

**THIS OPINION IS NOT A
PRECEDENT OF
THE TTAB**

Mailed: September 25, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mickelson

Serial No. 78666050

Peter N. Jansson of Jansson, Shupe, Munger & Antaramian,
Ltd. for Scott D. Mickelson.

Laura A. Hammel, Trademark Examining Attorney, Law Office
116 (Michael W. Baird, Managing Attorney).

Before Hairston, Walters, and Taylor, Administrative
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Scott D. Mickelson ("applicant") has filed an
application to register the mark NO MORE DRAMA (in standard
character form) for goods ultimately identified as
"clothing, namely sweat shirts, t-shirts and hats" in
International Class 25.¹

Registration has been refused under Section 2(d) of
the Trademark Act, 15 U.S.C. §1052(d), on the ground that

¹ Serial No. 78666050, filed July 8, 2005, and alleging July 7,
2005 as the date of first use of the mark anywhere and in
commerce.

applicant's mark, when used on his identified goods, so resembles the registered mark, shown below,



for "men's and women's clothing, namely, shirts, sweaters, vests, shorts, pants, jackets, socks, and hats" in International Class 25,² as to be likely to cause confusion, mistake or deception.

After the refusal was made final, applicant appealed and requested reconsideration of the final refusal. On February 6, 2007, the Examining Attorney denied the request for reconsideration and the appeal was resumed. Applicant and the examining attorney filed briefs. We affirm the refusal to register.

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

² Registration No. 2,499,023, issued October 16, 2001 (the "'023 Registration").

Ser No. 78666050

1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, 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 and/or services. 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).

Similarity of the Goods/Trade Channels/Class of Purchasers

Turning first to a consideration of the respective goods, it is clear that applicant's items of clothing are identical in part (i.e., hats) and are otherwise closely related to the items of clothing in the cited registration. We note in this regard that applicant does not argue otherwise. Further, it is apparent that both applicant and registrant are marketing the kinds of wearing apparel which would be sold to the same class of purchasers, namely ordinary consumers, through the same channels of trade (e.g., clothing stores, department stores, and mass merchandisers).

Accordingly, the du Pont factors of similarity of goods, channels of trade and class of purchasers strongly favor a finding of likelihood of confusion.

Similarity of the Marks

We next compare registrant's NO DRAMA! and design mark with applicant's mark NO MORE DRAMA. In determining the similarity or dissimilarity of the marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See du Pont, supra. See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 their entireties that confusion as to source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Last, where, as in the present case, the mark marks appear on, at least in part, legally identical goods, the degree of similarity necessary to support a conclusion of likely confusion declines. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

The examining attorney argues that when the marks are compared in their entireties, applicant's mark is

confusingly similar to the registered mark in sound, appearance, meaning and overall commercial impression.

Applicant, on the other hand, contends that the examining attorney did not consider the registered mark as a whole, but rather improperly dissected the mark and focused exclusively on the word portions NO and DRAMA. Applicant particularly argues that the examining attorney "discounted" the design and "ignored" the stylization in registrant's mark and that "the marks are sufficiently distinguishable when compared in their entireties to prevent a likelihood of confusion, especially (emphasis in original) considering the design element of the [mark in the] '023 registration." We disagree.

Although, as applicant correctly notes, we must compare the marks in their entireties, one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) ["There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in

their entireties. Indeed, this type of analysis appears to be unavoidable.”]

Applicant argues that the “distinctive” design element of the registered mark is sufficient to distinguish its mark, which has no design element, from the registered mark. The argument is unpersuasive. Although applicant’s mark contains no design element, we find that the design in the registered mark, consisting of the universal prohibition sign imposed over two dramatic masks, while clearly noticeable, does not serve to distinguish the marks in sound or appearance. The design simply reinforces the meaning of the wording “NO DRAMA” in registrant’s mark.

Moreover, it is the wording NO DRAMA that would be used by purchasers to call for registrant’s goods. Thus, the wording would make a greater impression on purchasers and is the portion that is more likely to be remembered as the dominant and source-signifying portion of the registered mark. *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593 (TTAB 2001) (“words are normally accorded greater weight because they would be used by purchasers to request the goods”). See also, e.g., *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (1987).

We also do not find the stylization of registrant’s mark a distinguishing factor. Applicant seeks to register

Ser No. 78666050

its mark in standard character format and, thus, applicant could conceivably display its mark in any lettering style, including that of the words NO DRAMA in registrant's mark. 37 C.F.R. § 2.52(a); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988) (when registering mark in block letters, registrant remains free to change the display of its mark at any time). Consequently, applicant's argument that the examining attorney "ignored" the stylization of the registered mark is unpersuasive. See e.g., *Sunnen Products Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744 (TTAB 1987) (styling of letters is irrelevant to the issue of confusion where applicant seeks to register mark without any special form of lettering or design).

For these reasons, the literal portion of registrant's mark, namely the words NO DRAMA, is the dominant portion of the mark.

The dominant portion of registrant's mark, NO DRAMA, is very similar to applicant's mark NO MORE DRAMA. Contrary to applicant's assertion, we do not find the addition of the word MORE sufficient to distinguish applicant's mark from the registrant's mark. The word is embedded between the words NO and DRAMA and, as pointed out by the examining attorney, "in applicant's mark, the word "MORE" is used as an adjective that modifies the word

"DRAMA." The word "MORE" means "additional: indicates something additional or further."³ (Examining attorney's brief at p. 8). The word MORE merely modifies the word DRAMA such that applicant's mark is similar in meaning to registrant's mark, the marks respectively meaning "no additional drama" and "no drama." Simply put, the word MORE has little impact visually or in meaning.

While differences admittedly exist between the respective marks, we find that in their entirety, the marks are not only substantially similar in appearance due to the shared phrase NO DRAMA but, in light thereof, they are substantially similar in commercial impression. Thus, the factor of similarity of the marks favors a finding of likelihood of confusion.

Conclusion

We conclude that purchasers familiar with registrant's clothing items, especially hats, sold under the mark NO DRAMA! (and design) would be likely to believe, upon encountering applicant's mark NO MORE DRAMA for clothing items, including hats, that the goods originate from or are associated with or sponsored by the same source.

³ The examining attorney cites to a definition from the Encarta World English Dictionary found online at www.encarta.msn.com and submitted with the August 2, 2006 Office action.

Ser No. 78666050

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