

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

10/15/97

Paper No. 20  
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U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Speedo Holdings B. V.  
v.  
Zura Sports, Inc.

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Opposition No. 97,621  
to application Serial No. 74/559,360  
filed on August 10, 1994

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Glenn Mitchell and Mary F. Leheny of Fross Zelnick Lehrman  
& Zissu for Speedo Holdings B. V.

Gail L. Morrissey of Standley & Gilcrest for Zura Sports,  
Inc.

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Before Sams, Simms and Quinn, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Zura Sports, Inc. to  
register the mark SPEEDRAY for "water sports equipment,  
namely kickboards."<sup>1</sup>

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<sup>1</sup> Application Serial No. 74/559,360, filed August 10, 1994,  
alleging a bona fide intention to use the mark in commerce.

**Opposition No. 97,621**

Registration has been opposed by Speedo Holdings B. V. under Section 2(d) of the Act on the ground that applicant's mark, if applied to applicant's goods, would so resemble opposer's previously used and registered SPEEDO marks for a full line of swimwear, water sports equipment and gear, including kickboards, as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; certified status and title copies of opposer's pleaded registrations, excerpts from printed publications retrieved from the NEXIS database, and applicant's responses to opposer's interrogatories and requests for admissions, all introduced by way of opposer's notice of reliance. Applicant attempted to introduce, by a notice of reliance, a computer print out retrieved from a data base entitled "Brands and Their Companies." Both parties filed briefs on the case.<sup>2</sup>

Before turning to the merits of the likelihood of confusion claim, we direct our attention to the evidentiary objections made by each party in their briefs on the case.

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<sup>2</sup> Opposer requested an oral hearing, but later withdrew the request.

**Opposition No. 97,621**

We first turn to applicant's hearsay objection to certain of the printed publications listed in opposer's notice of reliance. For the reasons set forth by opposer in its reply brief, the objection is overruled. This evidence is admissible for what the publication excerpts show on their face (but not for the truth of the matters contained therein). *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 12 USPQ2d 1267 (TTAB 1989), *aff'd*, 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990). With respect to opposer's objection, opposer contends that the computer print out submitted by applicant is inadmissible hearsay and is incompetent evidence of third-party uses of similar marks. We agree. The search report is neither a printed publication nor an official record as contemplated by Trademark Rule 2.122(e). *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). Accordingly, opposer's objection is sustained and the print out does not form part of the record for our consideration.

We now turn to the claim of priority and likelihood of confusion. Opposer has made of record the following registrations<sup>3</sup>: SPEEDO for "men's and women's sports shirts both knitted and woven, walking shorts, leisure jackets for

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**Opposition No. 97,621**

informal wear, underwear and swim suits",<sup>4</sup> "men's and women's sport shirts, both knitted and woven, walking shorts, leisure jackets for informal wear, underwear, swim suits, jumpers, slacks, track suits and bathing caps",<sup>5</sup> "protective goggles",<sup>6</sup> SPEEDO and SPEEDO and design for "transportable swimming pools, non-motorized surfboards, kickboards, balls, balloons, bar-bells, horizontal bars, bats for games, body developers in the nature of exercising machines, golf clubs, dumb-bells, hockey sticks, squash racquets, tennis racquets and tennis nets, roller skates, skate boards, rowing exercisers, cricket and golf bags, swimming paddles (hand), [and] flippers",<sup>7</sup> SPEEDO and design for "footwear",<sup>8</sup> and SPEEDO and design for "eye protection goggles for sports activities, surfing, sailing and windsurfing".<sup>9</sup> In view of opposer's ownership of valid and

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<sup>3</sup> Registration No. 1,464,368 was canceled by the Office under Section 8.

<sup>4</sup> Registration No. 718,276, issued July 11, 1961; renewed.

<sup>5</sup> Registration No. 1,011,585, issued May 27, 1975; renewed.

<sup>6</sup> Registration No. 1,012,121, issued June 3, 1975; renewed.

<sup>7</sup> Registration Nos. 1,169,452 and 1,169,451, respectively, issued September 15, 1981; combined Sections 8 and 15 affidavit filed.

<sup>8</sup> Registration No. 1,183,860, issued December 29, 1981; combined Sections 8 and 15 affidavit filed.

<sup>9</sup> Registration No. 1,593,159, issued April 24, 1990; combined Sections 8 and 15 affidavit filed.

**Opposition No. 97,621**

subsisting registrations for its pleaded marks, there is no issue with respect to opposer's priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As dictated by the evidence, different factors may play dominant roles in determining likelihood of confusion. *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). The factors deemed pertinent in the proceeding now before us are discussed below.

