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PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Olin Corporation

Serial No. 78818909

Elizabeth D. Odell of Harness, Dickey & Pierce, for Olin Corporation.

Sandra E. Manios, Trademark Examining Attorney, Law Office 104
(Chris Doninger, Managing Attorney).

Before Quinn, Bucher and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Olin Corporation filed an application to register the mark THE AMERICAN LEGEND for goods identified as "ammunition; firearms," in International Class 13¹. The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark AMERICAN HEROES AND LEGENDS, in typed drawing form, for "firearms" in

¹ Serial No. 78818909, filed February 20, 2006, alleging a bona fide intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

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International Class 13,² that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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"). We consider each of the factors as to which

² Registration No. 2558773, issued April 9, 2002, claiming June 1, 1994 as its date of first use and August 30, 1994 as its date of first use in commerce, and claiming acquired distinctiveness under Section 2(f) of the Trademark Act; 15 U.S.C. §1052(f). Sections 8 and 15 affidavits acknowledged and accepted.

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applicant or the examining attorney presented arguments or evidence.

The Goods and Channels of Trade

Both the application and the cited registration identify "firearms." Accordingly, the goods at issue are in part identical. The only other good identified by applicant is "ammunition." Applicant has argued that ammunition is sold separately and in different channels of trade than firearms. However, the record includes probative evidence from both applicant and the examining attorney showing various websites that market firearms and ammunition together. Accordingly, we find that the goods are in part identical and otherwise highly related. Additionally, there is nothing in the recital of goods in either the application or the cited registration that limits either's channels of trade. In the absence of specific limitations therein, we must presume that both applicant's and registrant's goods will travel in all normal and usual channels of trade and methods of distribution. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade

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normal for those services, and that the services are available to all classes of purchasers for the listed services). In other words, there is nothing that prevents the registrant's firearms from being sold in the same channels of trade and to the same classes of consumers that purchase firearms and ammunition from applicant. Accordingly, we find that since the goods are in part identical and otherwise highly related, and the channels of trade will be the same or overlapping, these *du Pont* factors weigh heavily in favor of finding a likelihood of consumer confusion.

The Marks

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, *supra*. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). Preliminarily, we note that that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d

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1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated*, 207 USPQ 443, 449 (TTAB 1980).

In addition, in comparing the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the relevant public comprises consumers who purchase and use firearms and/or ammunition.

Applicant's mark consists of three words, "THE," "AMERICAN" and "LEGEND." The cited registered mark consists of four words, "AMERICAN," "HEROES" "AND" "LEGENDS." Two of the three words in

applicant's mark are encompassed in the cited registered mark. The third is the common article, "THE." Accordingly, the marks look and sound highly similar. Applicant argues that the connotations are different however, asserting that the cited registered mark, with the word "HEROES," emphasizes people, whereas applicant's mark with just the word "LEGEND," emphasizes a story. The examining attorney submitted dictionary definitions, stating in relevant part as follows:

Hero: 1. In mythology and legend, a man, often of divine ancestry, who is endowed with great courage and strength, celebrated for his bold exploits, and favored by the gods. 2. A person noted for feats of courage or nobility of purpose, especially one who has risked or sacrificed his or her life; 3. A person noted for special achievement in a particular field. 4. The principle male character in novel, poem, or dramatic presentation. *American Heritage Dictionary of the English Language* (4th ed. 2000).

Legend: 1.a.) A story coming down from the past, especially one popularly regarded as historic although not verifiable. b.) a body of such stories. c.) a popular myth of recent origin; d.) a person or thing that inspires legends. e.) the subject of a legend. *Merriam-Webster Online Dictionary*.

The submitted dictionary definition of "hero" actually includes the word "legend" and the definition of "legend" includes "a person." Furthermore, the examining attorney submitted evidence from the Internet showing the exact words from applicant's mark, "The American Legend," used to refer to a particular celebrity such as Babe Ruth or James Dean. Accordingly, we are not persuaded by applicant's argument that

the word "heroes" used in conjunction with "legends" - as done in the cited registered mark -- produces a different commercial impression than just the word "legend" - as done in applicant's mark.

Finally, applicant argues that it was the record owner of a now-expired registration, shown at right. However, that does

more than a gun,
an American legend.³

not affect our likelihood of confusion determination herein. An expired registration is not entitled to any of the presumptions of Section 7(b) of the Trademark Act. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything."). To the extent applicant is claiming to be the senior user of "an American legend," when compared with registrant, applicant cannot collaterally attack a cited registration during an *ex parte* examination or appeal. To the extent that applicant is arguing that the cited mark is weak, even a weak mark is entitled to protection against registration of a confusingly similar mark. *See Giant Food Inc. v. Roos and Mastacco, Inc.*, 218 USPQ 521 (TTAB 1982). Furthermore, inasmuch as the cited registration is

³ Registration No. 1093732 covering "firearms" in International Class 13 issued on June 20, 1978; expired under § 9 on March 30, 1999.

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registered under the provisions of Section 2(f) of the Act, as a mark having demonstrated acquired distinctiveness, it is no longer considered an inherently weak mark.

In sum, the marks are substantially similar in terms of appearance, sound, meaning and commercial impression. In view of the foregoing, we find that the first *du Pont* factor weighs heavily in favor of finding a likelihood of consumer confusion.

Balancing the Factors

In view of our findings that the goods are in part identical and otherwise highly related; they move in the same channels of trade to the same purchasers; and the marks are substantially similar, we find that applicant's mark THE AMERICAN LEGEND for firearms and ammunition is likely to cause confusion with the registered mark AMERICAN HEROES AND LEGENDS for firearms.

Decision: The refusal to register is affirmed.