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Mailed: January 21, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

GA Peach Buns, Inc.

v.

Voucia Corporation

Opposition No. 91174032

Chrystal R. Ferrier of Ferrier & Ferrier, P.C. for GA Peach Buns, Inc.

Heng-Wei Chen, Esq. for Voucia Corporation.

Before Bucher, Grendel and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Voucia Corporation (applicant) has filed an application to register on the Principal Register the standard character mark shown below for "lingerie" in Class 25.¹

Peach Claire

GA Peach Buns, Inc. (opposer) filed a notice of opposition on the ground of priority and likelihood of confusion under

¹ Application Serial No. 78776498, filed December 19, 2005 based on an allegation of first use and first use in commerce of December 1, 2005. The application states, "The name 'PEACH CLAIRE' does not identify a particular living individual."

Section 2(d) of the Trademark Act.² Opposer alleges that it has continuously used the mark PEACH BUNS and the trade name peachbuns.com since September 1997 in connection with the wholesale and retail distribution of girls and ladies clothing namely, swimwear, wraps, tops, cover ups, skirts, shorts and dresses; that on September 22, 2003, opposer filed an application to register its mark for said goods; and that applicant's mark when applied to applicant's goods so resembles opposer's previously used mark PEACH BUNS for clothing as to be likely to cause confusion.

Applicant filed an answer denying the salient allegations in the opposition.

The Record

The record consists of the pleadings; the file for the involved application; opposer's testimony, with exhibits, of Miranda Smith, opposer's president;³ and applicant's notice of reliance on materials including a dictionary definition of "lingerie," opposer's responses to applicant's interrogatories and printouts of third-party registrations.

² To the extent that opposer asserted various additional grounds for opposition, opposer limited its arguments in its brief to the ground of likelihood of confusion. Accordingly, any such additional grounds are deemed waived.

³ Opposer attached as an exhibit to the testimony of Ms. Smith, a reply brief submitted in support of its earlier motion for summary judgment (denied by the Board on October 29, 2008). However, the reply brief exhibits were not made of record during trial, and any unsupported facts or arguments in this brief will not be considered.

Both parties have filed briefs.

Standing and Priority

As we noted, opposer pleaded ownership of a pending application for the mark PEACH BUNS for "clothing, namely, swimwear, wraps, tops, coverups, skirts, shorts, dresses" filed September 22, 2003. Opposer states in its brief that this application issued into Registration No. 3212015 on February 27, 2007. Opposer did not make either the application or the registration of record during its testimony period, nor did opposer seek to amend the opposition to rely on the registration. Nevertheless, applicant cross-examined Ms. Smith on matters concerning the application, and moreover applicant treated the registration as being of record by specifically relying on the registration in its brief. Under the circumstances, the registration is considered to have been stipulated into the record, and the pleading is deemed amended under Fed. R. Civ. P. 15(b) to conform to the evidence. See, e.g., *Jockey International, Inc. v. Frantti*, 196 USPQ 705, 706 n.5 (TTAB 1977) ("Although status copies showing title in opposer were never filed by opposer...applicant's brief treats the registrations as being in the record and so shall we.")

In view of our determination that opposer's registration is of record, opposer's standing has been established, and its priority with respect to the registered mark for the goods identified in the registration is not in issue. King Candy Co.,

Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our determination 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 issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/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 Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and the differences in the marks."). We discuss the relevant *du Pont* factors below.

Goods/Channels of trade/Conditions of purchase

Applicant's goods are identified in the application as "lingerie." "Lingerie" is broadly defined as "women's underwear."⁴ Opposer's goods as identified in its registration are "clothing, namely, swimwear, wraps, tops, coverups, skirts, shorts, dresses." The extent to which the channels of trade and purchasers actually overlap is not entirely clear. The record

⁴ App's. Not. of Rel., Exh. F (*Cambridge Advanced Learner's Dictionary* (2009)).

shows that opposer's goods are primarily swimwear, and that opposer's channels of trade and purchasers for its swimwear are actually quite narrow and specialized. The swimwear is sold on opposer's website, peachbuns.com, and opposer appears to target particular consumers, such as prospective models, and, for example, participants in pageants and swimwear competitions. In addition, opposer exhibited its swimwear at the International Lingerie Show in Las Vegas in 2006. This was described by Ms. Smith as "a novelty show," offering lingerie, club wear, exotic dance wear and swimwear to specialty shops and stores. Smith Test., p. 15.

