

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Yves Levenson

Serial No. 75/119,966

Ezra Sutton for Yves Levenson

Nicholas K. D. Atree, Trademark Examining Attorney, Law
Office 109 (Chris Pedersen, Managing Attorney)

Before Simms, Hohein and Wendel, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Yves Levenson (applicant) has appealed from the final refusal of the Trademark Examining Attorney to register the mark DIVA for ladies' footwear.¹ The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 995,333, issued October 8, 1974 (renewed), for the mark show below for

¹ Application Serial No. 75/119,966, filed June 17, 1996, based upon applicant's allegation of use in commerce since at least as early as 1985.

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"articles of clothing--namely, neckties, scarves, and men's belts." The last listed owner of this registration is Diva Cravatte S.r.l., an Italian corporation.

It is the applicant's position that his goods (ladies' footwear) travel in different channels of trade and are sold in different stores and different departments of the same stores from registrant's neckties, scarves, and men's belts. Applicant also argues that the same company does not normally make all of these goods. Applicant also contends that there have been no instances of actual confusion despite use of applicant's mark since 1985.

Applicant places considerable reliance upon the fact that the cited registration issued over another registration covering the mark "Diva" in somewhat stylized form for various items of women's and young ladies' clothing. That registration, originally cited by the

Examining Attorney, was withdrawn when applicant pointed out that it had expired. It is applicant's position that the cited registration, for what applicant regards as "men's" clothing items,² is not likely to cause confusion with applicant's mark for ladies' shoes because that registration itself was allowed despite the existence of the now-expired registration for women's and ladies' items of clothing.

As the Examining Attorney pointed out, applicant has not argued that the respective marks are dissimilar, but has focused his arguments on the dissimilarity of the goods and the channels of trade. With respect to the goods, the Examining Attorney argues that the goods being compared need not be identical or directly competitive in order for there to be a likelihood of confusion; they need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from the same source. The Examining Attorney argues that the goods listed in the cited registration should be construed to include items of clothing for women as well as men because

² As the Examining Attorney had pointed out, the registration covers "neckties, scarves, and men's' belts." The neckties and

the description of goods uses the term "men's" only as a modifier for the last listed item, belts. That is to say, the scarves listed in the cited registration could include scarves for women as well as for men, the Examining Attorney argues. With respect to the allowance of the cited registration over an earlier now-expired registration, it is the Examining Attorney's position that prior actions of different Examining Attorneys should not affect an Examining Attorney's duty to disallow an application that is unregistrable under Section 2(d) of the Act.

Upon careful consideration of this record, we agree with Examining Attorney that confusion is likely. First, although applicant has offered no argument with respect to any dissimilarity between the marks, we observe that one feature of a mark may be recognized as more significant in creating a commercial impression than another. See *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this regard, we agree with the Examining Attorney that greater weight should be placed on the word portion DIVA in the registered mark because it may be used in identifying and calling for registrant's goods.

scarves are not limited with respect to the sex for which they are made or to whom they are sold.

Also, in likelihood-of-confusion cases such as this, the focus should be on the recollection of the average purchaser of these goods and not on a side-by-side comparison of the respective marks. A purchaser may retain only a general, rather than a specific, impression of a particular trademark. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Even if purchasers were to recognize any differences in the respective marks, they may believe that the trademark owner has simply modified its mark somewhat.

With respect to the goods, we believe that ladies' footwear (i.e., shoes), although obviously different from neckties, scarves and men's belts, are sufficiently related that a purchaser, aware of registrant's DIVA and design neckties, scarves, and men's belts, who then encounters applicant's DIVA ladies' footwear, perhaps in the same clothing store, will believe that all these items of apparel come from the same source. See, for example, *Cambridge Rubber Co. v. Cluett, Peabody & Co., Inc.*, 286 F.2d 623, 128 USPQ 549 (CCPA 1961)(women's boots vs. men's and boys' underwear); *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985)(women's shoes vs. outer shirts); *In re Mercedes Slacks, Ltd.*, 213 USPQ 397 (TTAB 1982)(hosiery vs. trousers); *In re Cook United, Inc.*, 185 USPQ 444 (TTAB

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1975)(men's suits, coats and trousers vs. ladies' pantyhose and hosiery); and Esquire Sportswear Mfg. Co. v. Genesco Inc., 141 USPQ 400 (TTAB 1964)(girdles vs. men's slacks). If we had any doubt in this matter, such doubt should be resolved in favor of the prior user and registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). We should also point out that the fact the cited registration was issued over another now-expired registration is of little moment to the question of whether consumers are or will be confused as the result of use of the respective marks in the marketplace.

Decision: The refusal of registration is affirmed.

R. L. Simms

G. D. Hohein

H. R. Wendel
Administrative Trademark
Judges, Trademark Trial and
Appeal Board