

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 13, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jolly Tundra, Inc.

Serial No. 75/201,749

Dennis R. Daley and Scott W. Johnson of
Merchant & Gould P.C. for Jolly Tundra, Inc.

Sue Carruthers, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Simms, Wendel and Bottorff, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Jolly Tundra, Inc. has filed an application to
register the mark JOLLY KIDZ in the stylized form shown
below for "children's outerwear, namely, coats, jackets,
parkas, buntings, snowsuits, pullovers, sweatshirts,
sweaters, shirts, pants, vests, scarves, neck gaiters, head

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bands, alpine gaiters, cross-country gaiters, mittens, socks, hats, and face masks.”¹

A disclaimer has been made of any exclusive right to use the term KIDS apart from the mark as shown.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 USC § 1052(d), on the ground of likelihood of confusion with the mark JOLLY in the stylized form shown below, which has been registered for “athletic shoes.”²

Applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

We make our determination of likelihood of confusion on the basis of those of the du Pont factors³ which are relevant under the present circumstances. Two key

¹ Serial No. 75/201,749, filed November 21, 1996, claiming a date of first use of January 1991 and a date of first use in commerce of February 1991.

² Registration No. 1,310,177, issued December 18, 1984. Section 8 and 15 affidavits accepted and acknowledged, respectively. The drawing is lined for the color red, but color is not claimed as a feature of the mark.

³ In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

considerations in our analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1991) and the cases cited therein.

We consider first the similarity or dissimilarity of the respective marks. The Examining Attorney maintains that JOLLY, the only word in the registered mark, is also the only distinctive word in applicant's mark. She argues that it is the word JOLLY in applicant's mark that creates the overall impression which will be retained over a period of time, rather the descriptive term KIDZ or the less significant design portions.

Applicant contends that the unusual spelling of the word KIDZ, the larger triangular-shaped letters used for KIDZ, and the addition of the exclamation mark all draw attention to the word KIDZ and serve to differentiate applicant's mark from the registered mark JOLLY. Applicant asserts that because of this display, consumers would first focus on the word KIDZ and second on JOLLY. Applicant further argues that its mark conveys the commercial impression of "merry children," a much different connotation from that of the registered mark. Applicant maintains that in the registered mark JOLLY, the red dot

design surrounded by thick black letters plays a significant part in conveying a distinct commercial impression.

While it is true that marks must be considered in their entireties in determining likelihood of confusion, it is also well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although descriptive portions of a mark cannot be ignored, the fact remains that the purchasing public is more likely to rely on the non-descriptive portion of the mark as the indication of source. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). Design elements are also of lesser import, because it is the word portion of a mark, rather than any design feature, unless highly distinctive, which is more likely to be remembered and relied upon by purchasers in calling for the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

It is true that the word KIDZ in applicant's mark is presented in such a manner that this word may be the first one focused on by potential purchasers. The question is whether this word would play a significant role in the

minds of these purchasers as an indication of source or whether it would merely be perceived as an indication that applicant is offering KIDZ clothing under the mark JOLLY.

Applicant has acknowledged, by the filing of a disclaimer, that KIDZ is descriptive when used with its children's outerwear. Looking at the specimens of record, we see that applicant's catalog consists of two parts, one the "adult" section and the other the "kidz" section. We consider it within the scope of judicial notice to note that it is a common practice to include a specific section devoted to children's, or "kids," attire in clothing catalogs. Applicant's presentation of the word KIDZ in a separate design in larger letters only serves to reinforce the descriptive nature of the term and to draw attention to the fact that these are the clothing items for children.

In addition, applicant's presentation of the word KIDZ in an entirely different format from the word JOLLY clearly contradicts applicant's argument that the phrase JOLLY KIDZ creates the commercial impression of "merry children." Thus, we have come to the conclusion that the general impression created by applicant's mark would be that these are clothing items for KIDZ originating from the source indicated by the word JOLLY.

As such, we find that overall commercial impression created by applicant's mark to be very similar to that of the registered mark JOLLY. While the red dot design of registrant's mark may also serve to catch the eyes of potential purchasers, it is the word JOLLY which would be remembered as the source indicator and used to call for the goods.

