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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Markwort Sporting Goods Company

Serial No. 77408993

Nelson D. Nolte of Polster, Lieder, Woodruff & Lucchesi
L.C. for Markwort Sporting Goods Company.

Katherine S. Chang, Trademark Examining Attorney, Law
Office 115 (John Lincoski, Managing Attorney).

Before Bucher, Zervas and Taylor, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

Markwort Sporting Goods Company ("applicant") filed an
application to register the standard character mark GAME
FACE on the Principal Register under Trademark Act Section
1(a), 15 U.S.C. § 1051(a), for the following International
Class 28 goods:

Open-faced protective face mask made from a
hardened polycarbonate incorporating a strike bar
for protecting the entire face of the wearer from
impacts from balls in the sports of baseball,
softball, soccer, flag football, lacrosse, and
field hockey and incapable of protecting the eyes

from liquid contaminants as in paintball activities.

Applicant claims first use and first use in commerce in November 1996.

The assigned 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 that applicant's mark as used on applicant's goods so resembles the following two marks for registrant's goods as to be likely to cause confusion or mistake or to deceive:

- (i) **GAME FACE** (Registration No. 2816135, in standard character form, Section 8 affidavit accepted and Section 15 affidavit acknowledged) for "goggles for use in paintball activities" in International Class 9, and "... paintball sporting articles, namely, protective masks ...," in International Class 28; and
- (ii)  (Registration No. 2779071, renewed) for "goggles for use in paintball activities" in International Class 9.¹

Both cited registrations are owned by the same entity.

We consider only the registration for registrant's standard character mark. If there is no likelihood of confusion between applicant's mark and the standard character mark, there will not be a likelihood of confusion

¹ Office records indicate that the International Class 28 goods in Registration No. 2779071 have been cancelled.

with the combination word and design mark (for less closely related goods). If there is a likelihood of confusion with this mark, there is no reason to consider the issue of likelihood of confusion regarding the combination word and design mark.

Before addressing the merits of applicant's appeal, we consider two preliminary issues. First, applicant submitted in or with its appeal brief two photographs of applicant's goods, and a copy of third-party Registration No. 3676498, none of which was made of record prior to the filing of the appeal. Applicant also referred for the first time to three websites in its brief.² The examining attorney has objected to each of the foregoing items. We sustain the examining attorney's objection to each item and have not considered them. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). See also TBMP § 1207.01 (3d ed. 2011). We note, however, that had we considered this material in our determination of the issue on appeal, the result would be the same.

Second, applicant requests that we take judicial notice of a definition of "game face" taken from an online

² A printout of each of the three web pages is not in the record.

dictionary. We opt instead to take judicial notice of the following definition of "game face," taken from a print dictionary, i.e., from *Slang, The Topical Dictionary of Americanisms* (Walker & Co., 1960): "looking mean and determined."

Our determination under Trademark Act § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

We first consider the similarity or dissimilarity of the marks, comparing the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. Applicant's GAME FACE mark is identical in all respects to registrant's GAME FACE standard character mark.

Next, we consider the relatedness of the goods and the trade channels, focusing on registrant's "... paintball sporting articles, namely, protective masks" In determining the relatedness of the goods, we note that there need be only a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists where the applicant's mark is identical to the registrant's mark. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983). The examining attorney correctly notes, citing *In re Iolo Techs., LLC*, 95 USPQ2d 1498 (TTAB 2010), that a likelihood of confusion may be found if the goods and/or services are related in some manner or that some 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 or intended to be used therewith, to a mistaken belief

that they originate from or are in some way associated with the same producer or that there is an association between the producers of each of the parties' goods and/or services. See also *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

The examining attorney introduced into the record web pages from three retailers of sporting goods (Dick's Sporting Goods, Sports Authority and Dunham's Sports)³ that offer (i) lacrosse and field hockey masks or catcher's masks, and (ii) paintball masks. (The trademarks on the respective masks are different.) The examining attorney argues that "a purchaser who encounters applicant's GAME FACE protective mask in a sporting goods store would also encounter the registrant's GAME FACE protective mask in the same store, leading him to be confused into believing that the two products emanate from the same source." Brief at unnumbered p. 7. She also states that "[t]he goods are of the same type: protective face masks for sports. ... In all of these sports, protective face masks prevent various sizes and shapes of balls from injuring the face of the mask-wearer. In other words, the goods are similar because they

³ The Academy Sports + Outdoors web pages only show a paintball mask and a football eye shield, which "[f]its most standard facemasks" and notes that the "[f]ace mask not included." Because the goods here are face masks, this material is not relevant.

are used in the same way and have the same purpose." Brief at 5.

