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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ardisam, Inc.

Serial No. 76/095,756

Richard John Bartz of Bartz & Bartz, P.A. for Ardisam, Inc.

Susan C. Hayash, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Hairston and Rogers, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Ardisam, Inc. to register BIG FOOT as a trademark for "deer hunting equipment, namely, deer hunter's stands, portable tree stands, back rests, arm pads, foot rests, adjustable seat and platform, combined seat and foot rest, non-motorized

deer carts, combined non-motorized deer cart and ladder stand, ladder shooting rails and tree climbing sticks.”¹

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant’s mark, as used in connection with the identified goods, is likely to cause confusion or mistake or to deceive consumers, in view of the prior registration of the mark BIG FOOT for “wild-fowl decoys.”²

When the refusal was made final, applicant appealed. Both applicant and the Examining Attorney have filed briefs,³ but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In the analysis of likelihood of confusion presented by this case,

¹ Serial No. 76/095,756, filed July 24, 2000, alleging first use and first use in commerce as of January 1, 1996.

² Registration No. 2,043,643, issued March 11, 1997; affidavits under Section 8 and 15 accepted and acknowledged, respectively.

³ Applicant, for the first time with its appeal brief, submitted material downloaded from the Internet concerning the “Bigfoot/Sasquatch” mystery. This material is clearly untimely, see Trademark Rule 2.142(d), and has not been considered.

two key considerations are the identity of the marks and the similarities of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Applicant's mark BIG FOOT is identical in every respect to the mark BIG FOOT shown in the cited registration. "This fact weighs heavily against applicant." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). The Board has stated in the past that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a likelihood of confusion." *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

We turn, then, to a consideration of applicant's and registrant's respective goods. The Examining Attorney argues that the goods are related because "[d]eer hunting equipment and wild-fowl decoys are all employed in the sport of hunting game." According to the Examining Attorney, "[a]lthough deer hunting equipment and wild-fowl decoys are designed for hunting different types of game, they are still used for the greater purpose of hunting." (Brief, p. 6). In addition, the Examining Attorney

maintains that the respective goods move in the same channels of trade. In support of the refusal to register, the Examining Attorney submitted copies of five use-based third-party registrations for marks which cover hunting stands or hunting blinds, on the one hand, and decoys, on the other hand.⁴ In addition, the Examining Attorney submitted Internet evidence which shows that several on-line sporting goods retailers offer both deer hunting equipment and duck hunting equipment.

Applicant, in urging reversal of the refusal to register, argues that the goods are not related because they are used in different seasons and for different purposes. According to applicant, its goods are marketed only to deer hunters, and would be used only in deer hunting season, whereas registrant's decoys are marketed to hunters of fowl and/or upland birds and fishermen.

It is, of course, well settled that goods or services need not 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

⁴ We judicially notice that "*blind*" is defined in Webster's New Collegiate Dictionary (1979) as: "a place of concealment; esp: a. a concealing enclosure from which one may shoot game or observe wildlife."

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 producer or that there is an association between the producers of the goods or services. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Also, it has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, we agree with the Examining Attorney that applicant's deer hunting equipment and registrant's wild-fowl decoys are sufficiently related that, when marketed under the identical mark, confusion is likely. As

pointed out by the Examining Attorney, both applicant's and registrant's goods are used for hunting. Applicant's argument that the respective goods are marketed to different purchasers is not persuasive, because there is no evidence that game and fowl hunters are distinct classes of purchasers. In other words, there is nothing in this record that would indicate that deer hunters are not also fowl hunters. Thus, we must assume that there are persons who hunt both game and fowl. And if, as applicant argues, deer hunting season and duck/goose hunting season are different, a hunter would not have to choose between one type of hunting and the other, but rather could simply hunt what is "in season." In short, we believe it is reasonable to conclude that there are persons who hunt both deer, on the one hand, and duck and/or goose, on the other hand. Further, in the absence of any restrictions with respect to the channels of trade in applicant's application and the cited registration, we must assume that the respective goods travel in all of the normal channels of trade, which would include sporting goods retailers and stores that specialize in hunting equipment and supplies.

In addition, although the third-party registrations submitted by the Examining Attorney are not evidence that the marks shown therein are in commercial use, or that the

public is familiar with them, they nevertheless suggest that hunting stands/blinds and wild-fowl decoys may emanate from a single source under a single mark. See *In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993).

In view of the foregoing, we conclude that purchasers familiar with registrant's BIG FOOT wild-fowl decoys would be likely to believe, upon encountering applicant's identical BIG FOOT mark for deer hunting equipment, that the respective goods emanate from or are associated with or sponsored by the same source. In particular, purchasers may believe that registrant has expanded its product line and is now marketing deer hunting equipment.

Two additional arguments made by applicant require comment. Applicant argues that marks containing or consisting of the term BIG FOOT are weak marks which are entitled to only a limited scope of protection. In this regard, applicant submitted with its response to the first Office action, a list of BIG FOOT marks taken from the PTO's TESS database, with their corresponding registration and/or application numbers. This type of list is not the proper way to make registrations or applications of record; and the Board does not take judicial notice of registrations or applications residing at the PTO. See *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). However,

the Examining Attorney who was handling the application at that time did not object to this material so that applicant could correct its submission. Therefore, we have considered the list to be properly of record. We note, however, that many of the marks in the list are "dead" (i.e., the registrations have either expired or otherwise been cancelled and the applications have been abandoned); also there is no indication of the particular goods and/or services covered by the marks. Thus, the list is of no probative value and fails to establish that registrant's BIG FOOT mark as used in connection with wild-fowl decoys is a weak mark. Even assuming that applicant's BIG FOOT mark is somehow suggestive of certain of applicant's goods (i.e., foot rests and combined seat and foot rest), there is nothing to indicate BIG FOOT is less than arbitrary when used for wild-fowl decoys and, therefore, registrant's mark must be considered a strong mark entitled to the full scope of protection.

Finally, applicant asserts that it and the registrant have used their marks concurrently without any evidence of actual confusion, and that this shows that confusion is not likely to occur. We are not persuaded by this argument. Applicant has not provided any evidence as to the extent of its use, nor is there any evidence as to the registrant's

Ser No. 76/095,756

use, such that we can determine whether there has been an opportunity for confusion to occur. Nor have we any information as to whether the registrant has encountered any confusion.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.