

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

Mailed:
June 22, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Lexington Furniture Industries, Inc.

v.

The Lexington Company, AB
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Cancellation No. 92048578
—————

Twanda H. Lord and James H. Sullivan of Kilpatrick Townsend & Stockton LLP for Lexington Furniture Industries, Inc.

Robert C. Faber and Stephen J. Quigley of Ostrolenk Faber LLP for The Lexington Company AB.
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Before Walters, Bergsman and Wolfson,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Lexington Furniture Industries, Inc. ("petitioner") has filed a petition to cancel Registration No. 3220226 for the mark LEXINGTON and design, shown below, for "bed linen; bed clothes, namely, pillow shams, bed covers, bed spreads, blankets, sheets, pillow cases, mattress covers; handkerchiefs; household linen; table linen; cloth coasters;

curtains; textile place mats; textile napkins; towels," in Class 24 (hereinafter "household linens").¹



Respondent's application for registration was filed on January 22, 2004 based on a request for extension of protection filed under Section 66(a) of the Trademark Act of 1946, 15 U.S.C. §1144f(a). In its application, respondent made a Section 67 priority claim, 15 U.S.C. § 1144f(g), as of September 4, 2003.

As grounds for cancellation, petitioner alleged priority of use and likelihood of confusion.² In this

¹ Petitioner also petitioned to cancel Registration No. 2657547 for the mark LEXINGTON and design for goods in Classes 20 and 24. However, during the proceeding, that registration was cancelled under Section 8 of the Trademark Act, 15 U.S.C. § 1058, because respondent did not file a declaration of use. In its brief, petitioner noted that Registration No. 2657547 had been cancelled after the commencement of the proceeding and stated that "[a]ccordingly, Registrant's Registration No. 3,220,226 is the only registration that is still subject to the cancellation in this proceeding." (Petitioner's Brief, p. 5). In view of the foregoing, we do not enter judgment against respondent pursuant to Trademark Rule 2.134(b) with respect to Registration No. 2657547.

² Petitioner also alleged that respondent abandoned its mark by failing to make use of it in commerce with the United States. However, because petitioner did not argue in its brief that respondent abandoned its mark, we consider the claim of abandonment to have been waived.

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regard, petitioner claimed ownership of the following registrations:

1. Registration No. 1504866 for the mark LEXINGTON, in typed drawing form, for "bedroom, dining room, living room, occasional and upholstered furniture," in Class 20;³

2. Registration No. 1576409 for the mark LEXINGTON FURNITURE INDUSTRIES, in typed drawing form, for "living room, dining room, bedroom and occasional furniture, upholstered and unupholstered, made of wood or wicker, or a combination of wicker and wood; namely - beds, dressers, chests, mirrors, tables, baby cribs, cabinets, buffets, hutches, services, party sets, chairs, benches, etageres, wall units, bars, entertainment centers, bookcases, sofas, love seats, ottomans, sleeper sofas, rocking chairs, and recliners," in Class 20.⁴ Petitioner disclaimed the exclusive right to use the term "Furniture Industries"; and

3. Registration No. 2684161 for the mark LEXINGTON HOME BRANDS, in typed drawing form, for "furniture," in Class 20 and "retail furniture store services; and retail store product merchandising display services featuring dedicated space for a single brand," in Class 35.⁵

³ Issued September 20, 1988; renewed.

⁴ Issued January 9, 1990; second renewal.

⁵ Issued February 4, 2003; Sections 8 and 15 declarations accepted and acknowledged.

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Petitioner disclaimed the exclusive right to use the word "Brands."

Respondent denied the salient allegations in the petition for cancellation.

Preliminary Issues

A. Whether respondent's second notice of reliance should be excluded?

During its testimony period, petitioner introduced, through a notice of reliance pursuant to Trademark Rule 2.120(j), excerpts from the discovery deposition of Tommy Lindhe, respondent's Chief Operating Officer. Respondent, during its testimony period, introduced, through a notice of reliance, excerpts from the Tommy Lindhe discovery deposition "which were omitted from Petitioner's Fourth Notice of Reliance and should in fairness be considered." Respondent's notice of reliance identified page numbers and "reasons for registrant's reliance." The "reasons" identified the subject matter of the testimony (e.g., "Registrant's selection and first use of the LEXINGTON mark," "Registrant's efforts to introduce its LEXINGTON brand products in the United States," etc.).

