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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Athlete's Foot Marketing Associates, Inc.

Serial No. 76/008,431

Kathryn E. Swint of Arnall Golden Gregory LLP for Athlete's
Foot Marketing Associates, Inc.

William H. Dawe, III, Trademark Examining Attorney, Law
Office 108 (David Shallant, Managing Attorney).

Before Seeherman, Hohein and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 23, 2000, Athlete's Foot Marketing
Associates, Inc. (applicant) filed an application to
register the mark GET FIT (in typed form) on the Principal
Register for services ultimately identified as "retail

store services featuring athletic footwear and clothing, excluding sweaters" in International Class 35.¹

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a prior registration for the mark GETFIT (in typed form) for "men's and women's sweaters" in International Class 25.²

When the refusal was made final, applicant filed this appeal.

The examining attorney argues that the "marks are virtually identical in appearance and overall commercial impression." Brief at 4. Specifically, the examining attorney found that applicant's spelling of its mark as a single compound word "does not change the overall commercial impression of the marks because the modification does not alter the manner in which these letters are viewed or pronounced." Id. The examining attorney also found that the goods and services are related because "there is every indication that the same customer would encounter the registrant's goods or advertising therefore [sic], in the same trade channels as the applicant's services." Brief at

¹ Serial No. 76/008,431. The application contains an allegation of a date of first use and a date of first use in commerce of June 1999.

² Registration No. 2,419,577, issued January 9, 2001.

9-10. To support his position, the examining attorney submitted numerous use-based, third-party registrations to suggest that the same marks have been registered by the same entities for sweaters and retail store services. As a result, the examining attorney concluded that there is a likelihood of confusion when applicant's and registrant's marks are used on the identified goods and services.

On the other hand, applicant argues that the examining attorney "unduly expands the protection to which registrant's mark is entitled" and that the description of its services "expressly excludes services pertaining to sweaters." Reply Br. at 1-2 (emphasis in original). Furthermore, applicant asserts that the examining attorney's evidence "does not contain a registration for both retail store services featuring a single niche type of clothing and one unrelated type of clothing." Reply Br. at 4 (underlining in original). In addition, applicant claims that the purchasers are sophisticated and that it "is unlikely that consumers would patronize Applicant's specialty retail stores looking for registrant's sweaters." Brief at 6. According to applicant, these factors demonstrate that confusion between the marks is unlikely.

We affirm.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must 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 begin our analysis by discussing the similarities and dissimilarities of the marks in the application and registrations. In this case, the marks are virtually identical, GET FIT and GETFIT. Both marks are depicted in typed form. The marks would be pronounced identically and they would have the same meaning and commercial impression. The absence of the space does not significantly change the appearance of the marks. Stockpot, Inc. v. Stock Pot Restaurant, Inc., 220 USPQ 52, 54 (TTAB 1983), aff’d, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK

POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); In re Best Western Family Steak House, Inc., 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"). Because the only difference between these marks is that one contains a space, the virtually identical nature of the marks is a significant factor in our likelihood of confusion analysis. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("Without a doubt the word portions of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant").

Applicant suggests that its "mark is a double entendre, since GET FIT, when used with services related to athletic footwear, means both 'get in shape' and 'get well-fitting' athletic shoes and athletic apparel. In contrast, the Registrant's mark suggests no connection to physical fitness." Brief at 7. However, it is not clear why registrant's sweaters would not convey the same "get fit" message that the mark would have when used with applicant's services, particularly if registrant's sweaters are those designed for cold-weather, outdoor fitness and athletic

activities. Furthermore, applicant's argument that registrant's mark "suggests 'getting' a sweater that 'fits'" (Reply Br. at 3) is similar to its assertion that its mark could mean "'get well-fitting' ... apparel." Brief at 7. Therefore, there does not appear to be any significant differences between the meanings created by registrant's and applicant's marks.

Next, we look at the goods and services to determine if there is a relationship between them. We must consider the goods and services as they are described in the identification of goods and services in the application and registration. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). The cited registration contains no limitations so we must assume that registrant's sweaters travel through all normal channels of trade. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are

no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"). We also do not read limitations into the identification of goods. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"). Therefore, we must assume that these sweaters would be sold through retail stores featuring athletic clothing and that registrant's sweaters would include those designed for outdoor fitness and sporting activities.

