

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 Driven Golf, Inc.

Serial No. 88215365

Rob L. Phillips, of FisherBroyles, LLP for Driven Golf, Inc.

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Before Cataldo, Goodman and Larkin, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Driven Golf, Inc., applied to register DRIVEN GOLF (in standard characters, GOLF disclaimed) on the Principal Register¹ identifying the following goods, as amended:

Golf training aids, namely tangible articles designed to attach to a golfer and/or golf club and improve a golfer's swing in Class 9; and

Apparel, namely T-shirts, shirts, hats, caps, sweatshirts, pants, sweat suits, hoodies and socks International Class 25.

¹ Filed December 4, 2018, alleging a bona fide intent to use the mark in commerce as to both classes of goods. Applicant submitted its disclaimer of "GOLF" in response to the Examining Attorney's requirement.

Applicant appeals from the Examining Attorney's final refusal to register: (1) pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that its mark is likely to cause confusion in view of the registered mark DRIVEN BY PING (in standard characters)² identifying "golf clubs" in International Class 28; and (2) based upon Applicant's failure to submit an acceptable identification of goods currently listed in Class 9.

I. Evidentiary Matter

Before proceeding to the merits of the refusal, we address an evidentiary matter.

Applicant did not submit any evidence during the prosecution of its involved application. Applicant subsequently attached evidence to its appeal brief.³ Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

² Registration No. 4269857 issued January 1, 2013 on the Principal Register. Combined affidavit under Trademark Act §§ 8 & 15 accepted and acknowledged.

³ 4 TTABVUE 9-16.

All citations to documents contained in the Trademark Status and Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

The evidence submitted with Applicant's appeal brief is untimely and will not be considered.⁴ *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1203.02(e) and § 1207.01 and authorities cited therein.

We turn now to the merits of this appeal.

II. Identification of Goods

In order to comply with statutory and regulatory requirements for filing an application, the wording of the identification must be clear and complete. 15 U.S.C. §§ 1051(a)(2) and 1051(b)(2); 37 C.F.R. § 2.32(a)(6). The USPTO has discretion to require the degree of particularity deemed necessary to identify with specificity the goods or services covered by the mark. *See In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1597 (TTAB 2014).

In this case, the Examining Attorney argues that the current identification of Class 9 goods is indefinite because it “does not specify whether it is electronic in nature or not”⁵ and thus lists goods that may be classified in more than one international class.

Applicant's arguments with regard to its present identification of Class 9 goods are as follows: (internal citations omitted)

⁴ The proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.02 and authorities cited therein.

⁵ 6 TTABVUE 11.

The current description of goods states “Golf training aids, namely tangible articles designed to attach to a golfer and/or club and improve a golfer’s swing.” The examining attorney opines that such description is indefinite. Applicant contends that the identification of goods is specific, definite, clear, accurate, and concise. Applicant promotes a series of different training aids that meet the offered description. It is not necessary that the Applicant define each and every good under the identification of goods. Applicant contends that the current description is satisfactory under TMEP §1402.⁶

We disagree. The Final Office Action of October 3, 2019 maintained and made final the requirement for an acceptable identification of goods and stated, inter alia, that the “wording ‘aids’ and ‘articles’ in International Class 9 must be clarified because it is indefinite as it does not specify the name or type of the aid.”⁷ “In addition, this identification is too broad and could identify goods in more than one international class.”⁸ In particular, the Examining Attorney noted that the *U.S. Acceptable Identification of Goods and Services Manual* (“ID Manual”) deleted a previously-acceptable entry for “Golf training apparatus, namely, devices used to help groove a repetitive putting stroke” ... “because the description was overbroad and may include goods in Class 9 or Class 28.”⁹ The Examining Attorney then suggested acceptable identifications of goods in Class 9 and Class 28.¹⁰

⁶ 4 TTABVUE 8.

⁷ At 3.

⁸ *Id.*

⁹ At 4.

¹⁰ *Id.*

Applicant's use of the wording "aids" and "tangible articles" is impermissibly vague because it is impossible to determine the exact nature and classification of the goods so identified. Contrary to Applicant's assertion, it is "necessary that Applicant define each and every good under the identification of goods,"¹¹ particularly when Applicant acknowledges that its goods encompass "a series of different training aids"¹² and thus may include several different types of goods used to improve a golfer's swing. Accordingly, the wording used by Applicant is indefinite because it could describe more than one type of goods in more than one international class.

