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

Paper No. 18  
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Healthy's, Inc.**

Serial No. 75/**380,362**

**Jeffrey L. Van Hoosear** of **Knobbe, Martens, Olson & Bear, LLP** for **Healthy's, Inc.**

**Jeffrey S. Molinoff**, Trademark Examining Attorney, Law Office 107  
(**Thomas Lamone**, Managing Attorney).

Before **Cissel, Hohein** and **Rogers**, Administrative Trademark  
Judges.

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

**Healthy's, Inc.** has filed an application to register the mark "KARMA KULA" for "men's, women's and children's clothing, namely athletic footwear, bandannas, bathing suits, bathing trunks, blouses, bodysuits, caps, coats, dresses, footwear, hats, head bands, jackets, jeans, jogging suits, jump suits, leotards, neck ties, night shirts, outerwear, overalls, pajamas, pants, play suits, polo shirts, pullovers, raincoats, robes, romper[s], scarves, shirts, shorts, snow suits, socks, stockings, sweat shirts, sweat pants, sweat bands, sweaters,

sweat jackets, suits, sun visors, suspenders, t-shirts, tights, tops and bottoms."<sup>1</sup>

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 "KARMA," which is registered for "clothing, namely, shorts, pants, shirts, T-shirts, sweat shirts, jackets, coveralls and caps,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed,<sup>3</sup> but an oral hearing was not requested. We affirm the refusal to register.

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<sup>1</sup> Ser. No. 75/380,362, filed on October 28, 1997, which alleges a bona fide intention to use the mark in commerce.

<sup>2</sup> Reg. No. 2,174,015, issued on July 14, 1998, which sets forth dates of first use of March 14, 1997.

<sup>3</sup> The Examining Attorney, in his brief, has raised an objection to the "new evidence" submitted as exhibits to applicant's initial brief, contending that such evidence is untimely under Trademark Rule 2.142(d) and thus should not be considered. Applicant, in its reply brief, faults the Examining Attorney for "carelessness" and asserts that the "evidence which the Examining Attorney objects to as being 'new evidence' was clearly evidence already made of record during the prosecution of the subject application ...." While applicant, in its request for reconsideration and other responses filed on or prior to the filing of its notice of appeal, did indeed raise arguments in which it referred to various factual assertions, applicant did not submit any actual evidence as proof of those assertions, such as copies of the specimens contained in the file of the cited registration and copies of Patent and Trademark Office records (pertaining to, among other things, a number of co-pending applications filed by applicant and a variety of third-party applications and registrations), until it filed the exhibits attached to its initial brief. Accordingly, while the Examining Attorney is correct that such "new evidence" is untimely under Trademark Rule 2.142(d), we nevertheless have considered the dictionary definition of "kula" which is included with applicant's Exhibit 2 inasmuch as it is settled that the Board may properly take judicial notice of dictionary definitions. *See, e.g.,* Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). Moreover, and in any event, even if we were to consider the

The 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."<sup>4</sup> Here, inasmuch as applicant's goods are identical in part to registrant's goods and are otherwise closely related thereto, the focus of our inquiry is on the similarities and dissimilarities in the respective marks when considered in their entirety. Moreover, as pointed out in Century 21 Real Estate Corp. v. Century Life of America,

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remainder of the "new evidence" submitted by applicant, it would not be persuasive of a different result. This is because, as accurately pointed out by the Examining Attorney in his brief, none of the co-pending applications filed by applicant as its Exhibit 3, and which presently have been or will be allowed, is for the same goods as are involved herein, nor are any of the third-party applications and registrations for "marks ... used in conjunction with goods or services related to clothing." (Furthermore, it should be noted that third-party applications are evidence only that the applications have been filed and nothing else.) Finally, with respect to the copies, submitted as applicant's Exhibit 1, of the specimens contained in the file of the cited registration, it is pointed out that even if registrant uses its mark in connection with a separate design, such use is legally irrelevant and immaterial in this case inasmuch as the issue of likelihood of confusion must be decided on the basis of the mark sought to be registered by applicant and the mark shown in the cited registration. See, e.g., Sealy, Inc. v. Simmons Co., 265 F.2d 934, 121 USPQ 456, 459 (CCPA 1959); Burton-Dixie Corp. v. Restonic Corp., 234 F.2d 668, 110 USPQ 272, 273-74 (CCPA 1956); Hat Corp. of America v. John B. Stetson Co., 223 F.2d 485, 106 USPQ 200, 203 (CCPA 1955); and ITT Canteen Corp. v. Haven Homes Inc., 174 USPQ 539, 540 (TTAB 1972).

