

**THIS OPINION IS NOT A
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Guard Master, Inc.

Serial No. 85338849

Edwin D. Schindler, Esq. for Guard Master, Inc.

Janet Lee, Trademark Examining Attorney, Law Office 102
(Mitchell Front, Managing Attorney).

Before Bucher, Cataldo and Hightower,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Guard Master, Inc., filed an application to register on the Principal Register the mark GUARD MASTER in standard characters for the following goods, as amended:

fabric protection, namely, fabric protectants for use on textiles and furniture

in International Class 1; and

coatings in the nature of industrial sealants for waterproofing and surface hardening; coatings used for furniture finishing; sealer coatings for use in wood protection; wood preservatives; wood treatment preparations for preserving

in International Class 2.¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with its goods, so resembles the mark MASTER GUARD, previously registered by two entities on the Principal Register in typed or standard characters for the following goods:

fabric protectant for use on fabrics, carpets and upholstery

in International Class 1;² and

coatings in the nature of wood sealers and protectors

in International Class 2 and

petroleum-based asphalt coatings; asphalt primers; asphalt fillers; and asphalt patch

in International Class 19,³ as to be likely to cause confusion, mistake or deception.

¹ Application Serial No. 85338849 was filed on June 6, 2011, based on applicant's assertion of September 15, 2006 as a date of first use of the mark anywhere and in commerce in connection with both classes of goods.

² Registration No. 1927549 issued to H & M Distributing, Inc. on October 17, 1995. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

³ Registration No. 2633999 issued to Conklin Co., Inc. on October 15, 2002. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs on the issue under appeal.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *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 Co., 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, 27 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Goods

We turn first to our consideration of whether the goods of applicant and registrants are related. In making our determination, we look to the goods as identified in the involved application and cited registrations. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of

an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

In this case, applicant's "fabric protection, namely, fabric protectants for use on textiles and furniture" are legally identical to the "fabric protectant for use on fabrics, carpets and upholstery" recited in Registration No. 1927549. The examining attorney has made of record the following dictionary definitions of "textile" - "any fabric or cloth, esp woven"⁴ and "upholstery" - "the padding, covering, etc., of a piece of furniture."⁵ According to these definitions, "textile" is the equivalent of "fabric," especially "woven fabric," and "upholstery" is a feature of certain types of furniture. Thus, both the application at

⁴ Collins English Dictionary, 10th Ed. 2009, attached to the examining attorney's April 16, 2012 Office action.

⁵ *Id.*

issue and cited Registration No. 1927549 identify fabric protectants used on textile or cloth and upholstery or furniture featuring upholstery.

In addition, the "sealer coatings for use in wood protection" in applicant's recited

coatings in the nature of industrial sealants for waterproofing and surface hardening; coatings used for furniture finishing; sealer coatings for use in wood protection; wood preservatives; wood treatment preparations for preserving

are legally identical to the "coatings in the nature of wood sealers and protectors" recited in Registration No. 2633999 inasmuch as both are coatings used to seal and protect wood.⁶

Thus, the goods identified in Class 1 of the involved application are legally identical in part to the goods identified in cited Registration No. 1927549. Similarly, the goods identified in Class 2 of the involved application are legally identical in part to the goods identified in cited Registration No. 2633999. It is not necessary for the examining attorney to prove likelihood of confusion with respect to each of the goods identified in applicant's

⁶ We note in addition that the examining attorney has made of record with her April 16, 2012 Office action printed pages from commercial Internet websites and copies of third-party registrations suggesting that the goods identified in Class 2 of the involved application and Registration No. 2633999 may emanate from a common source.

application; if there is likelihood of confusion with respect to any of applicant's identified goods in a particular class, the refusal of registration must be affirmed. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Finally, we observe that applicant does not present any arguments regarding the similarity or dissimilarity of the goods at issue.

