

This Opinion is not a
Precedent of the TTAB

Mailed: October 21, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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*Anthropologie, Inc. and Urban Outfitters Wholesale, Inc.*¹

v.

Happy Green Company LLC

—
Opposition No. 91204412
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William J. Lehane, Mita K. Lakhia and Melissa Berger of Drinker Biddle & Reath
for Anthropologie, Inc. and Urban Outfitters Wholesale, Inc.

Drew Alia, Esq. for Happy Green Company LLC.

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Before Quinn, Bucher and Masiello, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Happy Green Company LLC (“Applicant”) filed an application to register the
mark shown below

anthō

for “bath salts; bath soaps in liquid, solid or gel form; cleaning and washing
preparations; cosmetics and make-up; deodorants and antiperspirants; fragrance

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¹ See discussion, *infra*, regarding the merger of the original joint Opposer, O.U.
Merchandise, Inc., and substitution of the merged entity Urban Outfitters Wholesale, Inc.
as this joint Opposer.

sachets; hair care preparations; nail care preparations; natural essential oils; non-medicated skin care preparations, namely, creams, lotions, butters, toners, cleansers, peels, body and foot scrubs, serums, bath and body oils, moisturizers, powders, masks and clays, lip balms and glosses; perfumes, aftershaves and colognes; room fragrances; shaving preparations” in International Class 3.²

Anthropologie, Inc. (“Anthropologie”) and U.O. Merchandise, Inc. (“U.O.”) (collectively, “Opposers”) opposed registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to Applicant’s goods, so resembles Opposers’ previously used and registered mark ANTHROPOLOGIE for retail department store services, clothing, handbags, and clothing and fashion accessories, and Opposers’ previously used mark ANTHRO for its customer affinity program services, as to be likely to cause confusion.

Applicant, in its answer, admitted the pertinent allegations related to Opposers’ ownership of two valid and subsisting registrations pleaded in the notice of opposition. (¶¶ 3, 5). Applicant otherwise denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; the trial testimony of two witnesses, with related exhibits, taken by Opposers; and official records and various documents retrieved from Internet websites, including Opposers’ websites, all introduced by way of notices of reliance. Applicant did not

² Application Serial No. 85385591, filed July 31, 2011, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on December 15, 2010. The application includes a statement that “the wording ‘ANTHŌ’ has no significance in the cosmetics trade or industry or as applied to the goods described in the application other than trademark significance.”

take any testimony or introduce any other evidence. Only Opposers filed a brief at final hearing.

Anthropologie owns one of the pleaded registrations, namely for the mark ANTHROPOLOGIE (typed) for “retail department store services” in International Class 42.³

With respect to the second pleaded registration, when the opposition was filed, the pleading was accompanied by a printout of information from the electronic database records of the USPTO showing the current status and title of this registration. *See* Trademark Rule 2.122(d)(1). By way of background, at that time the registration was owned by U.O., the other original joint Opposer. A check of Office records reveals five assignment documents for the registration, the most recent showing that U.O. was merged into Urban Outfitters Wholesale, Inc. on February 1, 2013, that is, after the filing of the opposition. Records show the current owner as the merged entity Urban Outfitters Wholesale, Inc. The documents were recorded in the Office on December 12, 2013, at reel 5172, frame 0439. Accordingly, the merged entity Urban Outfitters Wholesale, Inc. is substituted as one of the named Opposers. *See* TBMP § 512.01 (2014). Thus, Urban Outfitters Wholesale, Inc. owns the following pleaded registration: ANTHROPOLOGIE (typed) for “handbags, all-purpose carrying bags, tote bags, travelling bags, shoulder bags, clutch purses, all-purpose athletic bags, backpacks, wallets, coin purses” in International Class 18; and “women’s clothing, namely, tops, blouses, shirts,

³ Registration No. 1814261, issued December 28, 1993; renewed. Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (2014).

sweaters, blazers, jackets, vests, skirts, jeans, shorts, dresses, suits, coats, sleepwear, socks, hosiery, swimwear, tights, hats and shoes” in International Class 25.⁴

Opposers are related companies, and both are subsidiaries of a common parent, Urban Outfitters, Inc., as stated in the parent’s annual reports for 2012 and 2013. (Notice of Reliance, December 12, 2013).

