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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Safari Club International

Serial Nos. 78203260 and 78203266

Stacie K. Smith, Esq. of Fennemore Craig, P.C. for Safari Club International.

Gene V.J. Maciol, II, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Hairston, Bucher and Kuhlke, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applications were filed by Safari Club International to register the marks SCI FIRST FOR HUNTERS (in standard character form) and SCI FIRST FOR HUNTERS and design, as shown below,

for goods ultimately identified as "clothing, namely, shirts, t-shirts, sweat shirts, vests, jackets, hats and caps" in International Class 25."[1]

The trademark examining attorney refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's marks, when used in connection with applicant's goods, so resemble the previously registered mark SCI for "clothing merchandise, namely t-shirts, sweat shirts, jackets and headwear,"[2] as to be likely to cause confusion.

When the refusals were made final, applicant appealed. Applicant and the examining attorney have filed briefs.

In view of the similar records and issues in these two applications, we have consolidated the applications for purposes of final decision. Thus, we have issued this single opinion.

Applicant, in urging reversal of the refusal to register, contends that its marks and the cited registered mark are different in sound, appearance, connotation and commercial impression. Applicant points out that both of its marks include the phrase FIRST FOR HUNTERS and one of

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[1] Application Serial Nos. 78203266 and 78203260, respectively. Both applications were filed on January 14, 2003 and are based on intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

[2] Registration No. 3086952, issued May 2, 2006.

its marks also includes a design element. Furthermore, applicant maintains that its marks and the cited registered mark have different connotations because SCI in its marks is an initialism for its name, Safari Club International, and SCI in the cited registered mark is an initialism for the registrant's name, String Cheese Incident. Insofar as applicant's goods and the goods in the cited registration are concerned, applicant argues that because they would not be encountered by the same purchasers, confusion is unlikely. According to applicant, it is a hunting membership organization whose goods are sold at its website and at conventions and sponsored events to purchasers who want to demonstrate their support for hunting, whereas registrant is a band whose goods are sold at its website and live performances to purchasers who want to show their support for registrant's band. In this regard, applicant has submitted Internet printouts with information about registrant's band. In addition, applicant contends that confusion is unlikely because its goods are sold to sophisticated purchasers, and there have been no instances of actual confusion to date. Finally, applicant argues that it is entitled to register its involved marks because the USPTO allowed its subsidiary, Safari Club International Foundation, to register the mark SCI FOUNDATION and Design

for clothing items (Registration No. 3056147) over the cited registration.

The examining attorney, on the other hand, maintains that the marks are similar in that applicant's marks and the cited mark share the identical element, SCI. As to the respective goods, the examining attorney argues that the clothing items identified in the involved applications are legally identical and otherwise closely related to the clothing merchandise identified in the cited registration, and that such goods would travel in the same channels of trade to the same classes of purchasers.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services.

Turning first to a consideration of the respective goods, it is well settled that in determining the issue of likelihood of confusion, we must consider the

identifications of goods set forth in the involved applications and cited registration, regardless of what the record may reveal as to the particular nature of the goods at issue, their trade channels, or the classes of purchasers to whom sales are made. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1813 (Fed. Cir. 1987); and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992).

In this case, applicant's goods are described as "shirts, t-shirts, sweat shirts, vests, jackets, hats and caps" and registrant's goods are described as "t-shirts, sweat shirts, jackets and headwear." Applicant's goods are identical in part (t-shirts, sweat shirts, jackets, hats and caps) and otherwise closely related (shirts, vests) to registrant's goods. The identifications of goods in the involved applications and the cited registration include no limitations with respect to channels of trade and classes of purchasers. In other words, there are no limitations indicating that applicant's clothing is sold at its website and at conventions and sponsored events to purchasers who want to demonstrate their support for hunting. Nor are there limitations indicating that registrant's clothing is sold at its website and live performances to purchasers who

want to show their support for registrant's band. Thus, in the absence of any limitations, we must presume that applicant's and registrant's clothing will be sold in all channels of trade that are appropriate for such goods and that they may be sold to all classes of purchasers. Purchasers of clothing are ordinary consumers who are not necessarily discriminating or knowledgeable about such products. Consequently, if applicant's and registrant's goods were to be marketed under the same or similar marks, confusion as to the source or sponsorship thereof would be likely to occur.

Turning then to a consideration of the marks, we must determine whether applicant's marks and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks

are sufficiently similar in terms of their 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 impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Finally, when marks appear on identical goods, the degree of similarity necessary to support a conclusion of likelihood of confusion declines. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 824, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant's marks are SCI FIRST FOR HUNTERS and SCI FIRST FOR HUNTERS and design. The cited registered mark is SCI. Obviously, because applicant's marks include the identical element SCI in the cited registered mark, there are consequent similarities in appearance, sound and connotation. We are not persuaded by applicant's argument that the connotations of the marks are different because the letters SCI stand for different things in the respective marks, i.e., Safari Club International versus String Cheese Incident. Safari Club International does not appear in applicant's marks and String Cheese Incident does not appear in registrant's mark. The names therefore are

immaterial to our analysis. See, e.g., Vornado, Inc. v. Breuer Elec. Mfg. Co., 390 F.2d 724, 156 USPQ 340 (CCPA 1968); Sealy, Inc. v. Simmons Co., 265 F.2d 934, 121 USPQ 456 (CCPA 1959); and ITT Canteen Corp. v. Haven Homes Inc., 174 USPQ 539 (TTAB 1972). While the additional phrase in applicant's marks, FIRST FOR HUNTERS, gives an added connotation to applicant's marks which is not present in the cited registered mark, we find that this point of difference is not sufficient to distinguish the marks overall.

Furthermore, we note that the phrase FIRST FOR HUNTERS is subordinate to and smaller in size than the SCI portion of applicant's marks. With respect to applicant's SCI FIRST FOR HUNTERS and design mark, we recognize that the globe design therein cannot be ignored. However, this design also is subordinate to the SCI portion of applicant's mark and is less likely to be remembered by consumers. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). In short, it is SCI that clearly dominates applicant's marks and it is the entirety of registrant's mark.

We find, therefore, that when applicant's marks and the cited registered mark are considered in their entireties, they are similar in sound, appearance,

connotation, and commercial impression. Given the fallibility of memory and that consumers often retain only a general rather than specific recall of marks to which they are exposed, the similarities in applicant's marks and the cited registered mark are such that, as used in connection with identical and closely related clothing, confusion as to source or sponsorship thereof is likely to occur.

Applicant asserts that it and the registrant have used their marks for ten years without any instances of actual confusion, and this shows that confusion is not likely to occur. We are not persuaded by this argument. Applicant has not provided any evidence as to the extent of its use, nor is there any evidence as to registrant's use, such that we can determine whether there has been a meaningful opportunity for confusion to occur. "Uncorroborated statements of no known instances of actual confusion are of little evidentiary value…. The lack of actual confusion carries little weight … especially in an ex parte context." Majestic Distilling, 65 USPQ2d at 1205.

Finally, applicant argues that it is entitled to register its involved marks because the USPTO allowed its subsidiary to register the mark SCI FOUNDATION and Design for clothing items (Registration No. 3056147) over the

cited registration. This argument is unavailing. It is well established that the Board is not bound by prior actions and decisions of examining attorneys. Each case must be decided on its own facts, based on the particular mark, the particular goods or services, and the particular record in each application. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."].

In view of the foregoing, and because similar marks are to be used in connection with identical and closely related goods, we find that there is a likelihood of confusion.

Decision: The refusal to register under Section 2(d) is affirmed in each application.