

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

May 26, 1998

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sun Mountain Sports, Inc.

Serial No. 74/673,773

Michael J. Hughes of The Intellectual Property Office
of Michael J. Hughes for applicant.

Julie Clinton Quinn, Trademark Examining Attorney, Law
Office 109 (Deborah Cohn, Managing Attorney).

Before Cissel, Hairston and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Sun Mountain Sports, Inc. has filed an application to register the mark ALTOS for "clothing, namely, shells, jackets, rainwear, cardigans, vests, sweaters, pullovers, shirts, slacks, shorts and upper body wear, consisting of, wind resistant suits, all particularly designed for use by golfers."¹

¹ Serial No. 74/673,773, in International Class 25, filed May 24, 1994, based on an allegation of a bona fide intention to use the mark in

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the marks ALTO and ALTO CANADA and design, previously registered by the same party for, respectively, "men's, women's and children's wearing apparel, namely, jackets, ski wear jackets and two piece suits, casual wear jackets, pants, shorts, one piece jump suits and snow suits, hats, gloves, coats, rain coats, ponchos, swamp coats and slickers, sweaters, tee shirts, rompers, overalls, vests, sweat shirts, skirts, swim wear, jogging wear, leotards, culottes, skirts and pedal pushers"² and "men's, ladies', boys' and children's wearing apparel - namely, sweaters, shirts, shorts, pants, T-shirts, outer jackets, vests, blouses, dresses, jumpers, ski pants, ski jackets, hooded jackets, jeans, over vests, scarves, toques, gloves, mittens and bandeaus,"³ that, if applicant's mark were used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

commerce. Applicant filed an amendment to allege use and specimens on May 18, 1996, alleging dates of first use and first use in commerce of November 10, 1995.

² Registration No. 1,369,091 issued November 5, 1985, to Queenswear International Ltd., in International Class 25. [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

³ Registration No. 1,294,532 issued September 11, 1984, to Queenswear International Ltd., in International Class 25. The registration includes a disclaimer of CANADA apart from the mark as a whole. [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

Additionally, the Examining Attorney has finally refused registration on the ground that the identification of goods is indefinite and she has required applicant to amend its identification of goods to replace the phrase "consisting of" with "namely."

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register under Section 2(d) on the ground of likelihood of confusion and reverse the refusal to register on the ground that the identification of goods is indefinite.

Addressing first the refusal regarding the identification of goods, we are unable to discern any real difference between the terms "consisting of" and "namely" in this particular context. Neither term leaves any doubt that the "upper body wear" item identified comprises the totality of such items covered by the recitation of goods. Thus, we reverse the refusal to register on the ground that the identification of goods is indefinite.⁴

⁴ We note, as did the Examining Attorney, that the heading of applicant's appeal brief includes a recitation of the goods that substitutes the word "namely" for the phrase "consisting of." Further, applicant did not address in its brief the requirement for a definite identification of goods. While it is unclear, it would appear that applicant intended, by this filing, to comply with the Examining Attorney's requirement. In view of our decision herein, there is no need for us to determine whether this constitutes an amendment to the identification of goods and the identification of record retains the phrase "consisting of." We add, however, that the Examining Attorney could have requested clarification of applicant's intent since an amendment that complied with her requirement would have rendered the

Turning to the refusal to register on the ground of likelihood of confusion, we note that 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 goods include several items of clothing that are identical to those listed in each of the cited registrations. A substantial number of the non-identical items of clothing in this application and the cited registrations are clearly closely related clothing and outerwear items. It is not necessary that all of the parties' goods be the same, similar or related; it would be sufficient if only one item identified in the application was the same or closely related to one item listed in the cited registration.

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

issue moot. Simply claiming that the amendment is untimely and refusing to consider it is counter-productive to the resolution of the issues in this case. Applicant may comply with an outstanding requirement at any time prior to final decision in an appeal.

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.

We are not persuaded that the goods of the parties and the trade channels are different by applicant's argument that applicant's goods are limited to clothes for golfers and are sold only in golf specialty shops; that golfers are discerning purchasers; and that registrant's clothing items are items of apparel for the general consumer and are available in chain and retail department stores. The cited registrations are broadly worded and, with the exception of certain individual items, such as "swim wear" and "jogging wear," contain no limitations to the identifications of goods. Thus, both of these registrations must be read to encompass clothing for golfers, such as that identified in this application. Nor are the channels of trade for applicant's golfing clothes, as identified, limited to sale in golf specialty shops. 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 chain and department stores and golf specialty shops. *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.

Considering, next, the marks, we note the 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, applicant's word mark differs from registrant's word mark, ALTO, by the single final letter "S." Applicant contends that this "S" significantly changes the connotation and commercial impression of its mark because ALTOS "is an aviation slang and was derived from the terms 'altostratus' and 'altocumulus'"; that "ALTOS is simply an English based fanciful term, which bears a meteorological connotation, and which generally evokes images of weather and atmospheric elements such as clouds, rain or strati [and, thus,] such connotation leads a viewer to conclude that the product has weather related design

considerations"⁵; that, on the other hand, as the term ALTO is a range of a singing voice, registrant's mark ALTO "evokes musical connotations." While applicant has quoted dictionary definitions of cloud types and of the musical connotation of "alto," applicant has provided no support in this record for its contention that ALTOS would be perceived as a "meteorological" term either by itself or when considered in connection with the goods identified in the application, or that, in connection with the registrant's identified clothing items, ALTO would be perceived as a "musical" term. Rather, we believe that regardless of whether ALTO is perceived to have a musical connotation, consumers would perceive of registrant's mark ALTO as an arbitrary term in connection with clothing. Further, applicant's mark is likely to be perceived as merely the plural version of registrant's arbitrary mark. As such, it is substantially the same in appearance, sound and

⁵ Applicant has submitted with its brief copies of other registrations it owns for marks which applicant alleges are names of clouds to establish that it owns a family of marks associated with clouds. The Examining Attorney discusses but does not object to this untimely filing, thus, we will consider these copies of applicant's registrations to be part of the record before us. However, applicant has not established that its marks comprise a family of marks and we find, further, that such a line of reasoning is not relevant to our consideration as none of those marks form any part of the mark herein. See, *Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992).

connotation to registrant's mark. Both marks engender substantially similar commercial impressions.⁶

We draw the same conclusion with respect to registrant's second mark, ALTO CANADA and design. The term ALTO is clearly the dominant portion of this mark. CANADA merely modifies the principal term ALTO, appearing to describe a subset of ALTO products, namely those originating in Canada. The design portion of the mark promotes the dominance of the term ALTO. ALTO appears in dark letters which are above and significantly larger than the term CANADA and the line design serves to underline and outline the word portion of the mark and point to the term ALTO, thereby enhancing its dominance.

In this case, we find that the parties' marks are substantially similar in sound, appearance and connotation.

Further, the test for 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

⁶ Applicant contends, also, that its mark is further distinguished from registrant's marks because SUN MOUNTAIN SPORTS, its corporate name and allegedly a registered mark, always appears on hang tags affixed to the goods in close proximity to the mark ALTOS. This argument is unavailing as we must consider only the applied-for mark, which does not include SUN MOUNTAIN SPORTS.

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). Viewing the marks in their entirety, we believe that any distinctions created by the additional letter "S" in applicant'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 the parties' marks are substantially similar.

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

Decision: The refusal under Section 2(d) of the Act is affirmed. The refusal on the ground that the identification of goods is indefinite is reversed.

R. F. Cissel

P. T. Hairston

Serial No. 74/673,773

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