

This Opinion is not a
Precedent of the TTAB

Mailed: August 20, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Chauvet & Sons, Inc.

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Serial No. 86075662

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Scott L. Lampert, in-house counsel,
for Chauvet & Sons, Inc.

Gina M. Fink, Trademark Examining Attorney, Law Office 109,
Dan Vavonese, Managing Attorney.

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Before Bucher, Ritchie and Lykos,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On September 26, 2013, Chauvet & Sons, Inc. (“Applicant”) filed an application to register on the Principal Register the mark **ROGUE** in standard character format for the following goods:¹

Lighting apparatus for sports arenas, theatres, clubs and discotheques; lighting apparatus incorporating one or more lighting colors for sports arenas, theatres, clubs and discotheques; Lighting devices incorporating one or more lighting colors for theatrical productions; Spot lights incorporating one or more lighting colors in International Class 11.

¹ Application Serial No. 86075662, filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark **ROGUE** also in standard character format on the Principal Register that, when used on or in connection with Applicant's identified goods listed below, it is likely to cause confusion or mistake or to deceive:²

Photographic accessories, namely: Collapsible light directors and diffusers for use with photographic lighting equipment for professional and recreational photography; Light directors and photographic lighting tents, all for use with photographic lighting equipment for professional and recreational photography; Stands for photographic apparatus in International Class 11.

In response to the first Office Action, Applicant attempted to overcome the refusal by amending the identification of goods to add the following exclusionary language at the end of the identification: "...all the foregoing excluding photographic uses." The Examining Attorney, however, found this language to be insufficient to obviate the refusal. When the refusal was made final, Applicant appealed, requested reconsideration and amended the identification to the following:

Lighting apparatus incorporating one or more lighting colors to create special lighting effects in sports arenas, theatres, clubs and discotheques; lighting apparatus incorporating one or more lighting colors for sports arenas, theatres, clubs and discotheques; Lighting devices incorporating one or more lighting colors to create special lighting effects for concerts, theatrical productions and other events.

² Registration No. 3896732, registered on December 28, 2010 on the Principal Register.

The Trademark Examining Attorney accepted the amendment but denied the Request for Reconsideration, maintaining the final refusal. Thereafter, the appeal was resumed, and the case is now fully briefed.

Evidentiary Objection

Before discussing the substance of this appeal, we shall address the Examining Attorney's objection to Applicant's submission in its appeal brief for the first time of excerpts from third-party websites attached as "Exhibit H." The Examining Attorney has objected on the ground of untimeliness.

Trademark Rule 2.142(d) provides in relevant part that "[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." It is clear that the website evidence was not made of record during prosecution of the application. Insofar as the Examining Attorney has timely interposed an objection to Applicant's late-filed evidence, the objection is sustained, and the new evidence noted in Applicant's appeal brief and attached as "Exhibit H" has been given no consideration.

Likelihood of Confusion Analysis

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"). 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, however, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors are discussed below.

It is undisputed that the involved marks are identical. Indeed, because both marks are in standard characters, they could conceivably be used in the same stylized format. Thus, the crux of this appeal turns on our analysis of the second du Pont factor, a comparison of Applicant's and Registrant's respective goods as they are identified in the application and the cited registration.

We bear in mind that where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-89 (Fed. Cir. 1993); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). Nonetheless, it is still the Examining Attorney's burden to establish that the goods are related to support a finding of likelihood of confusion. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods/services are used together or used by the same purchasers; advertisements showing that the relevant goods/services are advertised

together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's goods/services and the goods/services listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

Applicant argues that Registrant's goods are fundamentally different from Applicant's based on the descriptions in the application and registration. More specifically, Applicant points out that Registrant's identification of goods is limited to "photographic lighting equipment for professional and recreational photography." By contrast, Applicant's goods as identified consist of high-end lighting equipment designed to "create special lighting effects" in large scale environments, namely "sports arenas, theatres, clubs, and discotheques" as well as "concerts, theatrical productions and other events." As Applicant maintains, there is no "per se" rule that all lighting equipment is commercially related.

