

This Opinion is not a
Precedent of the TTAB

Oral Hearing: November 15, 2016

Mailed: January 17, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Prosser, Inc.
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Serial Nos. 86415217 and 86425269
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Danica L. Mathes of Bell Nunnally & Martin LLP,
for Prosser, Inc.

Jeffrey S. DeFord, Trademark Examining Attorney, Law Office 115,
John Lincoski, Managing Attorney.

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Before Taylor, Lykos and Kuczma,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On October 6, 2014, Prosser, Inc. (“Applicant”) filed applications to register on the Principal Register the standard character mark **True Velocity** and the composite mark displayed below



for “ammunition.”¹

The Trademark Examining Attorney refused registration of Applicant’s marks under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks so resemble the registered mark **VELOCITY** in typed format² on the Principal Register for “ammunition; shotgun shells; shotgun shell shot” in International Class 13³ that, when used on or in connection with Applicant’s identified goods, they are likely to cause confusion or mistake or to deceive.

In an effort to circumvent the refusal, Applicant amended the identification of goods in both applications to “[a]mmunition provided solely in connection with governmental and military use.” The Examining Attorney accepted the amended identification of goods but maintained and made final the refusal to register under

¹ Application Serial Nos. 86415217 and 86425269, originally filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On October 19, 2015, Applicant filed amendments to allege use and specimens for each application which were accepted on October 22, 2015. Both amendments to allege use claim January 5, 2015 as the date of first use anywhere and in commerce.

The description of the composite mark is as follows: “The mark consists of the stylized words ‘TrueVelocity’ as one word, with the letters ‘T’ and ‘V’ above the words ‘TrueVelocity’. The letter ‘T’ fits into the open area at the top of the letter ‘V’.” Color is not claimed as a feature of the composite mark.

In response to an inquiry from the Examining Attorney, Applicant stated that “[t]o Applicant’s knowledge, the wording “TRUE VELOCITY” or “TRUE” or “VELOCITY” has no meaning or significance in the relevant trade or industry or as applied to the goods described in the application. Applicant’s March 24, 2015 Office Action Response.

² “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. ... A typed mark is the legal equivalent of a standard character mark.” Trademark Manual of Examining Procedure (“TMEP”) § 807.03(i) (Oct. 2016).

³ Registration No. 2386219, registered September 12, 2000; Sections 8 and 15 affidavits accepted and acknowledged; renewed. The registration alleges July 1, 1998 as the date of first use anywhere and in commerce.

Section 2(d), noting that Applicant's goods remained legally identical to those of the cited Registrant. *See* April 28, 2015 Office Action.

Applicant then filed notices of appeal and requests for reconsideration, and further limited the identification of goods in both applications to “[p]olymer-based center fire rifle cartridges meeting military specifications and provided solely in connection with Department of Defense, governmental and military use in automatic machine guns and semi-automatic machine guns, excluding all other ammunition, shotgun shells and shotgun shell shot” in International Class 13. The Examining Attorney accepted the amendment but determined that the added restriction again failed to obviate the likelihood of confusion, and denied Applicant's requests for reconsideration.

Both appeals are now fully briefed, and an oral hearing was held. Because we deem the cases to have common questions of fact and of law, and the records are largely identical, we have consolidated the appeals. *See, e.g., In re Country Music Association, Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011). *See also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 1214 (2016).⁴

For the reasons explained below, we affirm the Section 2(d) refusal to register both applications.

