
To: The Murray Company (TLeach@lewisrice.com)
Subject: TRADEMARK APPLICATION NO. 76465812 - MURRAY COMPANY
- Fed 00680
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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/465812

APPLICANT: The Murray Company

CORRESPONDENT ADDRESS:

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**BEFORE THE
TRADEMARK TRIAL
AND APPEAL BOARD
ON APPEAL**

MARK: MURRAY COMPANY

CORRESPONDENT'S REFERENCE/DOCKET NO: Fed 00680

CORRESPONDENT EMAIL ADDRESS:

TLeach@lewisrice.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

EXAMINING ATTORNEY'S APPEAL BRIEF

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL

Applicant: The Murray Company : BEFORE THE
Trademark: MURRAY COMPANY : TRADEMARK TRIAL
Serial No: 76465812 : AND
Attorney: Thad Leach : APPEAL BOARD
Chad Brigham :
Address: Lewis, Rice & Fingersh, LC : ON APPEAL
500 N. Broadway, Suite 2000
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EXAMINING ATTORNEY'S APPEAL BRIEF

STATEMENT OF THE CASE

Applicant has appealed the Trademark Examining Attorney's final refusal to register the trademark MURRAY COMPANY^[1] for "construction management" in Class 37 on the ground of likelihood of confusion, mistake or deception under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), with the mark in Reg. No. 1264473, M MURRAY^[2], for "industrial, commercial and residential construction and general contractor services" in Class 37.

FACTS

Applicant filed this application on November 8, 2002, applying to register on the Principal Register the mark MURRAY COMPANY for "construction management." In the First Office Action dated May 8, 2003, registration was refused under Section 2(d) on the ground that the mark, when used in connection with the identified services, so resembles the mark in Reg. No. 1264473 as to be likely to cause confusion, to cause mistake, or to deceive. The applicant was also required to disclaim the descriptive wording "COMPANY" and submit a new drawing of the mark.

On June 30, 2003, the applicant (1) argued against the refusal to register the mark under Section 2(d) likelihood of confusion with regard to Reg. No. 1264473, (2) submitted a disclaimer of the wording "COMPANY", and (3) submitted a new drawing of the mark.

On October 9, 2003, the disclaimer was accepted, the substitute drawing was accepted, and the refusal to register under Section 2(d) with regard to Reg. No. 1264473 was maintained and made final.

On April 13, 2004, applicant filed a Notice of Appeal.

On April 27, 2004, the Trademark Trial and Appeal Board denied applicant's appeal as untimely.

On May 14, 2004, examining attorney issued a Notice of Abandonment.

On June 28, 2004, applicant filed a Petition to Revive the application.

On September 29, 2004, a Notice of Revival of Application was issued.

On October, 4, 2004, a Notice of Revival of Application was issued.

On January 18, 2005, the applicant filed its appeal brief, and the file was forwarded to the examining attorney for statement on February 2, 2005.^[3]

ISSUE

The issue on appeal is whether the mark, when used in connection with the identified services, so resembles the mark in Registration No. 1264473 as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d).

ARGUMENT

BECAUSE THE MARKS WILL BE APPLIED TO CLOSELY RELATED SERVICES, REGISTRATION OF MURRAY COMPANY, WHICH CREATES THE SAME COMMERCIAL IMPRESSION AS M MURRAY, IS LIKELY TO CREATE CONSUMER CONFUSION AS TO SOURCE

(A) SIMILARITY OF THE MARKS: THE MARKS CREATE THE SAME COMMERCIAL IMPRESSION

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods or services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods or services. TMEP §1207.01. The Court in *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods or services. The overriding concern is to prevent buyer confusion as to the source of the goods or services. *Miss Universe, Inc. v. Miss Teen U.S.A., Inc.*, 209 USPQ 698 (N.D. Ga. 1980). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

When determining whether there is a likelihood of confusion under Section 2(d), the question is not whether people will confuse the marks, but rather whether the marks will confuse the people into believing that the services they identify emanate from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); TMEP §1207.01(b).

The applicant applied to register the mark MURRAY COMPANY and design. The registered mark is M MURRAY (stylized).

