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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CCC Acquisition Corporation

Serial No. 75/813,280

Simon Bock of Katten Muchin Zavis Rosenman (formerly
Rosenman & Colin LLP) for CCC Acquisition Corporation.

Scott M. Oslick, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Seeherman, Hairston and Drost, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

CCC Acquisition Corporation has appealed from the
final refusal of the Trademark Examining Attorney to
register OCEAN GEAR, with the word GEAR disclaimed, as a
trademark for "pants, shirts, shorts and swimtrunks."¹

¹ Application Serial No. 75/813,280, filed October 1, 1999,
based on an asserted bona fide intent to use the mark in
commerce.

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Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d) on that ground that applicant's mark so resembles the following three marks, registrations of which are owned by the same entity for the indicated goods, that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

OCEAN for "men's swimming trunks;
bathing suits for women and juniors;
bathing caps and pool caps for women,
men and juniors; men's and ladies'
terry cloth robes; and warm up suits
and sweat suits."²

The image shows a stylized, cursive script logo for the word "Ocean". The letters are fluid and interconnected, with a long, sweeping tail on the final 'n' that extends to the right. The overall appearance is that of a handwritten signature or a calligraphic brand mark.

for "clothing, namely bathing suits,
bathing trunks, tee shirts, tank tops,
shorts, robes, swimming caps and
wristbands"³

² Registration No. 985,060, issued May 28, 1974; Section 8 affidavit accepted; Section 15 affidavit received; renewed.

³ Registration No. 1,620,039, issued October 30, 1990; section 8 affidavit accepted; Section 15 affidavit received. This registration also includes goods in Class 28, but it is clear that the Examining Attorney is not asserting likelihood of confusion with the registration in this class.



for "clothing, namely, swimwear."⁴

The appeal has been fully briefed,⁵ but an oral hearing was not requested.

Before we discuss the substantive issue in this appeal, we must note that the two cited registrations which are stylized or contain a design element were due for renewal on, respectively, October 30, 2000 and October 8, 1991. The Office records do not show that these registrations have been renewed, but neither do they indicate that the registrations have expired. Because it is not clear whether these registrations have been renewed, we will not refer to them in determining whether there is a likelihood of confusion.

⁴ Registration No. 1,659,816, issued October 8, 1991; Section 8 affidavit accepted; Section 15 affidavit received.

⁵ In its brief applicant states that on November 20, 2000 a response was submitted in error, and should be treated as superfluous. The response, which was treated as a request for reconsideration and acted on by the Examining Attorney on December 22, 2000, forms part of the record in the application.

However, with its reply brief applicant has, for the first time, submitted an Office action from a prior application. This material is clearly untimely, see Trademark Rule 2.142(d), and has not been considered. An additional exhibit, a printout from the TrademarkScan database, had been submitted previously, and is part of the record for whatever probative value it may have.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, we note that they are identical in part. The cited registration includes bathing trunks and shorts, which are legally identical to the swimtrunks and shorts identified in applicant's application, while applicant's identified shirts would encompass the tee shirts and tank tops listed in the registration. Applicant's goods are otherwise closely related to the registrant's identified goods.

In view of the identity of the goods, they must be deemed to be sold in the same channels of trade to the same classes of customers, which in this case would include retail outlets such as mass market and department stores, where the purchasers would be the general public.

Applicant does not dispute this, but concentrate the arguments in its appeal brief on asserted differences in

the marks. Thus, 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 necessary to support a conclusion of likely confusion declines." **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 864, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant's mark is OCEAN GEAR; the cited mark is OCEAN. Applicant argues that the additional word GEAR in its mark creates a mark which is different in appearance, pronunciation and connotation from OCEAN. We disagree. The word "gear," as applied to applicant's goods, is at least descriptive, as evidenced by applicant's disclaimer of this term and the evidence of third-party registrations for clothing items which bear disclaimers of this word. Moreover, the Examining Attorney has submitted with his brief a definition of "gear," of which we take judicial notice,⁶ as meaning "clothing, garments."⁷

It is well-established that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for

⁶ The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁷ Webster's New Collegiate Dictionary, © 1973.

rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the mark in their entirety. **In re In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Because the word GEAR is another word for clothing, consumers will view the word OCEAN as the source-indicating portion of the mark. Accordingly, it is entirely appropriate to treat this part of the mark as the dominant element.

Further, the minor differences in appearance and pronunciation of the marks resulting solely from the fact that the word GEAR appears in the mark and will be pronounced as part of the mark, do not serve to distinguish the marks. The dominant word OCEAN in applicant's mark will clearly be seen and pronounced in the identical manner as the word OCEAN is seen and pronounced in the cited mark.

