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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AllPredatorCalls.com, Inc.

Serial Nos. 85596596 and 85648155

Robert A. Gurr, Gurr Law, PLLC for AllPredatorCalls.com, Inc.

Kim L. Parks, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

Before Cataldo, Bergsman and Kuczma, Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

AllPredatorCalls.com, Inc. (“applicant”) appeals from the final refusals to register the following two marks in standard character format:

WICKED LIGHTS¹

for (as amended):

Lighting kits for use in hunting, consisting of flashlights,
tactical flashlights, and hand-held spotlights in Class 11;

and,

¹ Application Serial No. 85596596 was filed on April 12, 2012, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a); “LIGHTS” is disclaimed.

WICKED HUNTING LIGHTS²

for (as amended):

Lights for use in hunting, namely, flashlights, tactical flashlights, hand-held spotlights, LED lights in the nature of rifle and shotgun-mounted lighting fixtures featuring LED bulbs, weapon-mounted lights in the nature of flashlights specially adapted for mounting to rifles and shotguns, vehicle-mounted spotlights and driving lights in the nature of lighting apparatus for vehicles for use in hunting, illumination devices in the nature of flashlights, fixed position spotlights, and directable beam spotlights for use in hunting in Class 11.

The examining attorney issued final refusals to register the marks pursuant to § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing the following previously-registered stylized marks as a bar to registration:

Registration No. 2813845³

Mark:



For: Telescopic sights for firearms, namely, rifle, handgun and spotting scopes in Class 9;

Owner: Hunter Company, Inc.

and,

Registration No. 2863338⁴

² Application Serial No. 85648155 was filed on June 11, 2012, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1(a); "HUNTING LIGHTS" is disclaimed.

³ Registration No. 2813845 issued February 10, 2004; Section 8 Declaration accepted; "OPTICS" is disclaimed.

⁴ Registration No. 2863338 issued July 13, 2004; Section 8 Declaration accepted; "OPTICS" is disclaimed.

Mark:



For: Telescopic sights for firearms, namely, rifle, handgun and spotting scopes in Class 9;

Owner: Hunter Company, Inc.

After the examining attorney made the refusals final, applicant filed requests for reconsideration which were denied and subsequently filed Notices of Appeal. Applicant and the examining attorney have filed briefs. For the reasons set forth below, the refusals to register are affirmed.

Consolidation of Appeals

We have considered the arguments and evidence filed in both cases. The refusals to register, as well as the records and the briefs, contain overlapping arguments and evidence. Therefore, the appeals involve common factual and legal issues which are addressed in this consolidated opinion.

Likelihood of Confusion

Applicant contends that in view of the differences between the marks, the goods covered in its applications versus the cited registrations, and the sophistication of purchasers, there is no likelihood of confusion between its marks and the marks in the cited registrations.

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of 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 Co., 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. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We carefully considered all of the evidence of record as it pertains to the relevant *du Pont* factors, as well as applicant's arguments (including any evidence and arguments not specifically discussed in this opinion). To the extent that any other *du Pont* factors for which no evidence or argument were presented may nonetheless be applicable, we treat them as neutral.

A. Similarity of the Goods

We first consider the second *du Pont* factor, namely, the similarity of the goods. It is well-settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved application and registration. *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

The goods of the parties need not be identical or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012).

The examining attorney maintains that applicant's hunting lights are complementary to registrant's telescopic sights (also referred to as "scopes") for firearms because both sets of goods are, or could be, firearm accessories or attachments sold through the same channels of trade. Applicant concedes that its hunting lights and registrant's telescopic sights or scopes may have a complementary use as a firearm attachment but contends the products are sold to sophisticated purchasers who would not be confused.⁵

In support of the relatedness of the products, the examining attorney points to applicant's own promotional materials as well as numerous third-party websites. Applicant's website and brochure establish that its goods are used for "night hunting." These materials also establish that applicant's goods, like registrant's goods, are "weapon mounted," and some of its products are spotlights that are "fieldscope mounted" and "riflescope mounted."⁶ Thus, not only are applicant's hunting light products intended for attachment to firearms, some are mounted to fieldscope or riflescope sighting devices which are the types of products covered in the cited registrations.⁷

In addition to the foregoing, numerous third-party websites in the record corroborate the complementary use of applicant's hunting light devices and

⁵ See applicant's August 30, 2012 Responses to Office Action p. 4; pp. 10-11 of Applicant's Brief for Serial No. 85596596; and p. 11 of Applicant's Brief for Serial No. 85648155.

⁶ See attachments to August 15, 2012 Office Actions from <http://www.allpredatorcalls.com/categories/Night-Hunting/Weapon-Mounted/> and attachments to applicant's August 30, 2012 Responses to Office Action.

