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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re U.S. Vision, Inc.

Serial No. 76676410

Sherry H. Flax of Saul Ewing for U.S. Vision, Inc.

Mariam Aziz Mahmoudi, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

Before Quinn, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

U.S. Vision, Inc. filed an application to register the mark SUN SPOT (standard character form) for "sunglasses" (in International Class 9).[1]

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously

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[1] Application Serial No. 76676410, filed May 4, 2007, alleging first use anywhere and first use in commerce on March 20, 2007.

registered mark shown below

for "jewelry and jewelry pins" (in International Class 14); "water bottles sold empty and mugs" (in International Class 21); and "T-shirts, sweatshirts, sweaters, T-necks, hats, headbands and wind-resistant jackets" (in International Class 25);[2] and the mark SUN SPOTS (typed form) for "wearing apparel; namely, women's bathing suits, cover-ups, dresses, shirts, pants, shorts, skirts, jackets, rompers, jumpsuits" (in International Class 25),[3] as to be likely to cause confusion. The cited registrations are owned by two different entities.

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

Applicant argues that there are "dozens" of third-party registrations of marks comprising SUNSPOT or SUN SPOT, thereby limiting the scope of protection of the cited marks. The fact that the examining attorney has cited two

[2] Registration No. 1864634, issued November 29, 1994; renewed.
[3] Registration No. 2425822, issued January 30, 2001; Sections 8 and 15 affidavits accepted and acknowledged.

nearly identical marks, both for clothing, indicates, according to applicant, that the Office recognizes enough differences between these marks to allow them to be registered by two different entities; thus, applicant concludes, there is no basis to bar registration of a similar mark, but for different goods, as in the case of applicant's application. Applicant also contends that the third-party evidence submitted by the examining attorney to show that the goods are related is not persuasive inasmuch as "dozens" of identical registered marks have issued to different entities for sunglasses and clothing. In support of its position, applicant submitted copies of third-party registrations.

The examining attorney maintains that the marks are virtually identical and that the goods are closely related. In support of the refusal, the examining attorney submitted copies of third-party registrations of the same mark owned by a single entity and covering both sunglasses and clothing or jewelry.

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. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, 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 impression that confusion as to the source of the 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).

We first turn to compare applicant's standard character mark SUN SPOT to the typed registered mark SUN SPOTS shown in Registration No. 2425822. The only difference between the marks is that applicant's mark is in the singular form. This is hardly a basis on which to distinguish the marks. *See Wilson v. Delauney*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word 'Zombie' and they will therefore be regarded here as the same mark."). In short, the marks are virtually identical in sound, appearance, meaning and overall commercial impressions. This virtual identity weighs heavily in favor of a finding of likelihood of confusion.

We next turn to compare applicant's mark with the registered logo mark shown in Registration No. 1864634. With respect to the logo mark, 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. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ["There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided

the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable."].

Where both words and a design comprise the mark (as in the registered logo mark), then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985). *See also Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Thus, in the case of the registered logo mark, we find that the dominant portion is the literal portion of the mark, namely the word SUNSPOT.

Thus, the dominant portion, SUNSPOT, of the registered logo mark is virtually identical to the entirety of applicant's mark SUN SPOT. The space between SUN and SPOT in applicant's mark is of no consequence in distinguishing the dominant, literal portions of the marks. *See Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd,* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks [STOCKPOT and STOCK POT] are confusingly similar. The word marks are

phonetically identical and visually almost identical"); and *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"). So as to be clear, we must do more than just compare the dominant portion of the logo mark with applicant's mark; it is necessary that we compare the logo mark as a whole. Even so, when we consider the design feature of the logo mark, we find that the sun design feature serves only to reinforce the literal SUNSPOT portion of the mark. Accordingly, we find that the marks, when considered in their entireties, are similar in appearance, sound, meaning and commercial impression. This factor weighs in favor of a likelihood of confusion.

Applicant contends that the registered marks are entitled to a narrow scope of protection in view of "dozens" of third-party registrations of marks comprising SUNSPOT or SUN SPOT. However, in order for us to consider such evidence, copies of the registrations must be submitted. *See In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974); and TBMP §1208.02 (2d ed. rev. 2004). In the present appeal, applicant introduced only four such registrations; thus, these registrations are the only ones we may consider, not the "dozens" allegedly existing on the

register. In any event, third-party registrations are not evidence of use of the marks shown therein. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1407, 177 USPQ 268 (CCPA 1973). Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of similar marks in the marketplace, and as a result are able to distinguish among SUN SPOT or SUNSPOT marks based on any differences in the marks. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973). Moreover, the four registrations cover newsletters in the field of weathering testing; medical electrodes; a photovoltaic solar energy monitoring system; and grass seed. These goods are far removed from the types of goods involved in this appeal and, thus, the registrations are of no value. *See Conde Nast Publications, Inc. v. American Greetings Corp.*, 329 F.2d 1012, 141 USPQ 249, 252 (CCPA 1964); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992).