Trademark Rule 2.120(j)(4) reads as follows:

If only part of a discovery deposition is submitted and made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered

by the submitting party. A notice for reliance filed by an adverse party must be supported by a written statement explaining why the adverse party needs to rely upon each additional part listed in the adverse party's notice, failing which the Board, in its discretion, may refuse to consider the additional parts.

Petitioner, in its brief, objected to respondent's notice of reliance on the ground that respondent merely identified the subject matter of the testimony and failed to explain why respondent needed to rely on excerpts from its witness's discovery deposition.⁶ Respondent argued to the contrary that "[t]he reasons for the admission of the additional deposition testimony were clearly articulated in the Notice of Reliance and are not, as Petitioner claims, merely descriptions of the content."⁷ Respondent pointed to pages 102-105 of the Lindhe deposition identified in respondent's notice of reliance as exemplary ("Evidence of the New England look for Registrant's LEXINGTON brand products"). Respondent explained that these pages were submitted "to address anticipated claims by Petitioner that Registrant is trading on Petitioner's mark."⁸

Petitioner's objection is well taken. Respondent has not shown how the portions of the Lindhe discovery deposition relied on by petitioner are misleading or how the

⁶ Petitioner's Brief, p. 43.

⁷ Respondent's Brief, pp. 29-30.

⁸ Respondent's Brief, p. 30.

excerpts relied on by respondent resolve the purportedly misleading nature of the excerpts relied upon by petitioner. See *Wear-Guard Corp. v. Van Dyne-Crotty Inc.*, 18 USPQ2d 1804, 1806 n.2 (TTAB 1990). Furthermore, the example noted by respondent has nothing to do with clarifying a purportedly misleading excerpt from the Lindhe deposition; rather it was identified in anticipation of an argument petitioner might assert in its brief. If respondent anticipated the need to counter an argument that petitioner might make in its brief, then it was incumbent upon respondent to call Mr. Lindhe as a witness on behalf of respondent.

In view of the foregoing, petitioner's objection to the second notice of reliance filed by respondent is sustained and we have not given the testimony identified in respondent's notice of reliance any consideration.

B. Petitioner's over-designation of confidential testimony.

Petitioner designated the entire deposition transcript of James O. Burke, III, petitioner's Senior Vice President of Sales, as confidential. However, based on our review of the deposition, the only confidential testimony relates to petitioner's sales. In rendering our decision, we will not be bound by the petitioner's designation. Board proceedings are designed to be publicly available and the improper designation of materials as confidential thwarts that

intention. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions. Therefore, in this opinion, we will treat only testimony and evidence that is truly confidential and commercially sensitive as confidential. See *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399, 1402-1403 (TTAB 2010).

The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the registration file for respondent's mark. The record also includes the following testimony and evidence:

A. Petitioner's Evidence.

1. Notice of reliance on certified copies of petitioner's pleaded registrations prepared by the United States Patent and Trademark Office showing the current status of and title to the registrations.

2. Notice of reliance on copies of third-party registrations purportedly showing marks registered to the same owners for furniture and household linens.

3. Notice of reliance on printed publications, namely, articles in newspapers and magazines to demonstrate unsolicited media references to petitioner's LEXINGTON marks.

4. Notice of reliance on excerpts from the discovery deposition of Tommy Lindhe, respondent's Chief Operating Officer, with attached exhibits, and respondent's responses to petitioner's first set of requests for admission.

5. Testimony deposition of James O. Burke, III, petitioner's Senior Vice President of Sales, with attached exhibits.

6. Testimony deposition of James C. Stamper, Jr., petitioner's Senior Vice President of Marketing, with attached exhibits.

