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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Player's Design, Inc.

Serial No. 75/350,932

Warren M. Haines, II of Kennedy Covington Lobdell & Hickman
L.L.P. for Player's Design, Inc.

Katherine Stoides, Trademark Examining Attorney, Law Office
109 (Ronald Sussman, Managing Attorney).

Before Hanak, Wendel and Rogers, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Player's Design, Inc. has filed an application to register the mark PLAYER'S DESIGN for "clothing, namely, children's and infants' golf shirts, overshirts, shorts, sweaters, sweatshirts and hats; infants' one-piece suits and cloth bibs; and golf shirts and overshirts sold only in golf shops or directly to corporations." A disclaimer has been entered of the word DESIGN.¹

¹ Serial No. 75/350,932, filed September 3, 1997, claiming a first use and a first use in commerce date of September 1988.

Registration has been finally refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with the registered mark PLAYERS for "men's and boy's apparel, namely, dress shirts, sport shirts, and knit shirts"² and with the registered mark PLAYERS SPORT for "ladies sportswear, namely, tops, jogging suits and sweaters."³ The cited registrations are owned by different entities. The refusal has been appealed and applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of the likelihood of confusion on the basis of those of the *du Pont* factors⁴ which are relevant under the circumstances at hand. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Considering first the goods, the Examining Attorney maintains that the goods as identified in the application

² Registration No. 1,464,623, issued November 10, 1987, Section 8 & 15 affidavits accepted and acknowledged, respectively.

³ Registration No. 1,317,086, issued January 29, 1985, Section 8 affidavit accepted. A disclaimer has been made of the word SPORT.

⁴ See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

and in the two registrations are either identical or closely related clothing items. As support for this claimed relationship of the items, she had made of record copies of third-party registrations showing that the same manufacturers often offer men's, women's and children's clothing under the same mark. She also argues that since the goods of the cited registrations are not restricted as to channels of trade, it must be presumed that these goods could also be sold in golf shops and directly to corporations, in the same manner as applicant's.

Applicant, on the other hand, argues that in view of the recited manner of sale of its goods, there are differences in the channels of trade and marketing for the goods of applicant from those of the registrants. Applicant further asserts that there are differences in factors such as the style, function, and price of the respective goods which must be considered.

As is well established, the issue of likelihood of confusion must be determined on the basis of the goods as identified in the involved application and registration(s). Moreover, in the absence of specific limitations, the goods must be considered in light of the normal channels of trade and methods of distribution for goods of this nature. See Canadian Imperial Bank of Commerce National Association v.

Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); CBS, Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

Thus, although applicant's clothing items may be golf-oriented and may be restricted to sale only in golf shops or directly to corporations,⁵ there is no limitation in the goods of the registrations that would preclude items such as men's knit shirts or ladies' sportswear tops from being sold in golf shops for use by golfers. There is no limitation which would preclude sale of any of the clothing items in either of the registrations directly to corporations. Any arguments as to relative price, style, function or the like are immaterial in view of the broad identification of the goods in the cited registrations. Accordingly, we find a definite overlap of applicant's goods with those of the cited registrations. Moreover, no differentiation can be made on the basis of channels of trade or method of marketing.

⁵ The identification of applicant's goods, as presently amended, may be viewed unclear as to whether all the items are intended to be restricted to sale in this manner or only the "golf shirts and overshirts." However, in view of applicant's argument that its goods are noncompetitive with those in the cited registrations, an argument which is not restricted only to "golf shirts and overshirts," and in view of the Examining Attorney having made no argument that the limitation applies only to those goods, we find that the Examining Attorney has accepted the limitation as applying to all the goods.

Turning to the respective marks, the Examining Attorney has taken the position that applicant's mark PLAYER'S DESIGN is highly similar to the registered marks, PLAYERS and PLAYERS SPORT in sight, sound and commercial impression. She argues that the term PLAYER'S is the dominant portion of applicant's mark, and, as such, is the phonetic equivalent of the dominant portion of each of the registered marks, i.e. PLAYERS. She considers the terms DESIGN in applicant's mark and SPORT in the cited mark PLAYERS SPORT to be of lesser trademark significance, since both are descriptive and have been disclaimed. She stresses that the focus in determining likelihood of confusion must be on the general overall impression created by the marks and not small differences which may be forgotten by purchasers over a period of time.

