

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

Mailed:
May 26, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Blue Heaven Hosiery Co., Inc.

Serial No. 76687280

Myron Amer of Myron Amer P.C., for Blue Heaven Hosiery Co., Inc.

David C. Reihner, Trademark Examining Attorney, Law Office 111
(Craig Taylor, Managing Attorney).

Before Walsh, Mermelstein, and Ritchie, Administrative Trademark
Judges.

Opinion by Ritchie, Administrative Trademark Judge:

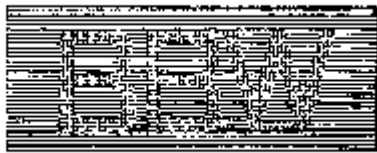
Blue Heaven Hosiery Co., Inc. ("applicant") filed an application to register the mark BBW for goods ultimately identified as "women's knee high stockings of nylon and spandex construction material and not including upper torso clothing," in International Class 25.¹

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of

¹ Serial No. 76687280, filed March 3, 2008, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), alleging first use and first use in commerce on January 10, 2000.

Serial No. 76687280

1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark BBW, as shown below, for "clothing for over-sized women - namely, jeans, blouses, lingerie, skirts, and slacks" in International Class 25,² that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive:



Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. For the reasons discussed herein, the Board affirms the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion

² Registration No. 1236403, issued May 3, 1983, claiming first use and first use in commerce on November 5, 1979; Sections 8 and 15 affidavits accepted and acknowledged. Renewed. The registration includes the following description: "In the drawing the lettering is lined for metallic gold and the background is lined for navy blue."

Serial No. 76687280

analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper 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 discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. In *re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. The cited registration consists of the words "BBW" in design form. These are also the same letters, presented in the same order, in applicant's standard character mark. Thus, the word portions of the marks are identical, and the only difference between them is the color design in the registered mark.

With respect to the design portion of applicant's mark, where a mark consists of words as well as a design, the words are generally dominant because the words will be used to call for or refer to the goods. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 UPSQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co.*,

Serial No. 76687280

Inc., 3 USPQ2d 1553, 1554 (TTAB 1987). This is particularly so in this case, where the registrant's mere addition of color to its mark does not change the likely commercial impression of the letters BBW. The design does not change the connotation of the cited registered mark, which is the same as that of applicant's mark.

In sum, the marks are nearly identical in appearance, sound, meaning and commercial impression. In view of the foregoing, we find that the first *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

The Goods and Channels of Trade

In determining the similarity or dissimilarity of the goods, we note that the more similar the marks at issue, the less similar the goods or services need to be for the Board to find a likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). 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 the 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 or intended to be used therewith, to a mistaken belief that they originate from or are

Serial No. 76687280

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).

In order to demonstrate the similarity of the goods identified in the application to those in the cited registration, the examining attorney submitted over a dozen use-based, third-party registrations that identify goods from both the application and the cited registration. Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). Applicant argues that its identified goods do not overlap with those in the cited registration since applicant has added the limitation of "not including upper torso clothing," thereby avoiding a likelihood of confusion. However, this limitation does not avoid a likelihood of confusion. The goods in the cited registration are not limited to upper torso clothing. In fact some, such as "skirts" and "slacks" are clearly intended to be worn on the lower torso. Furthermore, the third-party registrations cover, variously, every one of the goods identified in the cited registration -- "jeans," "blouses," "lingerie," "skirts" and "slacks" -- alongside applicant's "knee-high stockings." Finally, although the clothing items identified in the cited registration are limited

Serial No. 76687280

to "over-sized women," the clothing identified in the application are not limited by size, and may include the same consumers.

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. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). Since there are no limitations on the channels of trade in applicant's identification of goods either, we must make the same presumption with regard to applicant's goods. In other words, there is nothing that prevents the registrant's various clothing items from being sold in the same channels of trade and to the same classes of consumers that purchase applicant's knee-high stockings (and vice versa). Accordingly, we find that these *du Pont* factors weigh in favor of finding a likelihood of consumer confusion.

Balancing the Factors

In view of our findings that the marks are nearly identical, the goods are similar, and the goods move in the same channels of trade to the same classes of consumers, we find that applicant's mark is likely to cause confusion with the mark in the cited registration.

Decision: The refusal to register is affirmed.