Applicant sells its lingerie on a wholesale basis to retailers, and its sales are made primarily through its website, peachclaire.com. However, applicant was also an exhibitor at the same International Lingerie Show in Las Vegas.

Nevertheless, the question of likelihood of confusion is determined on the basis of the identification of goods set forth in the application and registration, and in the absence of any restrictions in the application or registration we must assume the goods are sold through all the normal trade channels to all the usual purchasers of such goods, regardless of what the record may show the actual nature of the goods or their channels of trade or purchasers to be. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir.

1987); and *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

Because there are no restrictions to any particular market or consumer in the application or registration and since both parties' goods include items of everyday apparel, we presume that these articles of clothing are sold in the same wholesale market as well as at least in some of the same retail channels, such as department stores, to the same ultimate consumers.

Applicant argues that purchasers of swimwear and lingerie exercise a high degree of care in terms of the fit and feel of both types of apparel. However, there is no evidence on this point in the record, and moreover, the goods include everyday items of clothing, such as underwear and tops, which may be purchased by consumers with no more than ordinary care.

Turning next to a comparison of the goods, we point out that there is no per se rule that all clothing items are related. See *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1723 (TTAB 2008); and *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984). In particular, we do not take judicial notice that outerwear and undergarments are related items of clothing for the purpose of determining likelihood of confusion. *Id.* See also, *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1506 (TTAB 2007); and *In re Sears Roebuck & Co.*, 2 USPQ2d 1312, 1314 n.5 (TTAB 1987) ("it is certainly not a matter of common knowledge" that sportswear and undergarments are often sold under the same

mark). Undergarments and outerwear are specifically different types of clothing, having different purposes. Therefore, opposer has the burden of showing that consumers will believe that these different types of clothing identified by similar marks come from a single source.

In this regard, opposer has submitted a *Victoria's Secret* catalog showing that certain items of the company's swimwear and undergarments are offered under the same marks, such as "Body by Victoria" and IPEX. This evidence is not sufficient to persuade us that swimwear typically emanates from companies that produce underwear or that purchasers would naturally expect both products to emanate from the same source. Also, while opposer notes that lingerie, exotic dance wear and swimwear were all displayed at the same trade show, there is no evidence that both types of garments were offered by the same company. Applicant's web page, under the heading "LINGERIE" also includes an item called a "mini dress" for sale, as applicant points out, but there is no indication that applicant sells this item under its PEACH CLAIRE mark.⁵

Nor is there evidence that outerwear and undergarments are complementary or, as opposer claims, functionally similar,

⁵ Opposer in its brief included a list of three marks that opposer claims are registered by third parties for both swimwear and lingerie. This evidence is not properly of record. First, the evidence was not timely submitted during opposer's testimony period. Furthermore, copies of the registrations (or the electronic versions thereof) were not provided. Contrary to opposer's contention, the Board does not

notwithstanding applicant's arguments that swimwear and dresses may incorporate some of the same materials as lingerie, such as lace or spandex, and that both may be worn in "an intimate situation." Smith Test., p. 55. Indeed, Ms. Smith specifically stated, "I don't consider swimwear an undergarment" and "I would not wear it as underwear." Smith Test., p. 53-55; App's. Exh. 1. Moreover, the fact that underwear and outerwear are worn in the same settings does not mean that consumers will view the apparel as related in the sense that they will assume the two types of clothing come from the same source.

