

**THIS OPINION IS  
NOT A PRECEDENT  
OF THE TTAB**

Decision Mailed:  
April 7, 2010

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re USCANTEEN, INC.

Serial No. 76692826

Myron Amer of Myron Amer, P.C. for USCANTEEN, INC.

Amy Alfieri, Trademark Examining Attorney,  
Law Office 109 (Dan Vavonese, Managing Attorney).

Before Bergsman, Wellington, and Ritchie, Administrative  
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

USCANTEEN, INC. has filed an application, as amended, to register the mark USWEAR (in standard character format) on the Supplemental Register for "clothing for adults, namely, jackets and sweaters, not including boys and girls sportswear" in International Class 25.<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that

<sup>1</sup> Serial No. 76692826, filed on November 22, 2004, which alleges a date of first use anywhere and in commerce of January 1, 1994.

applicant's mark, when applied to its goods, so resembles the mark US WEAR (in standard character format) on the Principal Register for "clothing, namely boys and girls sportswear, namely, pants, jumpers, overalls, coveralls and woven and knit shirts and skirts" in International Class 25,<sup>2</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

Our determination of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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).

With respect to the marks, we find that they are nearly identical; the only difference between the two marks is the single space between the terms US and WEAR in the registered mark and applicant has combined the terms, USWEAR. The marks are identical in sound. Likewise, any connotation and commercial

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<sup>2</sup> Reg. No. 2947603, issued on May 10, 2005; the word "WEAR" is disclaimed.

impression created by the marks will be the same inasmuch as both marks are being used on clothing apparel.

Because of the near identity of the marks, this *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

Insofar as the goods are concerned, if the marks are identical or nearly so, as in the present case, it is only necessary that there is a viable relation between the goods to support a holding of likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); and *In re Opus Wine Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). Here, there is clearly more than just a viable relationship between applicant's "clothing for adults, namely, jackets and sweaters, not including boys and girls sportswear" and the cited registrant's "boy's and girl's sportswear, namely, pants, jumpers, overalls, coveralls and woven and knit shirts and skirts." Applicant attempts to make hay out of the exclusionary language in its identification of goods, i.e., that its clothing is for adults, not boys and girls, and that registrant's goods are children's sportswear. Applicant's argument in this regard is not persuasive. Rather, both the items in the application and those in the cited registration fall under the general rubric of "clothing." Furthermore, the examining attorney has presented evidence to show that it is not unusual for the same mark to be registered for clothing items for both adults and children.

While these registrations are not evidence that the marks are in use or that consumers are familiar with them, they do suggest that clothing for adults and children may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Thus, the registrations are probative in that they suggest that consumers who encounter clothing for adults and children, being sold or offered under a nearly identical mark, are likely to perceive that they are being offered by the same entity.

Accordingly, this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

As to the trade channels and classes of purchasers, it is presumed the identified goods are offered in all channels of trade which would be normal therefore, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). And, while applicant's goods are adult clothing items and the cited registration identifies children's sportswear, this does not necessarily mean that the trade channels for the respective goods are different. Indeed, clothing for children and adults is likely to be found in stores that feature clothing or the clothing departments of larger stores, e.g., The Gap, Filene's, Sears, Nordstroms, K-Mart, etc. As to the classes of purchasers, we note that the purchase of children's clothing is often undertaken by the parents of the

children. Thus, to the extent that many adults are parents (and certainly most parents are adults), the classes of purchasers overlap. Furthermore, given that nearly all of the identified articles of clothing may appear in various price ranges, nothing more than ordinary care would likely be utilized in purchasing decisions.

Accordingly, the *du Pont* factors involving trade channels and classes of purchasers weigh in favor of finding a likelihood of confusion.

We have considered all arguments put forth by applicant and the examining attorney in addition to the evidence of record. We have no doubt and conclude that consumers familiar with registrant's mark US WEAR on "clothing, namely boys and girls sportswear, namely, pants, jumpers, overalls, coveralls and woven and knit shirts and skirts," upon encountering applicant's mark USWEAR for "clothing for adults, namely, jackets and sweaters, not including boys and girls sportswear," are likely to believe that the respective clothing items originate from or are associated with or sponsored by the same entity.

**Decision:** The refusal under Section 2(d) is affirmed.