I. Applicable Law

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In*

⁴ Unless otherwise indicated, citations to the record are to Application Serial No. 86415217.

re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); and *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Applicant argues that the Examining Attorney has considered only three of the *du Pont* factors (the marks, the goods, and the trade channels), ignoring other factors such as the number and nature of similar marks on similar goods, impulse versus careful, sophisticated purchasing and the market interface between Applicant and Registrant.⁵

The “Board reviews an Examining Attorney’s decision on appeal to determine if the refusal to register was correctly made. In doing so, the Board need not adopt the rationale of the Examining Attorney.” *In re AFG Indus. Inc.*, 17 USPQ2d 1162, 1163 (TTAB 1990) (citing *In re Avocet*, 227 USPQ 566 (TTAB 1985)). In reaching our determination, the Board has considered and balanced all relevant *du Pont* factors for which evidence was made of record, regardless of whether the factor was argued by the Examining Attorney in the appeal brief. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within the *du Pont* list, only factors that are “relevant and of record” need be considered). The likelihood of confusion analysis is not a mechanical test - “not all of the *DuPont* factors are relevant or of similar weight in every case.” *Opryland USA Inc. v. Great Am. Music Show*, 970 F.2d 847, 23 USPQ2d 1471, 1473 (Fed. Cir. 1992). See also *In*

⁵ The Examining Attorney did address some of these additional *du Pont* factors during oral hearing.

re Shell Oil, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (the various du Pont factors “may play more or less weighty roles in any particular determination”).

With these principles in mind, we commence our analysis.

A. *The Goods and Channels of Trade*

At the outset, we compare the goods as they are identified in the applications and registration as well as the established, likely-to-continue channels of trade. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (“*Stone Lion*”). *See also Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant does not dispute that both Applicant’s and Registrant’s goods fall under the general category of ammunition.⁶ Applicant’s Brief, p. 16; 7 TTABVUE 17. Indeed, as the record shows, Applicant originally identified the goods in both applications as “ammunition” without any further specifications as to type. Applicant argues, however, that by ultimately amending its original identification of goods from “ammunition” to “[p]olymer-based center fire rifle cartridges meeting military specifications and provided solely in connection with Department of Defense, governmental and military use in automatic machine guns and semi-automatic machine guns, excluding all other ammunition, shotgun shells and shotgun shell

⁶ In its appeal brief, Applicant contends that “shotgun shell; shotgun shell shot” merely serve as modifiers to the more general term “ammunition” which is listed first in the identification in the registration. This constitutes a misreading of the goods listed in the registration of the cited mark. Each item is separated by a semi-colon, meaning that “ammunition” is a stand-alone product.

That being said, we note that during oral hearing, counsel for Applicant conceded that the goods are legally identical, further corroborating our determination of this factor.

shot,” it has distinguished the goods and limited the channels of trade to avoid any likelihood of confusion. As Applicant maintains, its particular kind of ammunition is vastly different from the shotgun shells and shotgun shots used for recreational use in the cited registration. In support thereof, Applicant points to excerpts from Registrant’s web site showing that Registrant’s goods are sold for the recreational sport of clay shooting. *See* excerpts from Registrant’s website submitted with Applicant’s March 24, 2015 Office Action Response. Applicant further maintains that because its products are intended only for “Department of Defense, governmental and military use”, they are unavailable for retail sale to the general public and are sold in different, more specialized trade channels for government purchases.

Applicant’s characterization of Registrant’s “shotgun shell; shotgun shell shot” as designed solely for recreational use may indeed be accurate but it is not reflected in the identification. An applicant may not restrict the scope of its goods and/or the scope of the goods covered in the cited registration by extrinsic argument or evidence. *See, e.g., In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986). As we have often stated, our focus is on the identification of goods as set forth in the application and registration rather than “on real-world conditions.” *Stone Lion*, 110 USPQ2d at 1161. For this reason, Applicant’s limitation regarding the type and intended use of its ammunition fails to distinguish the goods. As set forth in the cited registration, “ammunition” is unrestricted as to type, field, or intended user. If the cited registration describes goods broadly, and there is no limitation as to their nature, type, channels of trade, or class

of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). As such, Registrant’s broadly worded “ammunition” necessarily encompasses Applicant’s more specific type of ammunition, making the goods legally identical in part. *See In re Jump Designs, LLC*, 80 USPQ2d at 1374 (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)). This is so despite the exclusionary language in Applicant’s identification. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409-10 (TTAB 2015) (rejecting applicant’s argument that confusion was unlikely because the identification limited the goods to those associated with William Adams, professionally known as ‘will.i.am,’ and finding instead that the wording does not, “in any meaningful way, alter the nature of the goods identified”). Thus the *du Pont* factor involving a comparison of the goods favors a likelihood of confusion.

