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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dalloz Safety, Inc.¹

Serial No. 75/932,374

Henry E. Bartony, Jr. of Bartony & Hare for Dalloz Safety,
Inc.

Christopher S. Adkins, Trademark Examining Attorney, Law
Office 101 (Angela Wilson, Managing Attorney).

Before Hairston, Walters and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 2, 2000, Dalloz Safety, Inc. (applicant)
applied to register the mark TITAN BY MILLER (in typed
form) on the Principal Register for goods ultimately
identified as "fall protection equipment, namely safety

¹ At the end of its appeal brief (p. 11), counsel identified applicant as Dalloz Fall Protection Investment, Inc. (assignee). USPTO records do not show an assignment to a party by that name although there is an assignment to a party identified as Dalloz Investment, Inc. (Reel/Frame No. 2423/0564).

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belts, safety harnesses, safety lanyards and lifelines" in International Class 9.²

The examining attorney refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of two prior registrations owned by different parties. The first registration is for the mark TITAN (typed) for "protective gloves for industrial use" in International Class 9.³ The second registration is also for the mark TITAN (typed) for "industrial shoes and workboots" in International Class 25.⁴

When the refusals were made final, applicant filed an appeal.

In a case involving a refusal under Section 2(d), 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

² Serial No. 75/932,374. The application alleges a date of first use and a date of first use in commerce of August 15, 1999.

³ Registration No. 2,127,114 issued January 6, 1998. The registrant is listed as Mapa Pioneer Corporation.

⁴ Registration No. 1,781,498 issued July 13, 1993. Affidavits under Section 8 and 15 have been accepted or acknowledged. The current owner is listed as Bill Thompson, Inc.

that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We start our analysis with a comparison of applicant's and registrants' marks. In this case, all three marks contain the identical word TITAN. It is the only word in the registered marks. Applicant adds the phrase BY MILLER to its mark. Applicant asserts that it owns two registrations (Nos. 1,558,832 and 1,560,575) for the mark MILLER. Applicant goes on and argues the mark MILLER "is a very strong designation of origin in the fall protection industry" and applicant "has gained substantial goodwill in the area of fall protection" as a result of its ownership of these marks. Brief at 8. Therefore, the mark TITAN BY MILLER clearly designates the origin of the goods of" applicant. Brief at 8.

The addition of a trade name or house mark to a registered mark does not generally avoid confusion. Menendez v. Holt, 128 U.S. 514, 521 (1888). However, the addition of a house mark may avoid confusion when there are recognizable differences between the common elements of the marks. See Rockwood Chocolate Co. v. Hoffman Candy Co.,

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372 F.2d 552, 152 USPQ 599 (CCPA 1967) (ROCKWOOD BAG-O-GOLD for candy not confusingly similar to CUP-O-GOLD for candy). Here, the differences between TITAN BY MILLER and TITAN are slight and the addition of applicant's MILLER mark does not overcome the similarity of the marks. See In re C.F. Hathaway Co., 190 USPQ 343 (TTAB 1976) (HATHAWAY GOLF CLASSIC for knitted sports shirts confusingly similar to GOLF CLASSIC for men's hats).

In a similar case, the Board held that the mark SPARKS and design and SPARKS BY SASSAFRAS and design were similar in sound, appearance, and meaning.

Those already familiar with registrant's use of its mark in connection with its goods, upon encountering applicant's mark on applicant's goods, could easily assume that "sassafras" is some sort of house mark that may be used with only some of the "SPARKS" goods. Conversely, those familiar with only applicant's mark would, upon encountering the registered mark on related goods, assume that all "SPARKS" products come from a single source, and that that source was in some instances further identified with the words "by sassafras."

In re Apparel Ventures, Inc., 229 USPQ 225, 226 (TTAB 1986).

When we compare the marks, we not only look at the drawing, but since applicant's mark is displayed in typed form, we also look at the specimens for help in visualizing how the mark can be displayed.

