

This Opinion is not a
Precedent of the TTAB

Mailed: August 8, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Ari Ventures
—

Serial No. 86838645

Ari Ventures, *pro se*.

Caryn Glasser, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

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Notice of Correction

By the Board:

On July 26, 2017, the Board mailed a final decision in this proceeding. There was a typographical error in the spelling of Applicant's mark on the last page of the decision, which have been corrected.

Attached hereto is a corrected form of the July 26, 2017 decision.

The time for filing an appeal or commencing a civil action by either party regarding the Board's decision continues to run from the mailing date of the July 26, 2017 decision. *See* Trademark Rule 2.145(d)(1), 37 C.F.R. § 2.145(d)(1).

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Before Adlin, Gorowitz and Goodman,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Ari Ventures (“Applicant”) seeks registration on the Principal Register of the mark PINKY PETALS in standard characters for

Nipple covers, namely pasties, in International Class 25.¹

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

¹ Application Serial No. 86838645 was filed on December 3, 2015, under Section 1(a) of the Trademark Act, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as September 1, 2015.

Applicant's mark so resembles the registered mark PINK PETAL for "bottoms; dresses; jumper dresses; knit bottoms; knit dresses; knit jackets; knit shirts; knit skirts; knit tops; tank tops; tank-tops; women's clothing, namely, shirts, dresses, skirts, blouses; women's tops, namely, camis; woven bottoms; woven dresses; woven or knitted underwear; woven skirts; woven tops," as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). *See also In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity or dissimilarity of the marks.

In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imports*, 73 USPQ2d at 1692. 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). Moreover, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009), citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB

When addressing the first word in Applicant’s mark, the Examining Attorney argues that “the addition of the letter ‘Y’ to the word ‘PINK’ does not sufficiently distinguish the marks to avoid a likelihood of confusion.” Examining Attorney’s Brief, 8 TTABVUE 6. We agree. Further, the word “pinky” can mean the color “pink.”²³ Therefore, not only are the words similar in both appearance and sound, they may also have the same meaning.

² We take judicial notice of the definitions of the word “pinky” from Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/pinky> and Merriam-Webster on-line dictionary. “Pinkie.” Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/pinkie>.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

³ “Pinky” can also mean “little finger.” However, in the context of Applicant’s goods, it would likely be perceived as “pink.”

As for Applicant's and Registrant's use of forms of "petal," there is no material difference between the singular and plural forms of the word; for trademark purposes they are generally regarded as the same. *Wilson v. DeLaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word 'Zombie' and they will therefore be regarded here as the same mark."); *See also Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 322 n.17 (TTAB 2015).

Applicant argues that the commercial impressions of the marks are different; that Applicant's mark PINKY PETALS "creates a commercial impression of makeup and beauty products" while the cited mark PINK PETAL "creates a commercial impression of knitted clothing." Appeal Brief, 5 TTABVUE 10. There is no evidence supporting Applicant's contentions and we do not find them persuasive.

The differences between Applicant's mark PINKY PETALS and the cited mark PINK PETAL are relatively minor as we find the marks are similar. Accordingly, the first *du Pont* factor favors a finding of likelihood of confusion.

B. The similarities or differences in the goods and channels of trade.

We base our evaluation on the goods and channels of trade as they are identified in the registrations and application. *In re Dixie Restaurants Inc.*, 41 USPQ2d at 1531. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

“It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

If any of Applicant’s goods are related to any of the goods in the cited registration, then we may find the goods related. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 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 in the identification of goods for that class).

The Examining Attorney introduced the following six use-based third-party registrations, each of which serves to suggest that nipple covers, namely pasties on the one hand and clothing items on the other, are the kind of goods that may emanate from a single source:

Registration No. 4157862 –BAMBOO & DIAMONDS for goods including: “nipple covers, namely pasties, camisettes, knit dresses, knit jackets, knit skirts”;⁴

⁴ July 20, 2016 Office Action, TSDR pp 6-8.

Registration No. 4378566 –BIKINIS -N- MARTINIS for goods including: “nipple covers, namely pasties, camisettes, bottoms, tank tops, skirts and dresses”;⁵

Registration No. 4555416 –MADE2ENVY for goods including: “nipple covers, namely pasties, knit dresses, knit jackets, knit skirts”;⁶

Registration No. 4902764 –IT’S NOT WHAT YOU TAKE OFF, IT’S WHAT YOU LEAVE ON. for goods including: “nipple covers, namely pasties, athletic tops with built-in bras,; women’s clothing, namely shirts, dress, skirts and blouses”;⁷

Registration No. 4974906 –PURE SHAPES for goods including: “nipple covers, namely pasties, chemises, and tank tops”;⁸ and

Registration No. 4959989 –PULABO for goods including: “nipple covers, namely pasties, dresses, shirts, pants, and jackets.”⁹

Use-based third-party registrations that individually cover a number of different items and that are based on use in commerce may have some probative value to the extent that they may serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.6 (TTAB 2015); *See also In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934-1935 (TTAB 2012); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

⁵ *Id.* at pp 9-11.

⁶ *Id.* at pp 12-14.

⁷ *Id.* at pp 15-17.

⁸ *Id.* at pp 18-20.

⁹ *Id.* at pp 21-23.

In addition, the Examining Attorney submitted Internet evidence establishing that “nipple covers” are sold on the same websites as goods in the cited registration, i.e., camis, and that Applicant’s goods are used with tank-tops and camis.¹⁰ For example,

- 3WISHES.COM¹¹
 - sells lingerie, camisoles, cami-tops and pasties; and
- Venus¹²
 - sells camis, bras, lingerie, and nipple covers.

Based on the evidence, we find that the goods may be used together and that they are sold in the same channels of trade to the same customers. Accordingly, the second and third *du Pont* factors favor a finding of likelihood of confusion.

C. Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. Because we have found that the marks at issue are similar; that Applicant’s identified goods are related to Registrant’s goods; that they would move in the same trade channels; and that they are offered to the same class of purchasers, we conclude that Applicant’s mark

¹⁰ Promotional material of seller intimates on eBay discusses use of non-adhesive nipple covers – “perfect to use under those cami tops with shelf bras and sports bas;” - “wear the original DIMRS [nipple covers] with form fitting tops and bras.” *Id.*, www.ebay.com/gds/DIMRS-Silicone-Nipple-Cover-Pasties-Nippies-Petals, TSDR pp 11-12.

All citations to the Trademark Status and Document Retrieval (TSDR) database are to the PDF version of the documents.

¹¹ March 24, 2016 Office Action, www.3wishes.com, TSDR pp 7-8.

¹² July 20, 2016 Office Action, www.venus.com, TSDR pp 24-27.

PINKY PETALS, as used in connection with “nipple covers, namely pasties,” so resembles the cited mark PINK PETAL for bottoms; dresses; jumper dresses; knit bottoms; knit dresses; knit jackets; knit shirts; knit skirts; knit tops; tank tops; tank-tops; women's clothing, namely, shirts, dresses, skirts, blouses; women's tops, namely, camis; woven bottoms; woven dresses; woven or knitted underwear; woven skirts; woven tops” as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant’s mark PINKY PETALS is affirmed.