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

Proceeding	86363216
Applicant	Mystic Apparel LLC
Applied for Mark	LOVE AT FIRST SIGHT
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APPLICANT'S APPEAL BRIEF

Applicant Mystic Apparel LLC (hereinafter "Applicant") appeals the Trademark Office's refusal to register Applicant's mark, LOVE AT FIRST SIGHT, pursuant to 15 U.S.C. §1052(d), on the ground set forth by the Examiner that the mark for which registration is sought so resembles the mark COUP DE FOUDRE shown in U.S. Registration No. 3,819,190 (hereinafter the "Cited Registration") that it is likely to cause confusion, to cause mistake, or to deceive when used with the goods. For the reasons outlined below, Applicant respectfully disagrees and requests a reversal of the Examiner's position and rejection.

BACKGROUND

The Examining Attorney refused registration of the Applied for Mark: LOVE AT FIRST SIGHT for goods identified in Class 3 as Colognes, Perfumes, and Cosmetics, because of the prior registration of the mark COUP DE FOUDRE for the same goods.

The issue on appeal is whether Applicant's LOVE AT FIRST SIGHT mark ("the Applied-for Mark") when used in connection with the identified and recited goods so resembles the mark COUP DE FOUDRE, as reflected in U.S. Reg. 3,819,190, (hereinafter the "Cited Registration"), which is registered in Class 3 for substantially the same goods as to justify the rejection or the basis of likelihood of consumer confusion. For the reasons outlined below, consumer confusion is remote and highly unlikely, and the Applied-for Mark should be approved for publication. There is no legitimate basis for rejection because there is no likelihood of consumer confusion. The rejection should therefore be reversed.

ARGUMENT

The test for likelihood of confusion under Section 2(d) of the Lanham Act is "whether the applicant's mark so resembles any registered mark as to be likely to cause confusion or mistake,

when used on or in connection with the goods or services identified in the application." TMEP § 1207.01. The Lanham Act does not provide a "mechanical test for determining likelihood of confusion" and the issue "is not whether the actual goods are likely to be confused but, rather, whether there is a *likelihood* of confusion as to the *source* of the goods." *Id.* (Empahsis added).

The factors for assessing whether confusion is likely (not a mere possibility) are set forth in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). "Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular [application to register the] mark need be considered." *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 U.S.P.Q.2d 1257, 1259 (Fed. Cir. 2010) (citation omitted).

Here, the relevant factor comprises:

- the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

Applicant respectfully submits that an analysis of the relevant *du Pont* factor supports a finding that the marks can easily co-exist in the marketplace without source confusion because the marks viewed in their entireties and their meaning and connotation are clearly sufficiently different and distinct in sight, sound, meaning and commercial impression. It follows that there is no <u>likelihood</u> of consumer confusion, maybe, however, at best for the Examiner's position, a very, very slim possibility.

I. The Dissimilarities of the Marks in Their Entireties Weigh in <u>Favor of No Likelihood of Confusion</u>

In order to determine whether there is a likelihood of confusion between two marks, they must be viewed in their entireties. *Martin v. Crown Zellerbach Corp.*, 422 F.2d 918, 165 U.S.P.Q. 171 (C.C.P.A. 1970), <u>*cert. denied*</u>, 400 U.S. 911 (1970); *Opryland USA, Inc. v. Great Am. Music Show*, Inc., 970 F.2d 847, 851, 23 U.S.P.Q.2d 1471, 1473 (Fed. Cir. 1992).

"Although it is often helpful to the decisionmaker to analyze marks by separating them into their component words or design elements in order to ascertain which aspects are more or less dominant, such analysis must not contravene law and reason. When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared." *Opryland USA*, 970 F.2d at 851. Here, the marks will be considered in their entireties. There are no words which are common Marks must be considered as the public perceives them, and therefore, a likelihood of confusion analysis must focus on the entireties of the marks. *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985) ("likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark"). Accordingly, when considering both the Applied-for Mark, LOVE AT FIRST SIGHT, and the Cited Registration, COUP DE FOUDRE, as a whole, Applicant's Mark so differs from the Cited Registration such that confusion is just not likely. The mere and very slim chance of possibility of confusion is not the standard, rather, there must be a likelihood of confusion, which is clearly not present here.

Applicant respectfully submits that the marks can surely co-exist without confusion because they do not give any substantial number of consumers, if any, the same connotation nor impression. The marks contain no common elements, begin with different letters, use different words, and are of different lengths.

The Examining Attorney argues however that because Applicant's mark has the same meaning as the Cited Registration's figurative (not actual nor literal) meaning, when the Cited Registration is translated and colloquially interpreted from the French language, the marks create similar commercial impressions. This is unsupportable Examiner-speak. To support this claim, the Examining Attorney cites to several English dictionaries to prove that the French term can be

translated and is understood by the public. However, these sources do not provide clear support for the Examiner's position. In fact, of the five dictionaries, only one offers the exact phrase "love at first sight" as a possible connotation or meaning and even in that case it is listed only as the second suggestion of a meaning. The remaining four dictionaries define the term much more generally as a "a sudden and amazing action or event." While it is true that two of the references imply that the term *can* apply to sudden feelings of love, neither state that the term is directly translated into: LOVE AT FIRST SIGHT. Instead, the references state that the term can be interpreted as "a sudden, intense feeling of love" or an "instance of love at first sight." That is, COUP DE FOUDRE is not directly understood, by any appreciable number of US consumers, even those familiar with the French language, to necessarily mean LOVE AT FIRST SIGHT. Even if translated as suggested by the Examiner, use of applicant's mark would not cause confusion as to the source of goods to those few French-fluent members of the US consumers—they would clearly and easily appreciate the distinct sources of even identical goods. This is a result, inter alia, of the fact that the words of the cited Registration are not generally translated—surely not by US/English speaking customers, and those who may be French speaking but in the US know the term is French and the Applied-for Mark English, which while the terms possibly then have related meanings they are obviously distinct and different trademarks indicating different sources of the goods. No appreciable number of US consumers are likely to be confused.