⁷ Indeed, the goods identified in Serial No. 85648155 include "LED lights in the nature of rifle and shotgun-mounted lighting fixtures . . . weapon-mounted lights in the nature of flashlights specially adapted for mounting to rifles and shotguns"

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registrant's scopes, that is, they show lights and scopes being sold as firearm attachments on the same websites as well as under the same brand names.⁸

Despite the strong showing made by the examining attorney, applicant argues that the products are distinct; a person in the market for firearm optics products such as registrant's scopes would not purchase applicant's hunting lights instead.⁹ Applicant's argument is not persuasive. The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009). If goods are complementary in nature, or used together, or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that "[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion"); *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1597-98 (TTAB 2011) (holding yogurt products and ready-to-eat cereals to be related because they are complementary products given consumers' longstanding behavior of mixing these

⁸ See attachments to the August 15, 2012 Office Actions, January 4, 2013 final Office Actions and April 2, 2013 Requests for Reconsideration Denied.

⁹ Applicant's Appeal Briefs p. 10.

types of breakfast foods and that consumers are regularly exposed to yogurt and cereal combined as a food product).

Here, the evidence shows that applicant's goods and the cited goods are sold together under the same brands, and are intended to be used together. Accordingly, we find that applicant's light devices and registrant's scopes are complementary and closely related goods and that this *du Pont* factor regarding the similarity of the goods weighs in favor of a finding of likelihood of confusion.

B. Similarity of Trade Channels and Buyers to Whom Sales Are Made

Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in the cited registration and application, it is presumed that registrant's goods and applicant's goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Paula Payne Products*, 177 USPQ at 77-78 (CCPA 1973); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

The third-party website evidence submitted by the examining attorney confirms that such goods are in fact sold through the same channels of trade to the same purchasers. Specifically, hunters may purchase both applicant's hunting lights and registrant's scopes from the same online retailer and mount them together on a hunting firearm. Thus, purchasers encountering applicant's goods and the cited registrant's goods sold under similar marks are likely to believe the goods emanate from the same source. *See Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990)

(purchasers would likely be confused when goods as closely related as modems and computer programs are sold under the virtually identical marks).

Despite the foregoing, applicant argues, without any corroborating evidence, that the purchasers of firearm scopes and night hunting lights are not general consumers, but are sophisticated purchasers who take great care in purchasing such items and will therefore not be confused by the marks at issue.¹⁰ Again, it is not necessary for purchasers or potential purchasers, including hunters who may be expected to readily distinguish applicant's goods from those of registrant, to confuse the goods themselves. Rather, it is only necessary that such purchasers may experience confusion as to the source of those goods which, as discussed above, may be purchased and used together. Even assuming purchasers of registrant's products are careful and sophisticated in their purchasing decisions regarding such goods, this does not necessarily mean that they are immune to source confusion. Here, the evidence of record shows the respective goods are complementary and sufficiently related such that even sophisticated purchasers could be led to the mistaken belief that the goods originate from the same source. It is well-settled that even careful purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar marks on or in connection with the goods. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *In re Cynosure Inc.*, 90 USPQ2d 1644, 1647 (TTAB 2009), citing *Wm. K. Stamets Co. v.*

¹⁰ Applicant's Reply Briefs p. 5.

The Metal Products Co., 176 USPQ 92, 93 (TTAB 1972) (even technically trained purchasers who are extremely familiar with expensive machinery may be confused when similar marks are used with respect to the same goods); *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009).

In view of the foregoing, applicant's goods and the goods in the cited registrations are related and move in the same channels of trade, and are sold to the same classes of purchasers, supporting a likelihood of confusion under the third and fourth *du Pont* factors.

C. Number and Nature of Similar Marks in Use on Similar Goods

Relying on numerous third-party registrations for marks beginning with the word "wicked" for various goods, none of which are in the same Classes as applicant's marks or the cited marks, applicant argues that the term "wicked" is used across many industries such that consumers are unlikely to give that word alone significant weight.¹¹ Applicant essentially contends the existence of the "active" third-party registrations demonstrates that the marks in the cited registrations are weak and only entitled to a narrow scope of protection that does not preclude the registration of its marks.¹² The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods and/or

¹¹ Applicant's Appeal Briefs pp. 6-8.

¹² We note that two of the 44 third-party registrations submitted by applicant are now cancelled.

services. *See National Cable Television Ass’n Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *du Pont*, 177 USPQ at 567.

Evidence of weakness or dilution consisting solely of third-party registrations, such as those submitted by applicant in this case, is generally entitled to little weight in determining the strength of a mark, because such registrations do not establish that the registered marks identified therein are in *actual use* in the marketplace or that consumers are accustomed to seeing them. *See Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992); *Davey Prods.*, 92 USPQ2d at 1204; *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009). Furthermore, the clothing, personal care, and household odor-control products, and the restaurant services and food products, listed in the third-party registrations submitted by applicant are different from the hunting lights and firearm sights at issue and thus do not show that the word “wicked” is commonly used in connection with such goods.

