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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
ON APPEAL

Applicant : The Topline Corporation
Serial No. : 78/975,345
Filed : February 20, 2003 (footwear)
Mark : REPORT SEATTLE in Class 25

TM Attorney : Stacy B. Wahlberg
Law Office : 113
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Date : March 4, 2005

Trademark Trial and Appeal Board
Commissioner for Trademarks
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APPLICANT'S APPEAL BRIEF

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I. INTRODUCTION

Applicant appeals the Examining Attorney's refusal to register on two grounds:

1. There is no likelihood of confusion between Applicant's mark REPORT SEATTLE and U.S. Registration No. 1,957,041 for REPORT COLLECTION.
2. Applicant should not be required to disclaim SEATTLE.

The Examining Attorney did not properly analyze the history and significance of the Applicant's prior use of REPORT marks for footwear or give proper weight to the Applicant's incontestable registration for REPORT: in class 25 for footwear. Not only is Applicant the senior user of its REPORT marks for footwear, but Applicant's REPORT marks (without the distinctive additional term SEATTLE that is present here) have also coexisted for over 11 years with the cited registration without incident. The Board's own precedent finds that such longstanding coexistence negates a finding of likelihood of confusion. The marks have successfully coexisted because they create two distinct commercial impressions that prevent any likelihood of confusion. The Section 2(d) refusal should be withdrawn.

Disclaimer of SEATTLE is unnecessary. Seattle is not known for clothing manufacture, and consumers will not view Applicant's mark as the geographical source of its goods. Moreover, REPORT SEATTLE is a composite mark, and a disclaimer of the SEATTLE element of this combined term would be improper. The disclaimer requirement should be withdrawn.

II. PROCEDURAL HISTORY

In an Office Action dated April 7, 2004, the Examining Attorney continued and made final a Section 2(d) refusal in light of U.S. Registration No. 1,957,041 for REPORT COLLECTION. Applicant seeks registration for REPORT SEATTLE for use in connection with "footwear." The cited registration owned by Modextil Inc. ("Modextil") does not include footwear. Rather, the registration is for "men's clothing and accessories, namely shirts, polos, T-shirts, sweatshirts, sweaters, cardigans, wind resistant jackets, coats, underwear, belts, socks."

The Examining Attorney asserts that a likelihood of confusion exists because both marks include the word REPORT. The Examining Attorney further asserts that Applicant's footwear is considered "clothing" just like the registrant's listed goods. The Examining Attorney further required Applicant to disclaim SEATTLE apart from the mark as shown, arguing that it is primarily geographically descriptive of Applicant's goods.

Applicant filed a Request for Reconsideration and Notice of Appeal on September 28, 2004 (received by the PTO on October 1, 2004). On December 1, 2004, the Examining Attorney denied Applicant's Request for Reconsideration, and this appeal resumed on January 31, 2005.

III. ARGUMENT

A. Applicant Is The Senior User of the REPORT Mark in Association With Footwear

The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 U.S.P.Q.2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 U.S.P.Q.2d 1687, 1690 n. 4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 U.S.P.Q.2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 U.S.P.Q.2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 U.S.P.Q.2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973). Applicant's mark is for footwear, **not clothing** as stated by the Examiner. The Examining Attorney's determination that Applicant's "footwear" description is synonymous with clothing is not supported by any evidence in the record, and is contrary to the requirement that the Examining Attorney determine the nature and scope of the goods as recited in the application.

Applicant presented ample support in its Request for Reconsideration that Applicant is the senior user of its REPORT marks for footwear. Applicant's first registration for REPORT:, effective June 1997 is now incontestable and claims use for "women's shoes" beginning in March

1993. *See* U.S. Reg. No. 2,169,637. Modextil's registration does not even list footwear. Thus, not only is there no doubt that Applicant is the senior user of its REPORT marks for footwear, Applicant's March 1993 first use pre-dates any priority claim for clothing in the cited registration.

