

This Opinion is Not a
Precedent of the TTAB

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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 Mueller Sports Medicine, Inc.
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Serial Nos. 85621801 and 85977651
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for Mueller Sports Medicine, Inc.

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Before Bucher, Cataldo and Adlin,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Mueller Sports Medicine, Inc. (“Applicant”) seeks registration of the mark
BODYGUARD OF ATHLETE, in standard characters and with the word “Athlete”
disclaimed, for:

Pharmaceutical goods sold in retail sporting goods stores,
namely, tape and taping supplies for medical purposes,
namely, medical adhesive tape, medical cohesive tape,
medical pretaping foam underwrap, medical pretaping
spray adherent, first aid kits, athletic trainers’ kits
comprised primarily of adhesive bandages, medical
adhesive tape, gauze pads for dressings, medical cohesive
tape, antibiotic ointments, antiseptic spray, spray-on
bandages and ice bags for medical purposes, analgesic

ointments and balms, medical and surgical dressings, namely, blister pads, wound dressings, nonmedicated topical gels and ointments for use as personal lubricants on skin, spray on bandages for skin wounds, antiseptic sprays and ointments for medical use, adhesive bandages in International Class 5;

Sporting goods sold in retail sporting goods stores, namely, tape and taping supplies for athletic purposes, namely, athletic adhesive tape, athletic cohesive tape and bandages, athletic pretaping foam underwrap, athletic pretaping spray adherent, athletic sporting goods, namely, athletic wrist and joint supports, ankle braces, ankle supports, ankle stabilizers, knee braces, knee supports, knee stabilizers, knee pads for athletic use, knee sleeves, knee straps, elbow sleeves, elbow supports, elbow pads for athletic use, wrist braces, wrist supports, wrist stabilizers, wrist sleeves, back braces, back supports, back stabilizers, thumb stabilizers, shoulder braces, thigh sleeves, thigh supports, calf/shin supports, arm slings, compression gloves for athletic use, nonmedicated lubricating ointments and gels for reducing skin friction in sports activities and running in International Class 28;¹ and

Medical goods sold in retail sporting goods stores, namely, cohesive support bandages, cohesive compression bandages; cold-hot therapy products for medical purposes, namely, ice bags, chemically activated cold packs, chemically activated instant cold packs, cold-hot thermal packs for first aid purposes, spray coolant for skin for medical purposes, medical cold-hot wraps; elastic bandages, elastic support wraps for medical purposes; medical and orthopedic products, namely, orthopedic braces, ankle braces, ankle supports, ankle stabilizers, knee braces, knee supports, knee stabilizers, knee sleeves, knee straps, elbow sleeves, elbow supports, wrist braces, wrist supports, wrist stabilizers, wrist sleeves, compression gloves, back braces, back supports, back stabilizers, thumb stabilizers, shoulder braces, thigh

¹ Application Serial No. 85621801, filed May 10, 2012 based on an intent to use the mark in commerce under Section 1(b) of the Trademark Act (the “Parent Application”).

sleeves, thigh supports, calf/shin supports, arm slings in International Class 10.²

The Examining Attorney refused registration of both applications under Section 2(d) of the Act, on the ground that Applicant's mark so resembles the previously-registered mark BODY GUARD, in typed format, for "Medical devices, namely, non-medicated silicone gel pads to reduce pressure, friction and scarring on skin and wounds,"³ that use of Applicant's mark in connection with Applicant's goods is likely to cause confusion or mistake or to deceive. After the refusals became final, Applicant appealed, filed a motion for reconsideration which was denied, later amended its identifications of goods in a manner which did not overcome the refusals and the appeals were consolidated. Applicant and the Examining Attorney filed briefs. Citations are to the record in the Parent Application unless otherwise indicated.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities

² Child application Serial No. 85977651 was divided from the Parent Application during prosecution and covers the goods in International Class 10 (the "Child Application"). Another child application, Serial No. 85980775, contains additional goods in International Classes 5 and 28 but is not involved in this appeal.

³ Registration No. 2866868 issued July 27, 2004; renewed.

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between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Turning first to the marks, we must compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). That is, we may not dissect the marks into their various components. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981).

