

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Allan Block Corporation

Serial No. 75/273,823

Orrin M. Haugen of Haugen Law Firm PLLP for Allan Block Corporation.

Thomas W. Wellington, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Seeherman, Hairston and Bucher, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Allan Block Corporation to register the mark NOVA BRIK for "mortarless concrete brick siding."¹

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the

¹ Application Serial No. 75/273,823 filed April 14, 1997, alleging a date of first use of March 1, 1997 and a date of first use in commerce of April 1, 1997. Applicant has disclaimed the word "BRICK" apart from the mark as shown.

ground that applicant's mark, when applied to the identified goods, so resembles the mark NOVA IV, which is registered for "vinyl siding,"² as to be likely to cause confusion. In addition, the Examining Attorney has made final a requirement that applicant submit acceptable substitute specimens.

Applicant has appealed. Briefs have been filed, but no oral hearing was requested.

We turn first to the requirement that applicant submit substitute specimens. It is the Examining Attorney's position that the specimens submitted by applicant do not appear to be displays associated with the goods. Applicant, during the prosecution of this case, maintained that the specimens show the mark as applied to areas in which the goods are displayed, namely sales outlets and trade shows. However, applicant, in its brief on the case, states that it will submit substitute specimens "upon an indication that the Examining Attorney's conclusion with respect to likelihood of confusion is reversed, and the case is therefore remanded, but otherwise in a condition for to (sic) passage to publication."

² Registration No. 1,523,504 issued February 7, 1989; Sections 8 & 15 affidavit filed.

In view of applicant's statement, it would appear that applicant has conceded that the requirement for substitute specimens is appropriate. In any event, we agree with the Examining Attorney that there is insufficient evidence upon which to conclude that the specimens are displays associated with the goods. The specimens are mere photocopies of what may be a label or a sign. It is not possible to determine, based on applicant's submission, how the label or sign is used, e.g., whether it is placed with the goods in such a manner that it could be considered a display associated with the goods. Under the circumstances, the requirement for substitute specimens is affirmed.

We turn then to the issue of likelihood of confusion.

Turning first to consideration of the respective goods, the Examining Attorney maintains that the goods are related because they both are types of siding which may be used in the same applications such as on residential and commercial buildings.

We note that applicant, in its brief, made little mention of the goods. We find that the goods are closely related because, as pointed out by the Examining Attorney, they both are types of siding. In addition, although the respective goods are made of different materials and thus

differ in appearance, they nonetheless may be used on the same structures, i.e., residential and commercial buildings.

With respect to the marks, the Examining Attorney maintains that the identical term NOVA is the dominant element in each mark, and thus the marks are highly similar in appearance, sound, and commercial impression.

Applicant, on the other hand, argues that the marks are distinctly different because its mark ends in the term BRIK and the cited mark in the Roman numeral IV. In addition, applicant contends that marks consisting of or containing the word NOVA are weak marks which are therefore entitled to only a limited scope of protection. In support of its position, applicant submitted an entry from Webster's Ninth New Collegiate Dictionary (1990) wherein "nova" is defined, inter alia, as "new."³

³ Applicant, for the first time with its brief, submitted the results of a search of a private company's data base of registrations for marks consisting of or containing the term NOVA for building products. Under Trademark Rule 2.142(d), evidence submitted for the first time with a brief on appeal is generally considered untimely and therefore usually given no consideration. Also, the submission of printouts from a private company's data base is not the proper way to make third-party registrations of record. See *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). In view thereof, we have not considered this evidence in reaching a decision herein. We hasten to add that, even if we had considered the evidence, our decision herein would be the same.

In this case, we agree with the Examining Attorney that applicant's mark NOVA BRIK so substantially resembles registrant's mark NOVA IV that, when the marks are used on closely related goods, confusion as to source or affiliation is likely to occur. Overall, the respective marks are dominated by the term NOVA. As pointed out by the Examining Attorney, the term BRIK in applicant's mark is of lesser weight because, as evidenced by the disclaimer, it is descriptive of applicant's goods. In re National Data Corp., 224 USPQ 749 (Fed. Cir. 1985). In determining likelihood of confusion, it is the similarity of the general overall commercial impression engendered by the marks which must be considered. This test requires us to consider that the average purchaser normally retains a general rather than a specific impression of trademarks.

In reaching our decision, we have not overlooked the suggestive significance of the term NOVA. However, even weak marks are entitled to protection against the registration by a subsequent user of a highly similar mark for closely related goods. We should add that none of the building products covered by the third-party registrations is as similar to the goods in the cited registration as are applicant's goods.

Accordingly, we conclude that purchasers and prospective customers, familiar with the mark NOVA IV for vinyl siding, would be likely to believe, upon encountering the substantially similar mark NOVA BRIK for applicant's mortarless concrete brick siding, that such closely related goods emanate from or are associated with the same source.

Decision: Both the requirement for substitute specimens and the refusal to register under Section 2(d) are affirmed.

E. J. Seeherman

P. T. Hairston

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

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