The same logic applies with equal force with regard to the channels of trade. Applicant has limited the established, likely-to-continue channels of trade for its ammunition to those trade channels which are typical for Department of Defense, governmental and military purchasers. By contrast, the trade channels for the “ammunition” listed in the cited registration are unrestricted, meaning that we must

presume that the goods travel in all channels of trade normal for such goods. *In re Elbaum*, 211 USPQ at 640. See *In re Viterra Inc.*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011) (“*American Lebanese Syrian*”). This would encompass the normal trade channels for all types of ammunition, including ammunition for recreational use as well as ammunition designed for use by the “Department of Defense, governmental, and military” entities. Likewise, we can also assume the same classes of purchasers, meaning both the general public as well as “Department of Defense, governmental, and military” purchasers. See *In re Association of the United States Army*, 85 USPQ2d 1264, 1272 (TTAB 2007) (because there are no limitations or restrictions in the cited registrations as to the trade channels and classes of purchasers for the identified goods and services in International Classes 9, 35, and 42, “we must presume that those goods and services are offered in all normal trade channels and to all normal classes of purchasers for such goods and services ... including the same trade channels as those in which applicant’s services are marketed, and would include the same classes of purchasers, i.e., current, former and potential members of the United States Army, as well as their families and others with a relationship to the United

States Army.”). As such, Applicant’s attempt to limit the class of purchasers to recreational hunters and sportsmen is unavailing. This *du Pont* factor also favors a likelihood of confusion.

B. Conditions of Sale

Next we consider the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005) (“*Palm Bay*”).

Applicant argues that the purchasers of its goods, the Department of Defense, governments and the military, are extremely sophisticated and are unlikely to confuse Applicant’s military grade ammunition with Registrant’s ammunition which is widely available to the general public for sporting and recreational endeavors such as target shooting and hunting. As Applicant points out, its goods must meet strict military regulations, and Applicant itself must undergo a rigorous screening process before it can be approved for supplying ammunition to the military. Applicant contends that even the general public exercises a high degree of care and is discerning when it comes to making purchasing decision of ammunition for recreational purposes.

As reflected in Applicant's identification, its goods are only sold to the Department of Defense, government and military purchasers who presumably are extremely knowledgeable, possess a high degree of expertise, and are familiar with the required specifications. Where the relevant buyer class is composed solely of professional purchasers, it is reasonable to set a higher standard of care than exists for general consumers and to assume that they are less likely to be confused than the ordinary consumer. See *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992) (holding that there was no likelihood of confusion where defendant and plaintiff sold computer services under the mark "E.D.S." to "experienced corporate officials after significant study and contractual negotiation"). However, because the identification of goods in the cited registration is unrestricted, we cannot assume, as Applicant urges, that Applicant's goods are rendered to a totally different class of buyers in a different marketing context. Rather, we must assume that the types of buyers overlap to the extent that Registrant's goods include both recreational and military purchasers as well. That being said, given the nature of the goods, we can assume that even the consumer purchasing ammunition for recreational use will exercise care and possess some knowledge in the field.

C. The Marks

Keeping in mind that where the goods are in part identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines (see *Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012)), we now consider the *du Pont*

likelihood of confusion factor which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay*, 73 USPQ2d at 1691 (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. Rather, we are obliged to consider the marks in their entireties. *Id.* *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, 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 a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161.