Applicant also argues that the marks are different in connotation and have differing commercial impressions, asserting that applicant's mark suggests "clothing or equipment associated in some manner with the ocean," while the registered mark suggests "a large natural body of water." Brief, p. 2, emphasis in original. Because "gear" means "clothing," we do not accept applicant's position that OCEAN GEAR suggests equipment associated with the

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ocean. Rather, the connotation of the mark is of clothing used in or near the ocean, or simply OCEAN as a brand of clothing. The registered mark, which is used for clothing also, conveys the same connotation. The fact that the generic term "clothing" (or "gear") is not part of the cited mark does not change the connotation; the goods identified by the mark would be regarded as OCEAN clothing or OCEAN gear.

Applicant has recognized that its mark consists of the registered mark, to which the word GEAR has been added. Applicant has cited several cases in which the addition of a term to another's mark has been found to avoid a likelihood of confusion, while the Examining Attorney has cited even more cases in which a likelihood of confusion has been found when a party appropriates the mark of another in its entirety, and adds subordinate matter to it. The cases cited by applicant are distinguishable from the present situation. The resulting mark in this case, OCEAN GEAR, has the same connotation as the cited mark OCEAN, as opposed to, for example, TIC TAC and TIC TAC TOE in **In re Ferrero**, 479.F.2d 1395, 178 USPQ 167 (CCPA 1973) and PEAK and PEAK PERIOD in **Colgate-Palmolive Co. v. Carter-Wallace, Inc.**, 432 F.2d 1400, 167 USPQ 529 (CCPA 1970).

With respect to other du Pont factors, there is no evidence of third-party use or registration of OCEAN marks.⁸ The word OCEAN obviously has a suggestive meaning with respect to swimtrunks and certain of the other goods listed in the cited registration, but that is the same suggestive meaning that applicant's mark has. Although OCEAN would not be considered a strong mark, and the registration thus would not be entitled to a broad scope of protection, that protection still extends to the use of the highly similar mark OCEAN GEAR for the same and closely related goods.

Applicant's other major argument is that the mark OCEAN GEAR was used by a predecessor-in-interest "from at least 1986 to 1992 and by the Applicant for an undetermined time thereafter until abandoned." Response filed March 8, 2001. Applicant claims that this shows that applicant's mark and the registered mark co-existed without confusion, and also that the Examining Attorney who examined applicant's predecessor's application did not find likelihood of confusion with the cited registration. There

⁸ In its response to the first Office action applicant submitted a list of OCEAN marks with their registration numbers. The Examining Attorney advised applicant that such a listing was not acceptable to make the registrations of record, and further pointed out that without any indication of the goods involved, the Examining Attorney could not make an assessment of the relevance of the registrations. Applicant never submitted copies of the registrations themselves, and therefore we have not considered the list, which has no probative value.

is no evidence of record which shows why the prior application for OCEAN GEAR was allowed to register, nor, as the present Examining Attorney points out, is the decision of an Examining Attorney with respect to another application binding on the Examining Attorney in this case. Whatever facts may have led an Examining Attorney to find OCEAN GEAR registrable in 1992 are not necessarily relevant ten years later. As for applicant's assertion that the marks were both in use for fourteen years, there is nothing in the record to support this. Applicant's own statement is that the mark was used by applicant's predecessor between 1986 and 1992 "and for an undetermined time thereafter until abandoned." This does not show that applicant or its predecessor used the mark for fourteen years. Although concurrent use of marks without actual confusion may be indicative that confusion is not likely to arise, there must be evidence that there has been such use. Here, applicant has not provided any details as to its use or its predecessors use in terms of the number or geographic scope of its sales that would indicate that applicant's and/or its predecessor's and the registrant's goods were exposed to the same classes of consumers and that there was an opportunity for confusion to occur if it were likely to occur. Applicant acknowledges that there

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was "temporary non-use of the mark", reply brief, p. 2. As far as we can tell from the record herein, that temporary non-use may have begun shortly after applicant acquired the mark in 1992, or there may have been an extended period of minimal sales before the abandonment. In any event, we do not find this factor of applicant's claim of no evidence of actual confusion⁹ to outweigh the other factors which support a finding of likelihood of confusion.

Decision: The refusal based on Registration No. 985,060 is affirmed.¹⁰

⁹ Obviously we have not had an opportunity to hear from the registrant as to its experience regarding confusion.

¹⁰ If the other two cited registrations, for OCEAN (stylized) and OCEAN and design are renewed, we also affirm the refusals based on those registrations. Both of those registrations include swimming trunks, and applicant's mark is confusingly similar to those marks, too. That is, the stylization and the minor design element in those marks is not sufficient to distinguish applicant's mark from them.