

THIS OPINION IS NOT
A PRECEDENT OF THE
T.T.A.B.

Hearing:
February 14, 2008

Mailed:
March 31, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Right-On Co., Ltd.

Serial No. 79011373

James A. Oliff of Oliff & Berridge, PLC for Right-On Co., Ltd.

Melissa Valillo, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Hohein, Zervas, and Walsh, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Right-On Co., Ltd. ("applicant") has applied to register the stylized mark¹

**HONEYSUCKLE
ROSE**

on the Principal Register for the following goods, as amended: "[c]lothing, namely, jeans, t-shirts, polo shirts, sweat shirts, sweaters, gloves and socks; belts;

¹ Serial No. 79011373, filed on April 21, 2005 under the Madrid Protocol, Section 66(a) of the Trademark Act, 15 U.S.C. §

footwear, namely, sports shoes, mountaineering boots and sandals; headgear for wear, namely, caps and hats" in International Class 25.

Registration of applicant's mark has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of Registration No. 2653702 (issued on the Principal Register on November 26, 2002) for the stylized mark



for "clothing, namely, t-shirts, shirts, blouses, jackets, vests, coats, overcoats, raincoats, pajamas, pants, jeans, overalls, jumpsuits, unitards, skirts, dresses, shorts, sweatshirts, sweatpants, sweaters, belts, scarves, shoes, and headwear, namely, caps and hats."

After the examining attorney made the refusal final, applicant filed this appeal. Both applicant and the examining attorney have filed briefs, and the Board

1141(f), based on International application Serial No. 2005-030523, filed on April 6, 2005.

conducted an oral hearing on February 14, 2008. The refusal to register is affirmed.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in *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.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 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).

We first consider applicant's and registrant's goods which are, at least in part, identical. Both applicant and registrant's identifications of goods include jeans, t-shirts, belts, caps, hats, sweaters and sweatshirts. Further, applicant's "polo shirts" are included within registrant's "shirts," and applicant's "sports shoes, mountaineering boots and sandals" are included within registrant's "shoes." Applicant's other goods, i.e., gloves and socks, are closely related to registrant's

clothing items inasmuch as gloves and socks could be used in association with registrant's clothing items.

Turning to the channels of trade and classes of consumers, since the goods are in part identical or overlapping, we must presume that the channels of trade and purchasers would be the same. *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). See also *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade").

Next, we look at the marks themselves to assess their similarities and dissimilarities. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) ("The first *DuPont* factor requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'"). Of course, when we are considering the

marks, we must consider them in their entirety rather than simply comparing their individual components.

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.

Baseball America Inc. v. Powerplay Sports Ltd., 71 USPQ2d 1844, 1848 (TTAB 2004). See also *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). We also keep in mind that when marks would appear on identical goods, as is the case in part herein, 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, 1701 (Fed. Cir. 1992).

We find that the dominant feature in registrant's mark is the literal portion, i.e., the wording HONEYSUCKLE, and not what applicant characterizes as "the blooming flower of a honeysuckle plant." Because it is by the wording in the mark that consumers will refer to or call for the goods, and because the depiction of the honeysuckle flower

reinforces the wording, the word HONEYSUCKLE will be recognized and used by purchasers as the primary means of source identification. As the dominant feature of registrant's mark, the wording HONEYSUCKLE is accorded more weight in our comparison of the marks under the first *du Pont* factor. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004).

The primary area of disagreement between applicant and the examining attorney lies in the connotation and commercial impression of applicant's stylized HONEYSUCKLE ROSE mark. The examining attorney contends that "the words that comprise the applicant's mark identify separate and distinct types of plants." Brief at unnumbered p. 6. Applicant contends that while the word HONEYSUCKLE alone refers to a "flower," the term "honeysuckle rose" refers to "a term of endearment," see brief at p. 4, or "a woman or 'feminine sweetness.'" See reply brief at p. 4. Applicant's contention regarding its mark is not supported by any record evidence. The lyrics to an eighty-year-old song entitled "Honeysuckle Rose" by Fats Waller and Andy Razaf, which applicant recites for the first time in its brief to show that applicant's mark refers to "a term of endearment" or "a woman or 'feminine sweetness,'" are not

part of the evidentiary record.² Thus, applicant's contention, not being supported by any evidence, is not persuasive.

Additionally, applicant argues that:

Used in music and film, the term HONEYSUCKLE ROSE has taken on ... cultural significance as evidenced by the numerous businesses that have appropriated this mark in their business names. Applicant is employing this cultural meaning in its use of the mark HONESYSUCKLE ROSE. As such, when consumers encounter Applicant's mark, completely different mental imagery is evoked than if the same consumers encountered the cited mark. Brief at p. 5.

