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PRECEDENT OF THE TTAB

Mailed: January 4, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Seiff

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Serial No. 78351857

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AnnMarie Crowell of Perkins & Dunnegan for Nicole Kule Seiff.

Naakwama Ankrah, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

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Before Hairston, Kuhlke and Cataldo, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Nicole Kule Seiff seeks registration on the Supplemental Register of the mark KULE (standard character claimed) for goods identified as "men's, women's and children's clothing, namely shirts, t-shirts, tank tops, blouses, vests, suits, jackets, pants, slacks, trousers, dresses, skirts, shorts, bathing suits, bathing trunks,

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ties, hats, sweaters, pajamas, shoes, sneakers, athletic shoes, scarves, gloves" in International Class 25.<sup>1</sup>

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark KÜL for "men's and women's footwear; clothing, namely, t-shirts, jeans, gym shorts, coats, hats, headbands, earbands, sweatbands, baseball-style caps, neck warmers, mittens, scarves, gloves, jackets, pullovers, shells, vests, sweaters, shirts, turtlenecks, clothing tops, sweatshirts, sweatpants, pants, undergarments, undershirts, undershorts, Bermuda shorts, socks, belts, balaclavas" in International Class 25, as to be likely to cause confusion, mistake or deception.<sup>2</sup>

When the refusal was made final, applicant appealed and briefs have been filed. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d

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<sup>1</sup> Application Serial No. 78351857, filed January 14, 2004, alleging first use on August 1, 2001 and use in commerce on January 1, 2002 under Section 1(a) of the Trademark Act. 15 U.S.C. §1051(a).

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1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the goods identified in the application and the cited registration. It is well settled that goods and services need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods and services themselves, but rather whether purchasers are likely to confuse the source of the goods and services. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrant's goods as they are described in the registration and we cannot read limitations into those goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281

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<sup>2</sup> Registration No. 22765230, issued September 16, 2003.

F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). 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).

The identified goods of applicant and those of the cited registrant include identical items (e.g., shirts, t-shirts, pants, vests, shoes/footwear, hats), and include otherwise related clothing items (e.g., blouses, undershirts and tank tops). Applicant's argument that the goods are not related because applicant's goods include children's clothing and "eight distinct terms that are not included in Registrant's identification" is not persuasive. It is sufficient that registrant's identification of goods encompasses some of applicant's goods, the fact that applicant's identification in International Class 25 includes other goods does not obviate the relatedness of the identical goods. See, e.g., Tuxedo Monopoly, Inc. v.

General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981). Moreover, many of applicant's "eight distinct" goods are related to registrant's goods, for example, tank tops and undershirts. We do not read registrant's clothing items to be limited to only men's and women's clothing in view of the semi-colon separating the footwear and clothing, i.e., "men's and women's" only modifies footwear. However, even with a restrictive reading of registrant's identification it encompasses applicant's clothing for men and women. Further, as to applicant's argument that "registrant only sells shoes for men, women and children" based on a review of registrant's website, applicant may not restrict the scope of registrant's identification of goods by extrinsic evidence.<sup>3</sup> See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Finally, applicant's argument that registrant "no longer sell[s] any goods or services" under its mark is an impermissible collateral attack on the registration and is improper in the absence of a petition to cancel the registration. Therefore, this argument has been given no further consideration. Section 7(b) of the Trademark Act provides that a certificate of registration on the Principal Register shall be prima facie

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<sup>3</sup> The examining attorney has objected to applicant's evidence that was submitted for the first time with applicant's brief.

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evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in connection with the goods or services identified in the certificate. During ex parte prosecution, including an ex parte appeal, an applicant will not be heard on matters that constitute a collateral attack on the cited registration. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); and In re Peebles Inc., 23 USPQ2d 1795, 1797 n.5 (TTAB 1992).

Considering the channels of trade, with regard, at least, to the identical goods, inasmuch as there are no limitations in either the registration or the subject application, we must presume that applicant's and registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994). Applicant's arguments regarding its actual channels of trade and attempts to limit registrant's channels of trade fail for the same reasons stated above with regard to the

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Inasmuch as this evidence is untimely it will not be considered. Trademark Rule 2.142(d).

relatedness of the goods. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). Further, the goods in the application and registration are general clothing items and would share the same customer base, including applicant's children's clothing inasmuch as men and women frequently purchase clothing for their children.

In view of the above, the du Pont factors of the similarity of the goods, the channels of trade and class of purchasers favor a finding of likelihood of confusion as to the mark in the cited registration.

We turn now to the first du Pont factor, i.e., whether applicant's mark KULE and registrant's mark KÜL are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. The analysis is not whether the marks can be distinguished when compared side-by-side. Rather, we must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

We find that applicant's mark KULE is similar in sound and appearance to registrant's mark KÜL. Applicant argues that the marks are not pronounced the same in that registrant's mark is pronounced "COOL" and applicant's mark is pronounced as "kYOUL" or "Qu-OOL." Applicant has provided no evidence to support her contention that KULE would be pronounced "kYOUL" by potential purchasers and it is just as likely that it would be pronounced in the same way as similarly spelled words which rhyme with COOL, for example, RULE. Moreover, there is no proper pronunciation of a trademark because it is impossible to predict how the public will pronounce a particular mark and correct pronunciation cannot be relied on to avoid a likelihood of confusion. See *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461 (TTAB 1985).

Applicant also argues that the marks are not similar in appearance. However, the only differences between the marks are the E on the end of applicant's mark and the "diacritical mark" on registrant's mark. We do not find these differences sufficient to distinguish the marks. As to connotation, while applicant's mark may be a surname, when pronounced the marks can have the same connotation in that they both sound like the word "COOL." Overall, we find that the marks have a very similar commercial

impression and that the factor of the similarity of the marks weighs in favor of likelihood of confusion.

Applicant's arguments regarding the other du Pont factors do not lead us to a different conclusion. First, with regard to the sophistication of the purchasers and the level of impulse with which these purchases are made, while applicant argues that its goods are "high end" children's clothing and "expensive," the identification of goods is not so limited. Moreover, even if applicant's goods are expensive and a potential purchaser may exhibit more care when purchasing applicant's goods than they would purchasing chewing gum, we are not persuaded that the purchasers of children's clothing are sophisticated to the level of distinguishing between highly similar marks that sound identical when used on identical goods. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). Further, while applicant argues that its professional buyers for retail stores "pay closer attention to the manufacturer of the product than the average consumer," we must also consider the average consumer. As to the factor of fame, registrant's mark need not be famous in order to receive protection under Section 7(b). Applicant's reference to a the prosecution history of a third-party application has no

relevance to this proceeding.<sup>4</sup> In re Sunmarks Inc., 32 USPQ2d 1470 (TTAB 1994); In re National Hockey League, Inc., 222 USPQ 638, 641 (TTAB 1984). Applicant's arguments regarding its right to exclude others and potential confusion fail inasmuch as these arguments constitute a collateral attack on the registration.

Finally, applicant argues that there is no evidence of any actual confusion and that there has been concurrent use for five years. We do not accord significant weight to applicant's contention, unsupported by any evidence, that there have been no instances of actual confusion despite contemporaneous use of the respective marks. The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of

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<sup>4</sup> The electronic printout of the third-party application submitted with the brief, is untimely and has been given no consideration. Trademark Rule 2.142(d).

confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

Majestic Distilling, 65 USPQ2d at 1205.

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

In conclusion, we find that because the marks are similar, the goods are identical and otherwise related, and the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the mark in the cited registration.

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