7. Testimony deposition of Warren Shoulberg, Editor-In-Chief of *HFN Home Furnishing News*, with attached exhibits.

8. Testimony deposition of Arthur Negrin, petitioner's Vice President of International Sales, with attached exhibits.

B. Respondent's Evidence.

1. Testimony deposition of Tommy Lindhe, with attached exhibits.

2. Notice of reliance on petitioner's response to respondent's Interrogatory No. 34.

3. Notice of reliance on four third-party registrations for marks comprising the word LEXINGTON for goods purportedly related to furniture.

Standing

Because petitioner has properly made its pleaded registrations of record, petitioner has established its standing to cancel respondent's registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

In a cancellation proceeding, where both petitioner and respondent are owners of registrations, petitioner must prove priority of use. *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998); *Henry Siegel Co. v. M & R Mfg. Co.*, 4 USPQ2d 1154, 1160 n.9 (TTAB 1987); *American Standard Inc. v. AQM Corp.*, 208 USPQ 840, 841-842 (TTAB 1980); *SCOA Industries Inc. v. Kennedy & Cohen, Inc.*, 188 USPQ 411, 413 (TTAB 1975). In proving priority of use, the earliest dates of use upon which either party can rely, in the absence of other evidence pertaining to use of their marks, are the filing dates of the applications that matured into their registrations. *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d at 1284; *American Standard Inc. v. AQM Corp.*, 208 USPQ at 842. Respondent has admitted that it

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has not used its mark in commerce with the United States, so the earliest date on which it can rely is the priority date claim in its application (September 4, 2003).⁹ The filing dates for petitioner's applications for registration precede respondent's filing date. Petitioner's filing dates are January 29, 1988 (Registration No. 1504866), April 21, 1989 (Registration No. 1576409) and March 9, 2000 (Registration No. 2684161). In view of the foregoing, petitioner has established priority.

Likelihood of Confusion

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing

⁹ Lindhe Discovery Dep., pp. 32-33 (did not sell product in 2006-2009), 46-47, 80-82 (no sales except one small order for baby bed linens in 2004 or 2005); Lindhe Testimony Dep., pp. 11, 26-27 (one sale of baby bed linens in the U.S. in 2006 or 2007), 51 (U.S. consumers cannot purchase applicant's products through respondent's website), 84 (no sales to U.S. customers in 2007, 2008 or 2009). To the extent that the one sale of baby bed linens constitutes *bona fide* use of the mark, Lindhe's testimony regarding the date of that sale is indefinite. In view of the uncertainty of respondent's testimony and lack of documentation, the one sale referenced by Mr. Lindhe can be no earlier than December 31, 2007, the last day of the specified time period identified in Mr. Lindhe's testimony. *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 598 n.5 (TTAB 1982) (documentary evidence showed first use in 1977, the month and day were unknown, therefore, the Board could not presume any date earlier than the last day of the proved period). *See also Osage Oil & Transportation, Inc. v. Standard Oil Co.*, 226 USPQ 905, 911 n.22 (TTAB 1985) (evidence established first use in 1968-1969, therefore December 31, 1969 is date of first use). The earliest use date upon which respondent could rely (December 31, 2007) is subsequent to its priority claim in its application (September 4, 2003).

on the issue of likelihood of confusion. *In re E.I. du Pont de 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 and/or services. See *Federated Foods, Inc. v. Fort Howard Paper 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").

- A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). 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 commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980). As discussed below, the average purchaser is an ordinary consumer.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); see also *Franklin Mint Corp. V. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion"). On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). In fact, 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 a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751.

In this regard, there are a number of cases that reflect the principle that if a mark comprises both a word and a design, the word is normally accorded greater weight because it would be used by purchasers to request the goods. *See In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). In this case, we find that the word portion of respondent's mark is the dominant element of the mark because the consumers would use it to call for the products. The dominant element of respondent's mark, the word LEXINGTON, is very similar to the petitioner's marks, LEXINGTON, LEXINGTON FURNITURE INDUSTRIES, and LEXINGTON HOME BRANDS.

Respondent argues to the contrary that the dominant impression of its mark is "clearly the flag with its bold and striking red, white and blue arrangement"¹⁰ and that the word LEXINGTON is stacked in a fanciful manner.¹¹ However,

¹⁰ Respondent's Brief, p. 3.

