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**THIS DISPOSITION
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Paper No. 11
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nova Knits, Inc.

Serial No. 75/308,399

George C. Limbach of Gray, Cary, Ware & Freidenrich for
Nova Knits, Inc.

Steven R. Berk, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Chapman, Wendel and Bottorff, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On June 13, 1997, Nova Knits, Inc. filed an
application to register on the Principal Register the mark
NOVA KNITS for "mens [sic] and womens [sic] knitted goods,
namely, sweaters." Applicant disclaimed the word "knits."
Applicant claimed a date of first use and first use in
commerce of 1985.

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the
ground that applicant's mark, when used on applicant's
identified goods, so resembles the registered mark NOVA

SHEERS for "pantyhose,"¹ as to be likely to cause confusion, mistake, or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

The Examining Attorney essentially takes the position that the dominant portion of both the cited registered mark and applicant's mark is the identical word NOVA, with the second word being highly descriptive in each mark; that the marks create similar commercial impressions; that the respective goods, while not the same clothing item, are nonetheless closely related clothing items which may be offered for sale by the same apparel manufacturer; and that the goods are sold to the same general purchasers through the same channels of trade.

Applicant contends that the marks must be considered in their entireties, including the words "KNITS" and "SHEERS"; that when so considered the marks are not similar, and in several published cases the Board has found no likelihood of confusion between marks which begin with "NOVA" or "NOVO"; that "'NOVA' is a common prefix and suffix in trademarks registered in class 25 for

¹ Registration No. 1,510,208, issued October 25, 1988, Section 8 affidavit accepted, Section 15 affidavit acknowledged. Registrant disclaimed the word "sheers." The claimed date of first use is November 24, 1987.

clothing..." (brief, p. 2); that the term "nov" or "novo" means "new," and because "'new' is an extremely common word, the distinguishing second words "KNITS" and "SHEERS" of applicant's and registrant's marks, respectively, clearly distinguish the two marks..." (April 20, 1998 response, p. 2); and that the respective goods, sweaters and pantyhose, are two separate and distinct types of clothing.

Turning to a consideration of the respective goods, the Examining Attorney has made of record copies of pages from two catalogs (Victoria's Secret and Hanes) to show that pantyhose is commonly sold along with sweaters (as well as various other items of clothing). In addition, the Examining Attorney submitted eleven third-party registrations, all of which issued on the basis of use in commerce, to show that various businesses have registered a single mark in connection with both sweaters and pantyhose.²

Third-party registrations are not evidence of commercial use of the marks shown therein, or that the public is familiar with them. Nevertheless, third-party registrations which individually cover a number of

² Also, the Examining Attorney requested in his brief that the Board take judicial notice of dictionary definitions from The American Heritage Dictionary of the words "hosiery" and "pantyhose" to show the relatedness of the involved goods. The request is granted. See TBMP §712.01.

different items and which are based on use in commerce have some probative value to the extent they suggest that the listed goods emanate from a single source. See *Olde Tyme Foods Inc., v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd*, Appeal No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

Moreover, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion; it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 596 (TTAB 1978); and *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992).

Based on the record before us, we readily conclude that applicant's goods, men's and women's knitted sweaters, are commercially related to the cited registrant's goods, "pantyhose." That is, these goods bear a sufficient relationship that the use of the same or similar marks on such goods would likely cause confusion. See *Kangol Ltd.*

v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) (Court affirmed Board holding of likelihood of confusion between KangaROOS and a kangaroo design for clothing, namely, athletic shoes, sweatsuits and athletic shirts and KANGOL and a kangaroo design for golf shirts having collars); In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991) (ESSENTIALS in stylized form for women's shoes against ESSENTIALS for women's clothing, namely, pants, blouses, shorts, and jackets); In re Apparel Ventures, Inc., 229 USPQ 225 (TTAB 1986) (SPARKS BY SASSAFRAS in stylized form for women's separates, namely blouses, skirts and sweaters against SPARKS in stylized form for shoes, boots and slippers); and In re Serac, Inc., 218 USPQ 340 (TTAB 1983) (RAM'S HEAD for men's, boy's and children's hosiery against a design mark for jackets, vests, sweaters and shirts for men, women and children).

