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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aktieselskabet af 21.november 2001

Application No. 76556260

Bassam N. Ibrahim, Holly N. Ford (on the brief), of
Buchanan Ingersoll & Rooney, PC, for applicant.

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**Before Bucher, Mermelstein, and Wellington, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

On October 29, 2003, Aktieselskabet af 21.november 2001
filed an application to register the mark ONLY (in standard
characters) on the Principal Register for the goods set out
below:¹

Class	Goods
3	Soaps for personal use only; perfume; essential oils for personal use, including bath, baby, and dentifrices.
9 ²	Spectacles, spectacle frames, tinted eyeglasses and sunglasses.
14	Based on section 1(b) only jewelry, namely, necklaces, chains, rings, bracelets, earrings, charms, broaches, namely, pins being jewelry, cuff links, tie pins; artificial jewels for fashions use, namely, costume jewelry; based on section 1(b) and section 44 chronometric instruments, namely, watches and clocks.

¹ Filed October 29, 2003, alleging a *bona fide* intent to use the mark in commerce and ownership of three foreign registrations. Trademark Act §§ 1(b), 44(e).

² International Class 9 has not been refused registration.

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Class	Goods
18	Bags made of leather and imitation leather, namely, hand bags, overnight bags; traveling bags; rucksacks, pouches, shoulder bags; textile shopping bags, canvas shopping bags canvas shoulder bags, wallets, purses; vanity cases sold empty; umbrellas.
25	Clothing, namely, skirts, jeans, safari-style clothing, namely, shirts, jackets, hats, dresses, skirts, shorts, and trousers; jackets, overcoats, one-piece dresses, blouses, two-piece dresses, hats, gloves, sweatshirts, polo-style [sic] shirts, blousons, and sweaters; footwear, namely, shoes, boots, and sandals.
26	Based on section 1(b) only hairclips of precious metals and stones.

The examining attorney issued a final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the marks in the following two registrations,

Reg. No	Mark	Class	Goods
1973394 ³	ONLY	25	Sportswear, namely shirts, dresses, trousers, T-shirts, blouses, tops, pants, shorts, skirts, warm-up suits, and jackets.
2946572 ⁴	ONLY	3	Liquid cleaner for household, commercial and industrial use; disposable wipes impregnated with liquid cleaner; utility articles for cleaning purposes, namely disposable pads wipes for impregnated with chemicals or compounds for cleaning, scrubbing, wiping, dusting or polishing; all purpose cleaning preparations for household, commercial and industrial use.

that it would, if used on or in connection with the identified goods, be likely to cause confusion, to cause mistake, or to deceive.

Applicant appealed. Both applicant and the examining attorney have filed briefs. We affirm.

³ Registered May 7, 1996, based on use of the mark in commerce. Filings under Trademark Act §§ 8, 9, & 15, accepted, granted, and acknowledged.

⁴ Registered May 3, 2005, based on use of the mark in commerce.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Record on Appeal

In support of his refusal, the examining attorney submitted 35 third-party registrations indicating registration under the same mark for goods including those of applicant and those of the cited registrants.

Applicant submitted 24 registrations indicating that

the mark ONLY is registered as a significant part of several marks that comprise the term ONLY in Classes 3, 14, 18, [and] 25.... In addition, it is a common part of speech the consumer s have become accustomed to hearing and distinguishing from other words and would not expect goods bearing this term to emanate from the same source. ... These are merely a representative sample of the many previously registered marks incorporating ONLY in connection with clothing and wearing apparel in Class 25 and cosmetics, jewelry and bags and other goods in Classes 3, 14, and 18. The sheer number of these marks conclusively demonstrates that ONLY is a very weak term when used in connection with clothing and all goods in Class 3 (even those as dissimilar as cleaning supplies and cosmetics).

Attached to applicant's brief were several pages of evidence which had not been previously submitted. The examining attorney's objection to consideration of this evidence is sustained. Trademark Rule 2.142(d).

III. Discussion

A. The Similarity or Dissimilarity of the Marks

Applicant's mark is identical to the marks in the cited registrations. All marks are depicted in standard characters, and are thus independent of any font, color, or size in which they may be displayed on the goods.

This factor strongly supports a finding of likelihood of confusion. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (use of identical mark "weighs heavily against applicant").

B. The Similarity or Dissimilarity and Nature of the Goods

We begin our analysis with the premise that, because the marks at issue are legally identical, the extent to which the applicant's and registrant's goods must be similar or related to support a finding of likelihood of confusion is lessened. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. See *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

1. International Class 3

Applicant's International Class 3 goods are identified as "soaps for personal use only; perfume; essential oils for personal use, including bath, baby, and dentifrices." The goods in the Registration No. 2946572 are

liquid cleaner for household, commercial and industrial use; disposable wipes impregnated with liquid cleaner; utility articles for cleaning purposes, namely disposable pads wipes for impregnated [sic] with chemicals or compounds for cleaning, scrubbing, wiping, dusting or polishing; all purpose cleaning preparations for household, commercial and industrial use.

