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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85365295

MARK: ROCKET FITNESS



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: E. Mishan & Sons, Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO:

J137-1716

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant E. Mishan & Sons, Inc., has appealed the examining attorney's final refusal to register the trademark "ROCKET FITNESS" for "manually operated exercise equipment, namely, push-up assistance devices, thigh muscle toning devices, and wheels for floor abdominal exercises; exercise bands; straps for fitness training, namely, stretch-out straps; personal exercise mats; exercise balls;

medicine balls; all for home use” under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the grounds of a likelihood of confusion with the mark in U.S. Registration Nos. 2949557 and 2994711.

STATEMENT OF FACTS

On, July 7, 2011, E. Mishan & Sons, Inc., hereinafter “the Applicant”, applied for registration of the mark “ROCKET FITNESS” for “manually operated exercise equipment, exercise bands, straps for fitness training, personal exercise mats, exercise balls, medicine balls.”

By office action dated October 28, 2011, the examining attorney refused to register the mark pursuant to Trademark Act Section 2(d), because of a likelihood of confusion with the marks “ROCKETLOK” in U.S. Registration No. 2949557 and “ROCKETLOK” and rocket design in U.S. Registration No. 2994711, both owned by Rocketlok, LLC., used in connection with “a weight exercise apparatus having an interlocking grip bar and rotationally removable weight plates, featuring a weight plate attached to a socket on the grip bar which can be interlocked with additional weight plates using a simple inset and twist motion and designed to limit rattle-type noise typical of loose weights on a barbell and featuring a latching mechanism to prevent a weight plate from being accidentally disconnected,” and was also required to clarify portions of the identification of goods submitted with the application.

On March 8, 2012, the Applicant responded and argued against a likelihood of confusion, and amended the identification to read “manually operated exercise equipment, namely, push-up assistance devices, thigh muscle toning devices, and wheels for floor abdominal exercises; exercise bands; straps for fitness training, namely, stretch-out straps; personal exercise mats; exercise balls; medicine balls; all for home use.”

On April 9, 2012, the examining attorney issued a final office action maintaining the likelihood of confusion refusal, and the Applicant submitted a Request for Reconsideration after Final Action on October 9, 2012, reiterating its argument that the term "ROCKET" is weak in connection with goods in International Class 28, in addition to filing a Notice of Appeal. This appeal follows the denial of the Applicant's Request for Reconsideration after Final Action.

ISSUE ON APPEAL

The issue on appeal is whether there is a likelihood of confusion of the proposed mark "ROCKET FITNESS" with the marks in U.S. Registration Nos. 2949557 and 2994711.

ARGUMENT

THE MARKS OF THE APPLICANT AND THE REGISTRANT ARE CONFUSINGLY SIMILAR IN APPEARANCE, SOUND, AND COMMERCIAL IMPRESSION AND THE RESPECTIVE SERVICES ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the applicant and registrant. See 15 U.S.C. §1052(d). In the seminal decision *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), the court listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). See TMEP §1207.01. However, not all the factors are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1355, 98 USPQ2d 1253, 1260 (Fed.

Cir. 2011); *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); see *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b).

In the present case, the Applicant seeks registration of the mark ROCKET FITNESS. The cited marks are ROCKETLOK and ROCKETLOK and rocket design. Looking at the literal portion of each mark, the marks are similar because they are comprised of the same dominant and primary term, ROCKET.

Applicant provides much attention and detail to dissecting the various aspects of each of the marks. However, the question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create a similar overall impression. See *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980). The focus is on the recollection of

the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b).

In the present case, the proposed mark is ROCKET FITNESS. The term “fitness” merely identifies the genre of the products marketed under the mark, as demonstrated by the evidence from Rogue Fitness, TKO, ZÖN, Sports Authority, Dick’s Sporting Goods, and Academy Sports & Outdoors attached to the final Office action of April 9, 2012. As such, this generic term serves little to no source-indicating function, and does not distinguish the applicant’s products from any other fitness products, including those of the registrant, in the marketplace. Thus, applicant’s insistence on focusing on this term as a distinguishing factor is misplaced.

The term “LOK” in the cited registrations merely identifies a feature of the registrant’s manually operated fitness equipment. As such, the dominant term in creating the overall commercial impression in the registered marks is ROCKET. Applicant turns this analysis on its head when it seeks to utilize the term, “rocket,” which may be used as either a noun or a verb, into an adjective. To do so not only requires the suspension of proper grammar and usage of the term, but also relies on the assumption that the American consumer would also adopt this entirely new usage of the term.

Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). Moreover, greater

weight is often given to the dominant feature when determining whether marks are confusingly similar. See *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

In the present case, the first term is also the dominant term in each of the marks. The term "ROCKET" is the sole source-identifying in the proposed mark, as "fitness" does not differentiate the goods in commerce, and is also the dominant term in the proposed mark, as "lok" (the phonetic equivalent of "lock") merely describes this feature of the goods. As such, the literal portions of the marks, to the extent any commercial impression is imparted, would impart the highly similar commercial impression of a rocket, regardless of which definition of the term the consumer chooses to apply.

Finally, even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to the overall similarities in sound, appearance, connotation, and commercial impression in the respective marks, 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 with which they are acquainted or familiar, and that "ROCKETLOK" is merely a variation of the "ROCKET FITNESS" mark utilized on a line of products featuring a locking mechanism. See, e.g., *SMS, Inc. v. Byn-Mar Inc.* 228 USPQ 219, 220 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing.").

Applicant also places great emphasis on its prior registrations for the term "AB ROCKET." However, prior decisions and actions of other trademark examining attorneys in registering different marks have little evidentiary value and are not binding upon the Office. TMEP §1207.01(d)(vi). Each case is decided on its own facts, and each mark stands on its own merits. See *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Int'l Taste, Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000); *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994). The proposed mark

is wholly different from the registered marks, and thus they are very little probative value. 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 the marks to be distinguished in the marketplace.

Similarly, the mark in U.S. Registration No. 1929244 intentionally misspells the term as “ROCKIT” to play on the apparatus’s rocking mechanism. This intentional misspelling alters the overall commercial impression, as the misspelling has additional significance other than merely being a misspelling. Thus, the coexistence of the cited registration with the registrations referenced by the Applicant is of no bearing to the present consideration. In the present case, the Applicant seeks registration of the term “ROCKET” with the mere addition of the generic identification of the genre of all of the products referenced in any of the applications discussed.

Rather than distinguishing the marks, the addition of the design element in U.S. Registration No. 2994711 serves to further the likelihood of confusion, as the use of the rocket in the design serves further emphasize the term “ROCKET” in the mark, and reinforce the commercial impression of a rocket.

Therefore, the marks are highly similar, and would be likely to cause confusion when used in connection with highly similar goods.

II. THE GOODS ARE HIGHLY SIMILAR

The Applicant seeks use of the applied-for mark in connection with “manually operated exercise equipment, namely, push-up assistance devices, thigh muscle toning devices, and wheels for floor abdominal exercises; exercise bands; straps for fitness training, namely, stretch-out straps; personal exercise mats; exercise balls; medicine balls; all for home use.” The registrations are issued for

“manually operated exercise equipment, namely a weight exercise apparatus having an interlocking grip bar and rotationally removable weight plates, featuring a weight plate attached to a socket on the grip bar which can be interlocked with additional weight plates using a simple inset and twist motion and designed to limit rattle-type noise typical of loose weights on a barbell and featuring a latching mechanism to prevent a weight plate from being accidentally disconnected.”

When analyzing an applicant’s and registrant’s goods for similarity and relatedness, that determination is based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

Absent restrictions in an application and registration, the identified goods are presumed to travel in the same channels of trade to the same class of purchasers. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d at 1268, 62 USPQ2d at 1005. Additionally, unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, both application and registration demonstrate the similarity of the goods on their face, as both preface the more specific identifications with the categorization of the goods as “manually operated exercise equipment.” While the specific goods identified in the application and registration may be different, the evidence from Rogue Fitness, Cap Barbell, Body-Solid, TKO, ZöN, and Valor Fitness attached to the final Office action of April 9, 2012, demonstrates that the providers of barbells and dumbbells also provide home exercise apparatus, such as bands and medicine balls, under the same or a similar mark.

Further, neither party has made any limitation as to the channels of trade or intended user of the goods. Thus, the trade channels of the goods are potentially identical or, at least, highly similar, such as sporting goods and fitness stores. For example, evidence from sporting goods stores Sports Authority, Dicks Sporting Goods, and Academy Sports & Outdoors carry both the goods identified in the application, as well as dumbbells, including interlocking dumbbells, in their “exercise” sections was also attached to the final Office action of April 9, 2012.

Finally, as both the goods of the applicant and the registrant are manually operated exercise equipment, the goods serve a similar function. All of the products identified in the application and registration are intended to be utilized to develop muscle systems through manual physical exercise, thus making the user more fit.

CONCLUSION

Consumers encountering the Applicant’s mark the registered mark in the marketplace are likely to believe mistakenly that the goods emanate from a common source, because the marks contain similar terms with highly similar commercial impressions, and are used in connection with similar goods utilized to achieve the similar goal of physical fitness, and being marketed to the same end consumer through the same general trade channels, often by the same entity. Accordingly, the examining attorney requests that the Section 2(d) refusal be affirmed.

Respectfully submitted,

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