

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

Mailed: July 23, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re ASICS Corporation

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Serial No. 77493747

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Michael E. Zall, Esq. for ASICS Corporation.

Dorritt Carroll, Trademark Examining Attorney, Law Office  
116 (Michael W. Baird, Managing Attorney).

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Before Walters, Holtzman and Walsh, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

ASICS Corporation has filed an application to register  
the standard character mark LEG BALANCE on the Principal  
Register for "athletic apparel, namely, shirts, singlets,  
jackets, shorts, tights, running suits, bras, briefs and  
socks," in International Class 25.<sup>1</sup> The application  
includes a disclaimer of LEG apart from the mark as a whole.

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<sup>1</sup> Serial No. 77493747, filed June 8, 2008, based on an allegation of a  
bona fide intention to use the mark in commerce.

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the typed mark FOOT BALANCE, previously registered for "leather boots and shoes," in International Class 25,"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We reverse the refusal to register.

Our determination 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 likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by

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<sup>2</sup> Registration No. 0326825, issued August 6, 1935. The registration is owned by Alden Shoe Company, Inc. [Section 15 affidavit acknowledged; renewed.]

Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

#### *The Goods*

We consider, first, whether or to what extent the goods involved in this case are sufficiently related to support a finding of likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). In considering this *du Pont* factor, we acknowledge that there is no *per se* rule governing likelihood of confusion in cases involving clothing items and footwear. See *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984).

Applicant contends that the goods are identified narrowly, i.e., "athletic" apparel and "leather" shoes and boots, and, as such, there is no overlap in the nature or use of the respective goods. Applicant submitted excerpts from registrant's website to support its contention that registrant's footwear is limited to "dress" shoes. It is

clear that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

However, applicant's argument raises valid questions about whether athletic shoes are made of leather and, thus, the extent to which registrant's identified "leather shoes" would be construed as encompassing athletic shoes; or the extent to which leather shoes may be complementary goods or are otherwise related to athletic apparel.

In connection with his contention that the goods are related, the examining attorney introduced several third-party registrations and excerpts from third-party websites in support of his position that athletic apparel and leather shoes and/or boots may emanate from a common source.

The website excerpts submitted include the following:

www.ASICS.com - showing ASICS athletic shoes and apparel;

www.2store.puma.com - showing Puma athletic shoes and apparel;

www.landsend.com - listing various virtual "departments," including "sport" and "shoes." Additional pages from the Lands End website show various different types of shoes from clogs, to patent leather and leather shoes, and tennis shoes;

www.tenpoint.thulehost.co.uk - shows many different brands of clothing and shoes, including ASICS "inner muscle" athletic shoes and apparel.

The evidence clearly establishes that athletic shoes and athletic apparel are closely related goods. However, aside from the fact that the examining attorney has submitted a minimal amount of website evidence, there are several problems with the probative value of this Internet evidence in connection with the issue of the relationship between athletic apparel, which may also be purchased and worn for informal, non-athletic purposes, and leather shoes. While the AISCS and Puma website excerpts reference both athletic shoes and apparel, the athletic shoes shown are not made of leather and there is no evidence that athletic shoes may be made of leather. The Lands End website excerpt does not refer to athletic apparel or to items of clothing that could be considered athletic apparel and, thus, it does not support the examining attorney's position. Regarding the Ten-Point website, while the website emanates from the U.K., it is obviously available for viewing in the United States. It is instructive for showing that ASICS, the applicant herein, offers both athletic apparel and running shoes under the same mark, i.e., "Inner Muscle"; however, again, the

referenced athletic shoes are not made of leather and there is no evidence in this record that athletic shoes may be made of leather.

Considering the third-party registrations submitted by the examining attorney, we note that "[t]hird-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Of these third-party registrations, one, Registration No. 3271583, is not based on use in commerce, and another, Registration No. 3203598, includes "beach shoes" and "tongs" as the only "footwear," and, thus, neither is probative herein. Of the remaining seven use-based third-party registrations, each includes a wide variety of apparel and other items, including, variously, "shoes," which encompasses leather shoes and athletic shoes, "socks," and items that clearly fall within the category of "athletic apparel," such as shorts, T-shirts, tank tops,

tennis wear, sweat shirts, jogging suits and warm up suits. However, most of these registrations encompass goods and services in several International Classes and a wide variety of seemingly unrelated goods. In view of the breadth of goods identified in these registrations and the fact that these registrations are not evidence of the use of the respective marks on those goods, we find this evidence only minimally probative of a relationship between the respective goods and not probative at all of whether athletic shoes may be made of leather or of the extent to which leather shoes may be used in connection with or are otherwise related to athletic apparel.

