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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Donald E. Moriarty

Serial No. 77946129

Jed H. Hansen of Thorpe North & Western LLP for Donald E. Moriarty.

Tina Brown, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Cataldo, Taylor, and Wellington
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Donald E. Moriarty ("applicant") has filed an application to register on the Principal Register the mark HAUT COZEES (in standard character form) for "clothing, namely, pants, denim pants, cargo pants, capri pants, stretch pants, jogging pants" in International Class 25.¹

¹ Serial No. 77946129, filed February 26, 2010, based on an allegation of a bona fide intent to use the mark in commerce on the identified goods.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of three registrations for the mark COZEEZ (in standard character form) covering "slippers";² "sleeping garments, namely, pajama tops and bottoms, nightgowns, sleepwear, [and] night shirts";³ and "baby newborn and infant layette apparel, namely, creepers, hats, booties, blankets, rompers, coveralls, outwear jackets."⁴ The three registrations are owned by the same entity and all goods in the cited registrations are in International Class 25.

Applicant appealed the final refusal of his application and both applicant and the examining attorney have filed briefs. As discussed below, the refusal to register is affirmed.

As a preliminary matter, the examining attorney has objected to applicant's mention in his brief of a third-party application. In particular, applicant points to the prosecution history of that application and argues that it culminated in a different result despite similar circumstances with the instant application. The examining attorney has properly objected because applicant did not, prior to appeal, identify this application or attach copies

² Registration No. 1469133 issued December 15, 1987; renewed.

³ Registration No. 2500833 issued on November 23, 2001; renewed.

of the actual application and/or file history. The objection is well taken and we have not considered the third-party application. See Trademark Rule 2.142(d) (the record should be complete prior to the filing of an appeal). Even if we had considered the third-party application, our decision would be the same inasmuch as each case is considered on its own facts and record. In *re* Netts Design Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We turn now to the merits of the refusal.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, 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).

⁴ Registration No. 2500833 issued on July 14, 2009.

We first consider the relatedness of applicant's and registrant's goods. With regard to this factor, applicant submitted little in the way of argument.⁵ Nevertheless, it is the examining attorney's burden to establish at least a viable relationship between the goods. Here, we find the record created by the examining attorney establishes that registrant's slippers, sleeping garments and baby and infant apparel are closely related to applicant's pants. The examining attorney has submitted numerous use-based, third-party registrations which individually cover either both pants and slippers, or both pants and sleeping garments, or both pants and baby/infant apparel. This evidence serves to suggest that such goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988). In further support, the examining attorney submitted internet evidence showing pants being offered for sale in proximity to registrant's various goods on the same retail apparel

⁵ Applicant's sole statement regarding the relatedness of the goods is relegated to a footnote wherein he simply cites to one Board decision in support of his statement that "the dissimilarity of the goods associated with each mark...further supports a finding of no likelihood of confusion." Applicant's brief, p. 5 footnote 2.

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websites. This evidence shows that applicant's and registrant's clothing goods may be found in the same channels of trade.

Based on the record, we find that applicant's pants are related to registrant's identified goods and we resolve the *du Pont* factors regarding the similarity of the goods and trade channels against applicant.

We now consider the similarity and dissimilarity between the marks. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

We find there is strong similarity between applicant's proposed mark, HAUT COZEES, and the registered mark, COZEEZ. The latter term in applicant's mark is nearly identical to registrant's mark. The difference in the last letter, "s" versus "z", hardly distinguishes these two terms visually. While there is no correct pronunciation of a trademark, it stands to reason that the COZEES and COZEEZ are very likely to be pronounced identically. To the extent that both applicant's and registrant's goods include apparel, the terms COZEES and COZEEZ being used in connection with such goods will have the same suggestive

connotation of apparel that is "cozy" or comfortable. However, we further note that the record does not show that the term COZEES or COZEEZ is so suggestive or has been used by third-parties such that it may be considered weak or treated as having less source-identifying significance.

We do not overlook the fact that our analysis is ultimately based on the respective marks in their entireties. Viewing applicant's mark as a whole, we must determine to what degree, if any, of similarity it bears to the registered mark. We have given careful consideration to applicant's arguments that the marks taken as a whole are dissimilar because HAUT is the dominant portion of the mark due to its position as the initial term and because a double entendre is created by the mark. Applicant also argues that HAUT "in English vernacular is audibly synonymous with the term 'hot' meaning cool or sexy" and that this "dual meaning makes the composite trademark HAUT COZEES even more distinctive and different from the commercial impression conveyed by the term COZEEZ alone." Brief, p. 3.

While HAUT is clearly the initial term of applicant's mark and, as such, may remain in consumers' minds when recalling applicant's mark, we do not agree with applicant's analysis of the commercial impression created

by the combined terms HAUT COZEES. In particular, there is no evidence to support applicant's contention that consumers will perceive the term "haut" as synonymous with "hot," either phonetically or in meaning, or will perceive the cool or sexy connotations. Applicant's assertion that his mark has a dual meaning or creates a double entendre is without any evidentiary support that consumers will understand or find a dual meaning in applicant's proposed mark.⁶ Thus, the addition of HAUT to COZEES does not create a new or different meaning to applicant's mark such that it will significantly distinguish it, as a whole, from the registered mark, COZEEZ. In sum, the similarity of the marks resulting from the near identity of the latter term in applicant's proposed mark with the registered mark outweighs the dissimilarity based on applicant's addition of the term HAUT.

⁶ In his brief, applicant also argued that "the term Haut is a German word meaning high-class or fashionable" and that this has relevance in creating a different commercial impression. Brief, p. 3. However, applicant did not make citation to any authoritative reference and we further note the term is translated from German to mean "skin, hide." German-English Collins Dictionary (5th ed. 2004, William Collins Sons & Co. Ltd). On the other hand, the same term is translated from French as meaning "high" and may be used in its feminine form with other terms to mean "high fashion" ("haute couture"). See, Collins English French Electronic Dictionary (Harper Collins Publishers 2005).

In view of the foregoing, and because we do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result, see *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975), we find that the *du Pont* factor regarding the similarity of the marks favors a finding of a likelihood of confusion.

Neither applicant nor the examining attorney presented arguments or evidence directed toward any of the remaining *du Pont* factors. As a result, we find the factors discussed above to be most relevant to our determination herein.

In conclusion, because of the similarity in the marks and the closely related goods, as well as the similarity in the trade channels, we find that purchasers familiar with registrant's goods offered under the mark COZEEZ would be likely to believe, upon encountering applicant's mark HAUT COZEES for pants that they originate with or are somehow associated with the same entity.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.