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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Truth Hardware Corporation

Serial No. 78421793

Michael A. Bondi of Patterson, Thuente, Skaar & Christensen
for Truth Hardware Corporation.

John Dwyer, Trademark Examining Attorney, Law Office 116
(M.L. Hershkowitz, Managing Attorney).

Before Bucher, Drost and Kuhlke, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 19, 2004, applicant Truth Hardware Corporation
applied to register the mark ENCORE (in standard character
form) on the Principal Register for "window hardware made
primarily of metal, namely, brackets, tracks, latches,
locks, knobs, handles, hinges, operators, and leversets,
sold exclusively to manufacturers" in Class 6.¹ The

¹ Serial No. 78421793. The application is based on applicant's
allegation of a bona fide intention to use the mark in commerce.
In its Reply Brief at 1, applicant has proposed adding the word
"window" before "manufacturers" in its identification of goods.

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examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C.

§ 1052(d)) because of Registration No. 2,870,619 (issued August 3, 2004) for the identical mark for "window shutters composed primarily of fiberglass or plastic" in Class 19.

Inasmuch as the issue in this case is whether there is a likelihood of confusion if applicant were to use its mark on the identified goods in view of the registered mark for the identified goods, we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first factor, the similarity of the marks, is straightforward inasmuch as applicant's and registrant's marks are absolutely identical. When both parties are

using or intend to use the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source").

Next, we address the issue of whether the goods of the parties are related. Applicant's goods are "window hardware made primarily of metal, namely, brackets, tracks, latches, locks, knobs, handles, hinges, operators, and leversets, sold exclusively to manufacturers." In effect, applicant's goods are various items of metal window hardware sold to manufacturers. Registrant's goods are "window shutters composed primarily of fiberglass or plastic."

When we compare the goods, it is imperative that we consider them as they are identified in the respective identification of goods. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the

question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). Regarding the identified goods, we do not read limitations into the identification of goods. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of [registrant's] mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"). However, if applicant or registrant has included limitations in its identification of goods, we do not ignore them.

In this case, registrant's identification of goods contains no restrictions so we must consider the goods to include all types of fiberglass and plastic window shutters. Regarding applicant's metal window hardware,

however, we must consider the fact that the hardware is limited to hardware sold exclusively to manufacturers.

To demonstrate that the goods are related, the examining attorney refers to the following evidence (Brief, pp. 6-7):

The Boston Globe, July 31, 2003

"... right down to the hardware holding the window shutters."

Chicago Daily-Herald, February 23, 2003.

"They also found about 150 original, louvered window shutters in the attic of the building. Each one features original hardware..."

Daily Press (Newport News, VA), January 13, 1999.

"That original window frame was preserved unchanged with its shutter hardware intact. That made it possible to restore the building with its original windows and shutters."

Intelligencer Journal (Lancaster, PA), March 14, 1998.

"... window and shutter hardware - such as hinges, knobs, locks and handles, ..., window weights ... have been recycled."

The Dallas Morning News, April 6, 1995.

"The recovered hardware includes about 100 items, including ... window pulls, key plates and hinges for window shutters."

The Washington Post, October 3, 1985.

"Among the most popular items are pieces of metal hardware for wooden window shutters."

As a result of this evidence, the examining attorney argues (Brief, p. 7):

Applicant notes that some of the articles seem to differentiate between "window hardware" and "shutter hardware," and argues that the registrant's goods cannot be used with the applicant's goods. The

registrant, however, has made no evidence of record that the terms "window hardware" and "shutter hardware" are specifically defined and precise terms, or that "window hardware" is necessarily separate and different from "shutter hardware." It is equally noteworthy that some of the articles do not seem to differentiate between "window hardware" and "shutter hardware." This suggests that focusing on the proximity of the word "hardware" in relation to either "window" or "shutter" is not relevant. That is, the operative word is "hardware" and hardware can be used with "window" products, including both windows and window shutters. Moreover, the applicant's identification does not specify the types of "manufacturers" to whom the goods are sold, nor what goods they are used to manufacture. As currently identified, the applicant's goods could be sold to any type of manufacturer and incorporated into any type of window product, e.g., windows, window screens, window blinds, window curtains, and window shutters.

Applicant responds (Reply Brief at 3) that:

It is noted that the above excerpted articles differentiate between different types of hardware, including window hardware and shutter hardware, since the adjective "window" or "shutter" is used to modify the term "hardware." The Examining Attorney noted in the Examining Attorney's Brief that the operative word is "hardware" and hardware can be used with window products, including both windows and window shutters." However, as noted in the *Intelligencer Journal* (above), hardware is also used in association with doors, "door, window and shutter hardware - such as hinges, knobs, locks and handles..." Hence, hardware can be used with a number of goods, including doors, windows, and shutters and but does not necessarily mean that the same hardware could be used for all of these goods, e.g. door hardware used on shutters.

Based on the evidence, we cannot conclude that the terms "window hardware" and "shutter hardware" are interchangeable terms. We must consider the goods as they are identified in the identification of goods and

applicant's hardware is limited to windows. The mere fact that articles use the term "window and shutter hardware" does not demonstrate that the hardware is interchangeable. Indeed, the usage suggests a difference between the items such as the terms "baseball and football games" or "men's and women's clothing" suggest that there are differences between the "games" and the "clothing." It also does not shift the burden to applicant to prove that they are not the same. Furthermore, as applicant has pointed out, the expanded quotation from the *Intelligencer Journal* article refers to "door, window, and shutter hardware." The examining attorney has not provided sufficient evidence that there is an interchangeability between "window hardware" and "shutter hardware." Second, applicant's goods are limited to window hardware or hardware for windows. We do not agree with the examining attorney that the identification of goods includes virtually anything modified by the word "window" such as window screens, window blinds, window curtains, or even window ledges or window flower boxes.