Applicant argues that the Examining Attorney has improperly determined that the term “velocity” as it appears in both marks is the dominant feature, ignoring the

initial literal term “true” as well as the design element in the cited registration. Applicant takes the position that the marks, when considered as a whole, convey different commercial impressions.

In comparing Applicant’s standard character mark **True Velocity** with Registrant’s mark **VELOCITY**, it is apparent that Applicant’s mark incorporates the entirety of the cited mark. To that extent, the marks are similar. The addition of the adjective “true” does little to alter the connotation or commercial impression of Applicant’s mark; instead it merely modifies the noun “velocity” as “function[ing] accurately.”⁷ Definition of “true” from Merriam Webster Dictionary (www.merriamwebster.com) submitted with Applicant’s March 24, 2015 Office Action Response. While we are cognizant of the principle that prospective consumers are more likely to focus on the first portion or word in a trademark (*see Palm Bay*, 73 USPQ2d at 1692), it is likewise true that likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding other distinctive matter. If the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences. *See, e.g., Stone Lion*, 110 USPQ2d at 1161 (affirming Board’s finding that applicant’s mark **STONE LION CAPITAL** incorporated the entirety of the registered marks **LION CAPITAL** and **LION**, and that the noun **LION** was the dominant part of both parties’ marks); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266, 62 USPQ2d 1001,

⁷ While Applicant points out that the word “true” has other meanings such as “loyal,” in the context of the mark **True Velocity** and goods, this is the most relevant definition.

1004 (Fed. Cir. 2002) (finding that, even though applicant's mark PACKARD TECHNOLOGIES (with "TECHNOLOGIES" disclaimed) does not incorporate every feature of opposer's HEWLETT PACKARD marks, a similar overall commercial impression is created); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion, noting that the marks are more similar than they are different and that the addition of applicant's "product mark," VANTAGE, to the registered mark would not avoid confusion); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (holding CAREER IMAGE (stylized) for clothing and retail women's clothing store services, and CREST CAREER IMAGES (stylized) for uniforms, likely to cause confusion, noting that CAREER IMAGE would be perceived by consumers as a shortened form of CREST CAREER IMAGES). Such is the case here where the term "true" serves merely modifies the dominant element "velocity." Thus both word marks are similar in sight, sound, connotation and commercial impression.



In analyzing Applicant's composite mark **TRUE VELOCITY** with the cited mark, "[t]here is no general rule as to whether letters or designs will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue." *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). In this particular instance, we do not find the letters "TV" stylized to resemble a shield to be so prominent as to be the dominant portion of that mark. In general, if a mark comprises both wording and a design, greater weight is often given to the wording,

because it is the wording that purchasers would use to refer to or request the goods or services. *See, e.g., In re Viterra, Inc.*, 101 USPQ2d at 1911; *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1247 (TTAB 2010); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). And while the single stylized term TRUEVELOCITY looks somewhat different to the cited mark because it includes the term TRUE, there is no difference in sound or pronunciation with regard to the term “velocity.” For these reasons, Applicant’s composite mark is similar in sound, connotation and commercial impression to Registrant’s typed mark **VELOCITY**.

Thus, this *du Pont* factor favors a finding of likelihood of confusion with regard to both of Applicant’s applied-for marks.

D. The Number and Nature of Similar Marks in Use on Similar Services

We will now consider the number and nature of similar marks in use on similar goods, the sixth *du Pont* factor. In an *ex parte* appeal, “[t]he purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694. *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“*Jack Wolfskin*”); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (“*Juice Generation*”) (internal citations omitted). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation*, 115 USPQ2d at 1675-

76 (internal citations omitted). “The weaker [the Registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). *See also Palm Bay*, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”). “In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark.” *American Lebanese Syrian*, 101 USPQ2d at 1028 (citing *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) and *McCarthy on Trademarks and Unfair Competition* § 11:83 (4th ed. 2011) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.”)).