The Examining Attorney also cites to English language publications to support the conclusion that the term COUP DE FOUDRE is "well known" as meaning "love at first sight" to English language readers. Applicant respectfully disagrees. A large number, if not the majority, of the cited articles relied on by the Examiner that use the term define the term immediately after

its use, proof that the term is not readily understood nor interpreted by American readers since each thought it necessary to supplement its use in the text with an explanation. If readily understood, there would be no need for a following translation. See for example, *Love and Loss on the Seine* ("A coup de foudre is to fall in love suddenly, fiercely."), *Peddling a French Idea* ("Ever since, Parisians have experienced a coup de foudre (passionate crush, what else?) over this new way to get where they need to go."), and *Down a Paris Alley, a Dream* ("The French describe love at first sight as a coup de foudre, or a lightning bolt."), among many others. Similarly an English language Google Search for COUP DE FOUDRE, attached as evidence herein, returns primarily webpages discussing the French language and translations. These results indicate that the term is not generally translated into a common English phrase nor is it one immediately recognized by a substantial number of the US consuming public. And, an informal "poll" in the undersigned's law offices of ten highly educated people, lawyers and support staff, revealed zero with knowledge of the so-called figurative "meaning" when asked what COUP DE FOUDRE mean in English. One person of the ten had knowledge of the French language and surmised it had something to do with a "takeover" by "fire" but did not know it was the "LOVE AT FIRST SIGHT" figurative expression.

And for those who are knowledgeable of the French language and the connotation, they, also fluent in English if within this country would likely not confuse the same as the source for goods sold here under the mark LOVE AT FIRST SIGHT. They would easily appreciate the English and French languages and the distinctions. No likelihood of confusion is present.

Further, the Examiner also urged that the marks are confusingly similar under the doctrine of equivalents. She stated, "'Coup de Foudre' is a French idiom that means 'Love at First Sight' in English. Under the doctrine of foreign equivalents, a mark in a foreign language

and a mark that is its English equivalent may be held to be confusingly similar." Applicant does not contest the existence of the doctrine of equivalents, yet the Examining Attorney herself states, "[g]enerally, the doctrine is applied when the English translation is a literal and exact translation of the foreign wording." (Emphasis added). The case at hand does not involve a literal or exact translation and therefore the doctrine should not apply. Literally translated into English, the French term of the prior and cited registration, is BOLT OF LIGHTNING. Therefore, at least one other mental "step" in the thought process is required to take that literal meaning to the figurative LOVE AT FIRST SIGHT. Few French speakers and no English speakers would make that second step or connection. There is accordingly no likelihood of confusion.

Holdings from the Federal Circuit and the TTAB have upheld the notion that the doctrine of equivalents does not apply in situations that do not involve direct translations. For example, in *In re Sarkli, Ltd.*, 220 U.S.P.Q. (BNA) 111, the Federal Circuit held that the terms SECOND CHANCE and REPECHAGE were not equivalents where "[n]one of [the cited] definitions makes 'second chance' the exact translation of 'repechage.'" Similarly, in *In re Pan Tex Hotel Corporation* 190 U.S.P.Q. (BNA) 109, the TTAB concluded that "LA POSADA" is registrable for lodging "Even though posada is translated into English as a 'home, dwelling; lodging-house, inn, small hotel; lodging'" The Board noted that "while 'LA POSADA' may be literally translated as 'the inn', nevertheless, it is clear from the Board's discussion in its prior decision of the various dictionary definitions thereof that such designation carries the added implication of a home or dwelling, and thus has a connotative flavor which is slightly different from that of the words 'the inn.'" Thus, it is clear that where the connotation is different than the exact translation for purposes of the doctrine of equivalents the rejection should not be sustained. Reveresal of this rejection seems is therefore warranted.

The rulings above involve similar comparisons as that between LOVE AT FIRST SIGHT and COUP DE FOUDRE because COUP DE FOUDRE does not translate literally to LOVE AT FIRST SIGHT. Instead, it translates literally to "lightning bolt." In fact, it is undisputed that LOVE AT FIRST SIGHT is only one possible idiomatic or figurative meaning. The contest between the marks is therefore more akin to that in *In re Sarkli, Ltd*., where REPECHAGE meant SECOND CHANCE only in specific circumstances, than it is to literal translations such as that in *In re Thomas*, 79 USPQ2d 1021 cited by the Examining Attorney in the Office Action. The present application therefore, like the marks in in *In re Sarkli, Ltd*. and *In re Pan Tex Hotel Corporation,* should also be deemed registrable despite the presence of the Cited Registration.

Thus, Applicant submits that there is a clear distinction between Applicant's Mark and the Cited Registration and that such a clear distinction weighs in favor of a conclusion of no real likelihood of confusion as to the source of the good exists, especially when the marks are each viewed as a whole.

CONCLUSION

Accordingly, for the reasons set forth above, Applicant's Mark is not likely to cause consumer confusion with the Cited Registrations. The combination of the fact that the overall appearance of the marks and their connotations are sufficiently different, ordinarily prudent purchasers are unlikely to be misled or confused as to the source of the goods. Therefore, the likelihood of confusion determination cannot be sustained. Reversal and publication for potential opposition is requested and believed fully warranted.

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Respectfully submitted,

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