

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB FEB. 24, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Pelican Products, Inc.

v.

21st Century Hard Armor Protection, Inc.

Opposition No. 108,618
to application Serial No. 75/204,833
filed on November 27, 1996

Thomas L. Blasdell of Merchant Gould Smith Edell Welter &
Schmidt for Pelican Products, Inc.

Mary J. Gaskin of Annelin & Gaskin for 21st Century Hard
Armor Protection, Inc.

Before Seeherman, Chapman and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Pelican Products has opposed the application of 21st
Century Hard Armor Protection, Inc. to register MIGHTY-LITE
as a trademark for "bullet-proof vests, collars, and groin

protectors which are worn by humans."¹ Opposer has brought this opposition on the ground of likelihood of confusion with its previously registered mark MITYLITE for flashlights.² Applicant has denied the salient allegations of the notice of opposition in its answer.

The record includes the pleadings; the file of the opposed application; and the testimony, with exhibits, of Gerald F. Linehan, one of the founders of opposer. Opposer has also made of record, under a notice of reliance, applicant's responses to certain of its interrogatories and requests for admission; excerpts of advertisements from printed publications; papers from applicant's application file;³ and the affidavit of Thomas J. Madison, president of applicant.⁴ Applicant has not submitted any evidence on its own behalf.

The case has been fully briefed; an oral hearing was not requested.

¹ Application Serial No. 75/204,833, filed November 27, 1996, asserting first use and first use in commerce on September 20, 1995.

² Registration No. 1,911,248, issued August 15, 1995.

³ It should be noted that the file of an opposed application automatically forms part of the record. See Trademark Rule 2.122(b)(1).

⁴ Although this document may not normally be made part of the record through a notice of reliance, in this case both opposer and applicant have treated it as of record and we therefore deem it to have been stipulated into the record.

Opposer adopted the trademark MITYLITE for a "non-incendive"⁵ flashlight in late 1984, and began using the mark in commerce in 1985.⁶ Because the flashlight does not create sparks and is therefore useful in hazardous environments, it has many industrial and public safety applications, including use by fire and police personnel. Opposer's MITYLITE is also appealing to police because it is durable, convenient and small, so it is good for writing reports while in their cars, for looking in their trunks, or for examining evidence. The flashlight can be purchased with a light bender, which is used to examine handguns and rifle bores to see if they are clean.

Opposer has advertised its MITYLITE flashlights in a variety of trade magazines, including those directed to the law enforcement market. Such trade journals include "Police," "Law Enforcement Technology," "Law and Order" and "Law Enforcement." It also advertises through flyers and catalogs, including a catalog specifically directed to the police market. Opposer also exhibits at trade shows,

⁵ Opposer's witness, Gerald Linehan, used this term in his testimony, referring to a flashlight which would not create sparks.

⁶ There was some confusion in Mr. Linehan's testimony as to when opposer obtained its registration, Mr. Linehan stating that this occurred in 1985, while the registration which was made of record shows that it issued in 1995. Although Mr. Linehan related some of his statements regarding opposer's use of the mark to the issue date of the registration, it is clear from our review of the testimony and exhibits as a whole that opposer began using the mark by 1985.

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including law enforcement trade shows such as Sheriff's Association Trade Show in Arkansas, Chief of Police Association Trade Show in Oklahoma, and Police Officers Association Trade Show in Texas.

Opposer's total promotion and advertising costs, which includes costs for its graphics department as well as for ad space alone, rose from a half a million dollars in 1985 to \$1.5 million in 1998. Of the latter figure, \$600,000 represents the cost of advertising space of all types. In 1998, opposer spent \$60,000 to buy advertising space in law-enforcement trade publications.

Since it first introduced its MITYLITE flashlights in 1985, opposer has sold 8 million of them, representing retail sales in excess of \$80 million. Although opposer could not break down the number of MITYLITE flashlights it had sold to the police, its witness testified that the MITYLITE flashlights represented 17% of its sales of all its goods, and that its total sales to police in 1998 were close to \$400,000. Opposer's witness also testified that the police market was becoming more important, and that it planned to make it a target market in 1999 (the testimony was taken in 1998). Opposer sells its products to the law enforcement market through a national network of sales representatives, who sell to 137 distributors who resell to the police market.

