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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re GINC UK Ltd.

Serial No. 76571967

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Sean W. Dwyer, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Quinn, Grendel and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, GINC UK Ltd., has filed an application to register the mark ZOGGS (in typed or standard character form) for goods ultimately identified as "swimwear, swimsuits, swim caps, warm-up suits, T-shirts, jackets, wet suits, shorts, socks, sun visors, sun hats and sun caps, sports clothing, sandals, beach

shoes, sports shoes, plimsolls, training shoes" in International Class 25.[1]

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the registered mark shown below for "outer wear, namely T-shirts, sweat shirts, coats, jackets, cover-ups, caps, hats, swim suits and wet suits, and inner wear, namely a body-conforming unitard" in Class 25, as to be likely to cause confusion.[2]

When the refusal was made final, applicant appealed. Both the applicant and examining attorney have filed briefs.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to

[1] Serial No. 76571967, filed January 22, 2004, alleging dates of first use and first use in commerce in March 2003. Applicant has claimed ownership of Registration No. 1949864 for the mark ZOGGS for "optical lenses; eyewear; namely, spectacles, sunglasses, frames, cases, chains, ribbons, nose pads; goggles, safety goggles and motorcycle goggles" in Class 9; and "skiing goggles, swimming goggles, diving goggles and masks" in Class 28.

[2] Registration No. 2786903; issued November 25, 2003 to Sexwax, Incorporated. The examining attorney also initially refused registration under Section 2(d) based on Registration No. 1510179 owned by the same entity. In his brief, the examining attorney withdrew the refusal as to that registration.

the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Applicant's goods include t-shirts, jackets, sun hats, sun caps and swimsuits. These goods are identical or legally identical to the t-shirts, jackets, hats, caps and swimsuits listed in the cited registration. Because there are no restrictions in the identification of goods, we must assume that these identical or legally identical goods are sold in all the normal channels of trade to all the usual purchasers for such goods, and that the channels of trade and purchasers for both applicant's and registrant's goods would be the same. See Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000). Further, it is well settled that purchasers of casual, low cost ordinary consumer items, such as the clothing items listed above, are held to a lesser standard of purchasing care and are more likely to be confused as to the source of the goods. See Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984).

It is clear that if these identical goods are offered under similar marks there would be a likelihood of confusion. Thus, we turn to the marks, keeping in mind that when marks would appear on identical goods, the degree of similarity between the marks necessary to support a finding of likely confusion declines. Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See du Pont, supra. See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

Applicant argues that the examining attorney has improperly dissected the marks. Applicant maintains that when properly evaluated, "the only possible similarity" between the marks "is the inclusion of the term 'ZOG.'" (Brief, p. 4, emphasis omitted). Arguing that "[t]he inclusion of one or more similar terms between competing marks does not necessitate a finding of confusing similarity," applicant contends that the star design in registrant's mark "is both dominant and significant" and serves to distinguish registrant's composite mark from applicant's typed mark ZOGGS. (Brief, pp. 4, 7.) It is applicant's position that the fact that the marks "have a single literal element in common, does little or nothing to diminish the otherwise substantial and

significant distinctions among them." (Brief, p. 7, emphasis omitted.)

While marks must be compared in their entireties, one feature of a mark may have more significance than another, and there is nothing improper in giving greater weight to the more significant feature. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). See also Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir. 2000) ("the Board was justified in examining each component of the mark ... and the effect of that component on the issue of likelihood of confusion as between the respective marks in their entireties").

When applicant's mark ZOGGS and registrant's mark ZOG and design are compared in their entireties, giving appropriate weight to the components therein, we find that the marks are similar in sound, appearance, meaning and commercial impression, and that the similarities in the marks far outweigh their differences.

Applicant's entire mark is the word ZOGGS. The strongest impression in registrant's mark is conveyed by the virtually identical term, ZOG. Contrary to applicant's contention, the design element in registrant's mark is less important than the word in creating an impression. While the design is not ignored, the fact is that the purchasing public is more likely to rely on

the word portion of the mark, ZOG, as an indication of source. See CBS, Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"). 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).

The terms ZOG and ZOGGS are virtually identical in sound. The fact that the marks differ in sound to the extent that one is the plural form of the other "does not amount to a material difference" in the marks. In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227, 227 (CCPA 1969). We note that similarity in sound alone has been held sufficient to support a finding of likelihood of confusion. See Krim-Ko Corp. v. Coca-Cola Co., 390 F.2d 728, 156 USPQ 523 (CCPA 1968). See also Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983) ("Another factor weighing heavily in our decision is that the dominant portion of both parties' marks sounds the same when spoken").

The marks are also similar in appearance. The word ZOG is visually prominent in registrant's composite mark. Applicant's mark consists entirely of the word ZOGGS, which is only a slightly different spelling of ZOG, and its mark contains no other word or design elements to visually distinguish it from

registrant's mark. Keeping in mind that the comparison of the marks is not made on a side-by-side basis and that recall of purchasers is often hazy and imperfect, the minor difference in spelling between ZOG and ZOGGS is insignificant and is not likely to be recalled by purchasers when seeing these marks at different times on identical goods. In addition, applicant's mark, ZOGGS, presented in typed or standard character form, could reasonably be displayed in the same style of lettering as ZOG, thereby increasing the visual similarity of the two marks. See Phillips Petroleum Co. v. C. J. Webb Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971); and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585 (TTAB 1992).

