

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Coyotes Ice, LLC
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Serial Nos. 86135128 and 86135177¹

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Steven J. Laureanti of Jackson White, P.C.,
for Coyotes Ice, LLC.

Donald O. Johnson, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

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Before Mermelstein, Shaw and Hightower,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Coyotes Ice, LLC (“Applicant”) seeks registration on the Principal Register of the marks COYOTES ICE SPORTS,² in standard characters, and ³ for

¹ Consolidated by order of the Board, August 5, 2015. Citations to the record are to Serial No. 86135128, unless otherwise noted.

² Application Serial No. 86135128 was filed on December 4, 2013, under Section 1(a), 15 U.S.C. § 1(a), based upon Applicant’s claim of first use anywhere and in commerce since at least as early as January 15, 2000.

³ Application Serial No. 86135177 was filed on December 4, 2013, under Section 1(a), 15 U.S.C. § 1(a), based upon Applicant’s claim of first use anywhere and in commerce since at least as early as October 8, 2013.

Retail sporting goods stores; Retail stores featuring hockey and figure skating equipment, merchandise and novelties, namely, hockey helmets, hockey sticks, hockey gloves, hockey pads, hockey pants, hockey socks, hockey stakes [sic], hockey apparel, hockey protective gear, hockey jerseys, hockey masks, hockey novelty items, hockey bags, hockey pucks and training aids, figure skating skates, figure skating apparel, figure skating gloves, figure skating novelty items, figure skating bags, in International Class 35.

Applicant has disclaimed the terms “ICE SPORTS” apart from the marks as shown. Application Serial No. 86135177 claims the colors red, white and black as a feature of the mark, and contains the following description:

The mark consists of the stylized word “COYOTES”, the letters being black with a white outline and a red outline around the white outline along the outside edges of all of the letters and along the interior circles of the letters “c” and “o”. The stylized words “ICE SPORTS” having black lettering appears at the bottom right portion below the stylized word “COYOTES,” beginning under the second letter “o” and ending under the letter “s”.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of a likelihood of confusion with the marks in the following three U.S. Registrations, owned by two different entities:

- Reg. No. 3655451 for the mark W COYOTE, in the following stylized form,

The logo consists of the word "W COYOTE" in a cursive, handwritten-style font. The letters are black with a white outline, and there is a red outline around the white outline.

, for “Retail sporting goods stores,” in International Class 35;⁴

- Reg. No. 3688377 for the mark W COYOTE OUTDOORS, in the following

The logo consists of the word "W COYOTE" in a cursive, handwritten-style font, with the word "OUTDOORS" in a bold, sans-serif font below it.

stylized form, for “On-line retail store services featuring outdoor equipment and sport goods,” in International Class 35;⁵ and

⁴ Issued July 14, 2009.

- Reg. No. 4379914 for the mark RED COYOTE, and design, in the following



form, **red coyote** , for “Computerized on-line retail store services in the field of running and fitness; On-line retail store services featuring shirts; t-shirts; singlets; shorts; sports jackets; wind jackets; hats; visors; beanies; arm warmers; Retail apparel stores; Retail sporting goods stores; Retail store services featuring a wide variety of consumer goods of others; Retail clothing stores,” in International Class 35.⁶

When the refusals were made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the requests for reconsideration, and the appeals resumed. Upon the Examining Attorney’s request, these two appeals were consolidated by order of the Board. The cases are fully briefed.

Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the goods or services and the similarities between the marks. *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

⁵ Issued September 29, 2009. The registration disclaims the term “OUTDOORS” apart from the marks as shown.

⁶ Issued August 6, 2013. The registration makes no claim to color and contains the following description: “The mark consists of the stylized wording ‘red coyote’ having a drawing of a coyote positioned above the stylized wording.”

the marks.”). The relevant *du Pont* factors discussed in these cases are the similarity of the marks, the similarity of the services, the number and nature of similar marks in use in connection with similar services, and the absence of any actual confusion among consumers.

A. The nature and similarity or dissimilarity of the services, the established, likely-to-continue trade channels, and the classes of purchasers.

We first consider the similarity of the services. We base our evaluation on the services as they are identified in the application and registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. 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 the sales of goods are directed.”).

