

COPY

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of
INCA TEXTILES, LLC
Serial No.: 78/940043
Filed: July 28, 2006
For: INCA MAMA

ATTN: Office of the Solicitor
Box 8
Appeal No.: 78940043

NOTICE OF APPEAL TO THE COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Applicant in the above-identified appeal hereby serves notice under 35 USC §§ 141 and 142 of appeal to the Court of Appeals for the Federal Circuit from the decision of the Trademark Trial and Appeal Board rendered April 30, 2008. A copy of the decision being appealed is attached.

Date: 21 May 2008
Respectfully submitted,


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THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB

Mailed: April 30, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Inca Textiles, LLC

Serial No. 78940043

Bradley M. Ganz of Ganz Law for Inca Textiles, LLC.

Maureen L. Dall, Trademark Examining Attorney, Law Office
117 (Loretta C. Beck, Managing Attorney).

Before Hohein, Walters and Ritchie de Larena, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Inca Textiles, LLC has filed an application to register
the standard character mark INCA MAMA on the Principal
Register for "maternity wear and clothing for pregnant and
nursing women, namely sweaters, wraps, coats, dresses,
skirts, shirts, tops, pants, and nightgowns," in
International Class 25.¹

¹ Serial No. 78940043, filed July 28, 2006, based on an allegation of a
bona fide intention to use the mark in commerce.

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The examining attorney has issued a final refusal to register under 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, previously registered for "clothing; namely, tee shirts, sweatshirts, shorts, pants, jeans, jackets, skirts, dresses, caps and socks and footwear; namely, shoes, sandals and boots,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

INCA GIRL.



² Registration No. 2735016 issued July 8, 2003, to Inca Girl Enterprises, Inc., in International Class 25.

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The mark includes the words "INCA GIRL" both above the figure and on the front of the figure's shirt.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Considering, first, the goods of applicant and registrant, we note that there is a substantial overlap in

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these goods. While applicant's clothing items are limited to those for pregnant and nursing women, registrant's identification of goods is not limited and, thus, would encompass clothing items for pregnant and nursing women. Both identifications of goods include "dresses," "skirts" and "pants." Applicant's "shirts" and "tops" would include "t-shirts," which are among the clothing items identified in the registration. Applicant's "coats" are certainly closely related to, if not the same as, the "jackets," listed in the cited registration. The examining attorney submitted numerous use-based third-party registrations including many of the clothing items in the cited registration and maternity clothing to establish that the remaining goods are also related. However, even considering only the identical and/or closely related goods identified in the application and registration, we find that this *du Pont* factor weighs strongly against applicant. The fact that the only some of the products listed in the description of goods are identical is sufficient to support a finding that there is a likelihood of confusion. *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any items that come within the identification of goods in the application).

Applicant argues that the trade channels and purchasers of the goods are different. Applicant submitted the declaration of Dori Rhodes, a third party who owns a wholesale showroom for maternity clothing. She stated that, at the wholesale level, maternity clothing and "contemporary"³ women's clothing are shown in different showrooms to different buyers; and that, at the retail level, maternity clothing is sold primarily in specialty boutiques and advertised in specialty maternity magazines. Applicant contends that pregnant women are discerning and careful shoppers and, as purchasers, they will be purchasing only maternity clothing, not contemporary clothing.

In support of her position that the trade channels and classes of purchasers are the same, the examining attorney submitted numerous excerpts from Internet websites showing that both maternity and "contemporary" women's clothing are available from the same sources, e.g., Nordstroms.com, OldNavy.com, TheGap.com, and AnnTaylorLoft.com; and that maternity clothing sold in a specialty maternity shop and contemporary clothing sold in a department store may emanate from the same designers, e.g., Diane Von Furstenberg and Nancy Miller. Applicant concedes that the same companies may sell both maternity and contemporary clothing, but

³ Ms. Rhodes states that, in the trade, "contemporary" is the term used to describe non-maternity women's clothing.

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argues that the trade channels are different because the maternity clothes sold by these companies are not available in the same stores as these companies' contemporary clothing, e.g., The Gap's maternity clothes are allegedly available only at Baby Gap stores.⁴

We note that, while applicant's identification of goods is limited to clothing for pregnant and nursing women, registrant's identification of goods is broadly worded, without any limitations as to channels of trade or classes of purchasers. We must presume that the goods of applicant and the cited registrant are sold in all of the normal channels of trade to all of the usual purchasers for goods and services of the type identified. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Because registrant's more broadly identified clothing encompasses applicant's clothing for pregnant and nursing women, the trade channels and classes of purchasers for these same goods are identical. Additionally, the evidence does not support applicant's contention that maternity clothing is sold only at specialty maternity shops. In fact, the Internet evidence shows women's

⁴ Applicant contends that the examining attorney is incorrect in asserting that likelihood of confusion must be determined on the basis of the goods as identified in the application and registration. Applicant argues that the goods are only one element in the determination, which is correct. However, in deciding whether the goods are the same or related, we are constrained to consider the goods as they are identified.