The drawing presented with the application shows the applicant's mark typed in capital letters, and under Trademark Rule 2.51(d), this means that the application is not limited to a mark depicted in special form. Thus, the mark presented for registration in accordance with said rule can be considered to be in any form and to visualize what form the mark can take, we are aided by the specimens filed with the application as illustrating "the mark as actually used." ... The similarity between applicant's mark as actually used and the cited registered mark is quite apparent.

In re Richardson Ink Co., 171 USPQ 818, 819 (TTAB 1971). See also Phillips Petroleum Co. v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971)(CCPA pointed out that the specimens emphasized the prominence of the "6-66" part of the mark"); Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 749 F.2d 669, 223 USPQ 1281, 1284 (Fed Cir. 1984) ("[T]rade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression. Applicant's labels support rather than negate that of which opposer complains: that SPICE VALLEY inherently creates a commercial impression which is confusingly similar to that of SPICE ISLANDS").

Here, a review of applicant's specimens emphasizes the prominence of the word TITAN. The words BY MILLER are obviously displayed in much smaller print. See Apparel Ventures, 229 USPQ at 226 ("The additional wording, 'by sassafras,' is less significant in creating the commercial

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impression of the mark as a whole. These words are very small in comparison to 'SPARKS' and appear underneath 'SPARKS' in all lower case letters. Registrant's mark is only the word 'SPARKS'").



DATE: 1/00
MODEL: T4000
SIZE: UNIVERSAL

MATERIAL: POLYESTER
CAPACITY: 310 LBS.
USE ONLY WITH TYPE I EQUIPMENT.
COMPLIANCE: ANSI A10.14,
OSHA 1926.502

WARNING: MANUFACTURER'S INSTRUCTIONS
SUPPLIED WITH THIS PRODUCT AT TIME OF
SHIPMENT MUST BE FOLLOWED: FAILURE TO
DO SO COULD RESULT IN SERIOUS INJURY
OR DEATH. CONTACT DALLOZ FALL
PROTECTION IF INSTRUCTION MANUAL IS
NEEDED.

ADVERTENCIA: DEBEN SEGUIRSE LAS
INSTRUCCIONES DEL FABRICANTE PROVISTAS
CON ESTE PRODUCTO AL MOMENTO DE DES-
PACHO: EL NO HACERLO PUEDE RESULTAR
EN LESIONES GRAVES O LA MUERTE. SI
SE REQUIERE EL MANUAL DE INSTRUCCIONES
CONSULTE CON DALLOZ FALL PROTECTION.

ADVERTISSEMENT: VOUS DEVEZ RESPECTER
LES INSTRUCTIONS DU FABRICANT QUE VOUS
AVEZ RECUES AVEC LE PRODUIT. DANS LE
CAS CONTRAIRE, VOUS RISQUEZ DES
BLESSURES GRAVES OU MEME LA MORT.
CONTACTEZ DALLOZ FALL PROTECTION SI
VOUS AVEZ BESOIN D'UN NOUVEAU MANUAL.

In any case, where likelihood of confusion is the issue, we must view the marks in their entireties. When the words BY MILLER are added to the word TITAN, the marks are still extremely similar. Wella Corp. v. California Concept Corp., 558 F.2d 1019, 1022, 194 USPQ 419, 422 (CCPA

1977)(CALIFORNIA CONCEPT and design held likely to be confused with CONCEPT for hair care products).

The next factor we consider is whether the goods of the applicant and the registrants are related. We must consider the goods as they are described in the identification of goods in the application and registration. 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"). To the extent that the goods are not restricted in the identifications, we must consider that they move through all normal channels of trade. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"). Furthermore, it is not necessary for the examining attorney

to establish that the registrant and applicant are competitors.

[G]oods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services.

