

This Opinion is Not a  
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Evolved Ingenuity, LLC*

Serial No. 85807923

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Jason Paul Blair, Trademark Examining Attorney, Law Office 104, Chris Doninger, Managing Attorney.

Before Quinn, Wellington and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Evolved Ingenuity, LLC (“Applicant”) seeks registration of the mark RECON, in standard characters, for “hunting blinds and hunting tree stands.”<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Act, on the ground that Applicant’s mark so resembles a previously-registered and identical

<sup>1</sup> Application Serial No. 85807923, filed December 20, 2012 based on an intent to use the mark in commerce under Section 1(b) of the Trademark Act.

mark for “crossbows,”<sup>2</sup> that use of Applicant’s mark in connection with Applicant’s goods is likely to cause confusion or mistake or to deceive. After the refusal became final, Applicant appealed and filed a motion for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

### **Likelihood of Confusion**

Our determination under Section 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 Company, 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) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

The marks are identical. Therefore, this factor not only weighs heavily in favor of finding a likelihood of confusion, but also reduces the degree of similarity between the goods that is required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time*

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<sup>2</sup> Registration No. 3374390, issued January 22, 2008; Section 8 affidavit accepted.

*Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).<sup>3</sup>

Turning to the goods and channels of trade, they need not be identical or even competitive in order to support a finding of likelihood of confusion. It is enough that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used, to a mistaken belief that Applicant's and Registrant's goods originate from or are in some way associated with the same source or that there is an association between the sources of the goods. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). 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 Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

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<sup>3</sup> While Applicant is correct that there is no evidence that the cited mark is famous, "it is not necessary that a registered mark be famous to be entitled to protection against a confusingly similar mark." *In re Big Pig Inc.*, 81 USPQ2d 1436, 1439 (TTAB 2006); *see also*, *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009). Indeed, "as is normally the case in ex parte proceedings," the fame *du Pont* factor "must be treated as neutral." *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006).

Here, the Examining Attorney has introduced evidence that crossbows and hunting blinds and tree stands are complementary or otherwise related. Specifically:

An article entitled “Hunting with a Crossbow” on The Sportsman’s Guide website (“sportsmansguide.com”) discusses the “advantages” and “limitations” of using crossbows to hunt, and includes a section on “Treestand Restrictions,” which states: “As few treestands have a platform that are large enough to use to safely cock a crossbow by placing a foot in the cocking stirrup, the crossbow should be cocked on the ground and hoisted up to the stand.”

An article entitled “Crossbow Buyer’s Guide” from the Bass Pro Shops website (“basspro.com”) discusses using crossbows to hunt.

A listing for the Ameristep® Crossbones Blind on Cabela’s website (“cabelas.com”) states: “this blind was engineered specifically with crossbow hunters in mind. It even comes with a sturdy crossbow holder.”

Office Action of February 23, 2013.

Applicant relies on evidence from the Cabela’s and Academy (“academy.com”) websites that “crossbows are sold in a different category than blinds and tree stands. This means they are sold on different web pages, in a manner akin to being located in different areas of a store. Office Action Response of August 22, 2013 p. 1 and Exs 1-2. However, the first page printed from the “cabelas.com” website, under the category “archery,” lists both “crossbows and accessories” and “box blinds,” almost next to each other on the page; moreover, “game cameras” are also listed directly above “crossbows and accessories.” *Id.* Ex. 1.

Applicant also relies on third-party registrations which purportedly show “that Recon is so commonly used for outdoor goods that the public will look elsewhere to distinguish the sources of the goods, such as the retail categories they are sold under at stores,” including:

PHENIX RECON, in standard characters, for “Fishing poles; Fishing rod blanks” (Reg. No. 4178155).

RECON, in standard characters, for “optical instruments, namely, monoculars, spotting scopes, binoculars, and telescopic rifle sights” (Reg. No. 3713194).

RECON 1, in typed form, for “sport knives” (Reg. No. 2557326).

RECON, in standard characters, for “sleeping bags” (Reg. No. 4192644).

RECON, in typed form, for “vehicles, namely all terrain vehicles and structural parts therefor” (Reg. No. 2327001).

RECON, in standard characters, for “Portable lighting products, namely, flashlights” (Reg. No. 3125928).

RECON, in standard characters, for “Bicycles” (Reg. No. 3653990).

RECON OUTDOORS, in standard characters, for “perimeter monitors for detecting, and providing notification of, person, animals or vehicles triggering the monitors; ozonators for scent removal from clothing, vehicles and buildings” (Reg. No. 3684361).

*Id.* at p. 1 and Exs. 3-10. In support of its argument that these registrations establish that the cited mark is weak, Applicant relies on website printouts which “show that goods such as binoculars, scopes, knives, sleeping bags, flashlights and all terrain vehicles are sold at the same stores as crossbows (although in different

categories) and are used by bow hunters.” *Id.* at p. 1 and Exs. 1, 2, 11-19 (printouts from “thecrossbowstore.com,” “crossbowdeals.com,” “crossbownation.com,” “crossbowmen.com,” “thecrossbowstore.com,” “bushnell.com,” “texasbowhunter.com” and “yamahamotorsports.com.”). Finally, Applicant points out and introduces evidence that crossbows have different purposes, functions and characteristics than hunting blinds and tree stands. Request for Reconsideration March 12, 2014 and Exs. 20-41.

