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PRECEDENT OF THE TTAB

Mailed: September 15, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Antillas Shoe Corporation

Serial No. 78630084

Wendy K.B. Buskop, Buskop Law Group for Antillas Shoe Corporation.

Daniel Brody, Trademark Examining Attorney, Law Office 115,
Tomas V. Vlcek, Managing Attorney.

Before Drost, Kuhlke, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Antillas Shoe Corporation seeks registration of the mark !SO WHAT!! (in standard characters) for "footwear and shoes for men, women, and children," in International Class 25.¹

Registration has been finally refused pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark

¹ Filed May 13, 2005, based on an allegation of first use and use in commerce as of May 4, 2005.

SO
WHAT!

for "clothing, namely, shirts, T-shirts, caps, socks, hats" in International Class 25,² as to be likely, if used in connection with the identified goods, to cause confusion, to cause mistake, or to deceive. Trademark Act § 2(d); 15 U.S.C. § 1052(d).

Applicant and the examining attorney filed briefs. After careful consideration of the record, we affirm.

I. Applicable Law

Our determination under Trademark Act § 2(d) 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 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 Fondee 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 Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 2291899, issued November 16, 1999, alleging a date of first use of January 8, 1996, and first use in commerce

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 [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. The Similarity Or Dissimilarity of the Marks in Their Entireties as to Appearance, Sound, Connotation and Commercial Impression.

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. We find the marks to be highly similar in appearance, sound, and commercial impression and identical in connotation.

As noted, applicant's mark is !SO WHAT!! in standard characters, while the mark in the cited prior registration is SO WHAT! in stylized form. Applicant contends that the marks are different in appearance because of the stylization of the mark in the cited registration. We

of March 19, 1997. Affidavits under Trademark Act §§ 8 and 15, accepted and acknowledged.

Serial No. 78630084

agree with the examining attorney, however, in noting that applicant seeks registration of its mark in standard characters, that is, without regard to any font style, size, or color. Thus, applicant's mark could be displayed in any stylization, including that used by the registrant.

Indeed, the marks are highly similar. Applicant's mark is identical in pronunciation and commercial impression to the cited registration. The only difference in the marks is that applicant's mark includes an additional exclamation point at the beginning and end. However, this is unlikely to provide any significant distinction; the (identical) literal portion of both marks is likely to make far more of an impression in the mind of the potential consumer than the appearance of the extra exclamation points. Since the cited registration contains the identical words and even includes an exclamation point, to the extent they notice any distinction at all, consumers are likely to believe that applicant's mark is merely a variation of the mark in the prior registration.

This factor strongly supports the examining attorney's refusal of registration.

C. The Similarity Or Dissimilarity And Nature Of The Goods

Applicant identifies its goods as "footwear and shoes for men, women, and children," in International Class 25, while the goods in the cited registration are identified as "clothing, namely, shirts, T-shirts, caps, socks, hats" in International Class 25.

Applicant notes that its goods and those of the cited registrant are different and argues that "there is no per se rule governing likelihood of confusion in cases involving clothing items, but rather each case is to be determined on its own particular facts and circumstances." App. Br. at 5, citing *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984). While applicant is correct, its argument ignores the fact that the examining attorney has gone well-beyond arguing that the goods are related merely because they are all items of clothing.

The examining attorney submitted thirteen third-party registrations, based on use in commerce, and covering one or more of both applicant's and registrant's goods. While they are not evidence of use, third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a

single source. See *In re Albert Trostel & Sons Co.*, 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). Further, the examining attorney submitted evidence from thirteen websites on which goods identified by both applicant and the cited registrant are being sold under the same mark and in close proximity to each other.

The examining attorney's submissions are convincing evidence that the goods of the parties are related in such a way that their sale under a highly similar mark is likely to cause confusion. Contrary to applicant's argument, the fact that footwear is often sold in different sections of a department store from many of the registrant's goods is not dispositive. First, the cited registration includes socks, which often are sold in close proximity to footwear, and are closely related in function and use. Second, the examining attorney's evidence indicates that consumers are accustomed to seeing goods similar to both applicant's and the registrant's originating from a common source. Thus even if true, the mere fact that the goods are not ordinarily sold next to each other is of little significance.

Serial No. 78630084

We conclude that applicant's goods and the goods of the cited registrant are related, a factor which likewise supports refusal of registration.

III. Conclusion

After careful consideration of the record evidence and argument, we conclude that use of applicant's mark on or in connection with the identified goods would pose a likelihood of confusion with the mark in the cited prior registration.

Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed.