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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Adams Products Company

Serial No. 76599592

Richard E. Jenkins of Jenkins, Wilson & Taylor for Adams Products Company.

Linda A. Powell, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

Before Quinn, Bucher and Kuhlke, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Adams Products Company to register the mark GREENLINE (in standard character form) for "recycled concrete masonry blocks."¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, if applied to applicant's goods, would so resemble the previously

¹ Application Serial No. 76599592, filed June 25, 2004, alleging a bona fide intention to use the mark in commerce.

Ser No. 76599592

registered mark shown below

The logo consists of the words "GreenLine" written in a black, cursive, handwritten-style font. The letters are connected, with a prominent loop at the end of the word "Line".

for "concrete set accelerators, compounds for dust-proofing and damp-proofing concrete, concrete curing and hardening compounds, bonding agents for mixing with cementitious materials, concrete form release compounds, [and] entraining agents for use in concrete" (in International Class 1); and "coatings for blacktop surfaces, coatings and sealers for concrete masonry and other porous surfaces, water-based primers for concrete, [and] masonry or other porous surfaces which will increase the adherence of membranes or other non-paint coatings,"² as to be likely to cause confusion.

When the refusal to register was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant argues that the "pre-product" concrete additive products and "post-product" sealers and primers covered by the cited mark are different from applicant's

² Registration No. 1865108, issued November 29, 1994; renewed.

recycled concrete masonry blocks. Applicant also contends that the goods are sold through different trade channels. According to applicant, its goods are bought by sophisticated professionals in the building structure industry who wish to utilize recycled or so-called "green" building materials for specific design purposes, as for example, buildings and retaining walls. Registrant's goods, applicant asserts, are sought out by those "seeking to enhance a bituminous construct for a specific purpose (i.e., to make the construct damp-proof or to make the construct release from a form more easily) or by those seeking to enhance the construct (such as a concrete slab) by sealing or priming it." Applicant further states that registrant's goods "are also narrowly tailored within a channel of trade specific for the betterment of concrete (or blacktop asphalt or similar material) slab-type products for a specific purpose." (Brief, p. 5).

Applicant contends that the respective goods are bought under different conditions and circumstances, and that the goods are bought by discerning and sophisticated purchasers after "extensive" consideration. Applicant also points to the absence of any actual confusion. In connection with its argument that the cited mark is weak, applicant relied upon two third-party registrations of GREENLINE marks.

The examining attorney maintains that the marks are almost identical, and that the goods are complementary in nature. Thus, according to the examining attorney, purchasers confronting both marks will ascribe a common source to the respective goods. The examining attorney also asserts that the goods move in the same trade channels for building construction materials. In support of the refusal, the examining attorney submitted excerpts of third-party websites to show that the goods are complementary.

We first direct our attention to an evidentiary matter. Applicant, in its March 22, 2005 response, referred to two third-party registrations. The examining attorney, in her April 20, 2005 responsive Office action, indicated that the registrations were not properly made of record. The examining attorney alternatively went on to consider the registrations, according them minimal probative weight. Applicant then provided copies of the two registrations with its appeal brief. The examining attorney, in her brief, reiterated her view that this evidence was of little consequence in determining the merits of the refusal.

Trademark Rule 2.142(d) states that the record in an application should be complete prior to the filing of an

appeal. Moreover, the mere reference to third-party registrations during the prosecution of an application is insufficient to make the referenced registrations of record. To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted. *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1456 n. 2 (TTAB 1998). See TBMP § 1208.02 (2d ed. rev. 2004).

In spite of the deficiencies related to the proper introduction of this evidence, we have followed the examining attorney's lead in considering the two third-party registrations.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: *In re Dixie*

Ser No. 76599592

Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the marks GREENLINE and GREEN LINE (stylized), they are identical in sound. They also are identical in meaning, both connoting an environmentally-friendly or "green" line of products.

