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A PRECEDENT OF
THE TTAB

Hearing:
August 10, 2017

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October 3, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bacardi

Serial Nos. 86809072 and 86809084

Ira Cohen of Henkel & Cohen
for Ruby A. Bacardi.

J. Ian Dible, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

Before Quinn, Taylor, and Adlin,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Ruby A. Bacardi (“Applicant”) filed applications to register on the Principal Register the marks THIRTEEN 30 and 1330, both in standard characters, for “clothing, namely, dresses, skirts, blouses, shirts, pants, and jackets” (in International Class 25).¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks, when

¹ Application Serial Nos. 86809072 and 86809084, respectively, filed November 4, 2015 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1052(b), alleging a bona fide intention to use the marks in commerce.

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applied to Applicant's goods, so resemble the previously registered mark shown below as to be likely to cause confusion:



for

Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; clothing for babies, toddlers and children, treated with fire and heat retardants, namely, pajamas, jackets, shirts, pants, jumpers; collared shirts; dress shirts; dresses; golf shirts; hooded sweat shirts; long-sleeved shirts; polo shirts; rugby shirts; shirts; shirts and short-sleeved shirts; short-sleeved or long-sleeved t-shirts; short-sleeved shirts; skirts; skirts and dresses; sports shirts; sports shirts with short sleeves; sweat shirts; t-shirts; tee shirts; wearable garments and clothing, namely, shirts; wind shirts; women's clothing, namely, shirts, dresses, skirts, blouses (in International Class 25).²

When the refusal was made final, Applicant appealed and requested reconsideration. The request for reconsideration was denied and the appeal resumed. Applicant and the Examining Attorney filed briefs. Pursuant to Applicant's request, the appeals were consolidated and an oral hearing was held. We decide each appeal in this single opinion.

² Registration No. 4488838, issued February 25, 2014. The registration includes the following statements: "The mark consists of a shield design outlined in brown with blue interior with a brown heart with 3 brown nails in it with the numbers '1330' in white in the middle of the heart and the word 'Logan' on top of the shield in brown. The color(s) brown, white and blue is/are claimed as a feature of the mark."

Applicant concedes that the goods are “related,” but argues that the marks are not similar, asserting that the cited mark “is a hodgepodge of multiple elements.” 8 TTABVUE 12-13; 14 TTABVUE 9. Applicant also points to the absence of actual confusion between the marks. Applicant introduced third-party registrations in an attempt to show that because several registrations of various “711” number marks coexist on the register, so can Applicant’s and Registrant’s marks.

The Examining Attorney maintains that the goods are identical or otherwise related, and that the marks are similar. In support of the refusal, specifically regarding the similarity of the goods, the Examining Attorney submitted portions of third-party websites.

Our 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 likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Varying weights may be assigned to each *du Pont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687-88 (Fed. Cir. 1993). The relevant *du Pont* factors in this appeal are discussed below.

With respect to the second *du Pont* factor regarding the similarity of the goods, we must look to the goods as identified in the applications and the goods in the cited

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registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's goods and Registrant's goods overlap to the extent all of Applicant's goods, namely "dresses, skirts, blouses, shirts, pants, and jackets," are listed in Registrant's identification of goods. Accordingly, the goods are identical in part, and otherwise closely related. At the oral hearing Applicant's counsel conceded that the goods are, in part, identical. Given the identity of the goods, we presume that the goods travel in the same channels of trade (*e.g.*, clothing stores, boutiques, and online clothing retailers) and are offered to the same potential purchasers (*e.g.*, ordinary consumers). *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). *See also 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); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

The identity of the goods, trade channels and purchasers weigh heavily in favor of a finding of likelihood of confusion.

There is no indication in the identifications of goods regarding the price point of either Applicant's or Registrant's clothing. Thus, the goods are presumed to include clothing that is relatively inexpensive. "When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). Thus, the *du Pont* factor of the conditions of sale weighs in favor of a finding of likelihood of confusion.

