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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kinedyne Corporation

Serial No. 78168051

Kathleen G. Mellon of Young & Basile, P.C. for Kinedyne Corporation.

Elissa Garber Kon, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Walters, Chapman, and Holtzman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Kinedyne Corporation (a Delaware corporation) filed an application on December 17, 2002, to register on the Principal Register the mark shown below



for goods amended to read: "woven flexible strapping for restraint and securment of cargo and individuals in wheelchairs during transit by vans, busses, trucks and trains" in International Class 22. The application is

based on applicant's claimed date of first use and first use in commerce of March 30, 2001. Applicant disclaimed the word "web."

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its identified goods, so resembles the registered mark shown below



for "rope" in International Class 22,¹ as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing.

We affirm the refusal to register. In reaching this conclusion, we have followed the guidance of the Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 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, however, two key considerations are the similarities between the

¹ Registration No. 1433950, issued March 24, 1987, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The word "ropes" is disclaimed.

marks and the similarities between the goods. 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 a consideration of the involved marks, it is well settled that marks must be considered in their entireties as to the similarities and dissimilarities thereof. However, our primary reviewing court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir. 2000); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this case, both applicant's mark and registrant's mark share the term RHINO (as well as a design of a rhinoceros and a rhinoceros head, respectively). The word RHINO is the dominant feature of both the cited

registrant's mark, and applicant's mark. The addition of the generic word "ropes" to registrant's mark does not detract from the dominance of the word RHINO in the commercial impression created by registrant's mark, and does not serve to distinguish the registered mark from applicant's mark. Likewise, the presence of the descriptive word "web" in applicant's mark, does not detract from the dominance of the word RHINO in the commercial impression created by applicant's mark, and does not serve to distinguish applicant's mark from the registered mark. In addition, the pictorial representation of a "rhinoceros/rhinoceros head" emphasizes the dominance of the term RHINO in each mark. While applicant's mark includes the word "web" and registrant's mark includes the word "ropes," we nonetheless find these marks are similar in sound and appearance.

There is nothing in the record to show that the term "RHINO" is anything other than arbitrary in relation to the involved goods. Applicant argued in its brief (p. 5) that the cited registered mark is "a weak mark under the 'crowded field' doctrine which recognizes the term RHINO is commonly used to suggest strength"; and that applicant "found over 600 marks with the term RHINO on the Trademark Office database." However, as the Examining Attorney

correctly points out, applicant's allegation is unsupported by any evidence that the term RHINO is weak, particularly with regard to the goods involved herein. Given the arbitrary nature of the term (and the designs) with respect to both applicant's and registrant's identified goods, and the dominance that the term has in both marks, it not only connotes essentially the same thing for both applicant's and registrant's goods (perhaps "strength" or "toughness"), but the marks create a similar commercial impression.

As explained earlier, the differences in the marks do not serve to distinguish the marks here in issue. That is, purchasers are unlikely to remember the specific differences between the marks, focusing more on the word RHINO, due to the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Purchasers seeing the marks at separate times may not recall these differences between the marks. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992).

We find that applicant's mark RHINO WEB and design and registrant's mark RHINO ROPES and design, when considered

in their entirety, are similar in appearance, sound and connotation. Also, the commercial impression of each mark is of an animal, arbitrary in relation to the goods, as each mark begins with the word "RHINO" and the design element in each mark reinforces this impression. See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Turning to the similarities/dissimilarities and the nature of the involved goods, the Board must determine the issue of likelihood of confusion on the basis of the goods as identified in the application and the registration, and in the absence of any specific limitations therein, on the basis of all normal and usual channels of trade and methods of distribution for such goods. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *Squirtco v. Tomy Corp.*, 697 F.2d 1034, 216 USPQ 937 (Fed. Cir. 1983).

Further, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that the goods are related in some manner or that the circumstances surrounding their marketing are such that

they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001).

In support of her position that these goods are related, the Examining Attorney submitted copies of some third-party registrations, based on use in commerce, to show that both ropes and strapping may be offered under the same mark by the same entity. (See, for example, Registration No. 1387448 for, *inter alia*, "ropes, straps, slings, tie downs and cords"; Registration No. 1453234 for "rope, webbing, twine, tow ropes and tow straps"; and Registration No. 1833702 for, *inter alia*, "...cargo control systems, namely, ropes and webbed or rubber tie-down straps.")