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contemporary clothing and maternity clothing available from the same websites noted above. Similarly, the record does not support the conclusions suggested by applicant that only pregnant women purchase maternity clothes; that pregnant women do not purchase contemporary clothes; or that pregnant women are more discerning clothing purchasers than other women or men. A pregnancy lasts for approximately nine months and, therefore, pregnant women are clearly also purchasers of contemporary clothing. We conclude that the channels of trade and classes of purchasers are at least overlapping and, thus, these *du Pont* factors weigh against applicant.

Turning to the marks, we note that "when marks would appear on virtually identical goods or services, 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).

While we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on

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consideration of the marks in their entireties." In re National Data Corp., 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). 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).

Applicant contends that INCA is a weak term that "suggests the association of the goods and services with the past and present culture of Incan people" (brief, p. 9) and, thus, INCA is not the dominant portion of either mark; that MAMA and GIRL have very different connotations; and that applicant's mark connotes "motherhood or maternity," whereas the registered mark shows a "scantly clad young woman" and this design element dominates the registered mark (*id.* at 5). Applicant submitted a substantial amount of evidence from Internet websites showing the use of the term INCA in articles about the INCA culture and peoples and about Peru, in articles about clothing worn by the INCA peoples and about clothing, particularly alpaca wool clothing, from Peru or with designs suggestive of INCA culture. Applicant's evidence also includes advertisements and information in connection with several products unrelated to clothing, such as INCA COLA, a soft drink.

The examining attorney contends that the marks are similar; that the design element in the registered mark is

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less significant than the wording; that INCA is the first and dominant word in each mark; that MAMA and GIRL are closely related terms with similar meanings; and, therefore, that the composite marks INCA MAMA and INCA GIRL create similar commercial impressions.

Regarding the strength or weakness of the term INCA, we find much of applicant's argument and evidence inapposite. There is no question that the word INCA suggests the INCA culture and peoples of Peru; or that the INCA peoples have a distinct "style" of traditional clothing; or that some Alpaca wool fiber and clothing are associated with Peru and with the INCA culture and peoples. However, both the application and the registration include a range of clothing items and, while INCA is not a made-up word and it may suggest to purchasers the INCA culture and peoples, this does not render the term INCA "weak" as a mark in connection with clothing.

Of more relevance is applicant's Internet evidence of a small number of uses of INCA with other terms in connection with clothing. The record contains no evidence about the extent of these uses and, as such, we do not conclude that INCA is a weak term in connection with clothing. Moreover, a mark including the term INCA, even if weak, is entitled to protection from registration of a similar mark for identical and closely related goods. See *King Candy Co. v. Eunice*

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King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

Considering, first, the cited registered mark, we note that the phrase INCA GIRL appears twice in the mark - both above and to the left of the image of a young woman and on the front of the young woman's shirt. While the design element of the young woman is large relative to the wording in the mark, she serves to reinforce the wording both by having INCA GIRL appear on her shirt and by appearing to be pointing to or holding the phrase INCA GIRL with her raised right hand. Additionally, the young woman is a "girl," as that term is defined.⁵ We agree with applicant that we cannot discount the design portion of the registered mark, nor do we find the design portion of less significance *per se* than the wording in creating the overall commercial impression of the mark. However, considering the design aspects of the mark as analyzed above and the fact that the wording in the mark is what purchasers will use in calling for the goods, we do find the word portion of the mark, INCA GIRL, is significant if not dominant, notwithstanding the fact that the wording appears in small characters relative to the design of the young woman. See *In re Dakin's*

⁵ The examining attorney submitted a definition of "girl" as, *inter alia*, "2. a young woman." *Encarta World English Dictionary*, 2007, at www.msncarta.com.

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Miniatures, Inc., 59 USPQ2d 1593 (TTAB 2001) ("words are normally accorded greater weight because they would be used by purchasers to request the goods"); and *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Comparing applicant's mark to the word portion of the registered mark, both consist of two words with the identical first word, INCA, followed by four-letter singular nouns that refer generically to females. While the word MAMA is defined as both "1. a mother" and "2. a woman,"⁶ it is likely that the connotation of MAMA in connection with maternity clothing is as "mother". However, our inquiry does not end by determining that the marks have some differences. In this case, viewing each of the marks as a whole, we consider them to be more similar than dissimilar. In connection with the respectively identified clothing, the two marks, INCA MAMA and INCA GIRL and design, are sufficiently similar that purchasers are likely to believe that INCA MAMA is the maternity line of clothing sponsored by INCA GIRL women's clothing. Therefore, this *du Pont* factor also weighs against applicant.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the

⁶ *Encarta World English Dictionary*, 2007, www.msnencarta.com.

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substantial similarity in the commercial impressions of applicant's mark, INCA MAMA, and registrant's mark, INCA GIRL and girl design, their contemporaneous use on the same and closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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