Applicant argues that the marks must be considered in their entireties; that the marks differ not only in appearance and sound, but the term DESIGN also contributes to the distinct overall commercial impression created by applicant's mark. Applicant asserts that since in its mark the term PLAYER'S is used as a adjective modifying DESIGN, and not as a noun as in the cited marks, the connotations of the marks are different.

It is true that, although marks must be considered in their entireties in determining likelihood of confusion, there is nothing improper in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Thus, despite the obvious differences in the marks PLAYER'S DESIGN and PLAYERS and/or PLAYERS SPORT in terms of appearance and sound, if the terms DESIGN and SPORT add little of trademark significance to the marks, the overall commercial impressions created thereby would be very similar. Clearly this is the case with respect to the mark PLAYERS SPORT; we agree with the Examining Attorney that the term SPORT would simply be viewed as a descriptive reference to the fact that this is a sport line of clothing.

We do not, however, find the same to hold true for the term DESIGN in applicant's mark PLAYER'S DESIGN. Although applicant, at the request of the Examining Attorney, has disclaimed the term DESIGN, we are not convinced that PLAYER'S so dominates applicant's mark that the mark has a similar connotation or creates a similar overall commercial impression to the cited marks. We believe the term DESIGN plays a part in the impression created by the mark which cannot be ignored. Applicant's mark PLAYER'S DESIGN has a

different connotation than PLAYERS per se. Whether the inference in the mark PLAYER'S DESIGN is that these are clothing items which are specifically designed for use by a golfer or that have been made in accordance with a particular player's specifications, the significance of the term DESIGN is clearly more than minimal. All in all, we do not find the commercial impressions created by the respective marks to be highly similar.

This distinction created by the presence of the term DESIGN becomes even more significant when we take into consideration another relevant factor, namely, the number of similar marks for similar goods. Applicant has not only pointed out the co-existence of the two cited registrations but also has cited several third-party registrations for marks containing the term PLAYERS or PLAYER'S for clothing items.⁶ The Examining Attorney, in response, argues that, other than the cited registrations, the third-party marks create different commercial impressions, the term PLAYERS therein being combined with a non-descriptive term. She further argues that the prior existence of these marks on

⁶ Although applicant has failed to make copies of these registrations of record, as is the proper means of introducing evidence of this nature, the Examining Attorney has failed to object to the registrations on this basis. Instead, she has responded to this evidence on the merits and, accordingly, we have done the same.

the register does not warrant applicant's registration of a mark confusing similar to those in the cited registrations.

We are well aware that the third-party registrations are not sufficient to show use of the marks covered thereby, or that the public is familiar with the marks. The registrations are competent, however, to show that others in the relevant field have adopted marks containing a particular term and that that term has a degree of suggestiveness in the field. See *In re Hamilton Bank*, 222 USPQ 174 (TTAB 1984). Here, we have evidence that the term PLAYERS has been used in several third-party marks for clothing items, particularly, sportswear.⁷ Under these circumstances, the mere fact that PLAYERS (or a variation thereof) may appear in both applicant's mark and the cited marks is not sufficient basis for a holding of likelihood of confusion if the marks are otherwise distinguishable as a whole. See *Northwestern Golf Co. v. Acushnet Co.*, 226 USPQ 240 (TTAB 1985). We find the presence of the

⁷ We note, as representative examples, the following:

Reg. No. 1,290,244 for PLAYERS CLUB for mens', womens', children's knit shirts, woven shirts, slacks, jeans, shorts, swim wear, jackets, warm-up suits, running shorts, blazers, socks, belts, and shoes;

Reg. No. 2,089,419 for TRUE PLAYERS for clothing, namely, tee shirts and hats;

Reg. No. 1,993,889 for PRIME PLAYERS for wearing apparel, namely, shirts; and

Reg. No. 1,725,884 for PLAYERS CHOICE for clothing, namely, hosiery and socks.

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additional term DESIGN in applicant's mark to have sufficient impact on the commercial impression created thereby to distinguish the mark as a whole from PLAYERS alone or PLAYERS SPORT.

Accordingly, taking into consideration the relative weakness of the term PLAYERS when used in marks for clothing items in the sportswear field and the differences in sound, appearance and connotation of applicant's mark when compared in its entirety to the cited marks, we find insufficient basis to support a holding of likelihood of confusion.

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

E. W. Hanak

H. R. Wendel

G. F. Rogers

Administrative Trademark Judges,
Trademark Trial and Appeal Board

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