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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In Centex/Taylor, LLC

Serial No. 78975852

Mitchell A. Tuchman of Womble Carlyle Sandridge & Rice,
PLLC for Centex/Taylor, LLC

Charles L. Jenkins, Jr., Trademark Examining Attorney, Law
Office 105 (Thomas G. Howell, Managing Attorney).

Before Quinn, Bucher and Kuhlke, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Centex/Taylor, LLC, applicant, has filed an application to register the mark MAN O'WAR (typeset word) for "golf and golf course related accessories, namely, golf clubs, golf club shafts, golf club inserts, golf club beads, golf irons, golf putters, golf putter covers, grip tapes for golf clubs, hand grips for golf clubs, head covers for golf clubs, golf balls, golf ball sleeves, golf ball retrievers, golf ball markers, golf bags, golf bag tags, golf bag pegs, golf bag covers, golf towel clips for

attachment to golf bags, golf accessory pouches, golf gloves, golf flags, golf tee markers, modular foam prefabricated putting surfaces, divot repair tools and non-motorized golf carts" (hereinafter "golf items") in International Class 28.¹

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 on its identified goods, so resembles the registered mark shown below



for "t-shirts and hats" in International Class 25,² as to be likely to cause confusion, mistake or deception.

We note that the first Office action only discussed the possible relationship of applicant's International Class 25 goods that were later divided out from this child

¹ Application Serial No. 78975852, filed May 8, 2003, alleging a bona fide intent to use the mark in commerce. This is a child application divided out from application Serial No. 78247087. The parent application was expressly abandoned on June 6, 2005.

² Registration No. 2361781, issued June 27, 2000 to Joey De Maio. The cited registration also includes the following goods and services: (1) a series of pre-recorded audio and video cassettes featuring music and lyrics, and a series of pre-recorded compact discs featuring music and lyrics, in International Class 9; (2) ornamental lapel pins and collectible ornamental pins, in International Class 14; and (3) entertainment services, namely, live performances rendered by a vocal and/or instrumental group, in International Class 41.

application. In the final Office action and response to applicant's request for reconsideration, the examining attorney maintained the Section 2(d) refusal and included argument and evidence to support his position that the International Class 28 golfing items are related to registrant's t-shirts and hats.

When the refusal was made final, applicant appealed. The appeal is fully briefed. No oral hearing was requested. We affirm the refusal to register.

As a preliminary matter, the examining attorney's objection to the evidence attached to applicant's brief which was not introduced into the record during the prosecution of the application is sustained and those exhibits have been given no consideration. Trademark Rule 2.142(d); TBMP §1203.02(e) (2d ed. rev. 2004).

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

We turn first to a consideration of the goods identified in the application and the cited registration. It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrants' goods as they are described in the registrations and we cannot read limitations into those goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all channels of trade normal

for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

The examining attorney has presented evidence in support of his position that applicant's golf items and registrant's t-shirts and hats are related through third-party registrations showing that entities have registered a single mark for both golf items and t-shirts. 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 are of a type which may emanate from a single source. In *re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Approximately half of these third-party registrations have little probative value inasmuch as, in addition to t-shirts and golf items, they include a wide variety of goods, from, for example, stationary to underwear to a hand-held unit for playing video games. See, e.g., Reg. No. 2497192 logo design for Baltimore Ravens. These registrations are for a broad range of goods, many of which are not related to another, and, therefore, no conclusion can be drawn as to the relationship between the goods in issue in this case. However, nine of the remaining third-party registrations clearly show t-shirts and the type of applicant's various

golf items registered under a single mark and are probative to the extent that they serve to suggest that applicant's golf items and registrant's t-shirts are goods which may emanate from a single source. See, e.g., Reg. No. 2669829 for THE GOLF AMBASSADORS for, inter alia, t-shirts and golf clubs; Reg. No. 2677642 for HAMILTON FARM GOLF CLUB (and design) for, inter alia, t-shirts and golf clubs; Reg. No. 2621292 for a design of a person swinging a golf club for, inter alia, t-shirts and golf clubs; and Reg. No. 2131169 for SUBPAR for, inter alia, t-shirts and golf clubs.

Applicant, in fact, "concedes that golf clubs and t-shirts bearing identical marks are frequently offered by the same registrant, e.g., golf courses with pro shops" and that the "'prior registrations in which golf clubs and t-shirts are offered by the same entities' made of record by the Examining Attorney, 'serve to suggest that the goods and/or services listed therein are of the kinds which may emanate from a single source.'" Brief p. 8. Applicant argues, however, that the third-party registrations are not evidence of likelihood of confusion between "this Applicant's goods and this Registrant's goods." The primary problem with applicant's arguments along this line of reasoning and regarding "relevant purchasers," is that applicant impermissibly reads a limitation into the

registration. The identification of goods in the registration does not limit the channels of trade in any way, therefore, these t-shirts could be sold anywhere, including golf pro shops. There is simply no evidence to support applicant's proposition that the registrant's goods exclude "golf enthusiasts" as the relevant consumer base.

In addition, applicant's arguments concerning use in the marketplace of registrant's mark, are not persuasive. An applicant may not restrict the scope of the goods covered in the registrant's registration by extrinsic evidence, or in this case, a mere unsupported statement. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Thus, applicant's unsupported statements do not serve to rebut the Examining Attorney's prima facie case that these goods are related.

In view of the above, the du Pont factor of the similarity of the goods weighs in favor of a finding of likelihood of confusion. In addition, because the identification of goods in the registration is not limited to any specific channels of trade, we presume an overlap in trade channels and that the goods would be offered to all normal classes of purchasers.

We turn now to the first du Pont factor, i.e., whether applicant's mark and opposer's marks are similar or

dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles. The test, under the first du Pont factor, 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 that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, the meaning or connotation of a mark must be determined in relationship to the named goods or services. See *In re Sears, Roebuck and Co.*, *supra*; *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984); *In re Sydel Lingerie Co., Inc.*, *supra*.

While the appearance of applicant's mark is slightly different from the mark in the registration due to the presence of the stylization in registrant's mark and the separation of the lettering and addition of the apostrophe between the letters "O" and "W" in applicant's mark, the literal portion of the marks is identical and when spoken, the marks sound the same. Further, we are not persuaded by applicant's argument that the consumer will perceive the connotation of a race horse when its mark is used in connection with its golf items. Applicant's arguments that its golf course development plans affect the connotation of the mark, are not persuasive. We analyze the connotation of the mark in relationship to the named goods. See *In re Sears*, supra. Applicant's mark MAN O'WAR when used in connection with golf items is just as likely, if not more so, to evoke the literal meaning "man of war" than the name of a historical race horse. Registrant's mark would also connote "man of war," at least, when spoken. Finally, in view of the identity of sound and the lack of stylization in applicant's mark the commercial impression is similar to registrant's mark. The minimal stylization in registrant's mark is not sufficient to distinguish applicant's mark from the cited mark. Thus, the factor of the similarity of the marks also favors a finding of likelihood of confusion.

In conclusion, we find that because the marks are similar, the goods are related, and the channels of trade are the same or overlapping, confusion is likely between applicant's mark and the cited registration. Finally, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register is affirmed.