

This Opinion is Not a
Precedent of the TTAB

Mailed: December 27, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Abbyson Living Corporation

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Serial No. 86382828

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Gregory Z. Boger of Koppel, Patrick, Heybl & Philpott
For Abbyson Living Corporation

Tina L. Snapp, Trademark Examining Attorney, Law Office 116,
Christine Cooper, Managing Attorney.

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Before Wellington, Kuczma and Lynch
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Abbyson Living Corporation (“Applicant”) applied to register the mark BELMONT, in standard characters.¹ As a preliminary matter, we must address the

¹ Application Serial Number 86382828 was filed September 2, 2014, based on intent to use under Section 1(b) of the Trademark Act, 15 USC § 1051(b).

operative identification of goods. The initial application identified “furniture.” Applicant subsequently amended its application to narrow the identified goods to “Domestic, plush, living-room furniture, namely, chairs, recliners, sofas, couches, and ottomans” in International Class 20.² On appeal, Applicant submitted another proposed amendment of its identification to “Luxury or high-end living-room furniture, namely, entertainment consoles, cabinets, drawers, and storage units.”³ The Board remanded the application for consideration of the proposed amendment, and the Examining Attorney accepted it,⁴ despite its clear violation of Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a) (“The applicant may amend the application to clarify or limit, but not to broaden, the identification of goods and/or services”). Applicant’s second proposed amendment runs afoul of the rule’s prohibition against broadening the identification by deleting the “domestic, plush” restrictions, and adding new and different types of furniture, “entertainment consoles, cabinets, drawers, and storage units.” *See In re Swen Sonic Corp.*, 21 USPQ2d 1794 (TTAB 1991) (affirming rejection of amendment to “ultrasonic cleaning tanks” from the operative, previously-narrowed identification of “ultrasonic-activated bathtubs,” regardless of the breadth of the original identification as “ultrasonic cleaning and bathing apparatus”). Given the impermissible nature of the broadening amendment, we reverse the acceptance of it,

² January 12, 2015 Response to Office Action at 3-4.

³ 16 TTABVUE 2 (Applicant’s Appeal Brief).

⁴ We note that although the Examining Attorney stated that Applicant’s second proposed amendment was acceptable, 18 TTABVUE 3 (April 14, 2006 Denial of Request for Reconsideration), the USPTO’s online TSDR database was not updated to reflect this amendment. Therefore, the TSDR record displays what we deem to be the correct and operative identification of goods.

and accordingly, the operative identification in this application remains “Domestic, plush, living-room furniture, namely, chairs, recliners, sofas, couches, and ottomans” in International Class 20. As discussed below, we would reach the same conclusion with either identification. Therefore, we consider it unnecessary to remand this case for a third time to the Examining Attorney, now with instructions to reverse acceptance of the improper broadening amendment. Rather, for the sake of efficiency, we analyze and address arguments on the refusal with the appropriate identification and also, in footnotes 24 and 27 below, with Applicant’s now-rejected amendment.

Turning to the issue on appeal, the Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that use of Applicant’s mark is likely to cause confusion with two registered marks owned by the same registrant, **BELMONT** for “box springs”⁵ (“425 Registration”) and BELMONT in typed form for “mattresses”⁶ (“490 Registration”). After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration. On remand, the Examining Attorney denied the request for reconsideration, and the appeal resumed. As noted above, because Applicant’s Appeal Brief included a proposed amendment of the identification, the Board again remanded the case. The

⁵ Registration Number 0513425, issued August 9, 1949; renewed.

⁶ Registration Number 0732490, issued June 5, 1962; renewed. A mark registered in typed form (now known as standard characters) is not limited to any special form of depiction. *Phillips Petroleum Co. v. C. J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). “The rights associated with [such a mark] reside in the wording ..., and not in any particular display.” *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2063 (TTAB 2013).

Examining Attorney maintained the Section 2(d) refusal. The appeal resumed, and has been fully briefed. We affirm the refusal to register.

The determination under 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 the “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 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 relatedness of the services. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *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 [services] and differences in the marks.”).

Turning first to the similarity of the marks, this factor weighs strongly in favor of likely confusion. *See Majestic Distilling*, 65 USPQ2d at 1204. The word BELMONT is the same in all three marks. Applicant’s standard character mark is identical to the typed form mark in the ‘490 Registration and legally identical to the mark in the ‘425 Registration. Applicant’s standard character mark may be used in any font or size, including that of the mark in the ‘425 Registration. *See Trademark Rule 2.52(a)*; *see also Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014). When comparing wording in a standard character

mark with identical wording in stylized mark, “that stylized lettering does not provide a significant difference between the marks.” *Majestic Distilling*, 65 USPQ2d at 1204.

