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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Harbro, LLC

Serial No. 78175956

Timothy A. Flory of Van Dyke, Gardner, Linn & Burkhardt, LLP
for Harbro, LLC.

Florentina Blandu, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Seeherman, Quinn and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Harbro, LLC applied to register EXTREME WOODLAND as a
trademark for the following goods, as amended:

Hunting clothing and accessories,
namely, headwear, hats, neckwarmers,
rainwear, coats, jackets, vests,
shirts, gloves, pants, belts,
suspenders, underwear, footwear, socks,
shoes and boots.¹

¹ Application Serial No. 78175956, filed October 18, 2002, and
asserting a bona fide intention to use the mark in commerce.

A final refusal of registration issued on two bases. The Examining Attorney asserted that applicant's mark, if used on the identified goods, is likely to cause confusion with the mark XTREMELAND.COM, registered for "wearing apparel, namely, pants, shirts, hats, neckties, coats, gloves, footwear, swimwear, belts, scarves, and wrist bands."² Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d). The Examining Attorney also required, pursuant to Section 6 of the Trademark Act, 15 U.S.C. 1056, that applicant disclaim exclusive rights to the word WOODLAND because it is merely descriptive of the goods.

After the final refusal of registration issued, applicant filed a request for reconsideration in which it agreed to the required disclaimer. Although the disclaimer was accepted, the Examining Attorney maintained the refusal of registration based on Section 2(d) of the Trademark Act. Applicant thereupon filed the instant appeal.

The appeal has been fully briefed. Applicant did not request an oral hearing.

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 re E. I. du Pont de Nemours & Co.*, 476 F.2d

² Registration No. 2438262, issued March 27, 2001.

1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the goods, applicant's goods are identified as various items of hunting clothing and accessories. They include shirts, belts, shoes and boots, which are identical to the goods identified in the cited registration. Although the registrant's goods are not identified as being specifically for hunting, we see no reason why goods such as those listed above could not be used by hunters. To this extent, the goods must be considered legally identical. Moreover, hunters also buy clothes for everyday use. Thus, both applicant's goods and the registrant's goods may be encountered by and purchased by the same classes of consumers. Further, because applicant's identification of goods and the registrant's identification include the same types of items (in particular, in addition to the foregoing, hats, coats,

jackets, gloves and pants), consumers are likely to believe, if they are sold under the same or a confusingly similar mark, that they emanate from a single source.

This brings us to a consideration of the marks, keeping in mind that when marks would appear on virtually identical goods, as they are in part here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Applicant has pointed out the various differences in the marks: registrant's mark spells XTREME without the initial "E", while in applicant's mark the word is spelled in the normal manner; registrant's mark ends with ".COM"; and applicant's mark has the word WOODLAND while registrant's mark has just LAND. Although these differences are apparent when the marks are compared side-by-side, under actual marketing conditions consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980). Here, we find that the marks convey a very similar overall commercial impression.

Consumers are not likely to remember the slight difference in the spelling of EXTREME/XTREME. Further, those who only hear the mark, either through word-of-mouth or radio advertising, will not even be aware of this difference. Nor are consumers likely to accord much source-indicating significance to the element ".COM" in the registrant's mark since this suffix is, as applicant points out, a readily recognized term indicating an Internet address. Although we do not discount this element in our comparison of the marks, it is well established that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Consumers are likely to assume that the registrant's mark and applicant's mark are variants of each other, and may conclude that the .COM mark of registrant is used to indicate goods of applicant which are sold over the Internet.

As for the fact that applicant's mark contains the element WOODLAND, consumers who are familiar with the registrant's mark are not as likely to notice or regard the additional WOOD portion of the word because the elements that precede it (EXTREME/XTREME) and the element that follows it (LAND) are virtually the same in both marks.

Moreover, since WOODLAND is descriptive of a camouflage pattern, consumers are likely to assume that this term has been used because the particular clothing is designed for hunters. Again, they will view applicant's mark as a variant of the registrant's mark, rather than as a mark identifying a separate source.

Applicant has argued that the elements EXTREME and LAND are weak because they have been registered by a number of third parties.³ Although there are third-party marks that contain the individual elements EXTREME and LAND, e.g., EXTREME, XTREME PEAK, EXTREME ELEMENTS, PLANET XTREME, WHITETAIL EXTREME, BIG LAND, TV LAND, KID LAND and LAND ROVER, applicant has pointed to no other registrations which contain both elements. Thus, we do not agree with the contention that the registered mark is entitled to only a limited scope of protection. Moreover, notwithstanding the issuance of these other registrations, they are unlike applicant's mark, which contains both of the elements EXTREME/XTREME and LAND that are in the registered mark, and depicts them in the same order.

³ Applicant has only referred to the marks in its responses to Office actions, and has not made the registrations of record by submitting copies taken from the USPTO's records. However, because the Examining Attorney has treated the registrations as being of record, we will accept the information as provided by applicant in its responses.

Applicant has also pointed out that its application for EXTREME WETLANDS for the same goods as those at issue herein has been approved for publication. We do not know why that action was taken, but the Board is not bound by decisions of Trademark Examining Attorneys. We must make our decision based on the record in the appeal before us.

Finally, we follow the well-established principle that, to the extent there is any doubt on the issue of likelihood of confusion, it must be resolved against the newcomer or in favor of the prior user or registrant. In *re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.