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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re O'Sullivan Industries, Inc.

Serial No. 75/566,625

Andrew B. Mayfield of Armstrong Teasdale LLP for O'Sullivan Industries, Inc.

Mark Sparacino, Trademark Examining Attorney, Law Office 103 (Michael Szoke, Managing Attorney).

Before Simms, Seeherman and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

O'Sullivan Industries, Inc. has filed an application to register the mark XPRESSIONS in International Class 20 for goods identified as "furniture."¹ The Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d),

¹ Application No. 75/566,625, filed October 7, 1998, based on applicant's allegation of first use and first use in commerce as of July 10, 1998.

because of the prior registration of EXPRESSIONS, in class 37 for "manufacture of upholstered furniture to the order and/or specifications of others" and in class 42 for "retail furniture store services."²

When the Examining Attorney made the refusal of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral argument was not requested. We affirm the refusal.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the virtually identical nature of the marks, the related nature of the goods and services, and the presumptively similar classes of consumers for these goods and services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

² Registration No. 1,499,910, issued August 9, 1988, based on claimed dates of first use for both classes of October 9, 1986. Section 8 & 15 affidavits accepted and acknowledged, respectively.

The marks are pronounced the same and have the same connotation or meaning. Indeed, applicant concedes that they are phonetically identical and makes no argument that the marks have different meanings. Applicant does attempt to distinguish the marks based on asserted differences in visual appearance. The involved marks, however, are both in typed form. Thus, there are no design elements or forms of lettering which serve to distinguish the marks³; although the cited mark begins with the letter "E" and this letter is omitted from applicant's mark, we consider them as having very similar appearances.

Turning to consideration of the involved goods and services, applicant argues that its furniture is not custom-manufactured or upholstered. Instead, applicant explains, its goods are "ready-to-assemble desks and other office-type furniture." It is well settled, however, that our consideration of the question of likelihood of

³ Though applicant's specimens show use of its mark with a large, stylized X, the drawing in the application is in typed form. When an applicant seeks registration of its mark in typed form, a "necessary premise in [the] evaluation of the registrability ... is that the mark ... may be displayed in any form or style of lettering, or in any color..." *Sunnen Products Co. v. Sunex International Inc.* 1 USPQ2d 1744, 1747 (TTAB 1987), citing *Kimberly-Clark Corp. v. H. Douglas Enterprises*, 774 F.2d 1144, 227 USPQ 541, 543 (Fed. Cir. 1985). Thus, not only must we disregard the stylized form in which applicant uses its mark, we also must presume that applicant might set forth its mark in the same form of lettering as any used by the registrant.

confusion must be based on the identifications in the involved application and registration. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990), and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). Accordingly, we consider applicant's goods to include all types of furniture, and we must consider registrant's retail furniture store services to involve sale of all types of furniture. As a result, there is little probative value to the evidence applicant has introduced regarding the more limited types of furniture advertised on registrant's web site. Moreover, we note both that applicant's specimens of use show use of its mark on packaging for an entertainment center and that the reprints from registrant's web site reveal that registrant sells entertainment centers in its stores.

There is, of course, no question that the use of similar marks for goods on the one hand and related services involving those goods on the other may, in appropriate cases, be likely to result in confusion in trade. See, e.g., *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 438, 435 (TTAB 1983) (STEELCARE for refinishing of furniture and office equipment held likely to be confused

with STEELCASE for office furniture and accessories). See also, *Safety-Kleen Corp. v. Dresser Industries, Inc.*, 518 F.2d 1399, 186 USPQ 476, 480 (CCPA 1975).

Applicant argues that its furniture is not sold through custom furniture manufacturers or retailers but is sold "primarily through mass market consumer and office products stores." There are, however, no restrictions as to channels of trade or classes of consumers in applicant's identification of goods or in either of the recitations of registrant's services. Thus, in this case, by virtue of the involved identifications, we must consider that both applicant and registrant would target all types of consumers of furniture. Moreover, even if we accept applicant's contention that the channels of trade are different, consumers exposed to the involved marks in separate settings are still likely to assume a relationship between the goods available in registrant's retail establishments and the goods of applicant. In particular, consumers familiar with custom-upholstered furniture offered under a particular mark are likely to assume, when later exposed to a nearly identical mark for ready-to-assemble furniture, that they emanate from a single source.

In this portion of our analysis, we are mindful that the test for likelihood of confusion does not involve a

side-by-side comparison of the marks, a comparison which a consumer may not be able to make, but rather, must be based on the similarity of the general overall impressions engendered by the marks. See *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255, 259 (TTAB 1980). Moreover, consumers normally retain a general, rather than a specific, impression of trademarks and the fallibility of purchaser memory must be considered in our analysis. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpub'd*, Fed. Cir. June 5, 1992, and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

In view of the presumptive similarity of the marks in appearance and their identical sound and connotation, and in view of the relatedness of the goods and services and lack of restrictions as to channels of trade or classes of consumers, we find there to exist a likelihood of confusion or mistake by consumers.

Decision: The refusal of registration under Section 2(d) is affirmed.