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Paper No. 9
HRW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re P-G Industries, Inc.

Serial No. 75/638,838

David V. Radack of Eckert Seamans Cherin & Mellott, LLC
for P-G Industries, Inc.

Brian A. Rupp, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Cissel, Chapman and Wendel, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

P-G Industries, Inc. has filed an application to
register the mark IRONROX for "castable refractory mixes."¹

Registration has been finally refused under Section
2(d) on the ground of likelihood of confusion with the mark
IRONROCK, which is registered for "bricks, tiles and paving
stones."² The refusal has been appealed and both applicant

¹ Serial No. 75/638,838, filed February 10, 1999, claiming a
first use date and first use in commerce date of November 23,
1998.

² Registration No. 1,108,683, issued December 12, 1978, Section 8
affidavit accepted and Section 15 affidavit acknowledged;
renewed.

and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of the *du Pont*³ factors which are relevant in view of the evidence of record. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods or services with which the marks are being used. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Looking first to the respective marks, the Examining Attorney maintains that the marks are essentially identical. Applicant, however, argues that there is a difference in the marks, in that applicant's mark IRONROX has a plural sound whereas registrant's mark IRONROCK has a singular sound.

The marks IRONROX and IRONROCK are highly similar in appearance and sound and project essentially the same connotation. The minimal distinction in singular versus plural does not change the overall commercial impression. Furthermore, it is well recognized that purchasers are not

³ *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

infallible in the their recollection of trademarks and often retain a general, rather than specific, impression of marks over a period of time. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); *Interco Inc. v. Acme Boot Co., Inc.*, 181 USPQ 664 (TTAB 1974). Clearly, any difference between the singular and plural could be forgotten, if not totally overlooked, by potential purchasers.

The main focus in this case, however, is upon the respective goods and the channels of trade for the same. The Examining Attorney argues that the goods are closely related; that applicant's castable refractory mixes may be used to make registrant's goods; and that "many manufacturers produce these goods which could be utilized in the same industry and encountered by the same purchasers." The Examining Attorney relies upon seven third-party registrations as evidence that the same marks have been registered by the same entities for both bricks, tiles and stones and the "mixes for creating such items." He also refers to excerpts of articles retrieved from the Nexis database which describe the use of refractory mixes to make bricks and which use the term "refractories" to refer to both formed objects such as bricks and unshaped products such as castables and other mixes.

Applicant contends that there are obvious differences in the goods. Applicant states that its goods are sold as a castable mix to be used for making steel fiber reinforced refractory concrete which is used to line furnaces where molten metal is present. Applicant argues that registrant's goods, on the other hand, are pre-formed brick, tiles and paving stones which would most likely be used in the construction of residential housing. Applicant further contends that because of these differences in the goods, they are sold in different channels of trade, with applicant's goods being sold to foundries for use, for example, in blast furnaces and registrant's goods being sold mostly to contractors for use in building homes. Applicant argues that the third-party registrations cited by the Examining Attorney in fact support applicant's contention that the goods are unrelated, since none of the registrations covers refractory mixes and bricks, tiles and paving stones. Applicant agrees that bricks can be used as refractories, but argues that it is clear from the goods listed in the registration that registrant is not selling refractory bricks.

As a general principle, it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a holding of likelihood of

confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate, or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) and the cases cited therein.

Here, however, we find applicant's arguments fully persuasive that the goods are not so related. Applicant's goods are "castable refractory mixes," which by definition are used for high-temperature applications such as in blast furnaces in foundries.⁴ Registrant's materials, on the other hand, are bricks, tiles and paving stones, which are used in the construction or home improvement areas. Looking to the third-party registrations relied upon by the

⁴ We take judicial notice of the following dictionary definition: refractory 2: a refractory material: as **a**: any of various nonmetallic ceramic substances that are characterized esp. by their suitability for use as structural materials at high temperatures usu. in contact with metals, slags, glass or other corrosive materials (as in furnaces, crucibles, or saggars) that are classified chemically as acid ..., basic... or neutral... and that are produced in the form of brick or other shapes, finely ground cementing materials, castable concretes, plastics and granular materials in bulk.

Webster's Third New International Dictionary (1993).

Examining Attorney, we find that six of the seven registrations cover goods such as paving stones, bricks and/or tiles and ordinary cement or mortar mixtures, but not castable refractory mixes. The seventh registration covers both refractory bricks and refractory casting mixes, but not ordinary bricks, tiles or paving stones. A clear distinction can be drawn between those entities which manufacture and offer under the same mark construction materials such as those listed in the registration and those which manufacture and offer refractory materials such as those listed in the application. Moreover, although we must consider registrant's goods as broadly as identified in the registration, taken in context with the other products covered by the registration, namely, paving stones and tiles, we do not find it reasonable to construe the registration as covering refractory bricks, as opposed to ordinary building bricks. No evidence of record supports a link between applicant's castable refractory mixes and registrant's bricks per se.

Accordingly, we find no basis in this record for concluding that a relationship exists between the goods of applicant or registrant or that the goods are such that they would be likely to be assumed to emanate from a common source, because similar marks are used on them. Nor do we

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find any basis for assuming a similarity of channels of trade, the areas of use of the goods being distinguishable by the very identifications of the goods in the application and registration. While applicant also points to the sophistication of the purchasers in these two separate markets, the mere fact that there is no evidence of any overlap such that the same purchasers would encounter the goods under circumstances which might lead them to believe that they emanate from a common source is sufficient to obviate any likelihood of confusion.

Decision: The refusal to register under Section 2(d) is reversed.