

This Opinion is Not a
Precedent of the TTAB

Mailed: June 5, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Vardhman Sancheti
v.
Bhupendra Tekwani DBA Artncraft

Cancellation No. 92077340

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Before Bergsman, Lynch, and Thurmon,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Petitioner Vardhman Sancheti filed a petition to cancel the registration owned by Respondent Bhupendra Tekwani DBA Artncraft for the standard-character mark ARTNCRAFT for:

Accent furniture; Ceramic knobs and glass knobs; Ceramic pulls; Ceramic pulls for cabinets, drawers and furniture; Chair cushions; Chairs; Cushions; Drawer pulls of plastic or wood, cork, reed, cane, wicker, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials; Footstools; Furniture, namely, wardrobes; Glass pulls; Non-metal doorknobs; Non-metal knobs; Non-metal pulls; Pillows; Plastic knobs; Porcelain knobs; Porcelain pulls; Screws, not of metal; Stone pulls; Stone pulls for cabinets, drawers and furniture; Wood pulls, in International Class 20.¹

Petitioner based its petition on likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with Petitioner's alleged prior used common law mark ARTNCRAFT for:

ceramic door knobs, drawer handles, drawer pulls, paintings and tapestries.²

In his Answer to the Petition to Cancel, Respondent admitted, in addition to the pertinent facts about his registration, the following:³

On or about April 17, 2019, the Registrant, issued a Take-Down Notice to Amazon.com stating that Petitioner's use of the mark ARTNCRAFT was an infringement of his trademark rights as evidenced by U.S. Registration No. 5,708,405, and demanded that the Petitioner's listings of goods under the ARTNCRAFT mark be removed from Amazon.com. Amazon.com complied with this Take-Down Notice, and the Petitioner has been barred from posting his goods to Amazon under the ARTNCRAFT mark.

Upon information and belief, the Registrant's Mark has only been used in commerce at since March 8, 2017.

¹ Registration No. 5708405 issued on March 26, 2019 from an underlying application filed July 2, 2018 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleges March 8, 2017 as the date of first use and first use in commerce.

² 1 TTABVUE (ESTTA coversheet and Petition for Cancellation).

³ 5 TTABVUE (Respondent's Answer admitting ¶¶ 1, 3, 7, 14, 15 and 18).

The Registrant's Mark is identical in sight, sound, connotation, meaning and overall commercial impression to [Petitioner's] ARTNCRAFT Mark.

The goods to which the Registrant's Mark purportedly applies are identical to, or at least highly related to, the goods which [Petitioner] provides under the ARTNCRAFT Mark.

[Petitioner] is not affiliated or connected with Registrant or its goods; nor has [Petitioner] endorsed, licensed or sponsored Registrant or his goods.

He otherwise denied the salient allegations.

Petitioner submitted his deposition testimony, with exhibits,⁴ and Respondent made no submissions during his trial period. Both parties filed briefs.

II. Entitlement to a Statutory Cause of Action⁵

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark or petition to cancel a registration when it demonstrates an interest falling within the zone of interests protected by the statute, 15 U.S.C. §§ 1063

⁴ The Board required Petitioner to file a corrected full-size page version of the deposition of Petitioner that also includes proof of service. 17 TTABVUE. Petitioner complied, and we accept the submission at 19 TTABVUE as the corrected filing.

⁵ Although the parties' briefs refer to "standing," we now use the nomenclature "entitlement to a statutory cause of action." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit regarding "standing" remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

& 1064, and a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

Here, Petitioner must demonstrate a real interest in the proceeding and a reasonable belief of damage from Respondent's registrations. *Australian Therapeutic Supplies*, 2020 USPQ2d 10837 at *3; *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012). Demonstrating a real interest in cancelling the registration of a mark satisfies the zone-of-interests requirement, and "[i]n most settings, a direct commercial interest satisfies the 'real interest' test." *Herbko Int'l v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1377 (Fed. Cir. 2002).