The examining attorney contends that fifteen of the third-party registrations he submitted cover at least some of applicant's goods and some of the cited registrant's, providing evidence that the those goods are related.

Applicant disagrees, arguing that

from a rational point of view, consumers would not expect these goods, "household cleaners and the like" and "soaps for personal use and the like," ... to emanate from the same source. ... The "cleaning products" industry is enormously broad and thus commonality which results for the same international classification of same is simply too tenuous a connection upon which to find that the goods are commercially related. The goods are non-competitive and clearly have significant differences in end user and essential characteristics.

Appl. Br. at 4-5.

Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. *See In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988).

We agree with the examining attorney. A number of the third-party registrations⁵ support the suggestion that applicant's Class 3 goods are of a type which may come from the same source as the goods identified in the '572

⁵ One registration was issued on the Supplemental Register. Because such registrations do not enjoy the presumptions of those on the Principal Register, *see* Trademark Act § 7, we do not consider it as probative of whether consumers would expect such goods to emanate from a common source. We further note that Registration No. 3007363 covers "cosmetics and all-purpose cleaning preparations." As it is not clear that applicant's goods are "cosmetics," we have not considered this registration.

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Registration. Although applicant suggests that it is not rational to expect cleaning products such as those of the prior registrant to come from the same source as personal care items such as those identified by applicant, the third-party registrations suggest otherwise. These registrations, while not evidence of use, clearly show that other purveyors have registered the same mark for both personal care products and cleaning products for other purposes.

Accordingly, there appears to be a significant overlap in the market for such goods, such that use of the same mark for these respective products is likely to cause confusion.

We accordingly conclude that there is a commercial relationship between applicant's goods and those listed in the '572 Registration, and that this factor supports a finding of likelihood of confusion.

2. International Classes 14 and 18.

Applicant identifies a number of jewelry items, as well as watches and clocks in International Class 14, and a variety of bags and luggage, and umbrellas in International Class 18. The examining attorney argues that these goods are closely related to the clothing items identified in the cited registration in that they "are clothing accessories that often emanate from the same source as the registrant's goods." In support of this argument, the examining attorney points to 20 of the third-party registrations which

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submitted. All of these registrations cover clothing items like those identified in the subject application, as well as jewelry. Twelve of these registrations also include jewelry items such as those identified by applicant. Applicant does not dispute that there is a relationship between these goods, arguing only that the registrant's mark is weak.

Again, these third-party registrations suggest that applicant's goods and those of the cited registrant are of a type which might be expected by the consumer to come from the same source. *Albert Trostel & Sons*, 29 USPQ2d 1783; *Mucky Duck Mustard Co.*, 6 USPQ2d 1467.

We again agree with the examining attorney that there is a significant relationship between the registrant's clothing items and applicant's International Class 14 and 18 goods, and that this is strong support for the examining attorney's refusal to register.

3. International Class 25.

Applicant's International Class 25 goods include "skirts, ... shirts, ... dresses, ... jackets, ... polo-style shirts...." These items are identical to the "shirts, dresses, ... T-shirts, ... skirts, ... [and] jackets" identified in the '394 Registration, strongly supporting a finding of likelihood of confusion.

4. International Class 26.

Neither applicant nor the examining attorney specifically addressed in their briefs the relationship of applicant's International Class 26 goods ("hairclips of precious metals and stones") with the cited registrant's goods. This appears to have been an oversight, and under these circumstances,⁶ we do not find that the issue of registrability with respect to these goods has been conceded by either applicant or the examining attorney.

The fact that a hairclip made of "precious metals and stones" is classified in Class 26,⁷ as opposed to Class 14 is based on an administrative classification system that is of no substantive effect on our likelihood of confusion analysis. *In Re Knapp-Monarch Co.*, 296 F2d 230, 132 USPQ 6,

⁶ When the appeal was filed, these goods were included in applicant's listing of its Class 14 (jewelry) goods. A final requirement to classify these goods in Class 26 was one of the issues for appeal at that point. When applicant filed its brief, it suggested that it would be willing to comply with this requirement, and the examining attorney requested a remand to resolve this and other issues involving the identification of goods. An examiner's amendment was subsequently entered and the appeal resumed.

The mark was clearly refused registration with respect to these goods, see final Office action at 3, along with applicant's other jewelry goods. Although applicant's hairclips have now been properly classified, applicant had not addressed them specifically in its earlier-filed main brief, nor did it file a supplemental brief after the remand. Likewise, the examining attorney did not separately address these goods in its brief.

⁷ International Class 14 covers "[p]recious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewelry, precious stones; horological and chronometric instruments." However, applicant's hairclips made of precious metals and stones are classified in International Class 26, because "hairclips" are specifically included in that class.

