

This Opinion is not a
Precedent of the TTAB

Oral Hearing: February 24, 2015

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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Campagnolo S.R.L.

Serial No. 85168469

Jeffrey J. Morgan and Anthony P. Venturino, of Vorys, Sater, Seymour and Pease LLP, for Applicant.

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Before Rogers, Chief Administrative Trademark Judge, Mermelstein and Wolfson, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Applicant Campagnolo S.R.L. seeks registration on the Principal Register of the mark **BULLET** (in standard characters)¹ for use on

Bicycle parts, components and accessories, namely, bicycle wheels, rims and spokes for bicycle wheels, hubs, fast-locking hubs for bicycle wheels, brakes, tires, tubular tires, and inner tubes.

International Class 12.

¹ Filed November 3, 2010, based on Trademark Act § 44, including a claim of priority based on an Italian application filed October 15, 2010, and now registered.

The Examining Attorney issued a final refusal to register pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the mark **BULLIT** (typed, *i.e.*, the equivalent of standard characters),² registered for use on "bicycle and bicycle frames," that confusion is likely as to the source of the identified goods. Applicant appeals the refusal to register.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. Similarity or Dissimilarity of the Marks

In comparing the marks at issue, we consider their appearance, sound, meaning, and commercial impression. *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "The proper

² Registration No. 2511623, issued November 27, 2001, renewed.

test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). When comparing the marks, we keep in mind that “[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *Hunt Control Sys. Inc. v. Koninklijke Philips Elec. N.V.*, 98 USPQ2d 1558 (TTAB 2011), *appeal filed*, No. 11–3684 (D.N.J. July 1, 2011).

Applicant admits that its mark is similar to the mark in the cited registration in both sound and appearance, but maintains that “it is not similar in meaning or commercial impression.” Applicant argues that “‘bullit’ is an invented word and has no recognized meaning” while “‘bullet’ has several well established meanings,” and that “‘bull” in the registered mark “may connote a meaning of strength . . . when considered in connection with the registered bicycle frame goods.” Applicant thus contends “that the meanings and commercial impressions of the respective marks are sufficiently different that the similarity of marks factor under *DuPont* is at most, neutral.” *App. Br.* 23 TTABVue 7. By contrast, the Examining Attorney notes that “[t]he only difference between the marks is the last vowel, which is an “E” in [A]pplicant’s mark and an “I” in [R]egistrant’s mark.” That difference, the Examining Attorney urges, “is insignificant and unlikely to be noticed by consumers as both marks begin with the

identical wording **BULL**,” and that purchasers are “more inclined to focus on the first word, prefix, or syllable in any trademark or service mark.” Finally, the Examining Attorney notes that “[t]he marks in question could clearly be pronounced the same.” *Ex. Att. Br. 25 TTABVue 5*.

While the marks are not identical, we find that they are highly similar. The marks are only slightly different visually in that Applicant’s mark ends in —**ET** while the cited mark ends in —**IT**. Both marks are presented in typed format or its more modern equivalent, standard characters, so we must assume that they could be used in any stylization, including that used by the other. And although there is no “correct” way to pronounce a term that is not a recognized word, *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014), we agree with the Examining Attorney that both marks could indeed be pronounced identically.

Although Applicant is correct that “bullit” is not a word in the English language — at least not a properly spelled one — while “bullet” is, slight differences in spelling do not always result in differences in meaning or connotation. As the Supreme Court long ago noted in considering the descriptiveness of a misspelled word, “[b]ad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning. . . .” *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U.S. 446, 458 (1911). As the Examining Attorney argues, *Ex. Att. Br. 25 TTABVue 6*, “because ‘bullit’ does not have any meaning, consumers are likely to assume that it means the same as the phonetically equivalent and well-known term ‘bullet.’” *See Federated Foods, Inc. v. Fort Howard Paper Co.*,

192 USPQ 24, 28–29 (CCPA 1976) (finding **HY-TOP** and **HY-TEX** similar in spelling); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000) (**YO-YO’S** similar to **HO-HOS**). Thus, even though **BULLET** is an easily recognized word in the English language, and the very similarly spelled **BULLIT** is not, prospective purchasers could easily mistake one for the other, lending the connotation of Applicant’s **BULLET** to the highly similar cited mark.

