

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

AUG. 31, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

No Fear, Inc.
v.
Steven Matthew Day

Opposition No. 102,129
to Application No. 74/714,827
filed on August 14, 1995

Kit M. Stetina, William J. Brucker and Darren S. Rimer of
Stetina, Brunda, Garred & Brucker for opposer.

Steven Matthew Day, *pro se*.

Before Cissel, Walters and Chapman, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

No Fear, Inc. filed its opposition to the application
of Steven Matthew Day to register the mark NO SPILLS, NO
THRILLS for "clothing, namely, T-shirts and sweatshirts,
footwear and head wear" in International Class 25.¹

¹ Application Serial No. 74/714,827, filed August 14, 1995, based upon
an allegation of a bona fide intention to use the mark in commerce in
connection with the identified goods.

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered NO FEAR marks noted below as to be likely to cause confusion, deception or mistake under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d).

Registration No. 1,855,031² for the mark NO FEAR for various jewelry, clothing and footwear items, including T-shirts, sweatshirts, visors, sandals and shoes.

Registration No. 1,737,420³ for the mark shown below for various items of wearing apparel, including, T-shirts, sweat shirts, hats and visors; and for surfboards, skateboards and various items used in connection therewith.

The image shows the words "NO FEAR" in a very bold, black, hand-drawn or stencil-like font. The letters are thick and have a slightly irregular, textured appearance, with some ink bleed-through or shadowing at the bottom of the letters. The words are stacked vertically, with "NO" on top and "FEAR" below it.

² Registered September 20, 1994, in International Classes 14 and 25.

³ Registered December 1, 1992, in International Classes 16, 25 and 28. Affidavit under Section 8 accepted.

Registration No. 1,842,402⁴ for the mark shown below for footwear.

The logo consists of the words "NO" and "FEAR" stacked vertically. Both words are written in a bold, black, hand-drawn, sans-serif font. The letters are slightly irregular and have a rough, textured appearance.

Registration No. 1,856,752⁵ for the mark shown below for decals and for various items of wearing apparel, including T-shirts, sweatshirts, visors, shoes and caps.

This logo is identical to the one above, featuring the words "NO" and "FEAR" stacked vertically in a bold, black, hand-drawn, sans-serif font.

⁴ Registered June 28, 1994, in International Class 25.

⁵ Registered October 4, 1994, in International Classes 16 and 25.

Opposer also alleges prior use of "a plurality of variations of the NO FEAR trademark, all conveying an 'absence of fear' for wearing apparel."

Applicant, in his answer, denied the salient allegations of opposer's claim. Also in his answer, applicant admits that opposer markets a variety of wearing apparel; that opposer has used the mark NO FEAR and variations of the NO FEAR mark, "all conveying 'an absence of fear,'" in connection with wearing apparel; that opposer owns the four pleaded registrations; and that the channels of trade for opposer's and applicant's goods would be the same. Applicant asserts that his proposed mark, NO SPILLS, NO THRILLS, is not similar to opposer's NO FEAR mark and does not, and is not intended to, convey "an absence of fear"; and that his mark "conveys the message that it is okay to be awkward and fall down, in fact, it can be thrilling."

The Record

The record consists of the pleadings; the file of the involved application; excerpts from printed publications made of record by opposer's notice of reliance; by stipulation of the parties, the discovery deposition by opposer of applicant, Steven Matthew Day, with accompanying

exhibits; and the testimony deposition by opposer of Marty Moates, opposer's vice president of trademark security, with accompanying exhibits. Applicant filed no evidence and took no testimony. Both parties filed briefs on the case, but a hearing was not requested.

The Parties

Opposer, through its vice president for trademark security, Marty Moates, testified that it has used the NO FEAR mark on a variety of goods, principally wearing apparel, since 1990; that 35% of opposer's sales are imprinted T-shirts; that opposer's annual sales for the years 1993 to the present are over \$100 million⁶; and that opposer spends about \$12 million annually on promotion. Mr. Moates stated his opinion that opposer's NO FEAR mark is famous.