The Examining Attorney, however, contends that Applicant's and Registrant's goods are related because they both fall under the broad category of "specialty lighting products." Examining Attorney's Brief, 11 TTABVUE 9. In support thereof, the Examining Attorney highlights in her brief several third-party registrations as well as excerpts from their corresponding websites. As a general proposition, although third-party registrations alone are not evidence that the marks shown

therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they are based on use in commerce and may serve to suggest that the goods are of a kind that may emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988). Here, however, we cannot definitively find that any of the third-party registrations reference both Applicant's and Registrant's types of identified goods. Arguably, the third-party registrations which present the strongest support for the Examining Attorney's position are the following:³

- Reg. No. 3784778 for the mark **HONL PHOTO SPEED SYSTEM** for "Light directors and photographic lighting tents, all for use with photographic lighting equipment for professional and high-end photography; lighting devices for taking pictures" in Class 9.

"Filters for photographic, cinematographic, video and performing arts lighting; filter kits comprising filters for photographic, cinematographic, video and performing arts lighting" in Class 11.

- Reg. No. 4147491 for the mark **LIGHT SMARTER, NOT HARDER** for "Bags for cameras and photographic equipment; Camera cases; Cases for photographic apparatus; Light directors and photographic lighting tents, all for use with photographic lighting equipment for professional and high-end photography; Lighting devices for taking pictures in Class 9; and Filters for photographic, cinematographic, video and performing arts lighting" in Class 11. (Owned by David Honl, registrant of the '778 reg. above)

- Reg. No. 3941549 for the mark for **LINCOInc** for "Accessories for lighting fixtures, namely, plastic pole with electrical source in protective cover; Bags for cameras and photographic equipment; Cases for

³ USPTO TSDR Case Viewer Application Serial No. 86075662 entry dated January 15, 2014 (Office Action).

photographic apparatus; Collapsible light directors and diffusers for use with photographic lighting equipment for professional and high-end photography; Electric light dimmers; Electric light switches; Electric warning light systems; Electric warning lights; Electrical lights for use in professional quality photography; Electronic LED signs; Electronic regulating and control devices for the operation of light emitting diodes; Flashlights for use in photography; Flashlights with light emitting diodes for use in photography; LED and HID light controls; LED circuit boards; Light diodes; Light directors and photographic lighting tents, all for use with photographic lighting equipment for professional and high-end photography; Light emitting diode (LED) displays; Light emitting diodes (LEDs); Lighting devices for taking pictures; Lighting panel control boards; Lights for use on video cameras; Luminous variable/dynamic signs using light emitting diodes and electronic controllers to produce real-time and programmable messages and information displays; Photographic exposure meters; Photographic filters; Photographic flash units; Photographic flashbulbs; Portable photography equipment, namely, reflectors, tripods, light stands and supports and bags specially adapted for these goods; Radio receivers and transmitters for monitoring and controlling light emitting diodes in a network of street lights and for processing emergency signals transmitted to individual street lights; Stands for photographic apparatus; Strobe light apparatus for use in professional quality photography” in Class 9.

“Filters for photographic, cinematographic, video and performing arts lighting; Flashing strobe light apparatus; Flat panel lighting apparatus; Fluorescent electric light bulbs; Fluorescent lighting tubes; Halogen light bulbs; LED (light emitting diode) lighting fixtures; LED light bulbs; Light bulbs; Light diffusers; Light emitting diodes (LEDs) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products; Light reflectors; Lighting fixtures that integrate natural daylight and fluorescent lighting into the fixture; Lighting tubes; Portable battery-operated lights that can be placed on surfaces where other light sources are unavailable; Television studio lighting apparatus; Theatrical stage lighting apparatus” in Class 11.

- Reg. No. 4252550 for the mark **PHOMAX** for goods including “Electric light bulbs; Film stage lighting apparatus; Flashing strobe light apparatus; Flat panel lighting apparatus; Fluorescent electric light bulbs; Fluorescent lighting tubes; Halogen light bulbs; Lamp whose light can be turned in all directions; Landscape lighting installations; Lanterns for lighting; LED (light emitting diode) lighting fixtures; LED (light emitting diodes) lighting fixtures for use in display, commercial, industrial, residential, and architectural accent lighting applications; LED and HID

light fixtures; LED landscape lights; LED light assemblies for street lights, signs, commercial lighting, automobiles, buildings, and other architectural uses; LED light bulbs; LED lighting fixtures for indoor and outdoor lighting applications; LED lighting systems, namely, LED modules, power supplies, and wiring; LED lights for lighting purposes incorporated into key chains, small toys or other similar personal items; LED underwater lights; Light bulbs; Light diffusers; Light reflectors; Lighted disco balls; Lighted party-themed decorations, electric light decorative strings; Lighting fixtures; Lighting tubes” in Class 11.