The commercial impression created by the applicant's mark, MURRAY COMPANY, is the same as the registrant's mark, M MURRAY.

The dominant element of each mark is the surname MURRAY with an emphasis on the first letter, M. Purchasers will very likely refer to both registrant's and applicant's services by using the term MURRAY. The appropriate weight of the wording "COMPANY" and design and stylization elements of both marks is far less than that of the name MURRAY, which forms the primary commercial impression of each mark. "[I]n 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 feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant has disclaimed the wording "COMPANY". While the examining attorney cannot ignore a disclaimed portion of a mark and must view marks in their entireties, one feature of a mark may be more significant in creating a commercial impression. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986). Disclaimed matter is typically less significant or less dominant.

When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

In addition, while there are different design elements in each mark, the design elements serve the same function and lead to a likelihood of confusion between the marks. Both design elements emphasize M, the first letter of the surname MURRAY. Registrant emphasizes this letter by enlarging it and setting it atop the wording MURRAY. Applicant emphasizes the M by enlarging it and placing a plumb bomb in the cradle of the M.

Applicant cites several cases in which it was held that that the dominant feature of a mark was an enlarged letter. However, none of the contentious marks in the cited cases contained an identical, or even phonetically equivalent, primary word portion as is the present case with the word MURRAY. *See, Tektronix, Inc. v. Daktronics, Inc.*, 189 USPQ 693 (CCPA 1976) (D DAKTRONICS INC. vs. TEKTRONIX); *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645 (Fed. Cir. 1990) (K+(stylized) vs. K+EFF); *Cohn-Hall-Marx Co. v. Am. Silk Mills, Inc.*, 89 USPQ 215 (Commr. Pats. 1951) (A AMERTIEX vs. Aamer-Mill). These cases do not address situations where a word portion of the mark is identical and the same letter is emphasized through design and stylization.

In *Tektronix*, the Court refrained from holding that any portion of the mark was dominant, "because [it] was persuaded that the differences between the marks, considered in their entireties and as applied to the parties' goods, [footnote omitted] [were] sufficient to avoid a likelihood of confusion." *Tektronix, Inc. v. Daktronics, Inc.*, 189 USPQ at 695.

In *Electrolyte Laboratories*, the court noted that "[i]t must be remembered that [registrant's] trademark consists of highly stylized letters and is therefore in the gray region between pure design marks which cannot be vocalized and word marks which are clearly intended to be." *In re Electrolyte Laboratories, Inc.*, 929 F.2d at 647. In the present case, it is clear that neither the applicant's nor the registrant's letters are "highly stylized." Each contain a design element, but those elements are separate from the word MURRAY and both emphasize the word MURRAY.

As applicant emphasizes in its brief, the marks at issue in *American Silk Mills* both contained a large letter "A" and the enlarged "A" created a large enough commercial impression to outweigh the difference in the word portions of the marks. *Am. Silk Mills*. 89 USPQ at 217. In the present case, the primary wording, MURRAY, is identical. The "M" is emphasized in both marks. The conclusion can be drawn from the decision in *American Silk Mills* that this emphasis creates a greater likelihood of confusion between the two marks.

In instances such as this one, where a word portion of the mark is similar, it is more appropriate to look to those cases considering marks that have identical wording with differing designs or stylization. *See In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

In *In re Dakin's Miniatures*, applicant was attempting to register the marks DAKIN'S QUALITY CRAFTED MINIATURES with three horses and a circle design and DASKIN'S CIRCLE B (and design). *In re Dakin's Miniatures Inc.*, 59 USPQ2d at 1593. Registrant had a number of registrations for marks using the word DAKIN, including a mark for the word DAKIN alone. *Id* at 1594. The Board found that "DAKIN" was the dominant portion of the applicant's and the registrant's marks and that the accompanying design elements were not sufficient to distinguish the respective marks. *Id* at 1595.

