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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Life Enhancement Technologies, Inc.

Serial No. 75571172

Edward S. Wright of Law Offices of Edward S. Wright for
Life Enhancement Technologies, Inc.

Katherine Stoides, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Quinn, Walters and Chapman, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

On October 15, 1998, Life Enhancement Technologies,
Inc. (a California corporation) filed an application to
register on the Principal Register the mark ISOWEAR for
goods amended to read "garments with heat exchangers
through which a fluid is circulated to warm or cool the
body, namely, shirts, pants, vests, jackets and caps." The

application is based on applicant's assertion of a bona fide intention to use the mark in commerce.

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 ISOSPORT for "slippers, hats, gloves and scarves,"¹ as to be likely to cause confusion, mistake or deception.

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

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, 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*

¹ Registration No. 2349044, issued May 9, 2000 to "totes Isotoner Corporation."

Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The Examining Attorney essentially argues that the word "ISO" is the dominant portion of both the cited registered mark and applicant's mark, with the descriptive words "sport" and "wear" having little, if any, trademark significance; that the marks are similar in sound, appearance and connotation, and they create similar commercial impressions; that one item of the registrant's and applicant's respective goods ("hats" and "caps") is legally identical and the remainder are related clothing items; and that the goods are sold to the same classes of purchasers through the same channels of trade.

Applicant contends that the marks share only the prefix "'ISO' which in the English language is a common prefix which indicates an equality in temperature when used in a thermal context" (brief, p. 2 -- referring to Webster's Third New International Dictionary of the English Language (Unabridged) (1993)); that when considered in their entirety, the marks are quite different in sound and appearance, they connote different things, and they create different commercial impressions; that "there are literally hundreds of 'ISO' marks which are the subject of current registrations or pending applications" in the USPTO

trademark database (brief, p. 3); that the Examining Attorney has overlooked a critical difference in the goods, namely, that applicant's garments have heat exchangers through which a fluid is circulated to cool or warm the body; and that applicant's goods are marketed to people "looking for something beyond ordinary gloves and scarves and therefore move in different channels of trade" (brief, p. 3).

Preliminarily, we note two evidentiary matters. First, in applicant's February 15, 2002 response to an Office action (p. 1) and in its brief (p. 2), applicant referred to a Webster's Third New International Dictionary of the English Language (Unabridged) (1993) definition with reference to "isotherm," but no copy thereof is included in the record. However, the Board has a copy of that particular dictionary, and we take judicial notice of the following definitions found therein: (i) "isothermal" as "adj. 1: of, relating to or marked by equality of temperature..."; and (ii) "iso" as "adj. : isomeric; esp: having a branched chain <~ acids with branching methyl groups> -- compare IS."

Second, applicant contends that there are numerous other "ISO" marks, but this assertion is unsupported as applicant did not submit the results of any search of the

USPTO database. Applicant asserts that there are hundreds of "ISO" registrations and applications, but applicant did not assert they were in the clothing field; and in fact, the Examining Attorney contends that "the [cited] registrant owns all of the marks bearing the 'ISO' prefix for use on clothing." (Brief, unnumbered p. 7.) Whether a term is a weak mark must be determined in the context of the particular line or field of merchandise in connection with which the mark is used. See *In re Bayuk Cigars Incorporated*, 197 USPQ 627 (TTAB 1977). Thus, while a term may be weak or commonly used in one field, the same word may be unique and possess strong trademark significance in another field. (We point out that even if applicant had submitted a printout of a USPTO database list, applications are not probative evidence except to show that each application was filed on a particular date; and any mere listing of registrations does not make the registrations of record. See *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); and *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974).)

Looking first to the marks, it is obvious that they are not identical. However, both involved marks are constructed in a similar manner. Specifically, both marks share the beginning term "ISO" followed by a suggestive or descriptive term relating to clothing. The first part of a

mark is often the part impressed upon the mind of the purchaser, and the most likely to be remembered. See *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895 (TTAB 1981). These marks are similar in sound and appearance.

Relevant purchasers may note the difference in the second syllable of these marks ("wear" and "sport"), but they would still think these goods come from the same source because of the parallel construction of the marks, specifically "ISO" followed by a term relating to clothing. That is, purchasers familiar with registrant's slippers, hats, gloves and scarves sold under the registered mark ISOSPORT, upon seeing applicant's mark ISOWEAR on shirts, pants, vests, jackets and caps (all with heat exchangers that carry a fluid), would assume that applicant's goods come from the same source as registrant's goods, and merely refers to a line of clothing made by registrant which includes heat exchangers.

We do not agree with applicant that the marks carry different connotations. The prefix in both marks is "iso" not "isothermal." Thus, whatever the public perceives "iso" to mean in relation to clothing would presumably be similar for both applicant's and registrant's items of clothing.

It is the impression created by each of the involved marks, each considered as a whole, that is important. See *In re Dixie Restaurants Inc.*, supra; *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); and *Franklin Mint Corp. v. Master Manufacturing Co.*, 667 F.2d 1005, 212 USPQ 233 (CCPA 1981). See also, 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §23:41 (4th ed. 2001). These marks do not create separate and distinct commercial impressions.

The minor difference is not likely to be recalled by purchasers seeing the marks at separate times. Under actual market conditions, consumers do not have the luxury of a side-by-side comparison of the marks; and further, we must consider the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Thus, the purchaser's fallibility of memory over a period of time must also be kept in mind. 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 the marks, considered in their entirety, are similar in sound, appearance, connotation and commercial impression.

Turning next to a consideration of the goods involved in this case, we start with the well-settled principle that the question of likelihood of confusion in Board proceedings regarding the registrability of marks, must be determined based on an analysis of the goods or services identified in applicant's application vis-a-vis the goods or services recited in the registration. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N. A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Further, it is also well settled that goods or services need not be identical or even competitive to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would likely be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they emanate from or are in some way associated with the same producer or that there is an association between the producers of each party's goods or

services. See *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992); and *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

In this case, applicant's identification of goods includes the item "caps" and registrant's identification of goods includes the item "hats." Thus, the registrant and applicant share one item that is legally identical.² There are also closely related items such as applicant's "vests, jackets" and registrant's "gloves."

It is true that applicant's identification of goods makes clear that applicant's items of clothing all include "heat exchangers through which a fluid is circulated to warm or cool the body." While purchasers would not assume that all clothing contains heat exchangers, nonetheless, registrant's identification of goods is not limited to exclude such feature, and could include the same feature as that found in applicant's identified goods.

We find that applicant's clothing items with heat exchangers and registrant's clothing items are related goods. See *Hewlett-Packard Company v. Packard Press, Inc.*,

² Our primary reviewing Court has stated that "when marks would appear on virtually identical goods or services, the degree of similarity [of the marks] 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).

281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services”); and *Recot Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.”).³

These goods, as identified, would be sold in the same or at least overlapping channels of trade to the same or overlapping classes of purchasers.

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

³ The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. See *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).