¹¹ Respondent's Brief, p. 4.

respondent's display of word LEXINGTON as separate syllables - - LEX, ING, and TON - - in a stacked form does not change the meaning or overall commercial impression of the mark; the word portion of respondent's mark is still LEXINGTON.

Furthermore, while the flag design is a prominent feature of respondent's mark, it is clearly the word LEXINGTON that consumers will use to refer to defendant's mark to identify the source of the goods. In other words, the presence of the flag design does not diminish the similarity of the marks because consumers familiar with petitioner's mark may mistakenly believe that respondent's mark is a logo version of petitioner's LEXINGTON mark. Respondent's flag design is not sufficient to convey that the marks identify different sources.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the goods described in the registrations.

Petitioner's LEXINGTON marks are registered for furniture and respondent's mark is registered for household linens. To show that the goods are related, petitioner submitted third-party registrations for marks purportedly for furniture and household linens. Third-party registrations which individually cover a number of different products that are based on use in commerce may have some

probative value to the extent that they serve to suggest that the listed products are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In this case, many of the third-party registrations submitted by petitioner were issued under the provisions of Section 44 of the Trademark based on foreign registration rather than use in commerce.¹² Therefore, such registrations have very little, if any, persuasive value for suggesting that the various goods may emanate from a single source. *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d at 1470 n.6. See also *In re 1st USA Realty Prof'ls. Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007).

Furthermore, the registrations for house marks or designer marks, such as LAUREN RALPH LAUREN (Registration No. 2845194), MARTHA STEWART SIGNATURE (Registration No. 2917948) and OSCAR DE LA RENTA (Registration No. 3046554), are entitled to little probative value because such marks are known to identify a wide variety of goods and/or services. Where the third-party marks are well-recognized as covering a wide variety of products, they are of little

¹² For the registrations more than five years old, there was no evidence that a Section 8 declaration of use had been filed.

value in showing that consumers will perceive the listed goods as emanating from a single source. *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d at 1470 n.6 (third-party registrations were not persuasive to show that the goods were related because "two of the four registrations which were based on use were issued to Saks & Company and to Knott's Berry Farm, owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods are sold"). Because house marks and designer brands are used on such a wide variety of goods, consideration of registrations for house marks and designer brands to show that the goods at issue are related could create a situation where widely disparate goods are considered related.¹³

Nevertheless, petitioner submitted a significant number of relevant used-based, third-party registrations for both furniture and household linens. The registrations listed below are representative.¹⁴

Mark	Reg. No.	Goods
BELLA CUCINA	3548177	Furniture; hand towels of textile, table linens, namely, cloth napkins, table runners, and table cloths; bed linens

¹³ For this reason, the testimony regarding the use of designer brands has little probative value.

¹⁴ We have not included the entire description of goods for each of the registrations. Only the furniture and products that comprise household linens are listed.

Mark	Reg. No.	Goods
COTTAGE COMFORT	3588918	Furniture; bed linens and blankets
POSH TOTS	3092160	Furniture; bed blankets, bed linen, pillow cases, bed pads, bed sheets, bed spreads, linens, quilts, blankets, curtains
ATTITUDES	3548174	Shelving, chairs, ottomans, end tables, beds, bed sheets, comforters, blankets, duvets, duvet covers, bed spreads, quilts pillow cases, pillow covers, mattress pads, mattress toppers, bed skirts, towels, towels, washcloths, shower curtains, table linens, textile napkins, window curtains
SWEET SLEEPER	3318896	Beds, cribs, bassinets, and cradles, bed pads and spreads, wash cloths, mattress covers, curtains, household linens, mattress pads, pillow shams, quilts, towels

Petitioner also introduced the testimony of witnesses in the furniture industry regarding the relationship between furniture and household linens. Robert C. Stamper, petitioner's Senior Vice President of Marketing, testified that prior to his employment with petitioner in 2007, he was an independent contractor for Drexel Heritage furniture company, a division of Furniture Brands International. Mr. Stamper has been in the furniture business since 1980. One of his tasks for Drexel Heritage furniture company was to

help establish dedicated furniture stores for selling Drexel Heritage branded furniture and related accessories.¹⁵

And at that point in time [2002-2007] Drexel Heritage was selling not only furniture, they were selling draperies, accessories, area rugs and top of bed. So they did every category. So really the idea was they wanted to become Ethan Allen. That what's [sic] Ethan Allen does.