Here, the marks are quite similar. It is settled that the first part of a mark is often its most prominent and dominant feature, and here Applicant’s mark begins with BODYGUARD while Registrant’s mark in its entirety is BODY GUARD. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *see also, Palm Bay Imports Inc.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The first part of Applicant’s mark sounds identical to Registrant’s mark and looks virtually identical to Registrant’s mark. *See The Finance Company of America v. BankAmerica Corp.*, 205 USPQ 1016, 1035 (TTAB 1979) (finding FINANCEAMERICA likely to be confused with THE

FINANCE COMPANY OF AMERICA, and stating that “the marks consciously or unconsciously would be equated with one another”).

As for meaning, consumers hearing the marks would make no distinction in meaning between BODYGUARD and BODY GUARD, which sound identical. To the extent that, as Applicant argues, “bodyguard” conveys someone who protects another person, while “body guard” conveys a good which protects a part of the body, we agree with the Examining Attorney that this is a fairly subtle difference which would be lost on many consumers, especially where Registrant uses its mark for “non-medicated silicone gel pads to reduce pressure” and Applicant intends to use its mark for, *inter alia*, “nonmedicated lubricating ointments and gels for reducing skin friction in sports activities and running” and “blister pads.”

While Applicant is correct that we cannot ignore the second part of its mark, OF ATHLETE, and we have not done so, it is not enough to overcome the similarities between BODYGUARD and BODY GUARD in sight, sound and commercial impression. Indeed, Applicant disclaimed ATHLETE, which is merely descriptive of its “goods sold in retail sporting goods stores,” including “athletic trainers’ kits,” “sporting goods,” “support wraps” and other products used by athletes. It is settled that disclaimed and descriptive wording such as OF ATHLETE is entitled to less weight in a likelihood of confusion analysis. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l*

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Data, 224 USPQ at 752); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION'S, not disclaimed word ROADHOUSE, is dominant element of BINION'S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression").

In fact, because Applicant's mark consists of what is essentially Registrant's mark, followed by non-distinctive wording, confusion is likely. *See, e.g., Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 253 F.2d 431, 117 USPQ 213 (CCPA 1958) (recognizing and applying general rule "that one may not appropriate the entire mark of another and avoid a likelihood of confusion by the addition thereto of descriptive or otherwise subordinate matter"); *see also, Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL and BENGAL LANCER & Design for related goods are confusingly similar); *International Paper Co. v. Valley Paper Co.*, 468 F.2d 937, 175 USPQ 704 (CCPA 1972) (DATA for "writing, typewriter and printing paper" confusingly similar to DATA-SPEED for "paper sold in bulk rolls or bulk reams for conversion only into business forms"); *In re Fiesta Palms LLC*, 85 USPQ2d 1360 (TTAB 2007) (CLUB PALMS MVP for casino services confusingly similar to MVP for casino services offered to preferred customers identified by special identification cards); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984) ("we are firmly of the opinion that purchasers who encounter applicant's 'LITTLE GOLIATH' stapler kits

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and registrant's 'GOLIATH' large diameter woodcased pencils are likely to believe ... that both products emanate from or are in some way associated with the same source"); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155 (TTAB 1982) (EBONY for cosmetics confusingly similar to EBONY DRUM for hairdressing and conditioner).

Applicant argues that Registrant's mark is "relatively weak and entitled to only a narrow scope of protection" based on the following registrations and published application owned by different third-parties:

BODY GUARD, in typed format, for a "pet food supplement" (Reg. No. 1386521)

Body-Guard, in standard characters, for "dietary and nutritional supplements" (Reg. No. 3786797)



for "paper and rubber goods, namely, incontinence pads" (Reg. No. 4132100)

BODY GUARD, in typed format, for "basketball goal assembly pole pads" (Reg. No. 1364643)

BODY GUARD, in typed format, for "ski gloves for water sports" (Reg. No. 2057527)

BODY GUARD, in typed format, for "protective equestrian equipment" (Reg. No. 2951444)

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BODYGUARD, in standard characters, for “medical devices” for use in the field of radiotherapy (Application Serial No. 77911295)⁴

BodyGuard, in standard characters, for “medical apparatus, namely, infusion and injection devices for administering drugs” (Reg. No. 3567596)

Office Action responses of September 26, 2012 in the Parent Application and March 6, 2013 in the Child Application.⁵ There are several problems with this evidence. First, it is settled that third-party registrations are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). In other words, because there is no evidence that any of the marks in these third-party registrations are currently in use, the third-party registrations standing alone are not particularly relevant. Second, “[n]either the Trademark Examining Attorney nor the Board is bound to approve for registration an Applicant’s mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.” *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014); *see also, In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed.

