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Bucher

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Heckler & Koch GmbH

Serial No. 78440897

George W. Cooper of Cooper & Kurz for Heckler & Koch GmbH.

John Dwyer, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

Before Bucher, Drost and Taylor, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Heckler & Koch GmbH seeks registration on the Principal Register of the mark **M7** *(in standard character format)* for goods identified in the application, as amended, as "firearms, namely small arms, being pistols and revolvers, sub machine guns, semi automatic and automatic small arms, ammunitions and projectiles, explosives, fireworks and covers for firearms," in International Class 13.[1]

[1] Application Serial No. 78440897 was filed on June 24, 2004 seeking registration under Trademark Act Sections 44(d) and 44(e), 15 U.S.C. § 1051(d) and § 1051(e).

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when used with the identified goods, so resembles the registered mark **M7** for "bayonets" in International Class 8 as to be likely to cause confusion, to cause mistake or to deceive.[2]

Applicant has appealed. Both applicant and the Trademark Examining Attorney have filed briefs. We affirm the refusal to register.

***Preliminary Matters***

We first address an evidentiary point. With its appeal brief, applicant has submitted a printout from an Internet website for arms collectors. This evidence is untimely and was not properly made of record prior to the appeal. The Trademark Examining Attorney has properly objected to it in his brief and the evidence will not be considered. *See* 37 C.F.R. § 2.142(d), which provides that the record in the application should be complete as of the filing of the appeal. We also point out that, even if we were to consider the printout, it has no probative value as it is an

[2] Registration No. 2565008 issued to The Ontario Knife Company on April 30, 2002 based upon an application filed on May 9, 2000 claiming first use anywhere and first use in commerce at least as early as January 1, 1987.

impermissible collateral attack on the cited registration inasmuch as applicant appears to be arguing that the term **M7** was coined, not by registrant, but by the United States military as part of its weapons designation nomenclature. During *ex parte* appeals, an applicant will not be heard on matters that constitute a collateral attack on the cited registration. *See In re Dixie Restaurants,* 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 1387, 165 USPQ 515, 517 (CCPA 1970); *In re Peebles Inc.* 23 USPQ2d 1795, 1797, n.5 (TTAB 1992); and *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2014-15 (TTAB 1988).

We also must examine the timeliness of applicant's reply brief. The Trademark Examining Attorney's appeal brief was mailed on December 7, 2006, making applicant's reply brief due twenty days later, on December 27, 2006. 37 C.F.R. § 2.142(b)(1). However, applicant's reply brief was not filed until January 10, 2007 and is therefore untimely. Accordingly, applicant's reply brief and the arguments therein have not been considered. We hasten to add that even if we had considered applicant's reply brief, it would not have changed the outcome herein.

### *Likelihood of Confusion*

We turn then to a consideration of the issue of likelihood of confusion. Our determination is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on that issue. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

### Comparison of the Marks

Turning first to the similarity of the marks, we find that Applicant's mark and Registrant's mark are identical. Applicant's mark is **M7** in standard character format and Registrant's mark is **M7** in typed form. Hence, both applicant and registrant may use the mark in any form and

are not limited to any particular depiction or stylization. *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicant has argued that the term "M7" is weak for bayonets, and therefore, that it is entitled to a limited scope of protection. This argument is based primarily on the Trademark Examining Attorney's initial refusal of this mark as merely descriptive under Section 2(e)(1) of the Trademark Act. The Trademark Examining Attorney subsequently withdrew this basis for refusal, and argues in his brief that the term "M7" is a "coined" term entitled to a relatively broad scope of protection. The majority of the evidence in the record regarding the weakness of the term "M7" for bayonets appears to refer to Registrant's own goods. In the absence of evidence in the record showing use of the term M7 or similar marks used by others on similar goods as required by the sixth *du Pont* factor, we are inclined to agree with the Trademark Examining Attorney. Based on this record, we cannot conclude that **M7** is a weak mark entitled to a narrow scope of protection. *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001) [the term "Pine Cone" is wholly arbitrary as applied to fresh fruit].

## Relatedness of the Goods and Channels of Trade

Turning next to the *du Pont* factor focusing on the relatedness of the goods, we note that if the marks of the respective parties are identical, the relationship between the goods or services need not be as close to support a finding of likelihood of confusion as would be required in a case where there are differences between the marks. *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981).