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7 (CCPA 1961) ("The Patent [and Trademark] Office classification of particular goods is immaterial in determining the likelihood of confusion...."); Trademark Act § 30, 15 U.S.C. § 1112 (classification does not "limit or extend the applicant's or registrant's rights"); Trademark Rule 2.85(g).

We acknowledge that none of the examining attorney's third-party registrations includes hairclips in International Class 26,⁸ although they cover a range of jewelry items (and some of them cover jewelry without restriction). Despite their classification, applicant's hairclips made of precious metals and stones are essentially of the same kind as applicant's jewelry, *i.e.*, jewelry to be worn in the hair. It does not appear that the applicant has ever contended otherwise throughout examination, when such goods were clearly subject to the refusal to register applicant's other Class 14 goods.

We conclude therefore that applicant's "hairclips of precious metals and stones" are substantially related to the prior registrant's clothing on the basis of the same third-party registration evidence.

⁸ It was not necessary for the examining attorney to do so; throughout examination, applicant's hairclips were listed in Class 14. Unless a refusal has been explicitly restricted to particular goods within a class, the finding of a likelihood of confusion with respect to any of the goods in the class results in refusal of the entire class.

C. Channels of Trade

Applicant argues that the channels of trade for its International Class 3 goods and those of the cited registrant move in different channels of trade:

The "cleaning products" industry is enormously broad and thus commonality which results for the same international classification of same is simply too tenuous a connection upon which to find that the goods are commercially related. The goods are non-competitive and clearly have significant differences in end user and essential characteristics.

...

The practical position here is that consumers will not expect [the cited registrant's goods] to emanate from the same source as [applicant's goods] and thus the likelihood that Registrant's mark would be confused with Applicant's mark in Class 3 is tenuous at best.

Appl. Br at 5.

Neither the applicant nor the examining attorney have submitted evidence regarding the channels of trade for most of the goods at issue here. The only fact of record bearing on this issue is that some of applicant's clothing items are identical to goods in the '572 Registration. At least to that extent, we must assume that they do share the same channels of trade (and class of customer). *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958).

Because we have no evidence as to the channels of trade for applicant's goods set out in International Classes 3,

14, 18, and 26, we conclude this factor neutral in our analysis. To the extent applicant's Class 25 goods are identical to the cited registrant's, we find that this factor supports the refusal to register.

D. The Strength of the Marks

Applicant maintains that "the examining attorney failed to adequately consider the large number of similar marks in the class." Appl. Br. at 5-6. Applicant submitted 24 third-party registrations showing that "the mark ONLY is registered as a significant part of several marks that comprise the term ONLY in Classes 3, 14, 18, [and] 25...."

Applicant's third-party evidence is entitled to little or no weight. None of applicant's third-party registrations consists of the term ONLY alone. Marks such as MEMBERS ONLY, OFFICERS ONLY, 1 & ONLY, and ONLY NATURAL, to use some examples from the registrations proffered by applicant, use the word "only" differently, resulting in a very different commercial impression than does the term "only" as used alone in applicant's mark and in the cited registrations. Accordingly, we do not agree that this evidence demonstrates that the marks in the cited registrations are weak.

We add that, even if the marks are considered weak, such marks are nonetheless entitled to some protection. *King Foods, Inc. v. Town & Country Food Co., Inc.*, 159 USPQ 44 (TTAB 1968). Here, given the identical marks and

identical and closely related goods at issue, confusion seems inevitable.

E. Sophistication of Purchasers

Finally, applicant argues that its mark "is used on a trendy chic line of clothing that is not likely to be confused with Registrant's use." Applicant asks us to assume limitations to its goods which do not appear in its application; we may not do so.

As identified, applicant's goods include a number of clothing items. But neither the clothes nor the customers for them are limited. We must therefore consider the pending application to cover all clothing of the type identified, whether trendy or trashy, chic or schlock. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) (goods in application and registration may not be limited by extrinsic evidence), *Elbaum*, 211 USPQ at 640.

Likewise, we must consider applicant's potential customers to include all people who would consider buying the identified items. *Elbaum*, 211 USPQ at 640, citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958). With respect to clothing, this class includes virtually all adults, a group which can not be said to be sophisticated as a rule.

We consider this factor to be neutral in our analysis.

IV. Conclusion

In weighing all the relevant likelihood of confusion factors, we find that because the marks are identical, the goods are identical or closely related, and move - at least in part - in the same channels of trade to the same classes of consumers, there is a likelihood of confusion with respect to both cited registrations.

While our conclusion with respect to applicant's International Class 26 hairclips, may not be entirely free from doubt, we must resolve such doubt against applicant. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed as to International Classes 3, 14, 18, 25, and 26.⁹

⁹ The goods identified in International Class 9 were not subject to this appeal. Whatever the ultimate result with respect to the appealed classes, upon termination of the appeal, the application will be forwarded for issuance of a Notice of Allowance with respect to International Class 9.