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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nine Dots LLC

Serial No. 77377797

Peter J. Vranum of Gordon, Herlands, Randolph & Cox LLP for
Nine Dots LLC.

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Office 105 (Thomas G. Howell, Managing Attorney).

Before Holtzman, Drost, and Taylor, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 22, 2008, applicant, Nine Dots LLC, filed
an intent-to-use application (No. 77377797) to register the
mark FOR EVERY WALK OF LIFE THERE IS ALWAYS ONE, in
standard character form, on the Principal Register for
"clothing, namely, shirts, vests, sweaters, shoes, caps,
bandanas, shorts, sweat shirts, pants, belts for clothing,
socks, swimwear, jackets, rainwear, blouses, dresses,

footwear, hosiery, scarves, hats, head bands, pajamas, lingerie and sleepwear" in Class 25.

The examining attorney refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) on the ground that applicant's mark is confusingly similar to the mark in Registration No. 3156528 for the mark FOR EVERY WALK IN LIFE in standard character form for:

Footwear accessories, namely, non-skid rubber soles to attach to shoes; partial and full insoles, removable rubber soles and footwear attachments with spikes for non-slip traction, for use with shoes, boots, and ski boots; embossed heel grips of rubber, heel cushion inserts for primarily non-orthopedic purposes; *clothing, namely vests, pants, sweaters, shirts, pajamas, gloves, scarves, hats, hoods, dickeys, bibs, coveralls; outdoor apparel, namely anoraks, pullovers, jackets, and ski wear* in Class 25 (emphasis added).¹

After the examining attorney made the refusal final, this appeal and a request for reconsideration followed.

Inasmuch as this case involves a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the

¹ Issued October 17, 2006. The registration also contains goods in Classes 1 and 3 that are not relevant to this appeal.

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).

We begin by comparing applicant's and registrant's goods, which are in part identical. Both applicant's and registrant's identifications of goods include "clothing namely" shirts, vests, sweaters, pants, jackets, scarves, hats, and pajamas. In addition, applicant's sweat shirts are included within registrant's goods identified broadly as "shirts." Since there are no restrictions in either identification of goods, these goods are identical. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Also, 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. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992). Furthermore, because the application and registration include identical goods, we must conclude that the purchasers and channels of trade of applicant's and registrant's goods are also identical. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) ("[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of

trade to the same class of purchasers") and *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade").

Next, we must compare "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). We begin by looking at the individual components of the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("[T]here 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").

Here, the marks are FOR EVERY WALK OF LIFE THERE IS ALWAYS ONE and FOR EVERY WALK IN LIFE. Applicant's mark is similar to registrant's mark because it begins with the same words "FOR EVERY WALK ... LIFE." It is different

because its fourth word is the preposition "Of" as opposed to registrant's "In," and it adds the clause "There is always one." Applicant argues (Brief at 3-4) that:

The cited mark is a clever play on the products which may be used "for every walk in life." Each time one walks and dons shoes the registrant's products will be used. The Applicant's mark on the other hand has a completely different meaning and connotation which is figurative. The phrase "walk of life" does not pertain to the physical act of walking but rather refers to an occupation, profession or social class.

With its Request for Reconsideration, applicant has submitted examples of how the phrase "walk of like" has been used in various publications. See, e.g. *Wall Street Journal* dated April 19, 2006 ("Windfalls can be disorienting for people no matter what their walk of life"). See also Response dated August 12, 2008, thefreedictionary.com ("walk of life - careers in general").

There are two problems with applicant's argument. First, consumers would have to notice the slight difference between the two-letter prepositions in the fourth word in the marks and remember it when they encounter the marks at different times. Many consumers are unlikely to do this.

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 impression 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.

Baseball America Inc. v. Powerplay Sports Ltd., 71 USPQ2d 1844, 1848 (TTAB 2004). See also *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973).

Second, even to consumers who may remember the difference in the prepositions, the examining attorney has included evidence (emphasis added) to show that the expression "Walk in Life" can also be used in a similar manner as the expression "Walk of Life."

He loved people regardless of their *walk in life*, and people loved him.
Orlando Sentinel, February 21, 2008.

The goal was not merely to provide material goods, but to put those being assisted on a better *walk in life*.
Arizona Republic, September 28, 2007.