Applicant's goods are identified as "firearms, namely small arms, being pistols and revolvers, sub machine guns, semi automatic and automatic small arms, ammunitions and projectiles, explosives, fireworks and covers for firearms" in International Class 13. The goods in the cited registration are "bayonets" in International Class 8.

Applicant argues that its firearms are "completely different in use and application from bayonets" (applicant's appeal brief at 1) and therefore, its mark is entitled to registration. However, the test is not whether the goods are the same or similar. The goods or services do not have to be identical or even competitive in order to determine that there is a likelihood of confusion. It is sufficient that the goods or services of the applicant and the registrant are so related that the circumstances surrounding

their marketing are such that they are likely to be encountered by the same persons under circumstances that would give rise to the mistaken belief that they originate from the same source. *In re Melville*, 18 USPQ2d at 1388, and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002) [for example, third parties sell both maps and children's activity books under the same mark].

In support of his refusal, the Trademark Examining Attorney has attached evidence from third party websites showing that bayonets are still widely used in connection with military rifles, and that, in fact, bayonet training remains an important part of military training. This evidence also shows that many bayonets are designed to fit particular rifles as part of a complete weapons system, and that some rifles feature permanently-mounted bayonets. Moreover, the Trademark Examining Attorney included a number of registrations showing that some firearms manufacturers, including applicant, Heckler & Koch GmbH, offer both small arms and bayonets under the same mark:

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| **STEYR** | for, *inter alia*, bayonets and rifles, guns and pistols[3] |

[3] Registration No. 1635979 issued on February 26, 1991; renewed.

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| STEYR MANNLICHER | for, *inter alia*, bayonets and rifles, guns and pistols[4] |
| HK | for, *inter alia*, bayonets and firearms[5] |
| HKJS | for, *inter alia*, bayonets and firearms[6] |
| HK | for, *inter alia*, bayonets and firearms[7] |
| **G 36** | for, *inter alia*, bayonets and firearms[8] |
| **M8** | for, *inter alia*, bayonets and firearms[9] |

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[4] Registration No. 1641056 issued on April 16, 1991; renewed.

[5] Registration No. 2715006 issued to Heckler & Koch GmbH on May 13, 2003.

[6] Registration No. 2912338 issued to Heckler & Koch GmbH on December 21, 2004.

[7] Registration No. 3011559 issued to Heckler & Koch GmbH on November 1, 2005.

[8] Registration No. 3028713 issued to Heckler & Koch GmbH on December 13, 2005.

[9] Registration No. 3125660 issued to Heckler & Koch GmbH on August 8, 2006.

We find that this evidence demonstrates that firearms and bayonets are related goods, that a number of third parties have registered the same mark for both bayonets and firearms, and that bayonets and firearms have been shown to travel in the same channels of trade.[10]

## The conditions under which and buyers to whom sales are made

Applicant argues that consumers of applicant's and registrant's goods "are sophisticated enough not to confuse a firearm with a bayonet nor would they assume a connection as to the source of origin" (applicant's appeal brief at 1). While applicant is correct that military purchasers will exercise care in purchasing weapons, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); and *In re Pellerin Milnor Corp.,* 221 USPQ 558 (TTAB 1983). Moreover, the Trademark Examining Attorney's evidence demonstrates that there is a significant secondary market for firearms and bayonets among collectors

[10] In addition to articles drawn from *The Roanoke Times*, *Spokane Spokesman-Review* and *Sunday News* (Lancaster, PA), the Trademark Examining Attorney submitted for the record a sampling of Internet websites such as: http://www.floridagunworks.com/, http://www.northridgeinc.com/, http://www.marstar.com/, http://www.southernohiogun.com/, http://www.gunsamerica.com/, and http://www.collectiblefirearms.com/.

who may not be as sophisticated as are military purchasers. We find this to be a relevant class of purchasers for purposes of our determination of likelihood of confusion. Accordingly, from applicant's vantage point, this factor is neutral, at best, and we find that confusion as to the source of the goods remains likely.

**Conclusion: Likelihood of Confusion**

In conclusion, we find that because of the identical nature of the marks, the relatedness of the identified goods and, the overlap in their respective channels of trade, confusion is likely between applicant's mark and the mark in the cited registration.

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