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Although applicant did not make any evidence of record, opposer has submitted certain of applicant's answers to opposer's interrogatories and requests for admission, and the affidavit of applicant's president. These documents show that applicant adopted the mark MIGHTY-LITE for a hard tactical vest designed to stop .223 rifle rounds. It first used the mark in commerce on September 20, 1995, and although it has continuously offered the product for sale, it has not made any sales as yet.⁷ The mark was chosen to suggest that the vest is lightweight, not heavy like hard tactical armor, and that it is strong. The expected purchasers are anyone in law enforcement, and applicant has advertised its product in trade journals such as "Police Chief" and "Law Enforcement Technology." Advertising expenditures have amounted to \$15,000. The channels of trade for the vest are direct sales and through

⁷ There are some apparent inconsistencies between applicant's responses to the interrogatories and its responses to the requests for admission. In the interrogatory responses applicant states that it has used the mark on only one product, a hard tactical vest, and has not made any sales of products bearing the mark. However, in response to a request for admission, applicant admitted that "applicant's first use in commerce of MIGHTY-LITE for bulletproof vests, collars, and groin protectors worn by humans was on September 20, 1995." We have no further information as to how this use was made. Because opposer has not raised non-use of the mark as a ground for opposition, we have treated the admission as showing that the mark has been used on all of the goods in commerce. However, to the extent that interrogatory responses provide more specific information, we have used that information in our findings of fact.

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distributors, and it is offered for sale through the world wide web.

Priority is not in issue in view of opposer's pleaded registration for MITYLITE for flashlights, which has been made of record. **King Candy Company v. Eunice King's Kitchen, Inc.**, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Moreover, the evidence shows that opposer began using its mark on flashlights prior to the filing date of applicant's application on November 27, 1996, which is the earliest date on which applicant is entitled to rely.

Turning to the issue of likelihood of confusion, both opposer and applicant have listed and discussed the factors enumerated in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In making our decision herein, we have considered all of the factors which are relevant, but we will limit our discussion to those we regard as most significant. In this regard, we note that opposer and applicant have totaled up the factors each says favors itself versus those which favor its adversary and those which are neutral, thereby giving the impression that du Pont encourages a mathematical test in which the one with the most favorable factors wins. However, it is clear that in any particular fact situation, one factor may play a greater role than another. See **Kellogg Company v. Pack'em**

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Enterprises, Inc., 951 F.2d 330, 21 U.S.P.Q.2d 1142 (Fed. Cir. 1991).

With respect to the marks, there is no question that they are phonetically identical and extremely similar in appearance. The fact that opposer misspells the word "mighty" in its mark as MITY, while applicant spells it correctly, does not distinguish the appearance of the marks. However, the marks have very different connotations as each is used with its respective goods. MITYLITE, as used for flashlights, suggests a product with a powerful light. In this connection, we note that opposer's labels have touted the product as "The World's Most Powerful Pocket Lite" and "Technically Advanced Powerful Lighting Products." On the other hand, MIGHTY-LITE, used for bullet-proof vests, suggests that the product is both strong and light-weight. MIGHTY-LITE for vests has no connotation whatsoever of brightness or illumination. Thus, as used on their respective goods, the parties' marks convey very different commercial impressions.

As for the goods, flashlights and bullet-proof vests are clearly different items. Although goods need not be similar or competitive to support a holding of likelihood of confusion, **In re International Telephone & Telegraph Corp.**, 197 USPQ 910 (TTAB 1978), opposer has the burden of demonstrating that they are related in some manner, such

that they could give rise to the mistaken belief that they originate from the same producer.

In this case, opposer has shown that its MITYLITE flashlights are marketed to, inter alia, those in law enforcement, and that this is the same group of consumers to whom applicant offers its MIGHTY-LITE products.⁸ Thus, the class of consumers for opposer's MITYLITE flashlights are, in part, the same class of consumers for applicant's vests. Opposer has also shown that both parties advertise in trade journals directed to those in law enforcement, including some of the same periodicals.

However, although law enforcement personnel may use both bullet-proof vests and flashlights, opposer has not established that they will assume such disparate items emanate from the same source when they are sold under the marks MIGHTY-LITE and MITYLITE. We are not persuaded by opposer's argument that the products are related "because both products are specifically designed to reduce the chance of personal injury to individuals whose jobs periodically

⁸ We note that applicant admitted, in response to a request for admission, that "Applicant's MIGHTY-LITE product is offered for sale to law enforcement agencies, fire departments, police departments and emergency personnel." However, in response to interrogatory No. 9, applicant stated that its vest is "available for sale to anyone in law enforcement." As we indicated in footnote 6, *supra*, we view this more specific information as better evidence regarding to whom the vest is offered. In any event, our decision herein would be the same even if we were to treat fire departments and emergency personnel as customers for applicant's products.

require them to encounter certain hazards." Reply brief, p. 5. The fact that a common phrase—personal injury reduction products—may be used to describe both parties' goods is not a sufficient basis to find the goods related. **General Electric Company v. Graham Magnetics Incorporated**, 197 USPQ 690 (TTAB 1977). Opposer's reliance on the fact that opposer's product is designed to protect against personal injury hazards caused by sparks, while applicant's product is designed to protect against personal injury hazards caused by gunshots actually shows the differences, rather than the similarities, of the parties' products. There is no basis for us to conclude, on this record, that a company that would make a non-sparking flashlight would also make a bullet-proof vest. For example, there is no evidence to show that the material that is used to make a non-incendive flashlight would have application for bullet-proof vests, or that companies which make bullet-proof vests also make flashlights.

