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November 13, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Grapevine Intellectual Properties, LLC

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Serial No. 77211233

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Edmund J. Ferdinand, III and Jessica S. Rutherford of Grimes & Battersby, LLP for Grapevine Intellectual Properties, LLC.

Ahsen Khan, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

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Before Hairston, Bergsman and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark Judge:

Grapevine Intellectual Properties, LLC ("applicant") filed an application to register the mark ANGEL FACE and design, shown below, for goods ultimately identified as "men's and women's athletic footwear and shoes," in International Class 25[1]. As part of the application, applicant stated that the portrait included as part of the mark does not identify a living individual.

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[1] Serial No. 77211233, filed June 20, 2007, alleging a bona fide intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark "ANGEL FACE," in typed drawing form, for "children's clothing, namely, tops, bottoms, jackets, sweat suits, pants, and playsuits" 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. For the reasons discussed herein, the Board affirms the refusal to register.

[2] Registration No. 2370580, issued July 25, 2000; Sections 8 and 15 affidavits accepted and acknowledged. The registrant claimed January 1997 as its dates of first use and first use in commerce.

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 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 consider each of the factors as to which applicant or the examining attorney presented arguments 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 registered mark consists entirely of the words "ANGEL FACE," which are also the only wording in applicant's mark. Thus, the word portions of the marks are identical. The only difference between the marks is applicant's design element.

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., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). This is true of applicant's mark, whose design of a woman's face merely presents a pictorial representation of the words "ANGEL FACE"; that is, the portrait emphasizes the word portion because it is the representation of a woman with an angelic face. The design does not change the connotation of appliant's mark, which is the same as that of the cited registered mark.

In sum, the marks are substantially similar in terms of 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 consumer confusion.

The Goods and Channels of Trade

In determinining 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). It is only necessary that there be a viable relationship between the goods or services to support a

finding of likelihood of confusion. *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 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).

Applicant's identified goods are footwear and shoes for men and women while the cited registration includes various items of clothing for children. While applicant's goods do not overlap with those in the cited registration, the examining attorney has submitted copies of use-based, third-party registrations covering goods of the type in both the application and the cited registration. These include both clothing for children, as identified by the registrant, and shoes for men and women, as identified by applicant. 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 has argued that footwear is sold separately and in different channels of trade than clothing. However, the examining attorney submitted evidence from websites of shoe stores such as Footlocker and Nine West, showing that they advertise and sell both footwear and clothing, side-by-side. Additionally, there is nothing in the recital of goods in the cited registration that limits the registrant's channels of trade. 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 clothing from being sold in the same channels of trade and to the same classes of consumers that purchase athletic footwear and shoes (and vice versa). Furthermore, since parents are the likely purchasers of their children's clothing, the target consumers of both registrant and applicant are the same. 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 substantially similar, the goods are similar, and the goods move in the same channels of trade to the same purchasers, we find that applicant's mark ANGEL FACE and design for athletic footwear and shoes is likely to cause confusion with the registered mark ANGEL FACE for "children's clothing, namely, tops, bottoms, jackets, sweat suits, pants, and playsuits."

Decision: The refusal to register is affirmed.