

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: 3/12/2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leisure Craft Industries, Inc.

Serial No. 85384900

Luke Brean of Brean Law LLC for Leisure Craft Industries, Inc.

Jonathan R. Falk, Trademark Examining Attorney, Law Office 111  
(Robert L. Lorenzo, Managing Attorney).

Before Quinn, Lykos and Adlin,  
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Leisure Craft Industries, Inc. ("applicant") filed, on July 29, 2011, an application to register the proposed mark WEATHERTEX (in standard characters) for "embroidered and non-embroidered clothing apparel, namely shirts, T-shirts, sweatshirts, sport shirts, undershirts, golf shirts, dress shirts, blouses, sweaters jackets, coats, headwear, trousers, footwear, sweatpants, sweatshirts, socks and belts" (in International Class 25). The application claims first use anywhere and first use in commerce on September 1, 2010.

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 used in connection with applicant's goods, so resembles the previously registered mark WEATHERTECH (in standard characters) for "industrial outerwear, namely jackets, coats, vests, pants" (in International Class 25) as to be likely to cause confusion. Registration No. 1963461 issued on March 19, 1996, and was renewed.

When the refusal was made final, applicant appealed and its concurrently-filed request for reconsideration was denied. Applicant and the examining attorney filed briefs.

Applicant argues that the goods are not related, highlighting the rule that not all clothing products are *per se* related. Applicant asserts that the evidence falls short of establishing a "close link" between industrial outerwear and traditional consumer-grade clothing inasmuch as they serve different purposes. According to applicant, even producers of both types of clothing differentiate their industrial items from consumer items on their websites. Applicant also points to the existence of several third-party registrations of marks that comprise, in part, the term "WEATHER" for clothing items, thus diminishing the distinctiveness of that element of the cited registration. Given the weakness of this term, applicant argues that purchasers are likely to focus on the "TECH" and "TEX"

portions of the involved marks, which are different and result in marks that "vary substantially in sight, sound, and commercial impression." (Brief, p. 6). In urging that the refusal be reversed, applicant submitted a photograph of its goods with the mark applied thereto, an excerpt from registrant's website, a search report retrieved from the USPTO's Trademark Electronic Search System (TESS) and copies of third-party registrations of "WEATHER" formative marks in the clothing field.

The examining attorney maintains that the marks are "nearly identical." (Brief, p. 4). Although the examining attorney does not dispute that "the word 'WEATHER' is diluted for Class 25 goods," the examining attorney points out that none of the third-party registered marks is as similar to applicant's mark as is the cited registered mark. *Id.* As to the goods, the examining attorney contends that traditional clothing and industrial clothing are "closely related." In this connection, the examining attorney relies upon third-party websites showing that both types of clothing, industrial and traditional, may emanate from the same source.<sup>1</sup>

---

<sup>1</sup> The examining attorney's brief includes links to two dictionary entries that relate to the pronunciation of "tex" and "tech." This evidence was not properly made of record, and the Board will not utilize a link to a website's internet address to consider content that may appear there. *In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.3 (TTAB 2012).

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). 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).

We first direct our attention to the *du Pont* factor of the similarity/dissimilarity between the marks. We must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1960 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). 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).

Applicant's mark WEATHERTEX is highly similar to registrant's mark WEATHERTECH. The marks are identical in construction, beginning with the same word "WEATHER," and ending with the similar terms "TEX" and "TECH." Thus, the marks, when considered in their entirety, look and sound alike. Further, the marks convey similar meanings. We doubt whether purchasers would perceive any significantly different meanings in the marks based on the difference in spelling between "-TEX" and "-TECH." Rather, it is likely that purchasers would view both marks as suggesting the same general idea, namely that applicant's clothing items are made of textiles (and/or technology) suited to different weather conditions (as shown by the photo of applicant's goods in which the goods are described as "Active Lifestyle Apparel"); and that registrant's industrial outerwear is technologically superior in protection against weather elements (as indicated on registrant's website, the goods are "waterproof, windproof, breathable"). Given the similarities in sound, appearance and meaning, the marks WEATHERTEX and WEATHERTECH engender highly similar overall commercial impressions.

The similarity between the marks weighs heavily in favor of a finding of likelihood of confusion.

We next turn our focus to the second *du Pont* factor involving the similarity/dissimilarity between the goods. We make our determination regarding the similarities between the goods, channels of trade and classes of purchasers based on the goods as they are identified in the application and registration, respectively. *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's identification of goods reads "embroidered and non-embroidered clothing apparel, namely shirts, T-shirts, sweatshirts, sport shirts, undershirts, golf shirts, dress shirts, blouses, sweaters jackets, coats, headwear, trousers, footwear, sweatpants, sweatshirts, socks and belts"; and registrant's goods are identified as "industrial outerwear, namely jackets, coats, vests, pants."

It is not necessary that the respective goods be identical or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer. *In*

*re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). "[T]he greater degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion." *Time Warner Entertainment Co. L.P. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002). The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

The examining attorney submitted evidence to show that traditional consumer clothing and industrial clothing are related goods. The evidence comprises excerpts of third-party websites (e.g., the websites of Dickies, Carhartt, Berne Workwear, Bulwark, Filson, Red Kap, Ben Davis, Rothco and Dri Duck); according to the examining attorney, "[i]ndustrial clothing of the type described in registrant's identification of goods often emanates from the same source as the types of clothing identified by applicant in their application and this is clearly demonstrated by the evidence in the record." (Brief, p. 6). Although the examining attorney relies on several websites, we concur with applicant that the examining attorney overstates his evidence on this point. As pointed out by applicant, only three of the websites (Dickies, Carhartt and

Berne) show that the same entity offers both traditional and industrial clothing under the same mark. Nevertheless, these three examples establish that the same entity may offer both types of clothing under the same mark (even if the two types of clothing are separately presented on the websites). We also note other third-party websites (e.g., National Workwear, Toughweld, Work'n Gear, and AW) showing that these online retailers sell both consumer and industrial clothing, albeit under a variety of brand names.

