

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 29, 00
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nan Ya Plastics Corporation of Taiwan

Serial No. 75/281,749

Joseph L. Strabala for Nan Ya Plastics Corporation of
Taiwan.

Sandy R. Switzer, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Cissel, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Nan Ya Plastics Corporation of Taiwan, a corporation of
the Republic of China, has filed an application for
registration of the mark "MASTERPIECE" on the Principal
Register for "doors constructed of synthetic materials."¹

The Trademark Examining Attorney issued a final refusal
to register based upon Section 2(d) of the Trademark Act, 15

¹ Serial Number 75/281,749, filed on April 28, 1997, based upon
the assertion of a *bona fide* intention to use the mark in
commerce. Then during March 1998, applicant filed an amendment to
allege use, asserting a date of first use anywhere of April 1997

U.S.C. §1052(d), on the ground that applicant's mark, "MASTERPIECE," when used on its goods, so resembles the mark, "MASTERPIECE," which is registered for "vinyl siding," as to be likely to cause confusion, or to cause mistake, or to deceive.²

Applicant has appealed the final refusal to register. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

In the course of rendering this decision, we have followed the guidance of *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). This case sets forth the factors, which if relevant, should be considered in determining likelihood of confusion.

First, the marks in this proceeding are identical.³

Second, the Trademark Examining Attorney argues that applicant's doors composed of synthetic materials and registrant's vinyl siding are highly related building products for home construction and improvement. The file

and a date of first use in interstate commerce of May 1997. The Examining Attorney accepted that amendment.

² Registration No. 1,665,051 issued on November 19, 1991, §8 affidavit accepted and §15 affidavit acknowledged. The registration sets forth a date of first use of March 1, 1990.

³ The marks are both the single word "MASTERPIECE." Accordingly, we find little value in focusing on third-party federal registrations where the marks contain the "-MASTER-" formative combined with a variety of different prefixes and suffixes, for other non-metallic building materials in International Class 19.

contains a sampling of registrations submitted by the Trademark Examining Attorney demonstrating that several manufacturers of the goods specified in the application also have their marks registered for goods of the type identified in the cited registration. These third-party registrations have some probative value to the extent that they may serve to suggest that the goods of the applicant and of the registrant are of a type which may emanate from a single source. See In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), and cases cited therein.

While we recognize that there are differences between these goods, it cannot be seriously contended that they are unrelated. Both vinyl siding and doors made of synthetic materials are used on the exteriors of houses. When doing a major home improvement project like putting on new siding, it is entirely logical that, at the same time, one might have one or more new exterior doors installed. The respective identifications of goods both indicate that the doors and the siding are made of synthetic materials.⁴ One might be inclined to purchase these precise goods (e.g., fiberglass doors and vinyl siding) for identical reasons

⁴ While the identification of goods in the application uses the broad language of "synthetic materials," the specimens of record reflect that at least one of these synthetic materials is "fiberglass." For variety and for ease of reference, we have chosen to use these terms interchangeably throughout this opinion.

(e.g., increased energy efficiency, maximum stability under severe stress, great resistance to wind and water, proven durability under harsh conditions, standardized color options, and some might argue, the best value for the expenditure compared to competing options for siding and for doors). Although applicant makes much of the fact that "doors" and "siding" are listed under separate headings in various classified directories, we find this irrelevant to our likelihood of confusion analysis. While we have acknowledged that these goods are somewhat different, we hasten to add that goods need not be competitive in order to be found to be commercially related. See In re Peebles Inc., 23 USPQ2d 1795 (TTAB 1992) [coats related to retail outlet services for camping and mountain climbing equipment]. Rather, as demonstrated by the Trademark Examining Attorney, we conclude that applicant's fiberglass doors are commercially related to registrant's exterior, vinyl siding inasmuch as they share many characteristics and are indeed complementary items. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) [bread and cheese are complementary items].

Moreover, we conclude that these goods may well move in the same channels of trade. In its response of March 30,

1998, applicant volunteered the following based upon marketing patterns in the "real world":

... [I]n the industry[,] siding is quite distinct from other building products and most outlets like Home Depot® do not carry siding, but do carry doors ... (Applicant's response, p. 5).

