

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

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bearington Collection, Inc.

Serial No. 78843023

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Stockton for Bearington Collection, Inc.

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105 (Thomas G. Howell, Managing Attorney).

Before Walters, Drost and Wellington, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Bearington Collection, Inc. has filed an application to register the standard character mark CUDDLE ME SLEEPERS on the Principal Register for "toy blankets consisting of an animal head rattle affixed to a small blanket," in International Class 28.¹ The application includes a disclaimer of SLEEPERS apart from the mark as a whole.

¹ Serial No. 78843023, filed March 22, 2006, based on use of the mark in commerce, alleging first use and use in commerce as of June 30, 2003.

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark CUDDLE ME, previously registered for "comforters,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 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); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. 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 impressions 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, 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). Furthermore, 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*

² Registration No. 1344525 issued June 25, 1985, in International Class 24, and is owned by Crown Craft Infant Products, Inc. [Renewed; Section 15 affidavit acknowledged.]

National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant argues that the term SLEEPERS in its mark is sufficient to distinguish the goods. We disagree. Applicant's mark consists of the registered mark in its entirety with the addition, at the end, of a merely descriptive, disclaimed term. As such, applicant's mark is likely to be perceived as identifying another product in the CUDDLE ME line. When we consider the marks as a whole, we find that they are substantially similar in appearance, sound, connotation and overall commercial impression.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough

that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

Applicant argues that the differences between the respective goods are considerable, noting that its goods are labeled, marketed and sold as toys, not blankets; that its toys and registrant's comforters "serve different purposes (one is a covering and the other is a plaything), are displayed in different areas of stores and are not complimentary or interchangeable" (brief, p. 10); and that its toys and registrant's comforters are sold in entirely different channels of trade.

The examining attorney contends that applicant's goods are, in fact, baby blankets, noting that applicant originally identified its goods as blankets. The examining attorney submitted copies of third-party registrations for marks registered in connection with both blankets and

comforters, including, specifically, baby blankets and baby comforters. He also referred to the excerpt from registrant's website, submitted by applicant, indicating that registrant manufactures infant bedding, blankets and accessories that are available at stores such as Babies "R" Us, JC Penney, K-Mart and juvenile specialty stores.

The registrant's goods are identified as "comforters," which encompasses all types of comforters, including baby comforters. The third-party registrations, while not evidence of use of the marks on the goods identified therein, are, nonetheless, sufficient to suggest that blankets and comforters may be offered by a single entity. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Applicant's goods are identified as "toy blankets consisting of an animal head rattle affixed to a small blanket." It is immaterial whether applicant's goods are marketed, or would be perceived by consumers, as primarily blankets to cover a baby, blankets to sooth a baby, or toy blankets, or all three. The toy animal head with rattle is affixed to a small blanket and, as such, it is likely to be perceived as related to blankets. Further, while applicant's identification of goods is limited to "small blankets," applicant is not limited therein to producing only the size blanket it currently produces. Because the

product consists in part of a blanket, it would be reasonable for consumers to believe that it comes from the same source as a baby blanket or baby comforter. Therefore, we find that the goods are sufficiently related that, if identified by similar marks, confusion as to source is likely.

Moreover, both applicant's and registrant's goods are baby products that are likely to be purchased by the general consumer and to travel in at least overlapping trade channels. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Applicant argues against a likelihood of confusion on the ground that the marks have coexisted in the marketplace for almost five years with no evidence of actual confusion. However, while a factor to be considered, the absence or presence of actual confusion is of little probative value where we have little evidence pertaining to the nature and extent of the use by applicant and registrant. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value."). See also, *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

Similarly, applicant's argument that it has no intent to trade upon registrant's reputation is unavailing. While proof of an intent to trade on registrant's reputation would weigh in favor of a finding of likelihood of confusion, a lack of such intent does not obviate likelihood of confusion.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, CUDDLE ME SLEEPERS, and registrant's mark, CUDDLE ME, their contemporaneous use on the closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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