

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Terry J. Pullaro

Serial No. 76/056,316

Bryan K. Wheelock of Harness, Dickey & Pierce for Terry J. Pullaro.

Edd Vasquez, Trademark Examining Attorney, Law Office 110
(Chris A.F. Pedersen, Managing Attorney).

Before Hanak, Bottorff and Holtzman, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark MOJO, in typed form, for goods identified in the application (as amended) as "sports training, practice, and conditioning equipment, namely a weighted hand-held device for sport-specific improvement of arm strength and conditioning."¹

¹ Serial No. 76/056,316, filed May 24, 2000. The application is based on use in commerce, and May 17, 2000 is alleged in the application as the date of first use anywhere and the date of first use in commerce.

The Trademark Examining Attorney has refused registration of applicant's mark on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark MOJO, previously registered for "snowboards, snowboard bindings, ice skates, roller skates,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).³

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney filed main appeal briefs, and applicant filed a reply brief. No oral hearing was requested. We affirm the refusal to register.

The evidence of record on appeal includes the application file, printouts of ten third-party registrations made of record by the Trademark Examining

² Registration No. 2,050,135, issued April 8, 1997 pursuant to Trademark Act Section 44(e).

³ The identification of goods in the cited registration, Reg. No. 2,050,135, also includes "helmets for skating" in Class 9, but the Trademark Examining Attorney has never specifically argued for refusal on the basis of those Class 9 goods. Indeed, in his final office action and in his appeal brief, the Trademark Examining Attorney's likelihood of confusion argument is directed specifically and only to the Class 28 goods identified in the registration, i.e., "snowboards, snowboard bindings, ice skates, roller skates," and he has made no mention of the Class 9 "helmets for skating" identified in the registration. In view thereof, we deem the Trademark Examining Attorney's Section 2(d) refusal to be based solely on the Class 28 goods identified in the registration.

Attorney, applicant's product brochure (submitted prior to appeal and re-submitted as Exhibit C to applicant's appeal brief), and a dictionary excerpt from Merriam Webster's Collegiate Dictionary (online ed. 2002), attached to applicant's appeal brief as Exhibit A, defining the word "mojo" as "a magic spell, hex, or charm; *broadly* : magical power."⁴ However, we have given no consideration to the materials attached as Exhibits B and D to applicant's appeal brief, which appear to be lists of certain third-party registrations and applications obtained from the Office's Trademark Electronic Search System (TESS). These materials are not evidence because they were not made of record prior to the filing of the notice of appeal. See Trademark Rule 2.142(d), 37 C.F.R. §2.142(d). In any event, third-party registrations and applications may not be made of record merely by listing them. See, e.g., *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the

⁴ The Board may take judicial notice of dictionary definitions. See, e.g., *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); see also TBMP §712.01.

likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we 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 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 *du Pont* factor requires us to consider "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." We find that applicant's mark MOJO is identical in all respects to the cited registered mark MOJO. In terms of connotation and commercial impression, moreover, we find that MOJO is a strong, inherently distinctive mark which is arbitrary or, at most, only slightly suggestive as applied to the sporting goods items involved in this case. Applicant's argument to the contrary is not persuasive. The first *du Pont* factor thus weighs heavily in favor of a finding of likelihood of confusion.

Turning next to the second *du Pont* factor, i.e., the similarity or dissimilarity of the goods, it is settled

that is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would 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 source or that there is an association or connection between the sources of the respective goods or services. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978). Moreover, the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion; where the applicant's mark is identical to the registrant's mark, as it is in this case, there need be only a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists. See

In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

Applying these principles to the present case, we find that the goods identified in applicant's application and the goods identified in the cited registration are sufficiently related that confusion is likely to result if the respective goods are marketed under the identical marks involved here. The goods identified in the cited registration are "snowboards, snowboard bindings, ice skates, roller skates." Applicant's goods, as identified in the application, are "sports training, practice, and conditioning equipment, namely a weighted hand-held device for sport-specific improvement of arm strength and conditioning." It appears from applicant's brochure that applicant's product is, essentially, a weight-training and conditioning device used to strengthen and condition the forearm, wrist and hand so as to improve swing speed and swing power in sports that involve swinging a hand-held implement such as a baseball bat, a tennis racket, a golf club or a hockey stick. The product consists of a weighted cylinder (such as is on the end of a dumbbell) attached to a handle with a sport-specific length and diameter.

The Trademark Examining Attorney has made of record ten third-party registrations which include, in their identifications of goods, various types of weight-training equipment and devices as well as various of the types of goods identified in the cited registration, notably including snowboards and ice skates. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods or services identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).⁵

Applicant argues that its goods are not competitive with nor related to the goods identified in the cited registration. Specifically, applicant argues that "applicant's products are not used with registrant's products, or useful to the user's [sic] of registrant's products." According to applicant, registrant is "a

⁵ We are not persuaded by applicant's contention that these third-party registrations lack probative value because none of them specifically includes, in the identification of goods, applicant's allegedly highly-specialized type of weight-training device. The "exercise weights" identified in the third-party registrations legally encompass applicant's more specialized weight-training device.

snowboard company" and its goods are "extreme sports" gear, while applicant's goods are used in connection with conventional sports such as baseball, tennis and golf. Moreover, applicant argues, registrant's goods are used during actual participation in the sports activity, while applicant's goods are not used directly during participation in sports activity but rather are used to condition and train for such sports activity.

