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Paper No. 9
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **LAC Basketball Club, Inc.**

Serial No. 75/445,760

Anil V. George for LAC Basketball Club, Inc.

Marlene M. Menard, Trademark Examining Attorney, Law Office 109
(**Ronald R. Sussman**, Managing Attorney).

Before **Cissel**, Quinn and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

LAC Basketball Club, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register the mark shown below for "clothing, namely, hosiery, footwear, T-shirts, sweatshirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, warm-up suits, jackets, parkas, coats, cloth

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bibs, head bands, wrist bands, aprons, boxer shorts, slacks, caps, ear muffs and gloves."¹



Registration has been refused under Section 2(d) of the Trademark Act on the ground that applicant's mark so resembles the marks shown below, all owned by the same registrant (Atlanta National League Baseball Club, Inc.), as to be likely to cause confusion:

Registration No. 845,032 for "jackets";²

The word "Braves" written in a stylized, cursive script font, slanted upwards to the right.

¹ Application Serial No. 75/445,760, filed March 6, 1998 based on an allegation of a bona fide intention to use the mark in commerce. Applicant has disclaimed the word "BUFFALO" and has claimed ownership of Registration Nos. 946,091 and 2,201,581.

² Issued February 27, 1968; combined Sections 8 and 15 filed.

Registration No. 1,562,115 for "clothing, namely, T-shirts, hats and shorts";³

The word "Braves" is written in a highly stylized, cursive script. The letters are thick and interconnected, with a decorative flourish at the end of the word.

Registration No. 1,596,052 for "clothing, namely, t-shirts, sweatshirts, jerseys, jackets, youth replica jerseys, sweaters, collar shirts, sweatpants, 3/4 sleeve baseball shirts, baseball caps, shorts, toddler suits, muscle shirts, baby bibs, and children's play suits."⁴

The word "Braves" is written in the same stylized cursive script as above. Below the word, there is a simple line drawing of a baseball bat and a baseball glove, positioned as if they are part of the brand's identity.

When the refusal was made final, applicant appealed. Briefs have been filed but an oral hearing was not requested.

As a preliminary matter, applicant, relying on *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 105 S. Ct. 658, 224 USPQ 327 (1985) and *In re The American Sail Training Association*, 230 USPQ 879 (TTAB 1986), among other cases, contends that the Section

³ Issued October 24, 1989; combined affidavits under Sections 8 and 15 filed.

⁴ Issued May 15, 1990; combined affidavits under Sections 8 and 15 filed. Both this registration and Registration No. 1,562,115 above include other classes. However, the refusal to register, as argued by the Examining Attorney, pertains only to the goods identified in Class 25 for each registration. Our decision in this case is accordingly limited to the goods in that class.

2(d) refusal is an impermissible collateral attack on applicant's prior Registration No. 2,201,581 for the mark BUFFALO BRAVES and design as shown below for the following goods: "Clothing, namely hosiery, footwear, T-shirts, sweat shirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, warm-up suits, jackets, parkas, coats, cloth bibs, head bands and wrist bands."⁵



It is applicant's position that the prior registration is "extremely similar" to the current application. Applicant argues that both of its marks contain the wording BUFFALO BRAVES, which is "the dominant portion of the marks"; that only the design portions are different; and that the application contains all of the goods identified in the registration with some additional goods in the application.

We disagree that the refusal to register constitutes a collateral attack on applicant's registration. To begin with, unlike the involved registrations in the cited cases, the registration relied on by applicant in this case is not

⁵ Issued November 3, 1998; the word BUFFALO has been disclaimed.

incontestable and, more important, it is not over five years old. In addition, the Section 7(b) presumptions accorded a registration afford prima facie rights in the mark shown therein as a whole, not in any individual component, and even then, only for the goods or services for which the mark is registered. See, e.g., *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, (Fed. Cir. 1987) and *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). The mark applicant now seeks to register is not the same mark as the mark previously registered by applicant. Moreover, the goods identified in the application are not the same as those in the prior registration, but instead include additional and different items of clothing. Each application for registration of a mark for particular goods must be separately evaluated. There is nothing in the statute which automatically entitles applicant to a registration for goods which are broader than those covered by the prior registration. *In re Loew's Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985) and *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, supra.

Turning to the likelihood of confusion analysis, we look to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the

similarity of the marks and the relatedness of the goods or services.

With respect to the goods, we note that a number of articles of clothing identified in the application, including jackets, t-shirts, hats shorts, jerseys and sweatshirts, are identical to those in the cited registrations. Applicant does not argue otherwise, but instead contends that purchasers of both applicant's and registrant's clothing are fans of professional basketball, fans of professional baseball, or collectors of sports memorabilia, and that these purchasers are sophisticated and knowledgeable about sports team names, sports marks and the different sources of the relevant goods. Applicant maintains that the identified clothing is sold in promotion of a particular sport and that relevant purchasers would recognize that the products are collateral to applicant's and registrant's primary services of sports entertainment.

We are not persuaded by applicant's arguments. The question of likelihood of confusion is determined on the basis of the identification of goods set forth in the application and registration, without limitations or restrictions as to the actual nature of the goods or services or the classes of purchasers which are not reflected therein. *J & J Snack Foods Corp. v. McDonalds' Corp.*, 932 F.2d 1460, 1464, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computers*

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Services Inc., 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

The application and cited registrations are for clothing, not any underlying sports activity. Applicant's presumptions about who the relevant purchasers are or what they would know or think when confronted with the respective marks on the goods as described in the application and registrations are not relevant. It must instead be presumed that while fans and sports collectors may be among the purchasers of these goods, in the absence of any specific restrictions in the application or registration as to the classes of purchasers, both applicant's and registrant's clothing would be purchased by customers of all types, including ordinary consumers. We also note that these goods are relatively inexpensive and therefore likely to be purchased by such consumers casually and on impulse, thus increasing the risk of confusion. See Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd., 774 F.2d 1144, 227 USPQ 541 (Fed. Cir. 1985).

