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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Maloof Skateboarding, LLC

Serial No. 77931954

Scott Hervey of Maloof Skateboarding, LLC for Maloof Skateboarding, LLC.

Janice Kim, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Quinn and Shaw, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Malooof Skateboarding, LLC has appealed from the final refusal of the trademark examining attorney to register the design shown below for "clothing, namely, shirts, t-shirts, sports shirts and sweaters; caps, hats and sun visors" in Class 25.¹ The mark is described as consisting "of a

¹ Application Serial No. 77931954, filed February 9, 2010, on the basis of Section 1(b) of the Trademark Act (intent-to-use). The application originally also was for services in Class 41; however, when the examining attorney refused registration solely

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silhouette of a skateboarder appearing to be in mid-air while performing a trick with a skateboard slightly underneath." Color is not claimed as a feature of the mark.



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark shown below, and registered for "men's shirts, jackets, outerwear, namely coats and jackets, sweaters, sweatshirts, t-shirts, pants, shorts, socks"² that, if used on applicant's goods, it is likely to cause confusion or mistake or to deceive.

with respect to the goods in Class 25, applicant requested that the Class 41 services be divided out into a "child" application.

² Registration No. 3216146, issued March 6, 2007.



We affirm the refusal of registration.

Our determination of the issue of likelihood of confusion 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's goods and the registrant's goods are in part identical. Applicant's identified shirts, t-shirts and sweaters encompass the "men's shirts, sweaters and t-

shirts" identified in the cited registration, while the "sports shirts" indentified in applicant's application is encompassed by the "men's shirts" identified in the registration. Although many of the other items in the applicant's identification of goods are, on their face, related to the registrant's identified goods, we need not discuss them, because likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Further, because the goods are in part legally identical, they must be presumed to be sold in the same channels of trade to the same classes of consumers. *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). The du Pont factors of the similarity of the goods and channels of trade favor a finding of likelihood of confusion.

We now turn to a consideration of the marks, keeping in mind that when marks would appear on identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Further, the test is not whether the marks can be distinguished when subjected

to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. In re Association of the United States Army, 85 USPQ2d 1264, 1268 (TTAB 2007); Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). 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. Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980). .

For ease of reference, we reproduce both marks below:



In a side-by-side comparison one can pick out specific differences in the marks, as applicant has detailed:

In addition to the clearly distinctive competitive skateboarding styles (vertical versus street as further discussed below), Applicant's Mark features the silhouette of a long-haired skateboarder wearing long jeans, no protective gear, and a skateboard forward facing with feet detached from the skateboard in midair performing a "kick flip." On the other hand, the Registered Mark features a skateboarder wearing shorts, a helmet, elbow and knee pads, and with feet planted on a downward facing skateboard board [sic] launching through the air. Additionally, the Registered Mark skateboarder's left arm is reaching up, while Applicant's skateboarder's left arm is downward facing.

Brief, p. 5.

However, as the case law makes clear, and as applicant acknowledges, a side-by-side comparison is not the correct test. Rather, we must consider the general impression that consumers will have of the marks, and the general impression of these marks is the same, the silhouette of a person on an airborne skateboard with his body turned slightly toward his right. Details such as whether the skateboarder has long hair or wears jeans, to the extent that these details would even be apparent in the silhouettes, are not likely to be noted or remembered. Nor are consumers likely to remember whether the skateboarder's arm is up or down.

Applicant's primary argument is that the marks feature figures practicing different types of skateboarding, with the registered mark representing a vertical or "vert skateboarder" while applicant's mark represents a "street skateboarder." Applicant further argues that to the relevant consuming purchasers, these different styles will be readily apparent and as a result they will distinguish the marks. It is applicant's position that the relevant consumers of applicant's goods are "highly specialized and knowledgeable about Applicant's sporting event and sub-categories of skateboarding, such as vert and street skateboarding." Brief, p. 9.

The problem with applicant's argument is that neither applicant's nor the registrant's goods are identified as being sold only to skateboarders or skateboarding aficionados. The goods are clothing items which may be sold to all members of the general public, not only those interested in skateboarding. Thus, whether or not some of the purchasers of the goods at issue are skateboarding enthusiasts who are knowledgeable and sophisticated purchasers, we must determine the issue of likelihood of confusion from the point of view of the general public that buys the ordinary clothing items identified in the application and registration. Such purchasers cannot be

assumed to recognize the distinctions in the skateboarding figures. Rather, to the public at large, the marks would have a similar appearance, and have the meaning and commercial impression of a skateboarder per se.

Thus, the du Pont factor of the similarity of the marks favors a finding of likelihood of confusion, as does the factor of the conditions of purchase. With regard to the latter, we reiterate that the goods as identified are items that are purchased by the public at large, including those without any specialized knowledge of skateboarding styles or the sport of skateboarding.

Neither applicant nor the examining attorney has discussed or submitted any evidence as to any other du Pont factors. To the extent that any are relevant, we treat them as neutral.

In view of the foregoing, and our findings that the marks are similar, the goods and channels of trade are in part legally identical, and the goods can be purchased by unsophisticated purchasers, we further find that applicant's mark, if used on its identified goods, is likely to cause confusion with the mark in the cited registration.

Decision: The refusal of registration is affirmed.