<sup>4</sup> 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."

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 confusion is not likely because, when considered in their entirety, the respective marks are sufficiently different in overall sound, appearance, meaning and commercial impression due to the presence of the term "KULA" in its mark, which is lacking in registrant's mark. In particular, applicant argues in its initial brief, although notably without evidentiary support, that "the term KULA means 'magic' in Sanskrit" and that, as shown by the dictionary excerpts attached as its Exhibit 2, "the term KULA also has multiple meanings in the Hawaiian language."<sup>5</sup> Applicant consequently contends that "the term KULA is not a nonsensical term," as asserted by the Examining Attorney in arguing that the word "KARMA" dominates applicant's mark, and therefore that "it is obvious that the combination of the term KARMA with the term KULA results in a different connotation as compared to just the term KARMA."<sup>6</sup>

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<sup>5</sup> As set forth in the Hawaiian Dictionary (1986) at 178, we judicially notice that such meanings include "1. n. Plain, field, open country, pasture .... 2. n. Source; container .... 3. n. Basket-like fish trap. Rare. 4. nvi. School, academy; to teach school, go to school; to hold school or class sessions .... 5. Also **gula**. nvs. Gold; golden."

<sup>6</sup> While applicant additionally asserts, in its initial brief, that its "KARMA KULA mark creates an entirely distinct commercial impression, completely separate and apart from the impressions conveyed by the use of the word KARMA standing alone," because "it uses the mark as the name of a 'superhero' type character," suffice it to say that a

The Examining Attorney, citing a definition of record of the word "karma," which the American Heritage Dictionary of the English Language (3rd ed. 1992) defines, inter alia, as meaning "3. *Informal*. A distinctive aura, atmosphere, or feeling,"<sup>7</sup> maintains on the other hand that confusion is likely inasmuch as the marks at issue, due to the shared presence of the word "KARMA," are similar in appearance, sound and meaning. Specifically, as to applicant's mark, the Examining Attorney argues that such word "appears to be the dominant one, as it is a word commonly used in the English language and it is the first word in the proposed mark." With respect to applicant's contentions that the term "kula" in its mark means "magic" in Sanskrit and has several meanings as well in Hawaiian, the Examining Attorney insists that, "to the purchasing public for clothing nationally, the term 'Kula' appears to be a nonsense term, further adding to the dominance of the term 'Karma'" in applicant's mark.

We are constrained to agree with the Examining Attorney to the extent that the typical purchasers of clothing, including retailers and wholesalers as well as ordinary consumers, would not be familiar with the foreign or esoteric meanings of the term "KULA" in applicant's mark. However, whether purchasers of items of apparel would consequently pay little attention to such term

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registration resulting from the subject application would not be so limited and that applicant would be free to use its mark in the same ways as those available to registrant with respect to use of its mark.

<sup>7</sup> The same dictionary also lists such word as signifying "1. *Hinduism & Buddhism*. The total effect of a person's actions and conduct during

as a nonsense term, as the Examining Attorney argues, is a question which we need not decide, anymore than we need to determine whether the word "KARMA" is the dominant portion of applicant's mark as the Examining Attorney also contends. Instead, as is readily apparent, it is sufficient that the word "KARMA" in applicant's "KARMA KULA" mark clearly constitutes a prominent and significant element thereof, resulting in a mark which, when considered in its entirety, is substantially similar in sound, appearance, connotation and commercial impression to registrant's "KARMA" mark.

Consequently, we concur with the Examining Attorney that confusion as to origin or affiliation is likely to occur from contemporaneous use of the respective marks. Even assuming, in this regard, that purchasers acquainted with registrant's "KARMA" mark would notice the "KULA" feature of applicant's "KARMA KULA" mark, they would nevertheless be likely to believe, especially when encountering the respective marks in connection with such identical and closely related items of clothing as t-shirts, sweat shirts, caps, jackets, jump suits, pants, shirts, shorts, and overalls or coveralls, that the goods emanate from, or are sponsored by or associated with, the same source. In particular, consumers could readily believe, for example, that registrant has expanded its "KARMA" clothing by introducing a new line of "KARMA KULA" apparel.

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

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the successive phases of the person's existence, regarded as determining the person's destiny" and "2. Fate, destiny."

**Ser. No.** 75/380,362