Trade Channels

Furthermore, inasmuch as the identifications of goods in both of the cited registrations and involved application do not recite limitations to any specific channels of trade, we presume an overlap, at least as to the legally identical goods, and that the goods would be offered in all ordinary trade channels for these goods and to all normal classes of purchasers. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). *See also Octocom Systems, Inc. v. Houston Computers Services Inc., supra.* Because neither applicant's nor registrants' goods contain any limitations as to trade channels or intended consumers, they are presumed to move in all normal channels of trade and be available to all classes of potential consumers. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

The Marks

Next we consider the similarities and dissimilarities between the marks. In coming to our determination, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

In this case, registrants' marks are MASTER GUARD in typed or standard characters while applicant's mark is GUARD MASTER in standard characters. Both marks contain the identical words "master" and "guard." Applicant has taken the only two words in registrants' marks and transposed them. These differences do not serve to distinguish the marks in terms of sound and appearance. In addition, we are not persuaded that reversing the order of the words in the marks makes a significant difference in commercial impression. As the Board has previously stated:

Further, the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions. See *Bank of America National Trust and Savings Assn. v. American National Bank of St. Joseph*, 201 USPQ 842 (TTAB 1978), and cases cited therein. Here, where the goods in question are legally identical, and where both marks, when applied to the goods in question, are likely to be perceived by purchasers as signifying that the product sold thereunder busts through, or breaks up, rust, we

agree with the Examining Attorney that the marks create substantially similar commercial impressions, and there is a likelihood of confusion. Cf. *In re Inco*, 154 USPQ 629 (TTAB 1967) ["GUARDIAN OF POSTURE for mattresses versus "POSTURGUARD" for mattresses - registration refused], and *McNamee Coach Corp. v. Kamp-A-While Industries, Inc.* v. 148 USPQ 765 (TTAB 1965) ["KING KAMPER" for camping trailers versus "KAMP KING KOACHES" for campers - registration refused].

In re Nationwide Industries, Inc., 6 USPQ2d 1882, 1884 (TTAB 1988) (RUST BUSTER for rust-penetrating spray lubricants confusingly similar to BUST RUST for penetrating oil).

Although there may be subtle differences in the meanings of the marks when they are subjected to close analysis, i.e., a guard of master rank versus a master of guards, we do not believe that consumers will undertake such an analysis. The test for likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. Also, in evaluating similarities between the marks, the emphasis must be 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 (TTAB 1975). Registrants' mark MASTER GUARD and applicant's mark GUARD MASTER convey highly similar meanings and commercial impressions when used in connection with legally identical

goods. Both marks suggest goods, in this case fabric and wood protectors, that guard such materials at a very high or master level. Thus, when the marks are considered in their entireties, we find that they are similar in sound, appearance, meaning and commercial impression.

Third Party Use

In its March 21, 2012 response to the examining attorney's September 21, 2011 Office action, applicant argues that third party registration of both GUARD MASTER and MASTER GUARD to identify various goods weighs against a finding of likelihood of confusion. In support of its contention, applicant submitted copies of the following seven third-party registrations:

Reg. No. 1600521 for the mark GUARDMASTER for "electrical connections, electric measuring and signaling apparatus, and electric remote controllers for machinery;"

Reg. No. 2416167 for the mark MASTER GUARD for "veterinary vaccines for farm animals;"

Reg. No. 2519951 for the mark GUARD MASTER (stylized) for "metal security storage cabinets;"

Reg. No. 2556874 for the mark MASTERGUARD for "metal fencing, windows and doors;"

Reg. No. 2599101 for the mark MASTER GUARD for "rubber household gloves and gardening gloves" and "rainwear;"

Reg. No. 2935503 for the mark MASTERGUARD for various metal valves and plumbing fittings; and

Reg. No. 2984997 for the mark GUARD MASTER and design for various electrical and electronic controls.

Applicant's evidence of seven third-party registrations is entitled to limited probative value. The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Moreover, the probative value of the third-party registrations is significantly diminished by virtue of the fact that the trademarks cover a wide variety of goods, none of which are related to the types of goods involved herein. *See Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992). In any event, even if we were to find, based on applicant's evidence, that registrants' marks are weak and entitled to a narrow scope of protection, the scope is still broad enough to prevent the registration of an identical mark for related goods. *See In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

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In summary, weighing all of the evidence of record as it pertains to the relevant *du Pont* factors, we find that a likelihood of confusion exists. Moreover, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal of registration is affirmed.