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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re NTA Enterprise, Inc.

Serial No. 77575867

Blynn Shideler of The BLK Law Group for NTA Enterprise,
Inc.

John M. Wilke, Trademark Examining Attorney, Law Office 104
(Chris Doninger, Managing Attorney).

Before Kuhlke, Bergsman and Ritchie,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

NTA Enterprise, Inc. ("applicant") filed an intent-to-use application to register the mark MARSHLAND, in standard character form, for goods ultimately identified as "fabric sold as an integral component of finished clothing items, namely, camouflage jackets, camouflage vests, camouflage pants, camouflage overalls, camouflage overall bibs, camouflage hats, camouflage gloves, camouflage socks, and camouflage shirts," in Class 25.

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of

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1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the previously registered marks owned by the same entity for MARSHLANDER, in standard character form, for "rain coats; rain jackets; rain suits; rain trousers; rainwear; waterproof jackets and pants," in Class 25¹ and MARSHLANDER and design, shown below, for "weatherproof and waterproof rainwear," in Class 25.²



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

¹ Registration No. 3162449, issued October 24, 2006.

² Registration No. 1935600, issued November 14, 1995; renewed.

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").

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

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that 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 impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*,

565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Applicant's mark MARSHLAND and registrant's marks MARSHLANDER and MARSHLANDER and design are similar in terms of sound and appearance in that registrant's marks incorporate the word "Marshland." Moreover, the design element of registrant's mark comprising the silhouette of a man in a boat engenders the commercial impression of person from a marshy or swampy region (*i.e.*, a marshlander).³

We are not persuaded by applicant's argument that the "ER" suffix in registrant's marks is sufficient to differentiate applicant's mark from the registered marks in any meaningful way. The "ER" suffix does not significantly distinguish the word MARSHLAND from MARSHLANDER and it, in fact, highlights the similarity between the marks, as indicated above, by drawing a connection between the place (*i.e.*, the marshland) and the people from that place (*i.e.*, a marshlander).

³ Contrary to applicant's argument, when MARSHLANDER is used in connection with raingear, consumers are more likely to associate the suffix "lander" with a person as in the word "lowlander" than with a vehicle designed to travel across a planet as in the term "lunar lander." See the dictionary definitions in applicant's December 9, 2009 response.

In view of the foregoing, we find that applicant's mark MARSHLAND is similar to registrant's marks MARSHLANDER and MARSHLANDER and design.

B. The strength of the registered mark.

Applicant asserts that registrant's MARSHLANDER marks are "relatively weak marks" entitled only to a narrow scope of protection "due to consumer ability to distinguish between minute differences in what are otherwise very similar looking marks."⁴ To support this argument, applicant submitted copies of the following six third-party registrations incorporating the word "Marsh":

Mark	Reg. No.	Goods/Services
MARSH LANDING	1298921	Women's clothing specifically shorts, pants, sweaters, shirts and blouses
HY-MARSH	0838908 EXPIRED	Marshmallow base
MARSH	0869064 1087155	A variety of private label products by a supermarket including ice cream, juices, tea, cookies, cake mixes, canned tuna laundry detergents, etc.
MARSH MAT	2707742	Erosion control sheeting and mats for construction and non-construction use

⁴ Applicant's Brief, p. 2.

Mark	Reg. No.	Goods/Services
MARSHMATE and design	2715620	Hunting stand, namely a wading stick that can be converted into a rotating stool with an attached gun, game and bag holder

The third-party registrations that applicant made of record fail to demonstrate that the third-party registered marks are actually being used, much less that the extent of such third-party use is so great that consumers have become accustomed to seeing the various marks and, therefore, have learned to distinguish between them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

While third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services, six third-party registrations do not prove that the term MARSHLANDER is so weak and diluted that applicant's change to MARSHLAND is sufficient to distinguish the marks when they are used in connection with related products. In

fact, there is nothing that shows that the term "Marshlander," or variations thereof, has any descriptive significance when used in connection with clothing and/or fabrics. At most, "Marshlander" may suggest that the clothing or fabric has an outdoor theme. Thus, we find that the word "Marshlander" is inherently distinctive when used in connection with clothing.

Finally, in its brief, applicant asserted that "[t]here are about 80 live registered marks bearing the formative MARSH literally or as an English language equivalent,"⁵ but it did not submit copies of the registrations. We cannot consider a passing reference to registrations that were not made of record. To make registrations of record, soft copies of the registrations or the electronic equivalent thereof (i.e., printouts or electronic copies of the registrations taken from the electronic search records of the USPTO) must be submitted. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Furthermore, the third-party registrations must include related goods or services. *In re Imperial*

⁵ Applicant's Brief, p. 2.

Jack Mining, Inc., 193 USPQ 725, 726-727 (TTAB 1977).