Applicant maintains that the common element in both marks – the word “velocity” – is conceptually weak and highly descriptive as applied to ammunition. In support thereof, Applicant has made of record the following use-based third-party registrations purportedly to show that the USPTO has approved similar marks in connection with ammunition or related goods:

TM/RN/Disclaimer	Register	Brief Goods/Services	Owner
MAXIMUM VELOCITY	Principal Register	(Int’l Class: 13) fireworks in shell forms	Ingram Enterprises, Inc. (Missouri Corp.)

RN: 3945437			
VELOCITOR RN: 3165303	Principal Register	(Int'l Class: 13) ammunition	Alliant Techsystems Inc. (Delaware Corp.)
VELOCITY TACTICS RN: 4598103	Principal Register	(Int'l Class: 13) ballistic weapons	Velocity Manufacturing Company (Kansas Limited Liability Company)
 PHALANX BY VELOCITY SYSTEMS RN: 4226085	Principal Register	(Int'l Class: 09) body armor, namely, ballistic rifle plates; armor for insertion into ballistic vests and other clothing	Velocity Systems, LLC (Virginia Limited Liability Company)
TERMINAL VELOCITY RN: 2759289	Principal Register	(Int'l Class: 13) fireworks	United Pyrotechnics, Inc. (California Corp.)
HIGH VELOCITY RN: 2116940	Principal Register	(Int'l Class: 09) protective clothing, namely, body armor	U. S. Armor Corporation (California Corp.)
TERMINAL VELOCITY RN: 2496524	Principal Register	(Int'l Class: 9) Protective clothing, namely, body armor.	U. S. Armor Corporation (California Corp.)
VELOCITY AIRSOFT RN: 4585277	Principal Register	(Int'l Class: 28) toys, namely, airsoft guns for recreational purposes, and accessories therefor, namely, bb pellets	Edo Trading, Inc. (California Corp.)
VLOCITY	Principal Register	(Int'l Class: 28) paintball game equipment, namely, loaders	Kee Action Sports LLC (Delaware Limited Liability Company)

RN: 3482184			
VERTICAL VELOCITY RN: 3763239	Principal Register	(Int'l Class: 13) fireworks	B.J. Alan Company (Ohio Corp.)

Applicant also cites to an entry from *Wikipedia* entitled “Velocity” which states that “velocity” as expressed in feet per second is a measure applied to all ammunition standards throughout the industry as further evidence that the cited mark is a commonly used descriptor. Applicant’s October 27, 2015 Request for Reconsideration.

In addition, Applicant submitted over 15 examples of third-party marketing materials and packaging which either describe ammunition as “high velocity” or “extreme velocity” or incorporate the term “velocity” as part of the trademark. *See id.* Applicant highlights in its brief some examples purportedly showing third-party trademark use, including the following:

...the mark HIGH VELOCITY is used in addition to and appears more prominently than the RWS house mark, the mark HIGH VELOCITY is used in addition to appears more prominently in the SK house mark, the mark EXTREME VELOCITY is used in addition to and appears more prominently than the McMillan house mark. ... the mark HIGH VELOCITY MAGNUM STEEL is used in addition to the ESTATE house mark, the mark HIGH VELOCITY is used in addition to and appears more prominently than the PETERS house mark, the mark HIGH VELOCITY is used in addition to and appears more prominently than the EXPRESS house mark, the mark HIGH VELOCITY HP is used in addition to and appears more prominently than the RWS mark.

Applicant’s Brief, p. 10; 7 TTABVUE 11. According to Applicant, “because of the overwhelming common use of the term VELOCITY in the trademarks, labeling, marketing and description of ammunition, the word VELOCITY by itself is extremely

weak when used in connection with ammunition and does not stand out.” Applicant’s Brief, pp. 6-7; 7 TTABVUE 7-8.

Active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used in a particular industry that the public will look to other elements to distinguish the source of the goods or services. *See, e.g., Jack Wolfskin, supra; Juice Generation*, 115 USPQ2d at 1674-75; *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eaglemotive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). Properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used. *See, e.g., Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987).

