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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re God's Property, Inc.

Serial No. 78739748

Danielle I. Mattessich of Merchant & Gould P.C. for God's Property, Inc.

Jason Paul Blair, Trademark Examining Attorney, Law Office 102 (Chris Doninger, Managing Attorney).

Before Seeherman, Kuhlke and Bergsman, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

God's Property, Inc. seeks registration on the Principal Register of the mark GOD'S PROPERTY (in standard character form) for "pants, shorts, hats, jackets, boots, beach cover-ups, clothing belts, bathing caps, cloth bibs, coats, shoes, socks, sun visors, swimsuits, undergarments,

pajamas" 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 applicant's mark, when used with the identified goods, so resembles the registered marks GOD'S PROPERTY (in typed form) for "entertainment services in the nature of live musical performances" in International Class 41[2] and "series of prerecorded audio cassette, video cassettes, cartridge tapes and phonograph records all featuring music and entertainment, namely, musical entertainment" in International Class 9,[3] as to be likely to cause confusion, mistake or deception. The registered marks are owned by the same entity, TCI Entertainment, Inc.[4]

The appeal is fully briefed. 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

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[1] Application Serial No. 78739748, filed October 25, 2005, alleging a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

[2] Registration No. 2575476, issued June 4, 2002.

[3] Registration No. 2575477, issued June 4, 2002.

[4] We note that the examining attorney cited another registered mark, GOD'S PROPERTY Reg. No. 2291735 owned by a third party, as a bar to registration of applicant's mark. However, this cited Reg. No. 2291735 was cancelled on August 12, 2006 and, therefore, is no longer an issue in this appeal.

facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 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 and 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).

As to the first factor, the similarity of the marks, here the marks are identical and this factor weighs heavily in favor of a finding of likelihood of confusion. Further, this finding has an impact on the second du Pont factor, the similarity or dissimilarity of the goods and services, because the greater the degree of similarity between the applicant’s mark and the cited registered marks, the lesser the degree of similarity between the applicant’s goods or services and the registrant’s goods or services that is required to support a finding of likelihood of confusion. Where the applicant’s mark is identical to the registrant’s mark, as it is in this case, there need be only a viable relationship between the respective goods or services in

order to find that a likelihood of confusion exists. In re Opus One Inc., 60 USPQ2d 1812 (TTAB 2001); In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983). Moreover, it is well established that it is not necessary that the goods of the parties 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 that the respective goods of the parties 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. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Applicant's clothing items, and registrant's musical entertainment performances and recordings are obviously not directly competitive or overlapping goods and services. However, because names of music groups and performers can be used as trademarks for merchandising products the goods and services may be related for purposes of a likelihood of confusion analysis. As noted in a case involving a television show, "[i]t is common knowledge ... that video games, t-shirts, beach towels, caps and other logo-

imprinted products are used as promotional items for a diverse range of goods and services..." Turner Entertainment Co. v. Nelson, 38 USPQ2d 1942, 1944 (TTAB 1996). See also General Mills Fun Group, Inc. v. Tuxedo Monopoly, Inc., 204 USPQ 396, 400 (TTAB 1979), aff'd 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) ("'collateral product' use is a matter of textbook discussion"); and In re Phillips-Van Heusen Corporation, 228 USP 949, 951 (TTAB 1986) ("The licensing of commercial trademarks for use on 'collateral' products (such as clothing, glassware, linens, etc.), which are unrelated in nature to those goods or services on which the marks are normally used, has become a common practice in recent years...).

In support of his contention that applicant's various clothing items are related to registrant's musical group entertainment services and music recordings, the examining attorney submitted several third-party use-based registrations to show that numerous entities have adopted a single mark for applicant's clothing items and registrant's music group entertainment services and musical recordings. See, e.g., Reg. No. 2384693 (MATCHBOX 20 for, inter alia, series of compact discs and vinyl records featuring musical sound recordings, t-shirts, sweatshirts and hats, and entertainment, namely, live performances by a musical

band); Reg. No. 2542422 (NEVILLE BROTHERS for, inter alia, series of pre-recorded phonograph records, audio cassettes, audio tapes, video tapes, recording discs and compact discs featuring music, t-shirts, sweatshirts, and headwear, and entertainment services, namely, live music performances by a vocal instrumental and musical group); Reg. No. 2616617 (THE FOUR TOPS for, inter alia, phonograph records, compact discs, cassette tapes, video tapes, video discs and floppy discs featuring musical and/or video recordings of musical performance, containing musical sound and/or video recordings...featuring musical performances, t-shirts, shorts, sweatshirts, jackets, tank tops, and caps, entertainment services, namely, live performances by a musical band); Reg. No. 2706191 (NICKLEBACK for, inter alia, series of musical sound recordings, recorded on compact discs, t-shirts and hats, entertainment services, namely live performances by a musical group); Reg. No. 26625549 (O-TOWN for, inter alia, pre-recorded compact discs, audio cassettes and video cassettes featuring music, hats, t-shirts and jackets, entertainment services in the nature of live performances by a musical group); Reg. No. 2708805 (BETTER THAN EZRA for, inter alia, entertainment, namely live musical performances by a musical group whose members sing and play musical instruments, t-shirts,

sweatshirts, headwear and canvas hats, series of prerecorded compact discs and audio cassette tapes featuring music); Reg. No. 2787451 (G-UNIT for, inter alia, pre-recorded phonograph records, compact discs, audio and video cassettes, and dvds featuring music, hats, t-shirts, jackets, shirts, sweatshirts and sweat pants and jerseys, entertainment services in the nature of live performances by the musical group); and Reg. No. 2780615 (LIFEHOUSE for, inter alia, pre-recorded audio tapes, compact discs, video tapes, video discs and phonograph records all featuring music, shirts, jackets, jerseys, t-shirts, sweatshirts, pants, shorts, and headwear, entertainment namely live musical performances). See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). In addition, he submitted third-party registrations of marks that consist of the name of individual musical performers. See, e.g., Reg. No. 3036055 (PUFF DADDY for, inter alia, jackets, t-shirts, sweatshirts, and headwear); and Reg. No. 2266899 (PUFF DADDY for, inter alia, musical sound recordings).

The examining attorney argues that these registrations serve to suggest that the goods and services listed therein...are of a kind that may emanate from a single source...[and that] [b]ecause recording artists and record labels so routinely register their marks for clothing

products, goods such as those in applicant's identification of goods are well within the cited registrant's 'zone of expansion.'" Br. p. 5.

Applicant counters with its own set of third-party registrations, contending that there are several examples where the identical mark registered by different parties for entertainment services or recordings and for clothing. The fact that different third parties may own these registrations does not negate those examples of common ownership submitted by the examining attorney and what that may suggest as to consumer perception in the marketplace. We find the examining attorney's third-party registrations persuasive evidence as to the factor of the relatedness of the goods and services, at least as to applicant's hats and jackets. Further, in view of our findings with respect to applicant's hats and jackets, and registrant's music group entertainment services and recordings, we need not discuss applicant's remaining goods in International Class 25. Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Applicant relies on Michael Caruso & Co. v. Estefan Enterprises, Inc., 994 F.Supp. 1454, 1461 (S.D.Fla. 1998) in support of its argument that the goods are unrelated. In that case, the court stated that "The mere fact that

defendants sell some clothing items and plaintiff specializes in retail apparel does not establish proximity of the goods for purposes of likelihood of confusion." However, that case involved a claim of infringement and thus the analysis was made in the context of the specific marketplace uses of that plaintiff and that defendant. In determining the question of registrability, however, we must consider the identifications of goods and services as they appear in the registrations and application.

Regarding the trade channels, applicant argues that clothing is typically "sold in retail clothing stores to consumers seeking to purchase apparel while musical sound recordings are sold in record stores to consumers seeking to purchase new musical records." Br. p. 5. The examining attorney argues that because the application and registrations are not limited by trade channels we must presume an overlap in trade channels. However, we must consider the ordinary channels of trade for the identified goods and services, and, while it may be that t-shirts, hats and jackets are sold alongside musical recordings at the entertainment venue where the musical services are being provided, this is a very limited trade channel specific to a particular music group and not a channel of trade for hats and jackets in general. Thus, we do not

find that there is an overlap in the channels of trade. However, as the examining attorney noted "the clothing items of recording artists and musical performers may be sold in retail clothing stores alongside applicant's clothing products." Br. p. 5. Thus, despite differing trade channels the same consumers could encounter both types of goods and services, and because of the merchandising/collateral use of musical group names, consumers could associate the hats and jackets with registrant's goods and services.

With regard to the potential purchasers, the involved goods and services are sold to the general public, thus the purchaser base overlaps. Applicant's goods, which as identified could include inexpensive items, would not be purchased with a great deal of care and could be subject to impulse purchases such that a consumer familiar with registrant's music performances, upon seeing a cap with the identical mark, might purchase it without further consideration of the origin of the hat. In our analysis, we must consider all potential customers, including the less sophisticated. In re Bercut-Vandervoort & Co., 229 USPQ 763, 765 (TTAB 1986) (average ordinary wine consumer must be looked at in considering source confusion).

In view of the above, the du Pont factors of the relatedness of the goods and services, class of purchasers and conditions of sale favor a finding of likelihood of confusion as to the cited registrations.

In making our determination we have considered applicant's argument that its companion application, Serial No. 78511551 for the mark GOD'S PROPERTY for t-shirts and wrist bands, has issued into Registration No. 3205001 and that consistent action should be taken in this case. In support of its argument, applicant cites Section 702.03(a)(ii) in the Trademark Manual of Examining Procedure (TMEP); however, Section 702.03(a)(i) would be more applicable inasmuch as the marks in the application and applicant's registration are identical.[5] This section instructs examining attorneys to act consistently in companion cases. The examining attorney argues that this policy does not apply because the refusal in the companion application was not withdrawn until after the first refusal was issued in this case. We are not convinced by the examining attorney's position, both because the refusal in

[5] Applicant also argues that TMEP §702.03(a)(iv) "instructs that if a companion application has been published for opposition or has registered, the examining attorney may presume that the action taken is acceptable, unless the examination was clearly wrong." Br. p. 12. This section of the TMEP pertains only to the "classification and identification" of goods and not to substantive refusals.

the companion case was withdrawn before issuance of the final refusal in this case and, more importantly, we do not see anything in the TMEP that distinguishes the timing of when actions are taken. However, while the examining attorneys are encouraged to take consistent action, it is well settled that the Board is not bound by prior decisions of examining attorneys, and must decide each case on its own merits. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

Finally, applicant argues that the clothing items in this application are within the zone of expansion of its registration for t-shirts. We are not persuaded by this argument. As noted above, the clothing items, in particular hats and jackets, are also within the zone of expansion of registrant's goods and services to the extent that we have found them to be related. In re 1st USA Realty Professionals, Inc., ___ USPQ2d ___ (Ser. No. 78553715, TTAB August 7, 2007).

In conclusion, we find that because of the identical marks, the relatedness of the goods and services, the overlap in purchasers, and the conditions of sale, confusion is likely between applicant's mark and the marks in the cited registrations. To the extent there are any doubts, we resolve them, as we must, in registrant's favor.

In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

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