We turn to a consideration of the marks, keeping in mind that when marks would appear on virtually identical goods or services, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. Century 21 Real Estate corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that the marks have been improperly dissected by the Examining Attorney. Applicant maintains that when properly evaluated, the marks are dissimilar in appearance, sound, meaning and commercial impression in that applicant's mark contains the additional word BUFFALO as well as design elements which are not present in the cited registrations. Contending that the word BUFFALO should not be disregarded merely because it has been disclaimed, applicant argues that BUFFALO is a "suggestive reference" to the City of Buffalo which, when combined with the depiction of the buffalo in its mark, "creates a double entendre." Applicant further argues that while the basketball design in its own mark is a suggestive reference to the sport of basketball, the tomahawk design in registrant's mark creates a "very different" suggestive reference to registrant's baseball team fans.

In evaluating the similarity of marks, our primary reviewing Court has stated that there is nothing improper in "examining each component of the mark" and giving appropriate weight to that component in reaching a conclusion based on consideration of the marks in their entirety. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir. 2000); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, supra; and *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). When we compare the marks in this case in their entirety, giving

appropriate weight to the components therein, we find that the marks are similar in sound and create substantially similar commercial impressions.

The dominant portion of both applicant's and registrant's marks is the word BRAVES. In fact, apart from the modest stylization of that term, in two of the three the cited registrations, the word BRAVES is essentially registrant's entire mark. Neither stylized lettering nor designs are sufficient to distinguish the respective marks and avoid confusion because those elements are not as likely to be noted or remembered as is the word BRAVES in these marks. The words in a mark are normally given greater weight because they would be used by purchasers to request the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Moreover, the word BUFFALO is not a distinguishing feature of applicant's mark. This word, while not ignored in the analysis, is admittedly geographically descriptive of applicant's goods and therefore of little significance as an indication of source. See *In re National Data Corp.*, *supra*. In addition, any possible "double entendre" associated with the word BUFFALO may enhance rather than diminish the likelihood of confusion. If anything, the association of the word "buffalo" with the animal rather than the city, when viewed in connection with other elements in the marks such as the word BRAVES, and the

representations of the feather headdress, buffalo, and tomahawk, all project Native American themes or images, thereby reinforcing the similar impressions that, as a whole, the marks create.

Finally, we note applicant's claim that its mark is "integrally linked to the city of BUFFALO, professional basketball, and the [NBA]"⁶ whereas the cited marks are "integrally linked to the city of Atlanta, professional baseball, and Major League Baseball." Applicant contends that the baseball team is known to the public as both the Atlanta Braves and as the Braves, "but has no connection or association with the city of Buffalo."⁷

In fact, as the Examining Attorney points out, applicant's own evidence (a printout from the NBA's website shown in exhibit 2 to applicant's response) refers to applicant's Buffalo Braves as simply "the Braves." It would seem from this evidence that

⁶ Applicant has submitted evidence regarding the history of the franchise and the evolution of its mark. The "NBA" publications applicant refers to on page 9 of its brief as having been submitted with its response to the first Office action are not in the application file. Regardless, none of this evidence presumably would do anything to distinguish the marks at issue in this case.

⁷ We note applicant's argument in its response to the first Office action (but not pursued in its appeal brief) that "many sports teams in different leagues currently coexist in professional sports with the same name without confusion." In support of this claim, applicant had submitted a list of eight different team names, each paired with what applicant characterizes as "similar" names for teams in different sports or different sport leagues. The mere listing of these team names without evidence of their use is of no probative value and, in any event, the team names can be differentiated readily by the different geographic terms which appear in each name.

purchasers are just as likely to view the word BRAVES in registrant's mark as a shorthand reference to the BUFFALO BRAVES as they would a reference to the Atlanta Braves. Moreover, there is nothing in the cited marks themselves which would suggest a connection with Atlanta or Major League Baseball, and the evidence submitted by applicant to support this connection is both untimely and unpersuasive.⁸

We conclude that applicant's intended use of its mark BUFFALO BRAVES (and design) for clothing would be likely to cause confusion with registrant's "BRAVES" marks for the identical goods.

Decision: The refusal to register is affirmed.

⁸ Applicant has asked the Board to take judicial notice of dictionary definition evidence as well as excerpts from articles taken from the Lexis/Nexis database, all of which was submitted for the first time with applicant's appeal brief. The database evidence is not proper subject matter for judicial notice. On the other hand, the Board will, if appropriate, take judicial notice of dictionary definitions. In this case, however, applicant failed to indicate the relevance of this evidence in its brief or to even identify the particular word applicant seeks to define. Thus, we decline to take judicial notice of any of this untimely evidence has not been considered. Even if we had considered this evidence it would not affect our decision. Even assuming the evidence shows that the "Atlanta Braves" team is also known as "the Braves," the evidence does not establish that purchasers would associate these particular marks, that is, the marks in the cited registrations, with the Atlanta team. We also note that, for the most part, the word "Atlanta" appears with the word "Braves" to identify the team at least once in each of the excerpted articles. The absence of the word "Atlanta" from other excerpts may be due to the severely truncated version of the article which applicant has supplied. Under the circumstances, we could not conclude from any of this evidence that the word "Braves" alone would automatically prompt an association with the Atlanta Braves.

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