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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Whigham Enterprises Inc.

Serial No. 76554271

John Wiley Horton of Pennington, Moore, Wilkinson, Bell & Dunbar, P.A. for Whigham Enterprises Inc.

Alain Lapter, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Holtzman, Drost, and Zervas, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On October 27, 2003, applicant Whigham Enterprises Inc. applied to register the mark TI CHOKE (in typed or standard character form) on the Principal Register for "shotgun choke tubes" in Class 13. The application (Serial No. 76554271) is based on an allegation of a bona fide intention to use the mark in commerce.

The examining attorney¹ has refused to register applicant's mark on two grounds. First, the examining attorney held that applicant's mark is not registrable under the provisions of Section 2(d) of the Trademark Act because it is likely to cause confusion, to cause mistake, or to deceive as a result of a registration for the mark:



for "firearms" in Class 13.² 15 U.S.C. § 1052(d).

In addition, the examining attorney also refused to register applicant's mark under the provisions of Section 2(e)(1) of the Trademark Act because the examining attorney found that the term TI CHOKE was merely descriptive of applicant's goods. 15 U.S.C. § 1052(e)(1).

After the Examining Attorney made the refusals to register final, this appeal followed.

¹ The current examining attorney was not the original examining attorney in this case.

² Registration No. 2,455,969 issued on May 29, 2001. Taurus International Manufacturing, Inc. is identified as the owner of the registration.

Descriptiveness

We begin our review by addressing the descriptiveness refusal. A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (A "mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"); In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is descriptive. Abcor, 200 USPQ at 218. See also MBNA, 67 USPQ2d at 1783 ("Board correctly found MBNA's emphasis on the regional theme through marketing promotions and picture designs provides circumstantial evidence of how the relevant public perceives the marks in a commercial environment"). Courts have long held that to be "merely descriptive," a term need only describe a single significant quality or property of the goods. In re

Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959).

The examining attorney argues (Brief at unnumbered p. 3) that the term TI CHOKE is merely descriptive because:

[T]he mark is comprised of a descriptive term - TI - and a term that simply identifies the goods - CHOKE. Specifically, the examining attorney concluded that the wording TI was descriptive of the goods in that TI was the recognized symbol for the element Titanium. This element, as the Applicant acknowledges, is a component of the goods. Consequently, TI is descriptive of the goods and since the additional wording CHOKE, as a generic term for the goods, did not create a non-descriptive commercial impression, the mark was refused registration under Section 2(e)(1) of the Trademark Act.

The term "Choke" is a generic term for "shotgun choke tubes." Applicant's literature³ defines a choke as follows:

What is a shotgun choke?
A choke is simply a tapered constriction of the gun barrel's bore at the muzzle end. The exit end of the choke is smaller by some dimension than the actual bore of the barrel. The difference is the amount of constriction. For example, if the bore of the barrel is .730 and the exit diameter of the choke is .710, you have a constriction of .020...

They can be grouped in 3 general types:

1. Fixed chokes - They are made as an integral part of the barrel and cannot be readily changed except by a gunsmith and any alteration is considered permanent.

³ *Trulock Chokes 2003 Product Resource Guide*. Applicant identified this Trulock catalog as "Applicant's Product Resource Guide." Response dated November 9, 2004 at unnumbered p. 3. See also www.fieldandclays.com ("Trulock Tool Division - Whigham Enterprises Inc.")

2. Interchangeable chokes - These can be of the "screw on" style which is externally attached or the "screw in" which is recessed into the barrel. To change the degree of constriction you simply remove and replace with a choke of a different diameter.
3. Adjustable chokes - This style of choke is adjustable throughout the entire range by turning a sleeve, which collapses or allows a collet to expand thus changing the exit diameter. A popular choke of this type is the Polychoke.

The term "Ti," is the "symbol for titanium."