Applicant’s services include, *inter alia*, “retail sporting goods stores,” without limitation or restriction as to goods or services, channels of trade, and classes of consumers. These services are identical to the services of “retail sporting goods stores” identified in Registrations Nos. 3655451 and 4379914. Similarly, Applicant’s services of “retail sporting goods stores” encompass the more narrowly identified services of “on-line retail store services featuring outdoor equipment and sport goods,” identified in Registration No. 3688377, inasmuch as both services consist of retail stores featuring “sporting goods” or “sports goods.”

Applicant argues that the respective services are different because its services “are limited to featuring hockey and ice skating equipment” whereas “the cited marks are used with goods and services related to online retail stores or computerized on-line retail stores limited to outdoors equipment or fitness services.”⁷ We disagree. The fact that some of Applicant’s other services are limited to hockey and ice skating equipment and that some of Registrants’ other services are limited to outdoors equipment or fitness services does not overcome the fact that other retail store services identified in the applications and registrations are not so limited. If there is likelihood of confusion with respect to any of Applicant’s identified services the refusal of registration must be affirmed. It is not necessary for the Examining Attorney to prove likelihood of confusion with respect to each of the services identified in Applicant’s single-class applications. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Here, both the applications and registrations identify the services of “retail sporting goods stores” or legal equivalents.

Because the services identified in the application and the cited registrations are in part identical and unrestricted, we must presume that the channels of trade and classes of purchasers are also the same for those identical services. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011; *see also In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994)

⁷ Applicant’s Br. at 18, 7 TTABVUE 19.

(“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.”).

In view of the foregoing, the *du Pont* factors relating to the similarity of the services, the channels of trade, and classes of purchasers all favor a finding of likelihood of confusion.

B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression.

Next, we consider the *du Pont* factor relating to the similarity of the marks. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “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. . . .” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

When, as here, the services at issue are identical, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than if the services were not identical. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)).

Applicant's mark consists of the term COYOTES ICE SPORTS in standard characters and in the stylized form shown above. The dominant element of Applicant's marks is the arbitrary term COYOTES. It is the first term in both marks, and it is much larger than the term ICE SPORTS in the stylized mark. The term "ICE SPORTS" is less dominant for several reasons: it follows the term COYOTES; it has fewer syllables than COYOTES; and it is descriptive of Applicant's services which include retail stores "featuring hockey and figure skating equipment, merchandise and novelties." See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'").

The term COYOTE is also the dominant term in Registrants' marks. In the W COYOTE marks, the presence of the letter "W" suggests that COYOTE designates a surname, but this suggestion does not change the connotation or commercial impression of the term COYOTE in the marks, and it is insufficient to distinguish the marks. See *Big M. Inc. v. U.S. Shoe Corp.*, 228 USPQ 614 (TTAB 1985) (holding MANDEE likely to cause confusion with T. H. MANDY). The W COYOTE marks appear in a stylized script form, but this too does not alter the meaning or the commercial impression formed by the term COYOTE. Moreover, Applicant's mark in Application Serial No. 86135128 appears in standard characters and, therefore, may be used in any form including Registrant's script. The term OUTDOORS in W COYOTE OUTDOORS is less dominant because it is descriptive of the type of goods

sold by Registrant, namely, “outdoor equipment and sport goods.” *Cunningham*, 55 USPQ2d at 1846. Thus, when we compare the marks in their entirety, the commercial impression of both Applicant’s marks and the W COYOTE marks is of a coyote.

The mark RED COYOTE and design also creates the same general commercial impression of a COYOTE. The term RED is subordinate to COYOTE and does not suggest a different commercial impression. Rather, it suggests a particular type of coyote. Similarly, the representation of a running coyote merely reinforces the commercial impression of a coyote.⁸ Applicant’s use of a red border around the word COYOTES in its stylized mark, although minimal, does contribute slightly to the likelihood of confusion with Registrant’s RED COYOTE mark.

