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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Airborne Athletics, Inc.

Serial No. 76699839

Catherine A. Shultz of Kinney & Lange PA for Airborne Athletics, Inc.

Elissa Garber Kon, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Seeherman, Lykos, and Kuczma, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Airborne Athletics, Inc. ("applicant") filed an application to register the mark DRILL WIZARD, with DRILL disclaimed, in standard character format for goods identified, as amended, as "athletic training equipment, namely, computerized controls sold as a component of ball-delivery training machines for setting up and executing machine assisted training routines for ball sports" in International Class 28.¹

¹ Application Serial No. 76699839, filed October 14, 2009, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of 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 SHOT WIZARD, also in standard character format, and with SHOT disclaimed, for "basketball training devices, namely, devices for placing over basketball rims to aid in shot training" in International Class 28,² that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive.³

For the reasons discussed below, the Board reverses 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). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

First, we consider the goods and conditions of purchase. The examining attorney, relying primarily on the language of applicant's and registrant's identification of goods, contends

² Registration No. 3125776, issued August 8, 2006 on the Principal Register.

³ During *ex parte* prosecution, the examining attorney withdrew a descriptiveness refusal pursuant to Section 2(e)(1).

that the products are closely related because they serve the same function of basketball shot aids. As the examining attorney argues, "applicant's identification of goods is broad enough to encompass computer controls sold as components of apparatus used in executing basketball shooting drills, even if it can be used in performing other drills and for other sports." Examining Attorney's Brief, unnumbered page 3. To further support the contention that the goods are related, the examining attorney in her brief focuses on the promotional materials submitted by applicant to argue that the term "DRILL" in applicant's mark refers to basketball training and shooting drills, and therefore it is clear that applicant's product is designed primarily for the sport of basketball even if it can be used for performing other types of drills for other sports.⁴

We agree with the examining attorney that applicant's identification of goods is sufficiently broad to encompass a component for basketball shot training devices. We also agree with the examining attorney that applicant's promotional materials confirm that its goods are used for such a purpose. However, the fact that applicant's and registrant's goods both fall within the overall category of basketball shot training aids does not necessarily make them related. *See, e.g., In re*

⁴ Although the application remains intent-to-use, during ex parte prosecution applicant submitted advertisements for the goods.

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White Rock Distilleries Inc., 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171-72 (TTAB 1987) (regarding food products).

The Board's decision in the case of *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509 (TTAB 2010), is particularly instructive here since it involved an identical mark used on goods which performed the same function. The examining attorney in that case argued that applicant's "personal headlamps" in International Class 11 were related to registrant's "electric lighting fixtures" in the same class because "the primary purpose of both types of goods is '... to emit and to provide light'" and because registrant's identification of goods was "broad enough to encompass applicant's goods." *Id.* at 1510. The Board, however, was not persuaded:

At the outset we note that the mere fact that both types of goods at issue here emit and provide light is not a sufficient basis for us to conclude that the goods are related. The goods, as identified, are sufficiently different in their uses to require proof that they are related. Nor can we conclude by intuition that both types of goods would be sold through common trade channels.

Id. Ultimately the Board found the third-party registrations and website evidence submitted by the examining attorney insufficient to show relatedness. *Id.* at 1512.

Similarly, in the case before us, although both applicant's and registrant's goods consist of basketball training devices, there are intrinsic differences in the goods as identified. Applicant's goods are computerized controls *sold as a component* of ball delivery training machines whereas registrant's goods are a mechanical device placed on the basketball rim.

More problematic, the examining attorney has not introduced any evidence (for example, third-party registrations or excerpts from third-party websites) to show that applicant's and registrant's goods may emanate from a single source.⁵ *See, e.g., In re Princeton Tectonics, Inc.*, 95 USPQ2d at 1510; *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). By contrast, applicant has introduced evidence to show that the channels of trade and purchasers of applicant's goods differ from that of registrant. According to excerpts from applicant's website,

⁵ With her final Office Action, the examining attorney submitted excerpts from third-party websites which sell various types of basketball training aids for shot improvement to show that the goods originate from the same "genus." This evidence was not discussed in her brief. Nonetheless, we have reviewed this evidence and have determined that it fails to support a finding that both applicant's and registrant's products would be manufactured by the same company or marketed under the same brand name.

