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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re NTA Enterprise, Inc.

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Serial No. 85478497

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

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

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Before Kuhlke, Bergsman and Ritchie, Administrative Trademark Judges.

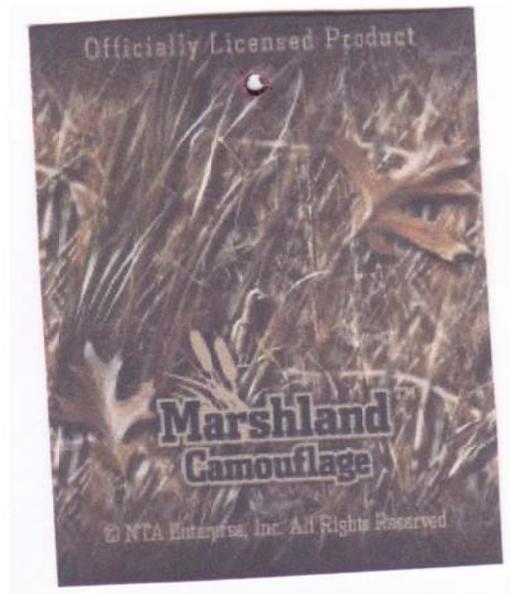
Opinion by Bergsman, Administrative Trademark Judge:

NTA Enterprise, Inc. (“applicant”) filed a use based application to register the mark MARSHLAND and design, shown below, for the following goods as amended:

Fabrics for the commercial manufacture of Camouflage articles by commercial manufacturers; Textile fabrics for the commercial manufacture of clothing by commercial manufacturers; Textile fabrics for use in the commercial manufacture of garments, bags, jackets, gloves, and apparel by commercial manufacturers; Camouflage fabric for use as a textile in the commercial manufacture of hunter clothing and hunter accessories by commercial manufacturers, in Class 24.



Applicant submitted the hangtag shown below as its specimen of use.



The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the previously registered mark MARSHLANDER and design, shown below, for "weatherproof and waterproof rainwear," in Class 25.¹

¹ Registration No. 1935600, issued November 14, 1995; renewed. The Trademark Examining Attorney also cited Registration No. 3162449 for the mark MARSHLANDER, in standard character form, owned by the same registrant for "rain coats; rain jackets; rain suits; rain trousers; rainwear; waterproof jackets and pants," in Class 25. However, that registration was cancelled for failure to file a Section 8 declaration of use.



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 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 1987). 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 design and registrant's mark MARSHLANDER and design are similar in terms of sound and appearance in that registrant's mark incorporates the word "Marshland." Although the marks must be considered in their entireties, including the design elements, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955) (different features may be analyzed to determine whether the marks are similar). In this case, where the marks consist of words and a design, the words are given greater weight because they would be used by consumers to request or identify the products. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). *See also Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed.

Cir. 1987); *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

The “ER” suffix does not significantly distinguish the word MARSHLAND from MARSHLANDER and it, in fact, highlights the similarity between the marks by drawing a connection between the place (*i.e.*, the marshland) and the people from that place (*i.e.*, a marshlander).

Moreover, the design element of applicant’s mark comprising “a silhouette of marsh reeds” is not so distinctive as to create a separate and distinct commercial impression simply underscores the connotation “marshland.” While the design element of registrant’s mark comprising the silhouette of a man in a boat is more distinctive than applicant’s design element, registrant’s design similarly underscores the connotation “marshlander” by engendering the commercial impression of a person from a marshland (*i.e.*, a marshlander) and does not serve to distinguish the marks.

When considering the marks in their entireties, we find that the marks are similar in terms of appearance, sound, meaning and commercial impression.

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

Applicant is seeking to register its mark for the following goods:

Fabrics for the commercial manufacture of Camouflage articles by commercial manufacturers; Textile fabrics for the commercial manufacture of clothing by commercial manufacturers; Textile fabrics for use in the commercial manufacture of garments, bags, jackets, gloves, and apparel by commercial manufacturers; Camouflage fabric for use as a textile in the commercial manufacture of

hunter clothing and hunter accessories by commercial manufacturers.

