

first use of the mark in interstate commerce on December 1, 1993.

The Examining Attorney refused registration under Section 2(d) of the Act on the ground that applicant's mark, as used in connection with the goods set forth in the application, so resembles the mark "POWER-LITE," which is registered¹ for "electric lamps," in Class 11, that confusion is likely. She also noted that the proper class for applicant's goods is Class 11.

Applicant responded by amending the application to the proper class, and also presented arguments on the issue of likelihood of confusion. Applicant contended that the term "electric lamps" in the cited registration refers to "the bulbs to which power is supplied to produce illumination," rather than to the fixtures which are specified in the application, and that in view of these differences in the goods, confusion is not likely.

Attached to the response were copies of printed advertising applicant uses to promote its lighting fixtures. Applicant also submitted a catalog from the registrant listing the products registrant sells under the cited registered mark. Applicant

¹ Registration No. 1,198,604 issued on the Principal Register to Duro-Test Corp. on June 22, 1982. A combined affidavit under Sections 8 and 15 of the Act was received and accepted.

argued that these exhibits establish that the goods of applicant differ substantially from the goods of the registrant, and that they move through different channels of trade to sophisticated purchasers. Lastly, applicant argued that it and its predecessors had been using the mark in the name of its companies here and in Canada since 1930, more than 26 years before registrant's claimed date of first use, and that this fact should be considered by the Board in determining whether confusion is likely.

The Examining Attorney accepted the amendment to the classification of applicant's goods, but made final the refusal to register under Section 2(d) of the Act.

Applicant timely filed a Notice of Appeal. Applicant filed an appeal brief and the Examining Attorney filed a brief in response to it. The Examining Attorney's brief objected to the fact that applicant had made arguments based on two third-party registrations and one prior registration owned by the same entity that owns the registration cited against this application, but applicant had not included copies of such registrations. Applicant, responsive to the Examining Attorney's objection, submitted copies of these registrations.

At applicant's request, an oral hearing on this matter was conducted before the Board on December 16, 1998.

Our determination of whether the refusal to register under Section 2(d) of the Act is appropriate is based on an analysis of all of the probative facts in evidence that are relevant to the factors the Court identified as bearing on the likelihood of confusion issue in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations 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).

In the case at hand, the marks are essentially the same. The fact that the registered mark has a hyphen between the terms "POWER" and "LITE" has almost no effect on the commercial impression that the mark engenders, which is substantially the same as that generated by the registered mark. It is well settled that where the marks in question are identical or nearly so, in order to support a refusal based on likelihood of confusion, the goods identified by the marks do not need to be as closely related as they would be if the marks were not the same. It is only necessary that there be a viable relationship between the parties' goods. *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

In the instant case, other legal principles also come into play. The most significant of these is that in determining

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whether confusion is likely, the Board must compare the goods as they are identified in the application and the cited registration, respectively, without limitations or restrictions that are not reflected therein. *Toys "R" Us, Inc., v. Lamps R Us*, 219 USPQ 340 (TTAB 1983). Further, any doubt as to whether confusion is likely must be resolved in favor of the prior user or registrant, and against an applicant, who has a duty to choose a mark which is not similar to a mark already in use by a competitor. *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 191 (TTAB 1979).

In the case at hand, the goods specified in the application are closely related to those set forth in the cited registration. The application specifies "electrical equipment, namely...lighting fixtures...", and the registration identifies the goods as "electric lamps." Clearly, these goods are complementary. As applicant correctly points out, lamps are not the same thing as fixtures, but as applicant also notes, (at page 6 of its brief), the advertising materials it submitted show that the owner of the cited registration in fact sells both lamps and lighting fixtures, although both products are apparently not sold under the registered mark. Clearly, purchasers of lamps and lighting fixtures have a reasonable basis to assume that the use of similar trademarks on them indicates that one entity is the source of both of these types

of products, when they have been shown to be promoted together in the same sales literature by the same producer for use together.

Applicant argues strenuously that the products it sells under the mark it seeks to register are different from the goods sold under the registered mark. To this end, as noted above, applicant made of record promotional material which describes in detail specific products sold by the registrant under the registered mark and specific goods applicant sells under its mark. Applicant's argument is, in essence, that the actual products marketed under the cited registered mark and the mark applicant seeks to register are quite different, that they move in different channels of trade to different sophisticated purchasers, and that they are used for different purposes.

The issue before the Board in this appeal is not whether the goods on which the marks are presently being used are different, however. The issue is whether the use of virtually the same mark on both the goods identified in the application and the goods identified in the registration is likely to give purchasers the mistaken idea that they come from the same source or are otherwise sponsored by or associated with the same entity.

Applicant's argument also runs afoul of the aforementioned rule requiring the Board to consider the goods as they are

identified in the respective application and registration, without limitations or restrictions which are not reflected therein. When we take this approach, we see what applicant concedes anyway, i.e., that lamps and electric lighting fixtures may emanate from a single entity, such as the owner of the cited registration in the case at hand. These goods are complementary, and although this record does not establish that purchasers of these products possessed any particular degree of sophistication, even if this were the case, the use of these nearly identical trademarks on such closely related goods is likely to cause confusion even among relatively sophisticated purchasers.

Applicant's argument that its prior use of its mark negates the likelihood of confusion with registrant's mark is not well taken either. As the Examining Attorney points out, any claim of priority would have to be made in the context of a petition to cancel the cited registration. In the absence of such a petition to cancel, applicant's claim of priority constitutes an impermissible attack on the validity of the cited registration. Such claims have no place in this ex parte determination of registrability of applicant's mark. In re Pollio Dairy Products Corp., 8 USPQ2d 2012 (TTAB 1988).

We note for the record that we have not considered the two third-party registrations, or the copy of the additional prior

registration, which applicant submitted after the Examining Attorney had submitted her brief on appeal. The Examining Attorney properly objected to these registrations, and did not argue the merits of the case as if they were of record. Because they were untimely submitted under Trademark Ruled 2.142(d), the Board has not considered them. Moreover, even if they had been properly made of record, third-party registrations have little probative effect on the issue of likelihood of confusion. In re Hub Distributing , Inc., 218 USPQ 284 (TTAB 1983).

In summary, we hold that in the case at hand confusion is likely because these nearly identical trademarks are used with products which, as identified without limitation or restriction in the respective application and registration, must be considered to be closely related, complementary goods. Additionally, as noted above, even if we had any doubts, such doubts would necessarily be resolved against applicant.

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Accordingly, the refusal to register applicant's mark under Section 2(d) of the Act is affirmed.

R. F. Cissel

H. R. Wendel

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

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