In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

Goods in Registration No. 2,127,114

We begin our discussion of the relatedness of the goods by addressing the goods in the '114 registration. These goods are identified as "protective gloves for industrial use" in International Class 9. The examining attorney's evidence supports the conclusion that these goods are related to applicant's fall protection equipment. The www.leonardsaftey.com and www.worknleisure.com website printouts show hand protection and fall protection products as available from the same site. Similarly, the Air Safe, Inc. printout shows fall protection products and puncture resistant gloves available from the same source. This type of protective equipment is also likely to be used or marketed together. See *Virginian-Pilot*, June 15, 1997

("Suited up in flame-retardant shirt, elbow-length rubber gloves, a harness and helmet, lineman Whitten gives a reporter a hands-on demo"); *Baltimore Sun*, August 13, 1995 ("Team members also had to be willing to put up several hundred dollars for personal equipment, such as helmets, ropes, harnesses and gloves"); *Providence Journal-Bulletin*, November 21, 1999 ("Bacou's goal is to eventually market 'protective products covering the whole body. That might mean shoes, coveralls, aprons, gloves, hard hats and harnesses'"). The examining attorney has also included copies of two registrations to show that the same entity has registered a common mark for protective gloves and fall protection equipment. See Registration Nos. 2,372,695 ("Protective clothing, namely ... work gloves and safety equipment, including ... safety harnesses") and 1,253,653 ("Safety equipment and clothing - namely ... gloves ... safety harnesses"). This evidence convinces us that applicant's fall protection equipment is related to registrant's protective gloves for industrial use. It is likely that these products would be bought by the same purchasers, namely, employers who would need to protect their employees from occupational hazards. They also would be sold together. Therefore, we conclude that there is a likelihood of confusion when the mark TITAN is used on

protective gloves for industrial use and TITAN BY MILLER is used on fall protective equipment.

Applicant also maintains that the "market for fall protection equipment is quite unique and small." Brief at 9. We note that applicant has not included any evidence of this assertion. Indeed, the printouts that the examining attorney has made of record do not hint that there is anything unique about the fall protection market that would somehow impact the likelihood of confusion analysis. If applicant is arguing that because the market is "small and unique," the customers are sophisticated and less likely to be confused, we note that "even careful purchasers are not immune from source confusion." In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999). See also In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products").

Another point applicant makes without any evidentiary support is that there are a large number of registrations that contain the term TITAN. Brief at 4. We do not give this unsupported statement any weight, but we do note that

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applicant's fall protection equipment and registrant's protective gloves are related, and even if these registrations were of record, they would not support the Office issuing another confusingly similar registration. In re J.M. Originals, 6 USPQ2d 1393, 1394 (TTAB 1988).

Goods in Registration No. 1,781,498

Regarding the goods in the '498 registration, we arrive at the opposite conclusion on the question of whether the goods are related. Applicant's goods are identified as fall protection equipment, namely, safety belts, harnesses, lanyards, and lifelines in International Class 9. The goods in the '498 registration are industrial shoes and workboots in International Class 25. As noted earlier, we must consider the goods as they are set out in the identification of goods. Octocom Systems, 16 USPQ2d at 1787. We also do not read limitations into the identification of goods, "in the absence of specific limitations in the registration." Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). In this case, the registration is limited to industrial shoes and workboots in International Class 25. The registration does not contain goods in International Class 9. *The Trademark Acceptable Identification of Goods and Services Manual* indicates that protective industrial boots are in

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International Class 9. Therefore, we cannot conclude that the '498 registration's goods include protective boots. Non-protective shoes and work boots are less likely to be viewed as coming from the same source as safety belts, harnesses, lanyards, and lifelines. As a result, we find that these goods are not related and there is no likelihood of confusion regarding Registration No. 1,781,498.

Decision: The examining attorney's refusal to register applicant's mark because of Registration No. 1,781,498 is reversed. The examining attorney's refusal to register applicant's mark on the ground that there is a likelihood of confusion with the mark TITAN for the identified goods in Registration No. 2,127,114 is affirmed.