Strength of opposer's mark

Opposer argues that its mark is well known to the "purchasing public," although it is not clear whether opposer is referring to the trade or the general public. Nevertheless, in order to establish market recognition, the evidence must be sufficient to at least permit an inference of wide exposure of the mark to the relevant public and an inference that the exposure has been effective in creating recognition. See, e.g., *In re Ennco Display Systems Inc.*, 56 USPQ2d 1279 (TTAB 2000) and *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997). Opposer's evidence in this regard is insufficient. The extent to which either the trade or ultimate consumers have been exposed to or are aware of opposer's PEACH BUNS mark, on this record, is simply not clear.

take judicial notice of registrations residing in the Office. See *In*

As we noted, opposer's business focuses primarily on swimwear. The record shows that opposer's PEACH BUNS mark has been in use in connection with swimwear since March 2003.⁶ In addition to the marketing of its swimwear to models and for use in pageants and competitions, opposer also conducts model searches and those who are selected will appear, wearing opposer's clothing, in opposer's "Collections Calendar," in opposer's fashion shows, and in promotions for clients who wish to use models in the promotion of their own goods and/or services.

In addition, opposer states that it supplies the clothes to models for magazine photo shoots. Opposer submitted the front cover of *Peach Magazine* (no relation to opposer) showing a model who, according to Ms. Smith, is wearing one of opposer's outfits. Ms. Smith states that opposer's swim suits are also worn by some of the models appearing on the front cover of the 2008 swimsuit issue of *Hooters* magazine. The PEACH BUNS trademark is not visible in either of these exhibits.

Opposer promotes its swimwear on its website, peachbuns.com, and opposer has exhibited its clothing on at least one occasion at a trade show, the International Lingerie Show, and in a

re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994).

⁶ Ms. Smith states that the mark was first used in September 1997, but this statement is unsupported by any documents or details regarding use as of that date or for the time period between 1997 and 2003. Nor does the record support use of the mark for t-shirts and pants as of March 2002, as opposer claims. The exhibit used to support this assertion,

fashion show at the Tabu Ultra Lounge in Las Vegas. Otherwise, opposer markets its clothing through its marketing division "Motor Coach Billboards," a form of mobile billboard advertising. Opposer sells advertising space on the tour bus to other companies, and both the PEACH BUNS mark and the client's advertising are prominently displayed on the side of the bus. The tour bus makes appearances at various events and shows during which opposer's models wearing opposer's clothing promote the client's goods or services. Opposer has provided no evidence regarding the frequency of these types of promotions or any details that might help determine the impact of this advertising on the public or that might be probative of consumer recognition of the mark. For example, opposer states that its tour bus appeared at the 2007 Super Bowl in joint promotion with the "Platinum Plus Gentlemen's Club." However, opposer did not provide any information as to, for example, where the bus was situated, its visibility, the nature of the interaction with the public, the duration of the appearance, or the extent of public attention its mark received.

Opposer argues that it has granted "licensing permission to use its mark" to many third parties, listing Hooters, Hawaiian Tropic, MGM Casino, Bourbon Street Station and Miss Trump International Pageant, among a number of others. However, the nature of these licensing arrangements is unclear and

which consists only of opposer's order form for the clothing, is not

unexplained. There is no evidence that any of the licensees have ever sold opposer's clothing, and no indication as to the extent to which these companies have used opposer's mark. For example, opposer states that for three years it "has been a primary sponsor" for the Hooters swimwear pageant. Smith Test., p. 29. Describing this sponsorship, however, Ms. Smith explains only that opposer sends catalogs and gift certificates for the Hooters employees to enter opposer's model search.

Opposer's general statements regarding its sales and advertising expenditures, without any context for the figures, are entitled to little weight. Opposer's asserted sales of \$75,000 a year does not seem particularly impressive on its face and moreover, opposer has provided no documentary support for this figure. Furthermore, although Ms. Smith estimated in response to interrogatories that opposer spent \$20,000 in each year 2006 and 2007 in advertising, she stated in that same response that "the dollar value of expenditures has never been totaled." App's Not. of Rel., Exh. B (Resp. to Int. No. 10).

We find that the evidence as a whole falls far short of indicating strength and recognition of PEACH BUNS in opposer's market.

Moreover, the mark by its nature is suggestive. Suggestive marks are accorded a more limited scope of protection than arbitrary marks. See *Shoe Corporation of America v. The Juvenile*

sufficient to demonstrate use of the mark on these items.