Opposer promotes its products through brand imaging, *i.e.*, its advertising promotes a certain image, rather than showcasing the product or NO FEAR trademark. In this regard, opposer sponsors athletes in a variety of different sports, for example, surfing, motor sports, soccer, and golf; and produces a number of different types of

⁶ It is not clear from the record whether this figure includes sales outside the United States, nor is it clear whether such sales are for goods bearing only the NO FEAR mark, or whether they include sales of products under all of opposer's marks.

promotional materials, including, for example, a book of photographs and text entitled "Don't Let your Fears Stand in the Way of Your Dreams." The promotional materials in the record, rather than including opposer's marks, showcase the sponsored athletes and their sports, and include themes such as "Focus," "Face your Fears," "Live your Dreams," "Victory," and "Crash and Burn."

Mr. Moates testified that opposer has approximately 36 "NO" derivative marks, characterizing them as a "family" of marks. He testified that opposer uses these derivative marks to a lesser extent than its NO FEAR mark, and that these marks include NO RISK, NO TEARS, NO CLUE, NO WHERE, NO DOUBT, KNOW, K-N-O-W, FEAR, NO WAY, NO CLOTHING, NO RAGE, FEAR NO BEER, NO LIMITS, FEAR NO FISH, NO BULL, NO FAIR, NO LIMITS, NO NAME, and NO VIOLENCE.

Applicant testified that he has not produced or sold any goods under the mark he seeks to register, nor has he made any formal business plans to do so. Applicant testified that, at the time he filed his trademark application, he had no knowledge of opposer's company or products.

Analysis

Inasmuch as opposer's registrations have been made of record through the testimony of opposer's witness and, further, that applicant admits opposer's ownership of the four originally pleaded registrations, 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 of likelihood of confusion under Section 2(d) must be 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. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Key considerations in this case are the similarities between the marks, the similarities between the goods and services, and the channels of trade. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

With respect to the goods of the parties, we observe that there is a substantial overlap in the goods identified in the application and in the pleaded registration. Thus, we conclude that the goods of the parties are, in part, identical.

Further, not only are both opposer's and applicant's identifications of goods broadly worded, without any limitations as to channels of trade or classes of purchasers, but applicant has admitted that the channels of trade for the parties' goods are likely to be the same. We must presume that the goods of applicant and opposer will be sold in all of the normal channels of trade to all of the usual purchasers for goods of the type identified. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). We therefore conclude that the channels of trade and class of purchasers of the parties' goods will be the same.

Turning to the marks, the proper test for determining the issue of likelihood of confusion is whether the commercial impressions engendered by the marks are similar. Due to the consuming public's fallibility of memory, the emphasis is on the likely 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); and *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975). Further, while we must base our determination on a comparison of the marks in their entireties, we are guided,

equally, by the well-established principle that, in articulating reasons for reaching a conclusion on the issue 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).

Opposer contends that the message conveyed by its marks is "that a person must push himself or herself to the edge to be all he or she can be," whereas the message conveyed by applicant's mark is that "'if you're not going to fall[,] you're not going to have a thrill[,] you have to push yourself.'" Noting that "there are obvious differences in the sight and sound" of the parties' marks, opposer contends that the messages are essentially the same and, therefore, that their connotations and commercial impressions are the same. Opposer also contends that it owns a family of "NO" marks, and that its NO FEAR mark is famous.

Applicant contends, on the other hand, that neither the connotations nor commercial impressions of the parties' marks are similar. He states "that none of Opposer's marks ... uses the word 'No' twice and that all but two of the

marks contain only two words (Fear No Beer and Fear No Fish being the exceptions"; that "[a]pplicant's mark contains four words, and is in fact a far more complex construct of English than any of the No Fear family of marks"; that "while each of Opposer's marks can be construed as a command, or at the very least a statement about the way one should be (Fear is for losers), Applicant's mark is an observation about the way things are."

Regarding opposer's contention that its NO FEAR mark is famous, notwithstanding applicant's remarks in his brief, opposer's witness' mere conclusory statement that its mark is famous, along with raw sales and advertising figures, is simply not sufficient in this case to establish that the mark NO FEAR is famous and, thus, entitled to "a wide latitude of legal protection." *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), *cert. denied*, 113 S.Ct. 181 (1992). *See, General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1277 (TTAB 1992). However, based on the evidence of record and applicant's remarks, we can conclude that opposer's NO FEAR mark is highly promoted and likely to be well known at least among certain sports-conscious portions of the general consuming public.