The fact that the two words comprising applicant's mark appear without a space between them hardly distinguishes the mark from the cited mark. Moreover, the stylization of registrant's mark is relatively minimal, neither striking nor otherwise dramatic, and it does little to distinguish the marks in view of the fact that purchasers are unlikely to remember this simple distinction. Rather, the words themselves are more likely to be recalled, and they will be used in calling for the goods. Inasmuch as applicant's mark is presented in standard characters, applicant is not limited to any particular depiction. Accordingly, applicant's mark presumably could be used in the same or similar manner of script as shown in registrant's mark. See *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

In sum, the marks are identical in sound and meaning, and virtually identical in appearance and overall

Ser No. 76599592

commercial impression. This factor weighs heavily in registrant's favor.

We next turn to a consideration of the goods. We note, at the outset of considering this du Pont factor, that the greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion. In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001). If the marks are the same or nearly so, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

The goods are related in that all are building construction materials and supplies. The Internet evidence provided by the examining attorney makes it quite clear that goods of the type sold by registrant, namely coatings, sealers and primers for concrete masonry, are used on applicant's type of goods, namely concrete masonry blocks. We think the examining attorney has it right when she states the following about the complementary nature of the goods:

In the instant case, consumers building structures, walls, retaining walls or the like from concrete masonry blocks such as those provided by applicant, are likely to seek sealers or protective coatings for concrete masonry blocks to reduce dust, to protect the blocks from weather or environmental damage, to enhance the visual appearance of the concrete masonry, or to prepare the concrete masonry of other non-paint coatings. Upon discovering sealers and coatings for concrete and masonry bearing an almost identical mark, consumers are likely to mistakenly believe that the goods originate from the same source, and that the goods are intended to be used together.

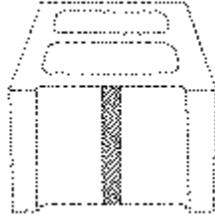
(Brief, unnumbered p. 3).

Contrary to applicant's contentions, the goods would travel through the same or similar trade channels, that is, those involving building construction materials and supplies. As pointed out by the examining attorney, there are no limitations in the identifications of goods. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the cited registration

are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). Accordingly, we must assume that applicant's and registrant's goods would travel in the same trade channels, such as building supply stores. Further, the goods would be bought by the same classes of purchasers (both building construction professionals and do-it-yourselfers). The fact that some purchasers may be sophisticated or knowledgeable in the building construction field does not necessarily mean that they are sophisticated or knowledgeable in trademarks or immune from source confusion. See In re Research Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are not infallible."]. See also In re Decombe, 9 USPQ2d 1812 (TTAB 1988).

Applicant contends that the cited mark is weak and, in trying to limit the scope of protection to be accorded registrant's mark, applicant has relied upon two third-party registrations. This evidence is not persuasive of a different result. The two third-party registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of similar marks in the marketplace, and as a result would be able to distinguish between GREEN LINE marks based on slight differences between them. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). The probative value of the two third-party registrations is significantly diminished by virtue of the fact that the trademarks cover goods (paints and floor adhesives) that are removed from the types of goods involved in the present appeal. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992).

Applicant's statement that there have been no instances of actual confusion is of no moment. Applicant refers to the contemporaneous use of its mark shown below³



with the cited mark. Firstly, applicant's two marks are very different, and the lack of any actual confusion between its design mark and registrant's mark is irrelevant to the present appeal. Secondly, the present word mark is based on an intention to use the mark, so there has been no opportunity for actual confusion to occur between the mark at issue and registrant's mark.

We conclude that purchasers familiar with registrant's "concrete set accelerators, compounds for dust-proofing and damp-proofing concrete, concrete curing and hardening compounds, bonding agents for mixing with cementitious materials, concrete form release compounds, [and] entraining agents for use in concrete" and "coatings for

³ Application Serial No. 76599297 is currently pending. The drawing is lined for the color green, and the mark is described as follows: "The mark is a band of green color and the mark is used by positioning the band of green color on one end of a concrete masonry block."

Ser No. 76599592

blacktop surfaces, coatings and sealers for concrete masonry and other porous surfaces, water-based primers for concrete, [and] masonry or other porous surfaces which will increase the adherence of membranes or other non-paint coatings" sold under its mark GREEN LINE (stylized) would be likely to believe, upon encountering applicant's "recycled concrete masonry blocks" sold under the mark GREENLINE, that the goods originated with or are somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.