B. There Is No Likelihood of Confusion Between the Marks as Evidenced by Their Longstanding Coexistence in Class 25

Applicant presented ample support in its Request for Reconsideration that Applicant's REPORT marks have coexisted with the cited Registrant's mark for over 11 years without confusion. *See* Applicant's Request for Reconsideration, p. 2. Indeed, Applicant's coexisting REPORT marks do not contain the distinctive term SEATTLE included in the present application, further amplifying the lack of potential confusion between REPORT SEATTLE and REPORT COLLECTION. The Board has consistently held that such longstanding coexistence negates a finding of likelihood of confusion. For instance, in *International Telephone and Telegraph Corp. v. Jaeco Pump Company*, 207 U.S.P.Q. 676, 679-80 (T.T.A.B. 1980), the Board held that where the marks JAECO and JABSCO had been used in association with related pump products for over twenty years without any evidence of actual confusion, there was no likelihood of confusion despite the similarities between the marks. The Board noted:

... Applicant has used the term "Jaeco" in one form or another since 1958, a period in excess of twenty years, and ... the products of the parties have been marketed under the marks here involved during this entire period without any evidence of actual confusion ... notwithstanding the relatedness of the products.

Id.

Likewise, the Board held in *Harry Fischer Corp. v. Keneth Knits, Inc.*, 207 U.S.P.Q. 1019, 1025-26 (T.T.A.B. 1980), that two similar "KEN(N)ETH" marks used in association with clothing were not confusingly similar where there was a 10-year coexistence period, noting:

[i]n view of this trade record compiled over a considerable period of contemporaneous use, there is no cogent reason to suppose that this situation [a lack of confusion] will not continue in the future.

Id. See also Procter & Gamble Co. v. Johnson & Johnson Inc., 485 F.Supp. 1185, 205 U.S.P.Q. 697 (S.D.N.Y. 1979), *aff'd*, 636 F.2d 1203 (2nd Cir. 1980) (no confusion for over 1 1/2 years during marketing blitz negated finding of likelihood of confusion); *U.S. Olympic Committee v. Int'l Federation of Body Builders*, 210 U.S.P.Q. 128, 137 (T.T.A.B. 1981)(sixteen years without actual confusion avoided finding of likelihood of confusion). Accordingly, long-term coexistence of similar marks without incidence of actual confusion creates a presumption that there is no likelihood of confusion. If confusion were likely, surely it would have occurred at some point over the many years that the marks coexisted.

Here, Applicant is the owner of several "REPORT" registrations in class 25 that have coexisted on the Principal Register with the REPORT COLLECTION registration since 1998 *without conflict*. (See Registration Nos. 2,169,637 for REPORT:, 2,377,891 for ONE ON 1 BY REPORT:, and 2,681,120 for REPORT: and Design). The Trademark Office did not object to Applicant's original filing for REPORT: for footwear in 1997 or the other registrations cited above, and it should not to this REPORT SEATTLE application. Applicant's actual use of REPORT: in class 25 dates back to **March 1993**, as evidenced in Applicant's incontestable Registration No. 2,169,637. The Applicant and Registrant have coexisted in commerce and on the Principal Register for over 11 years. Certainly, if there were a genuine likelihood of confusion between these two marks, the issue would have arisen by now. It has not. Registrant's and Applicant's marks have coexisted, unchallenged by either party for the entire 11 years that both marks have coexisted. Applicant's and Registrant's successful coexistence for 11 years in class 25 demonstrates that there is no likelihood of confusion between the marks.

C. The Marks Create Different Commercial Impressions That Prevent Confusion

Under Section 2(d)(1) of the Lanham Act, a mark that can distinguish an applicant's goods from the goods of others shall not be refused registration on the principal register unless it "so resembles a registered mark or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the

applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. §1052(d)(1). Likelihood of confusion has been said to be synonymous with “probable” confusion--it is not sufficient if confusion is merely “possible.” *American Steel Foundries v. Robertson*, 269 U.S. 372, 70 L. Ed. 317, 46 S. Ct. 160 (1926).

Likelihood of confusion depends on whether the purchasing public would mistakenly assume that the applicant’s goods originate with, are sponsored by, or are in some way associated with the goods or services sold under a cited registration or trademark. *FBI v. Societe: “M. Bril & Co.”*, 172 U.S.P.Q. 310 (T.T.A.B. 1971). The factors used for determining likelihood of confusion are set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973).¹

Viewing the marks in their entirety, and taking account of the differences created by the word “SEATTLE” in Applicant’s mark, shows that consumer confusion is unlikely. Compound marks must be analyzed the way they are used and perceived. *In re Hearst Corp.*, 982 F.2d 493 (Fed. Cir. 1992). Marks tend to be perceived in their entirety. Ultimately, the Examining Attorney must analyze the marks in their entirety and determine if the marks are likely to cause confusion.

