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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re McCrane, Inc.

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Serial No. 85728534

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Edward S. Wright
for McCrane, Inc.

Russ Herman, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

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Before Quinn, Wellington, and Gorowitz,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

McCrane, Inc., doing business as Harbinger (“Applicant”), filed an application to register on the Principal Register the mark shown below

HUMANX

for goods identified as

exercise and fitness equipment, namely, weightlifting gloves, balance trainers, jump ropes, wrist stabilizers and supports, fabric wrist wraps, weight vests, forearm protectors, resistance cables, push-up bars, foam rollers,

personal exercise mats, personal exercise mats for abdominal exercise, yoga mat towels, palm flap gloves, weightlifting straps, knee wraps, weightlifting belts, weightlifting head harnesses, abdominal weightlifting straps, weightlifting hooks, and weightlifting bar pads (in International Class 28).¹

The application includes the following statements: “The mark consists of the word HUMANX in stylized black letters with a red triangle in the left side of the letter X.

The color(s) black and red is/are claimed as a feature of the mark.”

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to Applicant’s goods, so resembles the mark HUMAN X (in standard characters), for “athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; boxing shorts; rash guards; tee shirts” (in International Class 25)² as to be likely to cause confusion.

When the refusal was made final, Applicant appealed. During the appeal, proceedings were suspended upon Applicant’s filing of a petition for cancellation (No. 92058907) of the cited registration. Applicant, without the written consent of Registrant, subsequently filed a withdrawal of the petition. The petition for cancellation was dismissed with prejudice on September 28, 2015. Both Applicant and the Examining Attorney filed briefs in the appeal.³

¹ Application Serial No. 85728534, filed September 13, 2012 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a *bona fide* intention to use the mark in commerce.

² Registration No. 4218147, issued October 2, 2012.

³ Applicant’s allegations in its appeal brief bearing on the “invalidity” of the cited registration are related to its grounds for the petition for cancellation, which now stands dismissed. In the absence of a cancellation proceeding, Applicant’s allegations constitute an impermissible

Applicant argues that the marks look and sound differently, and that the goods are distinctly different. In connection with the latter contention, Applicant asserts that the Examining Attorney has failed to provide sufficient evidence to show that the goods are sufficiently related for purposes of likelihood of confusion.

The Examining Attorney maintains that the marks are similar and that the goods are related. Further, the Examining Attorney contends that the goods are low-cost, lending themselves to more casual purchase and an increased likelihood of confusion between the involved marks. The Examining Attorney introduced portions of third-party websites to show that the goods move in the same trade channels, with online sporting goods retailers offering for sale both exercise/fitness equipment and athletic apparel on the same webpage.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.” *In re SL&E Training Stable, Inc.*, 88 USPQ2d 1216, 1217 (TTAB 2008). *See also Federated Foods, Inc. v. Fort Howard*

collateral attack on Registrant’s registration. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant’s ownership of the mark and of the registrant’s exclusive right to use the mark in connection with the goods or services identified in the certificate. During *ex parte* prosecution, including an *ex parte* appeal, an applicant will not be heard on matters that constitute a collateral attack on the cited registration. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1376 (TTAB 2006). *See* TMEP § 1207.01(d)(iv) (2016).

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

With respect to the first *du Pont* factor, we must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “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*, 101 USPQ2d at 1721 (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Accordingly, we compare Applicant’s mark **HUMANX** in special form to Registrant’s mark HUMAN X in standard characters. Because Registrant’s mark is registered in standard character form Registrant is entitled to depict its mark in any font style, size, or color, including a stylization that approximates the one present in Applicant’s mark. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344,

98 USPQ2d 1254, 1258-59 (Fed. Cir. 2011). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012). Thus, although we recognize that Applicant's mark is in special form, the marks are similar in appearance; the triangle design in Applicant's mark serves to separate the word "human" from the letter "x," thereby creating a similar appearance to the registered mark. In sum, the stylization of the letters and the red triangle in Applicant's mark are insufficient in terms of appearance to distinguish the mark from the registered mark in standard characters.