Although we agree with applicant that the evidence does not necessarily establish a "close link" between the different types of clothing (Brief, p. 4), the evidence shows the goods to be sufficiently related that, when sold under highly similar marks, purchasers are likely to be confused. The evidence also shows that both types of goods are sold in common trade channels, namely through online retail outlets. Further, the goods are marketed to the same classes of purchasers, including ordinary purchasers looking to clothe themselves for both the industrial workplace and outside of the work environment. Even assuming that some purchasers of industrial clothing may be knowledgeable in the field, as applicant asserts, this does not mean that they are immune to source confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (indicating that



"even sophisticated purchasers can be confused by very similar marks").

In making our decision in this appeal, we have considered the third-party registration evidence introduced by applicant to show that the term "weather," when it appears in a mark for clothing, is relatively weak and that the cited mark is entitled to only a narrow scope of protection. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1693. In this connection, applicant submitted a TESS search report listing fifty third-party registrations of "WEATHER" formative marks for goods in Class 25. Of these listed registrations, applicant submitted copies of eleven of the registrations.

To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted during prosecution of the application. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006). Thus, the mere submission of the TESS search results listing the third-party registrations, without copies of the registrations, is insufficient to make the registrations of record. However, inasmuch as the examining attorney did not advise applicant that the TESS search report is insufficient to make the registrations of record at a point when applicant could have corrected the

error, the examining attorney is deemed to have waived any objection to consideration of the list itself, for whatever probative value it may have. See *In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012).

Although we have considered applicant's evidence of eleven third-party registrations, it is of limited probative value to support applicant's position because "[t]he existence of [third-party] registrations is not evidence of what happens in the market place or that consumers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive." *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010). We agree with the examining attorney's assessment that none of these registrations is as close to registrant's mark as is applicant's applied-for mark; perhaps more importantly, even a weak mark is entitled to protection against the registration of a similar mark for related goods. Further, the mere listing of the remaining thirty-nine registrations in the TESS search report, showing only the registration number, registered mark and whether the registration is live/dead, is entitled to even less probative weight. See *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 n.6 (TTAB 2011).

Notwithstanding the limited probative value of applicant's third-party registration evidence, we acknowledge, as does the examining attorney, that the "WEATHER" portion of the marks is suggestive, a fact borne out by the registrations. See *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009). We disagree, however, with applicant's statement that customers will accordingly focus on the "TEX" and "TECH" portions of the marks. Purchasers in general are inclined to focus on the first word or portion in a trademark, in this case, "WEATHER." *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered"). See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. Moreover, even if purchasers focused on "TEX" and "TECH," as stated earlier, these terms are themselves similar.

In reaching our decision, we have kept in mind that there is no *per se* rule governing likelihood of confusion cases involving wearing apparel. See *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984). However, in numerous cases in the past, many different types of apparel have been found to be related products which are sold in the same trade channels to the same classes of purchasers, including to ordinary consumers, and that confusion is likely to result if the goods were to be sold under

similar marks.<sup>2</sup> To state the obvious, we have decided this appeal based on the specific evidence before us.

We also have considered the Board's decision in an unpublished case highlighted by applicant, *In re Banom, Inc.*, Ser. No. 78869262 (TTAB May 19, 2008), wherein no likelihood of confusion was found between GRIP-RITE for "protective gloves for industrial use" and GRIPRITE for "footwear, namely, shoes and boots." The earlier decision, which the Board indicated involved a "close question," does not warrant a finding of no likelihood of confusion in this appeal. First, the cases are distinguishable on the facts. In the prior case the Board found that "protective gloves for industrial use" in Class 9 were purchased by the industries in which those goods were used, and that the involved goods did not share common trade channels. That situation is unlike the present appeal wherein there is evidence showing that the same entity offers both consumer and industrial clothing under the same mark. Further, the

---

<sup>2</sup> See, e.g., *Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 128 USPQ 549 (CCPA 1961) (women's boots related to men's and boys' underwear); *Jockey Int'l, Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992) (underwear related to neckties); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991) (women's pants, blouses, shorts and jackets related to women's shoes); *In re Pix of America, Inc.* 225 USPQ 691 (TTAB 1985) (women's shoes related to outer shirts); *In re Mercedes Slacks, Ltd.*, 213 USPQ 397 (TTAB 1982) (hosiery related to trousers); *In re Cook United, Inc.*, 185 USPQ 444 (TTAB 1975) (men's suits, coats, and trousers related to women's pantyhose and hosiery); and *Esquire Sportswear Mfg. Co. v. Genesco Inc.*, 141 USPQ 400 (TTAB 1964) (brassieres and girdles related to slacks for men and young men).

unpublished decision dealt with gloves and shoes which are different products, whereas the present appeal involves identifications of goods that include some of the same clothing items, albeit for different uses. Second, an opinion designated as not precedential is not binding upon the Board.

We conclude that consumers familiar with registrant's "industrial outerwear, namely jackets, coats, vests, pants" sold under the mark WEATHERTECH would be likely to mistakenly believe, upon encountering applicant's mark WEATHERTEX for "embroidered and non-embroidered clothing apparel, namely shirts, T-shirts, sweatshirts, sport shirts, undershirts, golf shirts, dress shirts, blouses, sweaters jackets, coats, headwear, trousers, footwear, sweatpants, sweatshirts, socks and belts," that the goods originated from or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, we must resolve it 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).

**Decision:** The refusal to register is affirmed.