

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

Mailed:  
August 9, 2012

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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Trademark Trial and Appeal Board

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In re Jonathan M. Klokow

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Serial No. 77850282

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H. John Rizvi and Glenn E. Gold of Gold & Rizvi, P.A. for  
Jonathan M. Klokow.

Erin Falk, Trademark Examining Attorney, Law Office 101  
(Ronald R. Sussman, Managing Attorney).

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Before Quinn, Holtzman, and Wolfson, Administrative  
Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

The decision of the Board that issued in this proceeding on August 7, 2012, contained an error in the caption of the decision. The error is corrected to reflect the correct statement of the examining attorney representing the office in the appeal, Erin Falk of Law Office 101 (Ronald R. Sussman, Managing Attorney). A corrected copy of the decision is attached. The time for filing any appeal from the decision of the Board will continue to be measured from the original mailing date of August 7, 2012.

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H. John Rizvi and Glenn E. Gold of Gold & Rizvi, P.A. for  
Jonathan M. Klokow.<sup>1</sup>

Erin Falk, Trademark Examining Attorney, Law Office 101  
(Ronald R. Sussman, Managing Attorney).

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Before Quinn, Holtzman, and Wolfson, Administrative  
Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

On October 16, 2009, Jonathan M. Klokow filed an  
application to register the mark MOO DA CHAINZ (in standard  
character format) for "hats; T-shirts" in International Class  
25, based on his bona fide intent to use the mark in  
commerce.

The trademark examining attorney has refused  
registration of applicant's mark under Section 2(d) of the  
Trademark Act, 15 U.S.C. § 1052(d), having determined that

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<sup>1</sup> It is noted that Mr. Klokow has submitted applicant's brief *in pro per*.

registration would lead to a likelihood of confusion in view of Reg. No. 3188038 for the mark MOODA CHAINZ for "Clothing, namely, tops, pants, shorts, skirts, dresses, hats, caps, jackets, coats, headwear, underwear, sleepwear, and footwear" in International Class 25.<sup>2</sup>

When the refusal was made final, applicant appealed. The appeal has been fully briefed. We affirm.

### **I. Evidentiary Issue**

Together with his appeal brief, applicant included copies of a certificate of copyright registration, a website printout, and a photograph of t-shirts bearing applicant's mark. This evidence was not submitted during the prosecution of the application but submitted for the first time with applicant's brief. The examining attorney has objected to this evidence as being untimely.

Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. See TBMP § 1208.02 (3d ed. 2011) and authorities cited in that section. Evidence submitted for the first time with a party's brief will not be considered by the Board. Accordingly, we have not considered this evidence.<sup>3</sup>

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<sup>2</sup> Registered December 19, 2006.

<sup>3</sup> We have, however, considered the evidence submitted by applicant with his response to the January 25, 2010, Office action; namely photographs of a hat and a long-sleeved t-shirt bearing the mark, a copy of the design applicant has copyrighted that includes the

## **II. Applicable Law**

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. 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 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); see also *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

## **III. Discussion**

### **A. Similarity or Dissimilarity of the Marks in Their Entireties**

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mark, and photographs of a hat and shirt bearing the mark MOVE THE CHAINS from an unrelated third-party.

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. In comparing the marks, 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 those goods or services offered under the respective marks is likely to result. *Coach Services Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Here, applicant's mark is compared to the cited mark without consideration of the design features applicant contends he uses in connection with his mark, because applicant has not applied for the mark as including a design, but only for the words MOO DA CHAINZ. See *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) (fact that applicant or registrant use their marks with different designs "is

irrelevant and immaterial." ). We also do not consider the particular stylization of the lettering of applicant's mark as it appears on applicant's goods, because applicant has applied for the mark as a standard character mark. Our comparison of the marks is confined to applicant's mark as shown in the drawing.

Bearing this in mind, we consider the mark MOO DA CHAINZ to be highly similar to the mark MOODA CHAINZ in sight, sound, meaning and commercial impression. In appearance and pronunciation, the marks are virtually identical. The first term of the cited mark is merely a combination of the first and second terms of applicant's mark, and the final terms of each mark are identical, novel spellings of the word "chains." As for meaning, applicant notes that "MOO DA" is a corrupt spelling for "move the" such that the entire phrase means "move the chains," a phrase that has meaning in the context of the game of football. The same meaning may be ascribed to the cited mark; nothing in the record suggests otherwise.<sup>4</sup> Overall, the marks are highly similar in commercial impression.