As indicated above, Applicant admitted that each Opposer owned a valid and subsisting registration as pleaded in the notice of opposition. Each of Opposers has established its standing to oppose registration of the involved application by properly making of record its pleaded registration of the mark ANTHROPOLOGIE. Thus, each Opposer has shown that it is not a mere intermeddler. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

In view of Opposers’ ownership of valid and subsisting registrations for the mark ANTHROPOLOGIE, Opposers’ priority is not at issue with respect to this mark and the goods and services identified in those registrations. *King Candy, Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

In addition to their registration rights, Opposers have introduced testimony and evidence to show prior common law rights in the marks ANTHROPOLOGIE and

⁴ Registration No. 2588172, issued July 2, 2002; renewed.

ANTHRO in connection with certain services.⁵

Turning first to the mark ANTHROPOLOGIE, Nicole Jones, Anthropologie's senior buyer of beauty (including cosmetics and make up) and gift products, testified that Opposers' retail store services include the sale of the identical types of products listed in Applicant's identification of goods. These goods include bath salts, bath soaps, moisturizers, perfumes and colognes. (26 TTABVue 9-14; Exs. 2, 4). However, so as to be clear (and contrary to Opposers' arguments), the evidence does not show use of Opposers' mark as a trademark for beauty and cosmetic products, but rather the products are branded with the marks of third-party manufacturers. Ms. Jones testified about recent sales revenue, and sales of these beauty products range from \$8.8 million in 2008 to \$13.1 million in 2012. (26 TTABVue 11-12; Ex. 3); the five years of sales total \$54.5 million. These products are sold through Opposers' retail stores, on Opposers' website and through Opposers' catalogs. Opposers began sales of beauty and cosmetic products in 1992 through their retail stores, and online sales of these products commenced in 1998. (26 TTABVue 13-14). Ms. Jones testified that Opposers "predominantly sell clothing and accessories," but that other products were sold to complement the clothing and accessories. (26 TTABVue 16). Ms. Jones further stated that there is an "advantage" to selling beauty items alongside fashion items, as done by Opposers: "We believe that these

⁵ Applicant, having presented no proofs regarding its first use, is limited to the filing date of its involved application, that is, July 31, 2011, for purposes of priority. *See UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1046-47 (TTAB 2009). We hasten to add that, in any event, Opposers have established use prior to Applicant's purported first use date.

items appeal to the same customer and round out her lifestyle, so we offer her all the different types of products that she might want to purchase.” *Id.*

The record establishes that Opposers have prior common law rights for the mark ANTHROPOLOGIE in connection with retail store services and retail on-line services featuring beauty and cosmetic products. Of course, Opposers’ pleaded registration for the mark covers the broadly worded recitation “retail department store services”; this recitation encompasses sales of beauty and cosmetic products. To reiterate, based on the present record, Opposers have not established trademark rights in its pleaded mark for any beauty and cosmetic products themselves. That is to say, the record is devoid of evidence showing the use of Opposers’ pleaded mark ANTHROPOLOGIE as a trademark for beauty and cosmetic products; however, the record does establish use as a service mark for retail services featuring such products.

With respect to Opposers’ use of ANTHRO, Ms. Jones testified that the term “Anthro” is “used as a nickname for Anthropologie, just an abbreviation for Anthropologie.” (26 TTABVue 24-25). Ms. Jones further indicates that “ANTHRO” is “also used for our customer loyalty program at Anthropologie.” (26 TTABVue 25).

Ms. Jones further testified:

So all of our customers that join the loyalty program are given a card. That’s their Anthro card which allows them to get special previews for sales and additional perks for the company.

