

The examining attorney has refused registration of the applicant's mark under 15 U.S.C. § 1052(d) on the ground that the applied-for mark "RED ZONE" is likely to be confused with the registered mark for "RED ZONE" for footballs, and also with the registered mark "RED ZONE" for golf clubs.

The applicant respectfully disagrees with the examining attorney's refusal to register the applicant's mark. The applicant requests the examining attorney to reconsider her refusal and submits the following arguments in support of registration.

SIMILARITY OF THE MARKS

The examining attorney has concluded that the marks are all identical. It is the applicant's position that, although the marks are the same in sound and appearance, each mark has its own distinctive connotation and commercial impression when viewed in light of its respective goods. Accordingly, the applicant contends that the marks are not identical.

"Under *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973), the first factor requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" TMEP § 1207.01(b) "When comparing the marks, '[a]ll relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar.' *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000)." TMEP § 1207.01(b)

"Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion." TMEP § 1207.01(b)(v) In each of the following cases, the TTAB

determined that there was no likelihood of confusion for marks that were the same in sound and/or appearance because the meaning of the marks for their respective goods was different:

1. *In re Sears, Roebuck & Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987) (holding CROSS-OVER for bras and CROSSOVER for ladies' sportswear, not likely to cause confusion, noting that the term "CROSS-OVER" was suggestive of the construction of applicant's bras, whereas "CROSSOVER," as applied to registrant's goods, was "likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which "crosses over" the line between informal and more formal wear . . . or the line between two seasons");

2. *In re British Bulldog, Ltd.*, 224 USPQ 854, 856 (TTAB 1984) (holding PLAYERS for men's underwear and PLAYERS for shoes, not likely to cause confusion, agreeing with applicant's argument that the term "PLAYERS" implies a fit, style, color, and durability suitable for outdoor activities when applied to shoes, but "implies something else, primarily indoors in nature" when applied to men's underwear); and

3. *In re Sydel Lingerie Co.*, , 197 USPQ 629, 630 (TTAB 1977) (holding BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's clothing not likely to cause confusion, noting that the wording connotes the drinking phrase "Drink Up" when applied to men's clothing, but does not have this connotation when applied to ladies' and children's underwear).

In this case, the applicant contends that the mark "RED ZONE" has a separate and distinctive connotation and commercial impression for each of footballs, golf clubs, and arrows.

“RED ZONE” for footballs is a reference to the area on a football field extending from the goal line to the twenty-yard line. This is a very well-known term-of-art among football players and fans alike, and is also a term that is frequently discussed by commentators during a football game. Attached as Exhibit A are screenshots from six separate websites – each using the term “RED ZONE” within the context of football as evidence of this particular meaning to the football consuming public. Thus, “RED ZONE” for footballs will be interpreted by the consuming public as having particular connotation as a reference to that particular area on the field.

A similar meaning for “RED ZONE” has been used in the world of golf. Being derived from the football meaning, “RED ZONE” for golf refers to the last 100 yards on a golf hole leading up to the pin. It is said that having a strong golf game in the “RED ZONE” is essential to being a great golfer, just as scoring touchdowns in the “RED ZONE” is essential for a championship football team. Attached as Exhibit B are third-party uses of “RED ZONE” referring to this term as the last 100 yards on a golf hole as evidence that such meaning exists. Therefore, just as within the football context, the mark “RED ZONE” when applied to golf clubs has a particular connotation and commercial impression to the consuming public.

On the other hand, the mark “RED ZONE” with respect to the applied-for goods of “archery arrows” is arbitrary. Unlike football and golf, there is no particular or special meaning for this term when applied to archery arrows. Although this mark is arbitrary for archery arrows, it could be thought that the “RED” in the mark may evoke thoughts of blood within the context of hunting. Either way, the mark “RED ZONE” has very distinct connotation and commercial impression as it relates to archery arrows.

Therefore, the applicant respectfully contends that - even though the marks have the same sound and appearance – the marks are not identical because they each have separate and unique

connotations and commercial impressions within the context of their goods. Even more so, the applicant contends that there is no likelihood of confusion between the applied-for marks and the two “RED ZONE” registrations because the differences in connotation and commercial impression of the marks are so substantial, as was the case in the three appeals before the TTAB identified above.

RELATEDNESS OF THE GOODS

The examining attorney argues that the goods are all related. In support of this conclusion, the examining attorney produced fourteen different third party trademark registrations that list both “archery arrows” along with “footballs” or “golf clubs” as being probative that arrows and footballs are related goods, and also that arrows and golf clubs are related goods.

The applicant understands that the TMEP says these fourteen trademark registrations have probative value to suggest that the goods emanate from a single source. TMEP § 1207.01(d)(iii)

However, the applicant contends that archery arrows are not related to either footballs or golf clubs. In fact, the applicant contends that footballs and golf clubs are much more related to each other than either is to archery arrows. Both footballs and golf clubs are *athletic* equipment for use in sporting events. Conversely, an archery arrow is *hunting* equipment. There is certainly a distinction between athletics and hunting, and the distance between the two renders archery arrows unrelated to athletic equipment like footballs and golf clubs.