Applicant's citation to an opposition decision (Elbeo G.m.b.H. v. McQuade Bloomhorst Inc.) published only in digest form (applicant provided a copy of the full decision) is inappropriate, and applicant's argument in relation to that inter partes case is unpersuasive in the context of this ex parte record.

Regarding the respective trade channels and purchasers, the Board must determine the issue of

likelihood of confusion on the basis of the goods as identified in the application and the registration. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As noted above, the specific items of clothing sold by applicant and by registrant are related, but clearly are not identical clothing items. However, the identifications of goods include no restrictions as to trade channels (types of stores or outlets where either party's goods may be sold, e.g., department stores, boutique shops). Both applicant's and registrant's goods, as identified, could be offered and sold to the same classes of purchasers through the same channels of trade. That is, both men and women may purchase pantyhose and/or men's and women's sweaters, either for themselves or as gifts. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Turning next to a consideration of the respective marks, it is well settled that marks must be considered in their entireties. However, our primary reviewing court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature

or portion of a mark. That is, one feature of a mark may have more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this case, both applicant's mark, and registrant's mark begin with the identical word NOVA, which is the dominant feature of each mark. Of course, there is an obvious difference in the two involved marks, specifically that the term SHEERS is the second word in registrant's mark, while the term KNITS is the second word in applicant's mark. Each of these words has been disclaimed because each one describes a type of fabric.³ This difference in the marks does not serve to distinguish the marks. In fact, purchasers are unlikely to remember the specific difference between the marks due to the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. That is, the purchaser's fallibility of memory over a period of time must also be kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v.

³ Applicant acknowledged that "while each of these terms can identify a fabric, those respective fabrics are entirely different." Brief, p. 2.

Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); Spoons Restaurants Inc. v. Morrison Inc., supra; and Edison Brothers Stores v. Brutting E.B. Sport-International, 230 USPQ 530 (TTAB 1986).

In any event, purchasers familiar with registrant's goods sold under the registered mark NOVA SHEERS may, upon seeing applicant's mark NOVA KNITS on closely related goods, assume that applicant's goods come from the same source as registrant's goods, simply referring to a different fabric for the respective item of clothing, SHEERS for pantyhose, and KNITS for knitted sweaters.

Applicant's arguments that "NOVA" means "new" as shown by previous inter partes proceedings here at the Board; and that "NOVA" is a common prefix and suffix in trademarks registered in the clothing class as shown by copies of twelve third-party registrations⁴ are not persuasive of a different result herein.

As explained earlier, third-party registrations are not evidence of commercial use of the marks shown therein, or what happens in the marketplace, or that consumers are familiar with the third-party marks. However, such

⁴ Applicant originally submitted copies of eleven third-party registrations, but with its brief on the case, applicant submitted one additional such registration. The Examining Attorney made no objection thereto and we have considered all twelve third-party registrations.

registrations are competent to show that others in a particular industry have registered marks incorporating a particular term, or that the common term in the marks has a normally understood meaning or suggestiveness in the industry. See *In re Hamilton Bank*, 222 USPQ 174 (TTAB 1984). See also, *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985).

On this record, applicant has not shown that the word NOVA is suggestive or descriptive of clothing items, pantyhose or sweaters. Further, we agree with the Examining Attorney that each of the marks in the twelve third-party registrations consists of the word NOVA along with other words and designs [e.g., NOVALOGIC, BOSSA NOVA, OSCAR NOVA (in stylized lettering and including a rectangular design), VIA NOVA, CASANOVA (in stylized lettering and including a rectangular design), and NOVAK (in stylized lettering and including an Eskimo figure design), resulting in each third-party mark forming a separate connotation and commercial impression different from the others.⁵

⁵ The Examining Attorney requested in his brief that the Board take judicial notice of dictionary definitions from The American Heritage Dictionary of the words "nova" and "Casanova" to show differing commercial impressions created by the third-party registered marks. The request is granted. See TBMP §712.01.

We find that the marks, NOVA SHEERS and NOVA KNITS, are similar in sound, appearance, connotation and commercial impression.

Any doubt on the question of likelihood of confusion must be resolved against the newcomer as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, at 1440 (TTAB 1993).

Based on the similarity of the marks, the relatedness of the goods, and the similarity of the trade channels and purchasers, we find that there is a likelihood that the purchasing public would be confused when applicant uses the mark NOVA KNITS for men's and women's knitted sweaters. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Decision: The refusal to register under Section 2(d) is affirmed.