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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Levy-Gardner-Laven Productions, Inc.

Serial No. 78740442

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Before Bucher, Rogers, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On October 25, 2005, Levy-Gardner-Laven Productions, Inc. (applicant) filed an application seeking to register the mark THE RIFLEMAN, in standard character form, on the Principal Register for goods identified as "Commemorative series of guns and rifles associated with a television series" in Class 13. The application (Serial No. 78740442) is based on applicant's assertion of a bona fide intention to use the mark in commerce. The application contains a claim of ownership of Registration No. 1576916 for the "THE

RIFLEMAN" for "entertainment services in the nature of a continuing television series" in Class 41.

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 the mark RIFLEMAN (typed or standard character drawing) registered for "riflescopes; optical lens scopes" in Class 9 and "scope mounts for firearms" in Class 13 (No. 3007779, issued to Leupold & Stevens, Inc. on October 18, 2005).

After the refusal was made final, applicant filed a request for reconsideration and a notice of appeal.[1]

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out 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.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

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[1] After the examining attorney filed his brief, applicant sought a remand to submit additional evidence and to amend the identification of goods to read: "Commemorative series of carbine rifles associated with a television series sold only on special order, similar in appearance to the carbine rifles featured on 'The Rifleman' television series and marketed and promoted with reference to 'The Rifleman' television series and sold with material referencing 'The Rifleman' television series." On December 12, 2007, the board denied applicant's request to remand the application.

The examining attorney argues that the "marks RIFLEMAN and THE RIFLEMAN are virtually identical in appearance, pronunciation and overall commercial impression." Brief at unnumbered p. 4. Regarding the goods, the examining attorney points out that "firearms and firearm scopes and scope mounts are clearly related and marketed together." Brief at 11. The examining attorney points to the third-party, used-based registrations made of record that include the following marks and relevant goods:

Reg. No.	Goods
0695896	Air rifles including gun scopes
1214561	Rifles and scope mount rings and bases
2247250	Air rifles and scopes for rifles and air rifles
2499681	Rifles and aiming scopes
2645000	Spotting scopes and firearms
3037251	Firearms and scopes and sights for firearms

Also, the examining attorney included printouts from the www.precisionarms.com website showing various rifles equipped with scopes. The website also advertised that it specializes "in Remington action rifles and Leopold & Nightforce optics." Other evidence that the examining attorney submitted include: printouts from Gamaliel Shooting Supply and Cabela's websites showing the sale of Leupold Rifleman scopes and firearms and a printout from the Bass Pro Shops website advertising scopes and muzzleloaders on the same page.

Applicant has submitted a one-page Google printout that shows the first ten results for a search of "'the rifleman.'" These results include:

> The Rifleman DVD Set
> www.tvdvdplanet.com
>
> The Rifleman - Cast, Crew, Reviews, Plot Summary…
> www.imdb.com
>
> The Rifleman
> Take a trip back to the town of North Fork. Visit with Lucas McCain…
> Members.tripod.com
>
> The Rifleman Episode Guide List
> www.riflemanconnors.com

Another piece of evidence includes a two-page article about the television show. http://en.wikipedia.org ("The Rifleman was a television program that ran from 1958 to 1963"). Applicant's final piece of evidence is a printout of several definitions of "rifleman" ("a soldier armed with a rifle" and "a person skilled in the use of a rifle").

Applicant argues that the "two marks do not carry the same overall impression because the word THE changes the meaning completely, and therefore associating the mark with the television series." Reply Brief at 2. Furthermore, applicant argues (Reply Brief at 2-3) that:

> While a Google search may not be perfect, it does point out in effect that the series ran for some five years with well over 150 episodes. Five years is a very substantial period of time in that earlier era of television where the wide variety of programming which

exists today through cable and satellite programming was nonexistent.

Regarding the goods, applicant points out that "the named goods are specifically delineated as being a 'Commemorative series of guns and rifles associated with a television series' and thus a decidedly different connotation than the cited registrant's goods." Reply Brief at 4.

We begin with the first *du Pont* factor, which "requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports 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, the marks are identical except that applicant has added the definite article "The" to the registered mark RIFLEMAN. The addition of this word has not been a significant factor in distinguishing otherwise confusingly similar marks. *Citadel v. Army and Air Force Exchange Service,* 21 USPQ2d 1158, 1159-60 (TTAB 1991) ("The marks are clearly very much alike. Notwithstanding the fact that opposer is always referred to by using the definite article "THE" before the word "CITADEL", it would be difficult to conclude that if the

parties sold similar products under "CITADEL" and "THE CITADEL," respectively, confusion would not be likely."); *In re Narwood Prod., Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (The fact that applicant's mark includes the definite article "the" is "obviously insignificant" to likelihood of confusion analysis); and *U.S. National Bank of Oregon v. Midwest Savings and Loan Ass'n,* 194 USPQ 232, 236 (TTAB 1977)("'THE' likewise adds little distinguishing matter because the definite article most generally serves as a means to refer to a particular business entity or activity or division thereof…").