⁴ Applicant indicates in its brief that this mark was registered after the appeal was filed and the record was closed. For purposes of this decision only, we assume that to be the case and have treated this mark as registered.

⁵ During prosecution, Applicant also submitted evidence concerning Registration No. 3718887, but that registration has been cancelled.

Cir. 2001) (“The Board must decide each case on its own merits ... Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”). Finally, even if these registrations established that the marks were in use, which they do not, the goods identified therein, arguably with the exception of “protective equestrian equipment,” are much less similar to Registrant’s goods than are Applicant’s.

In short, we find that when considered in their entirety, Applicant’s mark and Registrant’s mark are quite similar,⁶ and there is no reliable evidence establishing that Registrant’s mark is weak, let alone so weak that it is not entitled to protection against Applicant’s similar mark. In fact, consumers familiar with Registrant’s mark may, upon encountering Applicant’s mark, believe that Applicant’s goods are a version of Registrant’s goods specifically intended for athletes. The similarity of the marks weighs in favor of finding a likelihood of confusion.

Turning to the goods, they need not be identical or even competitive in order to support a finding of likelihood of confusion. It is enough that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used, to a mistaken belief that Applicant’s and Registrant’s goods originate from or are in some way associated with the same

⁶ Applicant’s focus on the number of characters, words and syllables comprising its mark and Registrant’s mark is misplaced. As Applicant itself recognizes, we may not dissect the marks, but instead must consider them in their entirety.

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source or that there is an association between the sources of the goods. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Here, Applicant's "medical and surgical dressings, namely, blister pads" are not limited to any particular type of pad, composition or purpose, and therefore they encompass Registrant's "non-medicated silicone gel pads to reduce pressure, friction and scarring on skin and wounds." In other words, Applicant's Class 5 goods are in part legally identical to Registrant's goods. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found with respect to a class of goods or services in an application if there is likely to be confusion with respect to any item that comes within the identification of the goods or services in that class). And while Applicant's goods are limited to being sold in "retail sporting goods stores," there is nothing which would prevent Registrant's gel pads from being sold in the same stores. Furthermore, Registrant's goods could be included in Applicant's "athletic trainers' kits."

In any event, even if Applicant's blister pads and Registrant's gel pads are not legally identical, the Examining Attorney has established that Applicant's goods are at least related to Registrant's goods. Indeed, as the Examining Attorney points out, Applicant's blister pads and "nonmedicated lubricating ointments and gels for reducing skin friction in sports activities and running" can be used for the same purpose as Registrant's "gel pads to reduce pressure." Registrant's website makes this clear, as its BODY GUARD® Hydro Gel Squares and Sheets are promoted for use in "sports applications." Office Action of April 10, 2013 in the Child Application (printouts from "nmtskincare.com"). Registrant's goods may therefore be offered in the same "retail sporting goods stores" as Applicant's goods. Moreover:

Cramer offers goods of the same type as Applicant's "athletic trainers' kits," "elastic wraps," "adhesive tape" and "cohesive tape," as well as "ortho gel padding material" and moleskin, which are similar if not identical to Registrant's gel pads, all under the CRAMER mark.

Collins Sports offers adhesive foam pads such as Applicant's "blister pads" and Applicant's adhesive bandages on the one hand, and Blisto-O-Ban, Blister Derm Anti-Friction Pads, and Mueller More Skin, which, like Registrant's goods, are essentially pads to reduce pressure and friction on the skin, on the other hand.

Bunga offers goods of the same type as Applicant's ankle braces and supports and goods of the same type as Registrant's blister cushions, under the BUNGA mark.

Office Action of November 14, 2012 (printouts from "cramersportsmed.com," "collinssports.com" and "gelpads.com"). In other words, Registrant's products and at least some of Applicant's products in each International Class in the Parent Application and Child Application are offered under the same marks. To the extent

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that Applicant argues confusion is unlikely because the goods in the Parent Application are in different classes than the goods in the cited registration, the argument is unavailing. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (stating that classification is for the convenience of the Office and “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”).