In *In re Appetito*, the applicant was attempting to register the mark APPETTITO with trapezoidal boxes above and below the wording. *In re Appetito Provisions Co.*, 3 USPQ2d at 1554. Registrant had two registered marks, APPETTITO'S written in script inside of a large stylized "A" and APPETTITO'S underneath a drawing of a sandwich with a capitalized "A" superimposed on the sandwich. *Id*. The Board found that the wording "Appetito's" in the mark was enhanced by the use of a stylized capital "A" referring to the first letter of the word portion on the mark. *Id*. The Board went on to find that "Inc." was "less likely to be remembered because [it] merely described [the registrant's] business form." *Id*. The applicant was refused registration due to likelihood of confusion with registrant's marks. *Id* at 1556.

In the present case, applicant's and registrant's marks are more similar than the marks in *In re Appetito* and *In re Dakin's Miniatures*. In both of the cited cases, the design elements of each mark were completely different. In this case, the design and stylization elements of each mark provide the same purpose, to emphasize the letter "M." Therefore the likelihood of confusion in the present case is even greater than that in the two above-cited cases.

In this case, the applicant's mark is similar to the registrant's mark in sound and appearance, and is identical to the registrant's mark in meaning and commercial impression.

(B) SIMILARITY OF THE SERVICES: APPLICANT'S IDENTIFIED SERVICES ARE CLOSELY RELATED TO AND CAN BE EXPECTED TO EMANATE FROM THE SAME SOURCE AS THE REGISTRANT'S SERVICES

A determination of whether there is a likelihood of confusion is made solely on the basis of the goods or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999). If the cited registration describes the goods or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); TMEP §1207.01(a)(iii).

Since the marks of the respective parties are highly similar in sound and appearance, and identical in meaning and commercial impression, the relationship between the goods or services of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70 (TTAB 1981); TMEP §1207.01(a). However, if the goods or services of the respective parties are closely related, the degree of similarity between marks required to support a finding of likelihood of confusion

is not as great as would apply with diverse goods or services. *ECI Division of E Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443 (TTAB 1980). TMEP §1207.01(b).

Not only are the marks in question highly related, but the services are very similar.

The applicant's identified services are "construction management." The registrant's identified services are "industrial, commercial and residential construction and general contractor services."

The examining attorney makes reference to and incorporates herein glossary definitions included in the October 9, 2003 Office Action. A general contractor is a party who is hired to oversee a construction project. The general contractor is responsible for the hiring and management of subcontractors (steel workers, plumbers, electricians, etc.).^[4] The duties of a general contractor are to manage construction projects.

"Construction management" is defined as "Activities over and above normal architectural and engineering services, conducted during the predesign, design, and construction phases, that contribute to the control of time and cost."^[5]

A construction manager oversees all phases of construction, usually to ensure that the project is brought in at or near budget. A construction manager oversees the contractors. A single party may offer both construction management services as well as the services of a general contractor. Since the duty of a general contractor is to oversee construction projects, the general contractor engages in "activities over and above normal architectural and engineering services, conducted during the predesign, design, and construction phases, that contribute to the control of time and cost." Both the general contractor and one engaged in construction management oversee construction projects. They perform the same function and are therefore, closely related.

Moreover, even the applicant's own specimens make clear that the services are closely related; the

applicant also offers general contracting services. In the brochure submitted as the specimen in the application dated November 8, 2002, applicant lists its "Capabilities." Included in this list, directly under "Construction Manager," is "General Contractor."^[6]

Any goods or services in the registrant's normal fields of expansion must also be considered in order to determine whether the registrant's goods or services are related to the applicant's identified goods or services for purposes of analysis under Section 2(d). *In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). The test is whether purchasers would believe the product or service is within the registrant's logical zone of expansion. *CPG Prods. Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983); TMEP §1207.01(a)(v). Even if the services here were not very closely related on their face, general contracting is certainly within the logical zone of expansion of construction management, as both services oversee construction projects.

The services are closely related and can be expected to emanate from the same source. The services of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the services come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). TMEP §1207.01(a)(i).

