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Hearing:
June 29, 2005

Mailed:
August 12, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wicked Fashions, Inc.

Serial No. 78145261

John T. Johnson of Fish & Richardson P.C. for Wicked Fashions, Inc.

Rudy R. Singleton, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

Before Hohein, Rogers and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Wicked Fashions, Inc. has filed, on July 18, 2002, an application to register on the Principal Register the mark LOT29 (in standard character form) for "wearing apparel, namely, jeans, trousers, shorts, coats, jackets, vests, shirts, and footwear" in International Class 25. The application is based on a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

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Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its goods, so resembles the previously registered mark LOT 53 (in standard character form) for "clothing, namely men's, women's, and children's pants, slacks, trousers, jeans, shorts, overalls, shirts, t-shirts, blouses, vests, skirts, jackets, coats, sport coats, sweaters, sweatshirts, sweatpants, hats, ties, belts, socks and shoes" in International Class 25 as to be likely to cause confusion, or to cause mistake or to deceive.¹

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs. An oral hearing was held on June 29, 2005.²

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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d

¹ Registration No. 2443476, issued April 10, 2001.

² Examining Attorney Rudy Singleton argued on behalf of the Office in the oral hearing.

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).

We first turn to the similarity or dissimilarity of registrant's and applicant's goods, the relevant trade channels and the purchasers of such goods.

The goods are identical in part, with jeans, trousers, shorts, coats, jackets, vests, and shirts being in both identifications of goods. In addition, applicant's "footwear" encompasses registrant's "shoes." As to the other goods, applicant's and registrant's items of clothing are closely related. Indeed, applicant, at p. 7 of its appeal brief, has acknowledged, "[t]here is no doubt that all of WFI's [i.e., applicant's] goods are covered by the Registration." Thus, the second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

With respect to the trade channels and the purchasers of the respective goods, we presume in the absence of any restrictions in the identifications of goods in the application and registration that applicant's and

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registrant's goods are marketed in the same, overlapping trade channels to the same classes of purchasers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, the third and fourth *du Pont* factors weigh in favor of a finding of likelihood of confusion.

We next consider the similarities and dissimilarities of the marks, mindful that in cases such as this one, where the marks would appear on identical or related goods, the degree of similarity necessary to support a conclusion of likely confusion declines. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). Specifically, we must determine whether applicant's mark LOT29, and registrant's mark LOT 53, are similar or dissimilar when compared in their entirety in terms of appearance, sound, connotation and commercial impression. 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. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In terms of appearance, we find that applicant's and registrant's respective marks are similar. Both marks begin with the letters "L," "O" and "T" (in the same sequence and without spaces between each letter), followed by a two-digit numeral. "53" and "29" of course are different numbers, and registrant's mark has a space between LOT and the numeral while applicant's mark does not. On balance, however, we find that the points of similarity between the marks outweigh the points of dissimilarity, and that when the marks are compared in their entireties, they are more similar than dissimilar.

In terms of sound, we find that the marks are similar. Both marks begin with the word "lot," a one-syllable word, and have a total of four syllables. The numerical portions of the marks both have three syllables. No words or symbols separate LOT and the numerals, thus there are no other sounds in either mark between the word LOT and the numerals.

Applicant contends that some may view LOT29 as an alphanumeric string and that it could be spoken as "EL-OH-TEE TWENTY NINE." While there is no "correct" pronunciation of a trademark because it is impossible to predict how the public will pronounce a mark, see *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985), it is

likely that very few purchasers would pronounce the mark as suggested by applicant. "Lot" is an English language word. When a series of letters spells out an English word, consumers will likely read the word, rather than sound out each letter in the word, even if the letters are followed by a numeral. Applicant, neither in its briefs nor during the oral hearing, has presented a convincing argument to the contrary.

In terms of connotation, we find that the marks have highly similar connotations. One of the definitions of "lot" in *The American Heritage Dictionary of the English Language* (2003), of which we take judicial notice, is "miscellaneous articles sold as one unit." See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (the Board may take judicial notice of dictionary definitions).³ Both marks convey to

³ Applicant, with its appeal brief, filed an affidavit by Anthony L. Fletcher, who identifies, inter alia, definitions of "lot" taken from three dictionaries. Mr. Fletcher also offers in his affidavit his own views of use of the term "lot" in the English language. The examining attorney has objected to Mr. Fletcher's affidavit because it was filed late in the prosecution of this case. We sustain the examining attorney's objection to the untimely submission of this evidence and we have not given any consideration to this evidence. See Trademark Rule 2.142(d); and TBMP § 1207.03 (2d ed. rev. 2004) and cases cited therein. Even if this evidence were considered, however, it would not compel a different result herein.

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consumers that the goods belong to or come from a numbered "lot." In the case of applicant's goods, its mark conveys to consumers that the goods belong to a "lot" numbered 29, or, to use applicant's wording, "batch number 29." In the case of the registrant's goods, its mark conveys to consumers that its goods belong to a "lot" numbered 53, or, "batch number 53."

In view of the similarities of the marks noted above, we find that when considered in their entirety, the marks are similar in overall commercial impression. The first *du Pont* factor is hence resolved in favor of a finding of likelihood of confusion.

Applicant argues in its brief that LOT "is suggestive of clothing itself - it implies that both **LOT29** and **LOT 53** clothes all derive from batches separately produced" and hence "is significantly less distinctive and weaker and therefore entitled to a significantly narrower scope of protection than if it were arbitrary." (Emphasis in the original.) Applicant also maintains that LOT is not the dominant portion of either mark, but rather that the numerical portions of the two marks are the dominant portions of the two marks, and that there would be "no problem distinguishing the two." We are not persuaded that the ultimate consumer would ascribe any particular

significance to "lot," or even the mark taken as a whole. To the ultimate consumer, which would include any member of the general public, because there is no restriction as to classes of consumers in applicant's and registrant's identifications of goods, whether a clothing product is part of Lot 29, Lot 53 or any other clothing lot would likely be of no consequence. Further, it has frequently been stated that the first part of a mark is more likely to be impressed upon the mind of a purchaser and remembered. *Presto Products v. Nice-Pak Products*, 9 USPQ2d 1825 (TTAB 1988). Consequently, we do not agree that the numerical portions of the marks are the dominant portions of the marks.

On the basis of our findings discussed above, we conclude that confusion with registrant's mark is likely to occur if applicant's LOT29 mark were to be used on or in connection with the goods identified in applicant's application. We have considered all of applicant's arguments to the contrary (including arguments not specifically addressed in this opinion) but are not persuaded by them.

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