So they wanted a model whereby everything in that store was branded Drexel Heritage. For those items that were nonfurniture, they were made by another vendor, but they were branded as Drexel Heritage, you know.¹⁶

"Top of bed" referenced in the deposition constitutes "anything that goes on top of the mattress"¹⁷ (e.g., sheets, bedspreads, pillows, comforters).¹⁸ Drexel Heritage started selling nonfurniture items "in the nineties."¹⁹

Mr. Stamper also testified regarding his knowledge of the products sold by other furniture manufacturers. According to Mr. Stamper, Ethan Allen was the first furniture company to have stores dedicated to selling its own brand: "[E]verything in that building is Ethan Allen,"²⁰ including "top of bed and draperies, the rugs, the

¹⁵ Stamper Dep., pp. 23-24.

¹⁶ Stamper Dep., p. 24.

¹⁷ Stamper Dep., p. 25; Burke Dep., p. 8.

¹⁸ Stamper Dep., p. 26; Burke Dep., p. 8.

¹⁹ Stamper Dep., p. 26. See also Shoulberg Dep., p. 48.

²⁰ Stamper Dep., pp. 27-28.

accessories.”²¹ Since “the nineties,” Thomasville Furniture Company and Bassett have manufactured furniture and sold top of bed and draperies under their Thomasville and Bassett brands.²² For at least ten years, Pottery Barn has been selling furniture and top of bed, draperies and table linen under the Pottery Barn mark.²³ Pottery Barn is owned by William-Sonoma which about three years ago started selling William-Sonoma branded furniture, top of bed, draperies and table linen.²⁴ Crate & Barrel began selling furniture and textile products in its stores about ten years ago.²⁵ Since around 2005, Ashley Furniture has sold furniture and top of bed and drapery under the Ashley brand²⁶ and Restoration Hardware has sold furniture and top of bed and draperies under the Restoration Hardware brand.²⁷ Mr. Stamper recently became aware of Aico furniture selling both furniture and top of bed products under the Michael Amini brand.²⁸

²¹ Stamper Dep., pp. 28 and 124-125. See also Shoulberg Dep., p. 46.

²² Stamper Dep., pp. 125-128 and Exhibit 15 (2007 Bassett Catalog). See also Shoulberg Dep., pp. 46-47.

²³ Stamper Dep., pp. 133-134 and Exhibit 17 (2008 Pottery Barn Catalog).

²⁴ Stamper Dep., pp. 133-135 and Exhibit 16 (2008 William-Sonoma Catalog).

²⁵ Stamper Dep., pp. 136-137. See also Shoulberg Dep., p. 47.

²⁶ Stamper Dep., p. 128. See also Shoulberg Dep., pp. 32-33 (Ashley, the largest furniture manufacturer and retailer in the country, sells Ashley-branded furniture and home textiles).

²⁷ Stamper Dep., pp. 131-133 and Exhibit 14 (Restoration Hardware Catalog 2008).

²⁸ Stamper Dep. 130-131.

Respondent argues that petitioner's furniture is not identical or similar to respondent's household linens.²⁹ However, in determining whether the goods are related, it is not necessary that the goods of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that products are related in some manner and/or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Schering Corporation v. Alza Corporation*, 207 USPQ 504 (TTAB 1980); *Oxford Pendaflex Corporation v. Anixter Bros. Inc.*, 201 USPQ 851 (TTAB 1978). As discussed above, petitioner has established that furniture manufacturers sell both furniture and household linens under the same mark and that the same consumers would encounter both marks under circumstances likely to give to the mistaken belief that LEXINGTON and design household linen and LEXINGTON furniture emanate from a single source.

Respondent also argues that "[t]he only real commonality between Petitioner's furniture and Registrant's

²⁹ Respondent's Brief, p. 9.

textiles is that they are consumer products for the home” and that “[a] broad general market category is not a generally reliable test of relatedness of products.”³⁰ We disagree. Respondent’s argument ignores the evidence and testimony that furniture companies sell furniture and household linens under the same mark.