Similarly, the evidence of record does not support opposer's assertion that it owns a family of marks. Although opposer does present some evidence that it uses various marks beginning with the word "NO," it is well-settled that the mere ownership of a number of marks sharing a common feature is insufficient to establish ownership of a family of marks characterized by the feature in the absence of evidence that the various marks said to constitute the family are used and promoted together in such a manner as to create among purchasers an association of common ownership based upon the family characteristic. See, *Hester Industries Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1646 (TTAB 1987). Mr. Moates' testimony and the promotional materials and copies of registrations submitted by opposer are insufficient to demonstrate that the general public would regard the initial word NO in applicant's mark as indicating that the mark is a member of a family of marks owned by opposer. See, e.g., *Hester Industries Inc. v. Tyson Foods Inc.*, *supra*; *Consolidated Foods Corp. v. Sherwood Medical Industries Inc.*, 177 USPQ 279, 282 (TTAB 1973); *Polaroid Corp. v. American Screen Process Equipment Co.*, 166 USPQ 151 (TTAB 1970); and *Polaroid Corp. v. Richard Mfg. Co.*, 341 F.2d 150, 144 USPQ 419, 421 (CCPA

1965). *Cf.*, *J&J Snack Foods, Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991).

Further, the mere fact that NO appears as the initial word in applicant's and opposer's marks is not, of itself, a sufficient basis on which to find likelihood of confusion. *See, Cutter Laboratories, Inc. v. Air Products and Chemicals, Inc.*, 189 USPQ 108 (TTAB 1975). As opposer acknowledges, there are obvious sight and sound differences between the marks. Thus, we are left to consider the connotations and overall commercial impressions of opposer's NO FEAR mark and applicant's NO SPILLS, NO THRILLS mark. Both the evidence of record and the plain meaning of opposer's mark, NO FEAR, establish its connotation either as a statement that one is without fear, or as an admonition to approach an activity, or life in general, without fear. Both connotations imply the further admonition to engage oneself, or to "live" one's life, to the fullest extent possible, or the statement that one is doing so.

The plain meaning of applicant's mark, NO SPILLS, NO THRILLS, is that if one does not take any spills, *i.e.*, falls, one will not experience any thrills. This statement includes the further implication that one must make mistakes to experience excitement.

We find these connotations of the parties' marks to be distinctly different. While both opposer's mark and applicant's mark are statements or admonitions applicable to either a specific activity or life in general, this similarity is insufficient to warrant a conclusion that their respective connotations are the same, or even substantially similar.

We find that when opposer's and applicant's marks are considered in their entirety, they engender distinctly different overall commercial impressions. The differences between the marks clearly outweigh the similarities highlighted by opposer, as discussed herein.⁷ *Cf., In re Kopy Kat, Inc.*, 498 F.2d 1379, 182 USPQ 372 (CCPA 1974) [while parties' marks have similar theme, registrant's development of theme differs from appellant's development of theme; registrant does not have exclusive rights with respect to every development of theme or every use of the words], and *Roush Bakery Products Co. v. Ridlen*, 203 USPQ 1086 (TTAB 1979 [petitioner not entitled to protection

⁷ Even if we were to conclude, which we do not, that applicant's mark might bring to mind opposer's mark, this does not necessarily mean that consumers would be confused into believing that the two marks indicate the same source of origin. See, *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) [the fact that one mark may bring another to mind does not in itself establish likelihood of confusion as to source]. See also, *Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717 (TTAB 1987).

against the registration of any and all marks having similar theme or motif for any or all food products or related services].

We conclude that opposer has not met its burden of proof with respect to its claim of likelihood of confusion. Having considered the relevant *duPont* factors, we conclude that the differences between the parties' marks, despite the identity and related nature of the goods and the channels of trade, are sufficient that purchasers are not likely to be confused. The likelihood of confusion claimed by opposer amounts to only a speculative, theoretical possibility. As stated by our primary reviewing court:

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). Simply put, a consumer familiar with opposer's NO FEAR mark on T-shirts is not likely to believe, upon encountering applicant's NO SPILLS, NO THRILLS mark on T-shirts, that the goods originate or are associated with the same entity.

Decision: The opposition is dismissed.

R. F. Cissel

C. E. Walters

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board