Overall, we conclude that Applicant’s mark is highly similar to the mark in the cited registration. This factor favors a finding that confusion is likely.

B. Similarity or Dissimilarity and Nature of the Goods; Trade Channels and Classes of Consumers; Conditions of Sale

In comparing the parties’ goods, “[t]he issue to be determined . . . is not whether the [services] . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). It is not necessary that the parties’ goods be the same or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, in light of the similarity of the marks, give rise to the mistaken belief that the services come from or are associated with the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

As noted, Applicant seeks registration of its mark for

Bicycle parts, components and accessories, namely, bicycle

wheels, rims and spokes for bicycle wheels, hubs, fast-locking hubs for bicycle wheels, brakes, tires, tubular tires, and inner tubes.

The goods in the cited registration are “bicycle and bicycle frames.”

“Applicant agrees” that its goods and those of the cited registrant “are both related to bicycles,” but contends that “Applicant’s goods are not bicycle frames but rather advanced technology integrated aluminum and carbon wheels designed to maximize aerodynamics and speed.” *App. Br.* 23 TTABVue 7–8. Arguing instead that the goods are related and travel in the same channels of trade, the Examining Attorney points to evidence in the record of a number of third-party registrations covering one or more of both Applicant’s and Registrant’s identified goods and to web evidence “showing retail stores selling bicycles, bicycle frames and bicycle parts under the same trademark.” 25 TTABVue 7–9.

We first address what may have been a misinterpretation by the Examining Attorney of Applicant’s identification of goods. Applicant describes its goods as “bicycle parts, components and accessories, namely,” followed by a list of specific goods. It appears from the evidence submitted and from some of the Examining Attorney’s argument that she may have considered “bicycle parts, components, and accessories” to be separate goods — *i.e.*, that Applicant’s goods comprise “bicycle parts” (presumably all bicycle parts), “bicycle components” (likewise all bicycle components), and the listed “accessories.” While it is not absolutely clear, we think that the more natural reading of Applicant’s identification of goods is that “bicycle parts, components and accessories” is a broad group of things, all of which is limited by the following “namely.” In other words, Applicant’s goods are only those bicycle parts, components

and accessories which are specifically listed. Although the Examining Attorney's error is understandable, we must disregard some of the evidence of record.³

Notwithstanding any confusion over the nature of Applicant's goods, the Examining Attorney has submitted evidence tending to show that the goods are related and sold in the same channels of trade to the same purchasers. Seven of the third-party registrations of record show a single mark registered for both Registrant's goods (bicycles and bicycle frames) and one or more of Applicant's specific goods. For instance, the mark in Reg. No. 3480641 is registered for both "bicycles" and "wheel hubs . . . [and] bicycle rims," and the mark in Reg. No. 3329368 is registered for "bicycles," "bicycle tires," and "inner tubes for bicycles." Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988) (unpublished table decision). This evidence suggests that Applicant's goods and those of Registrant are of a type known to emanate from a

³ For instance, the evidence from www.danscomp.com (attached to *Final Off. Action*, Oct. 17, 2012), shows retail sale of both "bikes" and "frames" (*i.e.*, both goods identified in the cited Registration) and other bicycle parts, but not any of the specific goods listed by Applicant. Likewise, some of the third-party registrations of record evidence registration under a common mark for both bicycles and specific bicycle parts that are not listed by Applicant. *E.g.*, Reg. No. 3627026 for "bicycles, bicycle parts, namely, bicycle frames" (attached to *Suspension Letter* of September 7, 2011). This type of evidence would only be relevant if Applicant's identification of goods included "bicycle parts" separately and without limitation. But because we find Applicant's goods to be limited to those specifically listed after "namely," we have only considered third-party registrations and evidence of actual use showing both bicycles or bicycle frames, on the one hand and one or more of Applicant's specifically listed goods on the other.

single source.

