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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 Plastic-Plus Awards

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Serial No. 77413749

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Brett A. North of Garvey, Smith, Nehrbass & North, L.L.C. for Plastic Plus Awards.

Colleen Dombrow, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Seeherman, Cataldo and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Plastic Plus Awards, a Louisiana partnership composed of Willis S. Beckworth, Vicky G. Juneau and Willis G. Beckworth, has filed an application to register on the Principal Register the mark MOTION XTREME (in standard character format) for "trophies, awards, medals, medallions, and plaques" in International Class 6.[1]

Registration has been finally refused (1) on the ground of likelihood of confusion under Trademark Act Section 2(d), 15

[1] Serial No. 77413749, filed March 5, 2008, and alleging a bona fide intention to use the mark in commerce.

U.S.C. § 1052(d), with the mark MOTION TROPHY (in typed form[2] and the subject of Registration No. 2589289) for "trophies and plaques" in International Class 20[3] and (2) because applicant has not complied with a requirement for a more definite identification of goods.[4]

Applicant appealed. Both applicant and the examining attorney filed briefs. For the reasons discussed below, we affirm the Section 2(d) refusal to register.

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[2] The former reference to what is now referred to as standard character form.

[3] Registration No. 2589289, issued July 2, 2002; Section 8 (6-year) affidavit accepted and Section 15 affidavit acknowledged. The registration includes a disclaimer of the word "Trophy."

[4] The examining attorney particularly contends that applicant's identification of goods is indefinite because the goods as identified could be classified in several International Classes. Applicant indicated in its brief that, with regard to "trophies," "when the rejections are dealt with, Applicant intends to adopt the Examining Attorney's suggestion to international class 020 for 'non-metal trophies'" and delete the goods presently identified as "awards, medals, medallions, and plaques." An application that has been considered and decided on appeal will not be reopened except for the entry of a disclaimer or upon order of the Director. Therefore, applicant cannot wait until "the rejections are dealt with" to amend its application. See Trademark Rule 2.142(g). Therefore, we have treated the identification as set forth in paragraph one of our opinion. However, even if applicant had timely amended its identification of goods it would not have had any effect on our decision on the likelihood of confusion issue.

Registration was also finally refused because applicant failed to comply with the requirement that it indicate whether the word "MOTION" has any significance in the trade or industry. Applicant indicated in its brief that "MOTION" has no such significance and the examining attorney's brief was silent on that issue. We accordingly find that the examining attorney has withdrawn the requirement and it will not be further considered.

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We consider first the goods, based on a comparison of the identifications in the application and the cited registration. *See* Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 at n. 4 (Fed. Cir. 1993). Here, the identified goods of applicant and the cited registrant include identical items, i.e., trophies and plaques. Likelihood of confusion may be found if there is likelihood of confusion between any of the applicant's goods and any of the goods of the cited registration. Tuxedo Monopoly, Inc. v. General Mills Fun

Group, 648 F.2d 1335, 209 USPQ 986,988 (CCPA 1988).[5] It is therefore unnecessary to rule as to whether each of the other items set forth in applicant's application, i.e., awards, medals and medallions, are related to the ones in the cited registration such that confusion would be likely. Nonetheless, and so as to remove any doubt as to the relatedness of the goods at issue, the examining attorney has made of record copies of third-party registrations showing that all of the goods identified in applicant's application and the goods identified in the cited registration emanate from the same source. Third-party registrations, while not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may serve to suggest that such goods are of a type that may emanate from a single source. *See* In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). We thus find applicant's goods and registrant's goods identical or closely related. Applicant does not argue otherwise. In fact,

[5] The fact that applicant's goods are classified in International Class 6 (metal goods) and registrant's goods are classified in International Class 20 (furniture; and goods not otherwise classified, including those of plastic) has no bearing on our determination. The system of dividing goods into classes is a USPTO administrative convenience and a determination on the relatedness of the respective goods is not restricted by this artificial boundary. See Jean Patou Inc. v. Theon Inc., 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); and Graco Inc. v. The Warner-Graham Company, 164 USPQ 400, 402 (TTAB 1969). Notably, and as stated previously, applicant indicated that it intended to amend the identification such that its goods would be classified in International Class 20.

applicant's brief is silent on the issue of the relatedness of the goods.