The majority of third-party registrations submitted by Applicant are of little probative value here because they involve goods unrelated to ammunition (such as “protective clothing, namely body armor”; “toys, namely airsoft guns for recreational purposes, and accessories therefor, namely bb pellets”; “paintball game equipment, namely, loaders). *See, e.g., Reg. Nos. 2116940, 2496524, 4585277, and 3482184.* The most that could be gleaned from these registrations is that they show that the term “velocity” is suggestive in relation to “ammunition.” VELOCITY TACTICS for “ballistic weapons,” on the Principal Register, is of minimal, if any, probative value

because we cannot determine from the face of the registration whether the term “velocity” is descriptive or generic of “ammunition” and therefore weak or deserving of a lesser degree of protection. See Registration No. 4598103. The mark VELOCITOR, while similar, is not the same as the word “velocity” and for this reason lacks probative weight. See Registration No. 3165303. And the registration for the mark VELOCITY TACTICS does not include a disclaimer of “velocity”; nor is the mark registered on the Principal Register under Section 2(f) or the Supplemental Register. This, coupled with the fact that the cited mark is registered on the Principal Register, means that on the record before us, we cannot find that “velocity” is descriptive or generic when applied to ammunition based on the registrations of record.

As to Applicant’s contention that it provided “numerous examples of third-party common law marks utilizing the term ‘VELOCITY’ in connection with ammunition,” (Applicant’s Brief, p. 9; 7 TTABVue 10) we have carefully reviewed each piece of evidence submitted by Applicant purportedly showing third-party trademark use of the term “velocity.”⁸ Only a handful incorporate the term “velocity” as part of a trademark.⁹ The majority use “velocity” within the context of a phrase such as “high

⁸ We have not considered any evidence showing sales of ammunition in foreign countries or evidence where the sale of the ammunition has been discontinued.

⁹ For example, tactical and precision ammunition sold under the Macmillan house mark appears to include the phrase EXTREME VELOCITY as a trademark; likewise steel shots used for duck hunting sold under the Winchester house mark appears to use the term HI-VELOCITY as a trademark. Applicant’s October 27, 2015 Request for Reconsideration.

velocity” to describe a feature of the ammunition.¹⁰ We therefore find that it is not uncommon for third parties to use the phrase “high velocity” to communicate to consumers an important feature of the goods. Thus, the term “velocity” appears to be conceptually weak when used in connection with “ammunition.”

That being said, based on the paucity of third-party trademark uses, we cannot conclude on the record before us that consumers have been exposed to so many VELOCITY and/or VELOCITY formative trademarks for use in connection with ammunition that “customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694. “[L]ikelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong’ mark.” *Anthony’s Pizza*, 95 USPQ2d at 1283 (quoting *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)). *See also American Lebanese Syrian*, 101 USPQ2d at 1028.¹¹ This *du Pont* factor therefore is neutral.

¹⁰ See for example, ammunition offered under the trademarks GAME SHOK, EXPRESS, REMINGTON, ESTATE, FEDERAL PREMIUM, WINCHESTER DOUBLE X, PETERS, PMC, AMERICAN EAGLE, AQUILA, RWS, and CCI MAXI-MAG, all sold with the descriptive label “high velocity.” Applicant’s October 27, 2015 Request for Reconsideration.

¹¹ We are mindful of the fact that the cited mark is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. As such, it is entitled to the statutory presumptions of validity as a non-descriptive mark. To find otherwise would amount to an improper collateral attack on the registration. The proper action for attacking the validity of a registration is a cancellation action. *See Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1919 n.7 (TTAB 2015) (stating that absent a counterclaim, an applicant may not pursue an impermissible collateral attack on an opposer’s registration).

