THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.

Oral Hearing: May 24, 2007 Mailed: August 7, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Loggerhead Tools LLC

Serial Nos. 78533029 and 78533032

Michael J. Turgeon of Vedder, Price, Kaufman & Kramholz, P.C. for Loggerhead Tools LLC.

Daniel Capshaw, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Hairston and Cataldo, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applications were filed by Loggerhead Tools LLC to register the following marks in standard character form on the Principal Register:

BIONIC WRENCH[1] and BIONIC GRIP[2]

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[1] Application Serial No. 78533029 was filed on December 15, 2004, based upon applicant's assertion of its bona fide intent to use the mark in commerce. In response to a requirement by the trademark examining attorney, applicant disclaimed the exclusive right to use "WRENCH" apart from the mark as shown.

[2] Application Serial No. 78533032 was filed on December 15, 2004, based upon applicant's assertion of its bona fide intent to use the mark in commerce. In response to a requirement by the

both (as amended) for "hand tools, namely, wrenches, screwdrivers, hammers, cable cutters, bolt cutters, crimpers, nut drivers, folding knives, special purpose knives, snips, scissors, chisels, punches, wire pulling grips, pipe cutters, tubing cutters, pliers, glass tube cutter, hose crimper, cable stripper, wire stripper and multiple function folding pocket tools comprised of screwdrivers, scissors, blades, files, can openers, corkscrews, wire cutters and wire strippers" in International Class 8.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's marks, as intended to be used on or in connection with its goods, so resemble the mark BIONIC, previously registered on the Principal Register in typed or standard character form for "power drill bits" in International Class 7,[3] as to be likely to cause confusion.

When the refusal was made final in both cases, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal in both cases and applicant filed reply briefs. In addition, applicant's

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trademark examining attorney, applicant disclaimed the exclusive right to use "GRIP" apart from the mark as shown.

[3] Registration No. 2615322, issued on September 3, 2002.

request for an oral hearing was granted; and applicant and the examining attorney presented arguments relating to the issue under appeal at an oral hearing held on May 24, 2007.

Because the examining attorney has cited Registration No. 2615322 as a bar to registration of both applications under consideration herein, and further because applicant and the examining attorney have presented essentially identical arguments on the issue under appeal on the same records, we will come to our determination with regard to both applications in this decision.

Evidentiary Matters

Before turning to the substantive ground for refusal, we note that applicant has submitted an exhibit with its reply briefs. This exhibit consists of a printout from the Time Magazine Internet website containing an advertisement for applicant's goods. Applicant argues that such article is admissible because it previously was unavailable. However, Trademark Rule 2.142(d), 37 C.F.R. §2.142(d), provides as follows:

> (d) The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional

> evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

Applicant did not request remand of the involved applications to the examining attorney for consideration of this evidence, but as noted above, simply submitted such with its reply briefs. We find, therefore, that this exhibit is untimely, and it has not been considered. *See Id. See also* TBMP §1203.02(e) (2d ed. rev. 2004) and the authorities cited therein. We note nonetheless that had we considered this exhibit in our determination of the issue on appeal, the result would be the same.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA

1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

We first consider the similarity of the marks. In this case, applicant's marks, BIONIC WRENCH and BIONIC GRIP, incorporate in their entirety the cited mark, BIONIC, as their most distinctive element. As such, applicant's marks are identical in part to the mark in the cited registration in appearance and sound. As for the presence of WRENCH and GRIP in applicant's marks, these terms, which have been disclaimed, are at best descriptive, if not generic, as applied to the identified goods which include "wrenches" and "wire-pulling grips." It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, 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 a consideration of the marks in their entireties. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In view of the descriptive, if not generic, nature of the words WRENCH and GRIP, they have little, if any, source-indicating

significance, and are entitled to less weight in the likelihood of confusion analysis.

Applicant argues that BIONIC modifies WRENCH and GRIP in its marks in such a manner as to connote "goods that provide substantially increased grasping force" (brief, p. 3). Applicant argues that, as a result, the terms WRENCH and GRIP, though disclaimed, play "a critical role in the public perception of Applicant's mark[s]" (brief, p. 2). However, there is nothing in the record to suggest that registrant's BIONIC mark does not have the same connotation as applied to the goods recited in the registration. That is to say, BIONIC connotes power drill bits that provide substantially increased force in the same manner in which BIONIC WRENCH and BIONIC GRIP connote wrenches and grips that provide substantially increased grasping force. The terms WRENCH and GRIP merely identify the goods in the applications upon which such benefit is conferred. As such, we find that the addition of those terms to applicant's marks does not serve to create a different connotation, or create a distinct commercial impression, from that of registrant's BIONIC mark.

Applicant further argues that BIONIC is a weak mark entitled to a narrow scope of protection. In support of its position, applicant submitted copies of third-party

registrations consisting of BIONIC and BIONIC-formative marks. We note, however, that none of the registrations made of record by applicant identify goods that are even remotely related to the goods recited in either its applications or the cited registration.[4] As such, we are not compelled by such evidence to find that BIONIC is a weak mark in the field of power drill bits or that BIONIC should be afforded a narrow scope of protection.

In this case, we find that consumers who are familiar with the mark, BIONIC, used in connection with registrant's power drill bits, who then see the marks BIONIC WRENCH and BIONIC GRIP used in connection with applicant's various hand tools, are likely to assume that the owner of the BIONIC mark has simply added WRENCH or GRIP when using the mark in connection with hand tools. In other words, consumers are likely to view the marks as variations of each other, but indicating a single source. Thus, despite the fact that applicant's marks respectively include the words WRENCH and GRIP, the marks BIONIC and BIONIC WRENCH and BIONIC GRIP, taken as a whole, are highly similar in

[4] For instance, applicant's evidence includes the following registrations, all for the mark BIONIC: Reg. No. 2944649 for "protective faceshields for industrial use;" Reg. No. 3078213 for "degreasing preparations for use on metal working manufacturing machinery;" Reg. No. 2948,490 for "golf gloves;" and Reg. No. 2753505 for "hockey gloves and hockey leg pads."

appearance, sound, connotation and commercial impression. Accordingly, this d*u Pont* factor favors a finding of likelihood of confusion.

