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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re NEJ, Inc.

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Serial No. 78716507

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Andy I. Corea of St. Onge Steward Johnston & Reens for NEJ, Inc.

Marcie R. Frumm Milone, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

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Before Walters, Cataldo and Bergsman, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

NEJ, Inc. has filed an application to register the standard character mark R.E. SPORT on the Principal Register for "clothing, namely, long and short-sleeved polo shirts, denim shirts, peached twill shirts, mockneck shirts, reverse fleece shirts; caps and footwear," in International Class 25.<sup>1</sup> The application includes a disclaimer of SPORT apart from the mark as a whole.

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<sup>1</sup> Serial No. 78716507, filed September 20, 2005, based on an allegation of a bona fide intention to use the mark in commerce.

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The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the two previously registered marks shown below that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

**Registration No. 3194911**

**Filing date:** May 12, 2004

**Registration Date:** January 2, 2007

**Owner:** Regarding Life, limited partnership composed of Trecarcia L. Yancey and Stacey D. Weihe

**Goods:** "Stationery, cards that deal with everyday life issues and situations, greeting cards, writing paper and envelopes, calendars, photographs, writing and blank journals for personal entries, diaries, paper products, namely, stock, envelopes, gift bags, books, namely, writing and blank journals, coffee table books in the field of personal inspiration, encouragement and everyday life, series of fiction books, real life documentary style books, airline ticket paper jackets," in International Class 16; and "Clothing and casual wear, namely shirts, jeans, pants, T-shirts, tees, tank tops, sweaters, sweatshirts, sweat pants, jogging pants, headgear, namely, hats and caps, belts, scarves, underwear, sleepwear, dresses, skirts, socks, stockings, shorts, shoes, shoes, namely, sneakers, sandals, pumps, flats, formal, casual and athletic shoes," in International Class 25

**Mark:**



**REGARDING LIFE**

**Registration No. 2232675**

**Filing date:** November 4, 1996

**Registration date:** March 16, 1999 [Sectons 8 & 15 affidavits accepted and acknowledged, respectively]

**Owner:** Sport Maska Inc.

**Goods:** "headwear, knitwear, namely, sweaters, active wear, namely, sweatsuits, sweatpants, sweatshirts; outerwear, namely, overcoats, parka[s], jackets and pullovers," in International Class 25

Mark:



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

Our determination under Section 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *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); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

*The Goods*

Considering the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each

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parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

Regarding Registration No. 3194911 for the mark RE: REGARDING LIFE and design, we note that this registration includes goods in International Class 16. Neither the applicant nor the examining attorney have mentioned these goods and the record contains no evidence indicating that there is any relationship between applicant's clothing items and the listed stationary items in the cited registration. Therefore, we conclude that these goods are not similar. However, this registration also includes goods in International Class 25, and a number of these goods are identical to the same goods identified in the application, i.e., "shirts," "hats and caps," and "shoes," which are encompassed by applicant's "footwear."

Regarding Registration No. 2232675 for the RE and design, the identified "headwear" encompasses applicant's "caps." Thus, with respect to both cited registrations, it is unnecessary to consider whether there is any relationship between the remaining items recited in the application and each of the cited registrations. It is sufficient to conclude that applicant's identification of goods includes

items identical to, or encompassed within, goods identified in each of the cited registrations.

Further, inasmuch as the identifications of goods in both the involved application and the cited registrations are not limited to any specific channels of trade, we presume that the goods would be offered in all ordinary trade channels for these goods and to all normal classes of purchasers, i.e., to the same purchasers through the same trade channels. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

#### *The Marks*

We turn, next, to a determination of whether applicant's mark and either of the registered marks, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. 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 overall commercial impressions that confusion as to the source of the goods or services 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). In this case, the average purchaser is the ordinary consumer of

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clothing. Furthermore, although the marks at issue 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).

In applicant's mark, R.E. SPORT, the "RE" portion appears as individual initials, R.E., modifying the word SPORT. While applicant's goods are not limited to sportswear, such clothing is encompassed within the identified shirts, caps and footwear and, thus, the term SPORT is highly suggestive if not merely descriptive, as indicated by the disclaimer of record, of clothing used in connection with various sports activities.

