

Hearing:  
March 31, 1998

Paper No. 43  
XXX/JQ

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB APRIL 30, 99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Seattle Pacific Industries, Inc.  
v.  
Brieland Professional Graphics, Ltd.

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Opposition No. 86,368  
to application Serial No. 74/110,275  
filed on October 29, 1990

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Paul T. Meiklejohn and Jane A. Hellmann of Seed and Berry  
for Seattle Pacific Industries, Inc.

Gregory J. Nelson and Joseph H. Roediger of Nelson &  
Roediger for Brieland Professional Graphics, Ltd.

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Before Cissel, Quinn and Walters, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Brieland Professional  
Graphics, Ltd. to register the mark DRY HEAT for "imprinted  
sportswear, namely shirts, tank tops, sweatshirts, t-shirts  
and caps."<sup>1</sup>

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<sup>1</sup> Application Serial No. 74/110,275, filed October 29, 1990,  
alleging a bona fide intention to use the mark in commerce.

Registration has been opposed by Seattle Pacific Industries, Inc. under Section 2(d) of the Trademark Act on the ground that applicant's mark, if applied to applicant's goods, would so resemble opposer's previously used and registered mark HEET for "men's, women's and children's clothing and sportswear garments, namely jeans, blouses, shirts, jackets, slacks, pants, tee-shirts [and] sweaters",<sup>2</sup> and opposer's previously used and registered mark shown below

for "men's, women's and children's clothing and sportswear garments, namely, shirts, slacks, pants, blouses, jackets, tee-shirts, sweaters, jeans, and hats"<sup>3</sup> 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; trial testimony, with related

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<sup>2</sup> Registration No. 1,363,481, issued October 1, 1985; Section 8 affidavit filed.

<sup>3</sup> Registration No. 1,369,129, issued November 5, 1985; Section 8 affidavit filed.

exhibits, taken by each party;<sup>4</sup> and certified copies of opposer's pleaded registrations introduced by way of opposer's notice of reliance.<sup>5</sup> Both opposer and applicant filed briefs on the case and an oral hearing was held.

Opposer, according to the testimony of Mr. Ritchey, has been engaged in the manufacture, distribution, marketing and selling of men's, women's and children's clothing, including sportswear, since August 1984. Opposer's marks have been promoted in a wide range of media, and opposer has policed its marks through the filing of a variety of actions against the owners of other marks. While a protective order precludes us from disclosing the extent of sales and advertising expenditures under the mark, suffice it to say that opposer has enjoyed considerable success and that the mark has been extensively promoted. Mr. Richey testified that opposer's mark is arbitrary, and is intended to reflect an active, fun lifestyle and attitude.

Applicant took the testimony of Michael Helland, its president and chief executive officer. According to Mr. Helland, applicant is a t-shirt manufacturer and wholesaler. Applicant's shirts bear a variety of silk screened graphic

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<sup>4</sup> Opposer's testimony of its president, Stephen R. Ritchey, was submitted in the form of a declaration pursuant to the parties' stipulation under Trademark Rule 2.123(b).

<sup>5</sup> Opposer apprised the Board that one of its registrations had been amended, and a copy of the amended registration was submitted to the Board.

designs, with themes ranging from southwest to tropical. One of the themes is the BUT IT'S A DRY HEAT series, based on the humorous phrase "but it's a dry heat," popular in Arizona and throughout the southwest.<sup>6</sup> The gist of the phrase is that the summers in that region are extremely hot, but the lack of humidity makes the high temperatures more tolerable. The shirts bear graphic designs showing skeleton figures engaged in a variety of activities (e.g., swimming, golfing, surfing) in a desert landscape. The shirts are marketed primarily as souvenirs, and are sold through gift shops and t-shirt shops. Mr. Helland testified that applicant probably would not use DRY HEAT standing alone; Mr. Helland did indicate, however, that DRY HEAT is used by applicant as a shorthand way of referring to its "but it's a dry heat" designation.

In view of opposer's ownership of valid and 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).

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<sup>6</sup> Applicant, on August 3, 1998, filed a request that the Board take judicial notice of applicant's Registration No. 2,163,837, issued June 9, 1998, for the mark ...BUT IT'S A DRY HEAT for clothing items. Opposer has objected to the request.

The Board does not take judicial notice of registrations issued by the Office. *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290 (TTAB 1986). See also: TBMP § 712.01. Accordingly, the request is denied. We hasten to add, however,

Our determination under Section 2(d) is based on an analysis of all of the probative factors 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.

We turn first to the goods at issue, keeping in mind that the registrability of applicant's mark must be evaluated on the basis of the identification of goods set forth in the involved application and the registration of record, regardless of what the record may reveal about the particular nature of the respective goods. Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). In the present case, when the goods are compared under such constraints, they are, at least in part, legally identical. Both parties sell t-shirts, shirts and caps (hats). Further, the remainder of the goods are all closely related clothing products. In this case, neither opposer's registrations nor applicant's application contains any limitations as to the types of stores where the clothing may be sold. The parties' goods are presumed to be sold in the

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that even if the registration were considered, this evidence

same channels of trade to the same classes of purchasers. In addition, the record shows that the parties' goods are relatively inexpensive, suggesting that they are purchased with nothing more than ordinary care.

We next turn to compare the parties' marks, HEET and DRY HEAT. Given the identity, at least in part, between the parties' goods, we note, at the outset, that when marks are applied to identical goods, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We find that the marks, when considered in their entirety, are similar in sound (HEET and HEAT being phonetic equivalents) and appearance. In comparing the marks, it is important to note that applicant's mark sought to be registered is DRY HEAT in typed letters, not the entire phrase that is depicted on its clothing items. We agree with opposer that the humorous meaning conveyed by the designation "...but it's a dry heat" essentially is lost when only the words "dry heat" are used. The similarities in sound and appearance outweigh whatever difference there is in connotation between the marks. Simply put, the marks HEET and DRY HEAT convey sufficiently similar overall

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would not persuade us to reach a different result in this case.

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commercial impressions that, if applied to identical or substantially similar goods, confusion would be likely to occur in the marketplace. In finding likelihood of confusion, we have kept in mind the normal fallibility of human memory over time and the fact that consumers retain a general rather than a specific impression of trademarks encountered in the marketplace. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992).

Opposer contends that its mark is "strong." Indeed, opposer has enjoyed success with the goods sold under the mark HEET, and opposer has undertaken significant promotional activities. The record also shows that opposer has policed its mark. Further, the mark HEET would appear to be arbitrary and the record is devoid of evidence of any third-party uses or registrations of similar marks in the clothing field. Although we are willing to accept opposer's claim that its mark is strong in the field, we do not accord, however, the status of "famous mark" to the mark HEET based on the record presently before us. Cf. *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

To the extent that any of applicant's contentions raise a doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior user and registrant.

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In re Martin's Famous Pastry Shoppe Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We conclude that consumers familiar with opposer's clothing items sold under its mark HEET would be likely to believe, upon encountering applicant's mark DRY HEAT for its clothing items, that the goods originated with or were somehow associated with or sponsored by the same entity.

Decision: The opposition is sustained and registration to applicant is refused.

R. F. Cissel

T. J. Quinn

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