Applicant disagrees and argues that the web pages have limited probative value because they are from "big box stores"; that "the mere fact that goods can be found in the same stores of a large retailer does not mean the goods are related"; that "the retailers also sell bicycles, treadmills, trampolines and billiard tables which are also not highly related goods to paintball masks"; and that there is "no evidence that such goods are ever located in the same section of the store or near one another." Reply at 2 - 3. Applicant also argues that the respective goods "may not be used in the same way for the same purpose"; and that applicant's and registrant's goods are different because applicant's goods do not prevent liquids or paintballs from striking the face. Reply at 1.

The examining attorney's website evidence regarding the trade channels of the goods is not particularly persuasive for the reasons noted by applicant, and because it is limited in number. Additionally, it has not escaped our attention that the Sports Authority web pages have links to the following "Top Shops" on the left side of the web pages: "Golf," "Cycling," "Footwear," "Paintball/Airsoft," and "Baseball/Softball." These links suggest that the paintball

"shop" is segregated from other "shops" on the Sports Authority web page and that protective masks for paintballs would be sold separate from masks for sports such as baseball or lacrosse. Further, none of the web pages exhibit the same types of goods on the *same* web page, or even as "related products"; the involved goods are depicted on *separate* web pages. The examining attorney therefore has not established that the trade channels are related, and we find the *du Pont* factor regarding trade channels is neutral in our analysis.⁴

However, with regard to the relatedness of the goods, despite applicant's contentions to the contrary, applicant's and registrant's goods both serve to protect the face, or portions of the face, during sporting activity. As noted earlier in this decision, where at least one of the cited marks is identical to applicant's mark, in order to find the goods related, there need be only a viable relationship between the respective goods. The noted similarity between the involved goods satisfies this requirement for a viable relationship.⁵ Because of their identical function, namely,

⁴ Applicant has not established that the trade channels are different.

⁵ Applicant's argument at pp. 1 - 2 of its reply brief that "consumers would not view these goods as related any more than a paintball mask and a Halloween mask" is hyperbole; a Halloween mask does not protect the user's face during sporting activity.

to protect the user's face and eyes, and the identical marks on the goods, a consumer who has, e.g., a lacrosse mask, and then is considering a paintball mask, would likely consider the goods as emanating from the same source, even if they are offered for sale in different sections of the same store or on different web pages.

Applicant argues that it has submitted many third-party registrations into the record that comprise or incorporate "game face," and "marks incorporating the term GAME FACE [are] diluted in sports related goods and services and [do] not enjoy a broad scope of protection." The third-party registrations do not prove that "game face" is a diluted, weak term. Absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks 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). As stated in *In re Hub Distributing, Inc.*, 218 USPQ 284, 286 (TTAB 1983):

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third[-]party registrations are still in use. Because of this doubt, third[-]party registration evidence proves nothing about the

impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as to their weakness in distinguishing source.

Further, we agree with the examining attorney that the registrations that applicant relies on are mostly unrelated to the goods at hand. See, e.g., Registration No. 1759878 for "temporary skin transfers or decals"; and Registration No. 3160465 for "chewing gum." Also, Registration No. 2755285 for educational services is not a "live" registration.

As far as applicant's point that "game face" is a common term in sports, gaming and competition in general, and hence weak, we disagree. The evidence adduced by applicant does not establish any weakness in the term as applied to the involved goods.

Finally, applicant argues that the consumers of both its goods and those of registrant make their purchasing decisions with care because the goods involve their health and well-being, and that of their children; and that the goods are used in activities where injury is common because of the high risk of injury involved. Applicant adds that "paintball equipment and sporting equipment can be expensive and more care is used in selected expensive items." Brief at 8. However, the evidence of record

exhibits that a paintball mask costs forty-five dollars and that a lacrosse mask costs eighty dollars. These items cannot be considered as expensive enough to justify heightened care in purchasing decisions. Also, there is no evidence in the record of a high risk of injury in paintball, baseball, lacrosse or other identified sports suggesting that greater care is taken by purchasers in deciding to purchase applicant's and registrant's goods.

In this situation, where applicant's mark is identical to the mark in cited Registration No. 2816135, and the goods are related, we find that applicant's mark for face masks for baseball, softball, soccer, flag football, lacrosse and field hockey, is likely to be confused with registrant's mark in Registration No. 2816135 for "paintball sporting articles, namely, protective masks."

Decision: The refusal to register applicant's mark under Trademark Act §2(d) in view of Registration No. 2816135 is affirmed.