

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      FEB. 9, 00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Underground Sounds Direct Marketing, Inc.

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Serial No. 75/126,661

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Alvin Wallace, president and CEO of applicant, *pro se* for applicant.

Katherine Stoides, Trademark Examining Attorney, Law Office 109 (Ronald Sussman, Managing Attorney).

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Before Walters, Wendel and Rogers, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Underground Sounds Direct Marketing, Inc. has filed a trademark application to register the mark THUG WEAR for "clothing, namely, shirts, pants, hats, jackets, jerseys, T-shirts, vests and shorts."<sup>1</sup> The application includes a disclaimer of WEAR apart from the mark as a whole.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15

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U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered marks shown below, owned by the same registrant, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.



- Registration No. 1,597,598, issued May 22, 1990, to Thunderwear, Inc. for "footwear," in International Class 25. [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

Thuggs

BY THUNDERWEAR

- Registration No. 1,542,651, issued June 6, 1989, to Thunderwear, Inc. for "footwear," in International Class

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<sup>1</sup> Serial No. 75/126,661, in International Class 25, filed June 27, 1996, based on use in commerce, alleging dates of first use and first use in commerce as of May 28, 1996.

25. [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

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.

Our determination under Section 2(d) is 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. *See, In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn, first, to a determination of whether applicant's mark and the registered marks, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether applicant's mark can be distinguished from registrant's marks when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under

the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See, *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant acknowledges, and we agree, that the THUG portion of its mark is similar to the THUGGS portion of registrant's marks (response filed April 1, 1997, p. 2). Regarding applicant's mark, we find the term THUG to be the dominant portion of the mark because it defines the "type" of WEAR and, further, WEAR is admittedly a merely descriptive term in connection with the identified goods.

Registrant's mark in Registration No. 1,597,598 consists of the word THUGGS within an inverted triangle with a distinctive abstract design. Despite the interesting nature of the design, we find that the word THUGGS is dominant in the mark and the inverted triangle design appears principally as background. Where both words

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and a design comprise a mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the goods. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

We also find the THUGGS portion of the mark in Registration No. 1,542,651 to be dominant. It appears larger than, and above, the phrase "BY THUNDERWEAR." Further, it appears to connote a particular line or brand of footwear presented by "Thunderwear."

Thus, we find that, considered in their entirety, the commercial impressions of applicant's mark and each of registrant's marks are significantly similar. This conclusion is further supported by the fact that the second term in applicant's mark is identical to the last syllable in THUNDERWEAR, which is registrant's name and appears in one of its registered marks.

We consider, next, the respective goods of applicant and registrant. It is quite true that the goods of applicant and registrant are different. However, it is

well-settled that the goods of an applicant and registrant need not be similar or even competitive in order to support a holding of likelihood of confusion, it being sufficient for the purpose if such goods are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that would give rise, because of the marks used thereon, to the mistaken belief that they emanate from or are in some way associated with the same source. *See, In re Kangeroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984), and cases cited therein.

In this regard, the Examining Attorney submitted copies of numerous third-party registrations that include in the identifications of goods both the clothing items identified in this application and footwear, as identified in the cited registrations. This is evidence that consumers are accustomed to seeing the same mark in connection with all of these goods.

Applicant argues that its goods are actually quite different from registrant's goods; and that applicant and registrant market their respective goods to different purchasers through different trade channels. However, it is a well established principle of trademark law that "the question of likelihood of confusion must be determined

based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-a-vis the goods and/or services recited in [the] registration, rather than what the evidence shows the goods and/or services to be." *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Both applicant's and registrant's goods are broadly identified, containing no limitations to the nature of the goods, the trade channels or the purchasers. Thus, we must presume that the goods of applicant and registrant are sold in all of the normal channels of trade to all of the usual purchasers for such goods. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). We find that the goods are sufficiently related that, if identified by significantly similar marks, confusion as to source or sponsorship is likely.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and registrant's marks, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods. Consumers familiar with registrant's marks for the identified goods are likely to believe that applicant's

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goods are a related line of clothing sponsored by registrant.

*Decision:* The refusal under Section 2(d) of the Act is affirmed.

C. E. Walters

H. R. Wendel

G. F. Rogers  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board