE 17-19, 412-94.

Based on the entirety of the record, while not at the famous end of the spectrum, FOUR SEASONS is commercially strong and we accord it a wider scope of protection.

3. Similarity or Dissimilarity of the Marks

Considering the similarity or dissimilarity of the parties' marks, we compare them in their entireties in terms of appearance, sound, connotation and commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018); *see also Palm Bay*, 73 USPQ2d at 1694. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721 (quotation omitted). The marks must be considered in their entireties, but "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *Detroit Athletic*, 128 USPQ2d at 1051 (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).



Applicant's mark  contains the entirety of Opposer's mark FOUR SEASONS. The literal element of Applicant's mark begins with this common element. *Palm Bay*, at 1689 (Fed. Cir. 2005) (first word in mark a prominent feature). The additional disclaimed wording OUTDOOR LIVING CO. appears in a smaller font under FOUR SEASONS. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming TTAB's finding that "DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (finding that "BINION'S," not the disclaimed descriptive wording "ROADHOUSE," is the dominant portion of the mark BINION'S ROADHOUSE).

The "rounded brown and black patterned square" with a tree design does not diminish the prominence of the FOUR SEASONS wording. Generally, where marks contain "both words and design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *Viterra Inc.*, 101 USPQ2d at 1908; *Max Capital*, 93 USPQ2d at 1247. This is so because it is the wording consumers use to request the services. *Viterra Inc.*, 101 USPQ2d at 1908.

The patterned square merely serves as a carrier for the tree design. The tree design serves to reinforce the commercial impression of the wording FOUR SEASONS relating to nature and the outdoors generally. Used in connection with identical, legally identical, and closely related services, the common element FOUR SEASONS has the same connotation, and the other elements in Applicant's mark,

the wording OUTDOOR LIVING and an evergreen tree, do not detract from, but rather enhance the same meaning.

Moreover, as we have here, where the services are identical or legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. See *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Viterra Inc.*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *New Era Cap v. Pro Era*, 2020 USPQ2d 10596, at *14.

We find the similarities in the marks outweigh the dissimilarities and this factor favors likelihood of confusion.

4. Actual Confusion

Opposer states there is no evidence of actual confusion. However, the application is based on intent to use, and there is no evidence of any meaningful opportunities for confusion to occur. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557 (Fed. Cir. 2001). This factor is neutral.

5. Balancing the Factors

We have carefully considered all arguments and evidence properly of record, including any not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors.

We have found that the parties' services, customers, and channels of trade are identical or legally identical, that Opposer's mark FOUR SEASONS is commercially strong affording it a broad scope of protection, and the marks are similar. Weighing



these factors, the record establishes Applicant's mark FOUR SEASONS
Outdoor Living Co. is likely to cause consumer confusion with Opposer's mark FOUR SEASONS.

DECISION: The opposition is sustained.