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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L.L. Bean, Inc.

Serial No. 78238339

Kevin R. Haley of Brann & Isaacson for L.L. Bean, Inc.

Georgia Ana Carty Ellis, Trademark Examining Attorney, Law
Office 108 (Andrew Lawrence, Managing Attorney).

Before Bucher, Holtzman and Drost, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

L.L. Bean, Inc. seeks registration on the Principal
Register of the mark **ORION** (*standard character drawing*) for
goods recited in the application, as "fishing rods and
reels" in International Class 28.¹

This case is now before the Board on appeal from the
final refusal of the Trademark Examining Attorney to
register this mark based upon Section 2(d) of the Trademark
Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney

¹ Application Serial No. 78238339 was filed on April 16, 2003
based upon applicant's allegation of first use anywhere and first
use in commerce at least as early as January 25, 2000.

has found that applicant's mark, when used in connection with the identified goods, so resembles the mark **ORION** (*standard character drawing*) registered for goods identified as "golf clubs" also in International Class 28,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney submitted briefs. Applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant argues that these goods are not related, that, in the marketplace, the respective trade channels cannot overlap, and that the discriminating nature of the sophisticated consumers of both of these products prevents confusion. Applicant also argues that the use of its house mark in connection with the involved trademark on applicant's goods reduces the likelihood of confusion between the registered mark and the applicant's mark. Finally, in its appeal brief, applicant has argued that should we find a likelihood of confusion on the circumstances of the case, applicant should be permitted to

² Reg. No. 2514067 issued to Focus Golf Systems, Inc. on December 4, 2001, based upon allegations of use in commerce since at least as early as June 16, 1998.

amend its application, explicitly limiting the channels of trade of the goods to L.L. Bean outlets.

By contrast, the Trademark Examining Attorney contends that ORION is a strong arbitrary mark for sporting goods, that applicant has adopted an identical mark to that of registrant, that applicant's use of its house mark on the goods cannot reduce the likelihood of confusion herein, that these respective goods "are somewhat related because they are the same class of goods, and because they are sporting tools used in the pursuit of recreational activities," and that "140 registered third-party registrations" she made of record demonstrate that "there are hundreds of entities that market these products simultaneously under the same trademark" and that "consumers are frequently exposed to golfing and fishing products being sold under the same marketing conditions." She also rejects applicant's proposed conditional amendment to the identification of goods.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the

similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the du Pont factor focusing on the similarity of the marks in their entireties. The Trademark Examining Attorney argues that applicant's mark is the same as the registered mark in appearance, sound, connotation and commercial impression. We agree with the Trademark Examining Attorney that the marks are identical.

As to the strength of the cited mark, there is certainly no evidence in this record as to the renown of the cited mark. Nonetheless, the Trademark Examining Attorney correctly notes that an arbitrary mark such as registrant's ORION mark is inherently distinctive and hence should be afforded a wide ambit of protection. See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). As to the du Pont factor focusing on the number and nature of similar marks in use on similar goods, the Trademark Examining Attorney also argues that it is significant that the registered mark is the only mark on the federal trademark register where the word ORION is used in connection with any kind of sporting goods. We find no evidence in the record suggesting that this is a weak mark

as applied to registrant's goods. Hence, these du Pont factors all favor the position taken by the Trademark Examining Attorney.

Accordingly, we turn to the similarity or dissimilarity and nature of the goods as described in the application and cited registration. As noted above, the marks are identical in every respect. With both registrant and applicant using the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ["[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source."].

In order to support a holding of likelihood of confusion, it is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they

originate from the same producer. See In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). We agree with applicant that our analysis must focus on the way the goods are encountered in the marketplace by typical consumers and whether consumers will be confused as to the source of the products. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 23:58 (4th ed. 2004) [a tribunal must "attempt to recreate the conditions under which prospective purchasers make their choices" in order to arrive at a "realistic" evaluation of likelihood of confusion].

We certainly have no *per se* rule that all sporting tools used in recreational activities are related. However, the Trademark Examining Attorney has made of record third-party registrations which show that a number of third parties have registered marks for both golf clubs and fishing rods:

REG. No. 2615712



for "toys and games, namely, ... golf clubs, fishing rods and reels, ..." in International Class 28;³

³ Reg. No. 2615712 issued to Cartoon Network LP on September 3, 2002 based upon registrant's claim of use in commerce since at least as early as August 27, 2001.

