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*Decision Mailed:
September 23, 2008
GDH/gdh*

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Outdoor Cap Company, Inc.

Serial No. 77275551

Mark G. Kachigian of Head, Johnson & Kachigian, P.C. for Outdoor Cap Company, Inc.

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Before Hohein, Kuhlke and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Outdoor Cap Company, Inc. has filed an application to register the mark "ECO3" on the Principal Register in standard character form for "headwear" in International Class 25.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "CO 3," which is registered on the Principal Register in standard character form for "men's, women's, and children's

¹ Ser. No. 77275551, filed on September 10, 2007, which is based on an allegation of a bona fide intention to use such mark in commerce.

clothing, namely, T-shirts, polo-shirts, jackets, sweatshirts, pants, hats and aprons" in International Class 25,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.³ See also In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Here, inasmuch as it is plain that applicant's goods, namely, "headwear," encompass and hence are identical in part to the cited registrant's "hats" and are also otherwise closely related to the cited registrant's "men's, women's, and children's clothing, namely, T-shirts, polo-shirts, jackets, sweatshirts, pants ... and aprons," such that

² Reg. No. 3,344,314, issued on November 27, 2007, which sets forth a date of first use anywhere and in commerce of July 20, 2006.

³ The court, in particular, pointed out that: "The 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." 192 USPQ at 29.

the respective goods would necessarily be sold through the same channels of trade to the same classes of customers, the focus of our inquiry in this appeal is accordingly on the similarities and dissimilarities in the marks at issue.⁴

In this regard, we note as a preliminary matter that as stated by our principal reviewing court in *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994), "[w]hen marks would appear on virtually identical goods ..., the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Applicant argues in its brief, however, that its "ECO3 mark is not likely to be confused with the cited mark CO 3 because they are not similar enough to foster such confusion." Among other things, applicant stresses that the "the registered mark has a space between the 'CO' and the '3,' whereas ... the Applicant's mark ECO3 does not have a space between the 'ECO' and the '3.'" Such a "distinction between the two [marks] is small, but very important," according to applicant, inasmuch as it aids in distinguishing the marks at issue.

Applicant also argues in its brief that its "mark ECO3 is distinct in appearance, sound, connotation, and commercial impression when contrasted--*in its entirety*--with the CO 3 mark." In terms of appearance, applicant contends that "[t]o the casual observer, the Applicant's mark creates the visual impression of a single word," while "the cited mark ... creates the impression of

⁴ Applicant, we note, does not contend otherwise in its brief.

two separate bits, a CO and a 3," which "gives the impression not of a single word, but of two words or possibly an abbreviation or alphanumeric identifier."

As to distinctions in sound, connotation and commercial impression, applicant asserts that:

Likewise, the two marks differ in sound. The Applicant's mark is pronounced "echo three" or "ē-co three," whereas the cited mark is likely pronounced as the letter C, the letter O, and the number 3. It is possible to argue that it would be pronounced "co-three," however, given the fact that "co-" is primarily a prefix and there is a space between the "CO" and the "3," suggesting that the "CO" does not operate as a prefix, this pronunciation is unlikely. Therefore, the two marks differ dramatically in sound.

Most importantly, the two marks differ drastically in suggested connotation and commercial impression. The Applicant's mark, ECO3, brings to mind ecology. In these times where the environment is on the minds of consumers, consumers are accustomed to seeing the term "ECO" indicating that the product so labeled is related to ecology, either because it is intended for outdoor use, it is made from environmentally friendly processes, or it otherwise serves an ecological purpose. CO 3, on the other hand, does not bring ecology to mind. In fact, the registered mark does not bring any specific meaning or impression to mind, other than a set of letters and a number. The registered mark creates the impression of being either an abbreviation or an arbitrary alphanumeric identifier. Therefore, a consumer is not likely to confuse the two, even if the marks are not considered side by side but rather are considered solely based on their commercial impressions. Moreover, a consumer will not be confused into thinking that the goods of the parties come from the same source.