The Trademark Examining Attorney belied this assertion by submitting for the record a copy of a flyer put out by Home Depot® touting the availability at the Home Depot® of both siding and doors. In turn, applicant then argued that the siding advertised by Home Depot® actually carried the trademark of Georgia-Pacific® -- not the "MASTERPIECE" mark of registrant. However, this fact is not relevant to a dispute about what consumers will assume about the source of two clearly related products based upon their perceptions of the respective channels of trade in the "real world." In any event, in the absence of any specific limitation in the identification of goods in the registration certificate or in the instant application, we must assume that the goods of applicant and of registrant travel in all the usual channels of trade for such goods. See In re Elbaum, 211 USPQ 639 (TTAB 1981).

In addition to the third-party registrations and the Home Depot® advertisement discussed, *supra*, the Trademark Examining Attorney submitted for the record a variety of on-

line ads for home improvement contractors. Based on the presence in the same advertisements of offers to install home siding and replacement doors, the Trademark Examining Attorney concluded that purchasers are accustomed to viewing the same marks on the goods of the applicant and on those of the registrant.

As to applicant's arguments about the sophistication of purchasers from among members of the general public, we are not convinced that these doors are such an "expensive product" (applicant's brief, p. 6) that average purchasers should be deemed to be sophisticated. While there is no evidence in the record as to the average price of applicant's doors, doors constructed from synthetic materials should not be more expensive than the wooden doors (e.g., made of solid oak and mahogany) advertised in the Home Depot® ad, priced from \$600 to \$1000. While a synthetic door costing several hundred dollars hardly qualifies as an impulse item, neither is it so expensive or complicated that purchasers of such goods would be expected to be more knowledgeable or sophisticated than the ordinary, prudent purchaser would be. Finally, with closely related goods bearing identical marks, as we have here, even the most sophisticated of contractors in the building trades is susceptible to confusion. *In re Americor Health Services*, 1

USPQ2d 1670, 1671 (TTAB 1986) [even sophisticated purchasers of infertility treatments may not be particularly sophisticated concerning trademarks or service marks and would likely be confused when related services are offered under the identical marks].

Applicant also makes the argument that there have been no instances of actual confusion. However, our conclusion that confusion is likely is not altered by the absence of any reported incidents of actual confusion during a period of a year or so of potentially contemporaneous use by the parties of their respective marks. This is because the absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales of its goods and any advertising thereof have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or both of the trademark owners. In this case, not only is the relevant time period an extremely short interval (i.e., from May 1997, the date of applicant's first use in the United States, until the time that this argument was first propounded, in January 1999), but there is no indication as to the extent of applicant's sales and advertising of its

goods in the United States under its "MASTERPIECE" mark (or for that matter, of sales or promotion of registrant's goods under its "MASTERPIECE" mark), so we have no basis upon which to gauge whether any opportunity for actual confusion has existed. The lack of any instances of actual confusion, therefore, is not indicative of an absence of a likelihood of confusion. Moreover, we are mindful that the test is likelihood of confusion, not actual confusion. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992).

Finally, applicant urges us to allow this trademark application to publish for opposition as was done in the Trademarks Division of the Canadian Intellectual Property Office. This Board has repeatedly held that we are not bound by the actions of an Examining Attorney who handles an application in the Trademark Examining Operation of the United States Patent & Trademark Office. We are even less bound to follow the actions of an examiner in another jurisdiction - a sovereignty having its own trademark statute, distinct examination practices, as well as a trademark registry reflecting a vastly different set of "real world" factors.

Accordingly, we find confusion to be likely between the mark, "MASTERPIECE," for doors constructed of synthetic

materials as recited in the instant application and the registered mark, "MASTERPIECE," for vinyl siding.

Decision: The refusal to register is affirmed.

R. F. Cissel

B. A. Chapman

D. E. Bucher

Administrative Trademark
Judges, Trademark Trial
and Appeal Board