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THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Hearing:
October 18, 2001

Paper No. 16
TJQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sunex International, Inc.

Serial No. 75/468,354

James M. Bagarazzi of Dority & Manning for applicant.

Scott Craven, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Simms, Cissel and Quinn, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Sunex International, Inc. to register the mark HEAVY HITTERS for "power driven heavy duty impact wrenches for professional mechanics in the automotive aftermarket."[1]

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the

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[1] Application Serial No. 75/468,354, filed April 15, 1998, based on an allegation of a bona fide intention to use the mark. Applicant subsequently filed an amendment to allege use setting forth dates of first use of July 20, 1998.

ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark HEAVY HITTER for "hand tools, namely, hammers, axes, mallets, sledgehammers, and picks"[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs, and an oral hearing was held before this panel.

The Examining Attorney maintains that the marks are essentially identical, differing only in the singular/plural form of "HITTER(S)." The Examining Attorney also asserts that the goods are related and that both types of goods are likely to be found in an automotive shop. In connection with his remarks directed to the goods, the Examining Attorney has relied upon third-party registrations to show that the goods are of a type which may emanate from a single source under the same mark. The Examining Attorney has discounted the absence of actual confusion and the sophistication of purchasers, both factors being pressed by applicant in urging that the refusal be reversed.

Applicant contends that the marks create different commercial impressions, with applicant's conveying "the

[2] Registration No. 2,253,961, issued June 15, 1999.

laudatory connotation of persons who are VIPs rather than any descriptive attribute of the tool itself" whereas registrant's mark conveys "the impression of an implement that is used to deliver a forceful blow." (brief, p. 3) Applicant also asserts that the nature of the tools is different, drawing distinctions between them (machine-powered versus muscle-powered, rotational force versus linear collision force, precision versus non-precision, fastening versus destruction, use by skilled professional mechanics versus manual laborers, and classified in different international classes). All of the distinctions, according to applicant, show that the goods are fundamentally unrelated. Applicant also has relied on the absence of any actual confusion in the marketplace, furnishing two declarations of Martin Huguet, applicant's vice president of sales and marketing. Based on the declarations, more than $350,000 of applicant's products have been sold over a two-year period without any actual confusion between its mark and registrant's mark. Applicant goes on to contend that the goods move in distinctly different trade channels to different classes of purchasers.

We affirm.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the marks HEAVY HITTER and HEAVY HITTERS, they differ, of course, by only one letter, with applicant's mark being the plural form. As such, we find that the marks are virtually identical in sound, appearance and meaning. The differences in connotation argued by applicant are not likely to be perceived by prospective purchasers.

Insofar as the goods are concerned, it is not necessary that the goods be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that

the goods originate from or are in some way associated with the same source. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978). Further, the identifications of goods in the application and the cited registration control the comparison of the goods. See: Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)["[T]he question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the] registration, rather than what the evidence shows the goods and/or services to be."]; and In re Elbaum, 211 USPQ 639 (TTAB 1981).

When the goods are compared in light of the legal constraints cited above, we find that applicant's "power driven heavy duty impact wrenches for professional mechanics in the automotive aftermarket" are related to registrant's "hand tools, namely, hammers, axes, mallets, sledgehammers, and picks." As articulated by the Examining Attorney, the distinctions between the goods argued by applicant are insufficient to avoid confusion when the goods are sold under virtually identical marks. For purposes of the legal analysis of likelihood of confusion herein, it is presumed that registrant's registration

encompasses all goods of the nature and type identified, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers. In re Elbaum, supra at 640.

Although the goods may be specifically different, both applicant's and registrant's goods may be used in the same auto shops by the same auto mechanics. While applicant's goods are limited to such products sold to professional mechanics in the automotive aftermarket, there are no limitations in registrant's identification of goods and, thus, we must presume that registrant's hammers and mallets may be used by professional mechanics in the automotive aftermarket. That is, registrant's hammers and mallets, as broadly worded, must be presumed to be purchased and used by auto shops that also use impact wrenches. This may be especially the case in shops where tires are changed and/or rotated. Accordingly, the goods, as identified, are presumed to travel in the same or similar channels of trade and are bought by the same or similar classes of purchasers.

In finding that applicant's power driven heavy duty impact wrenches are related to registrant's hand tools, we have considered the four third-party registrations based on

use which the Examining Attorney has submitted. The registrations show particular marks registered by different entities for both types of goods involved herein. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods listed therein, including impact wrenches and hammers and mallets, are of a kind which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Applicant's argument based on sophistication of purchasers is not supported by any evidence in the record. In any event, although this factor would favor applicant, it is outweighed by the similarities between the marks and the goods.

In finding likelihood of confusion, we have considered Mr. Huguet's declarations regarding the absence of actual confusion between the involved marks despite applicant's sales under its mark exceeding $350,000. As a du Pont factor, the absence of actual confusion weighs in applicant's favor. However, our assessment of this factor is somewhat hampered by the lack of any specifics relating

to the extent of use of registrant's mark as well. Thus, we are unable to tell, with any degree of confidence, whether there has been a meaningful opportunity for confusion to occur in the marketplace.

We find that purchasers familiar with registrant's hand tools, namely, hammers, axes, mallets, sledgehammers, and picks sold under the mark HEAVY HITTER would be likely to believe, upon encountering applicant's mark HEAVY HITTERS for power driven heavy duty impact wrenches for professional mechanics in the automotive aftermarket, that the goods originated with or were somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points argued by applicant casts doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 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.