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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Adam Khatib*

Serial No. 85556033


Matthew H. Swyers of the Trademark Company for Adam Khatib.

David Yontef, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Kuhlke, Lykos and Greenbaum, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Adam Khatib (applicant) seeks registration on the Principal Register of the standard character mark ENDORPHINS for “hats; sweatshirts; t-shirts; tank tops” in International Class 25.<sup>1</sup>

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant’s mark so resembles the previously registered mark  for a variety of clothing

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<sup>1</sup> Application Serial No. 8555633 was filed February 29, 2012, based upon applicant’s assertion of his bona fide intent to use the mark in commerce.

items including hats and t-shirts in International Class 25, as to be likely to cause confusion when used on applicant's goods.<sup>2</sup>

This appeal ensued following a final refusal and a denial of applicant's request for reconsideration. As discussed below, we affirm the refusal.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *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.*, 315 F.3d 1311, 65 USPQ2d 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the goods, channels of trade and class of purchasers. We must make our determinations under these factors based on the goods as they are recited in the registration and application. *See In re Elbaum*, 211 USPQ 639 (TTAB 1981). In this case, the goods in the application and cited registration include identical hats and t-shirts. It is sufficient for a finding of likelihood of confusion if the relatedness is established for any item encompassed by the identification of goods within a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981). Further, because the goods include identical hats and t-shirts, and there are no limitations as to channels of trade or classes of purchasers in either the


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<sup>2</sup> Registration No. 3927040, issued March 1, 2011 to Endorphin Corporation.


application or cited registration, we must presume that applicant's and registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

In view of the above, the *du Pont* factors of the similarity of the goods, the channels of trade and classes of purchasers favor a finding of likelihood of confusion.

With regard to the conditions of sale, because we are bound by the description of goods in the application and registration and because the descriptions of goods are not restricted as to price, the goods at issue must include inexpensive as well as expensive clothing. Inexpensive hats and t-shirts would not be purchased with a great deal of care or require purchaser sophistication, which increases the likelihood of confusion. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care”) (citations omitted). This factor also favors a finding of likelihood of confusion.

We turn then to the *du Pont* factor of the similarities and dissimilarities between applicant's mark ENDORPHINS and registrant's mark . We analyze “the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting *du Pont*, 177 USPQ at 567. The proper test is not a side-by-side comparison

of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). In making this determination, we are mindful that where, as in the present case, registrant’s goods include goods that are identical to applicant’s goods, the degree of similarity between the marks which is necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, the word ENDORPHIN is the dominant portion of registrant’s mark . The stylization and design element in registrant’s mark are minimal and do not overcome the dominance of the literal element ENDORPHIN. *In re Decombe*, 9 USPQ2d 1812, 1814 (TTAB 1988); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). To the extent consumers would recognize the design element in registrant’s mark as a “molecular design of the chemical endorphin,” (App. Br., p. 9), the design merely serves to visually represent the literal term ENDORPHIN, and does not distinguish registrant’s mark from applicant’s mark

ENDORPHINS. *In re Max Capital Group. Ltd.*, 93 USPQ2d 1243, 1247 (TTAB 2010); *Appetito*, 3 USPQ2d at 1554. In addition, applicant's mark ENDORPHINS is simply the plural form of the word ENDORPHIN. Contrary to applicant's assertions, there is no material difference between singular and plural forms of the same term. *See, e.g., In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969).


In view of the foregoing, we find that when applicant's mark and registrant's mark are compared in their entirety, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related goods, confusion would be likely to occur. As such, this *du Pont* factor favors a finding of likelihood of confusion.

The next factor we consider is that of third-party use. As applicant points out, evidence of third-party use can be used to show that a registrant's mark is weak and thus entitled to a limited scope of protection. To this end, applicant submitted copies of seven active third-party registrations, which, according to applicant, "incorporate[e] the term 'ENDORPHINS' and literal equivalents thereof used in relation to similar goods." App. Br., p. 9. However, unlike the marks in the application and cited registration, none of the third-party registrations consists of the words ENDORPHINS or ENDORPHIN alone or with a minimal design element.<sup>3</sup> In addition, five of the seven third-party registrations are for services, and not clothing, and the two third-party registrations for clothing (ENDORPHIN

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<sup>3</sup> The third-party registrations are for the following marks: ENDORPHIN WARRIOR; GOT ENDORPHINS?; ENDORPHUN SPORTS; SWIM WITH THE ENDORPHINS; EF ENDORPHIN FITNESS; ENDOMONDO FREE YOUR ENDORPHINS; and NDORFNZ.

WARRIOR and GOT ENDOPRHINS?) are for marks that create commercial impressions that are quite different from applicant's and registrant's marks. In any event, the third-party registrations are of limited value as they are not evidence of use of the marks in commerce or that the public is familiar with them. *See, e.g., In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Moreover, third-party registrations cannot assist applicant in registering a mark that is likely to cause confusion with a registered mark. *See AMF Incorporated v. American Leisure Products, Inc.*, 177 USPQ 268 (CCPA 1973). Accordingly, the evidence does not show that the term ENDORPHIN in its singular or plural form is weak on its face for clothing. *See, e.g., Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005) (ESSENTIALS is weak on its face for clothing), and *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (ELEMENTS weak on its face for clothing).

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 substantial similarity in the appearance, sound and commercial impressions of applicant's mark, ENDORPHINS and registrant's mark , their contemporaneous use on the identical goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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**Decision:** The refusal to register based on a likelihood of confusion under Section 2(d) of the Trademark Act is affirmed.