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Paper No. 9
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **HL USA, Inc.**

Serial No. 75/**564,084**

Eric K. Karich, Esq. for **HL USA, Inc.**

David A. Stine, Trademark Examining Attorney, Law Office 114
(**Margaret Le**, Managing Attorney).

Before **Hohein, Walters** and **Chapman**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

HL USA, Inc. has filed an application to register the
mark "CHILI WORKS" and design, as reproduced below,



for "bicycle parts, namely, suspension forks."¹

¹ Ser. No. 75/564,084, filed on October 2, 1998, which is based on an allegation of a bona fide intention to use the mark in commerce. The application states that: "The mark consists in part of a stylized representation of a chili pepper."

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 applied to its goods, so resembles the mark "HOT CHILI," which is registered for "human powered cycles, namely, bicycles and structural parts therefor,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, 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 facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), "in any likelihood of confusion analysis[,] two key considerations are the similarity of the goods and the similarity of the marks."³ Here, inasmuch as applicant's goods are identical in part to registrant's goods, inasmuch as a suspension fork is a bicycle structural part, and are otherwise closely related to registrant's bicycles, the respective goods would be sold through the same channels of trade to the identical classes of purchasers. The principal focus of

² Reg. No. 2,034,148, issued on January 28, 1997, which sets forth a date of first use anywhere of April 30, 1994 and a date of first use in commerce of September 15, 1994.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

our inquiry, therefore, is on the similarities and dissimilarities in the marks at issue when considered in their entireties. Moreover, as pointed out in *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994), "[w]hen marks would appear on virtually identical goods ... , the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines."

Applicant argues that the fact that two marks share the same term does not necessarily mean that the marks create a similar commercial impression. In particular, applicant asserts that the fact that the marks at issue herein contain the common word "CHILI" does not suffice to engender a similar commercial impression because "they use the term entirely differently."

According to applicant:

HOT CHILI focuses on the term HOT, with all of the connotations that arise from the term HOT, including the slang meaning of "full of or characterized by any very strong feelings, or by intense activity, speed, excitement, enthusiasm, ... sexual desire" Websters® New World Dictionary.

CHILI WORKS, however, focussed [sic] on the term "works" which is suggestive of the term "skunk works," which is defined by the American Heritage® Dictionary of the English Language as "a small, loosely structured corporate research and development unit or subsidiary formed to foster innovation."

....

Translated by the target consumer, HOT CHILI suggests that the products are generally "intense" and "exciting," while CHILI WORKS suggests that the products come from a high technology R&D department that makes cutting edge products. Notwithstanding

[the] Examiner's conclusory statements to the contrary, applicant's mark does not create a commercial impression that is similar to the [mark of the] prior registration.

Applicant also contends that "despite the inclusion of the word CHILI in both marks," the marks are distinguishable in sound and appearance. Specifically, applicant notes that, both when pronounced and when viewed in a side-by-side comparison,⁴ the respective marks "include different secondary terms and the word orders are inverted." Because, according to applicant, "these differences are substantial," applicant urges that confusion is not likely.

We agree, however, with the Examining Attorney that, when considered in their entirety, the respective marks are "quite similar in overall commercial impression" due to the shared presence of the term CHILI, which clearly appears to be arbitrary as used in connection with bicycles and such structural parts thereof as suspension forks. As the Examining Attorney persuasively notes in his brief:

While the respective marks must be considered in their entirety ..., it is nevertheless proper to recognize that one feature of a

⁴ Such a comparison, as the Examining Attorney correctly points out in his brief, is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); and *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973).

mark may be more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, [753 F.2d 1056,] 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976).

Application of these standards to the instant case clearly indicates that the identical, and completely arbitrary, term "CHILI" is the obvious dominant feature of both marks. In applicant's mark, the entity designation "Works" is clearly subordinate in size, location and overall presentation to the "CHILI" brand mark. The "Chili" significance is reinforced by the graphical presentation of a chili pepper. The remaining design element comprises a mere background for the wording and presents no objective basis upon which the respective marks may be distinguished.

Similarly, the overall commercial impression created by the registered mark is dominated by the identical term ... "CHILI." The addition of the adjective ... "HOT" has little real impact on the overall commercial impression created by the registered mark, which clearly creates the overall impression of a variety of the "CHILI" brand.

We accordingly concur with the Examining Attorney's conclusion that "prospective purchasers are likely to assume, incorrectly, that applicant's 'CHILI WORKS' [and design] brand bicycle components[, namely, suspension forks,] are designed for use in connection with registrant's 'HOT CHILI' bicycles or that registrant's 'HOT CHILI' bicycles and [structural] components are a variety or model of the goods produced by the [same source as applicant's] 'CHILI WORKS' [and design brand bicycle suspension forks]". Moreover, even assuming that customers for bicycles and their structural parts, such as suspension forks, notice and

remember the differences in sound and appearance between the respective marks, it is still the case that the arbitrary term "CHILI" so dominates each mark that, for example, consumers familiar with registrant's "HOT CHILI" mark for bicycles and structural parts therefor could reasonably assume, upon encountering applicant's "CHILI WORKS" and design mark for bicycle suspension forks, that applicant's goods constitute a new or additional line of components from registrant which are specially designed for use with registrant's "HOT CHILI" bicycles. Confusion as to origin or affiliation is therefore likely to occur from the contemporaneous use of respective marks in connection with identical and otherwise closely related goods.

Nevertheless, as a final consideration, applicant contends that confusion is unlikely because purchasers of bicycles and specialized component parts thereof, such as suspension forks, are knowledgeable and sophisticated consumers who "are familiar with the industry and the various manufacturers" of the goods at issue. Essentially, applicant insists that such goods are not "a general consumer product, which is purchased by consumers on the spur of the moment with little forethought," but are instead relatively expensive products which are selected with a great degree of care.

However, as the Examining Attorney notes, applicant's assertions are not only unsupported by any evidence, but in any event "bicycles are a relatively basic and unsophisticated item, which may be commonly purchased and used by many people lacking particular expertise in the field of cycling." Moreover, even

assuming that at least some buyers of bicycles and their structural parts are highly sophisticated and discriminating consumers, we observe that the fact that consumers may exercise care or thought in choosing the respective products "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983). Here, the overall commercial impression engendered by applicant's "CHILI WORKS" and design mark and registrant's "HOT CHILI" mark is so similar, due to the shared presence of the arbitrary and dominant term "CHILI," that the contemporaneous use thereof in conjunction with bicycle suspension forks, on the one hand, and bicycles and their structural parts (which would include suspension forks), on the other, is likely to cause confusion, even among knowledgeable and discriminating consumers of such goods.

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