

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

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re The Closet Guy, Inc.

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Serial No. 77426306

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Inc.

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109 (Dan Vavonese, Managing Attorney)

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Before Seeherman, Kuhlke and Mermelstein, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

The Closet Guy, Inc. has appealed from the final  
refusal of the trademark examining attorney to register THE  
CLOSET GUY and design, as shown below, with CLOSET  
disclaimed, for services ultimately identified as  
"installation of custom closets and storage systems" in

Class 37 and "custom manufacture of closets and storage systems" in Class 40.<sup>1</sup>



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the mark THE CLOSET LADY in typed drawing format, with CLOSET disclaimed, registered for "custom designed closet and storage systems, comprised of shelves, drawers, bins and shoe racks, sold as a unit" in Class 20; "consulting and design services for others in the field of storage units and closets" in Class 42; and "syndicated newspaper columns and newsletters in the field of storage systems and interior space design" in Class 16.<sup>2</sup>

The appeal has been fully briefed.

As a preliminary matter, the examining attorney has objected to Exhibit 1 which was submitted for the first time with applicant's appeal brief. This submission is

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<sup>1</sup> Application Serial No. 77426306, filed March 19, 2008, asserting first use and first use in commerce as early as December 13, 2004.

<sup>2</sup> Registration No. 1917077, issued September 5, 1995; renewed.

untimely, and has not been considered. See Trademark Rule 2.142(d). The examining attorney has also claimed that a list of trademarks in applicant's brief "is without merit because the applicant failed to provide the registered trademark numbers for each mark for a complete analysis." Brief, p. 6. The examining has misread the nature of this list. Applicant has cited a number of cases which found no likelihood of confusion between particular marks in which the applicants had added a word to previously registered marks, and the list simply shows those marks in a column format. Thus, we have considered that list, and those cases, for whatever probative value they have, but note that because those cases address a different factual situation from the one at hand, their value is quite limited.

We now turn to the substantive issue of likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between

the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant has discussed only the du Pont factor of the similarity of the marks. In her brief the examining attorney pointed this out, and stated that "it is reasonable to assume that the applicant concedes that the applicant and registrant's goods and services are similar and commercially related." Brief, p. 6. In its reply brief applicant did not contest this statement, but again discussed only the factor of the similarity of the marks. Therefore, we agree that it is reasonable to conclude that applicant does not dispute that the du Pont factors discussed by the examining attorney in her brief, with the exception of the similarity of the marks, favor a finding of likelihood of confusion.

Moreover, we find that applicant's services of "custom manufacture of closets and storage systems" and registrant's "custom designed closet and storage systems, comprised of shelves, drawers, bins and shoe racks, sold as a unit" are very similar, while applicant's "installation of custom closets and storage systems" is complementary to these identified goods of registrant, as well as to

registrant's "consulting and design services for others in the field of storage units and closets." Because applicant's services and both the registrant's goods in Class 20 and its services are closely related, this du Pont factor favors a finding of likelihood of confusion.<sup>3</sup>

Although we do not have any evidence about the channels of trade in which the services are offered, based on their respective identifications we must assume that they will be sold to the same classes of consumers, including members of the general public who want their closets designed and who want storage systems designed for their particular closets.

The only other du Pont factor discussed by the examining attorney, and the only factor discussed by applicant, is the similarity of the marks.<sup>4</sup> Applicant has acknowledged that, as a general rule, when a mark consists of words and a design, it is the word portion that is

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<sup>3</sup> Given the close similarity of these goods and services, we need not discuss whether applicant's services and the registrant's goods in Class 16 are also related. Thus, in reaching our decision herein we specifically do not rest our finding on the Class 16 goods in the cited registration.

<sup>4</sup> Applicant has attempted to discuss the strength of the registered mark in terms of third-party use of the term CLOSET. The evidence applicant attempted to submit in support of this point was, as previously discussed, untimely submitted with applicant's brief. However, we will discuss the fact that the word CLOSET has been disclaimed in both marks in the context of our consideration of the similarity of the marks.

accorded greater weight in the likelihood of confusion analysis because it would be used by purchasers to refer to or request the goods or services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). However, applicant asserts that in the case of its mark the design should be given greater weight because it is such a prominent part of the mark. We do not agree. Although the design is certainly visually prominent, it is a picture of a man building a closet, and therefore it merely reinforces the meaning of the word portion of the mark, THE CLOSET GUY. As such, it does not serve to distinguish applicant's mark from the registrant's.

Applicant has also pointed out that no one is entitled to exclusive rights to the words THE and CLOSET, and that because of the differences in the words GUY and LADY, the marks are sufficiently different. We agree that the mere inclusion of the words THE and CLOSET in two marks would not necessarily be a sufficient basis on which to find them similar. However, the marks at issue herein--considered in their entireties--are also similar in their meaning and commercial impression, in that they both convey the idea of a person who is creating closets for customers. The difference in the gender of the person conveyed by the word GUY and LADY in the respective marks is not sufficient to

distinguish them, as the overall impression is that of a person who helps the customer and performs the service for them. As applicant itself has recognized:

The federal courts have acknowledged an assumption that "an average purchaser does not retain all the details of a mark, but rather the mental impression the mark creates in its totality." T&T Mfg. Co. v. A.T. Cross Co., 449 F. Supp 813, 820, 197 USPQ 763 (D.R.I. 1978). The federal courts have further indicated that "[t]he marks must be compared not by examining in minute detail their differences, but by viewing them in their entirety, to capture the general impression that they would give a consumer." American Assoc. for Advancement of Science v. Hearst Corp., 498 F.Supp. 244, 259, 206 USPQ 605 (D.D.C. 1980) [other citations omitted].

Brief, pp. 10-11. Although these were infringement cases, and the Board normally follows its own precedent and that of the Federal Circuit, our primary reviewing court, the same principles have been stated in our cases as well. See Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980) (under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections).

Because the word portion of applicant's mark follows the same format as the registered mark, i.e., the phrase

THE CLOSET followed by and ending with a word identifying a person by gender, such that the overall meaning is that of a person who designs or creates closets; because the design element in applicant's mark merely reinforces this meaning; and because the marks as a whole create the same commercial impression; we find that the du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

As noted, no evidence was submitted with respect to any of the other du Pont factors, and we therefore treat them as neutral. Because of the relatedness of the goods and services, the fact that they are offered to the same classes of consumers, and the similarities of the marks, we find that applicant's mark, as used in connection with its services, is likely to cause confusion with the cited registration. To the extent that there is any doubt about our conclusion, we must follow the well-established principle that such doubt must be resolved in favor of the registrant and prior user. In *re* Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.