

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 12, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Melanie Hart
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Serial No. 77909807
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Robert O’Connell, Jr. and Anthony H. Cataldo, of Goodwin Procter LLP, for Melanie Hart.

Anne M. Farrell, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Bucher, Shaw and Kuczma, Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Melanie Hart (“applicant”), appeals from the final refusal to register the following mark in standard character format:

CALLULA LILLIBELLE

for the following goods:

Towels that may be worn as a dress or similar garment in
Class 24; and

Dresses; Skirts; Slacks in Class 25.¹

The examining attorney issued a final refusal to register the mark² pursuant to § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing the following Registration, owned by Kahn Lucas Lancaster, Inc. as reflected in the Office records, as a bar to registration:

Registration No. 3634829³

Mark: KALULA KIDS

For: Children's clothing, namely, girls' dresses, tops, pants, and skirts, separately and in sets in Class 25.

After the refusal was made final, applicant appealed and filed a request for reconsideration which was denied. Applicant and the examining attorney have filed briefs. For the reasons set forth below, the refusal to register is affirmed.

Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of 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, two key

¹ Application Serial No. 77909807 filed on January 12, 2010, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² In the June 13, 2011 Final Office Action, the requirement that applicant pay the applicable surcharges for loss of Teas Plus status was also made final. Pursuant to authorization to charge the designated deposit account provided by applicant subsequent to filing her appeal briefs, the \$50 additional surcharge fee per Class for both Classes has been paid.

³ Registration No. 3634829 issued June 9, 2009, for a standard character mark; the word "KIDS" is disclaimed.

considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We have considered these and any other *du Pont* factors on which applicant and the examining attorney have submitted evidence and argument. To the extent that other factors are applicable, we treat them as neutral.

A. Similarity of Goods, Channels of Trade and Classes of Consumers

We first consider the *du Pont* factor involving the similarity or dissimilarity of applicant's goods (towels that may be worn as a dress or similar garment, and dresses; skirts; slacks), in relation to the goods in the cited registration (children's clothing, namely, girls' dresses, tops, pants, and skirts) and their channels of trade and classes of consumers. It is well-settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods and services as they are identified in the involved application and registration. *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012).

Because the identification of goods in Class 25 in the cited registration is not limited to a particular type of dresses, skirts and slacks, we must presume that it covers all types of such items, including the girl's dresses, skirts and pants in applicant's application. Therefore, the goods of applicant and the cited registrant are, at minimum, identical in part to the extent they both include dresses, skirts and pants or slacks. In determining the similarity of applicant's and registrant's

goods, it is sufficient if likelihood of confusion for each Class of goods is established for any item encompassed by the identification of goods for that Class. *See In re Wacker Neuson SE*, 97 USPQ2d 1408, 1409 (TTAB 2010) citing *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Similarly, the identification of the remaining goods in applicant's application, namely, towels that may be worn as a dress or other garment, is not limited, and therefore includes towels that may be worn by children. Towels that may be worn by children as a dress or other garment are clearly related to the children's clothing items in the cited registration. Accordingly, applicant's goods in Class 24 are closely related to the goods in the cited registration.

Applicant argues that the clothing items in her application and the cited registration differ because her clothing is for women while the cited registration covers children's clothing. The identification of goods in applicant's application is not limited to women's clothing. However, even if the clothing items were limited to women's clothing, they would still be related to the children's clothing recited in the cited registration. The relatedness of women's clothing and children's clothing is demonstrated by the evidence submitted by the examining attorney showing third-party retailer websites which offer women's and children's clothing.⁴ Indeed, the evidence from www.oldnavy.com and www.gap.com demonstrates that girls' dresses

⁴ See attachments to June 13, 2011 Final Office Action consisting of printouts from www.gap.com, www.landsend.com, www.llbean.com, www.hannaandersson.com and www.oldnavy.com.

in particular (identified in the cited registration) are sold alongside men's and women's clothing; and the www.landsend.com, www.llbean.com and www.hannaandersson.com websites demonstrate that children's clothing, and men's and women's' clothing, are sold alongside each other. This evidence shows applicant's goods and the goods in the cited registration are related because they are the types of products offered for sale together and sold by the same entity. The fact that these entities concentrate their businesses on clothing and are not mass retailers selling all types of products, increases the probative value of this evidence.

While there is no per se rule that all clothing items are related, many cases have recognized different types of clothing items to be related goods. *See Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 128 USPQ 549, 550 (CCPA 1961) (women's boots related to men's and boy's underwear); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991) (women's pants, blouses, shorts and jackets related to women's shoes); *In re Pix of America, Inc.*, 225 USPQ 691, 691-92 (TTAB 1985) (women's shoes related to outer shirts); and *In re Cook United, Inc.*, 185 USPQ 444, 445 (TTAB 1975) (men's suits, coats and trousers related to ladies' pantyhose and hosiery). Thus, there is sufficient evidence that applicant's goods and the goods in the cited registration are closely related.

The relatedness of the products is also amply demonstrated by the thirteen use-based, third-party registrations, that recite men's, women's and children's clothing items, submitted by the examining attorney.⁵ Although these registrations

⁵ Copies of these thirteen third-party registrations, owned by twelve different registrants, were attached to the June 13, 2011 Final Office Action. Although fourteen registrations

are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent they are based on use in commerce and serve to suggest that the goods identified therein are of a kind which may emanate from a single source under a single mark, i.e., that it is common for the same entity to provide men's, women's and children's clothing under the same mark. *See In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Thus, consumers encountering applicant's clothing items and the cited registrant's children's clothing sold under similar marks are likely to believe the goods emanate from the same source.

