

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jelly Belly Candy Co.

Serial No. 77106782

Nicholas S. Gold of Law Offices of James R. Cypher for
Jelly Belly Candy Co.

Howard Smiga, Trademark Examining Attorney, Law Office 102
(Karen Stryz, Managing Attorney)

Before Zervas, Cataldo and Bergsman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Jelly Belly Candy Co. ("applicant") filed an
application to register the mark SPORT BEANS in standard
character form on the Principal Register for the following
goods: "protective helmets for sports" in International
Class 9; and

clothing for sports for men, women and children,
namely, shorts, pants, t-shirts, sleeveless
shirts, shirts with collars, tank tops, tankinis;
training and warm-up suits, rain proof and wind-
resistant jackets, skirts and skirt/short
combinations, sweaters, underwear, socks,
sweatbands, bathing suits, hats, caps, and

visors; cycling apparel, namely, booties, caps, gloves, headbands, jackets, jerseys, muffs, shirts, pants, socks, shorts, tights, leg and arm warmers and trousers

in International Class 25.¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as intended to be used in connection with its goods, so resembles the mark BEANSPORT, previously registered on the Principal Register in typed or standard character form for "women's swimsuits and fitness wear, namely, shorts, pants, tops, skirts, tankinis, tank tops and capris" in International Class 25,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs on the issue under appeal.

Goods Subject to the Refusal to Register

Prior to our determination of the issue under appeal, we first must clarify which of the goods recited in the involved application are subject to the refusal to register. In his first Office action, the examining

¹ Application Serial No. 77106782 was filed on February 13, 2007, based on applicant's assertion of a bona fide intent to use the mark in commerce. In response to a requirement by the examining attorney, applicant disclaimed SPORT apart from the mark as shown.

² Registration No. 2697973 issued on March 18, 2003.

attorney presented arguments directed toward the refusal to register the mark SPORT BEANS as applied to the goods identified in the application both in Class 9 and Class 25. However, in his final Office action as well as his brief on appeal, the examining attorney presented arguments in support of his refusal to register directed solely toward applicant's goods identified in Class 25.³

Applicant, for its part, did not present any arguments either in its responses to the examining attorney's Office actions or its brief on appeal directed toward the similarity or dissimilarity between its goods and those in the cited registration. In addition, it is noted that neither applicant nor the examining attorney introduced any evidence directed toward the similarity or dissimilarity between registrant's goods and those recited in Class 9 or 25 of the involved application.

Inasmuch as the examining attorney has presented neither arguments nor evidence in his final Office action or brief relating his refusal to register to applicant's Class 9 goods, namely, "protective helmets for sports," the refusal to register is deemed to be withdrawn as to such

³ The examining attorney's denial of applicant's request for reconsideration did not indicate to which of applicant's goods the refusal pertains.

goods. Accordingly, we will consider the issue of likelihood of confusion solely as it pertains to the goods recited in Class 25 of the involved application.

Likelihood of Confusion

Our determination of the issue 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, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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, 27 (CCPA 1976).

The Goods

We turn first to our consideration of whether registrant's goods and applicant's Class 25 goods are related. In making our determination, we look to the goods as identified in the involved application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the

question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.")

As noted above, applicant's goods include various items of clothing for sports for men, women and children and cycling apparel. As identified, these goods encompass registrant's more narrowly identified swimsuits and fitness wear for women. In other words, registrant's athletic wear for women is included among applicant's athletic wear for men, women and children and cycling wear. We note in particular that both applicant's and registrant's goods include "shorts," "pants," "skirts," "tankinis" and "tank tops."

As a result, applicant's goods are identical in part to those of registrant, and otherwise are related items of clothing worn for sports and fitness activities. We note

in addition that applicant does not argue that its goods differ from those of registrant.

Trade Channels

Furthermore, inasmuch as neither applicant's identification of goods nor that of registrant recites any limitations to any specific channels of trade, we presume an overlap and that the goods would be offered in all ordinary trade channels for these goods and to all normal classes of purchasers. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). *See also Octocom Systems, Inc. v. Houston Computers Services Inc.*, *supra*. As such, we are not persuaded by applicant's arguments and extrinsic evidence regarding asserted limitations to the trade channels for registrant's goods. *See Id.* Further, in view of the identity in part of the goods and the lack of restrictions to the trade channels, the goods must be presumed to be sold to the same class of purchasers. *See In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Accordingly, both applicant's and registrant's goods are presumed to move in the same channels of trade and be available to the same classes of potential consumers. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

The Marks

Next we consider the similarities and dissimilarities between the marks. In coming to our determination, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

In this case, registrant's mark is BEANSPORT while applicant's mark is SPORT BEANS. Both marks contain the identical words "BEAN(S)" and "SPORT." Applicant has taken the only two words in registrant's mark and transposed them. While we acknowledge that the marks are not identical, we find that transposition of the words comprising the marks does not serve to distinguish them in terms of sound and appearance. The word "bean" is dominant portion of the marks because it is arbitrary when used in connection with clothing while the word "sport" is descriptive of the type of clothing. Accordingly, consumers will be more likely to recall or remember the "bean" portion of the marks. Under these circumstances, we find that the similarities of the appearance and sound of the marks outweigh any differences.