REG. No. 2474314 for "sporting goods, namely, golf clubs,
CORK-T GRIP fishing rods" in International Class
28;⁴

REG. No. 2821567 for "sporting goods, toys and games,
 **PROMONTORY** namely, golf balls, golf clubs, golf
THE RANCH CLUB bags, golf putters, golf divot repair
tools, golf tees, golf ball markers,
golf bag covers, club head covers, golf
gloves, tennis rackets, tennis ball,
skis, snowboards, ski poles, ski carry
bags, ski boot carry bags, ice skates,
fishing tackle, fishing rods, fishing
reels, ..." in International Class 28;⁵

REG. No. 2735111 for "tennis and racquetball rackets;
TOURNAMENT golf balls, and golf accessories, namely
CHOICE golf head covers, golf balls, practice
golf balls, practice nets, golf bag
travel covers, golf gloves, golf tees,
golf ball shaggers, and golf clubs;
darts, fishing reels, terminal fishing
tackle, and fishing accessories, namely
bait buckets, crab traps, minnow seines,
rods, lures, reel cases; hunting
accessories, namely target throwers and
arrow cases" in International Class 28;⁶

REG. No. 2759301 for " ... recreational sporting good
CHRYSLER items, namely, ... fishing rods, reels and
BUILDING tackle, skis, ski poles, bindings,
snowboards, golf clubs, ..." in
International Class 28;⁷

⁴ Reg. No. 2474314 issued to Herbert E. Hoff on July 31, 2001 based upon registrant's claim of use in commerce since at least as early as October 7, 1999. Registrant disclaims the word GRIP apart from the mark as shown.

⁵ Reg. No. 2821567 issued to Pivotal Promontory Development, L.L.C. on March 9, 2004 based upon registrant's claim of use in commerce since at least as early as March 1, 2001.

⁶ Reg. No. 2735111 issued to Academy Managing Co., L.L.C. on July 8, 2003 based upon registrant's claim of use in commerce since at least as early as October 28, 2000.

⁷ Reg. No. 2759301 issued to 405 Lexington L.L.C. on September 2, 2003 based upon registrant's claim of use in commerce since at least as early as March 4, 1999.

REG. No. 2117540 for "toys and sporting goods, namely, ...
TOP CAT golf clubs; fishing reels and rods; ... "
in International Class 28;⁸

REG. No. 1875371 for "sporting goods, sports equipment
Franklin and games, namely ... golf clubs and
balls, ... fishing rods and reels, ..." in
International Class 28;⁹

REG. No. 2207366 for "sporting goods, namely, golf balls,
SOUTH BEACH golf gloves, tennis balls, fishing
equipment, namely, fishing rods, fishing
reels, hooks, leaders, line, and tackle;
and in-line skate accessories" in
International Class 28;¹⁰ and

REG. No. 1637672 for "fishing equipment, namely fishing
G. LOOMIS rods, rod blanks, fishing reels, fishing
line, golf clubs and golf club shafts"
in International Class 28.¹¹

Although third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, nevertheless third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type

⁸ Reg. No. 2117540 issued to Hanna-Barbera Productions, Inc. on December 2, 1997 based upon registrant's claim of use in commerce since at least as early as January 1991.

⁹ Reg. No. 1875371 issued to Franklin Sports, Inc. on January 24, 1995 based upon registrant's claim of use in commerce since at least as early as October 15, 1993; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

¹⁰ Reg. No. 2207366 issued to Arbor Packaging Inc. on December 1, 1998 based upon registrant's claim of use in commerce since at least as early as August 10, 1998.

¹¹ Reg. No. 1637672 issued to G. Loomis, Inc. on March 12, 1991 based upon registrant's claim of use in commerce since at least as early as August 1982; renewed.

which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).¹²

These registrations, thus, tend to demonstrate that goods of the type identified in applicant's application and the cited registration can emanate from the same source, and be offered under the same mark.

Two other third-party registrations suggest similarities in the underlying technologies used in fabricating golf club shafts and fishing rods:

REG. No. 2032398 for "tubular structures of composite
FIBERSPAR material for exercise equipment; namely,
 gymnastic bars and weight lifting
 machines; tubular shafts of composite
 materials for use in athletic and
 sporting articles; namely, for golf
 clubs, fishing rods, hockey sticks,
 baseball bats, tennis racquets, squash
 racquets, racquetball racquets,
 badminton racquets and table tennis
 racquets" in International Class 28.¹³

¹² Although the Trademark Examining Attorney states that "there are hundreds of entities that market these products simultaneously under the same trademark," we find the evidence would more correctly support a conclusion that there are "dozens" of such entities. In addition to multiple registrations owned by the same enterprise, or registrations where the registrant was simply manufacturing or marketing bags specifically designed for golf clubs and fishing rods and reels, many of those third-party registrations submitted by the Trademark Examining Attorney are owned by foreign entities, which registrations are based on Section 44 of the Lanham Act, not on use in commerce.

¹³ Reg. No. 2032398 issued to Fiberspar Corp. on January 21, 1997 based upon registrant's claim of use in commerce since at least as early as February 13, 1994.

