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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Blue Cast Denim Co., Inc.

Serial No. 78915364

Howard F. Mandelbaum, of Levine & Mandelbaum for Blue Cast Denim Co., Inc.

Brian Pino, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Hohein, Walters, and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark Judge:

Blue Cast Denim Co., Inc. filed an application to register the mark WHOOZ BLOOZ, in standard character format, for "jeans, pants, jackets, shorts, and skirts" in International Class 25.¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that the WHOOZ BLOOZ mark, when

¹ Application Serial No. 78915364, filed June 23, 2006, pursuant to Section 1(a) of the Trademark Act, 15 USC §1051(a), claiming first use and first use in commerce on June 10, 1989.

used in connection with the identified goods, so resembles the mark BLOOZ, registered on the Supplemental Register for "footwear, headwear, clothing, namely, shirts, pants, jackets, sweatshirts, sweatpants," as to be likely to cause confusion.²

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, we affirm the final refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). We consider each of the factors as to which

² Registration No. 2950420, issued February 2, 2004 for a typed drawing in International Class 25, claiming first use and first use in commerce on September 1, 2000.

applicant or the examining attorney presented arguments or evidence.

The similarity or dissimilarity
and nature of the goods, and channels of trade

Applicant is seeking registration of its mark for pants and jackets, in addition to jeans, shorts, and skirts. The cited registration also covers pants and jackets, in addition to shirts, sweatshirts, and sweatpants. Accordingly, the goods are identical in part and otherwise highly related. Applicant agrees that the similarity of the goods is not in dispute, stating: "At the outset, Applicant wishes to state that no reliance is being placed on distinctions between the goods identified in the cited registration and those identified in the application under appeal." (Appl's Brief at 3).

Applicant further concedes that the goods will travel in similar channels of trade: "Applicant does not question that the goods are sold in similar channels." (Appl's Reply Brief at 1). Indeed, there is nothing in the recital of goods in the cited registration to limit registrant from targeting the same consumers as applicant. In the absence of specific limitations in the registration, we must presume that registrant's goods will travel in all normal and usual channels of trade and methods of distribution and be sold to all classes of consumers. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). In view of the foregoing, these *du Pont* factors weigh heavily

in favor of finding that there is a likelihood of consumer confusion.

The similarity or dissimilarity of the marks
in their entireties

Preliminarily, we note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks, we are mindful that 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 impression so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v.*

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Oliver & Winston, Inc., 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). BLOOZ constitutes the whole of registrant's mark, and is one of only two words in applicant's mark.

Applicant argues that BLOOZ is a misspelling of the word "blues" and is therefore merely descriptive of registrant's goods. On this point, applicant refers to an office action from the application file that ultimately matured into the cited registration. The cited office action asserts that "BLOOZ" is merely descriptive of registrant's goods because some of the clothing may be blue. The examining attorney in the present case objected to this evidence by applicant, claiming that it was wrongly introduced for the first time on appeal in violation of the TBMP §1207.01. Since the evidence was actually first introduced in response to the initial office action herein, we overrule the objection.

Applicant further argues that with only a registration on the Supplemental Register, registrant is entitled to scant protection for its "BLOOZ" mark. While it is true that the Supplemental Register does not afford registrants the full benefits accorded to registrants on the Principal Register, marks on the Supplemental Register are protected under Section 2(d) of the Trademark Act against registration of confusingly similar marks. See *In re Amtel Inc.*, 189 USPQ 58 (TTAB 1976). Moreover, although applicant argues that registrant's mark is inherently weak,

even weak marks are entitled to protection where confusion is likely. *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978). In particular, there is no "requirement that citation of marks on the Supplemental Register under §2(d) be limited to marks identical to that sought to be registered." *Id.* at 341. As the CCPA observed in *Clorox Co.*, there is no reason to apply different standards to registrations cited under §2(d). "The level of descriptiveness of a cited mark may influence the conclusion that confusion is likely or unlikely, but that fact does not preclude citation under §2(d) of marks on the Supplemental Register." *Id.* (*internal cites omitted*).

We also find it probative that applicant chose the exact same misspelling of "blues" for its own mark. We conclude that the addition of the word "WHOOZ" to the registered mark "BLOOZ" does not create a sufficiently different overall commercial impression to obviate a likelihood of confusion where the goods are identical in part and otherwise highly related. See *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) ("CAREER IMAGE" AND "CREST CAREER IMAGES"); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) ("GASPAR'S ALE" and "JOSE GASPAR GOLD"); *Lilly Pulitzer, Inc. v. Lilly Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) ("THE LILLY" and "LILLI ANN"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE").

The examining attorney has attested that other than the cited registration and the present application, "there are no marks that contain the word BLOOZ in the relevant class." In view of the foregoing, this *du Pont* factor weighs in favor of finding that there is a likelihood of consumer confusion.

Balancing The Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that the goods are identical in part and otherwise highly related; they are likely to be sold through the same trade channels; and the marks are similar. It is well established that any doubts as to likelihood of confusion are to be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Accordingly, we find a likelihood of confusion between applicant's mark WHOOZ BLOOZ for "jeans, pants, jackets, shorts, and skirts", and the cited mark BLOOZ as registered on the Supplemental Register for "footwear, headwear, clothing, namely, shirts, pants, jackets, sweatshirts, sweatpants".

Decision: The refusal to register is affirmed.