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6-24-04

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Haas Outdoors, Inc.

v.

Jordan Outdoor Enterprises, Ltd.

Opposition Nos. 91123651 and 91123413
To application Serial Nos. 76123118 and 76123158
filed on September 6, 2000

W. Whitaker Raymer for Haas Outdoors, Inc.

Daniel J. Warren for Jordan Outdoor Enterprises, Ltd.

Before Sams, Hanak and Quinn, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Jordan outdoor Enterprises, Ltd. (applicant) seeks to register in typed drawing form ADVANTAGE TIMBER HD (Serial No. 76123118) and REALTREE HARDWOODS HD (HARDWOODS disclaimed) (Serial No. 76123158) for "printed camouflage patterns for hard surfaces" (Class 16) and "cotton, wool, and synthetic fabrics having camouflage patterns" (Class 24). Both intent-to-use applications were filed on September 6, 2000.

Haas outdoors, Inc. (opposer) filed timely Notices of Opposition alleging that opposer and applicant are competitors in the "camouflage industry" and that applicant's marks are "merely descriptive, and/or generic." While opposer did not make specific reference to Section 2(e)(1) of the Trademark Act, it is clear that this is the basis for the Notices of Opposition.

Applicant filed Answers which denied the pertinent allegations of the Notices of Opposition. Both sides filed briefs. Neither side requested a hearing.

The parties requested that these Oppositions be consolidated because they involve common questions of law and fact. In an order dated February 7, 2002, this Board granted the request of the parties to consolidate.

The record in this case is summarized at pages III-IV of opposer's brief and pages 4 and 5 of applicant's brief. It consists, in part, of the deposition of Darrell Daigre, a representative of opposer designated by opposer pursuant to FRCP 30(b)(6).

At the outset, one matter should be clarified. During the course of these proceedings, opposer has made it clear that it is not contending that applicant's entire marks ADVANTAGE TIMBER HD and REALTREE HARDWOODS HD are descriptive or generic for applicant's Class 16 or Class 24

goods. Rather, as stated at page V of opposer's brief, the issue in these proceedings is as follows: "The issue before the Trademark Trial and Appeal Board in [these] Opposition[s] is whether the Applicant's use of the term 'HD' is registerable without disclaimer, in the Patent and Trademark Office, or whether the term is generic or merely descriptive as an acronym for 'high definition.'" At page 6 of its brief, applicant concurs with opposer that this is the issue before the Board in these oppositions.

In their briefs, neither party distinguished between applicant's Class 16 and applicant's Class 24 goods. Rather, at page 1 of its brief opposer clarified the nature of the goods in question by stating that they were "camouflage fabric and patterns for application on hunting equipment, supplies and outdoor goods." At page 8 of its brief, applicant describes the relevant goods as "camouflage fabric for the hunting industry in general." Obviously, the goods listed in applicant's applications are "printed camouflage patterns for hard surfaces" (Class 16) and "cotton, wool and synthetic fabrics having camouflage patterns" (Class 24). As set forth in the applications, the identifications of goods are broader than the goods which were litigated in these oppositions, namely, "camouflage fabric and patterns for application on hunting

equipment, supplies and outdoor goods.” (Opposer’s brief page 1). Indeed, as further demonstrated by a reading of the Daigre deposition, these oppositions have been tried in connection with an even narrower scope of goods, namely, camouflage patterns and camouflage products for the hunting industry (Daigre deposition page 5).

Obviously, applicant’s broadly described Class 16 and Class 24 goods include the narrower category of goods of camouflage patterns for the hunting industry. If opposer can prove that the initialism HD is descriptive or generic for a subset of the goods as described in the applications, then it will prevail in these opposition proceedings. In re Analog Devices, Inc., 6 USPQ2d 1808 (TTAB 1988), aff’d 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

Opposer has established that the term “high definition” is perhaps descriptive of a new type of camouflage fabric for use by hunters. For example, one of applicant’s advertisements reads, in part, as follows:
REALTREE HARDWOODS® “feature our proprietary imaging process, High Definition™. ... High Definition™ (HD) is an innovative process that combines the latest imaging and printing technologies. The pattern elements are captured digitally and individually manipulated; then the colors are laid out in a totally new way on both fabric and hard

goods.” Opposer has further demonstrated that applicant uses on its goods a triangular symbol in which there appears in large lettering HD and then above HD there appears in smaller lettering HIGH and below HD there appears in the same smaller lettering DEFINITION™.