With respect to the goods, both parties use their marks in connection with identical products, namely kickboards. In addition, opposer's marks are used on swimwear and water sport goods which are closely related to kickboards. The goods clearly travel in the same channels of trade and are bought by the same classes of ordinary purchasers.

Turning next to the marks SPEEDO (with or without the design) and SPEEDRAY, we find that they are different in

sound and appearance and that they are significantly different in overall commercial impression. We recognize, of course, that the marks are similar to the extent that both have a "SPEED" prefix. However, it can hardly be disputed that the term "speed" is suggestive when used in connection with kickboards and, for that matter, with any of a number of the swimming products listed in opposer's registrations.<sup>10</sup> In any event, the marks must be compared in their entireties, and, in doing so, we conclude that the marks are different. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). Opposer's mark is a play on the word "speed" alone. Applicant's mark, on the other hand, likely would be perceived as a play on "ray" or "stingray", a sea creature that glides swiftly through the water.<sup>11</sup> Applicant's mark SPEEDRAY conjures up that image, suggesting that the user of applicant's kickboard will move through the water in the same fashion. Thus, while both marks convey the idea of speed, SPEEDO and SPEEDRAY do so in entirely different ways.

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<sup>10</sup> The Board takes judicial notice of the dictionary listing for the word "speed": "the act, action or state of moving swiftly." Webster's Third New International Dictionary (1976).

<sup>11</sup> Applicant, in its response to interrogatory no. 5, indicates that the meaning of the mark "is that the product combines speed with a distinctive shape."

**Opposition No. 97,621**

We note applicant's admission that "the mark SPEEDO is famous in the field of swimwear." Applicant denied, however, that "the mark SPEEDO is famous (or well known) in the field of water sports equipment and accessories." We further note applicant's admission that "it is not aware of any trademark consisting of the term SPEED, alone or in conjunction with other terms, for swimwear or water sport equipment or accessories." Moreover, opposer's NEXIS evidence attests to the widespread exposure of opposer's SPEEDO marks in the marketplace. Although the factors of the fame of opposer's SPEEDO marks in connection with swimwear, and the absence of any third-party uses of "speed" marks are important factors, we simply find that these factors are outweighed by the significant differences in overall commercial impressions of the marks. *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635 (Fed. Cir. 1990); *Kellogg Co. v. Pack'em Enterprises, Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), *aff'g* 14 USPQ2d 1545 (TTAB 1990); and *Stouffer Corp. v. Health Valley Natural Foods Inc.*, 1 USPQ2d 1900 (TTAB 1986), *aff'd*, No. 87-1292, (Federal Circuit Sept. 30, 1987).

With respect to actual confusion, opposer points to an interrogatory answer (no. 20(a)), contending that the record shows at least one instance of actual confusion:

**Opposition No. 97,621**

"Applicant has not witnessed or obtained any knowledge or information regarding confusion or the likelihood of confusion, however, on or about February, 1995, Mr. Paul A. Reeder [applicant's president] received a single phone call in which he believes the caller asked for information regarding the 'SPEEDORAY'". This is hardly probative evidence of actual confusion. We can only speculate as to the reason behind the alleged misstatement. The absence of probative evidence of actual confusion, while a factor to be considered, is not significant here. Although the record reveals that applicant has commenced use of its mark, the record is silent regarding the extent of the use. Thus, we have no way of gauging the opportunity for actual confusion to arise in the marketplace. In any event, the applicable test is likelihood of confusion.

Finally, opposer questions applicant's intent in adopting the mark SPEEDRAY. Opposer points to applicant's knowledge of opposer's mark prior to applicant's adoption of the mark SPEEDRAY. Suffice it to say that this fact, standing alone, does not demonstrate any bad faith adoption by applicant. Further, opposer's comparison of the design feature in its mark with the shape of applicant's keyboard (as shown in applicant's advertisements) is stretching the bounds of imagination.

**Opposition No. 97,621**

Based on the relatively small record before us, we see the likelihood of confusion claim asserted by opposer as amounting to only a speculative, theoretical possibility. Language by our primary reviewing court is helpful in resolving the likelihood of confusion controversy in this case:

We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), *citing* Witco Chemical Co. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

Here, we find that consumers familiar with the mark SPEEDO for swimwear and water sports equipment, including kickboards, would not believe that applicant's SPEEDRAY kickboards emanate from the same source. The difference between the marks in overall commercial impressions is so significant that confusion is not likely to occur even when the marks are applied to identical and/or closely related goods.

Decision: The opposition is dismissed.

Opposition No. 97,621

J. D. Sams

R. L. Simms

T. J. Quinn  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board