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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Chillers Clothing Corporation

Serial No. 78741042

John M. Kim, Esq. for Chillers Clothing Corporation.

Michael G. Lewis, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

Before Walters, Zervas and Walsh, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On October 26, 2005, Chillers Clothing Corporation filed an application (Serial No. 78741042) to register the mark

on the Principal Register for goods ultimately identified as, "Dress shirts; Jackets; Jeans; Pants; Short-sleeved or long-sleeved t-shirts; Shorts; Sweat shirts; T-shirts" in International Class 25. Applicant claims first use anywhere and first use in commerce on September 12, 2005 and has entered the following description of the mark into the application record; "The mark consists of the word 'CHILLERS' with a man laying on top of the letters."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of

> (i) Registration No. 2991647 for the mark URBANCHILLERS (in typed form) issued on September 6, 2005 to Urbanchillers Films Limited for goods and services including "Clothing, namely, T-shirts, sweatshirts, jackets, vests and scarves; footwear; headgear, namely, hats[,] caps and berets" in International Class 25; and
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> (ii) Registration No. 3011442 for the mark AUSSIE CHILLER (in typed form) for "hats" issued on November 1, 2005 to Gary Stauffenberg; registrant has disclaimed the term AUSSIE.

The examining attorney also finally refused registration of applicant's mark in view of Registration No. 2432656 issued to INDICAL Manufacturing, Inc. for the mark CHILLER BANDANNA (in typed form) for "[b]andannas impregnated with heat-stressed-reducing chemicals in [the] nature of water-absorbent polymer crystals." On December 8, 2007, however, the Office cancelled the CHILLER BANDANNA registration

under Section 8 of the Trademark Act. The refusal to register in view of Registration No. 2432656 is therefore moot.

Applicant has appealed the final refusal of its application. Both applicant and the examining attorney have filed briefs. As discussed below, the refusal to register is affirmed.

We first consider one evidentiary matter. Applicant has submitted, for the first time with its brief, a second webpage from aussiechiller.com, a dictionary definition of "urban legend" from m-w.com and a webpage from urbanchillers.com. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) provides that the record should be complete prior to the filing of a notice of appeal. However, because the examining attorney has not objected to this evidence, we have considered this evidence as part of the record.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 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).

Considering first the *du Pont* factor regarding the similarity or dissimilarity of applicant's and registrants' goods, we find that applicant's goods are identical in part to several of the goods in the URBANCHILLERS registration. Specifically, both the application and the registration for URBANCHILLERS include t-shirts, sweatshirts and jackets.

As for the remaining goods in the application, i.e., dress shirts, jackets, jeans, pants and shorts, we find them to be similar to the goods in both the URBANCHILLERS and AUSSIE CHILLER registrations. The examining attorney has made several third-party use-based registrations of record listing the following clothing items; (i) shirts, jackets, pants and/or or shorts, and (ii) t-shirts, sweatshirts, caps and/or hats. These registrations suggest that the same entity is likely to be the source of such clothing items. *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001) ("The

registrations show that entities have registered their marks for both television and radio broadcasting services. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the services listed therein, including television and radio broadcasting, are of a kind which may emanate from a single source. *See, e.g., In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988)").

In view of the foregoing, we resolve the *du Pont* factor regarding the similarity or dissimilarity of applicant's and registrants' goods against applicant.

With regard to the trade channels of the goods, applicant maintains that its goods "will not be marketed in the same fashion, sold in the same stores or sold to the same type of consumers" as registrants' goods. For the URBANCHILLERS registration, applicant maintains that because the registrant is an entertainment company, registrant "obviously sells or gives away clothing as promotional materials," and does so "only through stores that sell entertainment merchandise or online at the registrant's website." Brief at unnumbered pp. 5 and 9.

Applicant's arguments are not well taken; a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registration. Because there are no limitations in the identifications, we must presume that the "registration[s] encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods," *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), and that applicant's goods would move in the same trade channels as registrants' goods and be sold in the same outlets as registrants' goods. We also find that applicant's and registrants' clothing items would be sold to the same purchasers, i.e., members of the general public. The *du Pont* factors regarding trade channels and classes of consumers are also resolved against applicant for both marks.

We next turn to the *du Pont* factor regarding the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under this *du Pont* factor, 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 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). Also, although the marks at issue must be considered in their entireties, it is well settled that 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 Chatam International Inc.,* 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant's mark consists of the word CHILLERS in stylized letters underneath a character wearing a baseball cap backwards and a pair of sunglasses, lying down on a portion of the word CHILLERS with his arms behind his head and with his legs crossed. Because (i) the word CHILLERS forms the literal portion of applicant's mark, and it is the literal portion of the mark that will be used by

purchasers in recalling the marks and purchasing the goods, see *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553 (TTAB 1987), and (ii) CHILLERS is much larger in size than the character and forms a greater visual impression on the purchaser, we find that the word CHILLERS, and not the design element, is the dominant portion of applicant's mark.

AUSSIE CHILLER

According to applicant, CHILLER in the AUSSIE CHILLER mark is not the dominant term in registrant's mark because CHILLER is a descriptive term. Applicant argues that registrant's hats are "Australian style ventilated hats that serve to cool or 'chill' the user's head," as demonstrated by the webpages from aussiechiller.com which promote the cooling aspects of registrant's hats. Brief at unnumbered p. 3. The webpages promote the goods as being "like an ICE-COLD towel" and "uniquely allows ventilation but blocks the sun!" Applicant does not argue that AUSSIE is not descriptive; rather it argues that the entire mark is descriptive and should not have been registered.

