

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

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Fruit of the Loom, Inc.
v.
Thomas Riley, David Saulters and Peter Dragon

Opposition No. 91182644
to application Serial No. 77177120

Carrie A. Shufflebarger and Louis K. Ebling of Thompson Hine
LLP for Fruit of the Loom, Inc.

Thomas Riley, David Saulters and Peter Dragon, pro se.

Before Holtzman, Cataldo and Wellington,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Thomas Riley, David Saulters and Peter Dragon,
(hereinafter, collectively, "applicant") applied to register
in standard characters on the Principal Register the mark
BODY FRUIT based upon an allegation of a bona fide intent to
use the mark in commerce for "footwear; headwear; jackets;
pants; shirts; shorts; sweat shirts; undergarments; coats;
tank tops" in International Class 25.¹

¹ Application Serial No. 77177120 was filed on May 9, 2007.

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Registration has been opposed by Fruit of the Loom, Inc. ("opposer"). In its amended notice of opposition, opposer asserts that it is the owner of numerous famous marks, previously used and registered on the Principal Register, including FRUIT OF THE LOOM (typed or standard characters²) for "apparel for men, women and children; namely, underwear, lingerie, shirts, tee shirts, tank tops, long sleeve tee shirts, sweatshirts, sweatpants, socks, hosiery leotard tights, shorts, brassieres, panties" in International Class 25.³ In addition to its standing, opposer asserts as grounds for opposition claims of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); and dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c). Opposer further asserts a claim that at the time the involved application was filed, applicant lacked a *bona fide* intent to use the applied-for mark in commerce as required by Trademark Act Section 1(b), 15 U.S.C. § 1051(b), thereby rendering the application void *ab initio*.

Applicant's amended answer consists of a general denial of the allegations in the amended notice of opposition.⁴

² Trademark Rule 2.52(a) was amended in 2003 to refer to "typed drawings" as "standard character" drawings. See Trademark Rule 2.52(a); 37 C.F.R. 2.52(a).

³ Registration No. 1876708 issued on January 31, 1995. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

⁴ In addition, applicant asserted certain affirmative defenses, but did not pursue them by motion or at trial. Accordingly, they

Description of the Record

The record in this case consists of the pleadings and the file of the involved application. During its assigned testimony period, opposer filed a notice of reliance upon the following: status and title copies of nine of its pleaded registrations, including Registration No. 1876708 discussed above; copies of advertisements for opposer's goods featuring its FRUIT OF THE LOOM and other related marks; trade journal and general circulation magazine articles discussing opposer's FRUIT OF THE LOOM brand; applicant's responses to opposer's discovery requests and printed TARR copies of applications for other marks filed by applicant.

Applicant did not take testimony or offer any other evidence during its assigned testimony period.⁵ Only opposer filed a brief on the case.

Opposer's Standing

Because opposer has properly made its pleaded registrations of record, we find that opposer has established its standing to oppose registration of

are deemed waived. Applicant also asserted certain "affirmative defenses" that are more in the nature of amplifications of its denial of the salient allegations of the amended notice of opposition and are so construed.

⁵ The parties were advised in the Board's February 25, 2010 decision (page 6, footnote 4) denying opposer's summary judgment motion that evidence submitted in connection therewith is not of record at trial.

applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

We turn then to opposer's claim of priority and likelihood of confusion.

Priority of Use

Because nine of opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to the marks and goods covered thereby. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue, even those not specifically discussed in this decision. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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For purposes of our likelihood of confusion determination, we will concentrate our discussion on opposer's pleaded Registration No. 1876708 for the mark FRUIT OF THE LOOM for "apparel for men, women and children; namely, underwear, lingerie, shirts, tee shirts, tank tops, long sleeve tee shirts, sweatshirts, sweatpants, socks, hosiery leotard tights, shorts, brassieres, panties." If our analysis of the *du Pont* factors leads to a finding of likelihood of confusion with the mark and goods in this pleaded registration, it will be unnecessary to consider opposer's other pleaded registrations. Conversely, if likelihood of confusion is not found with the mark and goods in this pleaded registration, it also will not be found with the marks and goods in opposer's other pleaded registrations.