When we view the marks in their entirety, as we must, we find they have strong similarities in appearance, sound, connotation and commercial impression. In appearance and sound, all of the marks are dominated by the arbitrary term COYOTE[S] while the remaining terms are subordinate. In connotation and commercial impression, all of the marks share the same suggestion of an association with a coyote. Although the marks at issue here do have some differences, they are nonetheless highly similar, particularly when we consider that the average

⁸ In its briefs, Applicant mischaracterizes Registrant’s mark as containing a “running fox logo.” Registrant’s mark purports to represent a coyote, not a fox. Registrant’s description of its mark states “The mark consists of the stylized wording ‘red coyote’ having a drawing of a coyote positioned above the stylized wording.” See Reg. No. 4379914, Office Action of March 18, 2014, p. 8. Although a coyote and a fox may look somewhat similar (especially given the lack of detail in the prior registrant’s depiction), any doubt in this case is removed by the wording RED COYOTE directly below the image in the registered mark. Customers viewing the registered mark as a whole are unlikely to think of a fox when seeing the silhouette of an animal with the word “coyote.”

consumer typically does not retain an exact recollection of marks. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Here, because the dominant feature of the marks, COYOTE, is the same, the connotation and commercial impressions of the marks as a whole are substantially similar, notwithstanding the small differences between them. “[S]imilarity as to one or more of [the du Pont] factors may be sufficient to support a finding that the marks are similar or dissimilar.” *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

Applicant argues that the “shared ‘COYOTE’ element of the marks cited against Appellant is diluted and weak in relation to sports or sports teams and thus should not be given much weight in a likelihood of confusion analysis.”⁹ This is the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods (or services). In support of its argument, Applicant submitted web site excerpts of amateur sports teams using the name COYOTES:

Appellant submitted at least seven sports team names to the record that use the common element “COYOTE” in their names. . . . This evidence demonstrates that others who appear to be unrelated to Registrants of the cited marks use the “COYOTE” element in association with sports retailers, who often sell sports team merchandise in connection with those sports teams. Thus, the “COYOTE” element shared by the cited marks has little power as a source identifier and thus should be accorded only limited protection. Further, the purchasing public has been exposed to the use of “COYOTE” or “COYOTES” in connection with sports teams and their

⁹ Applicant’s Br. at 10, 7 TTABVUE 11.

sports equipment sold by sports retailers, and thus and [sic] will not look to that portion of a mark as a source identifier.¹⁰

Applicant's evidence is unpersuasive to show that COYOTES is weak for retail sporting goods store services and, therefore, that consumers will look to slight differences in the marks to distinguish the services. *See Palm Bay Imports*, 73 USPQ2d at 1693. The evidence shows only use of the term COYOTES as the name of several local amateur sports teams. It does not show use of COYOTES in connection with any retail sporting goods store services. Even assuming, arguendo, that COYOTES is weak for sports teams, it does not follow that it is weak for retail store services. Simply put, we fail to see how use of the term COYOTES by seven local amateur sports teams will condition the public to look to slight differences in the marks to distinguish Applicant's and Registrants' retail sporting goods stores.

Neither do we find that the third party uses of COYOTES demonstrates that the term is in any way suggestive or descriptive of Applicant's or Registrants' services. *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (“[a] real evidentiary value of third party *registrations* per se is to show the sense in which . . . a mark is used in ordinary parlance.” Quoting 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)).

Accordingly, we find COYOTES ICE SPORTS, W COYOTE, W COYOTE OUTDOORS, and RED COYOTE and design to be similar for purposes of the *du*

¹⁰ *Id.*

Pont factor relating to similarity in appearance, sound, connotation and commercial impression. This favors a finding of likelihood of confusion.

C. Lack of Actual Confusion

Applicant argues that there is no evidence of any actual confusion. Specifically, Applicant argues: “the Examining Attorney’s refusal to register Appellant’s ‘COYOTES ICE SPORTS’ mark . . . does not properly take into account the absence of any actual confusion during the five years of concurrent use.”¹¹

Uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *Majestic Distilling*, 65 USPQ2d at 1205. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur. This *du Pont* factor is neutral.

D. Conclusion

When we consider the marks in their entirety, given the dominance of the arbitrary term COYOTE[S] in the marks, we find it likely that consumers familiar with any of Registrants’ retail sporting goods stores could presume that Applicant’s retail sporting goods stores were a related enterprise, albeit focusing on ice sports. Because the marks are similar, and the services are in part identical and travel in the same trade channels, there is a likelihood of confusion between Applicant’s COYOTES ICE SPORTS marks and the marks W COYOTE, W COYOTE OUTDOORS, and RED COYOTE and design in the cited registrations.

¹¹ Applicant’s Br. at 8, 7 TTABVUE 9.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Lanham Act is affirmed.