For the foregoing reasons, the requirement for a more definite identification of Class 9 goods is affirmed.

III. Likelihood of Confusion

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence, 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 and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999)

¹¹ Applicant's brief, 4 TTABVUE 8.

¹² *Id.*

1. Evidence

In support of the refusal to register, the Examining Attorney introduced into the record with the October 3, 2019 Final Office Action¹³ copies of two use-based registrations identifying various golf training aids assertedly of a type similar to the “tangible articles” in the subject application, as well as the golf clubs in the cited registration. The Examining Attorney also submitted five additional third-party registrations for marks that have been registered under the provisions of the Madrid protocol or pursuant to Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e). These five registrations have little, if any, probative value because they do not require use in commerce to be registered and therefore are not evidence that the marks therein have ever been encountered by consumers in the marketplace, so as to condition consumers to perceive marks as identifying the goods identified in the subject application and cited registration, and thus that such goods may originate from a common source. *See In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The Examining Attorney also made of record with the March 1, 2019 First Office Action¹⁴ pages from the websites of three businesses and the social media sites of an individual putatively associated with Applicant to support the position that

the goods are golf equipment or apparel directed to the same target audience, i.e., golfers, (see, promotions of applicant through YouTube and Facebook) where applicant promotes itself broadly as a “multi purpose golf industry company.” The training aids and clubs are of the type sold through the same channels of trade, e.g., online golf sports equipment

¹³ At 6-43.

¹⁴ At 8-22.

sites, and directed to the same target audience, i.e., golfers. The evidence also shows applicant's principal wearing applicant's marked shirt while holding a golf club of some unknown source, perhaps even a Ping club. (Facebook™ page of Ryan Winther). As admitted by applicant, PING is an arguably famous golf brand in the golf industry; hence its name is not limited to an association with golf clubs, as evidenced by the "NBC Golf" article from www.golfchannel.com in which the registrant's clubs are being sold as part of a larger charity efforts for others, specifically cancer research ("From the driver sales, 5 percent of the proceeds will help [that] goal."). The evidence from the Yahoo! Sports webpage reiterates that 5% of proceeds from the sale are "going to 'Bubba Long in Pink. Driven by Ping' which is Ping's part of [pro golfer Bubba] Watson's charity initiative."¹⁵

In reply, Applicant notes that it has not yet commenced use of the involved mark and asserts that the individual "Ryan Winther" and the entity "Driven Golf, Inc." discussed in the Examining Attorney's evidence are third parties unrelated to Applicant.¹⁶

2. Analysis

A. Similarity or dissimilarity and nature of the goods

In comparing the goods, "[t]he issue to be determined . . . is not whether the goods . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source." *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). It is not necessary that the parties' goods be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner or that the conditions surrounding their marketing are such that they would be encountered

¹⁵ Examining Attorney's brief, 6 TTABVUE 8-9.

¹⁶ Applicant's Reply Brief, 7 TTABVUE 2-3.

by the same persons under circumstances that could, in light of the similarity of the marks, give rise to the mistaken belief that they come from or are associated with the same source. *Albert Trostel & Sons Co.*, 29 USPQ2d at 1786.

The Examining Attorney's evidence establishes that two third parties have registered use-based marks identifying, inter alia, golf clubs and various golf training aids under the same mark. The evidence further establishes that a single third party, named Driven Golf, Inc. but apparently not related to Applicant herein, provides golf instruction, golf fitness and golf videos. The mere fact that an individual named Ryan Winther, associated with this third party, is wearing an NBC Sports Driven Golf polo shirt and carrying a golf club does not establish the relatedness of the goods at issue herein. Simply put, this very sparse record is insufficient to establish that consumers are likely to believe Applicant's goods emanate from the same sources as those identified in the cited registration.¹⁷ As a result, the evidence of record fails to support a finding that the goods identified in the cited registration are related to Applicant's goods in Class 9 or 25.

This factor favors a finding that confusion is not likely.

B. The similarity or dissimilarity of established, likely-to-continue trade channels

As discussed above, there is insufficient evidence that Applicant's goods in Classes

¹⁷ We observe that the indefinite nature of Applicant's present identification of Class 9 goods does not assist the Board in our determination regarding the relatedness of the goods for purposes of our likelihood of confusion determination. Nonetheless, even construing Applicant's goods as broadly as possible, the evidence of record fails to establish their relatedness to the goods in the cited registration.

