

**This Opinion is Not a
Precedent of the Trademark
Trial and Appeal Board**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RA Brands, L.L.C.

Serial No. 85721641

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Before Seeherman, Cataldo and Adlin,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

RA Brands, L.L.C. (“Applicant”) has appealed from the Trademark Examining Attorney’s final refusal to register BLACK BELT in standard characters for “ammunition” in Class 13.¹ Registration was refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the standard character mark BLACK BELT, registered for “pepper

¹ Application Serial No. 85721641, filed September 6, 2012, based on Section 1(b) of the Trademark Act (intent-to-use).

spray” in Class 13,² that if used on Applicant’s goods it is likely to cause confusion or mistake or to deceive.

We reverse the refusal to register.

As a preliminary matter, we note that Applicant and the Examining Attorney both resubmitted duplicate evidence that each had made of record with previous Office actions and responses thereto.³ There is no need to do this, and it increases the work for the Board to review duplicate submissions.

Applicant has also submitted with its brief a substantial amount of evidence that was not previously made of record. Although Applicant is aware that the record should be complete as of the filing of the appeal, *see* Trademark Rule 2.142(d), in this case Applicant contends that it is appropriate for the Board to consider this evidence. The evidence consists of webpages, excerpts of which were made of record by the Examining Attorney with his denial of Applicant’s request for reconsideration. Because the request for reconsideration was denied after the appeal commenced, Applicant could not make this evidence of record prior to the commencement of the appeal. Applicant contends that this evidence should be considered under the reasoning of *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 820 (Fed. Cir. 1986). In that opinion, the Court noted that the Examining Attorney had, during examination, made of record with a final Office action excerpts of two articles obtained through a Nexis search, “an action that

² Registration No. 3985513, issued June 28, 2011.

³ Applicant’s third-party-registration evidence was initially taken from the USPTO’s TESS electronic database, and later was submitted as “soft copies” of the registration certificates; the later submissions are no more probative than the earlier ones.

closed further prosecution of the application.” The applicant then included in its brief more extensive excerpts of those same articles. The Court, in finding that the applicant’s more extensive excerpts should be considered, stated:

Let it be clear that by citing only a portion of an article, that portion is not thereby insulated from the context from whence it came.

Id. Further, as discussed in TBMP Section 1208.01:

If the applicant or the examining attorney submits excerpts from articles, the nonoffering party may submit the complete article, even if such submission is made after the appeal is filed. ... If only a portion of an article is submitted, that portion is not thereby insulated from the context from whence it came. If the nonoffering party wishes to have the entire article considered, the better practice is to submit the article with a request for remand. However, because the party submitting the excerpt of the article had the opportunity to review the entire article, if the article is submitted with an appeal brief the Board need not remand the application, and may instead consider the article as part of the record. (citations omitted).

The same reasoning applies herein. Because the Examining Attorney had the opportunity to consider the entire websites from which he submitted certain webpages, there is no unfair surprise to him in our considering Applicant’s evidence. To the contrary, to not consider the additional excerpts would be unfair to Applicant. The Examining Attorney’s objection to this evidence is overruled.

We turn now to the substantive issue presented in this appeal, whether Applicant’s use of BLACK BELT for ammunition is likely to cause confusion with the mark BLACK BELT registered for pepper spray. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315

F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Indeed, the Examining Attorney has approached the issue as though they are the only considerations:

[A] likelihood of confusion determination in the case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. Second, the goods are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. (citations omitted)

Examiner's brief, 22 TTABVUE 4-5. Apparently the reference to the "activities surrounding their marketing" refers to the *du Pont* factor of the channels of trade, because the Examining Attorney has submitted evidence and argument on this factor as well.

Turning first to the similarity of the marks, they are identical. Applicant does not argue otherwise. This *du Pont* factor favors a finding of likelihood of confusion.

At the same time, however, we recognize that the mark is not strong. The mark is suggestive, because BLACK BELT conveys the idea of being able to defend oneself, or being good at self-defense. Thus, the scope of protection to be accorded this suggestive mark is not as great as if the mark were an invented or arbitrary term.

There is substantial evidence that the trade channels for the goods are the same, with ammunition and pepper spray being sold through such diverse websites as Walmart, sporting goods stores such as Cabela's and Dick's Sporting Goods, and firearms-oriented outlets such as Ammunition Depot and ZX Gun. The *du Pont* factor of the trade channels favors a finding of likelihood of confusion.

When it comes to the factor of the similarity of the goods, however, the Examining Attorney's evidence is quite weak. He has submitted a large number of third-party registrations in an attempt to show that parties have adopted a single mark for both ammunition and pepper spray. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). However, a close examination of these registrations shows that only one entity, a German company called German Sport Guns GmbH,⁴ has adopted a single mark for both types of goods, albeit it has registered several marks. The fact that one company has registered the same mark for both ammunition and pepper spray is insufficient to show that ammunition and pepper spray may emanate from a single source.

