

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JULY 21, 00
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Henry Clay Pottery, Inc.

Serial No. 75/367,800

Aaron B. Retzer of Epstein, Edell & Retzer for Henry Clay Pottery, Inc.

Jason Turner, Trademark Examining Attorney, Law Office 108
(David Shallant, Managing Attorney)

Before Simms, Cissel and Hairston, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Henry Clay Pottery, Inc. (applicant), a Mississippi corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark shown below

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for decorative vases and pots, all made in whole or significant part of clay.¹ The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of three registrations held by the same entity, Henri Studio, Inc. Those registrations are for the marks HENRI STUDIO for lawn statues of cement, concrete birdbaths, concrete figurines, plastic liners for ponds and fountains, water fountains and planters for the home (Registration No. 1,979,235, issued June 11, 1996); the mark shown below

for plant baskets, plastic liners and plastic liner underlays for pools, pool kits composed of pump filters, pumps, plastic pond liners and protective underlays, cast stone figures and pedestals for figures, connectors and tubing and flow restricters, water jet and spray kits composed of pumps, nozzles and tubing; low voltage lighting fixtures and parts therefor; and nozzles for use in

¹ Application Ser. No. 75/367,800, filed October 3, 1997, based upon allegations of use and use in commerce since July 1997. Applicant has disclaimed the word "CLAY" apart from the mark.

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fountains and pools (Registration No. 2,038,686, issued February 20, 1996)(the words "WATER GARDENING" have been disclaimed); and the mark shown below

for planters for the home; water fountains, plastic liners for ponds and fountains; and lawn statues of cement, concrete birdbaths and concrete figurines (Registration No. 2,166,708, issued June 23, 1998).

Applicant and the Examining Attorney have submitted briefs, but no oral hearing was requested. We reverse.

The Examining Attorney argues that, with respect to the marks, the literal portions of all of the marks present the phonetically equivalent first term "HENRY" or "HENRI"; that the remainder of the marks are descriptive or "weak" terms which refer to features of the goods or the entity creating them, such that those features of the marks have little trademark significance; and that the designs of the marks, to the extent designs appear therein, only serve to reinforce the literal portions and, because they are minor design features, do not affect the likelihood-of-confusion determination. The Examining Attorney also argues that, with respect to applicant's mark, the impression conveyed

by the mark would more than likely be that of clay products made by Henry rather than the play on the famous statesmen Henry Clay, as applicant has argued. With respect to the goods, the Examining Attorney argues that registrant's goods include planters, which are decorative containers for houseplants, as well as plant baskets. The Examining Attorney has made of record, from assertedly over three hundred third-party registrations, twelve wherein the marks identify both pots or vases and baskets, tending to establish that these goods may come from the same source. The Examining Attorney further argues that registrant's planters and plant baskets as well as applicant's vases and pots would travel in similar channels of trade to the same class of potential purchasers, and that these items are relatively inexpensive and are bought without a great deal of purchaser care.

Applicant, on the other hand, argues that the name "HENRY" is not the dominant aspect of its mark, but that the words "HENRY CLAY" are, creating a distinct commercial impression because of the clever double entendre created by this mark, being both a reference to the famous statesman from Kentucky as well as a reference to the clay material of which applicant's goods are made. Also, because of the French spelling of the name "HENRI," as well as the

specifically different words in the registrations ("WATER GARDENING" and "STUDIO"), those registered marks have different meanings and different commercial impressions, according to applicant. Applicant's attorney also points to the different design elements which are said to serve to differentiate those marks. Concerning the goods, applicant's attorney argues that applicant's goods are made from a different material (fired clay) processed in a different manner from registrant's goods. In addition, while these goods may be found in home improvement stores, applicant's attorney contends that they are packaged differently because specialized packaging is required to ensure that applicant's clay pots and vases are not broken. Applicant's attorney also argues that the fact that these goods may be sold in the same home improvement stores is not determinative because these goods may be located in different sections of those retail stores. Applicant also contends that care is used in selecting these goods and that someone looking for a plant basket is not likely to purchase a clay pot or vase.

Upon careful consideration of this record and the arguments of the attorneys, we agree with applicant that confusion is not likely. First, while registrant's planters and plant baskets and applicant's vases and pots

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(for plants) are closely related items of merchandise which may be found in the same aisles or sections of the same retail stores, we agree with applicant that its mark is sufficiently different from the registered marks that confusion is unlikely. In this regard, applicant's mark would be pronounced and seen in such a way as to create a double entendre--the famous orator from Kentucky as well as a reference (at least in part) to the material from which applicant's goods are made. This difference in sight, sound and commercial appearance is sufficient, in our view, to avoid any likelihood of confusion. Also, a significant number of purchasers may well realize the difference in spelling of the first term "HENRI" in the cited registered marks and may pronounce this mark as "on-ree," rather than as the more common English equivalent. In any event, applicant's mark is sufficiently different from the registered marks that confusion is unlikely.

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Decision: The refusal of registration is reversed.

R. L. Simms

R. F. Cissel

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial
and Appeal Board