Further, we are not persuaded that reversing the order of the words in the marks makes a significant difference in commercial impression. As the Board has previously stated:

Further, the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions. See *Bank of America National Trust and Savings Assn. v. American National Bank of St. Joseph*, 201 USPQ 842 (TTAB 1978), and cases cited therein. Here, where the goods in question are legally identical, and where both marks, when applied to the goods in question, are likely to be perceived by purchasers as signifying that the product sold thereunder busts through, or breaks up, rust, we agree with the Examining Attorney that the marks create substantially similar commercial impressions, and there is a likelihood of confusion. Cf. *In re Inco*, 154 USPQ 629 (TTAB 1967) ["GUARDIAN OF POSTURE for mattresses versus "POSTURGUARD" for mattresses - registration refused], and *McNamee Coach Corp. v. Kamp-A-While Industries, Inc.* v. 148 USPQ 765 (TTAB 1965) ["KING KAMPER" for camping trailers versus "KAMP KING KOACHES" for campers - registration refused].

See *In re Nationwide Industries, Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (RUST BUSTER for rust-penetrating spray lubricants confusingly similar to BUST RUST for penetrating oil). Also, the word "BEAN" is the equivalent of the word "BEANS." *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (there is no material difference, in a trademark sense, between singular and plural forms of a word).

While applicant disagrees with the examining attorney's determination that applicant's and registrant's marks have the same commercial impression, its argument on this point is unpersuasive. Specifically, applicant argues that its mark SPORT BEANS describes beans related to sports and that registrant's mark BEANSPORT, to the extent it has a recognized meaning at all, may refer to BEANS PORT, BEAN SPORT, or registrant, L. L. Bean, all with different possible meanings. Although there may be subtle differences in the meanings of the marks when they are subjected to close analysis, we do not believe that consumers will undertake such an analysis. The test for likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. Also, in evaluating similarities between the marks, the emphasis must be 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).

Further, we are not persuaded by the declaration made of record by applicant of Laurel Sutton, a principal and linguistics project director of a brand name development company, in which declarant opines that applicant's mark is dissimilar from that of registrant. Neither applicant nor

Ms. Sutton have introduced any evidence of the consuming public's comparative impression of the marks as applied to the goods identified thereby. Rather, the declaration merely expresses Ms. Sutton's opinion regarding the dissimilarity between the appearance, sound, connotation and meaning of the marks: in other words, it is essentially a survey comprising a one person universe. As a result, such declaration is entitled to very limited probative weight in our likelihood of confusion analysis.

Moreover, it is the Board's responsibility to decide an appeal from an adverse final decision of the examining attorney based on the evidence of record. This duty may not be delegated by adopting the conclusions of applicant's expert witness. See *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).⁴

Registrant's mark BEANSPORT and applicant's mark SPORT BEANS, to the extent that either mark has a recognized meaning, convey similar meanings and commercial impressions when used in connection with athletic clothing. Both marks rather fancifully suggest beans that are related to sporting and athletic wear. Thus, when the marks are considered in their entirety, we find that they are

⁴ As indicated above, we have considered Ms. Sutton's "testimony," but find that it has limited probative value.

similar in sound, appearance, meaning and commercial impression.

Actual Confusion

The final *du Pont* factor discussed by applicant is that of the lack of instances of actual confusion. Applicant asserts that the absence of actual confusion since June 2005 suggests no likelihood of confusion. In support of its contention, applicant has made of record the declaration of its president and chief operating officer, Mr. Robert M. Simpson, Jr.

However, and as pointed out by the examining attorney, it is not necessary to show actual confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an *ex parte* proceeding, applicant's assertion of the absence of actual confusion is of little probative value in our determination on the issue of likelihood of confusion because the Board cannot readily determine whether there has been a significant opportunity for actual confusion to have occurred, such that the absence of confusion is meaningful. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984). In those situations where the

Board has recognized the absence of actual confusion as probative in an ex parte setting, there existed a "confluence of facts" which together strongly suggested that the absence of confusion was meaningful and should be given probative weight. See *In re Opus One Inc.*, supra; and *In re Jeep Corp.*, supra. The "confluence of facts" is not present in this record.

Conclusion

In summary, weighing all of the evidence of record as it pertains to the relevant *du Pont* factors, we find that a likelihood of confusion exists.

Decision: The refusal of registration is affirmed as to the goods in International Class 25.

As noted above, the refusal of registration is deemed to have been withdrawn as to the goods in International Class 9. Accordingly, the involved application will be forwarded for registration in International Class 9 in due course.