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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Specialty Sports Limited

Serial No. 76391643

James A. Mitchell and Marcus P. Dolce of Price, Heneveld,
Cooper, DeWitt & Litton for Specialty Sports Limited.

Rudy R. Singleton, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Chapman, Grendel, and Rogers, Administrative
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark depicted below



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for goods identified in the application (as amended) as "motorcycle clothing, namely, suits, jackets, pants, gloves, boots, rainsuits, t-shirts, hats, jackets (sic) and shirts," in Class 25.¹

The Trademark Examining Attorney has refused registration of applicant's mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, as applied to applicant's goods, so resembles each of two previously-registered marks (owned by the same registrant) as to be likely to cause confusion, to cause mistake, or to deceive. The first cited registration² is of the mark depicted below



for various goods identified in Classes 9, 18 and 25, including, in pertinent part, "protective helmets for motorcyclists" and "protective spectacles for

¹ Serial No. 76391643, filed April 4, 2002. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and February 19, 2001 is alleged as the date of first use anywhere and the date of first use in commerce.

² Registration No. 2703998, issued April 8, 2003.

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motorcyclists" in Class 9, and "motorcyclist boots" and "protective apparel for use when motorcycling, namely suits, bibs, knee protectors, elbow pads and gloves," in Class 25.

The second registration³ is of the mark depicted below



for various goods in Classes 9, 18, 25 and 28 including, in pertinent part, "protective helmets for motorcyclists," "protective spectacles for motorcyclists," and "protective clothing for motorcyclists, namely, protective suits, protective bibs" in Class 9; "motorcyclist boots" in Class 25; and "knee protectors, elbow pads and protective gloves for use in motorcycling" in Class 28.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic*

³ Registration No. 2495746, issued October 9, 2001.

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

We find that the goods identified in applicant's application and the goods identified in each of the cited registrations are identical in part (motorcycle suits, gloves and boots), and that they otherwise are closely related. We also find that these goods presumably are marketed in the same trade channels and to the same classes of purchasers, inasmuch as neither applicant nor registrant has included any restrictions or limitations in their respective identifications of goods, and that the goods would not necessarily be purchased with a great deal of care. Applicant does not contend otherwise as to any of these issues. Instead, applicant contends that the dissimilarity of the marks is the determinative factor in this case, i.e., that the marks are so dissimilar that no confusion is likely. We thus turn to the issue of the similarity or dissimilarity of the marks.

Under the first *du Pont* factor, we must determine whether applicant's mark and the cited registered marks are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We turn first to a comparison of applicant's mark and the registered design mark cited by the Trademark Examining Attorney, i.e., Registration No. 2703998. We find that the marks are similar, because when viewed in their entireties, they both are arrowhead-like designs set on a dark background.

Applicant argues that there are differences between the marks which render them dissimilar for purposes of the first *du Pont* factor. The cited registered mark, according to applicant, is a reverse arrowhead-like design presented against a solid oval-shaped background. Applicant's mark, on the other hand, consists not of an arrowhead but rather of a forward-looking "T," which "is presented against the background of and within an emblem which itself has the appearance of a forward-looking 'T' and which includes a distinguishing white band around its perimeter." (Main Appeal Brief at 5.)

We are not persuaded by this argument. The marks are not identical, but that is not dispositive. The test is not whether the marks can be distinguished when subjected

to a side-by-side comparison. Rather, the issue is whether the marks are sufficiently similar in terms of commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific recollection of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). This is especially so when the marks in question are design marks, because the purchaser's recollection of such marks is likely to be especially general and hazy. See *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975); and *Matsushita Electric Industrial Co., Ltd., v. Sanders Associates, Inc.*, 177 USPQ 720 (TTAB 1973).

Here, purchasers are likely to remember, generally, the appearances and commercial impressions of the marks as being arrowhead-like designs on dark backgrounds. They are not likely to remember any detailed differences between the marks which are apparent only upon a side-by-side comparison of the marks.

Applicant's argument that its mark is a stylized "T" is especially unpersuasive. The letter "T" does not appear to be part of applicant's trade name and does not appear to have any connection to applicant's business or goods which

would lead purchasers to assume that the design is a "T." See *In re Steury, supra*. More importantly, however, the alleged "T" in the mark is so highly stylized that it is extremely unlikely that purchasers will recollect, or even initially perceive, that the mark includes or consists of a "T." Rather, purchasers will perceive and recollect applicant's mark as an arrowhead-like design on a dark background. The specific differences in the two designs, such as the fact that the arrowhead-like design in applicant's mark points forward rather than backward like the registered mark, and the presence of the outlining around the perimeter of applicant's mark, do not suffice to distinguish the two marks' overall similarity in terms of appearance and commercial impression.

Finally, in cases such as this, where applicant's goods are identical and otherwise closely related to the goods identified in the cited registration, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical or closely related.

Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

For the reasons discussed above, we find that applicant's mark is similar to the design mark depicted in Registration No. 2703998.

We also find that applicant's mark is similar to the mark depicted in Registration No. 2495746, which consists of the same design feature contained in Registration No. 2703998 along with the stylized letters AXO. As discussed above, it is undisputed that the goods identified in applicant's application and in this cited registration are identical and otherwise closely related; that the goods presumably are marketed in the same trade channels and to the same classes of purchasers; and that the goods are not necessarily purchased with a great deal of care. These factors weigh heavily in support of a finding of likelihood of confusion.

Comparing the marks under the first *du Pont* factor, we find that they are similar. The design feature of the registered mark is similar to applicant's mark, for the reasons discussed above in connection with Registration No. 2703998. Obviously, the registered mark in question also includes the stylized letters AXO. However, we find that the presence in the registered mark of these letters is insufficient to render the marks dissimilar when the marks are viewed in their entireties. The design feature appears

first in the registered mark, on top of the letters, and its contribution to the overall commercial impression of the mark is undeniable. Finally, as noted above, where applicant's goods are identical and otherwise closely related to the goods identified in the cited registration, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical or closely related. *Century 21 Real Estate Corp. v. Century Life of America, supra.*

For the reasons discussed above, we find that applicant's mark and the registered mark consisting of the design and the letters AXO are similar.

Weighing all of the *du Pont* factors at issue in this case, we find that the marks are sufficiently similar that source confusion is likely.⁴

Decision: The refusal to register is affirmed as to each of the cited registrations.

⁴ To the extent that any doubts might exist as to the correctness of our affirmance of the Section 2(d) refusal of applicant's mark based on Registration No. 2495746 (the design plus AXO mark), we resolve such doubts against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). In any event, our affirmance of the Section 2(d) refusal based on the design-only mark, Registration No. 2703998, the correctness of which we have no doubt, precludes applicant's mark from registration.