

Mailed: March 12, 2003

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re La Rue Distributors, Inc.

Serial No. 76/140,920

Mark P. Stone, Esq. for La Rue Distributors, Inc.

Sonya B. Stephens, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Hanak, Chapman and Drost, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

La Rue Distributors, Inc. (applicant) seeks to register BA·NY in the form shown below for "diaper backpacks, diaper bags, diaper fanny packs and infant carriers in the nature of straps worn on the body." The application was filed on October 4, 2000 with a claimed first use date of November 19, 1998.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark BA, previously registered in the form shown below for, among other goods, "backpacks." Registration No. 1,363,001.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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.").

Considering first the goods, we note that they are, in part, legally identical. Applicant's goods include "diaper backpacks." The goods of the cited registration include "backpacks." Obviously, the word "backpack" is broad enough to include all types of backpacks, including "diaper backpacks."

Considering next the marks, we note at the outset that when the goods are legally identical, as is the case here, "the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines."

Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant's mark incorporates the letters BA of the registered mark, and then adds to these letters the letters NY, which applicant has conceded to be descriptive of its goods. In this regard, we note that in the first Office Action dated March 27, 2001, the Examining Attorney stated that "applicant must disclaim the descriptive wording NY." In response, applicant stated that "no claim is made to the exclusive right to use NY apart from the mark as shown."

At page 5 of its brief, applicant correctly notes that "in determining likelihood of confusion, marks must be

evaluated and compared in their entireties." Citing In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). However, what applicant fails to note is that the Court in National Data went on to state that "on the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark." National Data, 224 USPQ at 251. Continuing, the Court in National Data stated that the fact "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark." National Data, 224 USPQ at 751.

Given the fact that applicant has conceded that NY portion of its mark is merely descriptive of its goods, there is nothing improper in giving less weight to that portion of applicant's mark, and giving more weight to the BA portion of applicant's mark. As previously noted, the BA portion of applicant's mark involves the identical letters of the registered mark BA. The only difference is that in applicant's mark the letters BA are perfectly horizontal whereas in the registered mark the letters BA

are positioned such that the letter B is slightly elevated above the letter A.

We find that a consumer familiar with registrant's BA backpacks, would, upon encountering applicant's BA·NY diaper backpacks, assume that both backpacks originated from a common source. In our judgment, consumers would view the NY portion of applicant's mark as merely indicating that the diaper backpacks were designed in or manufactured in New York City. This is particularly true when one recognizes that backpacks, including diaper backpacks, are relatively inexpensive items purchased by ordinary consumers exercising minimal care.

Of course, it need hardly be said that to the extent that there are doubts on the issue of likelihood of confusion, said doubts must be resolved in favor of the registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

Decision: The refusal to register is affirmed.