The Examining Attorney relies on the underscored items above to support her position. While each third-party registration does include some photographic accessories similar to those in the cited registration, it is not entirely clear whether they also include any high end lighting devices like those in the involved application. While the references to equipment for “performing arts” in the two Honl registrations may suggest a resemblance to Applicant’s products, it is not entirely clear. And even if we view the remaining registrations which include items such as “theatrical stage lighting apparatus,” “film stage lighting apparatus; flashing strobe light apparatus” and “lighted disco balls” as similar to Applicant’s types of lighting devices, two third-party registrations without more are insufficient to support a determination that Applicant’s and Registrant’s goods may emanate from a common source.

We likewise find that the Examining Attorney’s evidence obtained from third-party websites falls short. Upon close review, none of the third-party websites discussed in the Examining Attorney’s brief clearly shows for sale both Applicant’s and Registrant’s types of goods. For example, David Honl is a photojournalist who

sells flash modifiers for photographers – not theatrical lighting.⁴ Similarly, the strobe and flashing lights offered for sale on the www.lincostore.com and the www.estudiolighting.com websites involve photographic studio lighting that does not appear to be commercially related to Applicant's lighting for large public venues.⁵

Thus, the evidence noted above fails to support a finding that consumers may encounter some of Applicant's and Registrant's identified goods offered under the same mark. In other words, we find this evidence insufficient to show a commercial relationship. Our determination that Applicant's and Registrant's goods are unrelated is further supported by evidence showing great disparities in the costs of such items. Registrant's low-priced photographic lighting accessories are priced from \$9.⁹⁵ to \$199.⁹⁵ and are marketed to photographers. *See* excerpts from www.rogueflash.com.⁶ By contrast, Applicant's products are high-priced professional entertainment lighting equipment ranging in price from \$1200 to \$4200 sold to sports arenas, theaters, clubs, discotheques and entertainment production companies to create special lighting effects at widely attended events such as concerts or theatrical productions. *See* excerpts from www.chauvetlighting.com.⁷

⁴ www.honlphoto.com, USPTO TSDR Case Viewer Application Serial No. 86075662 entry dated February 5, 2015 (Request for Reconsideration Denied, at 14-19 of 29).

⁵ *Id.* at 20-23 of 29 and 5-10 of 29, respectively.

⁶ USPTO TSDR Case Viewer Application Serial No. 86075662 entry dated January 20, 2015 (Exhibits A-E, Request for Reconsideration, at 15-23 of 26).

⁷ *Id.*, Exhibits F-G, at 24-26 of 26.

We further observe that the appeal presently before us bears some resemblance to *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509 (TTAB 2010). In that case, the applicant sought to register the mark EPIC in standard characters for “personal headlamps” in International Class 11. Registration was refused based on the identical mark EPIC also in standard characters for “electric lighting fixtures” in the same class of goods. The examining attorney argued that “personal headlamps and electric lighting fixtures are related because the primary purpose of both types of goods is ... to emit and to provide light” and that “registrant’s fixtures are broad enough to encompass applicant’s goods.” *Id.* at 1510. The Board rejected this argument, reasoning that

... the mere fact that both types of goods at issue here emit and provide light is not a sufficient basis for us to conclude that the goods are related. The goods, as identified, are sufficiently different in their uses to require proof that they are related. Nor can we conclude by intuition that both types of goods would be sold through common trade channels.

Id. The Board also found that the third-party registrations and website evidence submitted by the examining attorney lacked probative value. More specifically, only one of the third-party registrations arguably included applicant’s goods. Likewise, none of the third-party websites offered for sale any of the involved goods. The remaining third-party websites consisted of entities such as Alibaba that sell a broad range of unrelated goods online. The Board therefore found that the Office failed to show a relationship between applicant’s and registrant’s identified goods and reversed the Section 2(d) refusal. We reach the same conclusion here. That is to

say, the mere fact that Applicant's and Registrant's goods fall under the same general product category is insufficient alone to show a relatedness of the goods.

In sum, after considering all of the evidence properly of record and arguments pertaining to the *du Pont* likelihood of confusion factors, we find that despite their identical marks, there is no likelihood of confusion between Applicant's applied-for and Registrant's registered mark. Simply put, the record before us fails to establish that the circumstances surrounding the marketing of photographic lighting and accessories, on the one hand, and lighting for large public venues, on the other hand, are such that relevant purchasers would mistakenly believe that the respective goods originate from the same source, even if the same, inherently distinctive mark is used on both.

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