

This Opinion is not a  
Precedent of the TTAB

Mailed: August 26, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re DZ Trading Ltd.*

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Serial No. 85759557

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Matthew H. Swyers of The Trademark Company, PLLC  
for DZ Trading Ltd.

Gretta Yao, Trademark Examining Attorney, Law Office 118,  
Thomas G. Howell, Managing Attorney.

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Before Bergsman, Lykos and Heasley,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On October 22, 2012, DZ Trading Ltd. (“Applicant”) filed an application to register on the Principal Register the mark **DUFFY** in standard characters for “dresses; hats; jackets; pants; shirts; shorts; skirts; sweaters; sweatshirts; tank tops; underwear” in International Class 25.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85759557, filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging January 2011 as the date of first use anywhere and in commerce. The application contains the following statement: “The name(s), portrait(s), and/or signature(s) shown in the mark does not identify a particular living individual.”

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 displayed below for "clothing, namely, jackets, coats, fur coats, fur stoles, fur cloaks, fur jackets, fur muffs, fur scarves, fur hats, fur earmuffs, fur capes, fur ponchos, and fur skirts" in International Class 25<sup>2</sup> that when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive:



Applicant appealed, and both Applicant and the Examining Attorney filed briefs. For the reasons set forth below, we affirm the Section 2(d) refusal as to both of the cited registrations.

### **I. Applicable Law**

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"). *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

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<sup>2</sup> Registration No. 2896942, alleging 1960 as the date of first use anywhere and in commerce; renewed under Sections 8 and 9. Color is not claimed as a feature of the mark.

similarities between the marks and the similarities between the goods. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and others as to which Applicant or the Examining Attorney submitted argument or evidence are discussed below.

#### **A. The Goods and Trade Channels**

We commence our analysis with the second and third *du Pont* factors – a comparison of the goods and established, likely-to-continue channels of trade. Applicant's and Registrant's respective goods must be compared as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 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).

At the outset, we observe that both the application and cited registration include “jackets.” In addition, Applicant's broadly worded identification of “hats” and “skirts” encompasses Registrant's more specific “fur hats” and “fur skirts.” As such, the goods are in part identical. *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant's broadly worded identification of ‘furniture’ necessarily encompasses Registrant's narrowly identified ‘residential and commercial furniture.’”).

Because the goods are in part identical and unrestricted as to trade channels, we must also presume that Applicant's and Registrant's identical products travel in the


same ordinary trade and distribution channels and will be marketed to the same potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Accordingly, the second and third *du Pont* factors both weigh in favor of finding a likelihood of confusion. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found as to the entire class if there is likely to be confusion with respect to any item that comes within the identification of goods or services in that class).

## **B. The Marks**

We now direct our attention to the first *du Pont* likelihood of confusion factor, which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks

would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Finally, we note that it is well-settled that, where the goods are identical or legally identical, typically less similarity between the marks is needed for us to find a likelihood of confusion. *See, e.g., Viterra*, 101 USPQ2d at 1908; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

Applicant argues that because its mark consists of the single term **DUFFY**, it engenders the commercial impression of a nickname such as “Murph” or “Chip.” By contrast, Applicant contends that the cited mark  projects the impression of the proper name of a specific individual.

We acknowledge the specific differences in sound and appearance pointed out by Applicant. However, in reaching a conclusion on the issue of likelihood 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, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat'l Data Corp.*, 224 USPQ at 751. *See also Stone Lion*, 110 USPQ2d at 1161. With this in mind, we find the given name “Peter” in Registrant’s mark ancillary to the commercial impression created by the surname “Duffy.” Because “Duffy” is the dominant portion of the cited mark, it is the term most likely to be remembered. Whether Applicant’s mark **DUFFY** is perceived as a nickname or surname is not critical; what matters is that the cited mark consists of only two terms, and that the dominant term forms the entirety of Applicant’s mark. *See In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1219 (TTAB 2008) (SAM EDELMAN is similar to EDLEMAN).

Applicant also contends that the marks are dissimilar because the cited mark is depicted in a highly stylized font similar to a personal signature and ascends from left to right. This argument is unpersuasive. Because the applied-for mark is in standard characters, Applicant could in theory use its mark in the same cursive stylization and presentation as Registrant’s mark. *See Trademark Rule 2.52(a)*; 37 C.F.R. § 2.52(a). *See also Trademark Manual of Examining Procedure (“TMEP”) § 807.03(a)* (April 2016) (“If the applicant files an application on paper that includes a standard character claim, the applicant may depict the mark in any font style; may use bold or italicized letters; and may use both uppercase and lowercase letters, all uppercase letters, or all lowercase letters, since no claim is made to any *particular* font style, size, or color.”) (emphasis in original). *See also Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).

Insofar as the marks are similar in sound, appearance, connotation and commercial impression, the first *du Pont* factor also weighs in favor of finding a likelihood of confusion.

### **C. Actual Confusion**

Lastly, Applicant points to the absence of evidence of actual confusion despite the Applicant's use of its mark since January 2011. A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the likelihood of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Further, any suggestion that there has been no actual confusion between the marks based on the coexistence of Applicant's mark and the cited registration is entitled to little probative value in the context of an *ex parte* appeal. *In re Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205. Therefore, this *du Pont* factor is neutral.

## **II. Conclusion**

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, the first, second and third *du Pont* factors discussed above favor a finding of likelihood of confusion, and the eighth factor is neutral. As noted above, the goods are in part identical or legally identical and identified without restrictions, meaning that we are entitled to invoke the

presumption that the established, likely-to-continue channels of trade are also identical. In addition, the marks are similar in connotation and commercial impression, despite some slight differences in sound and appearance. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record. Accordingly, we find that there is a likelihood of confusion between Applicant's and Registrant's marks for the goods identified therein.

*Decision:* The Section 2(d) refusal to register Applicant's mark is affirmed.