In view of the foregoing, we find that furniture and household linens are related products.

C. The established likely-to-continue trade channels and classes of consumers.

With respect to the channels of trade and classes of consumers, we note that neither petitioner’s descriptions of goods nor respondent’s description of goods is limited or restricted to any channels of trade or classes of consumers. Thus, it is presumed that petitioner’s furniture and respondent’s household linens move in all channels of trade normal for those services, and that they are available to all classes of purchasers for those goods. *See Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1073 (TTAB 2011); *Coach Services Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1608 (TTAB 2010). Where as here, the descriptions of goods are broadly constructed, we must allow for all possible channels of trade and classes of consumers.

³⁰ Respondent’s Brief, p. 12.

Mr. Stamper testified that "there's not a retail channel that I'm aware that we do not sell."³¹ Petitioner sells to traditional retail stores that carry multiple lines of furniture, "to-the trade" resellers, including designers, architects, and builders, regional chains with multiple stores, department stores, membership clubs, a factory outlet store, designer showrooms and through the Internet to resellers.³² Mr. Lindhe testified that respondent has identified Bed, Bath & Beyond, JC Penney's, Macy's, ABC Home, Macy's Bloomingdale's, Saks Fifth Avenue, Linen's 'N Things, Marshall Fields, etc. as its prospective customers or distributors for its products.³³ Both parties sell their products through department stores.

However, it is well known that department stores sell all types and categories of products. Nevertheless, furniture and household linens are sold in close proximity to each other in a department store.³⁴

Q. Where, in proximity, is the furniture section to the top of bed section of the Masco stores as you're [sic] recall seeing them?

A. Generally speaking, for any department store, the home category is going to be on the same floor. And, generally, furniture is immediately adjacent to the bedding area defined as mattress and box

³¹ Stamper Dep., p. 45.

³² Stamper Dep., p. 45-50.

³³ Lindhe Discovery Dep., pp. 26, 28.

³⁴ Stamper Dep., p. 149.

springs, and the top of bed, and
then the bed and bath department.³⁵

Moreover, retailers sell furniture by recreating how it looks in the home: that is, as an ensemble with all the elements of a decorated room.³⁶ "[Y]ou've got to put together a display so that you're really replicating what does that product look like in a consumer's home."³⁷

[C]onsumers are very visual. They really need to see it put together in order to make a buying decision. So what lifestyle merchandising does is allow us within that store to show not only all categories of product, but to show them beautifully displayed, just like we would expect to see them displayed in that consumer's home.

* * *

So you are going to have the bed and the nightstands, the dresser, the mirror and an armoire or a chest. But in addition to that, you need to show them how does that furniture relate in the room. So the paint color is important. The drapery selection is important. The top of bed is critical. The area rug is important.³⁸

In other words, the furniture is displayed with household linens.

Warren Shoulberg, the Editor-in-Chief of *HFN Home Furnishing News*, concurs.

The consumer does not trust their [sic] instincts when they buy home furnishing

³⁵ Stamper Dep., p. 149.

³⁶ Stamper Dep., pp. 39-40.

³⁷ Stamper Dep., p. 40.

³⁸ Stamper Dep., p. 40.

products. It's not like they are going into The Gap, and they're buying a shirt. And if they made a mistake or the color is wrong, they wasted 29.99, and they'll throw it away. They are uncomfortable making major purposes [sic] like home furnishings products, so they'd love somebody to tell them that this is the right way to buy this. ... And so the customer feels much more comfortable knowing that Ralph Lauren says, "All of these products go together, and you're not making a mistake." So the consumer likes this.³⁹

Mr. Shoulberg further testified that consumers do not make distinctions between products such as furniture and household linens.⁴⁰ Accordingly, some furniture retailers have moved into selling multiple-product classifications.⁴¹

[T]hey basically will sell you an entire room at one price. So if it's a living room, they'll sell you the couch, the table, the rug and the framed picture. If it's a bedroom, they'll sell you the bedroom set, the lamps that go on the nightstand, and the sheets and comforter that go on the bed.⁴²

With respect to the classes of consumers, Mr. Stamper testified that petitioner's customers are "probably as broad a range as you would find in the industry" because it has "one of the industry's broadest offerings in terms of style and price that you'll find."⁴³ "When you look at [petitioner], because of the breadth of product line, you

³⁹ Shoulberg Dep., p. 34.