On the other hand, Mr. Daigre, a witness selected by opposer, testified that opposer has never used and has no plans to use the initialism HD on any of its products or in any of its advertising. (Daigre deposition page 6).

Furthermore, Mr. Daigre testified that no third-party competitors used HD in connection with their camouflage products or in the hunting industry in general (Daigre deposition page 8) Indeed, Mr. Daigre testified that only applicant is using the initialism HD. (Daigre deposition page 8).

Moreover, at Mr. Daigre’s deposition applicant’s counsel introduced as exhibit 5 a printout from the AF Acronym Finder showing that the initials HD have over 35 different meanings. At least two of these meanings, namely, “heavy duty” and “high density” along with the meaning “high definition” could describe the goods in question.

In addition, at Mr. Daigre’s deposition applicant’s counsel made of record as exhibit 2 an advertisement for

McKenzie™ HD™ TARGETS. These targets are designed to stop arrows. The advertisement touts the fact that these targets consist of "exclusive, self-sealing, high-tech flexible foam," and that while they "initially cost more, they quickly pay for themselves by outlasting other targets many times over." At page 9 of his deposition, Mr. Daigre acknowledged that the use of the initialism HD in this advertisement could mean a number of different things. Obviously, while bow and arrow targets and hunter's camouflage are different products, they both would be marketed to the same consumers. Thus, the acknowledgement by Mr. Daigre that as applied to targets the initialism HD could have a number of different meanings is still pertinent to the issue of whether HD is synonymous with "high definition."

Likewise, applicant's counsel also made of record exhibit 3 which is an advertisement for a rifle case which features the following statement: "Super strong, HD polyethylene shell." Mr. Daigre acknowledged that this indeed was an advertisement for a gun case. Furthermore, he acknowledged that the use of the initialism HD in this advertisement for a gun case could mean any number of things such as heavy duty, high density or perhaps high definition. (Daigre deposition page 11).

The leading case in determining whether initials are descriptive of the goods on which they are used is Modern Optics, Inc. v. Univis Lens Co., 234 F.2d 504, 110 USPQ 293, 295 (CCPA 1956) where the Court stated as follows:

"It does not follow, however, that all initials of combinations of descriptive words are ipso facto unregistrable. While each case must be decided on the basis of the particular facts involved, it would seem that, as a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith." (emphasis added).

The reasoning of Modern Optics has received favorable reception by other Courts of Appeal. See Anheuser-Busch, Inc. v. Stroh Brewery Co., 750 F.2d 631, 224 USPQ 657, 659 (8th Cir. 1984) ("We find the reasoning of Modern Optics persuasive."). See also G. Heileman Brewing Co. v. Anheuser-Busch Inc., 873 F.2d 985, 10 USPQ2d 1801, 1808 (7th Cir. 1989). Of course, this Board would be bound to follow the rule of Modern Optics regardless of its favorable reception by other Courts of Appeal.

Applying the law to the facts of this case, we find that even assuming arguendo that the phrase "high definition" is descriptive of the goods in question, opposer has simply failed to prove that the initialism HD is "substantially synonymous" with the phrase "high definition." Opposer has conceded that no one other than

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applicant has used the initials HD. Furthermore, when applicant has used the initials HD, applicant has found the need to explain that these initials mean "high definition." Hence, if the initials HD were substantially synonymous with the term "high definition" applicant would not have to include such explanations. Furthermore, the record demonstrates that the initials HD have a number of different meanings not only in connection with camouflage fabric, but also in connection with other products of interest to hunters.

Decision: The oppositions are dismissed.