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Subject: U.S. TRADEMARK APPLICATION NO. 85267214 - DON'T CARE SPORTS
WEAR - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

APPLICATION SERIAL NO. 85267214

MARK: DON'T CARE SPORTS WEAR



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

TTAB INFORMATION:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the trademark examining attorney's refusal to register the trademark

"DON'T CARE SPORTS WEAR" on the ground that it is likely to cause confusion with cited

Registration No. 3,630,810 within the meaning of Section 2(d) of the Trademark Act, 15 USC

1052(d).

STATEMENT OF THE CASE:

Applicant has applied for registration on the Principal Register for the mark

"DON'T CARE SPORTS WEAR" for athletic apparel, namely, shirts, pants, jackets, footwear,

hats, caps and athletic uniforms. Registration was refused under Trademark Act Section 2(d), 15

USC 1052(d), based on likelihood of confusion with Registration No. 3,630,810 for the mark "IDC

I DON'T CARE WEAR" for use on t-shirts, shorts, pants, hats, jeans, jackets, sweat shirts and

socks. This appeal follows the Examining Attorney's final refusal under Section 2(d).

In response to a requirement made in the first Office Action, applicant disclaimed exclusive rights to use the descriptive wording "sportswear" except as part of the mark. The Office

Action, dated June 21, 2011, referenced attached definitions of "sportswear" from three online

dictionaries.

OBJECTION TO UNTIMELY EVIDENCE:

As a preliminary matter, the undersigned attorney objects to the admission of all of

the evidence submitted with the applicant's brief as untimely filed. The record in an application

must be complete prior to the filing of an appeal. Because the proposed evidence was submitted

with the appeal brief, the undersigned attorney respectfully requests that this evidence not be

considered. 37 CFR 2.142(d); *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058-9 n. 2 (TTAB 2002); *In*

re Trans Cont'l. Records, Inc., 62 USPQ2d 1541 n. 2 (TTAB 2002); TBMP 1203.02(e), 1207.01;

TMEP 710.01(c).

"Judicial notice" refers to a court or adjudicating body's authority to accept as evidence well-known and indisputable facts for the purpose of convenience and without requiring a

party's proof. *Black's Law Dictionary* 923 (9th ed. 2009). The Trademark Trial and Appeal Board

does not take judicial notice of third-party registrations. TBMP §§1208.02, 1208.04; *see* Fed. R.

Evid. 201; 37 C.F.R. §2.122(a); *In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB

2002); *In re Carolina Apparel*, 48 USPQ2d 1542, 1543 n.2 (TTAB 1998). Accordingly, the third-

party registrations submitted by applicant with its appeal brief should not be considered.

(Applicant's brief, page 11.)

To make third party registrations part of the record, an applicant must have

submitted copies of registrations from the USPTO's database prior to appeal. *In re Ruffin Gaming*,

66 USPQ2d at 1925 n.3; *In re Carolina Apparel*, 48 USPQ2d at 1543 n.2; TBMP §1208.02; TMEP

§710.03. Applicant failed to timely submit its third-party registration evidence.

ARGUMENT:

APPLICANT'S MARK IS LIKELY TO CAUSE CONFUSION WITH CITED REGISTRATION NO. 3,680,810.

A. The marks at issue are similar.

The first factor under *In re E.I. du Pont de Nemours & Co.* requires examining the similarity of the marks as a whole. 177 USPZ 563, 567 (CCPA, 1973). The Court of Appeals for

the Federal Circuit explains that, although marks must be compared in their entireties, it is proper –

and even “unavoidable” – to assign more or less weight to a particular feature of a mark, based on

rational reasons. *In re National Data Corp.*, 224 USPQ 749, 750-1 (CAFC, 1985). If marks for

related goods share similar dominant features and, when viewed as a whole, create similar overall

impressions, then confusion is likely. *In re Cynosure, Inc.*, 90 USPQ2d, 1644 (TTAB, 2009).

The test is whether the marks are sufficiently similar that a likelihood of confusion

exists as to the source of the goods. *In re Iolo Techs, LLC*, 95 USPQ2d 1498-9 (TTAB, 2010).

The standard for evaluating similarity between the marks is the recollection of the average purchaser who normally retains a general, nonspecific impression of marks. *Cynosure*, 90

USPQ 2d, 1644-5.

Applicant's mark, filed in standard character format, consists solely of the wording

DON'T CARE SPORTS WEAR. The mark is notable as a rhyming negative phrase. Especially

because so many people now are obsessed with external appearance, including physique and

youthfulness, applicant's mark is a refreshing and nonchalant approach to athletic and casual

apparel. Registrant's mark, IDC I DON'T CARE WEAR, is also in standard character form and

possesses the same characteristics. IDC represents the first three letters of the next three words in

the mark and therefore is not random. The abbreviation is a preview of the rest of the mark.

Therefore, both marks share the similar dominant features of rhyming negative terminology and,

when viewed in their entireties, create overall similar impressions.

