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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85365295
Applicant	E. Mishan & Sons, Inc.
Applied for Mark	ROCKET FITNESS
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Date	04/12/2013

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

APPLICANT	:	E. Mishan & Sons, Inc.
SERIAL NO.	:	85/365,295
FILING DATE	:	July 7, 2011
FOR	:	ROCKET FITNESS
EXAMINING ATTORNEY	:	Nicholas A. Coleman, Esq.
LAW OFFICE	:	115

APPLICANT'S REPLY

Applicant, E. Mishan & Sons, Inc. ("Applicant"), respectfully submits its reply to the Examining Attorney's Appeal Brief.

A. The Refusal With Respect to Registration No. 2,994,711 Is Moot

Registration No. 2,994,711 ("'711 Registration) was cancelled on October 12, 2012, as noted in Applicant's appeal brief. A TSDR status sheet for the '711 Registration (printed on January 25, 2013), showing the status of the '711 Registration as "cancelled", was submitted with Applicant's appeal brief.

Surprisingly, the Examining Attorney's Appeal Brief does not acknowledge the cancellation of the '711 Registration, or the indication in Applicant's appeal brief that the '711 is cancelled. Instead, the Examining Attorney's Appeal Brief (pp. 2, 3, 6) continues to assert the ROCKETLOK and Design mark of the '711 Registration as a basis for refusal.

It is respectfully submitted that the Board may take notice of the cancellation of Registration No. 2,994,711 and conclude that the portion of the refusal based on the cancelled registration is moot.

B. Record Lacks Evidentiary Support That Confusion Is Probable

The Examining Attorney's Appeal Brief (p. 5) surmises that consumers "could still reasonably assume . . . that registrant's manual exercise equipment sold under the 'ROCKETLOK' marks constitute a product line from the same source as the exercise equipment sold under the 'ROCKET FITNESS' mark".

The Office has not proffered any factual support for its mere conclusion that consumers will "assume" that the ROCKETLOK weight exercise apparatus with a specific locking feature (as specified in the identification of goods in the '557 Registration) is a product line from the same source of exercise equipment sold under the ROCKET FITNESS mark.

Further, the possibility that a consumer may incorrectly assume the goods emanate from a single source does not correctly state the test for likelihood of confusion. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 U.S.P.Q.2d 1399 (T.T.A.B. 2010); *Signetics Corp. v. Sigona*, 212 U.S.P.Q. 318, 320 (T.T.A.B. 1981). Confusion must be likely, i.e., probable. *See Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992)(quoting *Witco Chemical Company, Inc. v. Whitfield Chemical Company, Inc.*, 418 F.2d 1403, 164 U.S.P.Q. 43 (C.C.P.A. 1969)("We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.")

C. Examining Attorney's Appeal Brief Does Not Consider Commercial Impressions of Marks in View of the Respective Goods

The Examining Attorney's Appeal Brief (p. 5) eschews the obvious and immediate differences in the overall appearances and pronunciations of the respective marks in their entireties, relying instead on the proposition that the respective marks "to the extent any commercial impression is imparted, would impart the highly similar commercial impression of a rocket."

The determination of the commercial impressions engendered by the ROCKET FITNESS mark and ROCKETLOK mark is not to be made in a vacuum, however, without any reference to the goods.

Commercial impressions must be considered in view of the goods listed in the identification of goods. *See*, *In re LSP Products Group, Inc.*, 2009 TTAB LEXIS 406 *6 (T.T.A.B. May 27, 2009)("More specifically, we do not consider the connotations and commercial impressions of the marks in a vacuum but in relation to the goods with which they are associated.")

Neither ROCKET FITNESS nor ROCKETLOK conveys the impression of a rocket per se when considered in view of their respective goods. ROCKET FITNESS suggests that applicant's equipment will propel the user into shape. ROCKETLOK connotes the quick disconnect system of registrant's weight exercise apparatus that allows a user to quickly remove and add weight plates to a grip bar.

The Examining Attorney's Appeal Brief neither addresses nor refutes the evidence offered to demonstrate that ROCKET FITNESS and ROCKETLOK convey distinct commercial impressions.

D. Applicant's Prior "ROCKET" Registrations Have Probative Weight

Applicant's trademark registrations for AB ROCKET and AB ROCKET TWISTER, both for "manually-operated exercise equipment", are probative evidence that consumers can distinguish between different ROCKET marks for exercise equipment.[1]

In addressing Applicant's registered AB ROCKET marks, the Examining Attorney's Appeal Brief, in part, states:

> "First, the shared term 'ROCKET' is not the primary term in the registered mark, and thus, is not the initial focus of the consumer. **Second, the additional term 'AB', while potentially descriptive of the muscle group with which the goods are intended to emphasize, provides assistance to the shared term and creates an incongruity, which would allow marks to be distinguished in the marketplace**."(Emphasis added).

Following the same logic, "FITNESS" in the ROCKET FITNESS and "LOK" in the "ROCKETLOK" marks, similarly "provide assistance" to the shared term ROCKET creating an incongruity in each of the Applicant's and the Registrant's marks that allows them to be distinguished in the marketplace.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Applicant's opening brief, Applicant respectfully requests that the Trademark Trial and Appeal Board reverse the refusal to register the ROCKET FITNESS mark and allow the subject application to proceed to publication.

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[1] Applicant respectfully disagrees with the Office's characterization that Applicant placed "great emphasis" on Applicant's prior registration for the AB ROCKET trademark for manual exercise equipment.

Dated: April 12, 2013

Respectfully submitted,

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