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**THIS DISPOSITION
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Paper No. 9
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Boot Royalty Company, L.P.*

Serial No. 75/938,995

Charles s. Cotropia of *Sidley & Austin* for *Boot Royalty Company, L.P.*

Brooke A. Beyer, Jr., Trademark Examining Attorney, Law Office 105 (*Thomas G. Howell*, Managing Attorney).

Before *Walters, Bucher and Bottorff*, Administrative Trademark Judges.

Opinion by *Bottorff*, Administrative Trademark Judge:

Applicant has filed an intent-to-use application to register the mark PBO (in typed form) for goods identified as "orthopedic insoles sold separately" and "orthopedic insoles sold as an integral part of boots and shoes."¹ Registration has been refused on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark depicted below,

¹ Serial No. 75/938,995, filed March 8, 2000.



previously registered for "orthopedic and prosthetic appliances and parts thereof, and instruments for the fitting and assembly of such appliances,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed main appeal briefs, but applicant did not file a reply brief, and no oral hearing was requested. We affirm the refusal to register.

Our likelihood of confusion 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 considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the

cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a determination of whether applicant's mark and the cited registered mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial

² Registration No. 932,357, issued April 11, 1972, renewed.

impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark consists solely of the letters PBO. We find that the letters PB constitute the dominant feature of the commercial impression of the cited registered mark. Neither the minimal manner in which those letters are stylized nor the rectangular carrier device in which the letters appear contributes significantly to the registered mark's overall commercial impression. We also find that the marks are arbitrary, inasmuch as there is no indication in the record that the letters "PB" or "PBO" have any meaning or significance as applied to the goods at issue here.

Applicant argues that its mark is distinguishable from the cited registered mark in terms of appearance and sound, due to applicant's addition of the letter "O" to its mark. We disagree. Applicant's mark begins with the letters PB, the same letters which comprise the dominant feature of registrant's mark. In our comparison of the two marks' overall commercial impressions, we find this point of similarity to be more significant than the differences which result from applicant's addition of the letter "O" to its mark. Although the two marks are not identical, we

nonetheless find that they are confusingly similar when viewed in their entireties.

It is settled that "confusion is more likely between arbitrarily arranged letters than between other types of marks." *Edison Brothers Stores, Inc. v. Brutting E.B. Sport-International GmbH*, 230 USPQ 530, 533 (TTAB 1986).

"Arbitrary arrangements of letters have generally been given a wide scope of protection, based on the premise that it is more difficult to remember a series of arbitrarily arranged letters than it is to remember words, figures, phrases or syllables." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §23:33 (4th Ed. 6/2000). Thus, confusing similarity has repeatedly been found to exist between an arbitrary letter mark consisting of two letters, such as the cited registered mark in this case, and another mark which consists of the same two letters plus a third, such as applicant's mark.³

³ See, e.g., *Feed Service Corp. v. FS Services, Inc.*, 432 F.2d 478, 167 USPQ 407 (CCPA 1970)(FSC and FS); *Helena Rubenstein, Inc. v. Hudnut*, 193 F.2d 207, 92 USPQ 147 (CCPA 1951)(RHR and HR); *Edison Brothers Stores, Inc., supra* (EBS and EB); *ECI Division of E-Systems, Inc. v. Environmental Communications, Inc.*, 207 USPQ 443 (TTAB 1980)(ECI and EC); *American Optical Corp. v. Southwest Petro-Chem, Inc.*, 175 USPQ 317 (TTAB 1972)(AOC and AO); *Scott Forsman & Co. v. Scientific Film Co.*, 165 USPQ 287 (TTAB 1970), *aff'd*, *Scientific Film Co. v. Scott Forsman & Co.*, 171 USPQ 525 (N.D. Ill. 1971) (SFC and SF); *Cities Service Oil Co. v. A.W. Chesterton Co.*, 127 USPQ 459 (TTAB 1960)(DSC and DC); *W-K-M Division of Joy Manufacturing Co. v. WK Industries*, 2 USPQ2d 1967 (S.D. TX 1987)(WKM and WK).

For these reasons, we find that applicant's mark is confusingly similar to the cited registered mark.

We turn next to the issue of the similarity between applicant's goods and the goods identified in the cited registration. It is not necessary that these respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods 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 source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

We are persuaded by the Trademark Examining Attorney's contention that the cited registration's broadly-identified "orthopedic appliances" must be deemed to include applicant's "orthopedic insoles." The Trademark Examining Attorney has submitted dictionary evidence establishing

that: "appliance" is defined as "a device or instrument designed to perform a specific function..." and as "a dental or surgical device designed to perform a therapeutic or corrective function"; that "orthopedics" is defined as "the branch of medicine that deals with the prevention or correction of injuries or disorders of the skeletal system and associated muscles, joints, and ligaments"; and that "insole" is defined as "the inner sole of a shoe or boot" and "an extra strip of material put inside a shoe for comfort or protection." Based on these definitions, we find that an "orthopedic insole" can be considered to be an "orthopedic appliance."