It’s also used often in social media; so for instance, for our Twitter account, the icon used says Anthro on it and

that's used to tweet out to our customers and to the general public online.

It's also often used in customer comments on our web site when remarking about different products as well as on blogs and just widely across the web on Pinterest, on Facebook when referring to Anthropologie.

Id.

Joanna Follman, a marketing associate for Anthropologie, followed up with additional testimony relating to Opposers' use of ANTHRO. Ms. Follman's job responsibilities include helping to manage Opposers' ANTHRO loyalty program. (27 TTABVue 11). She describes the ANTHRO loyalty program as follows:

It's a loyalty program that customers sign up for and receive a 50 percent off coupon around their birthday and they're entitled to certain perks like invitations to events.

Customers receive a card bearing the mark ANTHRO. (27 TTABVue 12, Ex. 9). Ms. Follman describes it as "a card for the loyalty program that when a customer presents it at checkout, it's a way to keep track of all their purchases so that they can return anything without a receipt. That's the main purpose of having it." (27 TTABVue, 12-13). Since the program began in 2007, Opposers have issued approximately 2.3 million cards. (27 TTABVue 13).

Ms. Follman also testified that "customers often do not call the store Anthropologie but just refer to it as Anthro, and we have quite a large blogger base out there that refers to products, like, you know, this Anthro dress that I bought, things like that." (27 TTABVue 14). "We have a big presence on Pinterest and Facebook and often times the customer refers to us as Anthro, or we use hash tags

and they'll hash tag a phrase with Anthro in it.” (27 TTABVue 14-15, 30-31; Ex. 22). Several exhibits to the testimony show use of “Anthro” by bloggers to refer to Opposers and/or their goods and services. (27 TTABVue 15-27, Exs. 11-20). Likewise, many other documents show third parties using the term “Anthro” to refer to Opposers and/or their goods and services on blogs (e.g., “Happily ever Anthro” at <happilyeveranthro.blogspot.com>), tweets (e.g., #anthrostyle) and Pinterest (e.g., “On sale at Anthro”) postings. (25 TTABVue). Opposers also have a Twitter account; all of Opposers’ tweets (i.e., a posting on Twitter) are accompanied by an icon that reads “Anthro.” (27 TTABVue 28; Ex. 21).

Both Ms. Jones and Ms. Follman state that Opposers’ employees often internally refer to the company as “Anthro.” (26 TTABVue 25; 27 TTABVue 14).

The record establishes, at the very least, Opposers’ prior common law rights in the mark ANTHRO for the services of administering and providing a customer loyalty program rendered in conjunction with Opposers’ retail store services and retail online services featuring beauty and cosmetic products. These rights are established by Opposers’ own use of the term in connection with their customer loyalty program. However, based on the current record, Opposers have not established additional rights in the mark ANTHRO for any goods or services beyond the customer loyalty program. *Cf. Big Blue Products Inc. v. International Business Machines Corp.*, 19 USPQ2d 1072, 1074 (TTAB 1991) (“The Board has on rare occasions stated that even if a company itself has not made use of a term, it may have ‘a protectable property right in the term’ if the public has come to associate the

term with the company or its goods or services. [citation omitted]. However, the use by the public of a term to refer to a company and/or its products or services does not mean that the company has obtained rights to exclude others from using the same term for any product or service, and it certainly does not mean that the company has obtained rights to register the term as a mark for any product or service. In other words, if a company does not obtain rights to register a term for all goods or services based upon the *company's own use* of the term on particular goods or services or as a trade name, then the company certainly does not obtain rights to register the term for all goods or services based upon *the public's use* of the term to refer to particular goods or services emanating from that company, or to refer to the company itself." [emphasis in original]).

Having determined the specific priority rights of Opposers, we now turn to the issue of likelihood of confusion. 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). 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). These factors, and the other relevant *du Pont* factors in the proceeding now before us, are discussed below.

