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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Muzzie's, Inc.

Serial No. 85065751

John S. Egbert of Egbert Law Offices, PLLC for Muzzie's, Inc.

Alain J. Lapter, Trademark Examining Attorney, Law Office 108
(Andrew Lawrence, Managing Attorney).¹

Before Holtzman, Mermelstein, and Lykos, Administrative
Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Muzzie's, Inc. ("applicant") filed an application to
register the mark displayed below



¹ During ex parte prosecution of the application, Lindsey H. Rubin was the assigned Trademark Examining Attorney.

Serial No. 85065751

for the services, as amended, of "retail clothing boutiques featuring young women's evening gowns, cocktail dresses and evening footwear and accessories, namely, high heel shoes, evening handbags and evening jewelry" in International Class 35.²

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the registered mark shown below



for "clothing, namely hats, shirts and jackets," in International Class 25 and "retail store, mail order catalog, direct order by telephone, and wholesale distributorship featuring motorcycle parts and clothing manufactured by others"

² Application Serial No. 85065751, filed June 17, 2010, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging 2000 as the date of first use anywhere and in commerce. The description of the mark is as follows: "The mark consists of a drawing of a woman's head with the underlined term "MUZZIE'S" depicted in stylized lettering directly to the right of the drawing." Color is not claimed as a feature of the mark.

Serial No. 85065751

in International Class 35,³ that when used on or in connection with applicant's identified services, it is likely to cause confusion or mistake or to deceive.

For the reasons discussed below, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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"). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

First, we consider and compare the appearance, sound, connotation and commercial impression of the marks in their

³ Registration No. 2060623, issued May 13, 1997 on the Principal Register; renewed.

Serial No. 85065751

entireties. *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). The question 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 their entireties 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. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant contends that the Trademark Examining Attorney has improperly dissected the mark by not considering the design element of applicant's mark and by focusing only on the shared literal element of "MUZZ-." Applicant emphasizes the differences in the spelling of the suffixes of the literal component "MUZZ-": "-IE'S" versus "YS." Applicant also maintains that "[t]he stylization and unique design of [a]pplicant's mark combine to make the mark very feminine in appearance. In contrast, the cited registrant's mark uses a

Serial No. 85065751

completely different stylization that is quite masculine in nature..." Applicant's Brief, p. 5.

Applicant's arguments are unconvincing. The difference in the spelling of MUZZIE'S versus MUZZYS is minor, especially given that the marks are pronounced in an identical manner. It is well settled that similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980). As such, in calling for the respective goods and services of applicant and registrant, prospective consumers will pronounce the literal portion of each mark in the same way.

As to the additional design element in applicant's mark, we find that in this particular case, it fails to mitigate the identical sound and nearly identical appearance of the respective literal portions of the involved marks. Applicant is reminded of the often-recited principle that when a mark consists of a literal portion and a design portion, the literal portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods and/or services; therefore, the literal portion is normally accorded greater weight in determining whether marks are confusingly similar. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). *See also CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983); *In re Kysela Pere et Fils, Ltd.*, 98

Serial No. 85065751

USPQ2d 1261, 1267-68 (TTAB 2011). We also agree with the Trademark Examining Attorney's assessment that applicant over-emphasizes the comparison between the font of applicant's mark as "feminine" as compared to registrant's supposedly more "masculine" font. Such differences in appearance are insufficient to overcome the fact that the marks are pronounced the same. Notwithstanding the above, consumers familiar with registrant's more "masculine" styled mark or applicant's more "feminine" styled mark may, upon encountering the other, believe that either applicant or registrant has expanded their business to include variations of their original marks.

Regarding commercial impression, applicant argues that the Trademark Examining Attorney "failed to consider one of the exceptions to the general rule regarding addition or deletion of terms, or matter, in marks that are being compared, namely the fact that likelihood of confusion will not be found if such additions and subtractions create significantly different commercial impressions between the marks in their entireties." Applicant's Brief, p. 6. Applicant then relies on various cases where no likelihood of confusion was found due to the addition of a different word, for example the case of *In re Farm Fresh Catfish Co.*, 231 USPQ 495 (TTAB 1986) (CATFISH BOBBERS for fish held not likely to be confused with BOBBER for restaurant services). Applicant's Brief, p. 6. Here, however, the only

distinction in the literal portions of the marks is not the addition of an entirely different word but rather the plural form of the word "MUZZY" versus the possessive form of the word "MUZZIE." It is obvious that the addition of an entirely different word to a mark has the potential to change the commercial impression, particularly where the common wording in the marks is suggestive, as it was in *Farm Fresh Catfish*. However, because this is not the factual circumstance we have before us, the case law applicant relies upon is inapposite. Thus, the first *du Pont* factor weighs in favor of finding a likelihood of confusion.