The Examining Attorney has also made of record a large number of pages from third-party retail websites in which both ammunition and pepper spray is

⁴ Noting that to be probative on this issue third-party registrations must be used in commerce, we point out that this German company's registrations all show use in commerce dates.

offered for sale. This evidence reinforces the inference we draw from the third-party evidence, namely, that it is not usual for the same companies to be the source of both ammunition and pepper spray. In fact, despite the significant amount of evidence regarding the sale of such products, there is no clear evidence that any marks are used for both ammunition and pepper spray. First, we note that there are no listings for the products of German Sport Guns GmbH, the third-party registrant. The Examining Attorney points to another third-party mark, RUGER, and asserts that it is used for both ammunition and pepper spray. We agree that RUGER is used as a trademark for pepper spray; there are numerous examples of such use, see, e.g., in the March 19, 2014 denial of the Request for Reconsideration, Ruger Armor Case Pepper Spray (p. 7), Ruger Lipstick Pepper Spray (p. 8), both on the Ammunition Depot website; Ruger Pepper Spray Stealth System Black (p. 16) on the ZX Gun website; and Ruger Ultra Pepper Spray and Ruger Stealth Pepper Spray (p. 28) on the Cabela's website. But the only example of use of RUGER for ammunition is on The Sportsman's Guide website, (pp. 48-49), where ".480 Ruger Ammo" ".204 Ruger Ammo" and ".375 Ruger Ammo" appear in a large list of "Ammo" products, including ".357 Sig Ammo," ".38 Short Ammo," ".44 Remington Magnum Ammo" and "9mm Ammo." We cannot ascertain from the appearance of the Ruger items in this list whether RUGER is being used as a brand name for the ammunition, or an identifier of the firearm for which the ammunition is intended to be used. There are no other references to RUGER as a trademark for ammunition on any of the other website pages submitted by the Examining Attorney, even

though many other brands of ammunition are listed. Therefore, we cannot find that the same mark, RUGER, has been used on both pepper spray and ammunition. Further, even if it is, this single usage of the same mark on both goods is not sufficient, in the absence of any additional evidence, to show that consumers would expect both pepper spray and ammunition to originate from the same entity and be sold under the same mark.

The Examining Attorney also contends that the goods are related because they are both used for self-defense and are complementary. However, as we have often said, simply because a term can be found to generally describe both goods does not necessarily make them related. *Calypso Technology Inc. v. Calypso Capital Management LP*, 100 USPQ2d 1213, 1221 (TTAB 2011) (in order to find that goods and services are related, there must be more of a connection than that a single term may be used to generally describe them); *W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007) (it is not sufficient that a particular term may be found which may broadly describe the goods).

As far as the goods being complementary, the Examining Attorney points to three third-party registrations that “show that manufacturers provide cases, belts and attachments to belts specifically designed to carry ammunition and pepper spray together, on for example, a police duty belt.” Brief, 22 TTABVUE 15. However, the registrations do not support this statement. Although Registration No. 4197283 includes in its identification “pouches for ammunition magazines” and “pouches specially adapted for pepper spray containers,” the identification does not

indicate that the registrant makes a combined pouch or pouches for these two types of items to be carried together. As for Registration No. 4016277, it is for, in relevant part, “attachments to belts, namely, cases and pouches for ammunition and for weapons in the nature of pistols, guns, pepper spray and electro-muscular disruption devices in the nature of stun guns.” The mere identification of pouches in this manner only shows that a third party has adopted a mark for various pouches that can be attached to belts, not that the pouches for ammunition and the pouches for pepper spray are necessarily used together. The question before us is not whether the pouches are related goods, but whether the items that go into the pouches are. Finally, Registration, No. 3621428 is for, inter alia, “holsters, ammunition bags, and belts for police and security equipment, namely, belts for holding holsters, handcuffs, pepper spray, flashlights, magazines, key rings, batons, radios, and clips for badges.” The identification does not indicate that the ammunition bags are attached to the belts to which the pepper spray is attached; on the contrary, the identification lists a number of specific items that the belts hold, and ammunition is not one of them, although holsters are listed as an item that can be held on the belt, as well as being listed separately. The identification does indicate that magazines and pepper spray can be held on the same belt. However, we cannot conclude from this single registration that it is normal for the ordinary consumer to buy pepper spray and ammunition for use together. This registration references “magazines,” i.e., carriers for ammunition, rather than ammunition per se. Further, the identification specifically states that these belts are “police and

security equipment.” Thus, to the extent that this registration shows that the goods are complementary, they would be complementary products for police and security personnel. As to whether police and security personnel are likely to be confused, they would be considered sophisticated purchasers, presumably familiar with the practices in the trade. Therefore, they would be likely to know that companies do not make both ammunition and pepper spray.

Based on the foregoing, and despite the identity in the marks and the same channels of trade, we find that the Office has not met its burden of showing likelihood of confusion. The evidence does not show that consumers are likely to believe that ammunition and pepper spray sold under the suggestive mark BLACK BELT will emanate from the same source. This is not to say that, on a different record, we might not reach a different result.

Decision: The refusal to register Applicant’s mark BLACK BELT is reversed.