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12 JUN 2003

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Groupe Dynamite, Inc.

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Serial No. 75/802,990

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Jane F. Collen, Esq. for Groupe Dynamite, Inc.

Michael Engel, Trademark Examining Attorney, Law Office 108  
(David Shallant, Managing Attorney).

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Before Seeherman, Hanak and Hairston, Administrative  
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Groupe Dynamite, Inc. (applicant) seeks to register in typed drawing form DYNAMITE STORES for "handbags, knapsacks" (Class 18); various clothing items including "sweaters, pants, skirts, suede and leather jackets, t-shirts and coats" (Class 25); and the "operation of retail clothing store" (Class 35). To be clear, applicant also seeks to register this mark for various goods in Classes 3, 14, 16 and 20. However, as the Examining Attorney notes at page 3 of his brief, he "has no objection to registration of the mark in Classes 3, 14, 16 and 20." The intent-to-use application was filed on September 20, 1999. At the

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request of the Examining Attorney, applicant disclaimed the exclusive right to use the word STORES apart from the mark as shown.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods and services, is likely to cause confusion with two marks previously registered in typed drawing form to two different entities. The first mark is DYNAMITE registered for "luggage." Registration No. 1,378,112. The second mark is DYNAMITE KIDZ registered for "children's clothing, namely, shirts, pants, jackets, hats, socks, sweaters, shorts, and coats." Registration No. 2,192,597.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs and were present at a hearing held before this Board on April 3, 2003.

Because this is a multi-class application, our likelihood of confusion analysis will consider separately applicant's Class 18 goods, applicant's Class 25 goods and applicant's Class 35 services. However, before discussing each of applicant's separate Classes, we wish to address certain arguments raised by applicant that pertain to all three Classes.

First, applicant at pages 8 and 10 of its brief argues that its clothing goods, handbags and knapsacks are high fashion and are sold exclusively through applicant's retail outlets. There are two problems with applicant's argument. First, applicant has offered no evidentiary support for its argument. Second, in any event, it is well settled that in Board proceedings "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited] registration[s], rather than what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Put quite simply, neither applicant's two classes of goods or one class of services contain any restrictions to the effect that applicant's goods and services will be limited to the high fashion market. Likewise, applicant's two classes of goods contain no restriction that they will be sold solely through applicant's retail stores.

Second, at page 6 of its brief, applicant argues that "confusion is unlikely because the term DYNAMITE is so widely used with clothing that the public easily distinguishes slight differences in the marks." Applicant

bases its assertion on the fact that there are or were third-party registrations for marks containing the word DYNAMITE which are or were for clothing. The problem with applicant's argument is that applicant has made of record absolutely no evidence whatsoever showing that any of these third-party DYNAMITE marks are in use, much less that they have been used so extensively such that consumers have become accustomed to distinguish slight differences in various DYNAMITE marks. Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) ("But in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use they [the third-party registrations] provide no basis for saying that the marks so registered have had or may have had any effect at all on the public mind so as to have a bearing on likelihood of confusion.") (original emphasis).

We now turn to a consideration of whether there exists a likelihood of confusion resulting from the contemporaneous use of applicant's mark DYNAMITE STORES for "handbags, knapsacks" (Class 18) and the mark DYNAMITE for "luggage." At the outset, we find that knapsacks and luggage are functionally equivalent in that they are both used for transporting clothes and the like. In this regard, we note that the term "knapsack" is defined as

follows: "A canvas, nylon, or other bag for clothes ... carried on the back." Random House Webster's Dictionary (2001). Indeed, the term "luggage" is broad enough to encompass "knapsacks." Id.

Considering next the marks, we recognize at the outset that when the goods are in part virtually identical, as is the case here, "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) ("insurance underwriting" services and "insurance brokerage" services).