First, Petitioner has made the requisite showing by establishing his common law use of his pleaded mark, which is identical to Respondent's registered mark, on goods that partially overlap with, and are related to, Respondent's identified goods.⁶ Based on such common law use, Petitioner has asserted a plausible likelihood of confusion claim against the involved registration, thereby showing a real interest in this proceeding beyond that of a mere intermeddler, and a reasonable basis for his belief of damage. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 607 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (plaintiff may establish standing by proving a real commercial

⁶ 19 TTABVUE 12-13 (Sancheti Deposition); 5 TTABVUE 3-4 (Respondent's Answer, admitting ¶¶ 14 & 15).

interest in its own marks and a reasonable belief that it would be damaged (e.g., a claim of likelihood of confusion that is not wholly without merit)); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (common law use of similar mark sufficient to establish standing).

Petitioner also has shown his direct commercial interest by establishing – including through Respondent’s admission in his Answer – that Respondent successfully had Petitioner’s goods barred from sale on the Amazon platform in the U.S. through Amazon’s takedown procedure, based on an allegation that Petitioner was infringing Respondent’s registered mark.⁷ See, e.g., *Great Seats Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235, 1237 (TTAB 2007); *Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons, Inc.*, 55 USPQ2d 1298, 1299 (TTAB 2000); *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990). Petitioner testified that the Amazon takedown resulted in a significant loss of inventory, and that he has not been able to reestablish his U.S. business under the mark through Amazon.⁸

Respondent makes a variety of unpersuasive arguments against Petitioner’s “standing to make a claim to the mark.”⁹ First, Respondent contends that Petitioner has no entitlement to a statutory cause of action because “Petitioner has no relevant trademark filings,” and this alleged lack of “effort to protect the name in any way” equates to a lack of rights. We reject Respondent’s contention as an incorrect

⁷ 19 TTABVUE 13-15 (Sancheti Deposition); 5 TTABVUE 2 (Respondent’s Answer, admitting ¶ 3).

⁸ 19 TTABVUE 14-15 (Sancheti Deposition).

⁹ 16 TTABVUE 6 (Respondent’s Brief).

characterization of the law, which allows for statutory entitlement to a Section 2(d) claim based on common law use. *See, e.g., Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that plaintiff uses its mark “is sufficient to support [plaintiff’s] allegations of a reasonable belief that it would be damaged”); *Giersch v. Scripps Networks*, 90 USPQ2d at 1022 (finding standing based on common law use).

Second, under the heading of “Standing,” Respondent alleges that because Petitioner relies on evidence of a 2013 sale under the mark on eBay of a metal item, and supposedly “[t]he description of goods in the subject registration is, as expressly stated therein, for non-metal items,” Petitioner cannot make a claim.¹⁰ Referring to Petitioner’s allegedly “weak attempt to establish priority,”¹¹ Respondent’s argument seems to confuse priority with entitlement to a statutory cause of action. Respondent himself admitted that Petitioner has used a mark identical to the registered mark on goods that overlap with and are highly related to the goods in the registration.¹² This certainly suffices to show Petitioner’s direct commercial interest and reasonable belief in damage caused by the registration.

Third, Respondent argues that Petitioner “abandoned” its mark because, following Respondent’s takedown procedure through Amazon.com in 2019, Petitioner has not sold goods under the ARTNCRAFT mark in the U.S. for three years.¹³ Again,

¹⁰ 16 TTABVUE 6-7 (Respondent’s Brief).

¹¹ 16 TTABVUE 7 (Respondent’s Brief).

¹² 5 TTABVUE 3-4 (Respondent’s Answer, admitting ¶¶ 14 & 15).

¹³ 16 TTABVUE 7 (Respondent’s Brief); 19 TTABVUE 29 (Sancheti Deposition).