REG. No. 2200720 for "sporting goods, namely, fishing
CAPE FEAR rods and golf club shafts, for
ROD COMPANY distribution in the wholesale channel of
trade" in International Class 28;¹⁴ and

As to the du Pont factor focusing on the channels of trade, applicant argues that it has established its own channels of trade:

L.L. Bean markets and sells all its products, including its ORION fishing equipment, solely through its L.L. Bean retail stores, factory stores, L.L. Bean catalogs and the L.L. Bean Internet site, www.llbean.com. L.L. Bean does not and has never marketed its products through third-party vendors or general retail outlets.

...

L.L. Bean is a direct marketer. Its ORION fishing rods are sold exclusively at L.L. Bean stores, on L.L. Bean's website, or through L.L. Bean catalogs. The ORION fishing rod will not appear in the same sporting goods section of any department store with Orion brand golf clubs.

Applicant's appeal brief, pp. 3, 8-9. However, even if we were to conclude that applicant's and registrant's respective goods would never be sold in the very same store, we find that they would still be sold in the same types of retail stores. Consumers acquainted with registrant's golf clubs are likely to encounter both kinds of goods. That is, individuals who would be the consumers

¹⁴ Reg. No. 2200720 issued to Hextek Technologies Corp. on October 27, 1998 based upon registrant's claim of use in commerce since at least as early as June 16, 1997.

of golf clubs would also be prospective purchasers of applicant's fishing rods and reels.

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, applicant argues that inasmuch as golf clubs and fishing rods and reels are expensive products,¹⁵ the relevant purchasers will all be sophisticated. In the alternative, applicant argues that even if it should be determined that some of the listed goods are not expensive, both groups of sports enthusiasts (e.g., fishermen and golfers) can be presumed to be very concerned with the quality, characteristics and origin of their equipment, and hence will be immune to confusion.

Applicant's identification of goods does not limit its goods to "expensive" fishing rods and reels, nor is there any evidence that fishing rods and reels are inherently expensive. Even if applicant is correct that the purchase of items such as golf clubs and fishing rods entails a certain amount of care and deliberation, when strong, identical marks are applied to related sporting goods such as fishing rods and golf clubs, even somewhat sophisticated

¹⁵ While applicant's ORION four-piece fishing rod outfit retails for more than \$650.⁰⁰, the record contains no specific price data for registrant's ORION golf clubs.

purchasers would not be immune to source confusion. See In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999).

Finally, at the end of its appeal brief, applicant requests a proposed, alternative amendment:

In the event that the Board does not overturn the Examining Attorney's refusal of registration, the Applicant respectfully requests that the Board accept an amendment to the Applicant's application in order to limit the channels of trade available to the goods and thereby restrict the potential for confusion. To accomplish that purpose, the Applicant proposes that the description of goods and services be amended by replacement with the following:

"Fishing rods and reels marketed solely through Applicant's retail, catalog and online outlets."

The Trademark Examining Attorney correctly objects to this amendment as being untimely.¹⁶ Furthermore, even if this amendment to the identification of goods had been unequivocal and submitted in a timely manner, consistent with our earlier discussion, we find that it would not have been effective in avoiding a likelihood of confusion herein. There are no limitations in the registration, so we must presume that registrant's golf clubs could be sold

¹⁶ An unequivocal amendment to the identification of goods made at this late date should have been accompanied by a request for remand and a showing of good cause. See TBMP § 1205.01 (2d ed. 2004). Applicant has cited no precedent for the insertion into its appeal brief of an alternative position of this nature, and we know of none.

in all channels of trade. Therefore, when consumers who are familiar with ORION golf clubs encounter ORION fishing rods, even in applicant's catalogues and retail outlets or through its online promotional efforts, they are likely to believe there is some association.¹⁷

In conclusion, we find that applicant has adopted a strong arbitrary mark identical to that of registrant, that these respective goods are related in such a manner that even somewhat sophisticated consumers exposed to golfing and fishing products being marketed simultaneously under this identical mark are likely to be confused as to source.

Decision: The refusal to register this mark based upon Section 2(d) of the Lanham Act is hereby affirmed.

¹⁷ When consumers encounter applicant's fishing rods in applicant's catalogues, online, in retail or factory outlets, the L.L. BEAN house mark will be prominently displayed. The specimens show it used on the rod within inches of the ORION product mark. However, because applicant's L.L. BEAN house mark is not part of the mark involved herein, many of the Board cases cited by the Trademark Examining Attorney are not pertinent to our decision.

On the other hand, to the extent we find that the Trademark Examining Attorney has made a case for the relatedness of these respective goods, should L.L. Bean, as the junior user, enjoy sales of an overwhelming volume of its ORION fishing rods and reels, we find that the possibility of "reverse confusion," as argued by the Trademark Examining Attorney, certainly does not help applicant's case herein.