We are not persuaded. The suggested distinction between equipment used to directly play a sport and equipment used to condition or train for a sport is legally and commercially insignificant. The third-party registrations of record show that both types of products, i.e., conditioning or training gear and game-participation gear, may be sold by a single source under a single mark. Applicant's own brochure states that one useful application of applicant's product is "on deck warm up and stretching," which shows that the product is intended for use during actual participation in a baseball game, and which suggests that the product could be used for "warm up and stretching" during actual participation in other sports as well.

Likewise unpersuasive is applicant's attempt to distinguish its goods from registrant's by limiting registrant's goods to "extreme sports" gear. First, as

noted above, some of the third-party registrations of record cover both snowboarding equipment and exercise and weight-training equipment, evidence which suggests that both types of products can be marketed by a single source under a single mark. Second, the goods identified in the registration are not limited to "snowboards," but also include "ice skates." Applicant's product brochure specifically identifies hockey players as athletes who may benefit from training with applicant's device. To that extent, at least, applicant's assertion that its product would not be used by or useful to the purchasers and users of registrant's goods is not supported by the record and is belied by applicant's own brochure.

As noted above, because applicant's mark is identical to the cited registered mark, the degree of similarity between the respective goods which is required to support a finding of likelihood of confusion is diminished. *In re Shell Oil Co., supra.* We find, under the second *du Pont* factor, that applicant's goods are sufficiently related to the registrant's goods that confusion is likely to result if the goods are sold under the same mark.

We also find, under the third *du Pont* factor, that the trade channels and classes of purchasers for the respective goods overlap and are otherwise similar rather than

dissimilar. Given the absence of restrictions in either applicant's or registrant's identification of goods, we presume that those goods move in all normal trade channels for such goods and are marketed to all normal classes of purchasers for such goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). This is so, regardless of what the evidence might show to be the actual trade channels and classes of purchasers for applicant's and registrant's goods at this time. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

The normal trade channels for both applicant's and registrant's respective goods include sporting goods stores and the sporting goods departments of department stores. Applicant argues that even if the respective products are sold in the same stores, they nonetheless are unrelated because they would be sold in different departments of those stores. According to applicant, registrant's goods would be sold in the "extreme sports" area of the store, an area in which applicant's goods would not be displayed because applicant's goods are not used in connection with such sports. Rather, applicant's training device "would be sold in particular departments [of the sporting goods store]. For example[,] applicant's baseball device would be sold with baseball equipment." (Reply brief at 3).

We are not persuaded. Again, applicant's argument is based on the faulty premise that registrant's goods are limited to "extreme sports" gear. If, as applicant asserts, applicant's baseball device would be sold with the baseball equipment, it follows that applicant's "hockey device" would be sold with the hockey equipment, alongside registrant's "ice skates."

There is nothing in the record to support applicant's contention that applicant's goods and registrant's goods are marketed to and used by different classes of purchasers. Hockey players would be among the purchasers of both applicant's hockey swing-training device and registrant's ice skates. Even with respect to extreme sports, however, there is no basis in the record for concluding that snowboarders and other extreme sports participants do not also participate in, and train for, conventional sports like baseball, or that they therefore would not be potential purchasers of applicant's goods. Vice versa, there is no basis for concluding that baseball players, tennis players, golfers and other "conventional sports" participants do not also participate in "extreme sports" such as snowboarding.

Thus, we find that the trade channels and classes of purchasers for applicant's and registrant's respective goods are similar rather than dissimilar.

The sixth *du Pont* factor requires us to consider evidence of "similar marks in use on similar goods." Applicant argues that the registered mark MOJO is weak and entitled to a narrow scope of protection because it is widely-used as a mark in the sporting goods field and in other fields as well. There is no evidence in the record to support this assertion. As noted *supra* at page 3, the list of third-party MOJO registrations and applications attached to applicant's appeal brief has not been considered because it was not timely-submitted and it is not in proper form. Even if the third-party registrations had properly been made of record, however, they would be entitled to no weight under the sixth *du Pont* factor. See *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992).

Having carefully considered and weighed all of the evidence of record pertaining to the relevant *du Pont* factors, we conclude that a likelihood of confusion exists. We have considered all of applicant's arguments to the contrary (including any arguments not specifically discussed in this opinion), but do not find them to be

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persuasive of a different result. We have no doubt as to our conclusion that confusion is likely, but even if we did, such doubt would be resolved against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *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.