Furthermore, it is not necessary for the examining attorney to establish that the registrant and applicant are competitors.

[G]oods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could 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 producer or that there is an

association between the producers of each parties' goods or services.

In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

See also Shell Oil, 25 USPQ2d at 1689 ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source").

In this case, the examining attorney has included numerous registrations in which the mark is registered for sweaters and retail clothing store services. See, e.g., Registration No. 2,332,482 ("Girl's and women's sports clothing, namely, ... sweaters" and "retail store services ... featuring girl's and women's sports clothing and equipment"); No. 2,472,275 (Sweaters and retail store services); No. 2,461,030 ("Clothing and sports-related apparel, namely, ... sweaters" and "retail store services featuring golf-related sporting goods equipment and clothing"); No. 2,483,278 (Sweaters and retail clothing store services); and No. 2,424,375 (Sweaters and retail clothing store services). These registrations provide some support for the examining attorney's position that sweaters and retail store services featuring athletic footwear and clothing are related because they show that these goods and services have been registered by the same source under the

same mark. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

Here, however, the question is whether consumers would believe that there is some relationship between registrant's GETFIT sweaters and applicant's GET FIT retail stores featuring athletic clothing but excluding sweaters. We hold that the answer would be in the affirmative. The Federal Circuit faced a similar question in a case involving the mark "bigg's"(stylized) for "retail grocery and general merchandise store services" and BIGGS and design for furniture.

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.

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In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988). See also MSI Data Corp. v. Microprocessor Systems, Inc., 220 USPQ 655, 658 (TTAB 1983) (“[I]t is well established that a ‘relatedness’ which speaks to a likelihood of confusion may occur not only where goods are involved but can exist between products on one hand and services dealing with or related to those products on the other hand”).

We recognize that applicant’s amended identification of goods specifically excludes sweaters as an item sold in its stores. This limitation does not mean that the services are no longer related to the goods. A potential customer familiar with GETFIT sweaters would likely believe that GET FIT retail stores featuring athletic clothing emanate from the same source even though the store does not sell sweaters. We can perceive of no significant difference in the consumers of retail store services featuring athletic clothing and of retail store services featuring athletic clothing excluding sweaters. Shell Oil, 26 USPQ2d at 1689 (It is relevant to consider the degree of overlap of consumers exposed to the [goods and] services”). The fact that, unlike most retailers of athletic clothing, there are no sweaters in applicant’s stores would most likely be considered by purchasers to be a seasonal

occurrence or a store preference, rather than a significant difference in the goods and services that they would ascribe to a difference in the source of the goods and services. Therefore, the purchasers of registrant's sweaters are likely to assume that they emanate from the same source as applicant's retail store services featuring athletic clothing, regardless of the presence or absence of sweaters in the stores. When purchasers encounter virtually the same mark for sweaters and for retail athletic clothing store services, even for athletic clothing stores that do not sell sweaters, they are likely to assume that there is an association or relationship between the goods and services.

Applicant also argues, without any evidentiary support, that consumers of registrant's goods "make careful purchasing decisions" and that "neither the Applicant's services nor the Registrant's goods are typically purchased on impulse." Brief at 7. We do not agree that customers of the identified goods and services would routinely make careful purchasing decisions or that these goods and services are not purchased on impulse; however, even if they were, when the marks are virtually identical and the services and goods so closely related, confusion would still be likely. In re Total Quality Group Inc., 51 USPQ2d

1474, 1477 (TTAB 1999) ("We recognize applicant's attorney's point that its software is expensive and that purchasers of it are likely to be sophisticated. Suffice it to say that no evidence in support of these assertions was submitted. In any event, even careful purchasers are not immune from source confusion"). See also In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products").

Therefore, when we consider that the goods and services are related and the marks are virtually identical, we conclude that, on the record in this case, confusion is likely.

Decision: The Examining Attorney's refusal to register applicant's mark GET FIT for the identified services because of a prior registration for the mark GETFIT for sweaters on the ground that it is likely to cause confusion is affirmed.