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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Elegant Headwear Co., Inc.

Serial No. 76577260

Myron Amer, Esq. for Elegant Headwear Co., Inc.

Ellen J.G. Perkins, Trademark Examining Attorney, Law
Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Drost, Zervas and Kuhlke, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On October 12, 2005, Elegant Headwear Co., Inc.
("applicant") filed an application (Serial No. 76577260) to
register the mark RISING STAR (in standard character form)
on the Principal Register for the following goods, as
amended: "products for infants, namely, infants' socks and
infants' booties" in International Class 25. Applicant has
asserted a claim of a bona fide intent to use the mark in
commerce under Trademark Act Section 1(b), 15 U.S.C. §
1051(b), in the application.

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The examining attorney has issued a final refusal to register the mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) in view of two registered marks. Specifically, she has refused registration in view of (i) Registration No. 3007759 ("the '759 registration"), which issued on October 18, 2005, for the mark RISING STARS (in typed form); and (ii) Registration No. 2915184 ("the '184 registration"), which issued on December 28, 2004, for the mark shown below.



Among the goods set forth in both registrations are the following; "clothing, namely T-Shirts, sweatshirts, hats and jackets" in International Class 25. Both registrations issued to the same registrant.

After the examining attorney made the refusal final, applicant filed this appeal. Upon careful consideration of the arguments advanced by applicant and the examining attorney, we find that confusion is likely.

Before considering the merits of the examining attorney's refusal to register, we address two preliminary issues.

First, on March 29, 2007, applicant filed an appeal brief, which the Board in an order dated April 17, 2007 stated would be construed as a supplemental brief. Applicant filed with its notice of appeal a paper entitled "Applicant's Appeal Brief," which contained an amendment to the identification of goods; on November 2, 2006, the Board remanded the application to the examining attorney for consideration of the amendment and stated that applicant would be allowed to file a supplemental brief if the examining attorney maintained the refusal to register. In the April 17, 2007 order, the Board noted that applicant had filed an "Evidentiary Declaration" with its March 29, 2007 brief; that applicant had not requested that the application be remanded to the examining attorney for consideration of this evidence; that applicant had not provided good cause for a remand; and that the Board would not consider the "Evidentiary Declaration" unless the examining attorney treats the "Evidentiary Declaration" as being of record. Because the examining attorney has not addressed the "Evidentiary Declaration" of March 29, 2007 in her brief, we do not further consider this "Evidentiary

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Declaration." We have, however, considered the "Evidentiary Declaration" filed on December 26, 2006 with applicant's amendment to the identification of goods.

The second preliminary matter concerns applicant's "Request for Clarification" filed on May 14, 2007. Applicant appears to be confused by the Board's statement in the April 17, 2007 order that the Board would not consider the "Evidentiary Declaration" unless the examining attorney treats the "Evidentiary Declaration" as being of record, when the Board's statement in its earlier January 22, 2007 order provided that the examining attorney must consider applicant's "Evidentiary Declaration." The January 22, 2007 order addressed the "Evidentiary Declaration" filed on December 26, 2006, and the April 17, 2007 order addressed the "Evidentiary Declaration" filed on March 29, 2007. The two "Evidentiary Declarations" are not the same. The April 17, 2007 order refers to the "Evidentiary Declaration" improperly filed with applicant's supplemental brief. See Trademark Rule 2.142(d), 37 C.F.R. §2.142(d).

We now consider the merits of the final refusal to register. In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*,

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476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We first address the similarity or dissimilarity of applicant's and registrant's marks. Our focus is on whether the marks are similar or dissimilar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Of course, when we are considering the marks, we must consider them in their entireties rather than simply comparing their individual components.

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser,

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who normally retains a general rather than a specific impression of trademarks.

Baseball America Inc. v. Powerplay Sports Ltd., 71 USPQ2d 1844, 1848 (TTAB 2004). See also *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973).

Because the wording in applicant's mark and the wording in registrant's marks are nearly identical, with applicant's mark being in the singular form and registrant's marks being in the plural form, the marks are identical in commercial impression and highly similar in meaning, appearance and sound. The wording in the mark of the '184 registration dominates over the design of the mark, and we accord the wording more weight, because it is the wording, not the design element, that will be recognized and used by purchasers as the primary means of source identification. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004).