As to sound, Applicant argues that its mark is pronounced "hu-man-ics" with the accent on "man," whereas Registrant's mark sounds like "human x" with a pause between the word "human" and the letter "x." For purposes of the Section 2(d) analysis, there is no "correct" pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark; therefore, "correct" pronunciation cannot be relied on to avoid a likelihood of confusion. *See, e.g., In re Viterra Inc.*, 101 USPQ2d at 1912 (upholding the Board's affirmance of a Section 2(d) refusal to register XCEED for agricultural seed based on a likelihood of confusion with the registered mark X-SEED and design, SEED disclaimed, for identical goods); *Centraz Indus. Inc. v. Spartan Chem. Co. Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (acknowledging that "there is no correct pronunciation of a trademark" and finding ISHINE (stylized) and ICE SHINE, both for floor finishing preparations, confusingly similar). Contrary to Applicant's argument, it is just as likely that both marks will sound like either "humanics" or "human x." In any event, while we acknowledge that consumers might pronounce the marks somewhat differently, they still are likely to

sound similar inasmuch as both marks comprise the word “human” followed by the letter “x.”

Applicant does not contend that there is any difference in meaning, and we agree. Both marks suggest the idea of something (like exercise equipment or athletic apparel) relating to humans. Given the similarities in sound, appearance and meaning, the marks engender overall commercial impressions that are similar.

As indicated earlier, we bear in mind that the “marks ‘must be considered ... in light of the fallibility of memory ...,’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014), and that the proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013). We also note the lack of any evidence of third-party uses or registrations that would indicate that customers have been educated to distinguish between different marks on the basis of small distinctions. *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015) (extensive evidence of third-party use and registrations may be probative in showing that a term is weak).

The high degree of similarity between the marks is a *du Pont* factor that weighs significantly in favor of a finding of likelihood of confusion.

The Goods

When analyzing the similarity of the goods, “it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of

confusion.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012), citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Instead, likelihood of confusion can be found “if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Id.* The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). In making our determination regarding the relatedness of the goods, we must look to the goods as identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014), quoting *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application and cited registration. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). We also keep in mind that when the marks are highly similar, as in the present case, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *See, e.g., In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636

(TTAB 2009); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

Accordingly, we compare Applicant's exercise and fitness equipment, namely, weightlifting gloves, balance trainers, jump ropes, wrist stabilizers and supports, fabric wrist wraps, weight vests, forearm protectors, resistance cables, push-up bars, foam rollers, personal exercise mats, personal exercise mats for abdominal exercise, yoga mat towels, palm flap gloves, weightlifting straps, knee wraps, weightlifting belts, weightlifting head harnesses, abdominal weightlifting straps, weightlifting hooks, and weightlifting bar pads" to Registrant's "athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; boxing shorts; rash guards; tee shirts."

Exercise/fitness equipment and athletic apparel may be bought and used together. To state the obvious, the goods are complementary in that consumers wear athletic apparel while using exercise/fitness equipment. Thus, Registrant's athletic apparel may be worn while the user works out with Applicant's exercise and fitness equipment. 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). We find that that the goods are sufficiently related, especially given that they are or will be sold under highly similar marks.

The Examining Attorney's evidence of record comprises webpages of four online sporting goods retailers: sportsauthority.com; dickssportinggoods.com; modells.com; and big5sportinggoods.com. These websites show that that exercise/fitness equipment and athletic apparel are promoted on the same webpage of the retailers. Thus, the evidence establishes that the goods move in the same trade channels (online sporting goods retailers) to the same classes of consumers (those interested in physical activity).

Ordinary consumers, who would be expected to use nothing more than ordinary care in purchasing Applicant's and Registrant's workout items because such goods can be inexpensive, may even purchase them on impulse. "When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

Although the goods are specifically different, exercise/fitness equipment and athletic apparel are complimentary. Moreover, the trade channels and purchasers are identical. Further, the conditions of sale involve nothing more than ordinary care, and may even involve impulse purchases. These factors weigh, on balance, in favor of finding that the goods are sufficiently related for purposes of the likelihood of confusion analysis, especially when viewed in the context of highly similar marks.

Conclusion

The similarity between the marks and the goods, the identity in trade channels and consumers, and the conditions of sale cumulatively outweigh any specific differences between the marks and the goods. We conclude that consumers, when encountering the marks, will mistakenly believe that the goods originate from or are associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.