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Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sleepyheads.com Inc.

Serial No. 78326944

Scott Q. Vidas of Vidas, Arrett & Steinkraus, P.A. for
Sleepyheads.com Inc.

Florentina Blandu, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Grendel, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark SLEEPYHEADS.COM (in standard character form)
for services recited in the application as "on-line retail
store services featuring clothing."¹

¹ Serial No. 78326944, filed November 12, 2003. The application
is based on use in commerce under Trademark Act Section 1(a), 15
U.S.C. §1051(a). September 25, 2000 is alleged as the date of
first use anywhere and the date of first use in commerce.

The Trademark Examining Attorney has issued a final refusal of registration on the ground that applicant's mark, as applied to the services recited in the application, so resembles the mark SLEEPY-HEAD HOUSE, previously registered (in standard character form) for "retail store services specializing in furniture and bedding,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d). Applicant has appealed the final refusal.

Applicant and the Trademark Examining Attorney filed main appeal briefs. After careful consideration of their arguments and the evidence of record, we reverse the refusal to register.

The evidence of record consists of the application file, printouts of certain third-party registrations and applications made of record by the Trademark Examining Attorney, and printouts of certain Internet web pages made of record by the Trademark Examining Attorney. We have not considered the listing of alleged third-party registrations contained in applicant's brief, because applicant has not provided copies of the registrations and the Board does not

² Registration No. 1459671, issued September 29, 1987. Affidavits under Trademark Act Sections 8 and 15 accepted and acknowledged.

take judicial notice of such material. See *In re JT Tobacconists*, 59 USPQ2d 1080 (TTAB 2001); *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974).

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Under the first *du Pont* factor, the issue is whether applicant's mark, SLEEPYHEADS.COM, and the cited registered mark, SLEEPY-HEAD HOUSE, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial

impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In terms of appearance and sound, we find that the marks are similar to the extent that they both include the term SLEEPYHEADS or SLEEPY-HEAD. The fact that applicant's mark is in the plural, and that registrant's mark is in the singular and includes a hyphen, are insufficient to distinguish this feature of both marks. However, the marks are dissimilar in terms of sound and appearance to the extent that registrant's mark, but not applicant's mark, includes the word HOUSE, while applicant's mark, but not registrant's mark, includes the suffix ".com."

In terms of connotation, we find that the marks are dissimilar because registrant's mark, but not applicant's mark, includes the word HOUSE, which gives registrant's mark the connotation of a "house for sleepyheads." No such connotation is presented by applicant's mark. Likewise, applicant's mark, but not registrant's mark, includes the suffix ".com," which in applicant's mark connotes that

applicant's services are provided via the Internet.

Registrant's mark has no such connotation.

In terms of overall commercial impression, we find that the sole point of similarity between the marks, i.e., the presence in both marks of the term SLEEPYHEADS or SLEEPY-HEAD, is outweighed by the points of dissimilarity between the marks, i.e., the presence in registrant's mark of the word HOUSE and the absence of that word from applicant's mark, and the presence of the suffix ".com" in applicant's mark and the absence of that term from registrant's mark. In this regard, we take judicial notice that "sleepyhead" is defined as "a sleepy person."

Webster's II New Riverside University Dictionary (1988) at 1094.³ We find that this term is highly suggestive as applied to the goods the parties offer under their respective marks, i.e., registrant's "bedding" and applicant's "clothing" (which, as is evident from applicant's specimen of use, includes sleepwear). The highly suggestive nature of this sole point of similarity between the marks renders it less significant, in our

³ The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

comparison of the marks, than would be the case if the term common to the marks was more distinctive.

Viewing the marks in their entireties as to appearance, sound, connotation and commercial impression, we find that the marks are dissimilar rather than similar for the reasons discussed above. The first *du Pont* factor thus weighs in applicant's favor.

We turn next to the second *du Pont* factor, which requires us to consider the similarity or dissimilarity of applicant's and registrant's respective services. It is not necessary that these services be identical or even competitive in order to support a finding likelihood of confusion. Rather, it is sufficient that the services be related in some manner, or that the circumstances surrounding their use be such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective services. 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);

and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In this case, the Trademark Examining Attorney argues that applicant's and registrant's respective services are related because both applicant and registrant are retailers. We disagree. The mere fact that both applicant and registrant are retailers is not sufficient to establish the requisite connection between the respective services. We also disagree with the Trademark Examining Attorney's contention that the words "retail store services" in registrant's recitation of services necessarily encompass applicant's "on-line retail store services." As discussed below, there is insufficient evidence in the record to support a finding that "retail store services" also encompasses "on-line retail store services" such as those recited in applicant's application. Moreover, this is not a fact of which we can or will take judicial notice.

The Trademark Examining Attorney has submitted printouts of twelve third-party registrations and applications which, she argues, support her contention that applicant's and registrant's services are related. Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the

extent that they serve to suggest that the goods or services listed therein are of a kind which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

However, of the twelve printouts submitted by the Trademark Examining Attorney in this case, three are applications, not use-based registrations, and thus are of no probative value under *Trostel*. Five of the registrations are for house marks, each of which lists a very wide variety of goods and services; these registrations likewise are of little probative value under *Trostel*. Of the remaining four registrations, none includes online retailing in its recitation of services, and one does not even include clothing. We find that the third-party registration evidence submitted by the Trademark Examining Attorney is de minimis at best, and of little probative value.

The Trademark Examining Attorney also has submitted printouts of several webpages in support of her refusal. We find that this evidence, like the third-party registration evidence, is de minimis and of little probative value. The only Internet material specifically mentioned by the Trademark Examining Attorney in her brief

deals with the Laura Ashley company. But this website is a website from the United Kingdom that refers primarily to Laura Ashley's operations in Europe; the only reference to the company's presence in the United States is that the company plans to close numerous retail stores in this country. The four other website printouts submitted by the Trademark Examining Attorney demonstrate that bedding is sold online, but it is not clear that the sources of such bedding also sell clothing, either online or at bricks-and-mortar stores.

We conclude that the Trademark Examining Attorney has failed to submit evidence sufficient to establish that applicant's and registrant's respective services are related, such that purchasers are likely to assume the existence of a source or other connection. The second *du Pont* factor weighs in applicant's favor.

Under the third *du Pont* factor, we find that registrant's "retail store services" and applicant's "online retail store services" are offered in different trade channels, i.e., bricks-and-mortar stores versus the Internet. However, under the fourth *du Pont* factor, we find that the purchasers of the respective goods are the same, and that they are ordinary consumers. The third *du Pont* factor weighs in applicant's favor, but the fourth

factor weighs in favor of a finding of likelihood of confusion.

Balancing all of the *du Pont* factors for which there is evidence of record, we conclude that there is no likelihood of confusion. The marks are dissimilar when viewed in their entireties. The services recited in the registration and application, respectively, have not been shown to be related. The services are marketed and rendered to the same classes of purchasers, but in different trade channels. We simply cannot conclude, on this record, that purchasers and prospective purchasers are likely to assume that a bricks-and-mortar retail store selling bedding and furniture under the mark SLEEPY-HEAD HOUSE also is or would be a source of clothing which is retailed online under the mark SLEEPYHEADS.COM.

Decision: The refusal to register is reversed.