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Mailed: November 4, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Irmãos Vila Nova, S.A.

Serial No. 79017559

David A. Weinstein, Esq. for Irmãos Vila Nova, S.A.

John Hwang, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Walters, Bucher and Cataldo, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Irmãos Vila Nova, S.A. to register on the Principal Register the mark SALSA (in standard characters)[1] for

> clothing, namely, pants, shorts, three quarter length pants, Chino pants, pirate Bermuda shorts, training-suits, shirts, tops, tunics, overshirts, bodice/corselets, jackets, blazers, parkas, corset/waistcoats, skirt and dress, undershirt/vest, knitwear, namely, knitted coats, sweaters, bonnets, gloves, berets, and scarves,

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[1] Application Serial No. 79017559 was filed on July 29, 2005, seeking an extension of protection under Section 66(a) of the Trademark Act as amended, based upon applicant's assertion of ownership of International Registration No. 0779721, issued on April 11, 2002.

> polos, singlets, sweat shirts, T-shirts, tunics, coats, raincoats, underwear, singlet underwear, swimsuits; clothing accessories, namely belts, socks, gloves, scarves and ties; headgear, namely, hats, caps and baseball caps

in International Class 25.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's marks, as intended to be used on or in connection with its services, so resemble the mark SALSA, previously registered on the Principal Register in typed or standard character form for "clothing, namely, bicycling, (sic) shorts, shirts, T-shirts, headbands, pants, and caps" in International Class 25,[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal.

Evidentiary Matters

Before turning to the substantive ground for refusal, we note that applicant has submitted exhibits with its brief consisting of printed copies of portions of the record of the application that matured into the cited

[2] Registration No. 2388958 issued on September 26, 2000. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Following registration, opposer deleted "dickies" and "berets" from the identification of goods.

Registration No. 2388958, printed copies of the post-registration filings from such registration, and printed copies of the results of applicant's search of the Google® Internet search engine containing information regarding registrant's goods. None of these materials was made of record prior to appeal. With regard to the Internet evidence attached to its brief, applicant argues that such "material can be treated as acceptable evidence in this proceeding as provided by TBMP Rule 1208.03" (brief, p. 5). However, the applicable rule is Trademark Rule 2.142(d), 37 C.F.R. §2.142(d), which provides as follows:

> (d) The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

Applicant did not request remand of the involved application to the examining attorney for consideration of this evidence, but as noted above, simply submitted such with its brief. Nor did the examining attorney treat the evidence as being of record by discussing it in his brief on appeal. *See, for example, In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 n.5 (TTAB 2001). We find, therefore,

that the exhibits submitted by applicant with its appeal brief are untimely, and they have not been considered. *See* Trademark Rule 2.142(d). *See also* TBMP §§1203.02(e) and 1207.03 (2d ed. rev. 2004) and the authorities cited therein. We note nonetheless that had we considered these exhibits in our determination of the issue on appeal, the result would be the same.

Likelihood of Confusion

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, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, though not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976).

The Marks

We turn to the first *du Pont* factor, i.e., whether applicant's mark and registrant's mark are similar or dissimilar when viewed in their entireties in terms of

appearance, sound, connotation and overall commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In this case, applicant's mark, SALSA in standard characters, is identical to the mark in the cited registration, SALSA in typed or standard characters, in every respect. Use of identical marks is a fact which "weighs heavily against applicant." *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984); and *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Accordingly, this d*u Pont* factor heavily favors a finding of likelihood of confusion.

Strength of the Cited Mark

Applicant argues that registrant's mark is weak and entitled to a limited scope of protection. In support of this contention, applicant has made of record printed copies of the following third-party registrations taken from the United States Patent and Trademark Office's (USPTO) records:

1. Registration No. 2833027 for the mark SOUTH BASS SALSA for "clothing, namely, hats, shirts, shorts, jackets, coats, socks, ties, underwear, and swimwear;" and

2. Registration No. 3121517 for the mark HOT CHILLYS SALSA for

> women's clothing, sportswear and active wear namely underwear, thermal underwear, tights, ski pants, jackets, coats, knit pullovers, vests, shirts, pants, t-shirts, tank tops, and shorts; sports bras and running bras; women's lingerie, panties, camisoles and intimate apparel, namely, robes and sleepwear; children's clothing, sportswear and activewear namely underwear, thermal underwear, tights, ski pants, jackets, coats, knit pullovers, vests, shirts, pants, t-shirts, tank tops, and shorts; women's and children's clothing namely rain wear, gaiters, gloves, hats and headbands, parkas, and ponchos.