Applicant argues that the consumers of these services are sophisticated and therefore, there will be no confusion between registrant's and applicant's services. It is well settled that the issue of likelihood of confusion between marks must be determined on the basis of the goods or services as they are identified in the application and the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*,

Inc., 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973). Since there is no limitation as to prospective purchasers in either identification, it is presumed that the claimed services encompass all services of the type described, that they move in all normal channels of trade and that they are available to all potential customers, including individual—and relatively unsophisticated—property owners who only wish to develop a single tract. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). TMEP §1207.01(a)(iii).

In any event, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). TMEP §1207.01(d)(vii).

Applicant argues that there is a lack of actual confusion. First, it must be noted that, as the applicant points out, the two marks have coexisted for only two years. Confusion may not be apparent after such a short time. Second, applicant provides no evidence of a lack of confusion. Applicant merely makes a blanket statement that there has been no confusion. Third, it was been well established that no actual confusion is necessary; the test is whether there is a *likelihood* of confusion. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990). TMEP §1207.01(d)(ii).

CONCLUSION

The applicant's mark MURRAY COMPANY is likely to be confused with the registrant's mark M MURRAY where the applicant's mark has the same meaning, creates the same commercial impression, sounds the same as the registrant's mark, where it is used on substantially related services, the services can be provided by the same companies, marketed under the same trademark, and sold through the same channels of trade to the same end consumers. For the foregoing reasons, it is respectfully submitted that the refusal of registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), be affirmed.

Respectfully submitted,

/Kristina Kloiber/
Examining Attorney
Law Office 116
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Meryl Hershkowitz
Managing Attorney
Law Office 116

[1] Applicant's mark is stylized with a design element and is attached herein as Exhibit A.

[2] Registrant's mark is stylized and is attached herein as Exhibit B.

[3] The Office has reassigned this application to the undersigned trademark examining attorney.

[4] Homeglossary.com available at http://www.yourwebassistant.net/glossary/g3.htm#general_contractor; and National Contractor Referrals and License Bureau Glossary available at <http://www.contractorreferral.com/cgi-bin/glossary/glossary.pl?TERM=G> and <http://www.contractorreferral.com/cgi-bin/glossary/glossary.pl?TERM=P>. Attached as evidence to the Final Refusal dated October 9, 2003.

[5] National Contractor Referrals and License Bureau Glossary available at <http://www.contractorreferral.com/cgi-bin/glossary/glossary.pl?TERM=C>. Attached as evidence to the Final Refusal dated October 9, 2003.

[6] The specimen is herein attached as Exhibit C.

MURRAY
COMPANY

IM

MURRAY

Capabilities

www.murray-company.com

"Provide integrated design and construction services that enable our clients to grow and prosper"

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References

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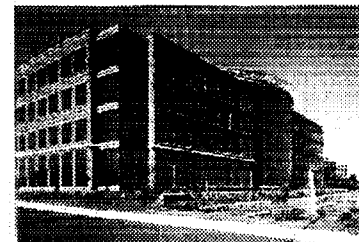
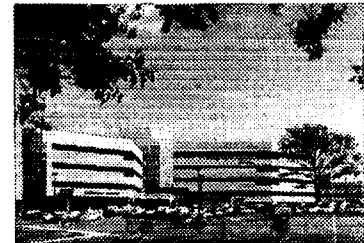
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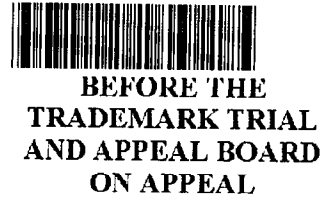
MURRAY
COMPANY

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/536416

APPLICANT: Carey, Cynthia Corso

CORRESPONDENT ADDRESS: JOHN L. SLAFSKY WILSON SONSINI GOODRICH & ROSATI PC 650 PAGE MILL ROAD PALO ALTO CA 94301-1050



MARK: TRAY CHIC

CORRESPONDENT'S REFERENCE/DOCKET NO: 1000-TM1001

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

- 1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant appealed the Examining Attorney's final refusal to register the trademark "TRAY CHIC" for "decorative serving trays for home or personal use" in International Class 21 on the ground of a likelihood of confusion with Registrant's mark in U.S. Registration No. 1,846,750 under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

I. FACTS

Applicant applied for registration on the Principal Register of the mark "TRAY CHIC" for "decorative serving trays for home or personal use" in International Class 21. In the first Office Action, the Examining Attorney refused registration under Section 2(d) of the Trademark Act based on U.S. Registration No. 1,846,750 for the identical mark "TRAY CHIC" for "serving tray stands for restaurants." That Office Action also noted several informalities that have since been resolved. This appeal follows the Examining Attorney's Final Refusal based on the likelihood of confusion under Section 2(d) based on the above noted registration.