Applicant’s and Registrant’s goods, or goods of the same type, also travel in the same channels of trade. For example:

Metro Medical Online offers “bandages,” “ointments,” “tapes and adhesives” and “silicone gel pads.”

Active Forever offers “adhesive bandages” and silicone gel “sheeting.”

e-first aid Supplies offers athletic trainers’ kits and trainer’s tape on the one hand and ortho gel padding for skin which is similar if not identical to Registrant’s gel pads on the other.

Absolute Athletics offers ankle braces and supports and blister cushions.

Medco Sports Medicine offers braces and supports on the one hand and gel pads on the other.

Blue Ridge Foot & Ankle offers elastic bandages and ankle braces on the one hand and gel pads on the other.

Ithaca Sports offers elastic bandages on the one hand and blister pads similar to Registrant’s gel pads on the other.

The Brace Shop offers back braces and BunionCare Gel Sleeves.

Comfortland offers knee and back braces and gel metatarsal cushions.

JRS Medical offers wrist supports and foam and arm gel pads.

Dr. Todd's offers wrist, back, elbow and ankle supports or braces, and adhesive gel pads.

Reveal Medical offers knee and ankle braces and gel moleskin.

North Coast Medical offers knee, ankle, wrist and back supports and gel squares for use on the skin.

Duell Medical Supply offers ankle braces and hydrogel moist gel pads.

Medco offers ankle and knee supports and blister pads and moleskin.

Shoreline Sport Medical Supply offers knee braces and gel pads, 2nd Skin, moleskin and blister foam.

Office Action of September 7, 2012 (printouts from "metromedicalonline.com" and "activeforever.com"); Office Action of November 14, 2012 (printouts from "e-firstaidsupplies.com," "gelpads.com" and "medco-athletics.com"); Office Action of June 27, 2013 (printouts from "ourdoctorstore.com," "ithacasports.com," "braceshop.com," "comfortlandmed.com," "jrsmmedical.com" and "drtodds.com"); Office Action of April 10, 2013 in the Child Application (printouts from "revealmedical.com," "ncmedical," "duellmedicalsupply.com" and "medco-school.com"). In other words, consumers are accustomed to seeing goods of the same type as Applicant's and Registrant's goods offered in the same channels of trade and could therefore expect to see Registrant's goods in the same "retail sporting goods stores" which offer Applicant's products.

In short, the evidence establishes that even if Applicant's and Registrant's goods are not legally identical, they are closely related. They are also offered in the same channels of trade, which may include retail sporting goods stores. These factors also weigh in favor of a finding of likelihood of confusion.

Applicant stresses that Registrant's goods are used for "scar treatment" while its are not, and argues that as a result confusion is unlikely. However, it does not matter that Registrant *in fact* offers "scar treatment" products when its *identification of goods* is not so limited. Indeed, where, as here, Applicant's identification of blister pads contains no limitations with respect to the pads' purpose, its goods are presumed to encompass all goods of the type described, such as pads to reduce pressure and friction, and the goods are presumed to move in all normal channels of trade and be available to all classes of consumers. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers."); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). We are bound by Applicant's and Registrant's' identifications and we simply cannot limit the goods, channels of trade or classes of customers to what Applicant's evidence shows them to be. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) ("It is well settled that in a proceeding such as this, the question of likelihood

of confusion must be determined by an analysis of the marks as applied to the goods identified in the application vis-à-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be.”); *see also*, *Tuxedo Monopoly*, 209 USPQ at 988; *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009) (“we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application and the registration at issue ... we may not limit or restrict the [goods] listed in the cited registration based on extrinsic evidence”).

There is no relevant evidence or argument concerning the remaining likelihood of confusion factors, and we therefore treat them as neutral.

Conclusion

After considering all of the evidence of record as it pertains to the relevant *du Pont* factors, including all of Applicant’s arguments and evidence, even if not specifically discussed herein, we find that confusion is likely because the goods are at least related and the marks and channels of trade are similar.

Decision: The Section 2(d) refusals to register Applicant’s mark are affirmed in both the Parent Application and the Child Application.