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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 16
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Edward Roth

Serial No. 75/374,375

Inga Regenass of Van Cott, Bagley, Cornwall & McCarthy for
Edward Roth

Daniel F. Capshaw, Trademark Examining Attorney, Law Office
109 (Ronald R. Sussman, Managing Attorney)

Before Seeherman, Hanak and Wendel, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Edward Roth, the assignee of the original applicant,
Mooneyes USA, Inc., seeks to register, under the provisions
of Section 2(f) of the Trademark Act, the mark ED "BIG
DADDY" ROTH and design, as shown below, for "shirts and
caps."¹ The mark is described as the words ED "BIG DADDY"

¹ Application Serial No. 75/374,375, filed October 14, 1997, and
asserting first use in June 1988 and first use in commerce in
July 1988.

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ROTH with the design of a rat. ED "BIG DADDY" ROTH is identified as a living individual and, indeed, is the current applicant.

The Trademark Examining Attorney has made final a refusal to register the mark, pursuant to Section 2(d) of the Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark BIG DADDY'S and design, shown below, and registered for "activewear, namely tee shirts, shorts, sweat suits, sweat shirts, and hats"² that, when used on applicant's identified shirts and caps, it is likely to cause confusion or mistake or to deceive.

² Registration No. 1,986,812, issued July 16, 1996.

Applicant has appealed from the final refusal. Both applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

We reverse.

In determining whether there is a likelihood of confusion between two marks, we must consider all relevant factors as 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 under Section 2(d), two of the most important considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the goods, they are in part legally identical, in that the shirts identified in applicant's application would encompass the tee shirts and sweat shirts listed in the cited registration, and the hats listed in the cited registration would encompass applicant's identified caps. Moreover, because there is no limitation in the application or the registration as to the channels of trade or customers for the goods, we must deem these legally identical goods to travel in the same channels of trade and to be sold to the same classes of consumers. See

Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A., 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); **In re Riley Company**, 182 USPQ 510 (TTAB 1974). Thus, applicant's arguments as to differences in the classes of the purchasers of the goods and trade channels are unavailing.

Despite this, however, we find that the differences in the marks are sufficient to make confusion unlikely. Although applicant's mark does include the term BIG DADDY which is, in effect, the dominant element of the cited mark,³ we must compare the marks in their entirety, and not focus our attention on only the common element in the marks. BIG DADDY'S is the dominant element of the cited mark, both visually, phonetically and connotatively. The typestyle, while having a printing quality, and oval carrier, are not likely to be noted or remembered by consumers. In applicant's mark, on the other hand, the name ED ROTH is clearly the major visual focus, being depicted in the largest letters, and in a visually eye-catching font, with exaggerated initials for both the first and last name. The rat design, too, has a strong visual effect. Of all the elements, the term BIG DADDY is the least noticeable because of its size and its placement.

³ We recognize that BIG DADDY'S appears in the possessive in the cited mark.

Phonetically, again ED ROTH has a strong presence, being the first and last word which is pronounced, with the term BIG DADDY sandwiched in the middle. Finally, with regard to connotation, applicant's mark suggests a specific person named ED ROTH, who either has the nickname BIG DADDY, or is associated with a rat named BIG DADDY. The cited mark, on the other hand, has only the general meaning of BIG DADDY, which is defined as, inter alia, "a man regarded as the paternalistic head of a family; the founder or a leading member of a company, organization, movement, etc.; *Chiefly Southern U.S. grandfather.*"⁴ Thus, the marks convey different commercial impressions.

Moreover, the term BIG DADDY, which is the only term common to both marks, is a recognized term in the nature of a nickname. Applicant has pointed out that "there are a number of 'Big Daddy's' around, not the least of whom include Cincinnati Bengals lineman Dan 'Big Daddy' Wilkinson, 1960s Speaker of the California Assembly, Jesse 'Big Daddy' Unruh, Ugandan dictator Idi 'Big Daddy' Amin, and fictionally, 'Big Daddy' in Tennessee Williams' *Cat on a Hot Tin Roof...*" Response filed November 23, 1999, p. 3.

⁴ The Random House Dictionary of the English Language, 2d ed., unabridged © 1987. 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).

Thus, BIG DADDY'S in the cited mark could indicate anyone who uses the nickname Big Daddy, and consumers are not likely to view this term as referencing the ED ROTH of applicant's mark.

Applicant has also made of record Internet submissions showing a large number of references to "Big Daddy," including the movie Big Daddy; Big Daddy Dave's Virtual Marketplace; Big Daddy's BBQ Sauce and Spices; Big Daddy's General Store and Big Daddy Doodle's Guitaropedia. In addition, applicant has submitted a substantial number of third-party registrations for BIG DADDY marks.⁵ Third party registrations may be used in the same manner as dictionary definitions, to show that a term has a meaning in a particular trade or industry. See **Conde Nast Publications, Inc. v. Miss Quality, Inc.**, 507 F.2d 1404, 184 USPQ 422 (CCPA 1975). In this case, the registrations are for a wide range of goods and services, ranging from golf clubs to frozen vegetables to grass seed. Although these registrations are for goods and services far different from the clothing items identified in applicant's application and the registrant's registration, the very range of goods

⁵ Applicant also submitted a number of third-party applications; however, such applications are evidence only of their filing, and have no other legal effect.

and services on which the mark is used suggests that BIG DADDY is widely recognized as a nickname. Moreover, two of the registrations submitted by applicant, owned by the same party, are for BIG FAT DADDY, and BFD BIG FAT DADDY, and are for clothing articles such as those at issue herein, including shirts, T-shirts and hats. It is noted that the cited registration issued in 1996, despite the presence of the BIG FAT DADDY registration which issued in 1995.

All of the foregoing evidence suggests that the term BIG DADDY (or BIG DADDY'S) is not entitled to a broad scope of protection. In view thereof, and given the differences in the marks, as noted above, we find that confusion is not likely. We say this even though the goods are legally identical, must be deemed to be sold through the same trade channels to the same classes of consumers, and, because of the nature of the goods, they are likely to be the subject of impulse purchases by the general public. It is well established that in determining likelihood of confusion, any one of the duPont factors may be dispositive. **Kellogg Company v. Pack'em Enterprises, Inc.**, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In this case, the differences in the marks and the limited scope of protection to be accorded the term BIG DADDY('S) outweigh

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the duPont factors favoring a finding of likelihood of confusion.

Decision: The refusal of registration is reversed.