Turning next to the goods, we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe Applicant’s and Registrant’s goods emanate from the same source. We must focus on the goods as identified in the application and the registrations, not on extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Furthermore, “even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source.” *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). *See also Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981) (When both parties are using or intend to use the identical designation, “the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar”). “[I]t is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or there is an association or connection between the sources of the goods.” *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Applicant's goods are chairs, recliners, sofas, couches, and ottomans, while Registrant's goods are mattresses and box springs. The record includes evidence of the market relatedness of mattresses and box springs and the furniture identified in the subject application. For example:

- SIMMONS used as a trademark for mattresses and sofas;⁷
- SERTA used as a trademark for mattresses, box springs, sofas and chairs;⁸
- NOAH's used as a trademark for mattresses and for furniture including sofas and chairs;⁹
- COLFAX FURNITURE & MATTRESS used as a trademark for mattresses and sofas;¹⁰
- MITCHELL GOLD + BOB WILLIAMS used in connection with ottomans, chairs, sofas, box springs and mattresses;¹¹
- BELFORT used in connection with mattresses, sofas and chairs;¹²
- BILLS' BROS. FURNITURE used as a service mark for the retail sale of mattresses, box springs, sofas, ottomans and chairs;¹³
- RAYMOUR & FLANIGAN FURNITURE-MATTRESSES used as a service mark for the retail sale of sofas, mattresses, box springs and chairs;¹⁴
- ATLANTIC BEDDING AND FURNITURE used as a service mark for the retail sale of mattress sets, recliners, sofas, chairs and ottomans;¹⁵

⁷ December 2, 2015 Office Action at 25-30 (simmons.com).

⁸ January 30, 2015 Office Action at 29-33 (overstock.com).

⁹ April 14, 2016 Office Action at 92-95 (noahsmfg.com).

¹⁰ *Id.* at 106-112 (colfaxfurniture.com).

¹¹ December 2, 2015 Office Action at 31-42 (mgbwhome.com).

¹² *Id.* at 43-59 (belfortfurniture.com).

¹³ January 30, 2015 Office Action at 5-12 (billsbros.com).

¹⁴ *Id.* at 13-17 (raymourflanigan.com).

¹⁵ *Id.* at 19-21 (atlanticbeddingandfurniture.com).

- ASHLEY FURNITURE HOMESTORE used as a service mark for the retail sale of sofas, couches and mattresses;¹⁶
- POTTERY BARN KIDS used in connection with mattresses, chairs and ottomans;¹⁷ and
- POTTERY BARN used in connection with sofas, chairs, ottomans and mattresses.¹⁸

This evidence shows that consumers would be accustomed to encountering furniture items such as those identified by Applicant promoted and offered together with mattresses and box springs, including in instances where the relevant goods bear the same trademark.

The record also includes 16 use-based third-party registrations for goods that include mattresses or box springs such as Registrant's as well as furniture identified by Applicant. Representative examples of these 16 registrations include:

- Registration No. 4350186 for THERAPEDIC for "furniture, namely, sofas, loveseats, chairs, ottomans, sofa beds, and futons; mattresses, box springs, mattress toppers, pillows" and "mattress pads";¹⁹
- Registration No. 4791037 for LAGOON and design for goods in International Class 20 including chairs, sofas, couches, ottomans, mattresses and crib mattresses;²⁰
- Registration No. 4514192 for K MOTION and design for goods in International Class 20 including furniture, mattresses, seats, sofas and stools;²¹

¹⁶ *Id.* at 22-28 (ashleyfurniturehomestore.com).

¹⁷ *Id.* at 56-58 (potterybarnkids.com).

¹⁸ *Id.* at 59-65 (potterybarn.com).

¹⁹ April 14, 2016 Office Action at 115-17.

²⁰ *Id.* at 118-120.

²¹ *Id.* at 121-23.