Conversely, we are not persuaded by applicant's contention that "appliance" has a specialized meaning in the relevant trade which would not encompass applicant's insoles. Applicant has made of record a copy of registrant's online catalog of orthopedic products. Based on this evidence, and on the presence of the words "and instruments for the fitting and assembly of such appliances" in registrant's identification of goods, applicant argues that "appliances" are understood in the relevant trade to be limited to "mechanical assemblies" which brace, support, or restrict movement of selected parts of the consumer's body, and which "must be custom

designed and fitted to the consumer's unique needs." Applicant's insoles, according to applicant, do not fall within this recognized and specialized meaning of "appliance," inasmuch as an insole "is a foot support/cushion which is simply placed inside a shoe to provide orthopedic support and/or cushioning to selected areas of the foot when a consumer is standing or walking." Rather than being assembled or custom-fitted, applicant argues, "insoles are distributed in pre-determined shapes and sizes such that a consumer can simply select a desired shape or size."

However, the evidence applicant relies on does not support its contention that "appliance" has any such special or restricted meaning in the trade. First, like applicant's insoles, many of the orthopedic products displayed in registrant's catalog are offered in pre-determined sizes, i.e., small, medium and large. Second, it does not logically follow from the presence of the wording "and instruments for the fitting and assembly of such appliances" in registrant's identification of goods that all "orthopedic appliances" require the use of such instruments. Applicant has provided us with no evidence from medical dictionaries or other reference sources which provides any such narrow definition of "appliance," nor has

applicant presented any third-party catalog or other evidence showing that others in the trade use the term solely to refer to a "mechanical assembly" which must be "custom designed and fitted." As noted above, the only direct evidence in the record as to the definition of "appliance" is the definition submitted by the Trademark Examining Attorney, which clearly would encompass applicant's insoles.

Moreover, even if we were to assume *arguendo* that "orthopedic appliance" has the narrow meaning in the trade that applicant ascribes to it, such that applicant's "orthopedic insoles" are not encompassed therein, we still would find that applicant's goods and registrant's goods are closely related for purposes of our likelihood of confusion analysis. Registrant, for example, offers for sale in a single catalog both "appliances" of the "mechanical assembly" type as well as other orthopedic products which are similar in kind, construction or use to applicant's orthopedic insoles. See, e.g., the knee, wrist and elbow braces, wraps and supports on pages 161 and 169. Even if orthopedic insoles and other such "non-mechanical" orthopedic products are different from or not encompassed within the meaning of "orthopedic appliances," they

nonetheless can originate from and be marketed by a single source under a single mark.

For these reasons, we find that applicant's goods and registrant's goods are similar rather than dissimilar, for purposes of the second *du Pont* evidentiary factor.

We turn next to a comparison of the trade channels and classes of purchasers for applicant's and registrant's goods. We note that neither applicant's nor registrant's identifications of goods are limited in any way as to trade channels or classes of purchasers, and that the identified goods accordingly are presumed to move in all normal trade channels for such goods and that they are marketed to all normal classes of purchasers for such goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Insofar as applicant's "orthopedic insoles" are deemed to be legally identical to and encompassed within registrant's broadly-identified "orthopedic appliances," we find that the respective goods share the same trade channels and classes of purchasers.

We are not persuaded by applicant's argument that "orthopedic appliances," as identified in the cited registration, are sold only pursuant to a doctor's prescription, or that they are sold only to medical professionals trained in the custom fitting and assembly of such appliances. Although it appears from registrant's

catalog that registrant offers its particular "orthopedic appliances" only by prescription, there is nothing in the registrant's identification of goods which so limits the goods, and nothing in the record which proves that similar products offered by others in the trade also are available only by prescription. Likewise, the fact that registrant's identification of goods includes the words "and instruments for the fitting and assembly of such appliances" does not support applicant's conclusion that any and all such appliances necessarily must be "custom" fitted or assembled by medical professionals.⁴

Finally, we find no evidence in the record to support applicant's contention that the goods involved in this case are purchased only by knowledgeable, sophisticated purchasers.

In summary, after careful review of the evidence of record pertaining to the relevant *du Pont* evidentiary factors, we conclude that a likelihood of confusion exists in this case. Any doubts as to that conclusion must be

⁴ Applicant's reliance on the Board's findings with respect to the nature of registrant's goods in the case of *U.S. Navy vs. United States Manufacturing Company*, 2 USPQ2d 1254 (TTAB 1987) is misplaced. Whatever evidence the Board relied on in making its findings in that inter partes case is not of record herein. More fundamentally, the goods identified in the cited registration in this case are not the same as the identified goods involved in that case.

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resolved against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.