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THE TTAB

Hearing:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kohl's Illinois, Inc.

Serial No. 76149873

Norman H. Zivin and Donna A. Tobin of Cooper & Dunham LLP
for Kohl's Illinois, Inc.

Nicholas K. D. Atree, Trademark Examining Attorney, Law
Office 108 (David Shallant, Managing Attorney).

Before Cissel, Hairston and Bottorff, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Kohl's Illinois, Inc. has filed an application to
register the mark BABY AND ME for "women's maternity
clothing, namely woven tops, denim pants, knit tops, pill
pants, sleep wear, pant sets, dresses, jumpers, knit pants
and shorts."¹

¹ Application Serial No. 76149873, filed October 20, 2000, which
alleges dates of first use of June 2000.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the previously registered marks BABY 'N ME for "intimate apparel, namely, nursing bras and maternity foundation garments; namely stockings, panties, slips and petticoats;"² and BABY 'N' ME for "bib for nursing mothers to use when discreet breastfeeding is desired."³ The registrations are owned by the same entity.

When the refusals were made final, applicant appealed. Applicant and the Examining Attorney have filed briefs, and both appeared at an oral hearing before this panel.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. With regard to the marks⁴, applicant argues that they differ in commercial impression because:

Applicant's mark calls to mind the well known rhyme "Pat-a-cake," which ends with the phrase "put it in the oven for BABY AND ME." In contrast, cited registrant's BABY 'N ME

² Registration No. 1,799,451 issued October 19, 1993; Section 8 affidavit accepted; renewed.

³ Registration No. 1,369,148 issued November 1985; Sections 8 and 15 affidavits accepted and acknowledged, respectively. The word "BABY" is disclaimed apart from the mark as shown.

⁴ We note that applicant and the Examining Attorney have referred to registrant's marks BABY 'N ME and BABY 'N' ME as a single mark, BABY 'N ME. In view thereof, and because the difference in the marks is so slight, we have done the same.

is more intimate and conveys a play on words in connection with maternity underwear as it can be interpreted as "baby in me."

We are not persuaded by applicant's argument. There is no evidence to support applicant's contention that its mark BABY AND ME will call to mind the "Pat-a-cake" nursery rhyme.⁵ Moreover, with respect to registrant's mark BABY 'N ME, purchasers are just as likely to "interpret" this mark as "baby and me." We judicially notice that the Dictionary of Slang (1999) at page 822 lists "'n': abbr. of standard English and, e.g., rock 'n' roll." In any event, even assuming that the marks differ in connotation, applicant's mark BABY AND ME is still substantially similar to registrant's mark BABY 'N ME in sound, appearance and overall commercial impression. As is apparent, both marks begin and end with the same words "BABY" and "ME." Further, the "AND" and "'N" portions of the marks are very similar in sound and appearance. In sum, we find that the marks are substantially similar in sound, appearance, meaning and commercial impression.

⁵ Applicant, for the first time with its brief on the case, submitted a copy of the "Pat-a-cake" nursery rhyme. As noted by the Examining Attorney, Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal and that the Board will ordinarily not consider evidence submitted after the appeal is filed. Thus, we have not considered applicant's submission in reaching our decision.

We turn next to a consideration of the goods in applicant's application (women's maternity clothing, namely woven tops, denim pants, knit tops, pill pants, sleep wear, pant sets, dresses, jumpers, knit pants and shorts) and the goods in the cited registrations (intimate apparel, namely, nursing bras and maternity foundation garments, namely, stockings, panties, slips and petticoats; and a bib for nursing). Applicant argues that there is a "competitive distance" between the respective goods and that they are sold in different sections of department stores.

At the outset, it should be noted that it is not necessary that the goods be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods originate from or are in some way associated with the same source. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Further, in comparing goods in these types of cases, relatedness of the goods must be determined on the basis of the goods as they are identified in the involved

application and registrations. In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). And, we must assume, in the absence of any specific limitations in the application and registrations, that the goods identified therein travel in all the normal channels of trade for such goods to the usual class of purchasers.

We find that applicant's women's maternity clothing is sufficiently related to registrant's nursing bras, maternity foundation garments, and a bib for nursing that when sold under the applied-for mark, confusion is likely to occur among consumers. Clearly, applicant's women's maternity clothing and registrant's nursing bras, maternity foundation garments, and bib for nursing are complementary goods which would be sold to the same class of consumers, namely pregnant women. Further, the respective goods would be sold in the same channels of trade, namely stores specializing in maternity wear, department stores, and mass merchandisers, and may even be purchased during the same shopping trip.

Although applicant argues that registrant's goods are of a type that are usually sold with assistance from a knowledgeable sales person, applicant offered no support for this contention and there is nothing inherent in the nature of nursing bras, bibs for nursing, and maternity

foundation garments that would lead us to this conclusion. Rather, both applicant's and registrant's goods would be sold to ordinary consumers who exercise nothing more than reasonable care in their selection and purchase of clothing.

With respect to the relatedness of the goods involved herein, the Examining Attorney submitted copies of thirteen use-based third-party registrations for marks which, in each instance, are registered for various maternity clothing items, on the one hand and maternity foundation garments, nursing bras and/or bibs, on the other. Although not conclusive, this evidence serves to suggest that the goods listed therein are of a type which may emanate from a single source under a single mark. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467 (TTAB 1988).

Finally, applicant argues that registrant's mark BABY 'N ME is weak and should only be granted a limited scope of protection. Applicant has submitted copies of six third-party registrations for marks consisting of "BABY AND (N) ME." The probative value of this evidence is very limited in our determination of the specific issue of likelihood of confusion in this case. There is no evidence that the

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marks listed therein are in use or that purchasers are familiar with them. In addition, all of the registrations are for goods/services far removed from maternity clothing. In any event, even weak marks are entitled to protection where confusion is likely, and here applicant's mark BABY AND ME is substantially similar in sound, appearance, connotation and commercial impression to registrant's mark BABY 'N ME.

We conclude that consumers familiar with registrant's maternity clothing offered under its mark BABY AND ME would be likely to believe, upon encountering applicant's substantially similar mark BABY 'N ME for nursing bras, maternity foundation garments, and a bib for nursing, that such closely related goods originated with or are somehow associated with the same entity.

Decision: The refusals to register under Section 2(d) of the Trademark Act in view of Registration Nos. 1,799,451 and 1,369,148 are affirmed.