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T.T.A.B.

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

MBA

Mailed: February 24, 2012

Opposition No. 91197030

Olin Corporation

v.

Alexander Industries, Inc.  
d/b/a Alexander Arms

**Before Cataldo, Bergsman and Wolfson, Administrative  
Trademark Judges.**

**By the Board:**

This case now comes up for consideration of opposer's motion for summary judgment on its claims of priority and likelihood of confusion and dilution, filed September 23, 2011.<sup>1</sup> The motion is fully briefed.

Background

Applicant seeks a registration for the mark AA & Design, shown below



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<sup>1</sup> Opposer's request for an oral hearing on its motion, also filed September 23, 2011, is denied, because the Board generally does not conduct oral hearings on motions for summary judgment, and we find no reason to do so in this case. See, TBMP § 502.03 (3d ed. 2011).

for ammunition, gun and rifle cases, rifles and related products.<sup>2</sup> In its notice of opposition, opposer alleges prior use and registration of the standard character marks AA for "ammunition and parts thereof" and DOUBLE A for "wads for shot shells," as well as the mark shown below



for "shot shells and wads for shot shells."<sup>3</sup> As grounds for opposition, opposer alleges that use of applicant's mark is likely to cause confusion with, and dilute, opposer's marks. Opposer's pleaded registrations are each over five years old. In its answer, applicant denies the salient allegations in the notice of opposition. On November 29, 2010, applicant filed an unconsented motion to amend its involved application to add a disclaimer of the letters "AA," apart from the mark as shown, and in its order of February 11, 2011, the Board deferred consideration of the proposed amendment "until final decision."

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<sup>2</sup> Application Serial No. 77795807, filed August 3, 2009, alleging first use dates of May 6, 2001 for "Ammunition; Ammunition casings; Ammunition for firearms; Cartridge cases; Cartridge dies; Gun and rifle cases; Gun cartridges; Loading tools for weapons, namely, reloading dies, re-cappers and loading blocks; Rifle cartridges; Rifles; Rifles and parts thereof; Shell casings; Small arms ammunition." The application includes the following description of the mark: "The mark consists of a shield with crosshairs and a circle in the center, and the letters 'AA'."

<sup>3</sup> Registration Nos. 1039225 (issued May 11, 1976), and Nos. 837744 and 837743 (both issued October 31, 1967), respectively.

Opposer's Motion and Applicant's Response

Opposer attached to its notice of opposition copies of the certificates of registration for each of its pleaded registrations,<sup>4</sup> and has introduced status and title copies of its pleaded Registration Nos. 837743 and 1039225. Affidavit of Karen M. Bearley, a paralegal with opposer's law firm, Exs. 7 and 9. Opposer also relies on the Declaration of Greg Kosteck ("Kosteck Dec."), its Director of Marketing, who testifies that opposer "has continuously used its AA marks throughout the United States since at least as early as 1965," and has made fairly extensive sales under the mark, though the exact sales figures are designated as "confidential." Kosteck Dec. ¶¶ 3-4. In addition, opposer introduces its 2010 Sub-Brand Recognition Study Results, which are also confidential, but appear to show that an appreciable number of the male hunters and target shooters surveyed recognize the "AA sub-brand." Id. Ex. 24. Opposer relies on the Declaration of Vicki Schrimpf ("Schrimpf Dec."), its Manager of Licensed Products, who testifies that opposer's marks are used "in national print and internet advertising campaigns," and that opposer's

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<sup>4</sup> The registration certificates are not printouts of Office records showing the current status and title of opposer's pleaded registrations. See Trademark Rule 2.122(d)(1). However, in its answer, applicant admits that opposer "is shown as the owner" of its pleaded registrations, and applicant has not counterclaimed to cancel any of them.

products are sold in a number of retail outlets. Shrimpf Dec. ¶¶ 4, 8. Based on this evidence, opposer argues that its mark is "famous" and "strong." Opposer further argues that the parties' marks create similar overall commercial impressions, including because the "literal portion" of applicant's mark "predominates" over the design elements thereof, and that the parties' goods are similar or identical, and travel in the same channels of trade.