There is no difference in meaning between the marks to distinguish them. In fact, ZOG, like ZOGGS, appears at least on this record to be an invented term with no known meaning. This is a factor which not only broadens the scope of the registered mark's protection, but significantly increases the likelihood that the marks, when used in connection with the identified goods would be confused. See Jockey International Inc. v. Butler, 3 USPQ2d 1607 (TTAB 1987). See also Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 230 USPQ 831, 834 (2d Cir. 1986) (a fanciful mark "is entitled to the most protection the Lanham Act can provide").

Furthermore, the fanciful nature of ZOG makes any differences in sound and appearance between the two marks even less significant and less likely to be noticed. See *McCarthy on Trademarks and Unfair Competition*, §11:6 (4th ed. 2006) ("Another aspect of coined marks is that they have no meaning, lending more weight to similarity in sight and sound") (citation omitted). See also Seven-Up Co. v. Tropicana Products, Inc., 356 F.2d 567, 148 USPQ 604, 605 (CCPA 1966) ("with coined words which are meaningless so far as the English language is concerned, slight variations in spelling or arrangement of letters are often insufficient to direct the buyer's attention to the distinction between marks"). At a minimum, ZOG appears to be a unique term in the clothing field, and to the extent it does have any recognized meaning, that meaning when used on the identical goods would be the same in both applicant's and registrant's marks.[3]

In further support of its position that the marks are not confusingly similar, applicant points to its ownership of an existing registration (Reg. No. 1949864) for the mark ZOGGS for "optical lenses; eyewear; namely, spectacles, sunglasses, frames, cases, chains, ribbons, nose pads; goggles, safety goggles and

[3] Applicant has cited a number of cases in support of its contention that the mere fact that marks share a common element does not necessarily mean that the marks are confusingly similar. While we do not take issue with this as a general principle, the cases relied on by applicant to support its contention involve different marks for different goods and/or services, and they do not compel a finding that the marks in this case are not confusingly similar.

motorcycle goggles" in Class 9; and "skiing goggles, swimming goggles, diving goggles and masks" in Class 28. Applicant argues that the skiing goggles, swimming goggles, diving goggles and masks covered by this registration are related to, at least, the swimwear, swimsuits, swim caps and wet suits in its present application, and that applicant has a right "to expand its Registered Mark to related goods identified in its pending application." (Reply Brief, p. 4.) Applicant also states that it previously owned a now cancelled registration (Reg. No. 2104680) for the mark ZOGGS TOGGS for "articles of clothing, namely, swimsuits, swim caps, warm-up suits, T-shirts, jackets and wet suits."[4] Noting that the Office previously allowed that registration to issue over the now-cited registration for ZOG and design, applicant argues that the Office has already determined that there is no likelihood of confusion between its marks and the mark in the cited registration and that it is inappropriate to now deny registration of its mark. In connection with these points, applicant also contends that there has been no actual confusion between ZOGGS and the cited mark, and that the marks have "coexisted side-by-side" without any instances of confusion for ten years. (Brief, p. 8.)

[4] This registration issued on October 14, 1997 and was cancelled under Section 8 of the Trademark Act on July 17, 2004.

Applicant's arguments are unpersuasive for a number of reasons. To begin with, the goods in the present application and the prior registration for ZOGGS are not the same. The goods identified in the application are more extensive than those covered by the prior registration. In particular, the goods as identified in the application are no longer just arguably related to those in the cited registration, they are now identical to registrant's goods. Further, the mark in applicant's now cancelled registration for ZOGGS TOGGS is different from the mark applicant now seeks to register. The fact that applicant may have obtained registrations for different marks and/or different goods has no bearing on whether the marks and goods at issue in this case are likely to cause confusion. Our determination of likelihood of confusion must be based on the facts and record before us. We are not bound by a previous examining attorney's determination that applicant’s marks were registrable, and to the extent those registrations were issued in error, we will not compound the error by permitting a confusingly similar mark to register again. See In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (stating that "The Board must decide each case on its own merits" and specifically noting that "Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior

registrations does not bind the Board or this court"). See also In re Perez, 21 USPQ2d 1075 (TTAB 1991).

Finally, applicant's unsupported assertion that there has been no actual confusion during an asserted ten year period of contemporaneous use is entitled to little probative weight.[5] In addition, without evidence of the nature and geographic extent of both applicant's and registrant's use of their respective marks, we cannot determine whether a meaningful opportunity for actual confusion has ever existed.[6] See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992). Cf. In re General Motors Corp., 23 USPQ2d 1465 (TTAB 1992). See also Trek Bicycle Corp. v. Fier, 56 USPQ2d 1527, 1530 (TTAB 2000) ("the assertion by one party that it is not aware of any incidents of actual confusion carries little weight").

In view of the foregoing, and because very similar marks are used in connection with identical goods, we find that there is a likelihood of confusion.

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

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[5] It is noted that applicant has claimed use of the marks ZOGGS for the goods identified in this application only since 2003.

[6] We also point out that coexistence of marks on the register does not prove coexistence of the marks in the marketplace without confusion. See In re Thomas, 79 USPQ2d 1021 (TTAB 2006).