

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed: January 31, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ingberg

Serial No. 77663302

Cheryl Lynn Ingberg, *in pro per*.

Brenan D. McCauley, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Holtzman, Taylor, and Ritchie, Administrative Trademark
Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Ms. Cheryl Lynn Ingberg ("applicant") filed an application to register the mark shown below for goods identified as "clothing for men, women, juniors, children and infants namely sweatshirts, t-shirts, hats, caps, visors, scarves, bandannas, dresses, skirts, jackets, underclothes, sleepwear, slippers and sportswear namely shirts, pants, shorts, jogging shorts, sweatpants, socks, swimwear, sarongs, beach cover-ups, flip

flops and sandals¹:



The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark THE LOVED DOG,² in typed drawing format, for "clothing for men, women and children, namely, t-shirts, sweatshirts, tank tops, shorts, caps, hats and unitards for infants," that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a

¹ Serial No. 77663302 in International Class 25, filed February 4, 2009, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), alleging a *bona fide* intent to use in commerce, and with the following description of the mark: "The mark consists of the word LUVDOG, the letter O is represented by a paw print with a heart inside."

² Registration No. 2960552, issued June 5, 2005 in International Class 25, based on first use and first use in commerce in all classes on February 24, 2005.

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likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); see also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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, 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 the marks").

The Goods and Channels of Trade

The items in the application are identical-in-part to those in the cited registration. The identical items include "sweatshirts," "t-shirts," "hats," "caps," and "shorts," which both the application and the cited registration identify as being directed to "men, women, and children."

Because the goods described in the application and the cited registration are in-part identical, 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,

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these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *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"). Additionally, to the extent that applicant's clothing is intended for "men, women, juniors, children and infants," registrant's clothing is similarly intended for "men, women and children." Furthermore, there is nothing that prevents the registrant from selling its "sweatshirts," "t-shirts," "hats," "caps," and "shorts," and other clothing items (for "men, women, and children") in the same stores, and indeed on the same shelves, as applicant's. This is particularly true where, as here, the goods are in-part identical. Accordingly, we find that these *du Pont* factors weigh heavily in favor of finding a likelihood of confusion.

The Marks

Preliminarily, we note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*

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Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks, we are mindful that the test 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 so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration consists of three words in typed format, THE LOVED DOG. Since the first word is merely an article, the dominant portion is clearly LOVED DOG. *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.”). Applicant’s mark is as follows:

LUVDOG

Applicant has offered the description of her mark as "The mark consists of the word LUVDOG, the letter O is represented by a paw print with a heart inside." Although applicant's mark does consist of a design element (to wit the heart/paw print replacing the letter "o"), we find it to be clearly viewed as the word "LUVDOG." In short, although applicant's mark consists of a design as well as a literal element, it is the words which will be used by consumers to call for or refer to the goods.

CBS Inc. v. Morrow, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Accordingly, we find that the marks are similar in both appearance and sound, with LUVDOG sharing almost the exact two words that dominate THE LOVED DOG. We further find that the connotation and commercial impression of applicant's mark are similar to that of the mark in the cited registration, being either a loved dog, or one who loves dogs.

Finally, applicant argues that the cited registration is weak. In support of this argument, applicant cites a few third-party applications that contain the terms "LOVE" and "DOG," or near derivatives thereof, as evidence that consumers will distinguish its mark from that in the cited registration. Third-party registrations may be used to show that a term has been commonly registered for its suggestive meaning. However,

here all applicant has submitted are a few notices of allowance, which do not show whether actual registration certificates were issued. See TBMP § 1208.02 (2nd ed. 2004) ("Third-party applications, as opposed to registrations, have no probative value other than as evidence that the applications were filed.") Moreover, even weak marks are entitled to protection against registration of a very similar mark for in-part identical goods. See *Giant Food Inc. v. Roos and Mastacco, Inc.*, 218 USPQ 521 (TTAB 1982). To the extent that applicant is arguing that she is entitled to a registration based on those notices of allowance, we note that every case is determined on its own merits, and we cannot grant a registration simply because other notices of allowance may have been granted for marks with similar wording. *In re Nett Designs Inc.*, 236 F.3d 1339 57 USPQ2d 1564, 1566 (TTAB 2001).

In sum, we find this *du Pont* factor to also favor finding a likelihood of confusion.

Conclusion

In summary we have carefully considered all of the evidence and arguments of record relevant to the pertinent *du Pont* likelihood of confusion factors. We conclude that with in-part identical goods, the same or similar channels of trade, and similar marks with similar connotations, there is a likelihood of confusion between applicant's mark for the goods for which it

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seeks registration and the registered mark THE LOVED DOG for the items identified therein.

Decision: The refusal to register is affirmed.