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THIS DISPOSITION IS NOT CITABLE AS  
PRECEDENT OF THE TTAB

DEC 11, 97

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Kohl's Department Stores, Inc.

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Serial No. 74/528,803

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Norman H. Zivin of Cooper & Dunham for applicant.

Jason Turner, Trademark Examining Attorney, Law Office 108  
(David Shallant, Managing Attorney).

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Before Cissel, Hohein and Walters, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Kohl's Department Stores, Inc. has filed a trademark  
application to register the mark M SPORT for "athletic  
footwear for men, women and children; casual socks for men,  
women and children."<sup>1</sup>

The Trademark Examining Attorney has finally refused  
registration under Section 2(d) of the Trademark Act, 15

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<sup>1</sup> Serial No. 74/528,803, in International Class 25, filed May 24, 1994,  
based on an allegation of a bona fide intention to use the mark in  
commerce. The application includes a disclaimer of SPORT apart from the  
mark as a whole.

U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark M.M. SPORT, previously registered for "clothing, namely, men's, women's and children's tops, bottoms, jackets, dresses, shirts, sweatshirts, sweatpants and vests,"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, and an oral hearing was held. We affirm the refusal to register.

In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the goods. Turning, first, to the goods, we agree with the Examining Attorney that applicant's identified footwear and socks are related to the articles of clothing identified in the registration. The evidence submitted by the Examining Attorney of catalog excerpts<sup>3</sup> and third-party registrations<sup>4</sup> suggests that such

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<sup>2</sup> Registration No. 1,785,643 issued August 3, 1993, to Major Motion Sportswear, in International Class 25. The registration includes a disclaimer of SPORT apart from the mark as a whole.

<sup>3</sup> The evidence includes a page from a Talbot's mail order catalog featuring both casual Talbot's pants and Cole Haan canvas sneakers; pages from an Eddie Bauer mail order catalog featuring different styles of winter boots; pages from an L.L. Bean mail order catalog featuring shorts, pants, tops, Saucony fitness walkers, and hiking boots (some by L.L. Bean and some by other manufacturers). We have not considered several additional excerpts from unidentified sources submitted by the Examining Attorney.

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goods are of a type which may emanate from a single 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).

We are not persuaded otherwise by applicant's argument that the goods and the trade channels are different, and that "[c]onsumers will not be faced with both marks in any retail outlet since applicant's goods are only sold in its retail stores and applicant does not sell registrant's goods." Neither the application nor the cited registration contains such limitations to the identifications of goods. Rather, both identifications of goods are broadly worded. Therefore, we must presume that the goods of the applicant and registrant are sold in all of the normal channels of trade to all of the normal purchasers for goods of the type identified, including department stores and other clothing and footwear retailers. See, *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). That is, we must presume that the goods of applicant and registrant are sold through the same channels of trade to the same classes of purchasers.

Finally, we note that goods or services need not be identical or even competitive in order to support a finding

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<sup>4</sup> Each of the submitted registrations, based on use in commerce, includes, in its identification of goods, items listed in both the application and registration herein.

of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Considering, next, the marks, we note that registrant's mark consists of "M.M." followed by the word SPORT, whereas applicant's mark consists of a single M followed by the identical word, SPORT.

The Examining Attorney contends, essentially, that the differences in sound, appearance and connotation between the marks are insubstantial and, thus, the marks engender significantly similar overall commercial impressions. Applicant disagrees, contending that the additional "M" and the punctuation in registrant's mark create a distinct appearance, result in a different pronunciation and "tend to stimulate a different response in the mind of the purchaser." Applicant argues that the Examining Attorney has improperly dissected the mark, which should be considered in its entirety; and that there are third-party

registrations in connection with clothing "which utilize the letter 'M' in combination with another letter and the word 'SPORT,' with the word 'SPORT' disclaimed."<sup>5</sup>

It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "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." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, we find that the marks are substantially similar in sound, appearance and connotation. We are not persuaded by applicant that its single "M" as compared to registrant's double "M" and punctuation sufficiently distinguish applicant's mark from registrant's mark in either sound or appearance.

We agree with the Examining Attorney that the principal cases cited<sup>6</sup> by the applicant in support of its position

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<sup>5</sup> In support of its position, applicant submitted, with its request for reconsideration, excerpts regarding third-party registrations from a commercial database. In order to make registrations of record, soft copies of the registrations themselves, or the electronic equivalent thereof, i.e., printouts of the registrations taken from the electronic records of the Patent and Trademark Office's (PTO) own data base, must be submitted. See, *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). Further, the Examining Attorney has objected to this evidence. As the third-party registrations have not been made of record properly, we give them no consideration. However, we hasten to add that our decision would remain the same if we had considered these registrations.

that the marks engender different commercial impressions are inapposite. Unlike the present case, in each of those cases, while the marks differed by only one letter, one of the marks was likely to be viewed by consumers as a common word so that the connotation of that mark differed significantly from the connotation of the other mark at issue. Such is not the case herein where the marks differ only by the repetition of the one letter comprising the first term in the mark. There is no connotation particular to "M" or "M.M.," either alone or in combination with SPORT, that is likely to distinguish these marks for consumers.

Further, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The issue is whether the marks create substantially the same overall commercial impression. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). Due to the consuming public's fallibility of memory, the emphasis is on the recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992). Neither applicant's nor registrant's mark

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<sup>6</sup> *Gulf States Paper Corp. v. Crown Zellerbach Corp.*, 417 F.2d 795, 163 USPQ 589 (CCPA 1969); and *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ2d 1719 (Fed. Cir. 1988).

includes a design element, nor is either mark solely a single letter or a combination of letters.<sup>7</sup> Viewing the marks in their entirety, M SPORT and M.M. SPORT, we believe that any distinctions created by the additional M and punctuation in registrant's mark are minimal such that, upon recall, a consumer is likely to be confused. In this case, we believe that the overall commercial impressions of these two marks are substantially similar.

In conclusion, in view of the substantial similarity in the commercial impressions of applicant's mark, M SPORT, and registrant's mark, M.M. SPORT, their contemporaneous use on the related goods involved in this case would be likely to cause confusion as to the source or sponsorship of such goods.

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<sup>7</sup> This case is distinguishable from the line of cases involving a single letter design mark, such as *In re Burndy*, 300 F.2d 938, 133 USPQ 196 (CCPA 1962), wherein the court found that the subject marks, although comprised of the identical single letter in stylized form, were essentially design marks not capable of being spoken and the differences in the designs of the respective marks were sufficient to distinguish the marks. To the extent that applicant is arguing that the "M" and "M.M." portions of the parties' marks are predominant, this case is more analogous to the case of *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), wherein the court, in finding a likelihood of confusion, noted that the marks therein, TMS and TMM, are unpronounceable letter combinations which may be inherently difficult to remember and thus more susceptible of confusion or mistake than are word marks, particularly where the marks therein differed only by the last letter.

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

R. F. Cissel

G. D. Hohein

C. E. Walters  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board