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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218738
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Abercrombie & Fitch Trading Co.,

Opposer,

v.

Isabella Elizabeth Schnittger,

Applicant.

Opposition No. 91218738

APPLICANT'S TRIAL BRIEF

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I. INTRODUCTION

Opposer Abercrombie and Fitch Trading Co. (hereinafter, “Opposer” or “A&F”) has submitted a lengthy and learned brief which tries very hard to bury the implications of its argument. A&F’s Moose Mark(s)¹, feature a peculiar moose with an unnatural pose of its palmate antlers. A&F sometimes uses its Moose Mark(s) without any other identification of the source of the article bearing the Moose Mark. Opposer argues that its Moose Mark is too easily confused with Applicant Isabella Schnittger’s (herein “Applicant”) Red Dear Mark of a seven point stag with the words “Red Dear” below it. If so, the implication clearly is that then no maker of clothing can legally use with its trade name an image of any of the sixty species in the deer family. The deer family is defined by having antlers, including not only moose, but also Brouzet deer, caribou and reindeer, Chinese water deer, Chital (Axis deer), elk, fallow deer, Huemul, marsh deer, mule deer, musk deer, Pere David’s deer, Pudu, Red deer, roe deer, or white tail deer. Could a clothing manufacturer create a trademark with its name and one of Santa’s reindeer? Not if A&F prevails in this proceeding.

Applicant argues that A&F should not be allowed to “occupy” the entire family of antlered animals so that no one else can combine an image of any of its 60 species with their own trade name in marketing “high quality, casual apparel and accessories for men, women and children with an active, youthful lifestyle in the United States.” (Opposer’s Trial Brief, p. 4).

II. DESCRIPTION OF THE RECORD

Applicant does not quarrel with Opposer’s description of A&F’s record. A&F is a well-known company, and Applicant does not claim any rights in the A&F Moose Trademark.

Applicant does, however, object to A&F’s characterization of the topics in Applicant’s testimony as “most of which are irrelevant”. Which ones? From Applicant’s perspective,

¹ As used herein, “Opposer’s Moose Mark(s)” and “A&F Moose Mark(s)” mean those trademarks referenced in footnote 1 of Opposer’s Trial Brief, on page 4. “Applicant’s Red Dear Mark” means the mark that is the subject of this proceeding and U.S. Trademark Application No. 86/152,857.

Opposer seems to believe that it is “irrelevant” that separate words, “deer” and “moose”, are used to describe two different, and different looking, animals. Simply because both deer and moose are “antlered animals” Opponent argues that its Moose Mark will be confused with Applicant’s Red Dear Mark even if literally has the words “Red Dear” as part of it.

III. STATEMENT OF PROCEEDINGS AND ISSUES

The record in this case is what it is, and is filed before this Board. Applicant recognizes that A&F maintains its objections to assertions by Applicant to what Applicant believes is a fact, namely that Moose and Deer look different and are different, and that the differences are not exactly subtle, such as pointed antlers of deer versus “palmate antlers” of moose (see Opposer’s Appendix 1, Objection No. 6, p. 6). Applicant believes that difference is a matter of fact and is relevant to any rational person with common sense who is tasked, as is this Board, with deciding whether Applicant’s Red Dear Mark, with the words “Red Dear” is so easily confused with A&F’s Moose Mark as to foreclose Applicant, or anyone else, from creating a mark with a trade name and an image of any “antlered animal”.

IV. STATEMENT OF FACTS

Applicant does not dispute that A&F has validly registered its marks, and that they have been used on clothing sold both in its stores and over the Internet. As Opposer states, however, “On many of A&F’s products, the A&F [Moose] Mark is the only visible trademark when worn by a customer.” (Opposer’s Trial Brief, p. 12). By not using its brand name in connection with its Moose Mark, Opposer wants to keep others from using not only the same image, or a similar image of the same animal, but any image of another and different looking “antlered animal”, even with a brand trade name. Applicant’s facts are really commonsense: Deer look different from Moose, in particular because the shapes of Moose antlers are strikingly different from the shape of Deer antlers. In addition, as a matter of fact, Applicant’s Red Dear Mark not only has a different animal in it from the antlered animal in A&F’s Moose Mark, it has the written words “Red Dear”.

V. ARGUMENT

Applicant does not argue that Opposer lacks standing, and concedes that the A&F Moose Mark(s) were registered before Applicant's Red Dear Mark. Applicant's argument is really very simple: it is not the purpose of trademark registration to allow one company to try to associate any "antlered animal" with its brand by foreclosing Applicant or anyone using both a trade name and a different "antlered animal", namely a 7 pointed stag (male) deer with the words "Red Dear", in creating a mark for its own brand.

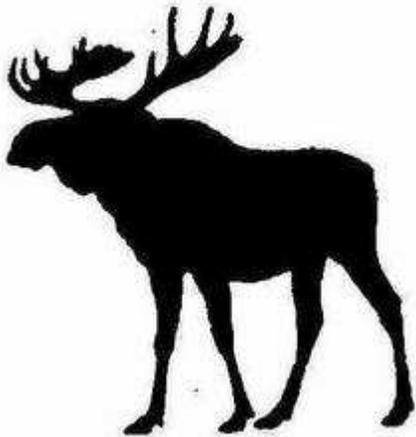
The issue presented is a two part one: likelihood of confusion, and the public's right to use images of a different species in animal kingdom in connection with their tradenames. Opposer cites *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C. C. P. A. 1973), and argues: "Here, all the relevant DuPont factors weigh in A&F's favor." Applicant begs to differ. DuPont can be distinguished by the kind of mark being considered: the word "RALLY". Five letters. No picture, and in particular, no picture, even stylized, of an animal existing in nature. No trade name; no trade dress. If A&F is successful in arguing that the addition of a trade name, and the use of a different species of animal, is not sufficient to dispel the likelihood of confusion, no one may create a trademark consisting of such a combination.

VI. CONCLUSION

In Part C 1 of Opposer's Argument (p. 19 of Opposer's Trial Brief), Opposer asserts that the marks are "similar". Applicant argues that this is blatantly incorrect. Is Applicant's Red Dear Mark:



Really confusingly similar to A&F's Moose Mark(s):



To Applicant, it appears that Opposer doth protest too much.

Dated: April 28, 2016

Respectfully submitted,

/s/ Isabella Schnittger

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Applicant's Trial Brief has been served on Opposer Abercrombie & Fitch Trading Co., on April 28, 2016 via email to Susan M. Kayser (skayser@jonesday.com) and Jessica D. Bradley (jbradley@jonesday.com), pursuant to agreement of the parties.

/s/ Isabella Schnittger
Isabella Schnittger