Respondent seems to confuse priority, which requires proof of previous use of a mark or trade name “not abandoned,” 15 U.S.C. § 1052(d), but no such showing is required of Petitioner for entitlement to a statutory cause of action. Regardless, as discussed below, Petitioner did not abandon his mark.

Fourth, Respondent asserts that Petitioner’s delay constitutes “acquiescence – *if not laches*,”¹⁴ but Respondent failed to plead these affirmative defenses in his Answer. The Board does not consider unpleaded defenses unless they were tried by consent. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d at 1655. Petitioner’s specific objections in his Reply Brief¹⁵ to Respondent raising the defenses preclude trial by consent. *Id.* Nothing in the record suggests any implied consent by Petitioner.

We therefore conclude that Petitioner has proven its entitlement to the statutory cause of action in this case.

III. Priority

Priority is an issue in this cancellation proceeding. To establish priority on a likelihood of confusion claim under Section 2(d) of the Trademark Act, a party must prove by a preponderance of the evidence that, vis-à-vis the adverse party, it owns proprietary rights in “a mark or trade name previously used in the United States . . . and not abandoned . . .” *Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1036-37 (TTAB 2010) (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d

¹⁴ 16 TTABVUE 9 (Respondent’s Brief).

¹⁵ 18 TTABVUE 5-6 (Petitioner’s Reply Brief).

1317, 209 USPQ 40, 44 (CCPA 1981)); *see also Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987).

To establish priority in a cancellation proceeding, under Section 7 of the Trademark Act, a registrant such as Respondent is entitled to rely on the filing date of its underlying application as a constructive use date. 15 U.S.C. § 1057(c); *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840, 1844 (TTAB 1995) (parties may rely on the constructive use filing dates for purposes of priority). Thus, as to Respondent's involved registration, he can rely on the underlying application filing date of July 2, 2018. *See* 15 U.S.C. § 1057(b). As an even earlier date, however, Petitioner, in the Petition for Cancellation, asserts that "[u]pon information and belief, the Registrant's Mark has only been used in commerce at since March 8, 2017,"¹⁶ and Respondent admitted this allegation.¹⁷ Respondent introduced no evidence of an earlier date. Thus, we rely on March 8, 2017 as Respondent's priority date.

Petitioner claims an earlier priority date, and as explained below, we find that Petitioner has met his burden of proving priority of use. Petitioner testified that beginning in 2013, he sold goods in the U.S. under the ARTNCRAFT mark, "prominently ceramic knobs, tapestries, home furnishings and other kinds of handicrafts."¹⁸ He described selling through "platforms like eBay and Amazon" and

¹⁶ 1 TTABVUE 5, ¶ 7 (Petition for Cancellation).

¹⁷ 5 TTABVUE 3, ¶ 7 (Answer).

¹⁸ 19 TTABVUE 12-13 (Sancheti Deposition).

“selling in the U.S. online market.”¹⁹ Petitioner introduced through his deposition a business record of a sale through eBay to a U.S. customer in Florida of a “brass demon” statue in May 2013.²⁰ The eBay confirmation refers to the item as a “home decor” good, and Petitioner’s invoice describes it as a “metal handicraft.”²¹ The ANTICRAFT mark was used on the packaging for the good.²² On cross-examination, Petitioner stated that in 2019 and prior years, before Respondent’s takedown notice, he “was selling primarily on United States” [sic] under the ARTNCRAFT mark, with “more than two third of the revenues” from the U.S.²³

Petitioner testified, “Actually, I was selling on Amazon since 2016 and three years I sold pretty well, but beginning April 2019,” Respondent’s takedown “stopped me from selling my own products.”²⁴ Petitioner further testified that he has been unable to reestablish U.S. sales through Amazon since that time” because “a lot of [his] inventory got blocked in Amazon warehouse,” and was eventually disposed of, resulting in a monetary loss, “[a]nd in the U.S. [he] was not able to make up after that.”²⁵

The record shows that Petitioner used the pleaded ARTNCRAFT mark on goods including ceramic knobs, tapestries, home furnishings and other handicrafts,

¹⁹ 19 TTABVUE 12 (Sancheti Deposition).