The examining attorney also argues that applicant does not specifically limit its goods to window hardware sold exclusively to *window* manufacturers. In its brief, applicant had assumed that the term "manufacturers" was

limited to "window manufacturers." See, e.g., Brief, p. 5 ("it is unlikely that a window manufacturer would purchase window shutters to sell as a unit with his own manufactured windows"). In its Reply Brief (p. 1), applicant has offered to include the word in its identification of goods. While the examining attorney can determine whether such an amendment is permitted, the lack of the term "window" is not significant to our determination here because the record does not show that the term "manufacturers" and "window manufacturers" would be substantially different. Obviously, window hardware sold to manufacturers includes "window manufacturers." However, while the examining attorney argues (Brief at 10) that "applicant's hardware could even be purchased by manufacturers of windows shutters for use in or on the shutters," there is no evidence that "window hardware" is sold to any other manufacturers or that any other manufacturers are likely to purchase shutters and window hardware. The mere fact that there are other types of "hardware" such as "shutter" and "door" hardware does not mean that there is any overlap with window hardware or that "shutter manufacturers" are likely to purchase "window hardware." It would be sheer speculation on our part to assume that there is some overlap in these cases. For example, if the goods were

"airplane engine parts sold to manufacturers," we would not assume, without evidence, that these parts would be used by automobile engine manufacturers simply because there are articles that refer to "aircraft and auto parts." While the examining attorney also refers to a registration (No. 2,510,664) that includes metal windows, metal window casements, and non-metal window frames and another (No. 2,906,920) for metal window treatments and non-metal window shutters, the record is insufficient to demonstrate that the sources of plastic window shutters are likely to expand into producing metal window hardware or that applicant's metal window hardware sold exclusively to manufacturers and registrant's shutters are related.²

If we viewed the goods without any limitations, we would be inclined to agree with the examining attorney that the window shutters and metal window hardware are related.

² Several other registrations that the examining attorney submitted involved foreign registrations or house marks, which are entitled to little, if any, weight. In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) ("11 of the 15 third-party applications and registrations... were filed under the provisions of Section 44 of the Act... Such registrations and applications are not even necessarily evidence of a serious intent to use the marks shown therein in the United States on all of the listed goods and services, and they have very little, if any, persuasive value on the point for which they were offered. Moreover, two of the four registrations which were based on use were issued to Saks & Company and to Knott's Berry Farm, owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods and services are sold").

However, the Office permits applicants to limit identification of goods that are by themselves acceptable. TMEP § 1402.06(a) (4th ed. rev. April 2005) ("Under 37 C.F.R. §2.71(a), there is no general prohibition against specific types of limitations in identifications of goods and services, such as the use of negatives, exceptions or similar language. Limitations on identifications phrased in the negative or as exceptions are acceptable, if they are otherwise proper"). Therefore, we cannot dismiss the language in applicant's identification of goods that limits these goods to those sold exclusively to manufacturers. With this limitation, applicant has changed the likelihood of confusion analysis.

The limitation changes our analysis in two ways in addition to making the goods less related. First, the purchasers of applicant's goods would be limited to sophisticated or careful purchasers. Buyers of window hardware for manufactures are not ordinary consumers and it would be expected that these purchasers would be careful and sophisticated purchasers. This fact limits the likelihood that there would be confusion. Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 220 USPQ 786, 790 (1st Cir. 1983) ("Perhaps the most critical factor that weighs against Astra in our

consideration of this issue is the sophistication of the class of prospective purchasers of the subject products. If likelihood of confusion exists, it must be based on the confusion of some relevant person; i.e., a customer or purchaser. And there is always less likelihood of confusion where goods are expensive and purchased after careful consideration"). In this case, any overlap of purchasers of applicant's and registrant's goods would occur only among the professionals who buy for manufacturers and these purchasers would be much less likely to be confused.

Another factor that limits the likelihood of confusion is the channels of trade. Applicant's goods would be sold to manufacturers. This is a significant limitation. These goods would not be sold in the retail market or to wholesalers. While registrant's goods are not limited to any particular channels of trade, there is no evidence that window or other manufacturers would also be in the market for window shutters.

We conclude by holding that there is no likelihood of confusion in this case. The limitation of the goods in the application means that its goods are sold only to manufacturers. We have little evidence to find that these purchasers would be confused and, therefore, while

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confusion may be possible, we cannot conclude that it is likely. See, e.g., Electronic Design and Sales Inc. v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1392-93 (Fed. Cir. 1992) (“[O]pposer urges that persons who use opposer’s data processing and telecommunications services at work and who buy batteries at retail stores would be confused as to source ... [T]he potential for confusion appears a mere possibility not a probability”). See also Bongrain International (American) Corp. v. Delice de France, Inc., 811 F.2d 1479, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987) (The “statute refers to likelihood, not the mere possibility, of confusion”).

Decision: The examining attorney’s refusal to register applicant’s mark under Section 2(d) of the Trademark Act is reversed.