

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 Kinetixx Golf, LLC

Serial No. 87671054

Rob. L. Phillips of FisherBroyles, LLP,
for Kinetixx Golf, LLC.

Scott Kumis, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.


Before Cataldo, Lykos, and Lynch,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Kinetixx Golf, LLC, seeks registration on the Principal Register of the mark KINETIXX (in standard characters) identifying “hockey sticks, hockey stick shafts and hockey stick blades” in International Class 28.¹

¹ Application Serial No. 87671054 was filed on November 3, 2017, based upon Applicant’s assertion of use of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act. 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the cited registered mark  identifying, "Baseball gloves, batting gloves, bowling gloves, boxing gloves, fencing gloves, field hockey gloves, football gloves, archery gloves, golf gloves, goalkeepers gloves, weight lifting gloves, windsurfing gloves, workout gloves" in International Class 28.²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. ___, 135 S. Ct. 1293, 113 USPQ2d 2045, 049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d

² Registration No. 6013845 issued on the Principal Register on March 17, 2020 with the following description and color statement: "The mark consists of the word 'KINETIXX' in stylized, capital letters in black and a larger red first X superimposed thereon;" "The color(s) black and red is/are claimed as a feature of the mark." The registration recites additional goods in International Class 25.

1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018). These and other factors are discussed below.

A. The Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918

F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

Therefore, to support a finding of likelihood of confusion, it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

In support of the refusal of registration, the Examining Attorney introduced with his April 28, 2020 Office Action at 8-24 and December 3, 2020 final Office Action at 5-22, printouts from third-party websites specializing in athletic equipment offering, under the same marks, various athletic gloves as well as hockey sticks. These include: Dick’s Sporting Goods, Franklin, STX, Academy Sports + Outdoors and Modell’s Sporting Goods.


We thus find that consumers would readily expect these goods could emanate from the same sources. In this case, the website evidence introduced by the Examining Attorney shows on its face that third parties offer on their websites Applicant’s products and many of the products identified in the cited registration under the same

mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

The Examining Attorney also introduced into the record with his April 28, 2020 Office Action at 25-57 copies of eleven use-based, third-party registrations for marks identifying, inter alia, various athletic gloves and hockey sticks. The following examples are illustrative:

Reg. No. 5890094 for the mark QOVO (in standard characters);

Reg. No. 5953978 for the mark GOLDEN SPORT (standard characters, “SPORT” disclaimed); and

Reg. No. 5971997 for the mark  (in stylized form).

As a general proposition, although use-based, 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 some probative value to the extent they may serve to suggest that the goods are of a kind that 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); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect

that athletic gloves of various types and hockey sticks could emanate from the same sources.

Applicant argues: “Despite being used in conjunction with gloves, the Cited Registration does not identify hockey gloves. Thus, the Applicant of the application maturing into the Cited Registration made a conscious decision to not list hockey gloves as part of its goods.” (Applicant’s brief; 4 TTABVUE 7-8.) However, in order to support a finding that the goods are related, it is not necessary for the goods in the cited registration to include hockey gloves inasmuch as the evidence above demonstrates that the registrant’s various athletic gloves may emanate from the same source as Applicant’s hockey sticks, blades and shafts. The absence of hockey gloves from the identification of goods in the cited registration does not, per se, mitigate in favor of a finding of no likelihood of confusion.³

Evidence of record demonstrates that Applicant’s goods and the goods identified in the cited registration may be encountered by the same classes of consumers, namely, members of the general public shopping for sports equipment and apparel, under the same marks in at least one common trade channel, i.e., the websites of

³ Similarly, we are not persuaded by Applicant’s contentions regarding its earlier Reg. No. 4485053 identifying “golf clubs” that did not bar registration of the application underlying cited Registration No. 6013845. We are not bound by the decisions of examining attorneys in other applications. *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re BankAmerica Corp.*, 231 USPQ 873, 876 (TTAB 1986). Further, “[i]t has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted); *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).


sporting goods and sporting apparel stores. In addition, the identifications of goods in the involved application and cited registration do not recite any limitations as to the channels of trade in which the goods are or will be offered. In the absence of trade channel limitations on the goods offered under the registered mark and application, we must presume that these goods are offered in all customary trade channels. See *Citigroup v. Capital City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).


We find that the *DuPont* factors of the relatedness of the goods, channels of trade and consumers weigh in favor of likelihood of confusion.

B. The Marks


Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's mark and the registered mark in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted). *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted). *See also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in proximity to one another and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d at 1468.

Applicant’s KINETIXX mark in standard characters consists in its entirety of the sole term comprising the registered mark  in stylized form. The marks thus are nearly identical in appearance. The fact that the registered mark is stylized is of little consequence here, inasmuch as the applied-for mark is in standard characters and therefore we must consider presentations of that mark regardless of font style, size or color in determining their similarity or dissimilarity. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (the Board should use the *DuPont* factors to determine whether there is a likelihood of confusion between the depictions of standard character marks and not restrict the analysis to “reasonable manners” of depicting standard character marks); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1910 (Fed. Cir. 2012).

In addition, the marks KINETIXX and , consisting of the same letters presented in the same order, are identical in sound.

While neither the application nor the cited registration provides a translation of the mark, both appear to be a novel or alternate spelling of the term “kinetics.” If so perceived by consumers, the marks are identical in meaning. If consumers perceive the marks as coined terms with no recognized meaning, both are likely to be so perceived.

Applicant argues that the registered  mark consists of a word and design, and argues that the facts of this case are similar to those of *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014) (holding confusion unlikely between REDNECK RACEGIRL and design of large, double-letter RR configuration and registered mark RACEGIRL, even when used on in part identical goods) and *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009) (holding VOLTA for vodka infused with caffeine, and TERZA VOLTA and vine shoot design for wines, not likely to cause confusion).



However, the applied-for mark in *Covalinski* included a



TERZA
VOLTA

prominent design, as did the registered mark in *White Rock Distilleries*.



In the case before us, the registered mark consists simply of the term KINETIXX in stylized form. As a result, we disagree with Applicant that “the over-seized [sic] red “X” (like the sticks in Terza Volta) stands out as the dominant portion as the first thing an observer notices when seeing the mark under the Cited Registration.” (4 TTABVUE 7.) Even in the event consumers first notice the red-colored letter “X” in the cited mark, they will see it as the penultimate letter in the stylized term KINETIXX.

We find that Applicant’s KINETIXX mark in standard characters is nearly identical to the registered mark in appearance, sound, meaning and commercial impression. The first *DuPont* factor thus also weighs in favor of finding a likelihood of confusion.



C. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant’s arguments relating thereto, including those arguments and

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evidence not specifically addressed herein, we conclude that consumers familiar with the registrant's goods offered under its mark would be likely to believe, upon encountering Applicant's mark, that the goods originated with or are associated with or sponsored by the same entity.

Decision: The refusal to register Applicant's proposed mark is affirmed under Section 2(d) of the Trademark Act.