In response, applicant relies on the Declaration of William Alexander ("Alexander Dec."), its founder, Vice President and Chief Technical Officer, who testifies that although he was aware of opposer's "Winchester AA target shotgun shells" at the time applicant adopted its mark, the two "A"s in applicant's involved mark are "representative of" the name under which applicant does business, Alexander Arms. Alexander Dec. ¶¶ 9-10. Although applicant's customers sometimes "abbreviate Alexander Arms as 'AA,'" applicant itself does "not promote the use of the letters 'AA' as a brand or way of referring to our company." Id. ¶ 11. Furthermore, while applicant has used its involved mark for over 10 years, it is unaware of any actual confusion between the parties' marks. Id. ¶¶ 16, 20. In any event, applicant argues that the parties' marks create different overall commercial impressions, especially as encountered by "consumers in the marketplace," and

similarly, that while both parties offer ammunition, applicant's ammunition is aimed at a "niche" market and the parties' ammunition products are therefore not in fact competitive, and travel in different channels of trade. Applicant concedes, however, that it sells its products "through some of the same retailers that sell [opposer's] products." Applicant's Memorandum in Opposition to Opposer's Motion for Summary Judgment p. 12 (emphasis in original). Finally, applicant argues that its customers exercise care in purchasing ammunition, that while opposer's mark "may be famous within the firearms industry," it is only famous for a "single product offering," and that the letters AA are widely used in trademarks, including trademarks in the firearms industry.

#### Decision

Summary judgment is only appropriate where there are no genuine disputes as to any material facts, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to a judgment under the applicable law. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Sweats Fashions, Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of

record, a reasonable fact finder could resolve the matter in favor of the non-moving party. See Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); Olde Tyme Foods, Inc. v. Roundy's, Inc., 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

The evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. Lloyd's Food Products, Inc. v. Eli's, Inc., 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); Opryland USA, supra. The Board may not resolve genuine disputes as to material facts; it may only ascertain whether genuine disputes as to material facts exist. See Lloyd's Food Products, 25 USPQ2d at 2029; Olde Tyme Foods, 22 USPQ2d at 1542.

#### Standing and Priority

There is no genuine dispute as to any material fact relating to either standing or priority. Opposer's pleaded registrations establish both. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party's ownership of pleaded registration establishes standing); Penguin Books Ltd. v. Eberhard, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108,

110 (CCPA 1974)) (priority not at issue where opposer introduces registration into evidence).

Likelihood of Confusion

"We determine likelihood of confusion by focusing on ... whether the purchasing public would mistakenly assume that the applicant's goods originate from the same source as, or are associated with," opposer's goods. In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the question on a motion for summary judgment, we analyze all probative facts in evidence which are relevant to the thirteen likelihood of confusion factors set forth in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), as well as whether there are genuine disputes as to any of these factors which would be material to a decision on the merits. In this case, the parties have introduced evidence concerning, and we therefore address herein, the strength of the parties' marks, the similarity between the parties' goods and marks, the channels of trade for the parties' goods, third party use of marks including AA and the lack of actual confusion.

Turning first to the similarity of the parties' goods and channels of trade, we must compare the goods identified in applicant's application to those opposer offers under its marks. Hewlett-Packard Co. v. Packard Press, Inc., 281 F.3d

1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Here, applicant seeks registration of its mark for, *inter alia*, "ammunition," and opposer uses its mark for ammunition and owns a registration of AA for "ammunition and parts thereof." While there may be some differences between the parties' ammunition, in appearance, uses, or otherwise, the fact remains that the parties' goods are legally identical.

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application, regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Systems, Inc. v. Houston Computers Services, Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Accordingly, not only is there no genuine dispute as to any material fact regarding the similarity of the parties' goods (they are legally identical), but there is also no genuine dispute of material fact regarding the channels of trade for the parties' goods or the classes of consumers. We must presume that those too are the same. Id. ("Because [applicant] seeks an *unrestricted* registration, such evidence as there is of a specific class of customers did not relate to a *material* fact.") (emphasis in original); see also, Hewlett-Packard, 62 USPQ2d at 1005; Genesco Inc. v. Martz, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part



identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

Turning next to the similarity or dissimilarity of the parties' marks, we note preliminarily that "in cases such as this, where the applicant's goods are identical (in part) to the opposer's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical." Barbara's Bakery, Inc. v. Landesman, 82 USPQ2d 1283, 1288 (TTAB 2007). Here, AA is the dominant portion of the parties' marks. Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A., 32 USPQ2d 1192, 1197 (TTAB 1994) ("In this case, we think that it is appropriate to give greater weight to the word portio[n] of the mark, because it is by the words that purchasers will refer to the goods, and the words, rather than the design feature or the stylized lettering, will therefore have a greater impression on them."); see also, Jansen Enterprises, Inc. v. Rind, 85