Next, we consider the goods, services and channels of trade. Turning first to a discussion of the involved services, applicant contends that by amending the recitation of services from "retail clothing boutiques" to "retail clothing boutiques featuring young women's evening gowns, cocktail dresses and evening footwear and accessories, namely, high heel shoes, evening handbags and evening jewelry," the now "vastly different channels of trade" will obviate any likelihood of confusion. Applicant's Brief, p. 3.

The fact that applicant restricted its recitation of services is of no matter. This is because the term "retail store" in registrant's recitation of services is sufficiently broad to encompass applicant's more particular type of "retail

Serial No. 85065751

clothing boutiques." Moreover, as recited in registrant's Class 35 services of "retail store, mail order catalog, direct order by telephone, and wholesale distributorship featuring motorcycle parts and clothing manufactured by others," registrant's retail store services are not limited as to the type of clothing sold or style. Consequently, we must assume that the registration encompasses all services of the type described, including those in applicant's more specific recitation, that the services move in all normal channels of trade, and that they are available to all potential customers. It must also be assumed that the same classes of purchasers shop for these items. *See In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). As such, the trade channels and potential purchasers are legally identical.

Considering now applicant's retail store services in relation to registrant's Class 25 clothing apparel, it is well established that confusion may be likely to occur from the use of the same or similar marks on clothing, on the one hand, and for retail services involving the sale of clothing, on the other. *See, e.g., In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE (stylized) for retail women's clothing store services and clothing held likely to be confused with CREST CAREER IMAGES (stylized) for uniforms). In support thereof, the Trademark Examining Attorney submitted into the record numerous copies of use-based, third-party registrations identifying both

Serial No. 85065751

retail store services featuring the sale of clothing as well as clothing items themselves. See Registration Nos. 2957988, 3330473, 2951537, 3437500, 3027835, and 3411758. Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

Applicant attempts to distinguish the goods, arguing that registrant's "hats, shirts and jackets" all identify motorcycle related apparel sold to motorcycle enthusiasts, whereas the prospective consumers of clothing apparel sold in applicant's boutiques are young women seeking formal attire. Applicant's Brief, pp. 8-9. To support this argument, applicant relies on excerpts obtained from registrant's web site which purport to show "the vast majority of the services provided are related to motorcycle parts, hats, shirts and jackets, while a few t-shirts and a hat advertising the shop are sold." Applicant's Brief, p. 8.

Applicant's reliance on extrinsic evidence to narrow the scope of the registrants' goods is improper. The law is clear that the question of likelihood of confusion must be determined based on the identification of goods in the application and cited registration, regardless of what the record may reveal as

Serial No. 85065751

to the actual nature of the goods, the particular channels of trade or the class of purchasers to which the goods are directed. *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed."). Registrant's clothing apparel in Class 25 is not limited to motorcycle related clothing or gear. Moreover, the sale of such items is not limited to motorcycle enthusiasts. We further note that the same logic applies to registrant's Class 35 services. That is to say that the clothing sold in registrant's retail services cannot be restricted by extrinsic evidence to motorcycle related apparel. Thus, these *du Pont* factors of the similarity of the goods and services and channels of trade weigh in favor of finding a likelihood of confusion.

Applicant also raises the argument in its brief that that its predecessor in interest previously owned a registration for the same mark for "retail clothing boutiques" which was inadvertently cancelled due to the failure to file a Section 8

Serial No. 85065751

affidavit.⁴ Applicant's Brief, p. 3. Applicant contends that the marks coexisted on the register for over six years without any instances of actual confusion. We are not persuaded. Applicant's cancelled registration cannot justify registration of its current application. A cancelled registration is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. See *In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007); *In re Hunter Publishing Company*, 204 USPQ 957, 963 (TTAB 1979) (cancellation "destroys the Section [7(b)] presumptions and makes the question of registrability 'a new ball game' which must be predicated on current thought."). Further, the determination of another Trademark Examining Attorney regarding a previously registered mark is not dispositive of the case before us. Lastly, we note that we cannot consider the lack of evidence of confusion in an appeal, to which the cited registrant is not a party. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984).

To the extent that there are any other relevant *du Pont* factors, we treat them as neutral. In addition, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

⁴ Registration No. 2683444, cancelled September 12, 2009.

Serial No. 85065751

After considering all of the evidence of record and argument pertaining to the *du Pont* likelihood of confusion factors, we conclude that there is a likelihood of confusion between applicant's mark and the registered mark when used in connection with their identified goods and services.

Decision: The Section 2(d) refusal is affirmed.