Similarly, the Examining Attorney has made of record pages from the websites of eight retailers selling goods of the type identified in both the subject application and the cited registration. *See Final Ofc. Action* (Oct. 17, 2012). For instance, evidence from CambriaBike.Com features a “Product Spotlight” advertising the sale of two bicycle frames and a wheel. The webpage also shows links for both bicycles and brakes. The website of Universal Cycles advertises a “Complete Bike,” as well as wheels. Likewise, Bike Nashbar.com advertises road bikes and mountain bikes, as well as a large sale on wheels, tires, and tubes. This evidence shows that the goods at issue are related, sold in the same channels of trade, and to the same prospective purchasers. As logic would suggest, Applicant’s bicycle wheels (and related items) and Registrant’s bicycles and bicycle frames are related because wheels (and related items) are bicycle parts or components, and because they are advertised together by the same retailers and to the same (or at least overlapping) groups of consumers.

For its part, Applicant argues that its “goods are not bicycle frames but rather advanced technology integrated aluminum and carbon wheels designed to maximize aerodynamics and speed.” *App. Br.* 23 TTABVue 7, citing the declaration of Applicant’s chairman and CEO, Valentino Campagnolo. Despite Mr. Campagnolo’s declaration, we are constrained in our analysis to consideration of the goods as Applicant has identified them in the subject application. That Applicant’s goods may in fact be limited to “advanced technology . . .” is irrelevant because that limitation does not

appear in Applicant's identification of goods. In comparing the goods, "it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods. . . . An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence." *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008).

Applicant also argues that its actual goods are limited to expensive products sold to knowledgeable and sophisticated purchasers only through authorized distributors. *App. Br.* 23 TTABVue 8. But again, absent limitation, it must be assumed that the identified goods encompass all goods of the type identified, whether expensive or not, that they are sold in all channels of trade normal for such goods, and to all usual purchasers of them. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). There is no evidence that ordinary purchasers of goods of the type at issue are so discriminating or exercise such care in their purchases as to avoid confusion when related goods are sold under similar marks.

We find that Applicant's goods are closely related to those in the cited registration, that they are advertised and sold in the same channels of trade, and to the same (or an overlapping group of) purchasers. These *du Pont* factors favor a finding that confusion is likely.

C. Lack of Actual Confusion

Arguing that confusion is not likely, Applicant notes "the absence of actual confusion in spite of the use of the **BULLET** mark for approximately two years by Appli-

cant.” *App. Br.* 23 TTABVue at 8. While evidence of actual confusion is highly probative of a likelihood of confusion, its absence rarely is. Under most circumstances, two years of concurrent use would be too short a period to suggest that confusion is not likely. But in any event, it is rarely, if ever, appropriate to consider an asserted lack of actual confusion in an *ex parte* context. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (citing *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965)).

[A]pplicant’s assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an *ex parte* proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from.... Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion.

In re Kangaroos U.S.A., 223 USPQ 1025, 1026–27 (TTAB 1984) (citations omitted).

We accordingly find this *du Pont* factor neutral.

D. Other Issues

Although not argued in Applicant’s brief, the Campagnolo Declaration asserts that Applicant “is an iconic source of cycling components,” *Campagnolo Dec.* ¶ 4, and that it is “extremely well-known and highly regarded in the cycle racing world. . .,” *id.* at ¶ 5. Nonetheless, the relevant *du Pont* factor is “[t]he fame of the *prior mark*.” *du Pont*, 177 USPQ at 567 (emphasis added). A junior party gains no advantage over its opponent when its fame eclipses that of the prior user. *See Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1638 n. 18 (TTAB 2007).

Finally, Applicant argues that its **BULLET** trademark is always used along with its **CAMPAGNOLO** house mark. *App. Br.* 23 TTABVue 9–10 (citing *Campagnolo Dec.* ¶ 8). However, the only trademark we may consider is the one Applicant has applied to register. In any event, it has long been recognized that a junior party’s use of its house mark as Applicant describes, frequently does not avoid confusion; it may, in fact exacerbate it. *Menendez v. Holt*, 128 U.S. 514 (1888) (“That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor.”); *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1602 (TTAB 2011) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010)).

III. Conclusion

Upon full consideration of all the evidence and argument of record, we find that Applicant’s **BULLET** trademark is highly similar to the registered trademark **BULLIT**, that Applicant’s goods are closely related to the goods identified in the cited registration, and that they share the same channels of trade, and are advertised and sold to the same ordinary consumers. We conclude that the applied-for mark is likely to cause confusion in view of the cited registration. Trademark Act § 2(d).

Decision: The refusal to register Applicant’s mark **BULLET** is affirmed.