Obviously, applicant's mark incorporates the registered mark DYNAMITE in its entirety and merely adds to it the disclaimed word STORES. At page 5 of its brief applicant correctly notes that in determining whether there is likelihood of confusion, "the marks must be considered in their entireties." Citing In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). What applicant fails to note is that the Court in National Data went on to note that "on the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a

particular feature of the mark." National Data, 224 USPQ at 751. We find that the dominant feature of applicant's mark DYNAMITE STORES is the totally arbitrary word DYNAMITE. As applied to knapsacks and luggage, the word STORES is, at a minimum, highly suggestive in that it indicates where the knapsacks and luggage may be obtained. Moreover, we note that DYNAMITE is the first word of applicant's mark, and this is "a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." Presto Products v. Nice-Pak Products, 9 USPQ2d 1825, 1897 (TTAB 1988). In sum, given the fact that knapsacks and luggage are virtually identical in that they are used to transport clothing and the like, and the fact that the most prominent part of applicant's mark is absolutely identical to the registered mark DYNAMITE, we find that there exists a likelihood of confusion resulting from the contemporaneous use of DYNAMITE STORES for knapsacks and DYNAMITE for luggage.

Turning to a consideration of applicant's Class 25 clothing goods and the goods of Registration No. 2,192,597, we note at the outset that the goods are in part legally identical. To elaborate, applicant's clothing goods include sweaters, pants, skirts, suede and leather jackets,

t-shirts and coats. Applicant's recitation of goods contains no limitation that would exclude children's clothing. On the other hand, the goods of Registration No. 2,192,597 include children's sweaters, pants, skirts, jackets, shirts and coats. Hence, the goods of the application and the cited registration are in part absolutely legally identical.

Turning to a consideration of the marks, as stated earlier in this opinion, when the goods of the parties are in part legally identical, the degree of similarity of the marks required for a finding of confusion declines.

Century 21 Real Estate Corp., 23 USPQ2d at 1700.

Obviously, DYNAMITE is the first word of both marks. Moreover, the second word in the registered mark (KIDZ) is but an extremely slight misspelling of the word "kids." Obviously, as applied to children's clothing, the KIDZ portion of the registered mark (DYNAMITE KIDZ) is clearly descriptive of said clothing.

In sum, given the fact that certain of applicant's clothing goods are absolutely legally identical to the clothing goods of Registration No. 2,192,597, and given the fact that the totally arbitrary term DYNAMITE is the most prominent portion of both applicant's mark and registrant's

mark, we find that the contemporaneous use of these two marks would result in a likelihood of confusion.

Finally, we turn to a consideration of whether the contemporaneous use of DYNAMITE STORES by applicant for the operation of retail clothing stores and the use of DYNAMITE KIDZ for various items of children's clothing is likely to cause confusion. At the outset, we note that there can be no serious dispute that children's clothing would be sold in retail clothing stores. Whether or not children's clothing is sold in applicant's particular clothing stores is irrelevant for the reasoning set forth in the Canadian Imperial Bank case. 1 USPQ2d at 1815. In addition, we note that it is not uncommon in the industry to add the word KIDS to clothing brand names to designate that the particular line of clothing is now designed for children.

Our primary reviewing Court has previously addressed a factual situation extremely analogous to the present one when it found that the contemporaneous use of BIGG'S TRUE MINIMUM PRICING for "retail grocery and general merchandise store services" and BIGGS for "wooden and upholstered furniture" would result in a likelihood of confusion. In re Hyper Shoppes, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988). In so doing, the Court made the following observation: "The only aspect of this case which is unusual

is that the marks sought to be registered are for services while the prior registration on which their registration is refused is for wares. Considering the facts (a) that trademarks for goods find their principal use in connection with selling the goods and (b) that the applicant's services are general merchandising - that is to say selling - services, we find this aspect of the case to be of little or no legal significance." 6 USPQ2d at 1026.

In similar fashion, we find that if a consumer was familiar with applicant's mark DYNAMITE STORES for retail store services, he or she upon encountering the mark DYNAMITE KIDZ for children's clothing would assume that the retail store services and the children's clothing are in some way related.

Moreover, to the extent that there are any doubts on the issue of likelihood of confusion, we are obligated to resolve said doubts in favor of the registrants. Hyper Shoppes, 6 USPQ2d at 1026; Century 21 Real Estate, 23 USPQ2d at 1707; and In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

Decision: The refusals to register with regard to applicant's Class 18 goods, Class 25 goods and Class 35 services are hereby affirmed.