Opposer has shown that applicant sells both flashlights and bullet-proof vests. However, applicant's response to the request for admission specifically states that its MIGHTY-LITE products are advertised and promoted on one website, while the third-party flashlights it sells are offered at a different website.

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Opposer has also made of record, as part of Mr. Linehan's testimony deposition, an advertisement applicant placed in the June 1998 issue of "Police." This advertisement lists, in two columns, the products applicant offers for sale. One column is clearly headed, "BODY ARMOR DIRECT FROM THE MANUFACTURER," and lists various items by generic names, e.g., "shields, tac vests, sniper mats, helmets." The second column is equally clearly headed, this time with the words, "DEALER FOR THE FOLLOWING:" and lists company names or trademarks, e.g., "Peerless Handcuffs," "Sure Fire," "MTM Health (CPR Kit), "Blackhawk" and "Stream Light." Sure Fire and Stream Light are either trademarks for flashlights, or are names of companies which make flashlights.

This advertisement does not establishment a sufficient nexus between the goods, such that we can find that they are related. Potential purchasers viewing this advertisement would clearly understand that applicant is a dealer for various third parties' products, but is a manufacturer of only body armor. In fact, purchasers viewing this advertisement are more likely to assume that applicant would not manufacture, or sell under its own brand, flashlights, since that would be likely to affect applicant's right to act as a distributor for the third-parties' flashlights.

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A critical factor in this case is the knowledge of the purchasers, and the care with which the products are purchased. The parties agree that this factor favors applicant. Opposer touts the non-incendive nature of its flashlights, and the fact that they can be used in hazardous environments. To the extent that opposer's flashlights are purchased by law enforcement personnel for this reason, research and care would be exercised in making the purchase. Even if the flashlights are to be used in cars merely to write up reports, and would therefore be more casually purchased, there is no question that applicant's bullet-proof vests are, by their very nature, products which would be purchased with great care. Law enforcement personnel, whether policemen or those working in the purchasing department of a police agency, are too sophisticated to assume that all types of police equipment come from a single source based only on the fact that they bear similar trademarks.

We also point out that the trademarks involved in this case cannot be considered strong. As noted above, both opposer's and applicant's marks are suggestive of the respective products (albeit the connotations differ). Opposer argues that its mark has achieved fame based on the use of the mark since 1985, sales of 8 million flashlights, and current annual advertising expenditures of \$600,000 for

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ad space alone. These figures do not demonstrate that opposer's mark is famous. Moreover, in this case the degree of fame must be determined with respect to the impact of the mark on law enforcement personnel, the only common purchasers of the parties' goods. Sales to those in, for example, the aviation industry or construction, or advertisements placed in "Industrial Distribution" or "Flight Training" magazines, does not show that opposer's mark is well-known to those in law enforcement.

However, we do not know how many MITYLITE flashlights opposer has sold to those in law enforcement, or what amount of its advertising expenditures can be attributed to advertising and promotion directed to the police market. The best information opposer has provided is that in 1998 its sales of all goods to the police were close to \$400,000, and that in general, sales of its MITYLITE flashlights amount to 17% of its sales. Even if we assume that the police sales follow the pattern of opposer's other markets, that represents sales of less than \$68,000 in 1998. Further, opposer's testimony shows that the police market is just becoming more important to them: "We are putting a tremendous amount of effort into the market in 1998, and in 1999 we'll feature it as a target market." Linehan test, p. 58. Thus, we cannot extrapolate from opposer's sales and

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promotional expenditures in 1998 the total number of sales or advertising to the police market through the years.

Finally, we note that there have been no instances of actual confusion but, given that applicant has not made any sales of its MIGHTY-LITE bullet-proof vests, that factor cannot favor applicant, in the sense that we cannot infer from the lack of such confusion that confusion is not likely to occur.

Although we have limited our discussion to the preceding duPont factors, in reaching our decision herein we have considered the evidence relevant to all the factors. In summary, although the parties' marks are highly similar in appearance and identical in pronunciation, and are both used on products that are sold to the same class of purchasers through the same channels of trade, because the marks have different suggestive connotations; because opposer's mark has not been shown to be a strong mark; because the goods are purchased with care by knowledgeable consumers; and because the record does not establish a sufficient relationship between the goods; we find that applicant's mark MIGHTY-LITE, used on its bullet-proof vests, collars and groin protectors, is not likely to cause confusion with opposer's mark MITYLITE for flashlights.

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Decision: The opposition is dismissed.

E. J. Seeherman

B. A. Chapman

G. F. Rogers
Administrative Trademark Judges
Trademark Trial and Appeal Board