We will focus our likelihood of confusion analysis on a comparison of Opposers' mark ANTHRO to Applicant's mark **anthō**. We must compare the marks in their

entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The marks are very similar in sound and appearance, differing by only one letter. Opposers’ mark ANTHRO clearly is a shortened version of its mark ANTHROPOLOGIE; there is nothing in the record regarding the meaning of Applicant’s mark. But, even assuming that the marks have different meanings, the similarities between the marks as to sound and appearance outweigh any differences. Given the close similarity in sound and appearance, the marks engender very similar overall commercial impressions. The first *du Pont* factor favors Opposers.

We next turn to consider the similarity/dissimilarity between Opposers' services and Applicant's goods. It is well settled that the goods and services of the parties need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and services of Applicant and Opposers are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue here is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); and *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

We find that Opposers' services of administering and providing a customer loyalty program rendered in conjunction with Opposers' retail store services and retail online services featuring beauty and cosmetic products are similar to Applicant's "bath salts; bath soaps in liquid, solid or gel form; cleaning and washing preparations; cosmetics and make-up; deodorants and antiperspirants; fragrance sachets; hair care preparations; nail care preparations; natural essential oils; non-medicated skin care preparations, namely, creams, lotions, butters, toners,

cleansers, peels, body and foot scrubs, serums, bath and body oils, moisturizers, powders, masks and clays, lip balms and glosses; perfumes, aftershaves and colognes; room fragrances; shaving preparations.” It is well recognized that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. *See, e.g., In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (holding BIGG’S (stylized) for retail general merchandise store services and BIGGS and design for furniture likely to cause confusion); *In re H.J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347 (CCPA 1961) (holding SEILER’S for catering services and SEILER’S for smoked and cured meats likely to cause confusion); *In re United Serv. Distribs., Inc.*, 229 USPQ 237 (TTAB 1986) (holding mark consisting of a design featuring silhouettes of a man and woman used in connection with distributorship services in the field of health and beauty aids and mark consisting of a design featuring silhouettes of a man and woman used in connection with skin cream likely to cause confusion); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (holding 21 CLUB for various items of clothing and THE “21” CLUB (stylized) for restaurant services likely to cause confusion); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (holding CAREER IMAGE (stylized) for retail women’s clothing store services and CREST CAREER IMAGES (stylized) for uniforms likely to cause confusion); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (holding STEELCARE INC. and design for refinishing of furniture, office furniture, and machinery and STEELCASE for office furniture and accessories likely to cause

confusion); *Corinthian Broad. Corp. v. Nippon Elec. Co., Ltd.*, 219 USPQ 733 (TTAB 1983) (holding TVS for transmitters and receivers of still television pictures and TVS for television broadcasting services likely to cause confusion). The *du Pont* factor relating to the similarity between Opposers' services and Applicant's goods weighs in favor of a finding of likelihood of confusion.

The respective goods and services are offered through the same types of trade channels, including retail stores and online retail websites. Purchasers for the goods and services overlap, and would include ordinary consumers. Further, insofar as the conditions of sale are concerned, the goods and services at issue are subject to impulse purchase. These *du Pont* factors weigh in Opposers' favor.

The record shows that Opposers have enjoyed success with their customer loyalty program services under the mark ANTHRO, as rendered in conjunction with their retail store services. Further, the record is devoid of any third-party uses of the same or similar mark. Accordingly, we find that the mark ANTHRO is strong for Opposers' customer loyalty program.

We have carefully considered all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion. We conclude that purchasers familiar with Opposers' ANTHRO customer loyalty program services rendered in conjunction with Opposers' retail store services and retail online services featuring beauty and cosmetic products would be likely to mistakenly believe, upon encountering Applicant's mark **anthō** for beauty and

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cosmetic products, that the respective goods and services originate from or are associated with or sponsored by the same entity.

Decision: The opposition is sustained, and registration to Applicant is refused.