USPQ2d 1104, 1109 (TTAB 2007). Indeed, consumers may simply refer to each party's ammunition as "AA." In re Dakin's Miniatures Inc., 59 USPQ2d 1593, 1596 (TTAB 1999). As noted, applicant's founder, Vice President and Chief Technical Officer testified that applicant's customers sometimes "abbreviate Alexander Arms as 'AA.'" Moreover, as applicant states in its application, the design portion of applicant's mark "consists of a shield with crosshairs and a circle in the center," i.e. is related to ammunition and firearms, and is therefore not distinctive for applicant's goods, and may be given little weight. Cunningham, 222 F.3d at 943, 55 USPQ2d at 1846. For all of these reasons, after careful consideration of the appearance, sound, connotation and commercial impression of the parties' marks, Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005), we find no genuine dispute as to any material fact remaining for trial on the issue of similarity of the marks. The parties' marks create similar overall commercial impressions.

With respect to the strength of opposer's marks, and third party use of similar marks, opposer's evidence establishes that opposer's sales have not been insignificant, and applicant admits that opposer's mark "may be famous within the firearms industry." Furthermore, with

respect to applicant's purported evidence of third-party use of similar marks, we find the evidence insufficient to establish a genuine dispute as to any material fact.

Indeed, while applicant has introduced some evidence of third-party marks containing AA which are registered or approved for registration for related goods, applicant "introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers." Palm Bay Imports, 396 F.3d at 1373, 73 USPQ2d at 1693 (citation omitted) (finding that under such circumstances, the probative value of such evidence is "minimal"). And the Internet printouts upon which applicant relies which purport to show third party use of AA for related goods are not persuasive, because standing alone (as they do), they do not establish that any third party actually sells or promotes ammunition or related products or services under marks containing AA. In short, there is no evidence that opposer's marks are weak such that they are not entitled to protection against a similar mark used for legally identical goods, and therefore these factors do not create a genuine dispute as to any material fact.

As for the degree of care consumers are likely to exercise, there is no evidence that purchasers of ammunition or other firearms-related products would be educated about

the products or discerning in their purchases. Furthermore, "even sophisticated purchasers can be confused by very similar marks." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1693 (Fed. Cir. 1993). In this case, in the absence of any evidence thereof, the alleged sophistication and care of the consumers does not create a genuine dispute as to any material fact. As discussed, the parties' goods are legally identical and travel in the same channels of trade, and the marks are similar enough that consumers would be likely to view the marks as identifying a single source.

Finally, the absence of evidence of actual confusion does not raise a genuine dispute as to any material fact. "The test is likelihood of confusion not actual confusion ... It is unnecessary to show actual confusion in establishing likelihood of confusion." Weiss Associates,, 902 F.2d 1546, 14 USPQ2d 1842-43. If the lack of evidence of actual confusion were enough to generally raise a genuine dispute, summary judgment could almost never be granted in favor of a plaintiff on a ground of likelihood of confusion, and that is not the case. See, Apple Computer v. TVNET.net, Inc., 90 USPQ2d 1393, 1397 (TTAB 2007) ("applicant's arguments regarding the lack of actual confusion and its good faith adoption of its VTUNES.NET mark do not raise genuine issues of material fact that preclude entry of summary judgment").

In sum, we find, based on the record herein and the applicable law, that there is no genuine dispute as to any material fact that opposer has established its standing; that opposer has priority; and that the parties' marks are similar and the goods are related. Accordingly, opposer has established its priority and likelihood of confusion as a matter of law.

Applicant's previously-deferred motion to amend its involved application to add a disclaimer of AA is **DENIED**. As opposer points out, applicant's assertion that a disclaimer "will negate Opposer's claims of likelihood of confusion and dilution of its marks" is incorrect. See, Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983) ("disclaimers are not helpful in preventing likelihood of confusion in the mind of the consumer, because he is unaware of their existence"); see also, In re Shell Oil Co., 26 USPQ2d at 1688-89.

#### Conclusion

Because we find, based on the record herein and the applicable law, that there is no genuine dispute as to any material fact and that opposer has established its priority and likelihood of confusion as a matter of law, opposer's motion for summary judgment is hereby **GRANTED**. Accordingly,

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judgment is entered against applicant, the opposition is sustained and registration to applicant is refused.<sup>5</sup>

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<sup>5</sup> Because the opposition is sustained on the ground of priority and likelihood of confusion, there is no need to consider whether opposer is entitled to judgment on its dilution claim.