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**THIS DISPOSITION
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Paper No. 19
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hotline Sales Corp.

Serial No. 75/525,735

Howard Joseph for Hotline Sales Corp.

Elliott S. A. Robinson III, Trademark Examining Attorney,
Law Office 108 (David Shallant, Managing Attorney).

Before Cissel, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 27, 1998, applicant filed the above-referenced application to register the mark "AGACCI" on the Principal Register for "clothing, specifically hosiery, undergarments, including lingerie," in Class 25. Applicant claimed use of the mark in connection with these goods in interstate commerce since 1992.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that as applied to the clothing items set

forth in the application, applicant's mark so resembles the mark "A'GACI," which is registered¹ for "retail store services in the field of women's clothing and accessories," that confusion is likely. He found the marks were similar in appearance, pronunciation and commercial impression, and that because applicant's goods are of the type sold in registrant's stores, use of these similar marks in connection with both the goods and the service of selling them is likely to cause confusion.

Additionally, the Examining Attorney required applicant to amend the identification-of-goods clause in the application to eliminate the indefinite word "including."

Applicant responded by substituting the word "and" for the word "including" in the identification-of-goods clause and arguing that confusion is not likely because applicant's mark is not similar to the cited registered mark. In an apparent reference to the way applicant's mark is presented on the specimen submitted in support of the application, applicant argued that its mark "is made up solely of lower case letters, has the letter 'c' repeated

¹ Reg. No. 1,504,380, issued to Twigland Fashions, Inc. on September 13, 1988; combined affidavit under Sections 8 & 15 accepted and acknowledged, respectively.

with the two letters superimposed on each other, and no apostrophe." The drawing submitted with the application, however, presents the mark sought to be registered in typed form, as "AGACCI," without the stylistic features the display of the mark on the specimens presents.

Although the amendment was accepted, the Examining Attorney was not persuaded by applicant's argument with regard to the likelihood of confusion. The refusal to register was made final in the second Office Action.

Applicant filed a Notice of Appeal, but the Board ruled the appeal was late filed and the application was deemed abandoned. The Board denied applicant's request for reconsideration, but the Assistant Commissioner for Trademarks granted applicant's petition to revive the application, and thereafter the Board instituted the appeal. Applicant was granted an extension of time in which to file its brief, which was submitted on January 22, 2002. The Examining Attorney timely filed his brief in response, but applicant did not file a reply brief or request an oral hearing before the Board.

The predecessor to our primary reviewing court listed the principal factors to be considered in determining whether confusion is likely in the case of *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA

1973). Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression and the similarity of the goods or services. In the instant case, confusion is likely because the marks create similar commercial impressions because they are similar in appearance and pronunciation, and the goods with which applicant uses its mark are the kinds of products which are provided as part of registrant's retail store services.

Contrary to applicant's arguments, we must compare the mark applicant seeks to register, as it is shown on the application drawing (not as presented in special form on the specimens), with the cited registered mark. When we make this comparison, we conclude that the marks create similar commercial impressions because they are similar in appearance and could be pronounced the same way. Although distinctions between the marks certainly do exist, the similarities plainly outweigh them. The marks are essentially phonetic equivalents. Marks used to identify the goods and services in the instant case, apparel and retail clothing store services, are frequently used orally when the goods and services are being called for or recommended. Similarity in sound alone is sufficient to support the finding that confusion is likely. Molenaar,

Inc. v. Happy Toys Inc., 188 USPQ 469 (TTAB 1975); In re Cresco Mfg. Co., 138 USPQ 401 (TTAB 1963).

The application, as amended, identifies applicant's goods as "clothing, namely, hosiery, undergarments and lingerie." The cited registration, as noted above, states registrant's services as "retail store services in the field of women's clothing and accessories." It is well settled that confusion is likely when similar marks are used for both goods and the service of providing those goods. See: In re Hyper Shoppes (Ohio) Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) [same mark used for both furniture and retail general merchandise store services held likely to cause confusion]; In re H. J. Seiler Co., 289 F.2d 674, 129 USPQ 347 (CCPA 1961) [similar marks use for both smoked and cured meats and catering services held likely to cause confusion]; and In re U.S. Shoe Corp., 229 USPQ 707 (TTAB 1985) [similar marks used on uniforms and in connection with retail women's clothing store services and clothing held likely to cause confusion].

In the case at hand, a person who is familiar with the use of the registered mark "A'GACI" in connection with retail store services featuring women's clothing and accessories who encounters "AGACCI" on women's

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undergarments, hosiery or lingerie is likely to assume, mistakenly as it would turn out to be, that a single source is responsible for both the goods and the services. This is precisely the kind of confusion that the Lanham Act was designed to help preclude.

DECISION: The refusal to register under Section 2(d) of the Act is affirmed.