

Hearing:
May 28, 1998

Paper No. 30
PTH

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

FEB. 12, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Osage Footwear, Inc.
v.
Jivago, Inc.

Opposition No. 96,391
to application Serial No. 74/467,467
filed on December 9, 1993

Lawrence E. Laubscher, Jr. of Laubscher & Laubscher for
Osage Footwear, Inc.

Robert G. Weilacher and Helen Hill Minsker of Beveridge,
DeGrandi, Weilacher & Young, L.L.P. for Jivago, Inc.

Before Seeherman, Quinn and Hairston, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Jivago, Inc. to
register the mark shown below.¹

¹ Application Serial No. 74/467,467 filed December 9, 1993,
alleging a bona fide intention to use the mark in commerce. The
application contains the following description of the mark: "The

Registration has been opposed by Osage Footwear, Inc. as to the goods in class 25, i.e., "clothing, namely, active wear, sports wear, fashion wear and belts" on the grounds that since prior to the filing date of applicant's application, opposer and its predecessors-in-interest have used the following registered marks:

for "shoes;"²

mark consists of two letters 'J' connected, intertwined and facing one another."

² Registration No. 873,488 issued July 22, 1969; renewed.

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for "footwear;"³

for "shoes;"⁴ and

for "shoes, pants, shorts, shirts and socks;"⁵ and that applicant's mark, if used in connection with the identified goods, would so resemble opposer's previously used and registered marks as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations of the notice of opposition.

As a preliminary matter, we note that opposer, in its brief on the case, states that for purposes of likelihood of

³ Registration No. 991,463 issued August 20, 1974; renewed.

⁴ Registration No. 1,408,653 issued September 9, 1986; Sections 8 & 15 affidavit filed.

⁵ Registration No. 1,584,765 issued February 27, 1990; Sections 8 & 15 affidavit filed.

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confusion, it is relying on pleaded Registration Nos. 873,488 and 1,408,653; Registration No. 1,951,997 for the mark

for shoes,⁶ and the unregistered mark reproduced below for footwear and clothing.⁷

While Registration Nos. 1,796,452 and 1,951,997 were not pleaded in the notice of opposition, applicant has not objected thereto. However, applicant has objected to the unregistered mark, contending that it was not informed of opposer's intention to rely upon this mark. Applicant's objection is well taken. Inasmuch as this mark was not pleaded in the notice of opposition nor was it the subject

⁶ Issued January 23, 1996 and containing the following statement: The mark consists of a design including a pair of parallel wavy lines applied to the side of applicant's shoes.

⁷ As to the other pleaded registrations and opposer's Registration No. 1,796,452 for the mark J BAR J and design for "shoes and children's western boots" (issued October 5, 1993), opposer states, in its brief, that these registrations are only

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of an amended opposition, opposer may not, for the first time, introduce a photograph of a shoe box which bears the mark into the record by way of an exhibit to opposer's declaration. To rule otherwise would subject applicant to undue surprise and prejudice. Accordingly, the photograph of this shoe box does not form part of the record, and we have not considered it in making our decision.

The record consists of the pleadings; the file of the involved application; declarations, with exhibits, submitted by stipulation of the parties; and certified copies of opposer's pleaded registrations and Registration Nos. 1,796,452 and 1,951,997 submitted as exhibits to opposer's declaration. Both parties filed briefs on the case and an oral hearing was held.

The record shows that opposer sells footwear and clothing primarily through retail stores, including department stores and specialty stores. Opposer's gross sales for 1995 and 1996 were approximately \$25 million. Opposer advertises and promotes its products through catalogs, posters, and displays. Applicant spent approximately \$600,000 in 1995 and 1996 on advertising and promotion.

Applicant currently markets fragrances, various beauty aids and lotions under the mark sought to be registered. It

being relied on by opposer as evidence of the different

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is applicant's intent to market clothing and jewelry as a complementary fashion/accessory line to applicant's beauty aids and fragrances. Applicant adopted its mark to symbolize its founder's belief and perceptions in holistic philosophy, spirituality, and human sexuality. The mark is intended to evoke female and male essences. Applicant refers to its mark in promotional literature for its fragrances as the "KISSING J's" logo.

Inasmuch as certified copies of opposer's pleaded registrations, showing status and title, are of record, 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).

With respect to the issue of likelihood of confusion, two key considerations are the similarities between the marks and the similarities between the goods.

The mark applicant seeks to register and the marks relied on by opposer for purposes of likelihood of confusion are basically design marks. Thus, the question of likelihood of confusion must be determined primarily on the basis of the marks' visual impressions. See *Ariens Company v. Kubota Tekko Kabushiki Kaisha (Kubota, Ltd.)*, 189 USPQ 46 (TTAB 1975).

appearances of "JJ."

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In this case, applicant's mark is a highly stylized abstract design which simply looks different and is easily distinguishable from opposer's marks, one of which consists of two parallel wavy lines and a second which features two front-facing "J's" with a jack-in-the-box design. Even when applicant's mark is compared to opposer's registered mark consisting of two front-facing "J's" alone, the visual impressions are strikingly different.

We should add that because of the highly stylized nature of applicant's mark, it is not capable of being spoken. However, we agree with applicant that as a result of its promotion, purchasers would be likely to refer to the mark as "KISSING J's." This is in contrast to opposer's marks, which if vocalized, would be done so as "JJ" because it is an acronym for opposer's Jumping Jack Shoes division and because the words JUMPING JACKS appear in one of opposer's marks.

For the above reasons, we find that the marks are so distinctly different in appearance that they create separate and different commercial impressions. Further, while the goods involved herein, i.e., clothing and belts and footwear and shoes are related, such goods are obviously not identical. Accordingly, the contemporaneous sale of these products under the dissimilar marks here is not reasonably likely to cause confusion. In particular, purchasers are

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not likely to regard applicant's mark as a variant mark of opposer. We should add that even if opposer's unregistered "JJ" mark had been considered, the result in this case would be the same.

Decision: The opposition is dismissed.

E. J. Seeherman

T. J. Quinn

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial and
Appeal Board