The crux of the likelihood of confusion issue rests on the first *du Pont* factor, namely the similarity or dissimilarity between each of Applicant's marks and the cited registered mark. The marks must be considered in their entirety as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). "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). The marks "must be considered ... in light of the fallibility of memory" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565

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F.2d 683, 196 USPQ 1 (CCPA 1977)). The focus is on the recollection of the average purchaser, in this case an ordinary consumer, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In comparing each of Applicant's marks THIRTEEN 30 and 1330 to Registrant's



mark , we are mindful that where, as here, the goods are identical in part, the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007). To emphasize this point, the facts that the goods are identical and inexpensive play a significant role when we compare Applicant's marks to the cited mark.

As to appearance and sound, there exist 9,000 four-digit numbers that are available for use in a trademark (*i.e.*, 1000 to 9999). Applicant's marks are comprised of the exact same four digit number as the one in Registrant's mark. Thus, to the extent that each of the marks includes 1330, the marks are similar in appearance and sound.

As to meaning, the number 1330 would appear to have no readily apparent meaning to ordinary consumers. Thus, they are likely to view the identical number (out of 9,000 four digit numbers) as arbitrary, or merely identifying a particular style or model of a line of clothing.

The centrally-positioned 1330 in Registrant's mark, and 1330 (or THIRTEEN 30) in each of Applicant's marks result in marks that engender similar overall commercial impressions, especially when used in connection with identical, inexpensive clothing items. The similarity of the marks is a factor that also weighs in favor of a finding of likelihood of confusion.

In comparing the marks, we have considered, of course, the presence of LOGAN and the design features of Registrant's mark, as well as the colors. LOGAN likely will be perceived as a name, and the design feature as being nails through a heart. The number 1330, whether as numerals or THIRTEEN 30, will not have any recognized meaning to consumers; thus, when consumers encounter the marks on identical clothing items, they may view Applicant's mark as an abbreviated version of Registrant's mark, or as identifying another line of clothing from Registrant.

Under the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods may play a role in the likelihood of confusion determination. However, the record is devoid of evidence of any third-party uses or registrations of the same or similar marks in the clothing field. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1088-89 (TTAB 2016) (comparing insufficient evidence (one third-party registration) with situations involving a "considerable" or "extensive" number

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of such registrations, citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Contrary to Applicant's argument, the coexistence of various third-party registrations of 7 ELEVEN or 711 marks for a variety of unrelated goods is not persuasive. First, these marks are registered for different goods and services, unlike this case that involves identical goods. Second, each case must be decided on its own merits. Prior decisions and actions of examining attorneys in registering other marks have virtually no evidentiary value and, in any event, are not binding on the Board. *See, e.g., In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)).

Applicant's reliance, in this *ex parte* proceeding, on the absence of evidence of actual confusion is misplaced. It is well settled that the relevant test is likelihood of confusion, not actual confusion. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990); *In re Big Pig*, 81 USPQ2d 1436, 1439-40 (TTAB 2006). *See In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). In any event, inasmuch as Applicant's application is based on an intention to use the mark, there is no evidence that there has been an opportunity for confusion between the marks to occur. *In re Kangaroos U.S.A.*, 223 USPQ at 1026-

27. Moreover, the lack of evidence of actual confusion carries little weight, especially in an *ex parte* context. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

We have considered all of the evidence made of record pertaining to the likelihood of confusion issue, as well as all of the arguments related thereto, including any evidence or arguments not specifically discussed in this opinion. Because each of Applicant's marks is similar to Registrant's mark, the goods are identical in part, the channels of trade are the same, the classes of consumers are identical, and the goods are subject to impulse purchase, we find, under the relevant *du Pont* factors, that confusion is likely between the marks. In reaching our decision, we recognize that this is a close case. However, to the extent that any of the points raised by Applicant raise a doubt about likelihood of confusion, that doubt is resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290-91 (Fed. Cir. 1984).

We conclude that consumers familiar with Registrant's clothing sold under the



mark  are likely to mistakenly believe, upon encountering each of Applicant's marks THIRTEEN THIRTY and 1330 for identical clothing items, that the goods originate from or are associated with or sponsored by the same entity.

Decision: The refusal to register in each application is affirmed.