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www.airborneathletics.com, and promotional materials, DRILL WIZARD is touted as a sophisticated component of applicant's ball-delivery machines. As noted in the materials:

From fundamentals to offensive innovation, experience the ultimate in efficiency! Using our proprietary Drill Wizard™, you can customize and save 50 custom drills right on the machine. Change ball speed, tempo, rotation range and speed, all on the fly, then save it! No springs, no hand cranks, just pure fingertip control for ease of use and maximum training efficiency. And, because of Airborne's digital controls and precise pneumatic delivery, you can rest assured that the drills will be carried out with precision for the kind of game-winning performance that comes from solid drill repetition.

Equally important, the ball delivery machines in which applicant's part is a component are expensive, costing between \$4995-\$6995, thereby making it a significant expenditure which would be carefully researched. This is confirmed by the evidence submitted by applicant of excerpts from a basketball coach messaging board, comparing the various features of applicant's ball-delivery machines with those of competitors. Applicant's Response to Office Action (February 16, 2011), Exhibit B. Due to its high cost and large size, these goods are not the type of item that would be purchased by the casual athlete. Rather, as illustrated by the message board, the typical purchaser of applicant's product would be an athletic coach for a school or club, whom we treat as a sophisticated purchaser of training equipment. We acknowledge that these same

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purchasers would also purchase registrant's goods. However, such purchasers are not likely to assume that applicant's and registrant's goods emanate from a single source simply because both are used in improving basketball skills. Rather, because they would know about basketball equipment, they would be aware that goods such as applicant's and goods such as registrant's do not normally emanate from a single source.

Registrant's goods cost \$99.95. Applicant's Response to Office Action (February 16, 2011), Exhibit C. Based on their price range, registrant's goods could be purchased by the amateur athlete. However, it is not clear from this record that such a purchaser, e.g., a high school or college basketball player, would encounter applicant's mark DRILL WIZARD when used as a component for its ball delivery training machines. Even if the ordinary athlete were to use both applicant's and registrant's goods during their training and drills, and were to note the DRILL WIZARD mark on the component of applicant's machine, given the difference in the intrinsic nature of each product, he or she is not likely to assume that both products are manufactured by the same company. We therefore find that the Office has not established that the goods are related.

Further, we find that the conditions of purchase factor favors registrant. Applicant's goods, because of their cost, would be purchased with care, and are purchased by knowledgeable

purchasers. Although registrant's goods are far less expensive than applicant's, at approximately \$100 they are not a casual or impulse purchase for the amateur athlete.

Next, we consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. We acknowledge that the marks are similar to the extent that they each contain the word WIZARD. However, because of the nature of applicant's goods, the term WIZARD has a particular "computer" meaning when used with applicant's goods that is not applicable to registrant's goods. See First Office Action (January 19, 2010), definition of "wizard" attached from Dictionary.com, which states, inter alia, "An interactive help utility that guides the user through a potentially complex task, such as configuring a PPP driver to work with a new modem. Wizards are often implemented as a sequence of dialog boxes which the user can move forward and backward through, filling in the details required." This difference in connotation somewhat differentiates the marks, and we treat the first *du Pont* factor as slightly favoring applicant.

To the extent that there are any other relevant *du Pont* factors, we treat them as neutral. After considering all of the evidence of record and argument pertaining to the *du Pont* likelihood of confusion factors, and in particular the

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differences in the nature of the goods and the care with which they are purchased, we find that the Office has not satisfied its burden of proving that confusion is likely. However, we emphasize that we have reached our determination that confusion is not likely based on the record before us. On a different record, such as might be adduced in an inter partes proceeding, we might well come to a different conclusion.

Decision: The Section 2(d) refusal is reversed.