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THE TTAB

Oral Hearing: February 21, 2008

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Arizona Lacrosse, LLC

Serial No. 76561842

Serial No. 76561843

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for Arizona Lacrosse, LLC.

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Before Quinn, Holtzman and Mermelstein, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Arizona Lacrosse, LLC, has filed applications to
register the marks shown below:

Serial Nos. 76561842 and 76561843

Application Serial No. 76561842



Application Serial No. 76561843:



The two applications are for the same goods, ultimately identified as follows:

Clothing, namely shirts, t-shirts, shorts, lacrosse uniforms, jerseys, sweatshirts, boxer shorts, robes, sleepwear and socks; and autographed shirts, t-shirts, shorts, lacrosse uniforms, jerseys, sweatshirts, boxer shorts, robes, sleepwear and socks, coats, jackets, pullovers, sweaters, pants, sweat pants and tops, caps, visors, shoes, athletic shoes, tank tops, scarves, stocking caps, gloves, vests, pajamas, underwear, rainwear, ponchos, belts and Halloween costumes.

The applications were filed on November 24, 2003, based on an allegation of a bona fide intention to use the mark in commerce. The word ARIZONA has been disclaimed in each

Serial Nos. 76561842 and 76561843

application. The '843 application contains the following description of the mark: "Scorpion holding lacrosse stick with the words Arizona Sting."

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act in each application on the ground that applicant's marks, when applied to applicant's goods, so resemble the mark shown below for "clothing, namely, T-shirts, tank tops, sweat shirts, knit shirts, shorts, pants, woven shirts, sweaters, swimwear, hats and socks," as to be likely to cause confusion.¹



When the refusal was made final, applicant appealed.² Briefs have been filed, and an oral hearing was held.

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. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key

¹ Registration No. 2781698; issued November 11, 2003.

² The appeals were consolidated by the Board on August 23, 2006.

Serial Nos. 76561842 and 76561843

considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the goods. Registrant's goods include t-shirts, sweat shirts, knit shirts, woven shirts, shorts and socks. These goods are identical or legally identical at least as to the shirts, shorts, sweatshirts, and socks identified in the applications.

Applicant, however, characterizes its goods as "team branded clothing," arguing that "there is absolutely no evidence in the record supporting the conclusion that an average consumer will encounter the marks in the same retail forum"; and that to the contrary "the evidence in the record establishes that Applicant's Mark is used in connection with goods sold to fans of Applicant's professional Lacrosse team." Applicant maintains that consumers "will undoubtedly know -- by virtue of both the design element associated with [the] Mark -- and the fact that they are likely to be purchasing the Mark at Applicant's team shop -- that the source of the Mark is the professional Lacrosse team Arizona Sting, and not the Competing Mark."

First, applicant's presumptions about what consumers would know or think when confronted with the respective marks on these goods are unsupported, and in any event, legally irrelevant. The

Serial Nos. 76561842 and 76561843

question of likelihood of confusion is determined on the basis of the identification of goods set forth in the applications and registration, rather than on the basis of what applicant claims, or the record may show, as to the actual nature of the goods, or as to the actual channels of trade or purchasers for the goods. See *J & J Snack Foods Corp. v. McDonalds Corp.*, 932 F.2d 1460, 1464, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

There are no restrictions in the applications or in the registration as to these identical goods. It must therefore be presumed that applicant's goods will include clothing that is not "team branded"; that while lacrosse fans may be among the purchasers of these goods, both applicant's and registrant's clothing would be purchased by customers of all types, including ordinary consumers; and that applicant's and registrant's clothing would be sold through all normal channels of trade, which would include all of the usual retail outlets for such goods. In other words, we must presume the goods, as well as the channels of trade and purchasers for both applicant's and registrant's goods would be the same. See *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000); and *In re Smith & Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Serial Nos. 76561842 and 76561843

We turn next to the similarity or dissimilarity of the marks in their entireties in terms of sound, appearance, meaning and commercial impression, keeping in mind that when marks would appear on identical goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)..

The test under this du Pont factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In addition, while marks must be compared in their entireties, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." In re *National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). "Indeed, this type of analysis appears to be unavoidable." *Id.*

Serial Nos. 76561842 and 76561843

When applicant's and registrant's marks are considered in their entireties, giving appropriate weight to the features thereof, and considering that the marks are used on identical goods, we find that the overall similarities in the marks outweigh their differences.

At the outset, we note that applicant takes issue with the examining attorney's characterization of applicant's marks as STING ARIZONA, insisting throughout its briefs that its marks "[are] now--and [have] always been -- ARIZONA STING."³ Suffice it to say that whether applicant's marks are characterized as ARIZONA STING or STING ARIZONA, has no affect on our analysis of the marks or on our ultimate determination of whether the marks when used on the identical goods are likely to cause confusion.