Because there are no limitations as to trade channels or classes of purchasers in the description of goods in either of the applications or the cited registration, we must presume that the respective goods travel through all usual trade channels for such goods and to all classes of prospective purchasers for those goods. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

The website evidence submitted by the examining attorney shows that applicant's goods and the goods in the cited registration are related, move in the same channels of trade, and are sold under conditions that would create a potential for confusion such as being offered for sale on the same websites. The evidence also indicates that the goods would be purchased by the same consumers. To the extent

were actually submitted, Registration No. 2985118 was not considered because it only identifies "infants and childrens clothing" [sic].

applicant's and registrant's respective clothing items are not restricted to particular trade channels and are therefore offered to the general consuming public, the classes of purchasers overlap and this overlap also weighs in favor of a finding of likelihood of confusion under *du Pont. In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001).

Based on the legally identical or highly related nature of the goods set forth in the application and cited registration, and the similar trade channels and customers, the *du Pont* factors of the similarity of the goods, trade channels and customers favor a finding of likelihood of confusion.

B. Similarity of the Marks

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, meaning and commercial impression. *du Pont*, 177 USPQ at 567.

Looking at applicant's CALLULA LILLIBELLE mark and the cited KALULA KIDS mark, the marks are different in appearance. However, the first word in each mark is phonetically identical.

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 in their entirety are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) and *San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196

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USPQ 1, 3 (CCPA 1977). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. See *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

As to the meaning of the marks, CALLULA LILLIBELLE is the name of applicant's daughter.⁶ In the absence of any evidence as to the meaning of the word "Kalula" in the cited mark, we concur with applicant's speculation that the word is a contraction formed from the beginning letters of the words in the name of the owner of the registration, Kahn Lucas Lancaster, Inc. In view of the apparent origin of the word "Kalula" and given the context in which it is used in the KALULA KIDS mark, the word "Kalula" would be perceived as identifying a name. Thus, both marks begin with an identical sounding name.

Because the word KIDS in the cited mark is descriptive of children's clothing, the dominant portion of the cited mark is KALULA; this is also consistent with the disclaimer of the word KIDS. Although a disclaimed portion of a mark cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. See *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985); and *SMS, Inc. v. Byn-Mar, Inc.*, 228 USPQ 219, 220 (descriptive feature can be afforded less

⁶ See October 14, 2010 Response to Office Action, "Mark identifies name of living individual, Callula Lillibelle Hart, minor daughter of applicant."

weight in confusion analysis). Thus, the dominant portion of the cited mark is the word KALULA.

The first word in applicant's mark and in the cited mark are phonetic equivalents, which can be enough for us to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (similarity in any one of the elements of appearance, sound, meaning or connotation may be sufficient to find the marks confusingly similar); *and In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (similarity in sound alone may be sufficient for finding of likelihood of confusion) citing *Krim-Ko Corp. v. The Coca-Cola Bottling Co. of New York*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968). This is particularly so because consumers are generally more inclined to focus on the first word in any trademark or service mark. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); see also *Mattel Inc. v. Funline Merchandise Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006) and *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions).

Applicant argues that the word LILLIBELLE in its mark is sufficiently distinctive to distinguish its mark from the cited mark. Whether or not LILLIBELLE is distinctive, the inclusion of the word LILLIBELLE in applicant's mark is not sufficient to avoid confusion, particularly in view of the distinctiveness

of the name KALULA. In the absence of evidence that “Kalula” or “Callula” are weak terms for clothing, consumers familiar with the cited mark may well believe that applicant’s CALLULA LILLIBELLE mark is used in connection with a new line of clothing from the maker of the KALULA KIDS clothing. This is especially so with respect to fashions where “the reference to a feminine name could be taken by the customer as identifying the designer.” *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (THE LILLY confusingly similar to LILLI ANN); *In re Southern Belle Frozen Foods Inc.*, 48 USPQ2d 1849, 1851 (TTAB 1998) (consumers familiar with registrant’s SHRIMP ROYALE packaged shrimp meal may conclude applicant’s SEAFOOD ROYALE frozen crab product is a new line of seafood from the maker of the SHRIMP ROYALE product); *NutraSweet Company v. K & S Foods Inc.*, 4 USPQ2d 1964, 1968 (TTAB 1987) (purchasers familiar with NUTRASWEET product, upon viewing NUTRA SALT, would be likely to believe it was a new product line put out by the NUTRASWEET producer or that the product was somehow associated with or sponsored by the people producing the NUTRASWEET product); *Nina Ricci S.A.R.L. v. Haymaker Sports Inc.*, 134 USPQ 26, 28 (TTAB 1962) (persons familiar with NINA RICCI or RICCI for women’s apparel would logically assume that women’s clothing bearing RICCI OF HAYMAKER emanates from same source or is connected in some way). Accordingly, applicant’s mark is similar to the cited mark.

Conclusion

Where the goods of the applicant and cited registrant are identical in part and/or closely related as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); also see *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004). After considering the applicable *du Pont* factors, we find that the goods involved are so closely related that their sale under marks beginning with phonetically identical names is reasonably likely to cause confusion, or to cause mistake or to deceive.

Decision: The refusal to register the mark in application Serial No. 77909807 under § 2(d) of the Trademark Act is affirmed.