

RESPONSE

This filing is in response to the Office Action mailed February 26, 2019 in which the Examining Attorney initially refused registration of Application Serial No. 88/204,177 for the mark HIDEOUT (“Applicant’s Mark”) based on Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.* as more fully described below.

REMARKS

I. APPLICANT’S MARK IS NOT LIKELY TO CAUSE CONFUSION WITH THE CITED MARK

Applicant traverses the Examiner’s rejections and asserts that registration of the Applied-for Mark on the Principal Register is proper. The Examiner cites U.S Trademark reg. 4610437 for HIDE OUT for goods of “*Sporting knives; hunting knives*” in International Class 008 as grounds for refusal. Respectfully, Applicant submits that the Applicant’s mark, HIDEOUT for the goods of *muzzle brakes that screw onto a rifle barrel* in International Class 013 and the Cited Mark are not likely to be confused.

The Applicant respectfully submits that the Applicant’s Mark is not confusingly similar to the Cited Mark. In determining whether there is a likelihood of confusion, the court in *In re DuPont De Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973) listed a number of factors to consider in making such a determination. The Examiner points out only two of these factors: similarity of the marks and similarity and nature of the goods and/or services.

Applicant submits that when all of the *DuPont* factors are considered, the marks themselves and the goods are sufficiently dissimilar to eliminate a likelihood of confusion.

Specifically, Applicant submits that careful consideration of several *DuPont* factors, such as:

- (A) The dissimilarity of the goods;
- (B) The dissimilarity of the likely to continue channels of trade.

weigh toward a finding of no likelihood of confusion between the Applicant's Mark HIDEOUT and the Cited Mark.

Applicant traverses the Examiner's rejections and asserts that registration of the Applied-for Mark on the Principal Register is proper.

A. The Applicant's Goods Are Not Similar To The Goods Of The Cited Mark.

In support of the Examiner's assertion that there is a likelihood of confusion between a trademark for firearms and a trademark for knives, the Examiner provides website information for four prominent firearms companies in the firearms industry. Applicant notes that each of these companies also sells the goods of knives on their websites. However, this is an improper basis to justify a rejection because unrelated goods can and are sold under a common brand from a common source. For example, Sturm Ruger, cited by the Examiner as www.shopruger.com¹, also sells on its website the following:

- a. bar stools, International Class 020, at <http://shopruger.com/Bar-Stool/productinfo/21099/>
- b. pens and pencils, International Class 016, at <http://shopruger.com/Ruger-Bolt-Action-Mechanical-Pencil/productinfo/18651/>
- c. coolers, mugs, wine glasses, and dog bowls, International Class 021, at <http://shopruger.com/Gray-and-Black-Cooler-Bag/productinfo/21114/>
- d. hats, outerwear, and other apparel, International Class 025 at <http://shopruger.com/Brown-Orange-Wax-Cap/productinfo/40011/>

¹ Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods and/or services are related. See, e.g., In re G.B.I. Tile & Stone, Inc., 92 USPQ2d 1366, 1371 (TTAB 2009); In re Paper Doll Promotions, Inc., 84 USPQ2d 1660, 1668 (TTAB 2007).

- e. firearms and accessories therefor, International Class 013, at <http://shopruger.com/450-Bushmaster-Muzzle-Brake/productinfo/90641/>
- f. sporting optics, International Class 009, at <http://shopruger.com/Vortex-Diamondback-Binoculars-12x50/productinfo/18462/> and
- g. backpacks, International Class 018, at <http://shopruger.com/Allen-Barricade-Tactical-Pack-Black/productinfo/19229/>.

The Examiner cites several cases for the principle that goods need not be identical to find a likelihood of confusion. Applicant acknowledges the principle, but disputes that it applies to goods as unrelated as knives and muzzle brakes. The Office Action cites *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) for the principle that goods and services of the parties need not be identical or directly competitive to find a likelihood of confusion.

The cited case is distinguishable from the instant situation because the goods and services On-line Careline were, unlike the instant situation, very closely related: One mark was for “providing access to online computer services offering computer industry news, commentary, and product reviews”, and the competing mark was for “services in nature of interactive advice and counseling via computer usage over telephone lines”. These are very similar goods to be used principally, perhaps exclusively, by the same people (internet users in approximately 1993) which enhances the likelihood of confusion in the mind of the consumer. In 1993, the ruling that an online service is similar goods to an internet service provider is sensible; at that time, the internet and its services were not as pervasive as the present and the limited universe of such

services would naturally give the consumer a very narrow view of the relationship between the two distinct goods.