Fame of Opposer's Mark

We begin our likelihood of confusion analysis with the fifth *du Pont* factor, which requires us to consider evidence of the fame of opposer's mark and to give great weight to such evidence if it exists. See *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Fame of an opposer's mark or marks, if it exists, plays a "dominant role in the process of balancing the DuPont factors," *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456, and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one "with extensive public recognition and renown."

Bose Corp. v. QSC Audio Products Inc., *supra*, 63 USPQ2d at 1305.

Upon careful review of the record in this case, we are not persuaded that opposer's mark is famous. It is the duty of a plaintiff asserting that its mark is famous to clearly prove it.

By its notice of allowance, opposer has introduced evidence that it has advertised its FRUIT OF THE LOOM brand in periodical and trade magazines since at least 1937.⁶ These include Dry Goods Journal; Women's Wear Daily; Good Housekeeping; Apartment Life; Chain Store Age; New York Times Magazine; Redbook; Cosmopolitan; Ladies' Home Journal; Rolling Stone; Men's Fitness; Family Circle; Ebony; Elle; Seventeen; Sports Illustrated; Woman's World; and Women's Health. Opposer further has introduced evidence that in

⁶ We observe that certain advertisements submitted by opposer contain notations written in pen or pencil indicating earlier dates. However, there is no testimony or evidence of record to substantiate these asserted earlier dates.

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2008, DNR magazine voted opposer's Fruit of the Loom brand the best-known men's clothing brand in the United States. In addition, opposer introduced evidence that in 2005, Women's Wear Daily voted opposer's Fruit of the Loom brand the 9th most recognized clothing brand in the United States. Opposer made of record by notice of reliance further evidence that various publications have ranked its Fruit of the Loom brand as a highly valuable and recognized brand. Finally, opposer cites to cases in various courts in which its Fruit of the Loom brand or marks have been found famous.

This evidence demonstrates that opposer has engaged in extensive print advertisement of its goods under the Fruit of the Loom brand and also enjoyed recognition of its clothing goods so branded. However, such evidence falls short of demonstrating the extent to which such activities and achievements translate into widespread recognition either of opposer's FRUIT OF THE LOOM mark or any of its other pleaded marks among the general public. Specifically, opposer's evidence of media recognition consistently discusses recognition of the Fruit of the Loom brand but does not indicate to which of its marks such recognition inures. As a result, such evidence does not establish that opposer's marks are widely recognized by the consuming public. Furthermore, we are not privy to the evidence made of record in the court cases noted by opposer in which its

brand or marks were found famous. Simply put, we cannot determine in this case the evidentiary bases for the courts findings.

We note that opposer has not made of record any testimony or evidence regarding or any sales or advertising figures for its goods under the FRUIT OF THE LOOM or other marks. *Cf., for example, Motion Picture Association of America, Inc. v. Respect Sportswear Inc.*, 83 USPQ2d 1555 (TTAB 2007) (opposer's members annually spent 4 billion dollars on advertisements and promotion). More importantly, opposer provides no context by which we may ascertain opposer's market share vis a vis other manufacturers of the goods identified in its pleaded registrations. As a result, it is impossible to determine, for example, how its sales or advertising expenditures compare to those of its competitors such that we may conclude therefrom that opposer's pleaded marks are famous. *See Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Accordingly, we are constrained to find on this record that the evidence falls short of establishing that any of opposer's pleaded marks is famous for purposes of our likelihood of confusion determination. Nonetheless, the record supports a finding that opposer's marks, including its FRUIT OF THE LOOM mark, are strong, to the extent we must recognize that they are inherently distinctive in view

of their registration on the Principal Register, opposer's examples of advertising and the absence of evidence of third-party uses of record.