Shoe Corporation of America, 266 F.2d 793, 121 USPQ 510 (CCPA 1959). In explaining the selection of opposer's mark, Ms. Smith states that she "had always been remembered amongst associates as the Georgia Peach with the perfect butt." App's. Not. of Rel., Exh. B (Resp. to Int. No. 7). In this regard we take judicial notice of the definition of "peach" as "*Informal.* a person or thing that is especially attractive, liked, or enjoyed"; and the definition of "buns" as "*Slang.* the buttocks."⁷ The mark suggests revealing clothing, or, for example, swimwear to show off an attractive part of the body.

In addition, applicant submitted printouts of several use-based, third-party registrations for marks consisting of or including the word PEACH or variations thereof for various items of clothing including Registration No. 2844913 for PEACH and design; Registration No. 2962527 for the mark BEHIND EVERY GIRL THERE IS A PEACH"; and Registration No. 3223702 for the mark PEACHES. While third-party registrations are not evidence of use, they may be given some weight to show the meaning of a mark in the same way that dictionaries are used. See *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976). The third-party registrations suggest that others in the clothing

⁷ Dictionary.com Unabridged based on the *Random House Dictionary* (2009). The Board may take judicial notice of dictionaries, including online dictionaries, which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

field have adopted and registered PEACH(ES) for its suggestive meaning for clothing.

Similarity or dissimilarity between the marks

Similarity is not an absolute matter but instead is a matter of degree. See *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (CAFC 2003). When goods are highly related, "the degree of similarity necessary to support a conclusion of likely confusion declines." *Shen Manufacturing Co., Inc. v. The Ritz Hotel Limited*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004). Conversely, when goods are not highly related, and we have found they are not in this case, a greater degree of similarity in the marks is required to support a finding of likelihood of confusion.

With that in mind, we turn to a comparison of opposer's mark PEACH BUNS with respondent's mark PEACH CLAIRE. In determining the similarity or dissimilarity of marks, we must consider the marks in their entirety in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The marks are similar in sound and appearance to the extent that they share the word PEACH, but the words BUNS and CLAIRE have nothing in common. The addition of those words significantly changes the meanings the marks as a whole convey and as a result, the marks create different, unitary commercial

impressions. PEACH BUNS is a slang expression suggesting revealing clothing or an attractive body part, while PEACH CLAIRE suggests a particular individual or an individual's name.⁸ To the extent that the marks have some aural and visual similarities, we find that the differences between the marks as a whole in terms of their meaning and commercial impression are sufficient to outweigh those similarities. See, e.g., *Colony Foods, Inc. v. Sagemark, Ltd.*, 735 F.2d 1336, 222 USPQ 185 (Fed. Cir. 1984) (HOBO JOE'S for restaurant services, suggesting a particular individual hobo named "Joe," not confusingly similar to HUNGRY HOBO for restaurant services, suggesting an anonymous person of that kind in need of a meal); and *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) (BOTTOMS UP for ladies' and children's underwear not confusingly similar to BOTTOMS UP for men's suits, coats and trousers based in part on the different connotations of the marks in connection with the respective goods).

Actual confusion

Opposer claims there has been at least one instance of actual confusion. Ms. Smith states that she called Rob Daniels the vice-president of exhibitor relations of the International Lingerie Show in Las Vegas to confirm her booth and was told that

⁸ We also note that during prosecution of the application, applicant was required to indicate whether "PEACH CLAIRE" identified a particular individual.

"Peach Claire" was already an exhibitor. We disagree that this amounts to an instance of actual confusion. First, the basis for Mr. Daniel's "confusion" is not explained, i.e., whether he confused the names or perhaps he simply misheard the name over the phone. Further, the question under this factor concerns confusion as to the source of the goods, not confusion as to the marks. In any event, to the extent there was confusion, it was not purchaser confusion.

Conclusion

In view of the suggestiveness of opposer's mark, and the cumulative differences in the marks and the goods, we find that confusion is not likely to occur.

Decision: The opposition is dismissed.