Applicant has presented little evidence that would indicate that we should give the term "The" greater significance in this case. Its evidence consists of the fact that forty-five years ago there was a show called "The Rifleman" that ended a five-year run on television. Applicant's one page of Google search results with ten entries hardly establishes that the addition of the term "the" eliminates the similarity with the registered mark "Rifleman." Google search results have not been considered to be very persuasive evidence. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than

evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations”).

In this case, applicant has submitted no evidence that would explain what factors contribute to the order of the search results or a comparison of search results for the terms “Rifleman” and “The Rifleman.” Therefore, the term “The” does not significantly distinguish the marks. The appearance and pronunciation of the marks are nearly the same and even their meanings would be similar because both applicant’s and registrant’s marks would suggest a person skilled with a rifle and the television show was apparently about a person who was skilled with a rifle. Regarding their commercial impression, we cannot see that these marks would be significantly different inasmuch as both contain the identical term “Rifleman” and it is not at all clear that consumers would place great weight on the presence or absence of the definite article. For example, in a description of the Leupold Rifleman™ Riflescope, the advertising refers to the fact that: “**the Rifleman** is

covered by the best consumer protection in the business." www.cabelas.com (emphasis added). Thus, it is unlikely that the presence of the definite article in applicant's mark will significantly change the commercial impression of the marks.

Applicant argues that "the words RIFLE and the word MAN when placed together as a whole are highly suggestive of the goods, that is rifles and the parts for rifles. Thus, when determining the scope of protection and likelihood of confusion under *Dupont*, the mark is highly suggestive and therefore is entitled to only a narrow range of protection." Reply Brief at 2. We agree that the term "Rifleman" for rifles and rifle scopes and mounts is suggestive of the goods. However, applicant has not shown that the mark is widely used by others on similar goods. We also note that even "weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services." *In re Colonial Stores*, 216 USPQ 793, 795 (TTAB 1982). *See also In re The Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

The second *du Pont* factor is whether the goods of applicant and registrant are related. The registrant's goods are rifle scopes and scope mounts. Applicant's goods include commemorative rifles. The examining attorney's third-party registrations show that various scopes and firearms are registered by a single entity under a common mark. These registrations suggest that there is a relationship between applicant's and registrant's goods. *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 nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

Goods are related if they are marketed in such a way that it "could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services." *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). When we consider the goods,

absent restrictions in the identification, we must assume that the goods travel in "the normal and usual channels of trade and methods of distribution." *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). Here, applicant's goods are limited to commemorative guns and rifles associated with a television series. Registrant's goods are not limited and they would include all types of riflescopes, optical lens scopes, and scope mounts for firearms. *See also 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") and *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration").

Applicant argues that "there is nothing inherent in the cited mark that would suggest a relation to the television series and commemorative goods related to the television series." Brief at 5. Even though applicant's goods are limited, registrant's goods are not. Thus, we have to assume that they would include commemorative scopes, lenses, and mounts. For example, registrant's goods would include commemorative scopes and mounts sold in association with a television series such as the series, "The Westerner," mentioned in applicant's Wikipedia article.

Also, applicant's goods, while somewhat limited because they are "commemorative," are not at all limited to any particular "guns and rifles." Therefore, we must assume that these commemorative guns and rifles would include guns or rifles that may be fitted with applicant's riflescopes, lens scopes, and scope mounts. The purchasers of commemorative rifles and guns and riflescopes and mounts would at least overlap inasmuch as the purchaser of a commemorative rifle may wish to add a scope to it. Furthermore, applicant does not limit the channels of trade for its firearms and we would have to assume that commemorative guns and rifles could be sold in the same retail establishments that sell scopes and mounts.

We add that while purchasers of commemorative rifles and scopes might not be impulse purchasers, we cannot agree with applicant that they are "discerning" purchasers (Brief at 14). While some purchasers may be discerning, others would be simply ordinary purchasers. Even if they were discerning purchasers, "careful purchasers are not immune from source confusion." *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

When we consider the evidence of record in relation to the *du Pont* factors, we conclude that confusion is likely in this case. The marks are virtually identical, THE RIFLEMAN and RIFLEMAN, and the goods, commemorative rifles associated with a television series and rifle scopes and mounts, are closely related. The purchasers and channels of trade for these items would overlap. Finally, we add that to the extent that we have any doubts about confusion, we have resolved them, as we must, in favor of registrant. *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004) and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The refusal to register applicant's mark THE RIFLEMAN under Section 2(d) is affirmed.