As regards the trade channels and classes of purchasers, we note that there are no trade channel limitations in either applicant's or registrant's identification of goods. Accordingly, at least with regard to the identical goods, we must presume that they will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See* In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

In view thereof, the *du Pont* factors of the similarity of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion as to the cited registration.

We now turn to a consideration of the marks, keeping in mind that when marks would appear on identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). That is, the purchaser's fallibility of memory over a period of time must be kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurant Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991); aff'd unpub'd (Fed. Cir., June 5, 1992).

With these principles in mind, we consider the marks. Applicant's mark is XTREME MOTION and registrant's mark is MOTION TROPHY. The marks are similar inasmuch as they both include the word MOTION. The other word in registrant's mark is the word "trophy," which the cited registrant has disclaimed. Although likelihood of confusion must be determined by analyzing the marks in their entireties, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their

entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of the mark." *Id* at 751. Contrary to applicant's contention, in this case, we find that "trophy" is particularly entitled to little, if any, weight inasmuch as registrant's goods include trophies. Thus, the generic word "trophy" has no source signifying value and, contrary to applicant's contention, cannot be the dominant element of registrant's mark; it is the word MOTION, the only source-signifying element, that is the dominant portion of registrant's mark.[6]

The additional word in applicant's mark is "xtreme," a variant spelling of "extreme" which is defined, in part, as: 1 c: exceeding the ordinary, usual, or expected <extreme weather

[6] Applicant relied on In re Farm Fresh Catfish Co., 231 USPQ 495 (TTAB 1986) to bolster its argument that disclaimed matter can prevent a finding of likelihood of confusion. That case, however, is easily distinguishable. In *Farm Fresh Catfish*, the Board found the mark CATFISH BOBBERS (with CATFISH disclaimed) for fish not likely to be confused with BOBBER for restaurant services. Unlike the situation here, in that case the combination of the terms CATFISH and BOBBERS created a distinct commercial impression. The Board particularly opined that the term "BOBBERS," as used in the applicant's mark CATFISH BOBBERS, clearly suggested the meaning of the word as a fishing bob or float, whereas it appeared wholly arbitrary as applied to the registrant's restaurant services.

conditions>."[7] The inclusion of this term, however, is not sufficient to distinguish applicant's mark from the registrant's. With particular regard to connotation and commercial impression of the marks, "xtreme" will be readily recognized as "extreme" and will be regarded as modifying the term "motion." That is, the word XTREME acts as an intensifier, so that it emphasizes the meaning of MOTION, with the result that the connotation and commercial impression of both applicant's and registrant's marks are overall the same. We find this so even though XTREME is spelled in a fanciful manner. The deletion of the first "e" in the mark "extreme," resulting in the slight misspelling "xtreme," simply does not significantly alter the commercial impression conveyed by applicant's mark.

While we have not overlooked the additional matter in either mark, we nonetheless conclude that the marks, when viewed in their entireties, are substantially similar in appearance, sound, connotation and commercial impression due to the shared term MOTION. Moreover, customers familiar with registrant's

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[7] Merriam-Webster Online Dictionary retrieved at www.merriam-webster.com/dictionary/extreme. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. *See* In re CyberFinancial.Net Inc., 65 USPQ2d 1789 (TTAB 2002). *See also* University of Notre Dame du Lac v. J. C. Gourmet Foot Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

MOTION TROPHY mark for trophies and plaques are likely to assume that applicant's XTREME MOTION mark for the same or closely related goods is a variant thereof identifying a new product line.

The *du Pont* factor of similarity of the marks thus favors a finding of likelihood of confusion.

In view of the foregoing, we conclude that prospective purchasers familiar with the registered mark MOTION TROPHY for trophies and plaques would be likely to believe, upon encountering applicant's substantially similar mark XTREME MOTION for trophies, awards, medals, medallions, and plaques, that such goods emanate from, or are sponsored by or affiliated with the same source.

Having found that applicant's mark is likely to be confused with the cited mark, we need not consider the requirement for a more definite identification of goods.

Decision: The refusal to register under Section 2(d) is affirmed.