- Registration No. 4657370 for PERFECTBACK for goods in International Class 20 including furniture, chairs, mattresses and sofas;²² and
- Registration No. 4581856 for MEMO'S for goods in International Class 20 including mattresses, sofas and mattresses.²³

The 16 use-based third-party registrations, which cover both types of goods, suggest that they may emanate from the same source. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (“The use-based, third-party registrations . . . also have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.”); *see also In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The evidence of record, including evidence not specifically discussed herein, amply demonstrates that Applicant’s identified furniture goods are related to the mattresses and box springs in the cited registrations.²⁴ “Moreover, the greater the

²² *Id.* at 124-26.

²³ *Id.* at 127-28.

²⁴ Given our rejection of the proposed amendment of the identification offered by Applicant in its Appeal Brief, we hasten to add that the outcome of this appeal would remain unchanged even were the amended identification accepted. The record also contains ample evidence of the relatedness of luxury or high-end entertainment consoles, cabinets, drawers, and storage units to mattresses and box springs. For example, the Examining Attorney submitted pages from the website of HOZZZ, offering “Luxury Furniture Online,” with goods including storage ottomans, storage units, cabinets, mattresses and box springs. April 14, 2016 Denial of Reconsideration at 2-22 (houzz.com). Similarly, MACYS offers “Luxury Furniture” for various rooms including the living room, as well as mattresses and box springs. *Id.* at 66-79 (macys.com). Moreover, multiple use-based third-party registrations submitted by the Examining Attorney cover these types of furniture items without restriction, therefore including luxury or high-end goods, as well as mattresses. April 14, 2016 at 115-57. Other evidence reflects that cabinets and storage units tend to be offered from the same sources as

degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion." *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

Applicant argues that likelihood of confusion is negated because its living room furniture would be placed in a different room of the home than the mattresses and box springs in the cited registrations. However, the evidence clearly shows that the same sources promote and offer both living room furniture and bedroom furniture, including mattresses and box springs. We therefore infer that consumers might expect living room furniture and mattresses and box springs to come from the same source. Thus, the showing in the record carries significance as to likely confusion, whereas no evidence bears on consumer expectations of source arising out of the placement of different types of furniture in separate rooms.

We further find that the record establishes that these goods move in the same trade channels to the same classes of purchasers. The recitations in the subject application and cited registrations are unrestricted, and we presume that the goods are marketed in all usual trade channels and to all normal classes of purchasers. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir.

mattresses. For example, ASHLEY FURNITURE HOMESTORE, in addition to the mattresses and other furniture discussed above, also offers cubes/storage, dressers and nightstands. January 30, 2015 Office Action at 34-39 (ashleyfurniturehomestore.com). MATHISBROTHERS.COM offers beds and kids' mattresses, along with chests, dressers, nightstands and chairs. *Id.* at 40-44 (mathisbrothers.com). Overall, the record supports relatedness of goods – and likely confusion – regardless of which identification of goods controls the analysis.

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”); *In re Wilson*, 57 USPQ2d 1863, 1865 (TTAB 2001). While Applicant asserts without pointing to evidentiary support that the goods in the cited registrations “are frequently sold and marketed in stores that focus only on mattresses and box springs,”²⁵ the evidence of record indicates that retailers often market and offer for sale both living room furniture and mattresses. Thus, the same classes of customers tend to encounter these goods offered by the same sellers in the same stores or through the same websites.

Applicant also contends that consumers of its high-end goods should be considered sophisticated and careful purchasers, who would pay close attention to the brand of the living room furniture that would be “in one of the most public rooms of the home.”²⁶ Given that the operative identification includes no restriction as to the high-end or luxury nature of the goods, Applicant’s argument is not borne out by its identification, which controls the analysis. We must “focus on the application and registrations rather than on real-world conditions, because ‘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.’” *Stone Lion Capital Partners*, 110 USPQ2d at 1162 (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 16 USPQ2d at 1787).²⁷

²⁵ 15 TTABVUE 8-9 (Applicant’s Brief).

²⁶ 15 TTABVUE 7 (Applicant’s Brief).

²⁷ Again, however, we add that even if Applicant’s identification were limited to luxury or high-end goods, the identifications in the cited registrations remain unrestricted, and therefore encompass high-end or luxury mattresses and box springs. As previously noted, the

Based on the identical marks, as well as the relatedness of the goods and the identical trade channels and classes of consumers, we find that Applicant's mark is likely to cause confusion with the mark in the cited registrations.

Decision: The refusal to register Applicant's mark is affirmed.

record suggests that these goods are sold together. Moreover, with identical marks such as these, and the reality that even sophisticated consumers are not immune from source confusion, Applicant's argument in this regard is not persuasive. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) ("That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods.").