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<sup>4</sup> Applicant argues that the registrant intends its mark to mean "Attitude for Life," but has not supported this contention with evidence of record. Although he states that registrant "represent[s] their concept of the phrase is a philosophy" on their website, and includes the web address, he has not submitted a copy of a web page from the website. The information is

**B. Similarity or Dissimilarity of the Parties' Goods**

With respect to the relatedness of the goods, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods identified in applicant's application vis-à-vis the goods identified in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Applicant seeks to register his mark for "hats, T-shirts." One of the items for which the cited mark is registered is "hats." These goods are identical. Moreover, the cited mark covers "tops," "caps," and "headwear," goods that either encompass or are virtually identical to "hats, T-shirts." It is sufficient for a finding of likelihood of confusion if the relatedness is established for any item encompassed by the identification of goods within a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981); *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004).

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therefore not in the record; the Board does not "look up" websites on behalf of a party.

The registration also covers additional items of clothing: "pants, shorts, skirts, dresses, jackets, coats, underwear, sleepwear, and footwear." These clothing items are closely related to "hats, T-shirts." To show their relatedness, the examining attorney has submitted copies of ten use-based, third-party registrations which cover both applicant's and registrant's types of goods. The evidence suggests that these clothing items are of a type that 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). In addition, the examining attorney has submitted copies of pages from third-party websites showing that companies offer various types of apparel under a single mark. For example, the pages from [www.ralphlauren.com](http://www.ralphlauren.com) show coats, jackets, shirts, dresses, footwear and baby clothes advertised for sale under the mark RALPH LAUREN; and the website at [www.jcrew.com](http://www.jcrew.com) advertises women's shirts, tops and skirts under the mark J.CREW. Material obtained from the Internet is acceptable in *ex parte* proceedings as evidence of potential public exposure to a term. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).



In view of the in part identical and in part related nature of the goods, we find applicant's "hats, T-shirts" to be closely related to the clothing items listed in the registration.

**C. Trade Channels and Classes of Purchasers**

Considering the channels of trade and classes of purchasers, because the goods are in part identical and there are no restrictions in the identifications as to trade channels or purchasers, we must presume that these identical goods will be sold in the same channels of trade, such as retail clothing and department stores, and will be offered to the same ordinary classes of purchasers. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The Internet evidence submitted by the examining attorney supports the presumption. We find that the similarities in the channels of trade and classes of purchasers favor a finding of likelihood of confusion.

**D. Applicant's Nonuse Arguments**

Applicant argues that there can be no confusion between his mark and the cited mark because the cited mark has allegedly not been in use for "nearly the past 2 years (if

not longer)."<sup>5</sup> Applicant requests "forfeiture, invalidation, rescission, [or] cancellation" of the cited registration, "as I believe they have NOT fulfilled the Requirement of a 'reasonable continuous Use' of their Mark."<sup>6</sup> (stylization in original). We construe this statement, taken together with applicant's recitation of steps he has taken to determine whether the cited mark is in use, and his stated conclusion that it is no longer in use, as an assertion that the registrant has abandoned its mark. See Section 45 of the Trademark Act, 15 U.S.C. § 1127.<sup>7</sup>

Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in connection with the goods and/or services identified in the

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<sup>5</sup> Applicant's brief, p. 7. It is noted that applicant asserts various lengths of nonuse throughout his brief; for example, on p. 9 he states that registrant has not used its mark "over the past nearly 6 years."

<sup>6</sup> *Id.*, p. 3.

<sup>7</sup> That section defines "abandonment," in pertinent part, as follows:

*Abandonment of mark.* A mark shall be deemed to be "abandoned" if [] the following occurs:

(1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be *prima facie* evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark. ....

certificate. Therefore, in the context of an *ex parte* proceeding, the registration enjoys the benefits of the presumptions of registration. Accordingly, an applicant who wishes to remove a registration from the register is required to file a petition to cancel the registration, thereby affording the registrant an opportunity to contest an allegation of abandonment.

Although applicant may be entitled to file a petition to cancel the cited registration, pleading proper grounds for his standing and abandonment claim, applicant is not entitled to challenge the validity of the registration during this *ex parte* proceeding. The validity of the registration can only be challenged by applicant's filing of a petition to cancel. During *ex parte* prosecution, including this *ex parte* appeal, applicant will not be heard on matters that constitute a collateral attack on the cited registration. *In re Dixie Restaurants, Inc.*, 41 USPQ2d at 1534; and *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). See TMEP § 1207.01(d)(iv) (8th ed. 2011).

In this case, applicant did not file a petition to cancel the registration, the registration is presumed valid, and applicant's arguments regarding whether the cited mark is in use or not are irrelevant to this proceeding. No

consideration has been given to applicant's arguments in this regard.

**IV. Conclusion**

We have carefully considered the entire record, including all arguments and the evidence submitted. We find that the marks are highly similar and the goods are identical in part and otherwise closely related. Use of applicant's mark in association with "hats, T-shirts" is likely to cause confusion with the mark in the cited registration.

**Decision:** The refusal to register under Trademark Act § 2(d) is affirmed.