For support that "honeysuckle rose" has "cultural significance," applicant points to two versions of the song "Honeysuckle Rose" by "jazz superstar" Louis Armstrong, and the "strong following" among Willie Nelson's fan base for the movie "Honeysuckle Rose" which stars Mr. Nelson and Amy Irving. We give such statements by applicant no weight because they too are not supported by any record evidence.

The evidence which is in the record which bears on applicant's "cultural significance" argument fails to persuade us of any such "cultural significance." Such evidence is extremely limited, consisting only of one article for "honeysuckle rose" from wikipedia.org and a

² The examining attorney's objection, on the ground of untimeliness, regarding these lyrics is sustained. Trademark Rule 2.142(d).

handful of webpages showing various business names which include "Honeysuckle Rose."

Wikipedia lists the following three separately discussed entries for "Honeysuckle Rose," none of which are persuasive for the reasons set forth below.

"'Honeysuckle Rose,' a song from 1928 written by Fats Waller, considered a jazz standard."

The reference to the song from 1928 says nothing about the current popularity of the eighty-year-old song "Honeysuckle Rose" among the general population; Wikipedia's characterization of the song as a "jazz standard" alone, without further support, simply is not persuasive.

"Honeysuckle Rose, the title to a 1980 movie, starring Willie Nelson, Amy Irving, and Priscilla Pointer."

The entry regarding the movie is too brief and does not identify any critical acclaim or reflect on the popularity of the thirty-year-old movie, particularly today.

"The name of Willie Nelson's famous touring bus."

Without more, we do not accept that the name of a touring bus is "culturally significant." Also, we give limited weight to Wikipedia's statement that the name of the touring bus is famous; Wikipedia is a collaborative online encyclopedia and a Wikipedia article at any given time may

contain significant misinformation. See *In Re IP Carrier Consulting Group*, 84 USPQ2d 1028 (TTAB 2007). In addition, there is no corroborating evidence that indicates that the bus is famous, and it may be that Mr. Nelson's bus may have been named after Mr. Nelson's movie of the same name.

Turning to the webpages that are in the record, we find the webpages to be of limited probative value. One webpage is for the "Honeysuckle Rose Cottage" in British Columbia, Canada; clearly, however, a cottage in Canada hardly shows any "cultural significance" of the term in the United States. The other uses of "honeysuckle rose" are too few in number for us to conclude that there is any "cultural significance" to the term. Further, we do not consider the combination of the webpages and the Wikipedia article as establishing any "cultural significance" of "honeysuckle rose"; that is, we are not persuaded that the term has "cultural significance" simply because it has been used to an unknown extent for eighty years and is the name of a song, a touring bus, a movie and a handful of businesses.

Inasmuch as applicant has not persuaded us that HONEYSUCKLE ROSE has any other meaning, we find that the meaning of the mark taken as a whole to the typical consumer of applicant's and registrant's goods is the

common meaning of the two terms, namely, an arbitrary combination of the names of two plants or flowers. HONEYSUCKLE in both marks therefore has the same connotation. Due to this shared connotation of HONEYSUCKLE, and because the addition of ROSE does not change the connotation of HONEYSUCKLE, we find the marks to be similar in overall connotation and commercial impression.

Applicant points out that the marks differ in appearance and sound. Certainly there are differences in the appearance of the marks in view of registrant's design and the different stylization of the lettering in the marks, which in the case of applicant's mark, is rather ordinary. There also are differences in the sound of the marks in view of applicant's addition of ROSE to HONEYSUCKLE. However, the differences in appearance and sound of the marks are outweighed by similarities in connotation and commercial impression of the marks created by the shared term HONEYSUCKLE.

In view of the foregoing, we find that the marks taken as a whole are similar.

Applicant also argues at p. 6 of its brief that "the co-existence of ... two marks on the U.S. Trademark Register for related or identical goods is not without precedent,"

citing to third-party registrations for HONEYSUCKLE and HONEYSUCKLE ROSE. There is no evidentiary support for applicant's argument inasmuch as applicant has not submitted copies of the registrations. However, even if it had, we would reject this argument because each case must be decided on its own merits, and previous decisions by examining attorneys are not binding on the Office or the Board. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984).

Thus, upon consideration of the relevant *du Pont* factors, as well as the evidence of record and the arguments of the examining attorney and applicant, we conclude that when purchasers who are familiar with registrant's mark encounter applicant's mark on identical and closely related goods, they are likely to be confused.

Decision: The examining attorney's refusal under Section 2(d) of the Trademark Act to register applicant's mark is affirmed.