

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

Mailed: April 20, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Loaded Clothing, LLC
v.
The Tefa Dexter and Tiffany Haugen Partnership
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Opposition No. 91161958
to Application No. 76553481
filed on October 2, 2003
—————

John Arai Mitchell of Arai Mitchell PC for Loaded Clothing, LLC.

Robert J. Schaap of The Law Offices of Robert J. Schaap for The Tefa Dexter and Tiffany Haugen Partnership.

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Before Walters, Taylor and Bergsman, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Loaded Clothing, LLC filed an opposition to the application of The Tefa Dexter and Tiffany Haugen Partnership to register the mark LOADED CLOTHING for "clothing, namely, hats, tank-tops, t-shirts, men's underwear, women's underwear, lingerie, skirts, shorts, pants, dresses, wristbands, jackets, socks, shoes, belts, bathing suits, beach wear, sweatshirts, sweaters,

sweatpants," in International Class 25.¹ The application includes a disclaimer of CLOTHING apart from the mark as shown.

As its ground for opposition, opposer asserts that applicant's mark, when applied to applicant's goods so resembles opposer's previously used mark LOADED for "high quality clothing ... primarily t-shirts, tank tops and caps," (Notice of Opposition, paragraphs 1, 2) as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Applicant, in its answer, denied the salient allegations of the claim and asserted several "affirmative defenses." However, only opposer submitted evidence and a brief on the case.² In view of applicant's failure to submit any evidence or a brief, its affirmative defenses are deemed to have been waived.

Opposer propounded discovery requests, including interrogatories, document production requests and a notice of deposition under Fed. R. Civ. P. 30(b)(6), to which applicant refused to respond (see opposer's letter to the Board of November 29, 2006). In its trial brief, opposer requested that judgment be entered against applicant for its

¹ Application Serial No. 76553481, filed October 2, 2003, based upon use of the mark in commerce, alleging dates of first use as of April 24, 2003, and first use in commerce as of July 25, 2003.

² Opposer's Reply Brief was inappropriately submitted because applicant did not file a brief. Thus, opposer's Reply Brief has not been considered.

failure to respond to discovery. Because opposer did not file a motion to compel discovery prior to the commencement of the first testimony period, we will not decide the case on this basis (See 37 C.F.R. §2.120(e); TBMP §523.03).

Rather, we will proceed to a determination on the merits of opposer's claim of priority and likelihood of confusion.

Findings of Fact

Opposer has established that it designs and manufactures clothing identified by the mark LOADED, including t-shirts, tank tops, caps, hoodies, and swimwear; that it produces custom clothing, including t-shirts, suit jackets and shirts, identified by the mark LOADED, for celebrities such as Brittany Spears, Gilby Clark, and Tommy Lee; that it first used the mark on these goods in sales to a retail store in Taiwan on March 12, 1999; that it first used the mark on these goods in commerce at least as early as December 31, 1999; and that it has a pending trademark application, Serial No. 78377202, filed March 2, 2004, for the mark LOADED for "clothing, namely, t-shirts, tank tops and caps" that is currently suspended pending the outcome of the instant opposition proceeding. (Trial testimony of Sonny J. Valenzuela, "Valenzuela," at 5-6.) Opposer has sold, and continues to sell, its goods to various stores in California, as well as in Wisconsin, Las Vegas, Philadelphia and New York (id. at 7-9, 28), and to an online store, L.A.

Celebrity (id. at 10); and that it has received media coverage for its goods in various magazines, including *L.A. Confidential*, *Lemonade*, *Proctor & Gamble Magazine* (2001), *Rolling Stone* (April 2004), and *Blender Magazine* (April 2006), and on the television show *Rock Star: Supernova* (id. at 11-21, exhibits 5-8). Opposer's sole proprietor, Sonny J. Valenzuela, stated that he observed applicant's t-shirts for sale in stores in California in close proximity to the stores selling his goods; and that several of his friends and customers reported to him that they mistakenly went to applicant's website looking for his products (id. at 22-23). Additionally, several stars of the *Rock Star: Supernova* television show appeared on the show wearing opposer's t-shirts. The show provided as a courtesy a web link from its MSN website to what they believed was opposer's web site. However, the television show mistakenly linked to applicant's website. This mistake was corrected when opposer became aware of it. After the link was corrected, opposer received a substantial increase in "hits" at its web site and made additional sales. (Id. at 22-28).

Analysis

Because opposer has a pending application that is suspended pending the outcome of this proceeding, and its likelihood of confusion claim is not frivolous, we find that opposer has established its standing to oppose registration

of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Opposer has established its priority because it has established uncontroverted first use and use in commerce dates in 1999 that predate applicant's October 2, 2003 filing date, the only date upon which applicant may rely herein.

Therefore, we turn to the issue of likelihood of confusion and note that our determination must be 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. *In re E.I. du Pont de Nemours & 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). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

With respect to the goods of the parties, we observe that applicant's identification of goods includes all of the goods upon which opposer has shown that it uses its mark. Applicant's remaining identified goods are closely related clothing items. Thus, we conclude that the goods of the parties are either identical or closely related. This factor favors opposer.

Further, both opposer's and applicant's identifications of goods and services are broadly worded, without any limitations as to channels of trade or classes of purchasers. We must presume that the goods and services of the applicant and opposer are sold in all of the normal channels of trade to all of the usual purchasers for goods and services of the type identified. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In other words, we conclude that the channels of trade and class of purchasers of the parties' goods and services are the same. This factor favors opposer.

Turning to the marks, we note that while we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a

conclusion on the issue of confusion, "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." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark consists of the word LOADED, which is identical to opposer's entire mark, followed by the disclaimed and, thus, admittedly descriptive, if not generic, word CLOTHING. We find that LOADED is clearly the dominant portion of applicant's mark because it is the first word in the mark and it is followed by a merely descriptive or generic term. Therefore, we find that applicant's mark is substantially similar to opposer's pleaded mark in sound, appearance, connotation and commercial impression. This factor favors opposer.

Finally, we also find that opposer has established the opportunity for actual confusion to occur and that such confusion has occurred to opposer's detriment. This factor favors opposer.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, LOADED CLOTHING, and opposer's mark, LOADED, their contemporaneous use on the same and closely related goods

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involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The opposition is sustained.