Who is your audience?
Everyday people from all *walks in life*.
Indianapolis Star, April 27, 2008.

I am here for the message of love and hope for everyone, no matter their *walk in life*.
Denver Post, May 26, 2008.
Everyone comes from a different *walk in life* and adds his or her own personal layer to the team.
Sun-Sentinel (Fort Lauderdale, FL), February 5, 2007.

Club members come from all *walks in life*.
Tampa Tribune, May 11, 2008.

Libraries provide a place for the community to gather, promoting reading and literacy, act as a resource for small businesses and level the playing field in terms

of providing access to the world of information via the Internet no matter your *walk in life* or level of income.

Herald Times Reporter (Manitowoc, Wisconsin), August 10, 2008.

While applicant argues that registrant's mark is a "clever play on the products" and it refers to "[e]ach time one walks and dons the registrant's shoes," we point out that registrant's goods are actually footwear accessories and registrant's shirts, vests, pants, sweaters, pajamas, and jackets are identical to applicant's. Therefore, the meaning and commercial impression of the expressions "Walk of Life" and "Walk in Life" can be the same.

Applicant also adds the expression "There is always one" to its mark. While the expression is a difference between the marks, it does not result in marks that are dissimilar. Both marks begin almost identically, "For Every Walk __ Life." The fact that applicant has taken almost the entire registered mark and added "There is Always One" to it would not change the fact that the marks have almost identical beginnings. Many potential purchasers are likely to believe that registrant has now simply added an additional phrase to its mark. The expression can be viewed as a slightly laudatory term perhaps suggesting the broad range or appeal of the "For Every Walk" clothing items. *See, e.g., Hoover Co. v. Royal*

Appliance Manufacturing Co., 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (“‘Number One in Floorcare’ is a generally laudatory phrase”). For many purchasers, the expression is likely to add additional information to the initial part of the “For Every Walk __ Life” mark but not to lead purchasers to understand that the sources of the products are different. See *Pickering & Co., Inc. v. Bose Corp.*, 181 USPQ 602, 603 (TTAB 1974) (“When both slogans are considered in their entirety, as they must be, there is little doubt but that they are substantially similar in sound and appearance. And, after a consideration of all the evidence herein, we are clearly of the opinion that applicant’s slogan ‘YOU CAN HEAR THE DIFFERENCE NOW.’ so resembles the slogan ‘FOR THOSE WHO CAN HEAR THE DIFFERENCE’”). See also *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“With respect to JOSE, the Board correctly observed that the term simply reinforces the impression that GASPAR is an individual’s name. Thus, in accord with considerable case law, the JOSE term does not alter the commercial impression of the mark.” The marks JOSE GASPAR GOLD and GASPAR’S ALE were determined to be similar); and *In re Computer Systems Center Inc.*, 5 USPQ2d 1378, 1381 (TTAB 1987) (“‘CSC

ADVANCED BUSINESS SYSTEMS' is substantially similar to the cited mark 'CSC'").

The evidence shows that for many purchasers the marks' meanings and commercial impressions would be similar and their pronunciations and appearances would likewise be similar because their initial components are pronounced and look virtually the same. The presence of the additional expression in applicant's mark and the different prepositions have been considered but ultimately, when we consider the marks in their entireties, their similarities in sound, appearance, meaning, and commercial impression outweigh their differences. Many purchasers are likely to focus on the beginning of applicant's mark, which is almost identical to the entire registered mark. For these purchasers, it would be the dominant part of applicant's mark and the only part of registrant's mark. *Palm Bay Imports*, 73 USPQ2d at 1692 ("To be sure, CLICQUOT is an important term in the mark, but VEUVE nevertheless remains a 'prominent feature' as the first word in the mark and the first word to appear on the label. Not only is VEUVE prominent in the commercial impression created by VCP's marks, it also constitutes 'the dominant feature' in the commercial impression created by Palm Bay's mark"). We add that many of the goods in this case are identical, which

Ser. No. 77377797

means that marks do not need to be as close for there to be confusion.

Ultimately, because registrant's and applicant's goods overlap and the marks are similar, we conclude that confusion is likely in this case.

Decision: The refusal to register applicant's mark FOR EVERY WALK OF LIFE THERE IS ALWAYS ONE under Section 2(d) of the Trademark Act is affirmed.