II. ARGUMENT

THE MARKS OF APPLICANT AND REGISTRANT ARE SIMILAR AND THE GOODS

ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

The Court in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d) of the Trademark Act. Any one of the factors listed may be dominant in any given case, depending upon the evidence of record. In this case, the following factors are the most relevant: the marks are identical and the goods are related. The other factors cannot be considered because no relevant evidence concerning those factors is contained in the record. See *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984).

A. THE MARKS ARE IDENTICAL

Applicant seeks to register the mark "TRAY CHIC." Registration No. 1,846,750 is also for the mark "TRAY CHIC." The marks are identical in sound, spelling and appearance. Furthermore, there are no design elements in either mark to further distinguish them from one another. The applicant does not argue against the conclusion that the marks are identical and conceded this point in its April 13, 2004 response. Therefore, it must be again concluded that the marks are identical.

B. THE GOODS ARE CLOSELY RELATED

If the marks of the respective parties are identical, as is the case here, the relationship between the goods of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *Ancor, Inc. v. Ancor Industries, Inc.*, 210 USPQ 70 (TTAB 1981).

Applicant's goods are identified in the application as "decorative serving trays for home or personal use." Registrant's goods are identified as "serving tray stands for restaurants." The applicant argues that there is no likelihood of confusion because the goods are different. The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not the likelihood of confusion between particular goods, but the likelihood of confusion as to the source of those goods. See *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984), and cases cited therein.

Furthermore, the goods of the parties need not be identical or even directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions

surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

In his Final Office Action, the examining attorney provided copies of five applications and nine registrations showing that trays and tray stands are often sold under the same mark and emanate from the same source. (Examples: U.S. Registration No. 1058942 for "VOLLRATH" and design for goods including trays and racks for serving and transporting food; U.S. Registration No. 2580638 for "EVERGREEN" for goods including tray stands and decorative plaques; U.S. Registration No. 2682723 for a design mark for trays and tray stands, among other goods, etc.).

The applicant argues that the examining attorney has failed to show that the goods of the respective parties are related. The examining attorney respectfully disagrees. The USPTO X-Search database printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely "decorative serving trays for home or personal use" and "serving tray stands for restaurants," are of a kind that may emanate from a single source. *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1218 (TTAB 2001), citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988). These USPTO X-Search database printouts show third-party registrations of marks used in connection with the same or similar goods as those of the applicant and registrant in this case. The applicant's goods are serving trays, albeit decorative ones, and the registrant's goods are trays for serving stands, be they decorative or not. Therefore, the goods, although not identical, are related.

Given that the marks of the respective parties are identical, and that as a result the relationship between the goods of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks, this examining attorney must conclude that the goods are in fact related.

C. Absence of Actual Confusion Irrelevant.

The applicant also argues that there have been no episodes of actual confusion between the marks and that as a result there can be no finding of a likelihood of confusion under Section 2(d) of the Trademark Act. The examining attorney respectfully disagrees with this conclusion. Actual confusion

is not the test. The true test under Section 2(d) of the Trademark Act is whether there is a *likelihood* of confusion. The marks are identical and the evidence provided by the examining attorney shows that the goods are related. It is unnecessary to show actual confusion in establishing likelihood of confusion in an ex parte proceeding. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), and cases cited therein.

D. Sophistication of Consumers.

Finally, the applicant claims that its consumers are of a sophisticated lot. No evidence was presented in support of this assertion. Nevertheless, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

III. CONCLUSION

For the foregoing reasons, the refusal to register under Section 2(d) of the Trademark Act should be affirmed.

Respectfully submitted,

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