⁴⁰ Shoulberg Dep., pp. 34-35.

⁴¹ Shoulberg Dep., p. 36.

⁴² Shoulberg Dep., p. 36.

⁴³ Stamper Dep., p. 42.

end up having a very broad range of consumer.”⁴⁴ Because there are no restrictions in the descriptions of goods and based on Mr. Stamper’s description of petitioner’s customers, petitioner’s prospective consumers encompass respondent’s prospective consumers.

Respondent argues that many of the stores that sell both furniture and household linens are company stores that sell one brand of product (*i.e.*, Ethan Allen, IKEA, Pottery Barn, etc.).⁴⁵ According to respondent, “[t]his creates a strong association in the consumer’s mind between the store name and the identically, and exclusively, branded products sold in the store” and, therefore, if furniture and household linens are sold in unaffiliated stores, then consumers will not believe that there is an association between the products.⁴⁶ We disagree. If consumers encounter furniture and household linens sold under identical marks in one setting and believe that the source of the products is the same, we see no reason that they would not mistakenly believe that furniture and household linens sold under similar marks are associated when encountered in a different setting. Moreover, respondent’s argument does not take into account the testimony that

⁴⁴ Stamper Dep., p. 43.

⁴⁵ Respondent’s Brief, p. 17.

⁴⁶ Respondent’s Brief, p. 17.

department stores sell furniture and household linens as an ensemble.

In view of the foregoing, we find that the channels of trade and classes of consumers are similar.

D. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

Respondent argues that "[t]he customers for both Petitioner's and Registrant's goods are sophisticated, careful purchasers who are not likely to be confused"⁴⁷ and that petitioner "targets 'high end retailers'" and that respondent's products are also "'positioned as a premium brand."⁴⁸ However, because the descriptions of goods are unrestricted, we cannot resort to such extrinsic evidence or arguments to restrict the prices of petitioner's or respondent's goods or their classes of consumers. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration). We must presume that both petitioner's furniture and respondent's household linens would be sold at all the usual prices for such goods to all classes of

⁴⁷ Respondent's Brief, p. 18.

⁴⁸ Respondent's Brief, p. 19.

consumers. In this regard, virtually everyone has furniture and some sort of household linens.

E. The strength of petitioner's mark.

Respondent argues that petitioner's LEXINGTON marks are not strong marks and that they are not entitled to a broad scope of protection or exclusivity of use.⁴⁹ Respondent contends, *inter alia*, that "Lexington" is a well known geographic name for cities in North Carolina, Kentucky and Massachusetts. However, because petitioner's LEXINGTON marks have been registered for over five years, they are immune for challenge under Section 2(e)(2), and entitled to the presumptions accorded by Section 7(c) of the Trademark Act, 15 U.S.C. § 1057(c) (*i.e.*, prima facie evidence of the validity of the registration mark and of the registration of the mark, of the ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods specified in the registration). Thus, even if we agreed that petitioner's marks were weak marks, that would not be fatal to finding likelihood of confusion because even weak marks are entitled to protection against confusion, *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974), especially, where as here, the marks are very similar.⁵⁰

⁴⁹ Respondent's Brief, pp. 20-23.

⁵⁰ While it is not necessary for our decision, based on our review of the evidence, petitioner has a strong market presence.

F. Balancing the factors.

Having carefully considered all the evidence and arguments bearing on the *du Pont* factors, including evidence and argument not specifically discussed in the decision, we find that because the marks are similar, the goods are related and the goods move in the same channels of trade and are sold to the same classes of consumers, applicant's mark LEXINGTON and design for household linens so resembles petitioner's LEXINGTON marks for furniture as to be likely to cause confusion.

Decision: The petition for cancellation is granted. Registration No. 3220226 will be cancelled in due course.