Turning now to our consideration of the identified goods, it is clear that applicant's various hand tools are not the same as registrant's power drill bits. However, it is not necessary that the goods at issue be the same as, or even similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead 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).

In this case, the examining attorney has made of record a number of use-based, third-party registrations which show that various entities have adopted a single mark for goods that are identified in both applicant's applications and the cited registration. *See, for example*:

> Registration No. 2344607 for, *inter alia*, power tool accessories, namely, drill bits, wrenches screwdrivers, hammers;
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> Registration No. 2800554 for, *inter alia*, power drill bits, pliers, screwdrivers, hammers, wrenches, and strippers;
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> Registration No. 2629217 for, *inter alia*, drill bits for power tools, hand wrenches;
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> Registration No. 2733300 for, *inter alia*, power-operated tools and accessories, namely, drill bits, screwdrivers, wrenches, pliers, nutdrivers, bits, and snips;
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> and
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> Registration No. 2906942 for, *inter alia*, power tools, namely, electrical drills, drill bits, hammers, wrenches, pliers, screw drivers, snips, chisels.

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

In addition, the examining attorney submitted evidence from commercial Internet web sites suggesting that the same entities provide both applicant's and registrant's types of goods. The following samples are illustrative:

> power drill bits as well as wrenches and pliers (www.wihatools.com);

power drill bits as well as wrenches and nut drivers,
(www.buy1.snapon.com);

pneumatic drill bits as well as hammers, chisel sets, ring pliers, cable cutters, scissors, knives, strippers, pliers and wrenches,
(www.mytoolstore.com);

power drill bits as well as wrenches,
(www.stanleytools.com);

power drill bits as well as pliers,
(www.matcotools.com);

and

power drill bits as well as wrenches, screwdrivers and pliers,
(www.sears.com).

We are not persuaded by applicant's arguments that registrant's goods are more restricted as to type or trade channel than indicated in the identification of goods in the cited registration. It is settled that in making our determination regarding the relatedness of the parties' goods, we must look to the goods as identified in the involved application and cited registration. *See 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 set forth in the application regardless of what the record may reveal as to the

particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") *See also 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.") Thus, while applicant may assert that registrant's goods are masonry drill bits marketed toward masonry professionals only through authorized distributors, registrant's identification of goods contains no such limitations. Accordingly, registrant's goods are presumed to move in all normal channels of trade and be available to all classes of potential consumers, including consumers of applicant's goods.[5] *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, the same consumers, including homeowners and individuals involved in do-it-yourself home projects, as well as contractors and other construction professionals, may use registrant's drill bits and applicant's various

[5] Because the record in these cases establishes that applicant's goods are related to those of registrant and that the channels of trade are unlimited, applicant's proposed alternative limitations to its identification of goods, specifically "excluding power drill bits" or indicating that its goods are "sold through mass merchandisers" both fail to obviate any likelihood of confusion between its marks and that of registrant.

hand tools for any construction or repair project to which such goods are suited.

Applicant further argues that the goods are not related because the Office has permitted registration by different entities of marks that are similar to one another for its goods on one hand and those of registrant on the other. In this regard, applicant submitted third-party registrations, owned by different entities, showing use of similar marks on various goods in International Classes 7 and 8. However, the probative value of this evidence is very limited because applicant presented no evidence concerning the extent to which these third-party marks are used in commerce. *See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Moreover, a review of the third-party registrations reveals that none are similar to the marks at issue in this case.[6] Thus, applicant's evidence does not establish that there is widespread use of BIONIC formative marks on power drill bits such that registrant's mark is weak and entitled to only a narrow scope of protection. Finally, each case must be decided on its own merits, and previous decisions by

[6] The third-party registrations made of record by applicant include, for instance, registrations for such marks as ZIP, MASTER, READY and SMART as well as marks with such formative roots.

examining attorneys in approving unrelated marks are without evidentiary value and are not binding on the Office or the Board. *See In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); and *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984).

This factor, therefore, favors a finding of likelihood of confusion.

The final d*u Pont* factor discussed by applicant is that of the conditions of sale. Applicant asserts that both its goods and those of registrant would be purchased by careful, well-informed and sophisticated users. We disagree. There is no basis to assume that applicant's and registrant's goods are limited to sophisticated or well-informed persons. None of the identifications of goods limit the intended purchasers to professionals or experts in a particular trade or field. As identified, both applicant's and registrant's goods may be purchased by ordinary members of the general public, who would not necessarily be sophisticated consumers but may include home owners engaged in occasional home repair projects. Further, even if an individual is careful about a purchase, that does not necessarily make him a sophisticated purchaser, since sophistication involves a greater

knowledge of the goods or industry than may be present in an ordinary consumer.[7] Moreover, in view of the third-party registrations which are evidence that both applicant's and registrant's goods are of a type which may emanate from a single entity, prospective purchasers may mistakenly believe that these goods could emanate from a common source. In addition, even if some degree of care were exhibited in making the purchasing decision, the marks BIONIC on the one hand and BIONIC WRENCH and BIONIC GRIP are so similar that even careful purchasers are likely to assume that the marks identify goods emanating from a single source.

Decision: The refusal of registration is affirmed.

[7] In addition, even sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988).