When considering the third-party registrations submitted by the Examining Attorney, it is settled that third-party registrations are not evidence of commercial use of the marks shown therein, or that the public is familiar with them. Nonetheless, third-party registrations which individually cover a number of different items and which are based on use in commerce have some probative

value to the extent they suggest that the listed goods emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988).

The Examining Attorney also submitted evidence in the form of several pages from various Internet websites showing that both ropes and straps are used for securing cargo during transport. See, for example, the following:

NC DMV
Section 3.3: Securing Cargo
...
Cargo Tiedown
Proper tiedown equipment must be used, including ropes, straps, chains and tensioning devices...
www.dmv.dot.state.nc.us;

KEEPER Cargo Control Made Easy
Cam Buckle Tie-Downs
Tie-Downs are the fastest, easiest and safest way to secure your cargo. Unlike rope and twine, they work without having to tie knots. ...
www.keepercorp.com;

AZtrucks.com
Hide-A-Hook Cargo Tie-Downs
...
Unique hook design allows easy use of straps or ropes...just hook one end to the Hide-A-Hook, and secure your cargo with the other. ...
www.aztrucks.com; and

New Haven Moving Equipment
...
Ropes, Webbing & Strapping
...
www.newhaven-usa.com.

Applicant argues that the nature of the goods is "different" (brief, p. 7); and that "a visitation to the registrant's website confirms that in fact it is selling only various types of rope (cordage) for marine and home use" (brief, p. 8). There is no limitation in the registrant's identification of goods "rope" as to uses thereof. Applicant's identification is limited to woven flexible strapping "for restraint and securment of cargo and individuals in wheelchairs during transit by vans, busses, trucks and trains." However, we find a reasonable reading of applicant's identification of goods as identifying two separate items -- strapping for securing cargo, and strapping for securing individuals in wheelchairs. Clearly, the record shows that both strapping and rope are used to secure cargo.

Based on this record, we find that the Examining Attorney has presented a prima facie case that applicant's woven flexible strapping and registrant's rope, are related

within the meaning of Section 2(d) the Trademark Act, as interpreted by the Courts and the Board.²

Regarding the channels of trade and conditions of sale du Pont factors, while applicant's identification is restricted in terms of uses to strapping used for securing cargo or used for securing individuals in wheelchairs during transport, the channels of trade are not limited in the registration.

Registrant's identification of goods ("rope") is broadly worded and it is not restricted as to either trade channels or purchasers. Thus, registrant's goods may be sold through all the normal trade channels and to all the usual classes of consumers for such goods. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, supra; *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, supra; and *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Applicant has not established either that these products are purchased with care or that the purchasers are sophisticated. Assuming arguendo that the purchase of

² In applicant's brief (p. 9), it acknowledges the following: "The examiner also attached information from the Internet to both of her Office Actions to show that both rope and webbing are used to secure cargo. The Applicant acknowledges that this may be true but this does not mean the goods will be associated as coming from the same source"

applicant's identified woven flexible strapping would be made with some degree of care, nonetheless, we find that, this factor does not negate a finding of likelihood of confusion. Further, assuming arguendo that the purchasers of these goods are sophisticated, this does not mean that such consumers are immune from confusion as to the origin of the respective goods, especially when sold under very similar marks. See *Wincharger Corporation v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999); and *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). That is, even relatively sophisticated purchasers of these woven flexible strapping and rope products could believe that these goods come from the same source, if offered under the involved substantially similar and arbitrary marks. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and *Aries Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, footnote 17 (TTAB 1992).

In this case, applicant's goods and those of registrant could be encountered by consumers in circumstances that would give rise to the belief that both parties' goods come from or are associated with the same source. See *Dan Robbins & Associates, Inc. v. Questor Corporation*, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979).

Applicant's statement (reply brief, p. 2) that it "is unaware of any instance of confusion/association" is not persuasive. There is no information in the record as to the nature and extent of sales by either applicant or registrant. And there is no input from the registrant. In any event, the test is likelihood of confusion, not actual confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.