The mark in cited registration no. 3194911,  includes the term "RE:" within a circle followed by the phrase "REGARDING LIFE." We take judicial notice of the dictionary definition submitted by applicant with its brief of "re:" as a common abbreviation for "regarding." As such, we agree with applicant that the "re:" portion of the mark in the cited registration is likely to be perceived as an abbreviation for "regarding," particularly in view of the appearance in the mark of the word REGARDING immediately

below the "re:" in a circle. In fact, the "re:" portion of the mark reinforces the connotation of the term REGARDING in the phrase REGARDING LIFE. Although the wording, REGARDING LIFE, is smaller than and below the "re:" in a circle, this phrase is not insignificant in determining the overall commercial impression of the mark. Consumers are at least as likely to refer to the phrase REGARDING LIFE in calling for the goods as to the abbreviation "re:" and, thus, we find this wording is at least as equally prominent as the "re:" within a circle portion of the mark. See *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593 (TTAB 2001); and *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (1987). We conclude that this mark and applicant's mark have distinctly different commercial impressions and, thus, these marks are **not** sufficiently similar that, if used in connection with the same, similar or related goods, confusion as to source would be likely.

The mark in cited registration no. 2232675,



includes the letters RE, with the R facing backwards, within a diamond-shaped carrier. We agree with the examining attorney that, despite the stylized lettering and the reversal of the "R" in this mark, it is likely to be perceived by consumers as the letters "RE" and consumers using the mark to refer to the identified goods are likely

to pronounce the mark as the individual letters rather than as a word, as there is no evidence that "RE" is an English word. This is not a situation where, as above, the two letters are followed by a colon and, as such, would be viewed as an abbreviation for "regarding." Further, while the reversal of the "R," the stylization of the letters and the diamond-shaped carrier are part of the visual appearance of the mark, we find that the letters "R" and "E" are the dominant portion of the mark because they are precisely what will be used by consumers to call for the goods.

Similarly, because of the appearance of periods following the "R" and "E" in applicant's mark, this portion of applicant's mark is likely to be pronounced by consumers as the individual letters "R" and "E."

Applicant argues that the addition of the merely descriptive term SPORT is sufficient to distinguish its mark from the mark in the cited registration because "RE" is a very weak term, citing to evidence of third-party registrations in International Class 25 for marks that include "RE." Following are several of the noted marks, which are registered for various clothing items: RE:AB (Reg. No. 2752576), RE: VERB (Reg. No. 2869106), RE-FLEX (Reg. No. 0810171), RE-FORM (Reg. No. 2668406), RE-UNION and design (Reg. No. 1949233), RE-SAILS (Reg. No. 3156724) and RE-TAIN (Reg. No. 2693260). However, we do not find any of

these marks to be similar or analogous to applicant's mark and, therefore, this evidence is not particularly useful. None of these registered marks includes either the addition of merely descriptive matter to "RE" or periods separating the "R" and "E."

While the marks are visually different due to the stylized presentation of the mark in the cited registration, applicant's R.E. SPORT mark is in standard character format meaning that it may be used in any reasonable form, including in a form similar to the registered mark. Further, we find that neither the periods nor the descriptive term SPORT distinguishes applicant's mark from the registered mark RE and design. There is no colon following the letters RE in this registered mark and, rather than being regarded as an abbreviation for "regarding," these two letters are likely to be viewed simply as initials. In other words, the connotation of the RE portion of the registered mark and the R.E. portion of applicant's mark are likely to be the same. Consumers could reasonably view applicant's mark as a variation of registrant's mark that is being used by registrant in connection with a line of sportswear. Therefore, we find the marks significantly more similar than dissimilar.<sup>2</sup>

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<sup>2</sup> We note, also, that "When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp.*

*Conclusion*

We have considered the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein. We conclude that the examining attorney has not established a likelihood of confusion with respect to Registration No. 3194911 for the mark



Regarding Registration No. 2232675 for the mark



we conclude that, in view of the substantial similarity in the commercial impressions of applicant's mark and registrant's mark, their contemporaneous use on identical goods, as are some of the identified goods herein, is likely to cause confusion as to the source or sponsorship of such goods.

*Decision:* The refusal under Section 2(d) of the Act is reversed with respect to Registration No. 3194911. The refusal is affirmed with respect to Registration No. 2232675.

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*v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).