We do not agree with applicant's arguments. First, applicant's contention that the entire mark is descriptive constitutes an impermissible collateral attack on the cited registration. Such an attack will not be entertained in an

ex parte appeal. See, e.g., *In re Peebles Inc.*, 23 USPQ2d 1795 (TTAB 1992); *In re C. F. Hathaway Co.*, 190 USPQ 343 (TTAB 1976). Thus, the mark as a whole cannot properly be considered descriptive. Second, AUSSIE has been disclaimed, and disclaimed matter is often "less significant in creating the mark's commercial impression." *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). Third, the evidence of record does not support the contention that CHILLER in AUSSIE CHILLER is descriptive. The definition of "chiller" from m-w.com is "one that chills," which appears to restrict the term to a person rather than a thing, and the only evidence of use of "chiller" in connection with hats is the single webpage from registrant's own website, aussiechiller.com. Rather, we agree with the examining attorney that CHILLER is at most suggestive and that it is the dominant term in the mark AUSSIE CHILLER.

While the marks in their entireties have obvious differences in appearance and sound due to the inclusion of AUSSIE in registrant's mark, these differences are not as significant as the similarities in appearance and sound created by the common dominant term CHILLER(S).[1] As far as

[1] The addition of the letter "S" in applicant's mark is inconsequential to our analysis.

the connotation of the marks, applicant argues that AUSSIE CHILLER "connotes an 'Australian' or 'Aussie' style hat that is used to 'cool down' or 'chill' the head" and that applicant's mark "connotes the slang word 'to chill', which means to relax or to be laid back. It connotes the laid back, casual and relaxed lifestyle of Southern California where surfers, skateboarders and other people simply 'chill.'" Brief at unnumbered p. 6. One connotation of CHILLERS in applicant's mark is certainly likely to be "to relax or be laid back" in view of the character who is in repose in applicant's mark. However, this same connotation of CHILLER could be applied equally to registrant's mark which encompasses hats of the type worn by the character in applicant's mark, i.e., a baseball cap. We find too that the overall commercial impressions of the marks are very similar because CHILLER and CHILLERS are the dominant terms in the respective marks and because the connotation of CHILLERS in the respective marks is likely to be the same. Hence, we resolve the *du Pont* factor regarding the similarity of the marks with regard to the cited registration of the AUSSIE CHILLER mark against applicant.

URBANCHILLERS

As noted earlier in this decision, some of applicant's goods are identical to some of the goods identified in the

URBANCHILLERS registration. The degree of similarity between the marks which is required to support a finding of likelihood of confusion therefore is less than it would be if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

When we compare URBANCHILLERS with applicant's mark, we find that the marks are similar in sound, appearance, meaning, and commercial impression. The presence of CHILLERS in both marks creates similarities in sound and appearance between the marks. As far as the meaning of the marks, applicant has argued that the connotation of CHILLERS in URBANCHILLERS is different from that of CHILLERS in registrant’s mark. We are not persuaded that there is a difference in the meaning of CHILLER(S) in the marks, for example, CHILLERS in URBANCHILLERS may also refer to those who relax, but in the context of an urban environment. Thus, applicant’s CHILLERS mark, even with the design element, is likely to be perceived as identifying a distinct line of registrant’s URBANCHILLERS clothing.

We hence conclude that although there are differences in the marks, when the marks are considered as a whole, the similarities in sound, appearance, meaning and commercial

impression due to the identical term CHILLERS in each mark outweigh any differences and that the marks are more similar than dissimilar when considered in their entireties. We resolve the *du Pont* factor regarding the similarity of the marks with regard to the cited registration for the URBANCHILLERS mark against applicant.

We add too that we are not persuaded otherwise by applicant's reliance on *In re Hearst Corp.*, 25 USPQ2d 1238 (Fed. Cir. 1992) and applicant's contention that in considering the similarities or dissimilarities of the respective marks, the marks have been improperly dissected. We have properly considered the component parts of the respective marks, providing the appropriate weight to these components in each mark, and then reached our conclusion based on consideration of the marks in their entireties. The Federal Circuit has recognized that (i) differing weight may be given to differing components, see *National Data Corp.*, 224 USPQ at 751 ("[t]hat a particular feature is descriptive … with respect to the involved goods … is one commonly accepted rationale for giving less weight to a portion of a mark"); and (ii) that the weight to be given terms in a mark is "not entirely free of subjectivity." *Hearst*, 25 USPQ2d at 1239.

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 registrants' marks for their respective identified goods encounter applicant's mark on identical or related goods, they are likely to be confused as to source. The fact that AUSSIE CHILLER, URBANCHILLERS and CHILLER BANDANNA (now cancelled) have coexisted on the Principal Register does not persuade us that there is no likelihood of confusion in this case. Not only must each case be decided on its own merits, but each of these registrations may be distinguished from the other in view of the additional wording in each mark, whereas applicant's mark is the single word CHILLERS without any additional wording.

Decision: The refusal to register under Section 2(d) of the Trademark Act in view of Registration Nos. 2991647 and 3011442 is affirmed.