Regarding the fourteen third-party registrations, both the CAFC and the TTAB have repeatedly downplayed the weight of this type of evidence when accompanying proof of actual third party use is not provided. For example, “[t]he purchasing public is not aware of registrations reposing in the Patent Office and though they are *relevant*, in themselves they have little

evidentiary value on the issue before us.” *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973). The TTAB has also repeatedly held that evidence of third party registrations without proof of use should have minimal value. “The probative value of third-party trademarks depends entirely upon their usage.” *American Lebanese Syrian Associated Charities, Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1030 (TTAB 2011) See also *Teledyne Technologies, Inc. v. Western Skyways, Inc.*, 78 USPQ2d 1203, (TTAB 2006); *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006); *In re Jump Designs, LLC*, 80 USPQ2d 1370 (TTAB 2006); *In re Toshiba Medical Systems Corporation*, 91 USPQ2d 1266 (TTAB 2009)

In addition, the applicant contends that the fourteen trademark registrations have no value in showing that the goods are related because each of these fourteen registrations include a long and lengthy listing of a wide variety of goods – many of these good being totally unrelated to each other. In other words, these are house marks, and the registrant’s objective is usually to list as many goods as possible into the registration, irrespective of actual use on every single item identified.

Using this same analysis, an argument could be made that the following goods are related:

1. “cakes” and “brakes” (listed concurrently in 108 registrations)
2. “golf balls” and “mopeds” (18 registrations)
3. “hammers” and “feathers” (48 registrations)
4. “computers” and “abacuses” (17 registrations)
5. “carpet cleaning” and “jewelry” (19 registrations)
6. “restaurants” and “planes” (74 registrations)
7. “paint” and “weddings” (114 registrations)

In fact, it turns out that it's actually fairly difficult to locate any two pairs of goods that don't appear on the same registration together. The Applicant was eventually able to find a pair that did not occur together: hamsters and race cars. (Attached as Exhibit C is the applicant's search history on TESS that produced these figures.) Producing this type of third-party registration evidence is probative of nothing, especially considering the extensive number of registrations that exist today that include a dozen or more classes of goods/services and list several thousands of goods and services. Locating third party registrations that list two different types of goods is not probative of anything, and the applicant respectfully contends it is not a basis for arguing that arrows are related to either golf clubs or footballs.

Therefore, the applicant contends that "archery arrows" are not related to "footballs" or "golf clubs" because arrows are hunting equipment, whereas the other goods are athletic equipment. Furthermore, the applicant contends that the third-party registration evidence is insufficient because virtually any two types of goods or services can be located together on at least one registration, and therefore be argued as being related to each other.

SOPHISTICATION OF THE PURCHASER

The level of sophistication of the purchaser is also a factor that can be considered in a likelihood of confusion analysis. TMEP § 1207.01 The likelihood of confusion is minimized when a greater degree of care is used in making purchasing decisions. Likewise, it has been held that a greater degree of care may be used in making purchasing decisions when the goods are relatively expensive compared to a cheaper impulse purchase.

In this case, hunters are very savvy purchasers and are very familiar with arrow manufacturers and the products on the market. Bowhunting is a passion for most people who

engage in this activity, and it is not something that people tend to dabble in. Thus, the consuming public for archery arrows are sophisticated purchasers and are familiar with each of the arrow manufacturers as well as many of the particular arrow models sold by each manufacturer.

In addition, archery arrows are not inexpensive goods. More economical archery arrows can sell for \$30-\$50 for a six-pack of arrow shafts. Higher end archery arrows, such as those sold by the applicant, can retail for \$80 or more for a six-pack of arrows.

Therefore, the consuming public for archery arrows are sophisticated consumers and the goods themselves are also not inexpensive. Accordingly, the likelihood of confusion is minimized because of the degree of care that the average archery arrow consumer would use in making a purchase.

NUMBER AND NATURE OF SIMILAR MARKS IN USE ON SIMILAR GOODS

In addition, the number and nature of similar mark in use on similar goods is another factor that can be considered when relevant. TMEP § 1207.01 In this case, the applicant has produced Exhibits A and B which show a number of exemplary uses of “RED ZONE” for football-related goods/services and also for golf-related goods/services.

Furthermore, the following is a list of current registrations for “RED ZONE” marks that are associated with athletic-related goods. Most of the registrations identified below have different owners. A copy of each registration is attached hereto as Exhibit D and made part of the record.

| <u>MARK</u> | <u>GOODS/SERVICES</u> | <u>REGISTRATION NO.</u> |
|--------------------|------------------------------|--------------------------------|
| RED ZONE TOWEL | Football towels; towels | 4142734 |
| RED ZONE | Footballs | 3582478 |

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| RED ZONE CHANNEL | Television and entertainment in the nature of football games etc. | 3182102 |
| RED ZONE | Golf clubs | 2599395 |
| RED ZONE | Retail store services featuring clothing, posters, DVDs and CDs featuring athletic events and sports commentary; pennants, decals, sports memorabilia; footballs, etc. | 4211954 |
| REDZONEGIRLS | Printed materials, namely, posters calendars, etc. featuring a team of female collegiate performers; Entertainment services, namely, live person appearances by a team of female collegiate performers | 3887365 |
| NFL REDZONE SUNDAY SWEEP | Entertainment services, namely, providing online electronic games. | 3995173 |
| REDZONE | Bar and restaurant services (for a sports bar (see Exhibit E)) | 3920501 |
| RED ZONE | Dietary supplements for use by bodybuilders | 3882270 |
| RED ZONE | Diet aids, namely, fat burning products in the nature of nutritional and vitamin supplements | 3857251 |
| RED ZONE | Bicycle parts and accessories, etc. | 3814559 |

These registrations are an acknowledgment from the U.S. Trademark Office that various applications of the words "RED ZONE" for similar services owned by different registrants are capable of acting as separate and distinct source indicators. When there are several registrations incorporating the words "RED ZONE," each mark and registrant should be granted a narrow scope of exclusivity confined to use of the identified mark on similar services.

CONCLUSION

The applicant respectfully requests the examining attorney to accept the foregoing arguments, reverse her Section 2(d) refusal, and pass this application to publication. If the examining attorney has any questions, or requires information from the applicant, she is requested to contact the undersigned attorney.