However, applicant's evidence of third-party registrations is entitled to limited probative value. The registrations are not evidence of use of the marks shown therein. As a result, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Thus, the third-party registrations proffered by applicant simply indicate that the USPTO has registered two marks containing the word SALSA in relation to clothing, neither of which is nearly as close to the mark in the cited registration as applicant's identical SALSA mark. As a result, such evidence fails to establish that the consuming public has

been exposed to third-party use of similar marks on similar goods or services, such that consumers would distinguish applicant's mark from the identical mark in the cited registration.

We note, nonetheless, that even if we were to conclude, based on applicant's evidence, that registrant's mark is entitled to a relatively narrow scope of protection, the scope is still broad enough to prevent the registration of an identical mark for goods that are found to be related to the goods identified in the cited registration. *See In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

The Goods

We turn then to a consideration of the parties' goods. In making our determination regarding the relatedness thereof, we must look to the goods as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

The greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between the parties' goods that is

required to support a finding of likelihood of confusion. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). If the marks are the same, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. *See In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

In this case, applicant's goods are various items of clothing in Class 25, including "shorts," "shirts," "T-shirts," "pants," and "caps." As identified, registrant's goods are "clothing, namely, bicycling, shorts, shirts, T-shirts, headbands, pants, and caps." There is considerable disagreement between the examining attorney and applicant as to whether "bicycling" in registrant's identification of goods modifies "shorts" or all of the clothing items listed thereafter. We note, however, that even if we construe registrant's identification of goods such that "bicycling" modifies all of goods listed thereafter, i.e., shorts, shirts, T-shirts, headbands, pants, and caps, applicant's identification of goods includes these identical clothing items, and these items are very broadly described and are not limited as to size, gender, age, or specific purpose for which they are suitable. As a result, applicant's shorts, shirts, T-shirts, pants and caps are presumed to

encompass all such goods, including such goods used for bicycling. On the other hand, if "bicycling" modifies only "shorts," then applicant's "shorts" encompasses bicycling shorts and applicant's shirts, T-shirts, pants, and caps are identical to the same goods in the cited registration. In view of the identity of these goods, it is not necessary to consider whether or to what extent the remaining goods identified in the application and registration are related.

This *du Pont* factor also favors a finding of likelihood of confusion.

Channels of Trade

We are not persuaded by applicant's arguments that its goods travel in channels of trade that are separate and distinct from those in which registrant's goods may be encountered. It is settled that in making our determination regarding the relatedness of the parties' goods, we must look to the goods as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the

particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.") As identified, neither applicant's nor registrant's goods contain any limitations as to trade channels or intended consumers. Accordingly, both applicant's and registrant's goods are presumed to move in all normal channels of trade and be available to all classes of potential consumers, including consumers of each other's goods. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In addition, the examining attorney has made of record evidence from commercial Internet websites suggesting that sporting goods stores as well as general clothing stores sell both athletic clothing and clothing for general purpose wear.[3] The foregoing evidence suggests that both applicant's goods and those of registrant may be encountered by consumers in the same retail establishments.

[3] The examining attorney's evidence includes "screenshots" from rei.com and macys.com.

Based upon the foregoing, this *du Pont* factor also favors a finding of likelihood of confusion.

Conditions of Sale

The final d*u Pont* factor discussed by applicant is that of the conditions of sale. Applicant asserts that registrant's goods would be purchased only by careful and sophisticated users who would be able to discern between the parties' goods. In that regard, there is no evidence of record to suggest that either applicant's or registrant's goods are expensive or of the sort that are likely to be purchased only after careful consideration by sophisticated consumers. Thus, we presume that both applicant's and registrant's clothing items as identified encompass both expensive and inexpensive clothing, and are likely to be purchased by general consumers, who encompass careful, sophisticated purchasers and impulse general purchases.

Conclusion

In light of the foregoing, particularly given that applicant's mark is identical to the mark in the cited registration, and the goods are at least overlapping, we find that a likelihood of confusion exists between the

applied-for mark and the mark in the cited registration. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal of registration is affirmed.