Webster's II New Riverside University Dictionary (1984).⁴

Shotgun choke tubes are made of titanium. See, e.g., www.ableammo.com ("12 ga.⁵ Titanium Choke Tubes ... The strength of Titanium with half the weight of conventional tube") and www.midwayusa.com ("Briley Spectrum Mach 1 Titanium Choke Tube Perazzi 4th Generation 12 Gauge Cylinder Choke - Titanium Mach 1 choke tubes are about half the weight of steel chokes and won't affect the balance of the gun as a steel choke might"). Indeed, the symbol for titanium has been used to indicate the presence of titanium in firearms. See www.ablearms.com ("The new Browning A-Bolt Mountain Ti (titanium) weighs in at only 5 lbs., 8 oz.").

⁴ We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ A "12 gauge" is a type of shotgun. See *Shooting Industry*, April 2002 ("The base single-shot shotgun is chambered in .410, 20 or 12 gauge").

At the website www.fieldandclays.com, there is a discussion under the heading "Trulock Choke Styles ... The New Titanium." The discussion begins:

Trulock, a leading manufacturer of screw-in shotgun chokes, introduces an entirely new line of extended individually color-coded chokes made from titanium alloy "Trulock Ti Chokes."

The Ti Chokes weigh about 33% less than steel but with the same strength. This will enable the shooter to use extended Ti Chokes without adding weight to the muzzle end of the shotgun.

The fact that applicant uses the symbol for titanium rather than the word titanium does not mean that its mark is not descriptive. In a case involving the term "ALR" in all capital letters, the board found that it was merely descriptive for insulated electrical conductor building wire. Southwire Co. v. Kaiser Aluminum & Chemical Corp., 196 USPQ 566 (TTAB 1977). The record in that case established that the abbreviation "ALR" was a descriptive abbreviation of the term "aluminum revised." Id. at 574.

The Board indicated that:

It is a reasonable inference from the foregoing that the entire electric industry ... because of the adherence of most electrical codes to the National Electrical Code for which UL establishes standards, are of necessity aware of the "CO/ALR" designation for wiring devices and significance of "ALR" as meaning "aluminum revised" to distinguish from the designation "AL" previously used to identify aluminum wire that has not been upgraded or revised.

Id. at 574.

Similarly here, the term TI would be merely descriptive for titanium shotgun choke tubes. We point out that applicant has depicted its mark as a typed or standard character drawing so we must consider that the mark can be displayed in any style⁶ including as the traditional symbol for titanium "Ti." As we indicated earlier, we must view the question of descriptiveness in the context of the identified goods. In this case, the goods would include shotgun choke tubes made of titanium. When we consider the mark as whole, prospective purchasers would immediately understand that the term TI CHOKE describes the fact that applicant's choke tubes have a titanium feature. We simply disagree with applicant's assertion that some imagination would be required for prospective purchasers to understand that applicant's TI CHOKE mark describes the fact that applicant's chokes are made of titanium.

We, therefore, affirm the examining attorney's refusal to register on the ground that applicant's TI CHOKE mark is merely descriptive for shotgun choke tubes.

⁶ By presenting its mark merely in a typed drawing, an applicant asserts rights in the mark "regardless of type styles, proportions, or other possible variations." Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983).

Likelihood of Confusion

Now we address the question of whether there is a likelihood of confusion. We consider this issue by applying the 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 and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

First, we look at whether the marks, in their entirety, are similar in sound, appearance, meaning, and commercial impression. Applicant's mark is TI CHOKE without any stylization and applicant's mark consists of the letters "Ti" in a circle design.



As we indicated previously, applicant's mark is displayed in typed or standard character form so we must consider that there is no viable difference between the stylization of its letters and registrant's stylization. Therefore, the only differences between the marks are that applicant includes the generic word "choke" in its mark while registrant adds a simple circle design. The "Ti" portions of the marks are legally identical.

Regarding the term "Choke," it is clear that the term is generic for shotgun choke tubes. See *Trulock Chokes 2003 Product Resource Guide*. The Federal Circuit has noted that generic terms are often given little weight in likelihood of confusion determinations.

With respect to ALE, the Board noted that the term is generic and that the registrant disclaimed it in its registration. Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under DuPont. As a generic term, ALE simply delineates a class of goods.

