

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

Mailed:  
January 17, 2012

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Homie International Corporation

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Serial No. 85005921  
Serial No. 85006121

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John S. Child of Paul and Paul for Homie International Corporation.

Edward Nelson, Trademark Examining Attorney, Law Office 106  
(Mary I. Sparrow, Managing Attorney).

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Before Grendel, Kuhlke and Bergsman,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Homie International Corporation ("applicant") filed intent-to-use applications for the marks HOMIES and HOMIE, in standard character form, both for "athletic bags and back packs," in Class 18.

The examining attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's marks, when used in connection with "athletic bags and back packs" so resembles the registered mark HOMIES and design, shown

below, for "clothing, namely, t-shirts and hats," in Class 25,<sup>1</sup> as to be likely to cause confusion.



Because both applications are owned by the same entity and involve identical questions of fact and law, we have consolidated the appeals.

#### Preliminary Issue

Applicant submitted exhibits with its appeal brief. The examining attorney did not object or address the evidence attached with the brief. Trademark Rule 2.142(d) addresses the submission of evidence submitted after an appeal is filed:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.

Evidence submitted after appeal, without a granted request to suspend and remand for additional evidence, *see* TBMP § 1207.02, may be considered by the Board, despite its

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<sup>1</sup> Registration No. 1965095, issued April 2, 1996; renewed.

untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. TBMP § 1207.03. Although the examining attorney did not object to the late filed evidence, he did not discuss it or otherwise treat it as being of record. Accordingly, the exhibits attached the applicant's brief are untimely and we have not considered them.

Likelihood of Confusion

Our determination of likelihood of confusion 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. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

- A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that 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 overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1835, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Applicant's marks HOMIES and HOMIE are virtually identical. See *Calvin Klein Industries Inc. v. Calvins Pharmaceuticals Inc.*, 8 USPQ2d 1269, 1271 (TTAB 1988) ("the

addition of the "S" at the end of applicant's mark [CALVINS] does little to distinguish it from opposer's mark CALVIN"); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (MCKENZIE'S is virtually identical to MCKENZIE). Accordingly, we will treat them together in our analysis.

In comparing marks, it is a well-established principle that 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 a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Dixie Rest.*, 105 F.3d at 1407, 41 USPQ2d 1531 (affirming TTAB finding that DELTA was the dominant feature of the mark THE DELTA CAFE and design, and that the design element and generic word "CAFE" were insufficient to overcome likelihood of confusion with the registered mark DELTA).

We find that the word "HOMIES" is the dominant portion of the mark in the cited registration and that is entitled to greater weight than its design elements because it is the term "HOMIES" by which consumers will refer to registrant's goods. *See In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also CBS Inc. v.*

*Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395-96 (Fed. Cir. 1983).

Moreover, because applicant's mark is displayed in standard character form, it is not limited to any special stylization and we must assume that it could be displayed in a stylization similar to that adopted by registrant. *In re RSI Systems LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008).

In view of the foregoing, we find that when the marks are compared in their entireties, they are similar in terms appearance, sound, meaning and commercial impression.

B. The similarity or dissimilarity and nature of the goods.

In comparing the similarity of the goods, we are mindful that the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion. *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB

1983). Even when goods are not intrinsically related, the use of identical marks can lead to the assumption that there is a common source. *In re Shell Oil Co.*, 992 F.2d 1024, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

The mark in the cited registration is for "t-shirts and hats" and applicant is seeking to register its marks for "athletic bags and back packs." The Examining Attorney submitted six use-based, third-party registrations for products listed in both the application and registration at issue. Third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Applicant argues that all of the third-party registrations cover a substantial number of different products that are not particularly relevant.<sup>2</sup> However, only one of the registrations arguably falls within that category.

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<sup>2</sup> Applicant's Brief, pp. 4-5.

Applicant also argues that two of the third-party registrations are not probative because they include "retail store services" and that the mere fact those different products can be found in a retail store is not a sufficient basis for finding that the goods are related.<sup>3</sup>

We agree with applicant that the one registration whose description of goods includes a wide variety of different products and includes retail store services is of limited probative value because it appears to be a house mark covering a wide variety of products. However, the other third-party registration that includes retail store services is probative because the retail store services are focused on clothing and accessories.

While the examining attorney's evidence regarding the similarity of the goods is unimpressive, it is well settled that applicant's goods and the registrant's goods do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective products are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give

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<sup>3</sup> Applicant's Brief, pp. 4-5.



rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785; *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

We find that the examining attorney has presented sufficient evidence to establish a *prima facie* case that the goods are related. Applicant did not present any evidence regarding the relationship of the goods and its arguments that the goods are not related were not persuasive.

C. Balancing the factors.

The *du Pont* factors require to us to consider the thirteen factors for which evidence has been made of record in likelihood of confusion cases. In view of the facts that the marks are similar and the goods are related, we find that applicant's marks HOMIES and HOMIE for "athletic bags and backpacks" are likely to cause confusion with the mark HOMIES and design for "clothing, namely, t-shirts and hats."

**Decision:** The refusal to register is affirmed.