

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 30,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Louisville Bedding Company**

Serial No. 74/**075,979**

Carmin D. Grandinetti of Greenbaum Doll & McDanald PLLC for
Louisville Bedding Company.

David M. Mermelstein, Trademark Examining Attorney, Law
Office **103** (Michael A. Szoke, Managing Attorney).

Before Cissel, **Hohein** and Bucher, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On March 21, 1996, applicant applied to register the
mark "WONDER FOAM" on the Principal Register for "bed
pillows," in Class 20. The basis for the application was
applicant's assertion that it possessed the bona fide
intention to use the mark on such goods in interstate
commerce.

Registration was refused under Section 2(d) of the Act on the ground that applicant's mark, if it were used in connection with the goods specified in the application, would so resemble the mark "WONDER FOAM," which is registered¹ on the Principal Register for "cushioning material made of foam plastic for pillows, upholstered furniture and bedding," that confusion would be likely.

The word "foam" is disclaimed in the cited registration, and, as required by the Examining Attorney, applicant has disclaimed it as well.

Applicant responded to the refusal to register with argument that confusion would not be likely. Submitted in support of the argument that the cited mark is a weak mark were copies of eighty third-party registrations on the Principal Register wherein the marks consist of either the term "wonder" or "foam," or a combination of the two words. Four of the marks include the words together. The goods in those registrations are "plastic floor coverings"; "spray insulation"; "carpet and upholstery shampoo; a kit comprising of cleaning preparations and implements, namely sponges, rollers, and sponge rollers for cleaning carpets

¹ Reg. No. 1,974,110, issued on May 14, 1996 to Nepsco, Inc. based on a claim of first use in commerce in August of 1994.

and upholstery"; and "foam strips for making foam toys and foam toys."

The Examining Attorney was not persuaded. He noted that the four registrations argued by applicant to demonstrate the weakness of the "WONDER FOAM" mark list goods which are unrelated to the goods specified in the instant application, and he made the refusal to register final in the second Office Action.

Applicant timely filed a Notice of Appeal and a brief. Attached to the brief as Exhibit A was a copy of a catalog wherein the products of the owner of the cited mark are promoted and offered for sale. The Examining Attorney filed a brief in response, presenting argument in support of the refusal to register and objecting to the untimely submission of Exhibit A with applicant's brief.² Applicant did not file a reply brief, nor did it request an oral hearing before the Board.

The sole issue before us in this appeal is whether confusion would be likely if the same mark, "WONDER FOAM," were used on both registrant's "cushioning material made of

² The Examining Attorney's objection is sustained. The Board has not considered the late-filed evidence. The record closed with the filing of applicant's Notice of Appeal. Trademark Rule 2.142(d). Moreover, even if the exhibit were to be considered, it would not change the ruling in this case.

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plastic for pillows, upholstered furniture and bedding" and applicant's "bed pillows." In view of the identity of the

marks and the close relationship of the goods as they are identified in the application and the registration, respectively, confusion would be likely, so the refusal to register under Section 2(d) is appropriate.

It is well settled that where the marks in question are identical, it is not necessary for the goods with which they are used to be the same or almost so in order for confusion to be found likely. It is sufficient, instead, if the goods are related in some viable way such that the use of the same mark in connection therewith would be likely to lead to the mistaken assumption that a single source is responsible for both. In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983). It is also true that in resolving the issue of likelihood of confusion, the Board must consider the goods as identified in the application and the cited registration, respectively, without restrictions or limitations not reflected therein. In re Elbaum, 211 USPQ 639 (TTAB 1981); Toys "R" Us, Inc. v. Lamps R Us, 219 USPQ 340 (TTAB 1983).

When the issue before us in this appeal is considered in conjunction with these two principles, we conclude that notwithstanding applicant's argument (and untimely submitted Exhibit A) to the contrary, the goods, as they are identified in the application and registration, are

indeed closely related. The registration lists "cushioning material made of foam plastic for pillows," and the applicant's goods are identified as simply "bed pillows." None of the distinctions with respect to trade channels, functions, or the identity and sophistication of purchasers argued by applicant are reflected in the ways these goods are identified in the application and the registration, so we must assume that the registrant's foam cushioning material for pillows could be the same kind of foam cushioning material that will be used in applicant's pillows. Under these circumstances, the use of the same mark would lead a purchaser to assume that "WONDER FOAM" pillows are made with "WONDER FOAM" cushioning material which comes from the same source, when in fact, this may not be so. As another example of how confusion would be likely to occur, an individual who needs to repair or replace pillows for his or her bed would be able either to purchase registrant's "WONDER FOAM" pillow foam cushioning material and use it to make new pillows with or to replace the deteriorated material in the worn-out pillows. The same person could, in the alternative, purchase new "WONDER FOAM" pillows from applicant as replacements. Clearly, confusion would be likely in such circumstances. In all of the above scenarios, the prospective purchaser would be

likely to assume, mistakenly, as it would turn out, that a single source was responsible for both "WONDER FOAM" pillow material and "WONDER FOAM" pillows.

Applicant's argument that confusion is not likely because the "WONDER FOAM" mark is weak fails for at least two reasons. To begin with, the two-word term is only shown to be used in four third-party registrations, and, as pointed out by the Examining Attorney, the goods in those registrations are not closely related to either the goods in the cited registration or the goods in the instant application. Moreover, even if the record did establish weakness in the registered mark, "even 'weak' or highly suggestive marks are entitled to protection against the identical mark for goods used for closely related purposes." In re Textron Inc., 180 USPQ 341 (TTAB 1973).

Decision: Because the marks are identical and the goods identified in the application are closely related to the goods set forth in the registration, confusion would be likely if applicant were to use the mark it has applied to

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register. Accordingly, the refusal to register is affirmed.

R. F. Cissel

G. D. Hohein

D. E. Bucher
Administrative Trademark Judges
Trademark Trial and Appeal Board

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