

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT  
OF THE TTAB 9/23/99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Kewaunee Scientific Corp.

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Serial No. 75/140,359

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Sana Hakim of Bell, Boyd & Lloyd for Kewaunee Scientific  
Corp.

Howard Smiga, Trademark Examining Attorney, Law Office 102  
(Thomas V. Shaw, Managing Attorney).

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Before Simms, Cissel and Wendel, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 26, 1996, applicant applied to register the  
mark "FLEXTECH" on the Principal Register for "furniture,  
namely, workstations designed to accommodate the technical  
requirements and physical characteristics of work areas  
that include desks, computer tables, riser units and  
pedestals," in Class 20. The application was based on

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applicant's claim of use of the mark on these goods in interstate commerce since January 8, 1987.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used with the goods set forth in the application, so resembles the mark shown below

which is registered<sup>1</sup> for "office furniture; namely, desks, tables, pedestals, shelves, partitions, printer tables, file cabinets, bookcases, conference tables, typewriter returns, corner tops, and keyboard supports," in Class 20, that confusion is likely.

The Examining Attorney also found the identification-of-goods clause in the application unacceptable, and suggested language that would be sufficiently specific.

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<sup>1</sup> Registration No. 1,672,613, issued on the Principal Register under Section 44 the Act to Decabois Inc. on Jan. 21, 1992.

Applicant amended the application to identify the goods as follows: "computer furniture, namely computer tables in International Class 9; and Furniture, namely desks, riser units and pedestals for workstations designed to accommodate the technical requirements and physical characteristics of work areas[,] in International Class 20." The fee for the additional class was included. Applicant also amended to claim first use of the mark on the goods in both classes in interstate commerce on January 8, 1987. This amendment was supported by specimens of use and an accompanying declaration of Eli Manchester, the President and Chief Executive Officer of applicant. Also submitted with applicant's response to the first Office Action was the declaration of Cynthia Freeze, the marketing services manager of applicant. She stated that to the best of her knowledge, there has been no actual confusion between applicant's mark and the registered mark cited as a bar to registration under Section 2(d).

The Examining Attorney accepted the amendment to the identification-of-goods clause, but made final the refusal under Section 2(d) of the Act. Applicant appealed.

Briefs were filed by both applicant and the Examining Attorney. Applicant attached to its reply brief an additional declaration, but this evidence was untimely

under Trademark Rule 2.142(d), so we have not considered it.

No oral hearing was requested. Accordingly, we have resolved this appeal based on the written record and arguments before us.

The only issue is whether confusion is likely to result from applicant's use of its mark in connection with the goods identified in the application in view of the registered mark, as it is used in connection with the goods identified in the registration. After careful consideration, we conclude that it is.

Our determination that the refusal to register under Section 2(d) the Act is appropriate is based on analysis of all of the probative facts in evidence that are relevant to the factors the Court identified as bearing on the issue of likelihood of confusion in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As is the case in any likelihood of confusion analysis, two key considerations in the case at hand are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, it appears that both applicant and registrant market under their respective

marks furniture such as tables and desks suitable for use with computer equipment. As the Examining Attorney has noted, applicant has not made any arguments with respect to the Examining Attorney's determination that the goods are nearly identical.

Applicant's only arguments on the issue of likelihood of confusion are that the marks are dissimilar in appearance, meaning and commercial impression, and that applicant's mark and the cited registered mark have coexisted in the marketplace for nine years without any evidence that actual confusion has occurred.

Applicant's arguments are not persuasive. The test for determining likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The test is whether they create similar overall commercial impressions. *Visual Information Institute, Inc. v. Vicon industries Inc.*, 209 USPQ 179 (TTAB 1980). We must focus on the recollection of the average purchaser of the goods, who normally retains a general, rather than specific, impression of the trademarks used on the products for which he or she is shopping. *Chemtron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

As the Examining Attorney points out, if the goods of the respective parties are closely related, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would apply with diverse goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ 2d 1698 (Fed. Cir. 1982), cert. denied, 506 U.S. 1034 (1994); *ECI Division of E Systems, Inc. v. Environmental Communications Inc.*, 207 the USPQ 443 (TTAB 1980). The goods in the case now before us, as identified in the application and the cited registration, appear to be closely related, if not the same, so the marks need not be as similar in order for confusion to be likely.

Turning then to the marks, we note that applicant's mark is essentially a transposition of the registered mark. Notwithstanding the minor design elements in the registered mark, that mark is essentially "TECHNO FLEX," while the applicant's mark the is "FLEXTECH." We agree with the Examining Attorney that this transposition does not create a different overall commercial impression sufficient to avoid confusion. The commercial impressions these two marks create are substantially similar because their connotations or the same. As applied to the furniture products identified in the application and registration,

both marks are suggestive, and each mark makes the same suggestion. The "FLEX" portion of each mark suggests that the furniture is "flexible," such that it may be adjusted or assembled from a variety of components in ways that will accommodate different spaces to different uses and/or users. The "TECH" component in applicant's mark is an abbreviated form of the word "technology," which is suggestive of the computer equipment with which applicant's furniture is designed to be used. In the same sense, the "TECHNO" component in the registered mark makes the same suggestion. Notwithstanding the fact that the order of the two components is reversed in these two marks, their similar connotations result in very similar commercial impressions.

We have no evidence that these products are particularly expensive or are bought by particularly sophisticated purchasers. In view of the fallibility of the memory of the ordinary consumers who are potential purchasers of this type of furniture, confusion is plainly likely when these similar marks are used on a the same or closely related goods.

We are not persuaded to the contrary by applicant's argument that it has no evidence that actual confusion has occurred. Whether confusion has actually taken place is a

factor to be considered, but the issue is still whether confusion is likely. It is not necessary to show actual confusion in order to establish that confusion is likely. *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990). Moreover, in the absence of admissible information concerning the nature and extent of the marketing activities of the applicant and the registrant under their respective marks during the asserted contemporaneous use, we do not have any basis upon which to conclude that there was any substantial opportunity for confusion to have taken place, nor do we have any indication as to what the experience of the registrant has been in this regard. The fact that applicant is unaware of the occurrence of any actual confusion therefore has no meaningful bearing on the resolution of the question of whether confusion is likely in this case.

We have no doubt that confusion is likely in this case, but even if we did, such doubt would necessarily be resolved in favor of the registrant, and against the applicant, who had an affirmative duty to select a mark that is dissimilar to the registered mark. *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 191 (TTAB 1979).

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In summary, we hold that confusion is likely because the mark applicant seeks to register is little more than a transposition of the two suggestive elements which make up the registered mark, and both marks create essentially the same commercial impression in connection with these identical or very similar products by virtue of the identical connotations of the same two suggestive components. Accordingly, the refusal to register under Section 2(d) of the Act is affirmed.

R. L. Simms

R. F. Cissel

H. R. Wendel  
Administrative Trademark Judges,  
Trademark Trial & Appeal Board

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