Further, the coexistence of the two cited registrations for goods closer to each other than they are to applicant's goods does not compel a different result. As often stated, each case must be decided on its own

facts. We are not privy to the files in those registrations and, in any event, we are not bound by the prior actions of examining attorneys. *See In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994). *See also In re Nett Designs Inc.*, 236 F.3d 139, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

With respect to the goods, applicant is seeking to register its mark for sunglasses, while the registered marks cover clothing and/or jewelry. At least insofar as a consideration of applicant's sunglasses and the clothing items listed in the typed registration is concerned, because the marks are virtually identical, the extent to which the goods of applicant and registrant must be related to support a finding of likelihood of confusion is lessened. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); and *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). It is only necessary that there be a viable relationship between the two to support a finding of likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ at 356. Further, as a general rule, is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the

respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

The examining attorney and applicant have introduced competing third-party registration evidence in support of their opposing arguments regarding the similarity of the goods. The examining attorney submitted registrations showing that each entity adopted a single mark for both sunglasses and clothing or jewelry. Applicant countered with registrations showing that different entities have registered the same or similar mark for both sunglasses and clothing or jewelry.

The examining attorney submitted forty-five third-party registrations, based on use in commerce, that include both sunglasses and clothing, or sunglasses and jewelry, or sunglasses and clothing and jewelry. More specifically, twenty-eight of the registrations cover sunglasses and clothing; nineteen of the registrations cover sunglasses and jewelry (including watches); and two registrations cover sunglasses and clothing and jewelry.

Applicant introduced six instances (twelve registrations) when registrations issued to different entities for similar marks, one covering sunglasses, and the other covering clothing or jewelry.[4]

"Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The weight of this evidence is in favor of the examining attorney's position. Few of the registrations

[4] Evidence of three of the instances (six registrations) was submitted for the first time with applicant's brief. The examining attorney did not object to this untimely submission, but rather considered the evidence. Accordingly, we have considered the three additional examples showing similar registrations owned by different entities, one for sunglasses and the other for clothing. However, in the case of the mark ELLIPSE (Reg. Nos. 2078330 and 2976302), the registrations are not based on use in commerce. Accordingly, these registrations are of no probative value. In addition, in the case of the registrations of the marks SOLEMATES and SOULMATES submitted during prosecution, the identified goods do not include sunglasses. Thus, these registrations are not helpful in this appeal.

relied upon by the examining attorney are what one would characterize as house marks or designer marks covering a wide range of products. Rather, the identifications of goods in the registrations are focused on eyewear and clothing or jewelry. As for applicant's evidence, two of the six sets of registrations relied upon by applicant (GRAND and GRANDE; and SELECT (plus design) and SELECT) are of marks that arguably are highly suggestive, thereby limiting the registration's scope of protection. Further, in two other cases, the marks included design features that serve to distinguish the marks. In any event, as already stated, we are not privy to the files in those registrations and, moreover, we are not bound by the prior actions of examining attorneys. *In re Sunmarks Inc.*, 32 USPQ2d at 1472.

It is common knowledge that sunglasses and clothing or jewelry may be complementary products in that consumers may purchase sunglasses as a fashion accessory, just as in the case with jewelry. Accordingly, and as suggested by the examining attorney's third-party registration evidence, consumers would expect that sunglasses and clothing or jewelry identified by virtually identical or similar marks emanate from the same source.

In view of the above, we find that the similarity of the goods weighs in favor of finding that there is a likelihood of confusion.

Because there are no limitations as to trade channels or classes of purchasers in the involved application or cited registrations, it is presumed that the application and registrations encompass all of the goods of the type described in the identifications of goods, that the goods so identified move in all trade channels normal for those goods, and that the goods are available to all classes of purchasers for the listed goods. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716; and *In re Elbaum*, 211 USPQ 639, 6490 (TTAB 1981).

Sunglasses and clothing and jewelry may be complementary products, as previously indicated, that are purchased by the same consumers, as part of a coordinated outfit, in a single shopping trip, from the same retailer. *See In re Melville Corp.*, 18 USPQ2d at 1388. Accordingly, we find that the trade channels and classes of purchasers are factors that weigh in favor of finding a likelihood of confusion.

As just stated, there are no restrictions or limitations in the identifications of goods in either the application or the cited registrations. Therefore, the

identifications are broad enough to encompass inexpensive sunglasses, clothing and jewelry, which may be sold in mass merchandise or discount stores to consumers who may exercise nothing more than ordinary care in making their purchase. Thus, the conditions under which sales are made is a factor that weighs in favor of finding a likelihood of confusion.

In sum, the *du Pont* factors, on balance, weigh in favor of the examining attorney's position that there is a likelihood of confusion between applicant's mark and each of the registered marks for the respective goods listed therein. In the case of one of the registered marks, the marks are virtually identical, and in the other, the marks are similar. Further, the goods are similar and may be purchased on impulse, and there is an identity in the channels of trade and classes of purchasers for the goods.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.