9 and 25 are related to the goods identified in the cited registration. As a result, there is no presumption that these goods travel in common trade channels and are marketed to the same consumers. Furthermore, there is very little evidence that these goods are available in the same channels of trade to the same consumers. While we recognize that golf clubs, golf training aids and clothing that is broadly identified to include clothing worn while golfing may be available in common trade channels, there is insufficient evidence in the record that these goods travel in the same channels of trade or may be purchased by the same classes of purchasers.

This factor also supports a finding that confusion is not likely.

C. Similarity or dissimilarity of the marks

In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “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, 1377, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation and internal quotation marks omitted).

Applicant’s mark is DRIVEN GOLF in standard characters, with GOLF disclaimed. The mark in the cited registration is DRIVEN BY PING in standard characters. In appearance, the only similarity between the two marks is the common word

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DRIVEN, which appears as the first word in both marks. We recognize that the prominence of the word DRIVEN is reinforced by its location as the first word in the marks. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”); *see also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word). However, although both marks are in standard-character format and could be presented in the same or similar stylization, they are somewhat more dissimilar than similar due to the additional wording in each mark.

The marks would also be largely dissimilar in pronunciation. Although the first word in each mark is identical and would be pronounced identically, each mark ends with different wording. Applicant’s mark includes the word GOLF, while the cited mark ends with the entirely different terms BY PING. Both the wording following DRIVEN and the marks in their entirety are somewhat different in pronunciation.

The word GOLF is disclaimed in the applied-for mark. We find that the term GOLF is, at best, highly descriptive of the identified goods in Class 9 that are intended to function as “golf training aids.” While we must consider the marks in their entirety, the “descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.” *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *In re Nat’l Data Corp.*, 753

F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)). As a result, the term GOLF in Applicant's mark possesses far less source-identifying significance than DRIVEN. On the other hand, there is no evidence in the record to suggest that PING is anything other than a distinctive term as applied to the goods identified in the cited registration. The Examining Attorney argues in his brief:

Registrant's mark is a composite "DRIVEN BY PING" which engenders separable commercial impressions: the house mark "PING" and the product mark "DRIVEN." Together the mark "DRIVEN BY PING" identifies a branded golf club, "Driven," made "by Ping." Applicant agrees that "PING is a well-known and arguably itself a famous mark for golf clubs ... [so] by including the term PING in the Registered mark, the owner is definitively telling the consumer that the golf clubs are a PING-branded product, (i.e., "by PING")."¹⁸

We agree with this characterization of the registered mark. The mark DRIVEN BY PING connotes PING-branded golf clubs, presumably drivers.¹⁹ Applicant's mark, on the other hand, connotes golf aids used by consumers who are driven to improve their game, and clothing related thereto. Thus, while we agree with the Examining Attorney that the addition of a house mark such as PING to a mark does not necessarily obviate a likelihood of confusion, *see, e.g., In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366-67 (TTAB 2007), the marks at issue herein are more dissimilar than similar in connotation.

Although Applicant's mark and that in the cited registration share a common first

¹⁸ Examining Attorney's brief; 6 TTABVUE 6.

¹⁹ We note, nonetheless, that the owner of the cited registration is not a party to this appeal and that, as a result, the putative fame of the cited mark is not before us. *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame is not normally a factor in ex parte proceedings).

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word, we conclude that when considered in their entirety, the marks are more dissimilar than similar in appearance, sound and particularly connotation and that, when viewed as a whole, the marks engender dissimilar commercial impressions.

This factor further favors a finding that confusion is not likely.

IV. Conclusion

Having considered all of the evidence and argument of record, we conclude on this record that Applicant's goods are not related to those of the cited registrant, and that there is insufficient evidence that the goods travel in the same channels of trade to the same purchasers. In addition, we find that the marks are more dissimilar than similar, and as result, that confusion is not likely.

Decision: The refusal to register under Trademark Act § 2(d) is reversed as to both classes of goods.

The requirement for a more definite identification of Class 9 goods is affirmed.

The involved application will proceed to publication for opposition as to the goods identified in Class 25.