In *Hearst*, the Board denied registration of the mark VARGA GIRL for “calendars” in light of the prior registration of VARGAS for, among other things, calendars (*i.e.*, identical goods). *Hearst*, 982 F.2d at 493. In its underlying analysis, the Board had stressed the term “varga” and diminished the term “girl” in the applicant’s mark because the term “girl” was

¹ Under the *Du Pont* test, the following factors should be considered in evaluating the issue of likelihood of confusion:

- (1) the similarity of the marks,
- (2) the similarity of the goods or services involved,
- (3) the similarity of the marketing channels of the goods or services,
- (4) the degree of care likely to be exercised by purchasers,
- (5) the fame of the prior mark,
- (6) the variety of goods as a “family mark,” and
- (7) other relevant factors.

Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F. 2d 669, 671-672, 223 U.S.P.Q. 1281, 1282 (Fed. Cir. 1984).

merely descriptive and thus could not be afforded substantial weight in comparing the marks. *Id.* at 494. The Board thus determined that the mark VARGA GIRL was confusingly similar to VARGAS. The Federal Circuit explained that this analytic approach was erroneous. *Id.* The court found that the appearance, sound, sight, and commercial impression of VARGA GIRL derived significant contribution from the component “girl” and that, by stressing the portion “varga” and diminishing the portion “girl,” the Board had inappropriately changed the applicant’s mark. *Id.* Even though the marks were used for identical goods, the Federal Circuit reversed the Board’s decision and allowed the mark VARGA GIRL to register. *Id.*

In this case, looking at the marks in their entirety, there are pronounced differences in the commercial impressions created by Applicant’s mark and the cited registration. REPORT SEATTLE suggests images of Seattle -- an attractive place to live, a fertile location for entrepreneurs, start-up companies or the natural beauty of the Pacific Northwest. These connotations are nowhere present in the cited registration. Comparing the marks without giving weight to each element inappropriately changes the marks in a similar manner to that reversed in *Hearst*. When the marks are compared in their entireties, and when sufficient weight is given to each element of the marks, it is evident that confusion with the cited registration is unlikely. Indeed, the long-term coexistence of Applicant’s REPORT marks and the cited registration bear out that there is no likelihood of confusion here.

Further, the differences in the goods preclude a likelihood of confusion. If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 U.S.P.Q.2d 1668 (T.T.A.B.

1986) (QR for coaxial cable held not confusingly similar to QR for various products (*e.g.*, lamps, tubes) related to the photocopying field).

Here, Applicant seeks registration for footwear and the cited registration is for men's clothing and associated apparel. The Examining Attorney has mischaracterized Applicant's goods as "clothing in the nature of footwear" (*see* April 7, 2004 Office Action). While Applicant believes these marks are different enough to avoid confusion *even when used for identical goods*, there is no support in the record or logic to equate footwear with clothing. Further, there is no *per se* rule (as the Examiner's arguments appear to assume) that similar marks used for clothing are likely to cause confusion. *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854, 855-56 (T.T.A.B. 1984); *See also, Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 U.S.P.Q.2d 1169, 1171 (T.T.A.B. 1987) (no *per se* rule for food-related goods); *Information Resources Inc. v. X*Press Information Services*, 6 U.S.P.Q.2d 1034, 1038 (T.T.A.B. 1988) (no *per se* rule for computer-related products). Instead, to be confusingly similar, the marks must be such that the relevant purchasing consumer acting under ordinary circumstances would be confused as to the source or sponsorship. The differences between Applicant's and Modextil's marks prevent such confusion, even for related goods.

In the present case, in light of the differences in the marks themselves, it is not probable that consumers will confuse the Applicant and Registrant's goods. Moreover, the differences between the goods, footwear and clothing, make a likelihood of confusion improbable. If confusion is not probable, there is no likelihood of confusion. *American Steel, supra*.

D. Disclaimer of SEATTLE Is Not Required

Applicant requests that the requirement to disclaim SEATTLE as geographically descriptive under Section 2(e)(2) be withdrawn because the meaning of Applicant's mark is not primarily geographic. Even if a term is known generally to the public to refer to a geographic location, that term is nonetheless registrable as long as the mark as a whole does not have a primarily geographic significance. *In re Gale Hayman Inc.*, 15 U.S.P.Q.2d 1478 (T.T.A.B.