²⁰ 19 TTABVUE 17-19, 50 (Sancheti Deposition & Exhibit 3).

²¹ 19 TTABVUE 50-51 (Sancheti Deposition, Exhibits 3 & 4).

²² 19 TTABVUE 21, 24 (Sancheti Deposition).

²³ 19 TTABVUE 27 (Sancheti Deposition).

²⁴ 19 TTABVUE 14 (Sancheti Deposition).

²⁵ 19 TTABVUE 14-17 (Sancheti Deposition).

including metal statues,²⁶ since 2013, well before Respondent's priority date. As noted above, however, Respondent asserts that any rights Petitioner may have had based on prior use are undercut because Petitioner abandoned the mark in 2019. We disagree. Even though Petitioner discontinued his use in the U.S. in 2019, where discontinued use is "occasioned by" enforcement activity such as Respondent's takedown, the discontinuation of use does not reflect an "intent to abandon the mark," particularly where the aggrieved party engages in "vigorous efforts" to defend itself, as Petitioner has done here by instituting this cancellation proceeding. *See Penthouse Int'l, Ltd. v. Dyn Elecs., Inc.*, 196 USPQ 251, 257 (TTAB 1977) ("nonuse of a mark pending the outcome of litigation to determine the right to such use or pending the outcome of a party's protest to such use constitutes excusable nonuse sufficient to overcome any inference of abandonment"). Petitioner's testimony and Respondent's admission regarding Respondent's enforcement activity against Petitioner suggest that Petitioner was justified in postponing his use of the mark pending the outcome of this proceeding.

²⁶ To the extent there is some variation between the goods for which Petitioner pleaded common law use in the Petition for Cancellation, 1 TTABVUE, and the goods addressed at trial (such as the metal statues, home furnishings and handicrafts), we find the common law use and priority of the unpleaded goods tried by implied consent, and deem the pleadings amended accordingly. We note that Petitioner testified in his deposition about the additional goods, and Respondent cross-examined him. 19 TTABVUE. Also, Respondent's Brief refers without objection to Petitioner's claim of rights in "home furnishings" and "other kinds of handicrafts," and discusses the metal statues. 16 TTABVUE 5. Respondent raises no objection based on the variation of goods from the pleading.

Thus, we conclude that Petitioner has demonstrated priority of use in ARTNCRAFT, and Petitioner's use has been sufficiently ongoing and consistent to satisfy his burden of proof of priority.

IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). A likelihood of confusion analysis often focuses on the similarities between the marks and the similarities between the goods. *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.”). If likelihood of confusion exists with respect to any of Respondent's identified goods in the single class of his registration, the Petition to Cancel must be granted. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

A. The Goods and Trade Channels

Although Respondent in his Brief now argues that the goods differ, Respondent admitted in his Answer that his goods “are identical to, or at least highly related to,

the goods which [Petitioner] provides under the ARTNCRAFT Mark.”²⁷ We consider Respondent bound by this admission. Moreover, Respondent’s argument to the contrary in his Brief rests on the premise that the only product Petitioner sold under his mark is the 2013 eBay sale documented in the record.²⁸ However, Petitioner’s credible testimony established priority in a broader range of goods, including ceramic knobs, tapestries, home furnishings and other handicrafts.²⁹ Thus, Petitioner’s and Respondent’s goods are identical, at least as to ceramic knobs. Also, Respondent’s broadly identified “accent furniture,” which must be construed to encompass all potential goods of that type, overlaps with Petitioner’s home furnishings. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”); *S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein).

Consistent with Respondent’s admission in his Answer, we find that Petitioner’s goods overlap at least in part with Respondent’s identified goods. Therefore, they are

²⁷ 5 TTABVUE; 1 TTABVUE.