In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004). Indeed, consumers familiar

with registrant's TI and circle design for firearms would likely assume the addition of the word "Choke" merely indicates that the registrant is now also the source of shotgun choke tubes.

Similarly, it would be unlikely that the circle design in the registrant's term would be relied upon by prospective purchasers to distinguish the marks. See In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) ("Neither the design element nor the generic term 'café' offers sufficient distinctiveness to create a different commercial impression. Indeed, as the board found, the design is an ordinary geometric shape that serves as a background for the word mark"). See also Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products). Thus, the marks' appearances would be similar inasmuch as the TI feature is the most noticeable element in both marks.

Applicant argues that the TI in its mark "is pronounced 'tie'" and that there is "a substantial difference in sound between Taurus International's "T i" and Petitioner's TI CHOKE." Brief at unnumbered p. 6. However, there "is no correct pronunciation of a trademark,

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and it obviously is not possible for a trademark owner to control how purchasers will vocalize its mark." Centraz Industries Inc. v. Spartan Chemical Co., 77 USPQ2d 1698, 1701 (TTAB 2006). While the marks would not be pronounced identically because of the additional word "choke" in applicant's mark, there is no basis in our analysis to distinguish the marks by the pronunciation of their common element, TI.

Regarding the meaning of the terms, it appears that both could likely be understood to have the common meaning "titanium." We have already found that the evidence demonstrates that the term "titanium" describes shotgun choke tubes. Similarly, registrant's mark would have, at least, a suggestive meaning for firearms. The meanings of the marks overlap.

As to the marks' commercial impressions, applicant argues that registrant uses its mark "exclusively as a 'proof mark' that is mechanically stamped in tiny print on the barrel of the gun to indicate the gun has passed their safety tests." Brief at unnumbered p. 6. However, registrant's goods are identified simply as firearms and nothing limits registrant's use to a "proof mark." The commercial impressions of the marks TI CHOKE and TI and circle design would be very similar.

When we compare the marks in their entireties, we hold that their similarities outweigh their differences because the marks both contain the same non-generic term and the differences are minor. We add that even if the cited mark is weak, "weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services." In re Colonial Stores, 216 USPQ 793, 795 (TTAB 1982). See also In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

The next critical factor is whether registrant's and applicant's goods are related. Applicant's goods are shotgun choke tubes and registrant's goods are firearms. We must consider the goods as they are identified in the identifications in the application and registration. 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"). Registrant's goods are identified simply as firearms. Shotguns are a type of firearm. See Webster's II New Riverside University Dictionary (1984) (emphasis

added) ("Shotgun" - "A shoulder-held *firearm* that fires multiple pellets through a smooth bore"). Therefore, we must assume that registrant's firearms include shotguns. 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 [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed"). We add that there is evidence that registrant is actually the source of a rifle/shotgun combination firearm. *Shooting Industry*, April 2002 ("Also from Taurus, Rossi's Matched Pairs shotgun/rifle comes in full size and youth size. The base single-shot shotgun is chambered in .410, 20 or 12 gauge. The second barrel is chambered in .22 Long Rifle, .22 magnum, .223 or .243"). As applicant's catalog demonstrates, chokes include fixed chokes that are an integral part of the barrel of the shotgun and interchangeable chokes that are screwed in or screwed on to the barrel. Applicant's shotgun choke tubes would be closely related to shotguns inasmuch as the choke tubes are

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designed to be attached to a shotgun. While applicant argues (Brief at unnumbered p. 5) that it "does not sell products that would be appropriate to Taurus International's handguns or rifles," that is not the test. We must assume that registrant's firearms include shotguns and these shotguns would include those that would be compatible with applicant's shotgun choke tubes.

Inasmuch as the marks TI and circle design and TI CHOKE are similar and firearms and shotgun choke tubes are closely related, we hold that there is a likelihood of confusion in this case.

Decision: The refusals to register the mark on the grounds of mere descriptiveness and likelihood of confusion are affirmed.