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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Drive Headwear, LLC

Serial No. 76347027

Ralph H. Dougherty of Dougherty, Clements & Hofer for Drive Headwear, LLC.

Daniel F. Capshaw, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Simms, Hanak and Bucher, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Drive Headwear, LLC ("applicant"), a North Carolina limited liability company, has appealed from the final refusal of the Trademark Examining Attorney to register the mark DRIVE HEADWEAR ("HEADWEAR" disclaimed) for "clothing; namely, hats, golf hats, visors, and baseball caps."¹ The

¹ Serial No. 76347027, filed December 10, 2001, based upon applicant's allegation of a bona fide intention to use the mark in commerce.

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Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,665,099, issued November 19, 1991 (renewed) for the mark DRIVE for "shoes." Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm.

Our determination under Section 2(d) of the Act 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 Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations are the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

Furthermore, likelihood of confusion may be found when the goods are not the same or even directly competitive, it being sufficient if they are related in some way or that the circumstances under which they are marketed are such

that persons encountering the goods would assume a relationship or common source because of the similarity of the marks. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Opus One Inc.*, 60 USPQ2d 1812, 1814-15 (TTAB 2001); and *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1898 (TTAB 1989).

First, concerning the marks, applicant argues that the Examining Attorney has dissected its mark and "discarded" the disclaimed word "HEADWEAR," and that the marks are different in sound, appearance and meaning. Applicant does acknowledge that the word "DRIVE" is "neither a suggestive term nor generic identifier." Brief, 6.

We disagree with applicant's contention that the Examining Attorney has dissected applicant's mark. Rather, the Examining Attorney has stated, in accordance with precedent, that, while marks must be considered in their entirety, it is not inappropriate to give greater weight to a dominant feature of a mark (in this case, the word "DRIVE") because that feature will have greater significance in creating a commercial impression than a generic or descriptive word (in this case, the generic and disclaimed term "HEADWEAR"). When the respective marks DRIVE and DRIVE HEADWEAR are compared in this light, the marks, whose dominant feature is the arbitrary word

"DRIVE," are substantially similar in sound, appearance and commercial impression.

With respect to the goods, shoes on the one hand and hats, golf hats, visors and baseball caps on the other, applicant argues that these are dissimilar goods worn on the opposite extremities of the body, which are sold in different departments of the same store, if not in different stores, to sophisticated purchasers.²

Here, too, we agree with the Examining Attorney that applicant's headwear and registrant's shoes are related items of apparel. As the Examining Attorney has noted, neither identification of goods is limited. Thus, we must presume that those identifications encompass all goods of the type described and that they travel in all normal channels of trade to all potential customers. See, e.g., *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); and *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). Viewed in this light, registrant's shoes could include all types of shoes, including athletic shoes, which could be worn with applicant's headwear. Moreover, the Examining Attorney has submitted evidence, such as thirteen use-based third-party registrations listing either hats, caps or visors as well

² Applicant does acknowledge that its headwear may be purchased on impulse.

as shoes.³ Other evidence submitted includes copies of clothing catalogs from the Internet showing that both hats of various types and shoes may be made by or sold by the same company.

Applicant's headwear and registrant's shoes may also be sold in the same stores to the same class of purchasers. And, as applicant has acknowledged, its relatively inexpensive goods may be purchased without much deliberation. Accordingly, we believe that purchasers, aware of registrant's DRIVE shoes, who then encounter applicant's hats, visors, and caps offered under the mark DRIVE HEADWEAR, are likely to believe that these goods come from the same source or are licensed or approved by the same source. See, for example, *Cambridge Rubber Co. v. Cluett, Peabody & Co., Inc.*, 286 F.2d 623, 128 USPQ 549 (CCPA 1961)(women's boots versus men's and boys' underwear); *General Shoe Corporation v. Hollywood-Maxwell Co.*, 277 F.2d 169, 125 USPQ 443 (CCPA 1960)(shoes vs. hosiery and brassieres); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991)(women's pants, blouses, shorts and jackets vs. women's shoes); *In re Apparel Ventures, Inc.*, 229 USPQ

³ The Examining Attorney maintains that his search strategy of identifications of goods listed in registrations ("shoes" with "hats" or "visors" or "caps" or "headwear") yielded 28,290 hits which listed shoes as well as one of the other items. The thirteen third-party registrations which the Examining Attorney made of record are a sample of the results of that search.

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225 (TTAB 1986)(blouses, skirts and sweaters vs. shoes, boots and slippers); *In re Alfred Dunhill Limited*, 224 USPQ 501 (TTAB 1984)(various items of men's clothing vs. shoes); and *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984)(athletic shoes vs. men's shirts).

Decision: The refusal of registration is affirmed.