The evidence of record establishes enough of a relationship between crossbows on the one hand and hunting blinds and tree stands on the other that confusion would be likely when these products are sold under identical marks. In fact, crossbows and hunting blinds and tree stands are used for hunting, as Applicant concedes. Applicant’s Appeal Brief at 2 (“Crossbows may be used for hunting ... Hunting blinds and tree stands are used by hunters. Blinds conceal hunters.”). And, as Applicant also concedes, crossbows and hunting blinds and tree stands are sold in the same stores. *Id.* at 3 (“Although the respective goods may be purchased from the same store, they are sold under different categories.”). While crossbows and hunting blinds and tree stands may often be sold in different sections of brick and mortar or online outdoor or hunting stores, Applicant’s evidence reveals that they are also grouped and promoted together, such as on one of the pages from the archery section of Cabela’s website. Office Action Response of August 22, 2013 Ex. 1.

Perhaps more importantly, crossbows and hunting blinds are used together, as some hunters use their crossbows inside hunting blinds. Indeed, the Ameristep® Crossbones Blind “was engineered specifically with crossbow hunters in mind,” so much so that it includes a “crossbow holder.” Office Action of February 23, 2013. Where, as here, products are complementary, they may be found to be related. *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *General Mills, Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1597-98 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB 2014); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009).

Furthermore, because Applicant’s and Registrant’s identifications of goods contain no limitations, they are presumed to encompass all goods of the type described, and the goods are presumed to move in all normal channels of trade and be available to all classes of consumers for those goods. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“An application with ‘no restriction on trade channels’ cannot be ‘narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers.’”); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Here, the evidence establishes, and Applicant essentially concedes, that the normal channels of trade for both crossbows and hunting blinds and tree stands include outdoor and

hunting stores such as Cabela's, Academy and Bass Pro Shops. While these stores may not typically sell Applicant's and Registrant's products together on the same shelves or webpages, consumers may still encounter Applicant's and Registrant's hunting-related products in the same stores and may be confused upon seeing complementary products sold under identical marks in the same stores.

We are not persuaded by Applicant's argument that the cited mark is so weak as to be unentitled to protection against Applicant's goods sold under an identical mark. In fact, as the Examining Attorney points out, the third-party registrations upon which Applicant bases its argument that the cited mark is commercially weak are not evidence that the marks therein are in use on a commercial scale or that the public has become familiar with them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). Furthermore, of the five registrations for the same mark at issue here, one is for all terrain vehicles, another for flashlights and a third is for bicycles, all of which are much more different from Registrant's goods than are Applicant's.<sup>4</sup> While the evidence reveals a relationship between Registrant's crossbows and Applicant's hunting blinds and tree stands, the

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<sup>4</sup> Applicant's reliance on *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910 (TTAB 1988) is misplaced, because in that case there was much more extensive and persuasive third-party registration evidence. Specifically, in that case there were 11 third-party registrations for IMPERIAL marks for vehicle-related products, whereas here there are at most four third-party registrations for RECON marks for hunting-related products.



evidence does not reveal nearly so close a relationship, if any, between Registrant's crossbows and the spotting scopes, rifle sights and sleeping bags sold under identical marks as revealed by Applicant's third-party registration evidence. Indeed, in sharp contrast to Applicant's hunting blinds and tree stands, there is no evidence that sleeping bags, spotting scopes or rifle sights are designed for use with crossbows, or that they are promoted on the same webpages as crossbows.<sup>5</sup>

To the extent Applicant argues that the relevant purchasers are careful or sophisticated, even if we assume this to be the case, it is settled that even careful purchasers can be confused as to source where identical marks are used on complementary goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (*citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)) ("Human memories even of discriminating purchasers ... are not infallible.").

There is no relevant evidence or argument concerning the remaining likelihood of confusion factors, and we therefore treat them as neutral.

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<sup>5</sup> While Applicant does not specifically argue that the cited mark is conceptually weak, the third-party registrations upon which Applicant relies may indicate that RECON may be suggestive of hunting-related products. Nevertheless, "[i]t has often been emphasized that even weak marks are entitled to protection against confusion." *Hunt Control Systems Inc. v. Koninklijke Philips Electronics N.V.*, 98 USPQ2d 1558, 1567-68 (TTAB 2011) (quoting *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)); *see also In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 (TTAB 2007) ("applicant has not submitted evidence that the term MVP is so highly suggestive that the inclusion of its house mark would create significant differences in the marks' appearance, pronunciation, meaning, and commercial impression"). Furthermore, to the extent RECON calls to mind "reconnaissance" and is suggestive of Applicant's hunting blinds, there is no evidence that such a suggestive meaning would extend to Registrant's crossbows, and it is Registrant's mark which is alleged to be weak.

**Conclusion**

After considering all of the evidence of record as it pertains to the relevant *du Pont* factors, including all of Applicant's arguments and evidence, even if not specifically discussed herein, we find that confusion is likely because the marks are identical and the goods and channels of trade are related.

*Decision:* The Section 2(d) refusal to register Applicant's mark is affirmed.