²⁸ 16 TTABVUE 11 (Respondent’s Brief). Also, Respondent inaccurately suggests that all its goods are restricted to non-metal items, *id.*, when in fact, many of the identified goods are not limited as to material composition. We cannot read limitations into the identification of goods in the Registration.

²⁹ *E.g.*, 19 TTABVUE 12-13 (Sancheti Deposition).

legally identical in part. As noted above, where the relatedness – or in this case identical nature – is established as to at least one item in a class, this suffices to establish it for likelihood of confusion purposes as to the entire class. *Tuxedo Monopoly*, 209 USPQ at 988; *Apple Comput. v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

Turning to the trade channels and classes of consumers, where recited goods in a registration do not contain trade channel limitations, they are presumed to move in all channels of trade normal for those goods. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Although this same presumption does not apply to Petitioner’s common law rights, we apply the presumption to Respondent’s registration. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”). Thus, because Respondent’s identified goods lack trade channel restrictions and overlap with Petitioner’s common law goods, we presume that Respondent’s goods move in all customary trade channels for the goods, which include Petitioner’s trade channels. *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017). This presumed overlap is confirmed by the record, which indicates that both parties

sold their goods in the U.S. through Amazon.com.³⁰ We therefore find that the trade channels and classes of consumers overlap.

B. Similarity of the Marks

Turning to the comparison of the marks, we must compare them “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). As Respondent admitted in his Answer,³¹ the marks ARTNCRAFT and ARTNCRAFT are identical.

C. Conditions of Purchase

The fourth *DuPont* factor considers “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Respondent argues, without supporting evidence, that because “the parties’ respective products are sold online, the items would not be impulse purchases.”³² Neither the record nor the nature of the goods at issue, which are ordinary consumer products, suggest any elevated degree of care in purchasing. We reject the notion that purchasers of ordinary consumer goods necessarily exercise a higher degree of care when shopping online.

³⁰ 19 TTABVUE 13-15 (Sancheti Deposition); 5 TTABVUE 2 (Respondent’s Answer, admitting ¶ 3).

³¹ 5 TTABVUE (Respondent’s Answer admitting ¶ 3); 1 TTABVUE 4 (Petition to Cancel).

³² 16 TTABVUE 11 (Respondent’s Brief).

We consider this *DuPont* factor neutral.

D. Actual Confusion

Under the seventh and eighth factors, we consider the parties' respective use "such that we could make a finding as to the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *In re Guild Mortg. Co.*, 2020 USPQ2d 10279 *25 (TTAB 2020). Respondent argues that the absence of actual confusion evidence in the record weighs in his favor.

However, the record does not provide contextual information on the length or any conditions of potentially concurrent use of the respective identical marks that could give rise to actual confusion, so we consider these *DuPont* factors neutral.

E. Any Other Established Fact Probative of the Effect of Use

The thirteenth *DuPont* factor considers "any other established fact probative of the effect of use." *DuPont*, 177 USPQ at 567. Under this factor, Respondent argues that the absence of evidence that he acted in bad faith weighs in his favor.³³ While evidence of bad faith adoption of a mark typically will weigh in favor of a likelihood of confusion, the converse is not true, and good faith adoption typically does not weigh against likelihood of confusion. *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991); *Eveready Battery Co., Inc. v. Green Planet, Inc.*, 91 USPQ2d 1511, 1516 (TTAB 2009). Here, we find this factor neutral.

³³ 16 TTABVUE 12 (Respondent's Brief).

V. Conclusion – Weighing the Factors

Petitioner's pleaded common-law mark, in which he has priority of use, is identical to Respondent's mark, and the parties' goods overlap and move in some of the same trade channels to some of the same classes of consumers. These factors weigh heavily in favor of likely confusion, and the other *DuPont* factors on which there are arguments or evidence are neutral. Petitioner has proven his likelihood of confusion claim in the cancellation.

Decision: The petition to cancel is granted, and Registration No. 5708405 will be cancelled in due course.