E. Market Interface

We turn next to Applicant's arguments regarding the "market interface" between Applicant and Registrant, under the tenth *du Pont* factor. The tenth *du Pont* factor is "the market interface between applicant and the owner of a prior mark: (a) a mere "consent" to register or use; (b) agreement provisions designed to preclude confusion, i.e., limitations on continued use of the marks by each party; (c) assignment of mark, application, registration and good will of the related business; (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion." *du Pont*, 177 USPQ at 567.

Applicant argues that the respective packaging used in connection with the sale of Applicant's and Registrant's products is different and that the stylization of the marks is dissimilar. As Applicant points out, Registrant uses its mark **VELOCITY** superimposed over an image featuring a shotgun and shotgun shells under the house mark **KENT CARTRIDGE** in "stark contrast" to the "nondescript black box" containing Applicant's mark **True Velocity**. In addition, Applicant explains that the product packaging for its goods indicates that its ammunition is intended for use by the U.S. government and complies with applicable military regulations. Applicant also cites to *In re Magic Muffler Service, Inc.*, 184 USPQ 125, 126 (TTAB 1974) for the proposition that "one must look to the specimens filed with an application because they show the mark as used on or in connection with the goods and therefore how the average purchaser would encounter the mark under normal marketing of such goods

and also suggest what the reaction of the average purchaser would be to this display of the mark.”

In the context of an *ex parte* appeal, virtually “all of the reported decisions involving the tenth *du Pont* factor, which deals generally with ‘the market interface between applicant and the owner of a prior mark,’ have focused on ‘a mere consent to register or use,’ and ‘agreement provisions designed to preclude confusion, i.e., limitations on continued use of the marks by each party.’” *In re Opus One Inc.*, 60 USPQ2d 1812, 1820 (TTAB 2001). In the present case, however, we have neither a consent agreement from Registrant, nor an agreement between Applicant and Registrant as contemplated by *du Pont* factors 10(a) or 10(b)). TMEP Sections 1207.01 and 1207.01(d)(viii) refer only to these *du Pont* sub-factors as potentially relevant within the context of an *ex parte* appeal. Instead, Applicant asserts that the “market interface” between Applicant and Registrant consists of the differences in product packaging. Such arguments are not contemplated by this *du Pont* factor in an *ex parte* appeal, and we cannot interpret the differences in product packaging as reflective of any such agreement between the parties. That is to say, “[t]he evidence of record applicant relies on in the present case simply does not suffice as a substitute for such an agreement.” *In re Opus One*, 60 USPQ2d at 1822.

In addition, the language Applicant relies upon from *In re Magic Muffler, supra*, has been taken out of context; that proposition refers to factors to take into account when determining whether an applicant is seeking to register a single composite or unitary mark. *See id.*

This *du Pont* factor is neutral as well.

II. Conclusion

We have carefully considered all evidence of record and Applicant's arguments, even if not specifically discussed herein, as they pertain to the relevant *du Pont* factors. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record.

The fourth *du Pont* factor does not favor a likelihood of confusion because the cited registration, as unrestricted, necessarily includes all types of consumers, including the consumer of recreational ammunition who is likely to exercise some degree of care given the inherent nature of the goods. Nonetheless, the first, second and third factors each weigh in favor of finding a likelihood of confusion, and the remaining factors discussed above are neutral. While there are instances where a single *du Pont* factor is dispositive, we do not think the fourth *du Pont* factor plays such a role here, given the similarity in the marks when compared as a whole as applied to legally identical goods and overlapping trade channels. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). *See also Stone Lion*, 110 USPQ2d at 1162-63. Balancing these factors, we find that the similarity of the marks and the fact that the goods as identified in the applications and cited registration are identical in part and marketed in overlapping trade channels outweigh any care or expertise

in purchasing decisions. *Id.* Accordingly, we find that confusion is likely between Applicant's applied-for mark and the mark in the cited registration.

Decision: The Section 2(d) refusal to register both of Applicant's applied-for marks is affirmed.