We next consider the similarity and dissimilarity of registrant's and applicant's goods. Our consideration of the goods is based on the identifications of goods as they are recited in the application and registration, and we do not read limitations into those identifications of goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d

1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639 (TTAB 1981). If the cited registration describes goods broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Thus, we do not consider the registrations as only encompassing T-shirts, sweatshirts, hats and jackets for adults, but also as including such items for infants.¹

In comparing the goods, we note that the greater the degree of similarity between the applicant's mark and the cited registered mark(s), the lesser the degree of similarity between the applicant's goods or services and

¹ Joseph Templer, applicant's president, in his declaration submitted with applicant's December 26, 2006 filing, states that applicant's "primary product line" is to market outfits for new born babies; and that "T-shirts, sweatshirts, hats and jackets," "due to inappropriate sizes" would not be for newborn infants; and that such goods are more appropriate for older children such as toddlers. Even if we accept that newborn infants would not wear T-shirts, sweatshirts, hats and jackets, applicant's argument is not well taken because its identification of goods does not specify that applicant's goods are limited to newborn infants.

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the registrant's goods or services that is required to support a finding of likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983). If the marks are the same or almost so, which is the case here at least with respect to the '759 registration, it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion. *Id.*

Furthermore, it is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In this case, the examining attorney has made of record a number of use-based third-party registrations

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which show that various entities have adopted a single mark for goods that are identified in both applicant's application and the cited registrations. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

See, for example:

Registration No. 3163334 for GRACO for, inter alia, booties, socks, tee shirts and jackets;

Registration No. 3099380 for ONLY BOYS for, inter alia, infant's socks, jackets, t-shirts and hats;

Registration No. 3166472 for CRADLEBABY (stylized) for, inter alia, socks and sweatshirts;

Registration No. 3089986 for BABY VIEWS for, inter alia, clothing and apparel for infants, namely, t-shirts, caps, booties and socks;

Registration No. 3111707 for COOKIE CRUMBS for, inter alia, infant clothing, namely, t-shirts, jackets and socks;

Registration No. 3111895 for SNAPDRAGON BABY for, inter alia, infant shirts, socks and hats;

Registration No. 3123489 for JOHNNY 21 CLOTHING for, inter alia, infant's clothing, namely, tee shirts, hats and socks; and

Registration No. 3129390 for TRUFFLES HAVE RUFFLES for, inter alia, clothing, namely children's and infant apparel, namely, shirts, hats and socks.

In addition, with her final Office action, the examining attorney submitted web pages showing the following:

Store.campusemporium.com showing infant socks and shirts both bearing the VT (Virginia Tech) mark;

Deergear.com showing adult shirts and infant socks, sweatshirts, jackets and hats, all with the JOHN DEERE mark; and

Polo.com showing infant socks, hats and jackets, and adult T-shirts and jackets, bearing the same horse design mark.

The foregoing evidence demonstrates the existence of at least a viable relationship between the goods at issue. We therefore resolve the *du Pont* factor regarding the similarity of the goods against applicant.

With respect to the factor regarding the similarity or dissimilarity between trade channels, because there are no trade channel restrictions, and because registrant's identification of goods encompasses t-shirts, sweatshirts, hats and jackets *for infants*, we find that the trade channels of applicant's and registrant's goods overlap.² The web pages of record addressed in the preceding paragraph provide additional support for our finding in that they show goods of the type claimed by applicant and

² Because registrant's identification of goods is not restricted, we are not persuaded by Mr. Templer's statement in paragraph 5 of his declaration filed on December 26, 2006 regarding trade channels and conditions of sale.

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registrant offered for sale on the same web pages.

Further, we find that applicant's and registrant's goods may include inexpensive clothing items that are sold to ordinary consumers who will not use a high degree of care in making their purchases and who would be subject to purchasing on impulse.

Upon consideration of the relevant *du Pont* factors discussed above, as well as the evidence of record and the arguments of the examining attorney and applicant, we conclude that when purchasers who are familiar with registrant's marks for its claimed goods encounter applicant's mark on related goods, they are likely to be confused.

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