1990). In *Gale Hayman*, the Examining Attorney refused to register the mark SUNSET BOULEVARD on the basis that the mark was primarily geographically descriptive of cosmetics, namely, perfume and cologne. *Id.*

The Examining Attorney argued in *Gale Hayman* that the primary significance of SUNSET BOULEVARD was geographic and that the applicant's offices were indeed located near Sunset Boulevard in Los Angeles, California. *Id.* The Examining Attorney claimed that this evidence created a legal presumption that the public was likely to associate the goods with Sunset Boulevard, and that the mark was therefore primarily geographically descriptive. The Board agreed that there was "no doubt that [Sunset Boulevard] is known generally to the public" as a geographic location, but stated:

The mere fact that applicant's principal offices are in Century City, close to Sunset Boulevard, does not mandate a finding that a goods/place association should be presumed. Sunset Boulevard itself would have to be associated with the products in such a way that the consuming public should be likely to assume that Sunset Boulevard was the place in which the perfume and cologne originated. Nothing in the record, however, indicates or even suggests that purchasers would believe that Sunset Boulevard was the place of manufacture or production of the perfume and cologne.

Gale Hayman, 15 U.S.P.Q. at 1479. The Board accordingly reversed the Examining Attorney's refusal to register the mark. *Id.*

In the present case, Applicant is located in Bellevue, Washington, a suburb of Seattle. As in *Gale Hayman*, however, the mere fact that Applicant's principal offices are *near* Seattle does not mandate a finding that a goods/place association should be presumed. There is no evidence in the record that indicates or suggests that consumers would assign primarily geographic significance to the mark, given that a separate readily understood meaning exists for REPORT SEATTLE.

Seattle is not known as a geographic source for clothing. The word "Seattle" may suggest a quality of life, but it is not associated with the manufacture of clothing. This case is like *Hyde*

Park Clothes, Inc. v. Hyde Park Fashions, Inc., 93 U.S.P.Q. 250 (S.D.N.Y. 1951), *aff'd*, 204 F.2d 223, 97 U.S.P.Q. 246 (2d Cir. 1953), *cert. denied*, 346 U.S. 827, 99 U.S.P.Q. 491 (1953) in which the Court held that the primary significance of HYDE PARK for men's suits was to suggest that the product is stylish or of high quality, rather than to provide information about geographic origin. Consumers similarly identify Applicant's REPORT SEATTLE mark as evoking the feeling and aesthetic of the Pacific Northwest, rather than the geographic location of Applicant's goods.

Further, when a geographic term is combined with additional wording, the Examining Attorney must determine the primary significance of the **composite**. TMEP §§ 1210.07 et seq. If the mark, when viewed as a whole, would not likely be perceived as identifying the geographic origin of the goods or services, then the mark is regarded as arbitrary, fanciful or suggestive. TMEP § 1210.07(e). For example, in *In re Sharky's Drygoods Co.*, 23 U.S.P.Q. 1061 (T.T.A.B. 1992), the Board held that PARIS BEACH CLUB used in connection with t-shirts and sweatshirts was neither descriptive nor deceptively misdescriptive of a Paris beach. Rather, given the additional words included in the mark other than "Paris," this mark was merely suggestive of the city of Paris. *See also, In re Yardley of London, Inc.*, 165 U.S.P.Q. 272 (T.T.A.B. 1970) (finding against geographic descriptiveness of LONDON LASHES for brush-on lash lengthener); *In re International Minerals & Chemical Corp.*, 147 U.S.P.Q. 262 (T.T.A.B. 1965) (finding against geographic descriptiveness of KENTUCKY TURF for fertilizer).

REPORT SEATTLE, like PARIS BEACH CLUB, HYDE PARK and LONDON LASHES merely suggests Seattle, and not the geographic origin of the goods. There is no basis in the record to conclude that the consuming public will believe that Seattle is the geographic source of Applicant's clothing. Consequently, the *primary* significance of the term SEATTLE in Applicant's mark is not the place of origin of Applicant's clothing, and REPORT SEATTLE is therefore registrable on the Principal Register without a disclaimer of SEATTLE.

IV. CONCLUSION

Applicant's REPORT mark and the cited REPORT COLLECTION mark have coexisted in the marketplace and on the federal register for 11 years without incident. This coexistence, combined with the differences in Applicant's REPORT SEATTLE mark and Registrant's mark, offers strong evidence that relevant consumers will not be confused. Moreover, Applicant need not disclaim SEATTLE because it is not primarily geographically descriptive of its goods. At most, SEATTLE suggests an aesthetic and cultural association with the style of Applicant's goods. Applicant therefore respectfully requests that the Board reverse the Examining Attorney's findings and approve Applicant's mark for publication.

Respectfully submitted,
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