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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pro Select, Inc.

Serial No. 76/092,271

Marshall A. Burmeister for Pro Select, Inc.

Dawn J. Feldman, Trademark Examining Attorney, Law Office  
111 (Craig D. Taylor, Managing Attorney).

Before Hanak, Hairston and Drost, Administrative Trademark  
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Pro Select, Inc. has filed an application to register  
TRIUMPH as a trademark for "golf clubs, golf club shafts,  
golf club head covers, golf balls and golf tees."<sup>1</sup>

The Trademark Examining Attorney refused registration  
under Section 2(d) of the Trademark Act, 15 U.S.C.

§1052(d), on the ground that applicant's mark, as used in

<sup>1</sup> Serial No. 76/092,271, filed July 20, 2000, claiming first use  
and first use in commerce as of October 1984.

connection with the identified goods, is likely to cause confusion or mistake or to deceive consumers, in view of the prior registration of the mark TRIUMPH for "softballs and tennis rackets."<sup>2</sup>

When the refusal was made final, applicant appealed.<sup>3</sup> Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E .I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, two key considerations are the identity of the marks and the similarities of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin with the marks. Applicant's mark TRIUMPH is identical in every respect to the mark TRIUMPH in the cited registration. "This fact weighs heavily against

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<sup>2</sup> Registration No. 1,221,926 issued December 28, 1982; affidavits under Section 8 and 15 accepted and acknowledged, respectively.

<sup>3</sup> The Examining Attorney's final refusal focused solely on "tennis rackets" as the basis therefore. Thus, we have given no further consideration to "softballs" in the cited registration.

applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). The Board has stated in the past that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a likelihood of confusion." In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

Turning then to the goods, it is well settled that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods or services. See In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); and In re International Telephone & Telephone Corp., 197 USPQ 910 (TTAB 1978).

Also, it has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board

proceedings regarding the registrability of marks, the Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration. See *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990) and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, we find that applicant's golf equipment and registrant's tennis rackets are closely related goods. The Trademark Examining Attorney has submitted printouts of 16 used-based third-party registrations which include in their identifications of goods both golf equipment and tennis rackets. Although these registrations are not evidence that the marks therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783; and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Moreover, the identifications of goods in the involved application and cited registration are not restricted as to channels of trade and/or purchasers. Because neither

party's identification restricts the trade channels or purchasers, the Board must presume that applicant's and registrant's respective goods are marketed in all normal trade channels to all normal classes of purchasers for such goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). These trade channels would include not only "pro" shops, but also sporting goods retailers and mass merchandisers. The purchasers would include not only professional golfers and tennis players, but also novice and amateur golfers and tennis players. Although we recognize that professional golfers and tennis players are discriminating purchasers, we are not convinced that all novice and amateur golfers and tennis players exercise a great degree of care in purchasing golf equipment and tennis rackets. Further, although applicant contends that the respective goods are bought by different purchasers, there is no evidence that golfers and tennis players are distinct classes of purchasers. On the contrary, it is reasonable to assume that there are persons who play both golf and tennis, and that these persons would purchase both golf equipment and tennis rackets.

In addition, applicant contends that the term "triumph" is suggestive of sporting goods and therefore the cited registration is entitled to only a narrow scope of

protection. Given the commonly understood meaning of "triumph,"<sup>4</sup> we are mindful of the suggestive significance of the term when used in connection with sporting goods. Nevertheless, it is well settled that suggestive marks are entitled to protection against the registration by a subsequent user of the same mark for related goods. In re Textron Inc., 180 USPQ 341 (TTAB 1973). Further, in the present case, the same suggestion is conveyed by each mark. Where as here, the identical mark is used on closely related goods, the relevant purchasers are likely to be confused as to the source of the goods. Purchasers may believe that registrant is now marketing golf equipment.

Finally, applicant has submitted the declaration of its vice-president Matthew Adams who states, in relevant part, that:

I have closely observed the sporting goods market for over 17 years, and I have an up to date knowledge of this market. I regularly attend sporting goods exhibitions, shows and conventions, but I cannot recall seeing a TRIUMPH softball or tennis racket. Most exhibitions, shows and conventions that I attend are limited to golf equipment, and those that exhibit golf equipment and other types of sports equipment generally locate the other sports equipment, including softballs and tennis equipment, in different areas from golf equipment. I also read

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<sup>4</sup> We take judicial notice of the following definition submitted with applicant's appeal brief: "**triumph:** to be victorious or successful; win." The American Heritage Dictionary of the English Language (Third edition 1996).

golfing magazines and industry literature relating to golf. I do not recall seeing an advertisement or mention of a TRIUMPH softball or tennis racket in such literature.

During the past 17 years, neither I nor to my knowledge any one associated with Triumph Golf Company, R&M Golf Company or Pro Select, Inc. have become aware of any confusion between TRIUMPH golf clubs, or other golfing equipment, and TRIUMPH tennis rackets or TRIUMPH softballs.

First, if applicant believes that registrant is not using the TRIUMPH mark, it was incumbent upon applicant to file a petition to cancel the cited registration on the ground of abandonment, if appropriate. Otherwise, the fact that applicant's vice-president has not encountered registrant's products at trade shows or by way of advertisements is not particularly probative of whether there is a likelihood of confusion among consumers in the marketplace.

Second, while the absence of any instances of actual confusion over a significant period of time is indeed a du Pont factor which is indicative of no likelihood of confusion, it is a meaningful factor only where the record demonstrates appreciable and continuous use by the applicant of its mark in the same markets as those served by registrant under its mark. See, e.g., *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

However, in this case there is no evidence of applicant's and registrant's geographic areas of sales, or the amount of the sales under the respective marks. Further, we have not had an opportunity to hear from the registrant in this ex parte proceeding as to what have been its experiences regarding confusion.

In view of the foregoing, we conclude that purchasers and prospective customers, familiar with the mark TRIUMPH for tennis rackets, would be likely to believe, upon encountering the identical mark TRIUMPH for golf equipment, that such closely related goods emanate from or are associated with the same source. See A.G. Spalding & Bros. V. Bancroft Racket Company, 149 USPQ 391 (TTAB 1966) [Use of the identical mark EXECUTIVE for tennis and squash rackets and golf clubs and golf balls is likely to cause confusion.].

**Decision:** The refusal to register under Section 2(d) is affirmed.