Applicant maintains that "there are virtually no professional sports teams whose place name comes after the team moniker" and that "no professional lacrosse fan is going to think that it is encountering a mark for anything other than the 'ARIZONA STING.'" However, as we said earlier, the purchasers

³ Applicant, in its brief, lists the serial numbers of eight applications claiming that the applications are all for the mark "Arizona Sting" and contending that these applications "are part of the record." The examining attorney states that he does not object to this late-filed evidence, so we have considered it as of record for whatever probative value it may have. That said, however, this evidence is of no probative value. We do not have the files for those applications or any information about the goods and/or services, and even if we did, those other applications would have no bearing on the question of whether there is a likelihood of confusion in the cases before us which must be decided on their own facts and record.

Serial Nos. 76561842 and 76561843

for applicant's goods are not limited to lacrosse fans; they include ordinary members of the general public who may or may not be familiar with the names of lacrosse teams, or even aware that this mark identifies a sports team. Moreover, even those purchasers who are familiar with the team are going to see these marks as emphasizing the team "moniker," STING. It is common knowledge that sports teams are also referred to by their names or nicknames alone, that is, without an accompanying geographic indicator.⁴

We turn then to a comparison of the marks as presented in the applications and registration. We begin by noting that the shared literal term, STING, is an essential element of both applicant's and registrant's marks. We also point out that the word STING is entirely arbitrary in relation to registrant's goods.⁵ Furthermore, there is no evidence that the word is

⁴ Indeed, applicant's evidence shows that the team is promoted as STING. Applicant submitted a printout from the website www.arizonastinging.com which according to applicant shows applicant's "actual usage" of its mark. We find that this evidence supports our view of the marks. The web pages contain numerous references to "STING" alone which further undercuts applicant's claim that the mark would necessarily be perceived as "Arizona Sting." These references include "STING HEADLINES"; "STING ACQUIRE FIRST ROUND PICK"; "STING FALL TO CALGARY"; and "STING TICKET INFO."

⁵ As requested by the examining attorney, we take judicial notice of the definition of "sting" in Random House Compact Unabridged Dictionary (Special Second Edition 1996) as meaning, for example, "to prick or wound with a sharp-pointed, often venom-bearing organ." None of the meanings has any relationship to clothing. The Board may properly take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Serial Nos. 76561842 and 76561843

commonly used or registered by others in the clothing field. As a result, registrant's mark which prominently features this term must be considered a strong mark entitled to a broad scope of protection. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("VEUVE is arbitrary term as applied to sparkling wines, and thus is conceptually strong as trademark"); and *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

Because the arbitrary term STING is the only literal component of registrant's mark, and it is a strong component of applicant's marks, the respective marks when spoken are similar in sound. The only additional word in applicant's mark is the disclaimed term ARIZONA. This term is not, as applicant contends, "a distinctive" addition to the mark. It is, instead, a non-distinctive, descriptive word which simply provides geographic information about the goods. Thus, while this term is not ignored in the analysis, the fact remains that it is far less important than STING in creating an impression, and it is of little, if any, source-distinguishing effect. See *In re National Data Corp.*, supra ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion

Serial Nos. 76561842 and 76561843

of a mark").⁶ Furthermore, the term STING, as the first word that purchasers will hear or see is more likely to have a greater impact on purchasers and be remembered by them when they encounter the marks at different times on identical goods. See *Palm Bay*, supra at 1692 ("The presence of this strong distinctive term [VEUVE] as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE.")).

The arbitrary word STING also contributes substantially to the meaning and the commercial impression of the marks. The "scorpion" design in the '843 application merely reinforces the word STING. Thus, the design adds to, but does not significantly change, the meaning and commercial impression conveyed by the word STING alone. Also, the stylized script of STING in registrant's mark, with its sharp, pointed edges at the beginning and end of the word, resemble stingers, perhaps scorpion stingers, which further enhances the impact of the word STING.

There are differences between the marks in appearance, but those differences are not sufficient to overcome the similarities in sound, meaning and commercial impression. In the '842 application, the word STING is clearly the predominant visual

⁶ Contrary to applicant's contention, *National Data* is clearly on point and the principle cited in that case is not limited to generic terms.

Serial Nos. 76561842 and 76561843

element. The word ARIZONA is so small that it may barely register if the marks are viewed from any distance. Furthermore, while the mark in the '843 application contains a large design feature, it is not, as applicant claims, a "design mark." In this regard, applicant's reliance on *In re Electrolyte Labs, Inc.*, 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir. 1990) and similar cases, such as *In re Burndy Corp.*, 300 F.2d 938, 940 133 USPQ 196 (CCPA 1962), is misplaced. Those cases involved composite "letter" marks which, as the Court in *Electrolyte* noted, can be close to design marks and therefore may or may not be vocalized. Here, we are dealing with composite marks that feature clearly identifiable and pronounceable words. In any event, those cases do not compel a finding that the design, or the design features, in the respective marks in the present case are sufficient to distinguish the marks as a whole.

We find, instead, that the word STING, notwithstanding the presence of the scorpion design, is still a visually significant, if not the most significant, element of that mark. Furthermore, the word portion of these composite marks is entitled to greater weight because purchasers will rely on the words, rather the designs, in calling for or referring to applicant's and registrant's clothing. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

Serial Nos. 76561842 and 76561843

In view of the foregoing, and because similar marks are or will be used in connection with identical goods, we find that confusion is likely.

To the extent that there is any doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register under Section 2(d) as to both applications is affirmed.