Therefore, the third-party registrations cited by applicant do not impact the meaning of applicant’s marks or the cited marks, nor do they support a finding that the cited marks are weak or otherwise entitled to a narrow scope of protection.

D. Similarity of the Marks

We next consider the *du Pont* factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In comparing the marks, we are mindful that

the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992).

Applicant's marks and the cited marks are alike in appearance, sound, meaning and commercial impression. To the extent that applicant's marks and the cited marks each begin with the word WICKED, they are similar in appearance and sound. Given the complementary nature of applicant's and registrant's goods, the word WICKED as used in each mark has a similar meaning.¹³ Likewise, due to the relatedness of the goods, the commercial impressions of the marks are necessarily similar. This is particularly so where the stylized elements of the cited marks, i.e., the pitchfork-shaped "W" in WICKED and the devil character, are consistent with several meanings of the term "wicked."¹⁴

¹³ The argument in Applicant's Reply Briefs that the word WICKED in the context of registrant's marks connotes the devil because the "W" in "wicked" is fashioned like a pitchfork and the mark in Registration No. 2813845 contains a devil design, does not alter this determination. Applicant's marks are presented in standard character format and do not contain anything inconsistent with the impression rendered by the cited marks.

¹⁴ We take judicial notice of these definitions for the word "wicked" set forth in applicant's Reply Briefs, i.e., "evil," "vicious," "disgustingly unpleasant." While we note that according to the definitions submitted by applicant, "wicked" may also mean "going beyond reasonable or predictable limits: of exceptional quality or degree" and "wonderful; great; masterful; deeply satisfying," there is nothing in the record to show consumers would perceive these meanings to the exclusion of "evil," "vicious" or "disgustingly unpleasant" or

The fact that applicant's marks are presented in standard character form does not avoid likelihood of confusion with the cited word and design marks because applicant's marks could be presented in the same manner of display as the wording in registrant's marks. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (the argument concerning a difference in type style is not viable where one party asserts rights in no particular display).

While the cited marks feature stylized lettering and the mark in Registration No. 2813845 also contains a character design, the word portion of the marks may be more likely to be impressed upon a purchaser's memory and to be used when requesting the goods and/or services. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *see In re Viterra Inc.*, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1247 (TTAB 2010). Thus, although the marks must be compared in their entirety, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar. *Viterra*, 101 USPQ2d at 1911 (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)); *Dakin's Miniatures*, 59 USPQ2d at 1596. Accordingly, the word portion of the cited marks, i.e., WICKED OPTICS, is more significant than the stylized lettering or character design.

that consumers would attribute different meanings to applicant's marks than those of registrant.

In addition to it being appropriate to give more weight to a dominant feature, we also acknowledge that disclaimed, descriptive or generic matter is typically less significant or less dominant in relation to other wording in a mark and accordingly consider the other wording contained in the marks. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985); *Binion*, 93 USPQ2d at 1534. The definitions of “light” and “optics” submitted by the examining attorney¹⁵ show that the wording LIGHTS and HUNTING LIGHTS in applicant’s WICKED LIGHTS and WICKED HUNTING LIGHTS marks, and the word OPTICS in the cited WICKED OPTICS and Design marks, are descriptive of the respective goods in applicant’s applications and the cited registrations. The descriptiveness of these terms is confirmed by the fact that each of them has been disclaimed. Therefore, they are less significant in affecting the overall commercial impressions of the marks and result in the word WICKED being the common dominant portion of applicant’s and registrant’s marks.

Additionally, consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay*, 73 USPQ2d at 1692; *see also L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012) citing *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897

¹⁵ Definitions: “optics”: *of or relating to the eye or vision*, from [http://www.collinsdictionary.com/dictionary/ English/optics](http://www.collinsdictionary.com/dictionary/English/optics); “light”: *A source of light, especially a lamp, a lantern, or an electric lighting fixture*, from <http://education.yahoo.com/reference/dictionary/entry/light>. See attachments to January 4, 2013 Final Office Actions.

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(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). Here, the first word in applicant’s marks and the cited marks is the distinctive term WICKED, which is the word most likely to be impressed upon the minds of consumers.

Based on the overall similarity of applicant’s WICKED LIGHTS and WICKED HUNTING LIGHTS to the WICKED OPTICS and Design marks in appearance, sound, meaning and commercial impression, it is likely that the average purchaser would retain the same recollection for each mark.

E. Conclusion

Because the goods are complementary and closely related, the channels of trade and classes of purchasers are the same. There is a strong similarity of the marks in sound, sight, meaning and commercial impression. Therefore, considering the relevant *du Pont* factors, we find that the Office has met its burden in showing a likelihood of confusion between applicant’s marks and the marks in the cited Registrations for the identified goods.

Decision: The refusals to register the marks in application Serial Nos. 85596596 and 85648155 under Section 2(d) of the Trademark Act are affirmed.