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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Arthur M. Kurek

Serial No. 85267214

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(Robert Lorenzo, Managing Attorney).

Before Bucher, Holtzman and Greenbaum, Administrative
Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Arthur M. Kurek filed, on March 15, 2011, an intent-to-use application to register the mark DON'T CARE SPORTS WEAR (in standard characters, SPORTSWEAR disclaimed) for "athletic apparel, namely, shirts, pants, jackets, footwear, hats, caps and athletic uniforms" (in International Class 25).

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

to applicant's goods, so resembles the previously registered mark IDC I DON'T CARE WEAR (in standard characters, WEAR disclaimed) for "clothing, namely t-shirts, hats, shorts, pants, jeans, jackets, sweatshirts, and socks" (in International Class 25),¹ as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Both applicant and the examining attorney filed briefs. As discussed below, we affirm the refusal to register.

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 (CCPA 1973). See also *In re Majestic Drilling 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); and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

The goods in this case include identical items, namely, hats, pants and jackets. It is sufficient for a

¹ Registration No. 3630810, issued June 2, 2009.

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). Applicant does not dispute this point.

Moreover, in view of the identical goods and because there are no restrictions in either the application or the cited registration, we must presume that these identical goods move in the same channels of trade, such as clothing stores, boutiques, clothing sections of department stores, and the like, and that the goods would be purchased by the same classes of purchasers. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). See also *Genesco Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to the trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.").

Applicant implicitly acknowledges that consumers of applicant's and registrant's goods may be the same, but asserts that they will exercise a higher degree of care in

their purchasing decisions. Specifically, applicant argues that purchasers of brand name clothing are sophisticated by nature, and that "[m]en and women who are sophisticated [or picky] enough to be looking for a particular brand will not buy one that has abbreviations [or omits abbreviations], or has [or omits] additional words, if that is not what they were looking for." Brief, p. 7. However, applicant submitted no evidence to support this argument.

Furthermore, the purchasers of ordinary, everyday wearing apparel such as jackets and pants include ordinary consumers who may not be brand-conscious or sophisticated and who would not necessarily exercise a high degree of care in their purchasing decisions.

In addition, we note that the types of clothes identified in the application and registration can be relatively inexpensive consumer items that may be purchased casually and on impulse, thereby increasing the risk of confusion. See *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984).

In view of the above, we find that the goods include identical items, and the channels of trade and classes of

purchasers, overlap. These *du Pont* factors favor a finding of likelihood of confusion.

In determining the similarity between the marks, we analyze "the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). In making this determination, we are mindful that where, as in the present case, marks would appear on identical or closely related goods, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

There are some differences in sound and appearance between applicant's mark DON'T CARE SPORTS WEAR and registrant's mark IDC I DON'T CARE WEAR. In particular, IDC I DON'T CARE WEAR comprises seven syllables--a three letter initialism followed by four words, the first of which is the pronoun "I," while DON'T CARE SPORTS WEAR comprises four syllables/words, including the descriptive word "SPORTS." More important, however, there is a significant similarity; both marks contain the identical two-word phrase, "DON'T CARE" and the final word "WEAR." The syntactic sequence DON'T CARE followed by WEAR is

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memorable as a rhyming negative expression that both marks share. The initialism IDC in registrant's mark introduces the three words that follow (I DON'T CARE), and the word "I" in registrant's mark is merely a pronoun with no particular significance except to answer the question: who doesn't care? It is not a significant addition to the overall sound of the mark. Moreover, although the terms WEAR in registrant's mark and SPORTS WEAR in applicant's mark are descriptive and have been disclaimed (as the unitary word SPORTSWEAR in applicant's mark), these similar terms serve to increase the overall similarities between the marks in sound, appearance, meaning and commercial impression.

The differences in the marks become even less significant when we consider that, in relation to the goods, the meanings conveyed by the marks are substantially the same. The meaning of a mark must be determined, not in a vacuum, but in relation to the goods to which it is applied because that is how the mark is encountered by purchasers. See *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895 (TTAB 1988). In relation to clothing, IDC I DON'T CARE WEAR and DON'T CARE SPORTS WEAR have the same meaning: they both suggest the wearer's playful,

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youthful, carefree attitude. The differences in these marks are not so significant that they are likely to be noted or remembered by purchasers when seeing these marks at different times on identical goods.

We note that applicant relies on the precedential decision in *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010), finding no likelihood of confusion between DEER-B-GON and DEER AWAY for animal repellents, and the non-precedential decision in *Pacific Sunwear of California, Inc. v. AIT, Inc.*, Serial No. 75323781 (TTAB February 18, 2004) finding no likelihood of confusion between PAC SUN and PAC AIT for various clothing items. Suffice it to say that the facts in those cases differed markedly from those herein, and those cases do not compel a finding that the marks in this case are distinguishable. It is well settled that the Board must decide each case on its own facts. *In re Nett Designs, Inc.*, 236 F.3d 1359, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Moreover, while applicant is entitled to cite to non-precedential decisions, such decisions are not binding on the Board. TBMP § 801.03 (3d ed. rev. 2012).

Thus, we find that the similarities in these marks far outweigh their differences, especially when we consider

that average purchasers are not infallible in their recollection of trademarks and often retain only a general overall impression of marks that they may previously have seen in the marketplace. See *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Moreover, while registrant's mark may be somewhat suggestive of the goods, perhaps suggesting casual clothing or a casual attitude of the wearer, there is nothing in the record to indicate that the mark is highly suggestive or weak, so as to be entitled to only a narrow scope of protection.²

In view of the foregoing, we find that the marks, when considered as a whole, are similar in appearance, meaning, sound and commercial impression, and we resolve this *du Pont* factor in favor of a likelihood of confusion.

Applicant argues that the absence of evidence of strength or fame of registrant's mark should be treated as a factor in applicant's favor. Brief, p. 6. In support thereof, applicant notes registrant's purported lack of

² In this regard, we note that applicant, for the first time on appeal, attached printouts of third-party registrations showing marks containing various combinations of the terms "don't," "care" and "wear" to support its claim that registrant's mark is weak and only entitled to a narrow scope of protection. The examining attorney's objection to the registrations as untimely under Trademark Rule 2.149(d) is well taken. Consequently, neither the evidence nor any arguments relating to the evidence

presence on the Internet and relies on printed results from searches conducted on August 11, 2011, utilizing the Google, Yahoo and Dogpile search engines, showing no hits for registrant's mark.³ Applicant submitted this evidence with his response to the initial Office Action. However, because this is an *ex parte* proceeding, we would not expect the examining attorney to submit evidence of the commercial strength or fame of the cited mark. This *du Pont* factor, as is normally the case in *ex parte* proceedings, must be treated as neutral. See *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006).

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Accordingly, we find that consumers familiar with registrant's clothes sold under its mark IDC I DON'T CARE WEAR would be likely to believe, upon encountering

will be considered. Even if we were to consider this evidence, we would not find it persuasive.

³ Additionally, applicant's purported acquisition of "Don't Care Sports Wear" as a domain name/address for future use is not relevant to the question of likelihood of confusion. See Brief, p. 7.

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applicant's mark DON'T CARE SPORTS WEAR for the same and closely related clothing items, that the goods originated with or are associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.