In contrast, Applicant's goods of muzzle brakes for firearms are very different from that of the Registrant, and although a muzzle brake may be used by the same consumers as knives, the goods would not be used by the same consumer simultaneously or in a manner that is complementary to each other.

The Office action argues that the goods need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Applied herein, this is to say the goods of knives and muzzle brakes may be encountered by the same purchasers, giving the purchaser the mistaken belief that the goods come from a common source. This argument is untenable, because if applied to all cases, would radically broaden the scope of trademarks to unrelated goods where there actually is no likelihood of confusion. For example, even if it were true that all users of muzzle brakes also used knives, this would be no different than the fact that essentially all muzzle brake users are consumers of clothing, backpacks, stools, coolers and pencils, typically on the same excursion in which the muzzle brakes are used.

Because a mark is applied (and registered for) two different types of goods in two different classes, even by multiple owners, does not mean that those goods are related. The mere fact of having the mark so applied does not transform unrelated or tangentially related items into related goods. To presume that they are related gives the Registrant the power to determine that

any other product, no matter how remote (cheese balls?) is now related to, say, knives. But the fact that a company could sell on its website goods for diverse classes or register its mark both for knives and cheese balls, neither situation makes knives any more closely to cheese balls than they were before the effort.

Even if several companies register their brands both for knives and muzzle brakes (or cheese balls), that does not make the two different goods related. For instance, many automobile companies register their brands both for cars (Class 012) and for hats and T-shirts (Class 025). This does not mean that hats and cars are related goods (a Stetson brand pickup truck would not infringe the hat trademark, dilution aside).

Simply because muzzle brakes and knives "may be sold by the same retailer" does not make them legally related, or likely to lead to confusion in all instances in which they happen to emanate from a single retail or wholesale source. Innumerable unrelated goods emanate from common sources under identical brands.

B. Two Products Sold In the Same Channel of Trade Does Not Suggest Relatedness.

The Examiner presents four commercial websites as evidence that archery equipment is related to gun barrels.

Applicant asserts that muzzle brakes are *not necessarily* sold in the same stream of commerce as knives. There are some retailers who may sell both items, however, many of these retailers, including those cited by the examiner, sell hundreds of products that are inarguably unrelated for trademark purposes. Thus sales of two products by a single entity does not create prima facie evidence that those products are related goods.

For example, the retail website www.Cabelas.com sells both knives and muzzle brakes. Cabela's also sells treestands and concealment products (IC 028), hunting accessories (IC 013,

025, and/or 028), school backpacks (IC 018), hearing protection (IC 010), waders (IC 025), accessory and gear bags for hunting equipment (IC 018), archery targets (IC 028), boots (IC 025), fishing equipment (IC 008 and/or 025), gun care packages (IC 013), cell phone cases (IC 009), tripods (IC 009 and/or 013), clothing (IC 025), blankets (IC 024), pancake syrup (IC 030). This is a diverse product offering of hundreds of products that represent at least nine distinct international classes. The fact these goods are sold through the same retailer does not create factual evidence that all of the above products are related. For example, it is difficult to argue that pancake syrup is related to boots, though it is conceivable that a consumer may use both products same simultaneously. Concurrent use of the products sold through the same retailer does not establish relatedness of the goods.

Similarly, a shooter might be supposed to be wearing long underwear of the sort that is sold through the same channel of trade – a sporting goods store or outdoor outfitter, for example – while simultaneously using a gun that has a muzzle brake. Because we recognize that long underwear and guns with muzzle brakes are not related goods, this illustrates the limitations of the trade channels principle.

The extremely minute overlap, if the same exists, of firearms and knives equipment in sporting goods stores is not enough to create a likelihood of confusion in the eyes of the either a firearms consumer or a knife consumer.

For the above reasons, the rejection is traversed and allowance is respectfully requested.

CONCLUSION

Applicant has addressed all outstanding issues raised by the Examining Attorney. Applicant respectfully requests that the application be approved for publication and requests that the Examining Attorney take such action.