Insofar as the goods are concerned, the Examining Attorney states as a general principle that footwear and other types of clothing have repeatedly been held to be related items for purposes of Section 2(d). More specific to the actual clothing items involved here, she has made of record copies of several third-party registrations as evidence that the same entities produce both wearing apparel of the outerwear type (i.e., sweatshirts, sweatpants, warm-up suits, jackets, head wear) and athletic footwear and market these items under a single mark.

Applicant argues that the goods of applicant and registrant have distinct uses, applicant's children's outerwear being worn outdoors for protection from weather conditions and registrant's athletic shoes being worn while engaging in sporting activities. On the basis of these distinct purposes, applicant contends that the goods are

sufficiently different to avoid the likelihood of confusion.

In the first place, the issue of likelihood of confusion must be determined on the basis of the goods as identified in the application and the cited registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). The athletic shoes of registrant are not restricted as to type of user or type of activity for which the shoes are purchased. Thus, registrant's footwear may include not only athletic shoes for adults engaging in particular sports, but also athletic shoes for children or athletic shoes purchased by all ages for everyday use, as is often the case.

Furthermore, although the third-party registrations introduced by the Examining Attorney are admittedly not evidence of use of the marks shown therein in commerce, they are adequate to suggest that the various items listed therein are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Accordingly, there is sufficient evidence of record to show that if highly similar marks are used on children's outerwear and athletic shoes, purchasers may well assume that the goods originate from the same

source. Regardless of the specific differences in the clothing items involved here, the goods have been shown to be related for purposes of determining likelihood of confusion as to the source of the various items.

Applicant argues that consideration must also be given to the channels of trade in which the respective goods travel and the sophistication of the consumers purchasing the goods. Applicant states that its outerwear items are targeted to children (or their parents) looking for outdoor weather clothes; that the goods are seasonal wear; and that the items are sold in children's departments, specialty children's stores or catalogs selling children's clothes. Applicant argues that this is a different channel of trade from that in which registrant's athletic shoes travel, registrant's shoes being purchased year-round for athletic purposes and being found in specialty shoe stores or shoe departments.

We do not find the fact that applicant's children's outerwear and registrant's athletic shoes may be used at different times of the year or may be sold in different types of retail stores, or different departments of the same store, sufficient to support any claim that the goods travel in different channels of trade. Both types of goods are available in retail clothing outlets and, as pointed

out by the Examining Attorney, both might be purchased by the same consumers, whether for themselves or their children and whether at the same or different times. Furthermore, despite applicant's arguments to the contrary, we do not believe the purchases made by these consumers are on a level of sophistication as would avoid any likelihood of confusion when similar marks are used on these retail clothing items.⁴ See *In re Melville Corp.*, 18 USPQ2d 1387 (TTAB 1991).

Finally, although applicant argues that, to its knowledge, there have been no instances of actual confusion during the period of over eight years that both parties have been using their marks, we are without the benefit of registrant's input as to any actual confusion. Even if there has been no actual confusion, this may be the result of the particular areas of the country in which the goods of applicant and registrant have been marketed up until this time. In any event, actual confusion need not be shown in order to establish the likelihood of confusion.

⁴ Applicant's attempt to introduce copies of third-party registrations as part of its brief in support of its argument of the dilution of the mark JOLLY in Class 25 is to no avail. The Examining Attorney has correctly objected to this evidence as being untimely under Trademark Rule 2.142(d) and we have given it no consideration. Contrary to applicant's arguments, the Examining Attorney raised no new issue in the final refusal which warranted the late introduction of this previously available evidence.

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Weiss Associates, Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d (Fed. Cir. 1990).

Accordingly, on weighing all the relevant du Pont factors, and giving particular consideration to the similarity of the respective marks and the close relationship of the clothing items upon which the marks are used, we find confusion to be likely. If there were any doubt in our minds, this also would be resolved in favor of registrant and against applicant as the newcomer in the field. See In re Hyper Shoppes (Ohio) Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Section 2(d) is affirmed.

R. L. Simms

H. R. Wendel

C. M. Bottorff
Administrative Trademark Judges,
Trademark Trial and Appeal Board

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