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Mailed:
18 January 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rawlings Sporting Goods Company, Inc.

Serial No. 78483560

Penny R. Slicer of Stinson Morrison Hecker LLP for Rawlings Sporting Goods Company, Inc.

George M. Lorenzo, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Grendel, Drost, and Cataldo, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On September 14, 2004, applicant, Rawlings Sporting Goods Company, Inc., applied, under the intent to use provisions of Section 1(b) of the Trademark Act (15 U.S.C. § 1051(b)), to register the mark PLASMA (standard character mark) on the Principal Register for "sporting goods, namely, baseball bats" in Class 28. Serial No. 78483560. The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a prior registration (No. 2,090,128)

for the mark BLACK PLASMA (in typed or standard character form) for "golf clubs" in Class 28.[1] When the examining attorney finally refused registration, this appeal followed.

In likelihood of confusion cases, we consider the facts in light of the factors set out by our principal reviewing Court 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). More specifically, the Court's predecessor explained 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).

We begin by considering the similarities and dissimilarities of the marks. This factor "requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" Palm Bay Imports

[1] Issued August 19, 1997; affidavits under Sections 8 & 15 accepted or acknowledged.

Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting du Pont, 177 USPQ at 567). Here, applicant's mark consists of a single word PLASMA, without any stylization or design. The examining attorney has cited a registration for the mark BLACK PLASMA, also without stylization or design. Therefore, both marks contain the identical word "Plasma" and registrant's mark also includes the word "Black." There is no evidence that the word "Plasma" has any meaning in the field of golf clubs or baseball bats so that it appears to be an arbitrary term.

The additional word, "Black," in the registered mark, the examining attorney argues, "is at the very least suggestive, if not descriptive, of the color of the registrant's sporting goods, and would have little significance as an indication of a particular source of the sporting goods." Brief at 4. In response, applicant maintains that the "term 'black' has many meanings and connotations beyond mere color." Reply Brief at 2.[2] While we have considered applicant's dictionary definitions, it

[2] We take judicial notice of applicant's submitted dictionary definitions for the term "black." 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). However, we will not consider the Internet printouts untimely submitted with applicant's reply brief. The record should be complete prior to appeal. 37 CFR § 2.142(d).

is not clear why the term "black" would not be a reference to the color "black" as opposed to definitions such as "thoroughly sinister or evil," "very sad" or "marked by occurrence of disaster."

We must, of course, compare the marks in their entireties, but "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] 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). In this case, the term PLASMA is the only feature of applicant's mark and we agree with the examining attorney that it is the dominant feature of registrant's mark. Not only is it an arbitrary term but the other term in the cited registration is simply the term "black." Consumers are not likely to distinguish the marks based on this term that can be used to describe a feature of the goods. While the presence of the term "black" is a difference, it not does not significantly change the arbitrary meaning or commercial impression of the marks. For example, the difference in meaning or commercial impression between PLASMA and PLASMA that is modified by the term BLACK for marks on these sporting goods would not be apparent to many purchasers.

Again, while the additional word "BLACK" would create differences between the pronunciation and appearance of the marks, the identical common, arbitrary portions of the marks would reinforce their similarities.

We have considered applicant's argument that "it is the first word, not the second word, that is more likely to be the dominant portion" citing the Palm Bay case. However, the Palm Bay case does not stand for the proposition that the first word is always the dominant term. Indeed, in that case, the Federal Circuit went on to explain that: "The presence of this strong distinctive term 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." 73 USPQ2d at 1692. That is not the case here where registrant's second term is the strong distinctive term and registrant's initial term "Black" is the more common and less distinctive term.

Both applicant's and registrant's marks emphasize the word "Plasma."[3] Consumers are likely to assume that

[3] Applicant has submitted copies of two registrations for the marks PLASMA EDGE for skis (No. 1,972,365) and PLASMA AIR SYSTEMS for regulators for use with air guns used in paint ball (No. 2,980,048). These marks and goods are significantly different and they certainly do not establish that the cited mark is weak or that there is no confusion in this case. Plus Products v. Star-Kist Foods, Inc., 220 USPQ 541, 544 (TTAB 1983) ("[T]hird

registrant has chosen to avoid the use of the color "black" in certain circumstances such as where it would not be accurate. Overall, we hold that the marks are similar in sound, appearance, meaning, and commercial impression. 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).

Therefore, the next question is whether the goods are similar. Applicant acknowledges that "large sporting goods stores sell a variety of sporting equipment." Brief at 6. In addition, applicant itself "offers a variety of sporting equipment under the mark RAWLINGS." Brief at 5. More to the point in this case, the examining attorney has included several registrations that show that golf clubs and baseball bats have been registered by the same entity under a common mark. See, e.g., Registration No. 1,966,420 (MIZUNO); 2,278,787 (COLLEGIATE PACIFIC); 2,683,960 (FOGDOG); 2,914,722 (MICKEY MANTLE); 2,716,054 (ISOGRID); 2,519,910 (DRAGON GOLF LTD. and design); 2,848,335 (design); 2,931,500 (GOOOZE); and 2,940,741 (EDUSPORTZ). These registrations are at least some evidence that golf

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party registrations relied on by applicant cannot justify the registration of another confusingly similar mark").

clubs and baseball bats would be sold by the same entity under a common mark. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993). Furthermore, the examining attorney has included websites from Wilson and Mizuno that show the same entity using a common mark in association with golf clubs and baseball bats.

Applicant argues that the "public would not recognize Appellant's mark PLASMA or the cited mark BLACK PLASMA as a mark for multiple types of sporting equipment like they would WILSON or MIZUNO." Brief at 5-6. We have no reason to find that consumers would only assume that registrant's mark would be used solely on golf clubs. Applicant is itself the source of a variety of sporting goods. Indeed, the evidence suggests that the same mark is registered for both golf clubs and baseball bats. Consumers who play golf and baseball could easily encounter these goods in the same stores. Therefore, we conclude that the baseball bats are

related to golf clubs. Shen Mfg. Co. v. Ritz Hotel Ltd., 393 F.3d 1238, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (citing Recot, Inc. v. Becton, 54 USPQ2d at 1898) ("[G]oods that are neither used together nor related to one another in kind may still 'be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis'").

Applicant also argues that "purchasers of golf clubs and baseball bats are also relatively sophisticated as to the purchase of these items." Brief at 7. There is no evidence that supports a finding that purchasers of golf and baseball equipment are necessarily sophisticated or careful purchasers. Indeed, it appears that these items, like many consumer items, would be purchased by all types of purchasers from novice or first time purchasers to highly sophisticated purchasers. Thus, the sophistication of the purchasers would not be a factor that would make confusion unlikely. Furthermore, we note that "even careful purchasers are not immune from source confusion." In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999).

In this case, applicant is seeking to register its PLASMA mark for baseball bats while registrant's mark BLACK

PLASMA is for golf clubs. The marks are very similar, the goods are related, and the purchasers would overlap. Furthermore, there is no evidence that would limit these purchasers to sophisticated or careful purchasers. Under such circumstances, we hold that confusion would be likely. We add that to the extent we have doubts, we resolve them, as we must, in favor of the prior registrant and against the newcomer. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) and In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729, 729-30 (CCPA 1973).

Decision: The examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act is affirmed.