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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Boyd Coddington's Hot Rods & Collectibles, Inc.

Serial No. 78913114

Kit M. Stetina of Stetina Brunda Garred & Brucker for Boyd Coddington's Hot Rods & Collectibles, Inc.

Ronald McMorro, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Quinn, Mermelstein and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Boyd Coddington's Hot Rods & Collectibles, Inc. filed an intent-to-use application for the mark BOYD'S, in standard character form, for goods ultimately identified as "wearing apparel, namely, t-shirts, shorts, sweatshirts, sweatpants, hats, visors, and sandals offered and sold through authorized dealers," in Class 25.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to

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cause confusion with the mark BOYDS, in typed drawing form, for "men's and women's clothing, namely suits, dresses, jackets, coats, pants, skirts, vests, tuxedos, shirts, blouses, sweaters, ties, belts, braces, shoes and hosiery," in Class 25 and "retailing services for men's and women's clothing and accessories," in Class 35.¹

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

¹ Registration No. 2396024, issued October 17, 2000; Sections 8 and 15 affidavits accepted and acknowledged.

A. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* Applicant's mark BOYD'S is virtually identical to the registered mark BOYDS. That applicant's mark has an apostrophe "s" while the registered mark does not is inconsequential in comparing the marks. *See In re Hyper Shoppes*, 837 F.2d 463, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988) ("bigg's" for general merchandise store services is likely to cause confusion with BIGGS for furniture); *Calvin Klein Industries Inc. v. Calvins Pharmaceuticals Inc.*, 8 USPQ2d 1269, 1271 (TTAB 1988) (the addition of the letter "s" at the end of applicant's mark CALVINS does not distinguish it from opposer's mark CALVIN); *In re Curtis-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (McKENZIE is virtually identical to McKENZIE'S). Accordingly, the similarity of the marks is a factor that weighs heavily in favor of finding that there is a likelihood of confusion.

B. The similarity or dissimilarity and nature of the goods and services.

Applicant is seeking to register its mark for "wearing apparel, namely, t-shirts, shorts, sweatshirts, sweatpants, hats, visors, and sandals," and the cited mark has been registered for "men's and women's clothing, namely suits, dresses, jackets, coats, pants, skirts, vests, tuxedos, shirts, blouses, sweaters, ties, belts, braces, shoes and hosiery," as well as "retailing services for men's and women's clothing and accessories." The clothing products identified by the applicant and the registrant are similar and applicant's products are the types of products that may be sold through the registrant's retailing services. In view of the foregoing, the similarity and nature of the goods and services is a factor that favors a finding of likelihood of confusion.

C. The similarity or dissimilarity of likely-to-continue trade channels.

The crux of this case is whether the restriction to applicant's channels of trade effectively removes or minimizes the likelihood of confusion. In this regard, applicant restricted its description of goods to clothing "offered and sold through authorized dealers." Applicant contends that the restriction to the channels of trade in

its description of goods eliminates any likelihood of confusion for the following reasons:

[Applicant] may control which dealers are classified as authorized dealers. The authorized dealers diminish confusion by clarifying and illustrating the differences between the goods sold in connection with the Proposed Mark and the goods sold in connection with the Cited Mark. In particular, the authorized dealers explain that the goods originate from different sources. Consequently, any likelihood of confusion is significantly diminished, if not completely eliminated.²

The problem with the restriction to the description of goods is that it does not effectively mitigate the likelihood of confusion because it does not specify a distinct channel of trade. For example, applicant does not identify the nature of the authorized dealers (e.g., authorized dealers of hotrod and vehicle parts and accessories).³ Without that specificity, we are not in a

² Applicant's Brief, pp. 8-9.

³ In view of the identity of the marks and similarity of the goods and services, it might also have been helpful for applicant to have limited its clothing products to promotional clothing apparel. While not opining how the Board would decide such a case, it would also behoove applicant to support its arguments with evidence demonstrating how and why the limited nature of its clothing and the restricted channels of trade would diminish, if not eliminate, any likelihood of confusion. Mere argument of counsel will not be sufficient. In this regard, even if applicant were to amend its description of goods to promotional clothing items sold only by authorized dealers of hotrod and vehicle parts and accessories, applicant would still have to address the fact that the registered mark is not restricted to any

position to interpret what kind of authorized dealers may be permitted to sell applicant's clothing items or in what channels of trade those authorized dealers may be involved. Accordingly, we are bound to interpret the current restriction as including authorized clothing retailers who may be competing with the registrant. In view of the foregoing, the channels of trade factor favors finding that there is a likelihood of confusion.

D. Balancing the factors.

In view of the facts that the marks are essentially identical, the goods and services are similar, and the channels of trade are similar, we find that applicant's mark BOYD'S for "wearing apparel, namely, t-shirts, shorts, sweatshirts, sweatpants, hats, visors, and sandals offered and sold through authorized dealers" is likely to cause confusion with the mark BOYDS for "men's and women's clothing, namely suits, dresses, jackets, coats, pants, skirts, vests, tuxedos, shirts, blouses, sweaters, ties, belts, braces, shoes and hosiery" and "retailing services for men's and women's clothing and accessories.

Decision: The refusal to register is affirmed.

channels of trade: that is, the registrant's products and services could be sold to virtually all adults, and therefore purchasers familiar with the registrant's mark could be confused, even if the applicant's products are sold in restricted channels of trade.