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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re TMNAB, LLC

Serial No. 78916114

Marc E. Hankin of Hankin Patent Law, A Professional Corporation for TMNAB, LLC.

April K. Roach,[1] Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

Before Holtzman, Drost and Zervas, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by TMNAB, LLC to register the mark shown below for "shirts, vests, sweatshirts, jackets, pants, short pants, underwear, belts, hats and socks," in Class 25.[2] The application states that "the literal element of the mark consists of A."

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[1] This case was reassigned to the above examining attorney to write the appeal brief.

[2] Application Serial No. 78916114, filed June 23, 2006 based on an allegation of a bona fide intention to use the mark in commerce.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark shown below for the following goods, as to be likely to cause confusion.[3]

> (Based on Use in Commerce) Ski wear for men, women and children, namely ski suits, ski pants, ski tops, ski masks, ski gloves, thermal underwear, and underwear; sports wear and accessories for men, women and children, namely tops, sweaters, pants, shirts, shorts, blouses, coats, suits, blanket coats, T-shirts, wind resistant jackets, bathing suits, socks, belts, hats, toques, caps, scarves, gloves and mittens; (Based on 44(e) Ski wear for men, women and children, namely ski suits, ski pants, ski masks, ski gloves, thermal underwear, and underwear; sports wear and accessories for men, women and children, namely, sweaters, pants, shirts, shorts, blouses, coats, suits, blanket coats, T-shirts, wind resistant jackets, bathing suits, socks, belts, hats, toques, caps, scarves, gloves and mittens. In Class 25.

[3] Registration No. 3135353, issued August 29, 2006.

When the refusal was made final, applicant appealed. Briefs have been filed.[4]

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. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the goods. Applicant's goods, which include shirts, jackets, pants, short pants, belts, hats and socks, are identical or legally identical to registrant's items of sportswear which include shirts, wind resistant jackets, pants, shorts, belts, hats and socks. The respective goods are otherwise closely related articles of clothing and accessories. The examining attorney has submitted a number of use-based third-party registrations showing, in each instance, a mark which is registered for the various items of clothing listed in the application, on the one hand, and goods listed in the cited registration, such as sweaters, scarves, gloves, underwear,

[4] The examining attorney has properly objected to listing of third-party registrations attached to applicant's brief. This evidence is untimely and has not been considered. See Trademark Rule 2.142(d).

bathing suits and ski pants, on the other. Third-party registrations, although not evidence of use of the marks in commerce, serve to suggest that the respective goods are of a type which may emanate from the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988).

Because the goods are identical and/or closely related, and there are no restrictions in the application or registration, we must assume that the goods are, or will be, sold in the same channels of trade to the same purchasers. See Genesco Inc. v. Martz, 66 USPQ2d 1260, 1268 (TTAB 2003). In addition, the examining attorney has submitted printouts from several retail sporting goods websites, www.sportsauthority.com, www.modells.com and www.dickssportinggoods.com, showing that even the more specific goods of registrant are sold with applicant's more general use clothing items. For example, both everyday articles of sportswear such as shirts, jackets, pants and hats, as well as specialized sports apparel such as ski wear, would be encountered by purchasers in at least some of the same channels of trade.

We turn next to the marks, keeping in mind that when marks would appear on identical goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. See Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

The marks in this case are both asserted to be a stylized letter "A." As the Federal Circuit observed in In re Electrolyte Laboratories, Inc., 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990), "the nature of stylized letter marks is that they partake of both visual and oral indicia." However, when letter marks are presented in a highly stylized form, they are essentially design marks incapable of being pronounced or conveying any inherent meaning. See Diamond Alkali Co. v. Dundee Cement Co., 52 CCPA 1216, 343 F.2d 781, 145 USPQ 211, 213 ("Symbols of this kind do not sound." Citation omitted). See also In re Burndy Corp., 300 F.2d 938, 133 USPQ 196 (CCPA 1962).

That is the situation we have here. The letters in these two marks are so highly stylized that in our view the marks as a whole would likely be perceived as purely visual designs. Thus, the question of similarity or dissimilarity turns in this case primarily on a visual comparison of the marks. See Textron Inc. v. Maquinas Agricolas "Jacto" S.A., 215 USPQ 162 (TTAB 1982).

The visual resemblance of these marks is striking, and the overall commercial impression of the marks is essentially the same. Both marks resemble an incomplete, five-pointed star, one the reverse image of the other. These "star" designs are very similar to each other in style and proportion. They have a similar hand drawn appearance, using a single continuous stroke to form the star. The stroke is bold and of similar thickness in

both marks even widening and narrowing in thickness in the same places in the mark. In both marks the stroke ends at the same place, that is, at the extended edge of the line that would form the crossbar of the letter A. Both marks are missing the same downward stroke needed to complete the star.

In its attempt to distinguish the marks, applicant points to the fact that the marks face in opposite directions; and applicant also contrasts what it describes as the tall, sharp, angular and jagged edge appearance of applicant's mark with the short, squat, blunt and rounded and smooth-edged appearance of registrant's mark.

We disagree that these distinctions between the marks are significant. It is well settled that marks must be compared in their entireties, not dissected into component parts and the minute details of each part compared with other parts. See Dan Robbins & Associates, Inc. v. Questor Corporation, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979). In the normal marketing environment, purchasers would not usually have the luxury of examining marks in such minute detail. Furthermore, the marks may not even be seen at the same time. We must consider that the average purchaser is not infallible in his recollection of trademarks and often retains only a general, rather than a specific, recollection of marks that he may previously have seen in the marketplace. In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB

1988). Ordinary purchasers who are familiar with registrant's "A" and design mark on clothing, upon later encountering applicant's mark on the identical and/or closely related items of clothing, would not necessarily remember fine details about the mark they had previously seen, given their imperfect recall, and they are likely to remember the marks as being essentially the same.

Applicant argues that the cited mark "resides in a crowded field, and as such, it is weak as a matter of law." To support this contention, applicant submitted a list of about 25 third-party registrations displaying the marks and identifying the registration numbers. Applicant claims that these marks are all "registered in Class 25" and that they all consist of the stylized letter "A." The various marks are grouped in "pairs" or sets of what applicant considers to be similarly styled letters. Contending that even slight differences in appearance were considered sufficient to distinguish the marks from each other and to allow them to coexist on the register, applicant concludes that the purchasing public is "conditioned to distinguish slight differences between design marks with the literal element 'A'" in Class 25 and that therefore its mark should be entitled to register as well.

At the outset, we note that these third-party registrations are not properly of record because printouts of the registrations

were not provided. However, the previous examining attorney did not object to the evidence on this basis, and so we have considered it as properly of record. Nevertheless, this evidence is of little probative value. First, third-party registrations are not evidence of use. The existence of these marks on the register is not evidence of what happens in the marketplace or that customers are familiar with them. AMF Incorporated v. American Leisure Products, Inc., 177 USPQ 268, 269 (CCPA 1973) ("little weight is to be given such registrations in evaluating whether there is likelihood of confusion.").

Furthermore, notwithstanding that the marks in the third-party registrations might all consist of same literal element, "A," the designs of those marks, which is how we must view them, are entirely different from the marks in this case. None of the third-party marks remotely resembles the star-like shape of the design of the letter A in registrant's mark, and none is as similar to the cited mark as applicant's mark. Whether the third-party marks are similar to each other is not relevant to our analysis, and has no bearing on the question of whether the marks in this case are likely to cause confusion.

In view of the foregoing, and because highly similar marks are used in connection with identical and closely related goods, we find that confusion is likely.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.