We agree with the Examining Attorney, however, that the marks at issue are sufficiently similar that confusion is likely. As the Examining Attorney accurately observes in his brief, the absence of a space in applicant's mark fails to adequately distinguish such mark from registrant's mark because:

Applicant's mark ECO3 in standard character [form] and Registrant's mark CO 3 in standard character [form] feature the same exact combination of letters and a number in the same exact order, namely "CO3" versus "CO 3." Applicant's addition of the letter "E" to the letter/number combination does not so significantly change the overall [commercial] impression of its mark so as to create a different overall [commercial] impression from the [mark in the] cited registration.

With respect to applicant's contention that its mark readily brings to mind the concept of "ecology" simply by the presence of the letters or abbreviation "ECO" at the beginning of its "ECO3" mark, we fail to see why such is necessarily the case, given that the mark also contains the number "3." Rather, like registrant's "CO 3" mark, the presence of the number "3" has a tendency to make the marks at issue susceptible to verbalization as combinations of letters and a number. As acknowledged by applicant, if registrant's mark is likely to be pronounced as either "the letter C, the letter O, and the number 3" or perhaps even "co-three," then it would seem that applicant's mark is likewise susceptible to being pronounced as a combination of letters and a number, namely, the letter "E," the letter "C," the letter "O" and the number "3" or as "ē-co three," either of which is substantially similar to registrant's "CO 3" mark when the marks are considered in their entirety. This is quite likely

because, as the Examining Attorney properly points out, there is no correct pronunciation of a mark" inasmuch as, generally speaking, "it is impossible to predict how the public will pronounce a particular mark." See, e.g., In re Great Lakes Canning, Inc., 227 USPQ 483, 484 (TTAB 1985); Gio. Budon & C. S.p.A. v. Buitoni Foods Corp., 205 USPQ 477, 482 (TTAB 1979); Yamaha International Corp. v. Stevenson, 196 USPQ 701, 703 (TTAB 1977); and Sterling Drug Inc. v. Sankyo Co., Ltd., 139 USPQ 395, 396 (TTAB 1963).

Clearly, not only are the respective marks susceptible to being pronounced in substantially the same manner, but the marks are substantially similar in appearance and overall commercial impression, differing for all practical purposes only in the fact that applicant's mark begins with the letter "E." As the Examining Attorney, citing McCarthy on Trademarks & Unfair Competition §7:10 (4th ed. 2008), further notes, when viewing marks which arbitrarily consist of letters and/or numbers, a change of only one letter may still result in confusion. Thus, notwithstanding the presence or absence of a space, the letters and numbers constituting the marks at issue herein are otherwise completely identical in terms of the shared characters which are utilized and their order of appearance, namely: the letter "C," followed by the letter "O" and ending with the number "3." As the Examining Attorney points out, the Board considers it a "well-established principle of our trademark law that confusion is more likely between arbitrarily arranged letters [and/or numbers] than between other types of marks." Edison Bros.

Stores, Inc. v. Brutting E.B. Sport-International GmbH, 230 USPQ 530, 533 (TTAB 1986). Applicant, moreover, has offered no evidence to substantiate its contention that, when used in connection with headwear, the mark "ECO3" must necessarily or exclusively connote "ecology," such that the respective marks can be said to differ significantly in meaning.

Accordingly, we conclude that purchasers and prospective consumers who are familiar or otherwise acquainted with registrant's "CO 3" mark for "men's, women's, and children's clothing, namely, T-shirts, polo-shirts, jackets, sweatshirts, pants, hats and aprons," would be likely to believe, upon encountering applicant's substantially similar "ECO3" mark for "headwear," that identical in part and otherwise commercially related goods emanate from, or are sponsored by or affiliated with, the same source. To the extent, however, that there may be any doubt as to our conclusion in this regard due to the asserted differences in connotation between the marks at issue, we resolve such doubt, as we must, in favor of the registrant. See, e.g., *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 156, 223 USPQ 1289, 1290 (Fed. Cir. 1984); and *In re Pneumatiques Caoutchouc Manufacture et Plastiques Kleber-Columbes*, 487 F.2d 918, 179 USPQ 729, 729 (CCPA 1973).

Decision: The refusal under Section 2(d) is affirmed.