Because applicant did not submit the registrations, we have no idea whether they are registered for goods and services with any connection with clothing or fabrics, specifically raingear, and, therefore, have any relevance.

In view of the foregoing, there is no basis upon which to conclude that consumers encounter marks comprising the word MARSHLANDER, or variations thereof, so often that they have learned to distinguish between the different marks.

C. The similarity or dissimilarity and nature of the goods described in the application and registration.

Applicant is seeking to register its mark for "fabric sold as an integral component of finished clothing items, namely, camouflage jackets, camouflage vests, camouflage pants, camouflage overalls, camouflage overall bibs, camouflage hats, camouflage gloves, camouflage socks, and camouflage shirts," and the cited registrations are for rainwear. It is well settled that applicant's goods and the registrant's goods do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under

circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The Examining Attorney has submitted excerpts from websites advertising clothing referencing the fabric from which the clothing is made. The following are illustrative of the excerpts made of record.

1. *Affordable Work Wear* (affordableworkwear.com)

In the excerpt for BULWARK Protective Apparel Products, the advertisement lists the clothing products by category of fabric (e.g., ExcelFR Cotton, ExcelFR Comfort Touch, NOMEX).

2. *Bass Pro Shops* website (bassproshops.com)

Bass Pro Shops advertised Bass Pro Shops® Pro Qualifier™ GORE-TEX® rain parkas. The excerpts from the *Travel Country* website (travelcountry.com) and the *L. L. Bean* website (llbean.com) identify GORE-TEX as the "well known and well trusted weatherproof and breathable fabric." See also the *Cabela's* website (cabelas.com) advertising raingear products made from GORE-TEX.

3. *L. L. Bean* website (llbean.com)

L. L. Bean advertised LaCrosse® Brush Tuff Neoprene Waders (boots) featuring "Thinsulate" insulation.

4. *Mark's* website (marks.com)

Mark's advertises women's pants with "Curvetech," as well as Dakota HYPER-DRI® HD3 Waterproof/breathable bib pants.

5. *Patagonia* website (patagonia.com)

Patagonia advertises its H2NO® fabric. H2NO is a waterproof and breathable laminate or coating applied to protective fabric.

This evidence demonstrates that retailers advertise clothing and fabrics together and, therefore, consumers of finished clothing items may come in contact with the fabric and the mark for the fabric from which the clothing items are made. Accordingly, we find that consumers are likely to ascribe a common origin to fabric and finished clothing that share a similar trademark. See *In re Dolly, Dolly Fashions, Inc.*, 223 USPQ 1351 (TTAB 1984) (SPREE INTERNATIONAL for ladies' sportswear so resembles SPREE for piece goods as to be likely to cause confusion); *In re Crompton Company, Inc.*, 221 USPQ 471 (TTAB 1983) (REGENCY for textile fabrics so resembles REGENCY for women's sportswear as to be likely to cause confusion). In this

regard, we note that applicant does not dispute that "[t]here is certainly a degree of similarity between the nature of the cited goods and the applicant's goods, as there are between the Women's (sic) apparel of the MARSHLANDING mark and the MARSHLANDER raingear."⁶

Finally, we note that in the websites submitted by the Examining Attorney, there were numerous examples of camouflage raingear. See the Bass Pro Shops, Cabela's, Carhartt, and L. L. Bean websites. Consumers could easily mistakenly believe that applicant's camouflage fabrics and registrant's raingear emanate from the same source because of the similarity of the marks.

D. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Applicant's mark is proposed for use in connection with fabrics sold as an integral part of clothing products. Accordingly, that means that the goods would move through the retail clothing channel and would be encountered by the ultimate consumers. Presumably, the sales process would be similar to clothing products made from GORE-TEX fabrics as displayed in many of the website excerpts submitted by the Examining Attorney. Moreover, as indicated above, the

⁶ Applicant's Brief, p. 5; see also Applicant's Reply Brief, p. 4.

evidence submitted by the Examining Attorney shows that there is an association between fabrics and clothing. In fact, several exhibits display camouflage raingear (e.g., L.L. Bean, RedHead clothing sold at BASS PRO SHOPS, CABELA'S, CARHARTT WorkCamo line). In view of the foregoing, we find that applicant's fabrics sold as an integral part of camouflage clothing and the registrant's raingear move in the same channels of trade and are sold to the same classes of consumers.

E. Balancing the *du Pont* factors.

In view of the facts that the marks are similar, the goods are related, move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's registration of the mark MARSHLAND for "fabric sold as an integral component of finished clothing items, namely, camouflage jackets, camouflage vests, camouflage pants, camouflage overalls, camouflage overall bibs, camouflage hats, camouflage gloves, camouflage socks, and camouflage shirts" is likely to cause confusion with the marks MARSHLANDER and MARSHLANDER and design for rainwear.

Decision: The refusal to register is affirmed.