In this case, registrant's goods encompass all types of shoes made of leather. However, the examining attorney has not established that athletic shoes may be made of leather. Thus, the examining attorney has not established that athletic apparel and leather shoes would be used together, are complementary, or are otherwise related such that purchasers would believe they come from the same source.

Therefore, we find that the examining attorney has not established a sufficient relationship between applicant's specified athletic apparel and registrant's leather shoes and boots that, if identified by confusingly similar marks, confusion as to source is likely. This *du Pont* factor weighs against a finding of likelihood of confusion.

*Channels of Trade/Purchasers*

Insofar as the trade channels and classes of purchasers are concerned, we note that there are no trade channel limitations in either applicant's or registrant's identification of goods. Accordingly, we must presume that the goods, as identified, are marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, notwithstanding that applicant's apparel is for use in connection with "athletic" endeavors, which may include wearing such apparel for informal, non-athletic purposes, and registrant's footwear is made of leather, it is likely that the goods move in overlapping trade channels (e.g., at least on-line retailers and department stores).

Further, given the absence of any limitations as to purchasers, we presume that the goods are bought by the same classes of consumers, including ordinary ones. Inasmuch as the identifications do not include any limitations as to cost, we must also presume that the goods include relatively inexpensive athletic apparel and leather footwear that would be subject to impulse purchase made by ordinary consumers with nothing more than ordinary care.

The above *du Pont* factors relating to the overlap in trade channels, purchasers and conditions of sale all weigh in favor of finding a likelihood of confusion.



*The Marks*

We turn, next, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar 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 impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715 (TTAB 2008). 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).

Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant contends that BALANCE is a highly suggestive term in connection with both its athletic apparel and registrant's leather shoes and boots. In support of its

position that the involved marks are weak, applicant submitted copies of eight third-party use-based registrations owned by different entities, as follows:

- Registration No. 1053241 for the mark NEW BALANCE for, inter alia, athletic shoes and T-shirts;
- Registration No. 2418305 for the mark BODY BALANCE for, inter alia, shorts and sports bras;
- Registration No. 2904546 for the mark AIR BALANCE and design for, inter alia, athletic shoes;
- Registration No. 3426618 for the mark ORTHO BALANCE for, inter alia, orthotics, socks, athletic shoes, leather shoes, work shoes and boots;
- Registration No. 2832024 for the mark THIRD BALANCE for, inter alia, hats, socks, sweaters, shoes, boots, pants; and
- Registration No. 3178668 for the mark DRI-BALANCE for, inter alia, pullovers.
- Registration No. 3524766 for the mark POWER BALANCE for, inter alia, athletic footwear ... footwear; and
- Registration No. 2897617 for the mark BIRKO BALANCE for, inter alia, footwear.

As we discussed, *supra*, these registrations are not evidence of use of the mark in connection with any goods. However, for the purpose of showing the strength or weakness of applicant's and registrant's marks, these third-party registrations are of probative value. They demonstrate that there exist on the register several two-word marks with BALANCE as the second word for goods which are either identical to applicant's and registrant's respective goods or closely related thereto. The coexistence on the register

of so many similar marks for related and similar goods suggests that BALANCE is either highly suggestive or ubiquitous in connection with these goods; and that the differing first word in each mark is sufficient to distinguish the marks from each other.

In view thereof, we find that, when compared in their entirety, the examining attorney has not established that the marks are sufficiently similar to support a conclusion of likelihood of confusion even if the goods had been found to be related. This du Pont factor weighs against a finding of likelihood of confusion.

*Conclusion*

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's and the examining attorney's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that the examining attorney has not established that there is a likelihood of confusion involved in this case.

*Decision:* The refusal under Section 2(d) of the Act is reversed.