

THIS OPINION  
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T.T.A.B.

Oral Hearing: 12/9/08

Mailed: 1/12/2009

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Cabot Safety Intermediate Corporation

Serial No. 78903884

P. Jay Hines of Cantor Colburn LLP, for Cabot Safety Intermediate Corporation.

Michael A. Wiener, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Seeherman, Taylor, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Cabot Safety Intermediate Corporation filed an application to register the mark SEAHAWK in standard character format for "protective eyewear; safety eyewear; safety goggles; and parts and components thereof," in International Class 9.<sup>1</sup> The trademark examining attorney refused registration of the mark

<sup>1</sup> Application Serial No. 78903884, filed June 8, 2006, pursuant to Section 1(b) of the Trademark Act, 15 USC §1051(b), alleging a bona fide intent to use in commerce.

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 mark SEAHAWK, registered for "optical instruments, namely, binoculars," in International Class 9,<sup>2</sup> that when used in connection with applicant's identified goods, it will be likely to cause confusion, mistake, or to deceive. Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. At applicant's request, the Board held a hearing on December 9, 2008. The hearing was presided over by this panel. After careful consideration of the arguments and evidence of record, we affirm 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*

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<sup>2</sup> Registration No. 1400222, issued July 8, 1986, based on first use and first use in commerce of October 31, 1953. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

*Howard 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 applicant or the examining attorney presented arguments or evidence.

#### The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The marks are identical. Accordingly, they have the same appearance and sound. In the context of the goods, they also have the same connotation and commercial impression.

The examining attorney argues that the term SEAHAWK is arbitrary when applied to registrant’s recital of goods. In support of this argument, the examining attorney asks us to take judicial notice of an encyclopedia article regarding the “sea hawk” bird.<sup>3</sup> Since hawks are known for their excellent vision

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<sup>3</sup> TBMP §1208.04 (2d ed. rev. 2004) (“The Board may take judicial notice of dictionary definitions . . . . The Board may also take judicial notice of encyclopedia entries, standard reference works, and of commonly known facts.”)

though,<sup>4</sup> we consider the term instead suggestive as applied to both registrant's and applicant's goods. Nevertheless, the mark is inherently distinctive.

With regard to market strength, applicant attempted to introduce with its brief some third-party registrations that comprise in whole or in part the term "SEAHAWK." The examining attorney objected to the evidence as having been improperly submitted for the first time on appeal. 37 CFR §2.142(d). Since the registrations were not otherwise made of record, we sustain the objection. Furthermore, even a suggestive/weak mark is protectable. *See Giant Food Inc. v. Roos and Mastacco, Inc.*, 218 USPQ 521 (TTAB 1982) (even owner of weak mark is entitled to protection from likelihood of confusion).

In view of the foregoing, the first *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

The Goods and Channels of Trade

Preliminarily, we note that the more similar the marks at issue, the less similar the goods need to be for the Board to find a likelihood of confusion. *In*

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<sup>4</sup> In this connection, we take judicial notice of the definition of "hawk-eyed" as "having very keen eyesight." *American Heritage Dictionary of the English Language* (4<sup>th</sup> ed. 2000). *See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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*re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). Moreover, goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, 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 (TTAB 1991).

The examining attorney submitted over a dozen third-party registrations that include both goods identified in the cited registration (binoculars) on the one hand and goods identified in the application (safety goggles and/or protective eyewear) on the other. Applicant objected to some but not all of these third-party registrations, and we find that they serve to suggest that the goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

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Additionally, the examining attorney submitted evidence of various websites that offer for sale both binoculars and safety goggles in close proximity. Moreover, the examining attorney submitted evidence of third-party manufacturers of binoculars and safety goggles, who use the same mark on both, further suggesting that consumers would expect such goods to emanate from a single source. We find the evidence submitted by the examining attorney to be highly probative that the goods listed in the application and the cited registration are related.

The evidence shows that the goods identified in both the application and the cited registration are optical devices that are available to consumers from some of the same manufacturers and through some of the same channels of trade. Since the identifications of goods in the application and the cited registration do not contain any limitations, both applicant's and registrant's goods are likely to travel through the same trade channels and be purchased by the same classes of purchasers. *See Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). Accordingly, the second and third *du Pont*

factors weigh in favor of finding a likelihood of confusion.

### **Consumer Sophistication**

Applicant argues that its consumers are sophisticated and would recognize the difference between the SEAHAWK mark as used by registrant for binoculars and the SEAHAWK mark as used by applicant for protective eyewear; safety eyewear; safety goggles; and parts and components thereof. As discussed above, the goods identified by both applicant and registrant are optical devices, available to consumers from some of the same manufacturers and through some of the same channels of trade.

Applicant argues that employers who may be required by law to provide protective eyewear, such as that identified by applicant, would be presumed to exercise a higher degree of care in their purchase than would ordinary consumers, citing *Haydon Switch & Instr., Inc. v. Rexnord, Inc.*, 4 USPQ2d 1510, 1517 (D.Conn. 1987); *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635, 1638 (Fed. Cir. 1990); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publi'g Group, Inc.*, 886 F.2d 490, 496, 12 USPQ2d

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1289, 1293 (2d Cir. 1989); *Barre-Nat'l, Inc. v. Barr Labs, Inc.*, 773 F.Supp. 735, 21 USPQ2d 1755, 1761 (D.N.J. 1991); and *Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc.*, 269 F.3d 270, 60 USPQ2d 1609, 1618 (3d Cir. 2001). However, the applicable standard of care is that of the least sophisticated consumer. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). The record shows binoculars being offered for sale for as little as \$19.93, and protective eyewear being offered at \$9.69. Moreover, with identical marks and related goods, even a careful, sophisticated consumer of optical devices is not likely to note the difference of source. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). Accordingly, the fourth *du Pont* factor weighs in favor of finding a likelihood of confusion.

#### Balancing the Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that the marks are identical; the goods are related; and they are likely to be sold through the same channels of trade to the same classes of generally unsophisticated purchasers. Accordingly, we find a likelihood of

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confusion between applicant's mark and the cited registration.

Decision: The refusal to register is affirmed.