This finding is further supported by the above described standard of the average

purchaser's general, nonspecific impressions of marks. In contrast to applicant's brief (page 4), the

shopper is unlikely ever to see these two marks together. The average consumer probably is

disinclined to compare number of syllables and lacks the opportunity for the subtle analyses

discussed in applicant's arguments (pages 5 – 6), especially amid the bustle of a lively, crowded

mall or department store. Instead, the consumer is most likely to remember "don't care...wear",

the negative rhyme featured in both marks.

Applicant argues that the word "sports" distinguishes its mark from the cited registration. Applicant neglects to acknowledge that, even though the words are separate in its

mark, "sportswear" is unitary terminology.

Evidence attached to Office action issued June 21, 2011:

-- Web page printout from www.macmillandictionary.com showing "sportswear" as unitary term.

-- Web page printout from www.merriam-webster.com/dictionary showing "sportswear" as unitary term.

-- Web page printout from www.yourdictionary.com showing "sportswear" as unitary term.

This fact also is reflected in the disclaimer, in which spelling must be correct. If a

mark includes misspelled wording that must be disclaimed, the disclaimer statement must contain

only the correct spelling. *In re Omaha National Corp.*, 2 USPQ2d 1859, 1861 (CAFC, 1987).

Applicant argues that the owner of the cited registration has abandoned its trademark due to the supposed nonuse online. (Applicant's brief, page 6.) However, this argument

is not persuasive since not all businesses are online. Moreover, a trademark registration on the

Principal Register is prima facie evidence of the validity of the registration and the registrant's

exclusive right to use the mark in commerce in connection with the specified goods. *See* 15 U.S.C.

§1057(b); TMEP §1207.01(d)(iv).

Thus, evidence and arguments that constitute a collateral attack on a cited

registration, such as information or statements regarding a registrant's nonuse of its mark, are not

relevant during ex parte prosecution. *See In re Dixie Rests.*, 105 F.3d 1405, 1408, 41 USPQ2d

1531, 1534-35 (Fed. Cir. 1997); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992);

TMEP §1207.01(d)(iv). Such evidence and arguments may, however, be pertinent to a formal

proceeding before the Trademark Trial and Appeal Board to cancel the cited registration.

Since both marks share the identical dominant wording "DON'T CARE" and feature rhyming negative terminology, the two marks create an overall, highly similar impression.

Accordingly, when viewed in their entireties, both marks are highly similar in appearance and

meaning.

B. Applicant's and registrant's goods are highly related.

“When marks appear on or in connection with virtually identical goods....,

the degree of similarity of the marks necessary to support a conclusion of likely confusion is not as

great as when the goods are different.” *In re Microsoft Corp.*, 68 USPQ2d 1195 (TTAB, 2003).

Both applicant and registrant list the following goods on which the marks, respectively, will be or are used: pants, hats and jackets. The rest of the products are closely related. For example, applicant's footwear and registrant's socks are complementary goods, likely to be purchased and worn together, and generally available in the shoe section of department stores. Registrant's t-shirts are a subset of applicant's general listing of shirts. Registrant's shorts and jeans are related to applicant's pants, the first merely being abbreviated length and the second made of a specific fabric, denim. Registrant's sweat shirts can function as a light weight version of applicant's jackets. Applicant's brief does not argue that the goods at issue are unrelated.

The dictionary evidence of record defines “sportswear” as comfortable, casual clothing for sports, recreation or informal occasions. The goods listings for applicant's and registrant's marks do not include suits, dresses, ties, tuxedos, or other costly formal wear. This absence further strengthens the relationship between applicant's and registrant's apparel.

In the identifications of goods for both applicant and registrant, the trade channels

are unrestricted. Therefore, the legal presumption controls that both operate in all normal trade

channels. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 98 USPQ2d 1253, 1261 (CAFC, 2011).

Thus, applicant's arguments about its prospective Internet marketing are irrelevant. (Applicant's

brief, page 7.)

The above presumption further holds that unrestricted goods are assumed to be available to all potential customers. In this instance, virtually everyone – the general public, in

other words -- needs to purchase casual apparel and sportswear for everyday and athletic use. The

standard of care for purchasing the goods is that of the least sophisticated purchaser. *Alfacell Corp.*

v. Anticancer, Inc., 71 USPQ2d 1301, 1306 (TTAB, 2004). Again, applicant's arguments are

improbable regarding sophisticated purchasers who will not be confused as to source of similar,

relatively inexpensive, widely available goods with similar marks separated by time and setting.

(Applicant's brief, pages 6-7, 11-12.)

CONCLUSION:

Any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d

1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d

1025, 1025 (Fed. Cir. 1988); TMEP 1207.01(d)(i). As a result, the comparison of the marks and

the related and identical clothing products demonstrate that consumer confusion is likely.

Therefore, registration should be refused under Section 2(d) of the Trademark Act.

Respectfully submitted,

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