The Goods

We turn then to our consideration of the similarities or dissimilarities between the parties' goods. The issue remains, of course, not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). Likelihood of confusion is determined on the basis of the identification of goods in the application at issue vis-à-vis the identification of goods in opposer's registration. *See Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

In this case, both applicant's identification of goods and that of registrant include "shirts," shorts," "sweatshirts," "tank tops," and "underwear" or "undergarments." Given that these goods are identified without any limitation as to type, they must be presumed to be legally identical. Likelihood of confusion may be found based on *any* item that comes within the identification of goods in the involved application. *Tuxedo Monopoly, Inc. v.*

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General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Further, and in any event, the remaining clothing items identified in the involved application appear closely related to several of the clothing items listed in opposer's registration (e.g., tee shirts, long sleeve tee shirts, sweatpants, socks).

The *du Pont* factor of the identity between the goods, at least in part, weighs heavily in favor of a finding of likelihood of confusion.

Channels of Trade and Classes of Purchasers

Because the goods identified in the application and the cited registration are in part identical and otherwise related, we must presume that the channels of trade and classes of purchasers are the same. See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); and *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("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").

Thus, this *du Pont* factor also favors a finding of likelihood of confusion.

The Marks

We turn then to the first *du Pont* factor, i.e., whether applicant's mark and opposer's mark are similar or dissimilar when viewed in their entirety in terms of appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot, supra.* The test, under the first *du Pont* factor, 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 their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result.

In this case, opposer's FRUIT OF THE LOOM mark is similar to applicant's BODY FRUIT mark in that both share the identical word FRUIT. We find that the word FRUIT, being the first term opposer's mark, is the dominant feature in the commercial impression created thereby. *See Presto Products, Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988)* ("...[it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin, supra,* ("Veuve" is the most prominent part of the mark VEUVE

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CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label). Furthermore, opposer's FRUIT OF THE LOOM mark suggests that its clothing goods are the result, or fruit, of its labors. Likewise, the word FRUIT in applicant's mark refers back to, and reinforces, BODY, suggesting that its goods are fruit to be worn on or emanating from the body. Thus, both marks as a whole suggest that the parties' clothing products under their marks are fruit produced to be worn on the body.

In terms of appearance, sound, connotation and overall commercial impression, we find that the similarities between the parties' marks which result from the prominence of the term FRUIT in both outweigh the dissimilarities resulting from the different terms comprising the marks. Further, with regard to the similarities between the marks, we note that, "[w]hen marks would appear on virtually identical ... [goods or] services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). *See also ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

Thus, when viewing the marks in their entirety, we find that as applied to goods that are in part identical, the

marks are more similar than dissimilar for purposes of our likelihood of confusion determination, and this *du Pont* factor also favors a finding of likelihood of confusion.

Summary

In view of the in part identical nature of the goods, trade channels and classes of consumers, and the similar nature of the marks, we find that consumers encountering opposer's goods under its FRUIT OF THE LOOM mark who then encounter applicant's in part identical goods under its BODY FRUIT mark, are likely to experience confusion as to the source of the parties' goods

Dilution

Because we have found above that opposer has not met its burden of demonstrating that its FRUIT OF THE LOOM mark, or any of its other marks, is famous for purposes of our likelihood of confusion determination, opposer cannot prevail on this record on its claim of dilution which requires a stronger showing of fame. *See, e.g., The Toro Company v. ToroHead*, 61 USPQ2d 1164 (TTAB 2001).

DECISION: Opposer has demonstrated its standing to bring this opposition proceeding. The opposition is sustained on the ground of priority and likelihood of confusion, and registration to applicant is refused on that ground.

The opposition is dismissed on the ground of dilution.

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Further, because opposer has prevailed on its claim of priority and likelihood of confusion, we need not also reach its claim that at the time applicant filed the involved application it lacked a *bona fide* intent to use the mark in commerce.