The cited registration is for rainwear. The term “rainwear” in registrant’s description of goods is broad enough to encompass camouflage 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 Trademark Examining Attorney has submitted four use-based, third-party registrations for goods listed in both the application and registration at issue. Third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-1786; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The registrations are listed.²

² We have not included the entire description of goods for each of the registrations. Only the relevant goods are listed.

Mark	Reg. No.	Goods/Services
TREBARK	1892882	Camouflage fabrics; ponchos
TIMBERGHOST	2636048	Textile photo-realistic camouflage fabrics for use in clothing; raincoats, rain pants, foul weather gear
S SANKO and design	3850967	Waterproof fabric for the manufacture of clothing; rainwear
FABRIC TO THE NEXT	3030393	Textile fabrics used to manufacture clothing; rainwear

We also note that the Trademark Examining Attorney submitted a copy of Registration No. 3611909 for the mark MIRAGEWEAR for hunting garments made of mesh-woven, mixed fiber fabrics and polyester camouflage fabrics, namely, ponchos. A poncho is often worn as a raincoat and, thus, may be considered to be rainwear.³ While the goods are not specifically fabrics and clothing, MIRAGEWEAR has some relevance because the registrant thought it important enough to highlight the fabric comprising the clothing item, rather than just setting forth ponchos.

The Trademark Examining Attorney also submitted the following Internet evidence advertising camouflage fabrics used in rainwear:

1. A copy of a web page from *AMAZON.com* advertising the sale of camouflage rainwear. *See also* the *Alibaba.com* webpage advertising camouflage raincoats;

³ **THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED)**, p. 1502 (2nd ed. 1987). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

2. A copy of a web page from *SeattleFabrics.com* advertising the sale of outwear fabric for “custom jackets and other applications” including “Camo Fleece-Super Waterproof/Breathable-Tex (2-Ply)” “perfect for hunting gear.” Seattle Fabrics also advertised “CAMO Micro Suede Polyester” which it touted as a fabric “perfect for clothing and other garments worn near the skin.”; and

3. A copy of a web page from *FashionFabricsClub.com* advertising camouflage fabric for outerwear.

Applicant’s fabrics are clearly different than the rainwear in the cited registration. However, it is undisputed that the fabric identified in the application may be used to create rainwear. In cases with similar records, we have found that fabrics and clothing are related. *See Dan River, Inc. v. Apparel Unlimited, Inc.*, 226 USPQ 186, 190 (TTAB 1985) (“Dan’elle” for jeans is likely to cause confusion with “Dan” for piece goods of cotton, rayon, or mixtures thereof, which includes denim and other textiles used in manufacture of jeans where opposer advertised its fabric for use in clothing, including hang tags indicating that the finished garments had been manufactured with opposer’s fabric); *In re Crompton Co., Inc.*, 221 USPQ 471, 472 (TTAB 1980) (confusion found likely in the contemporaneous use of REGENCY for textile fabrics and REGENCY for women's sportswear; confusion found likely also in the contemporaneous use of SPORTEEN for textile fabrics and SPORTEENS for various items of clothing where Examining Attorney submitted advertisements for clothing identifying its fabric); *Warnaco Inc. v. Adventure Knits, Inc.*, 210 USPQ 307, 315 (TTAB 1981) (LUV TOUCH for knitted piece goods is likely to cause

confusion with LOVE TOUCH for brassieres where the fabric is used to advertise the product). In fact the Board has previously noted that clothing and the fabric from which it is made are inherently related products.; *In re Mangel Stores Corp.*, 165 USPQ 22 (TTAB 1970) (confusion found likely in the contemporaneous use of PRESSCOTT for various clothing items and PRESCOTT for cotton piece goods because “there is an obvious intimate commercial relationship between piece goods and articles of apparel”); *In re Regal Garment Corp.*, 122 USPQ 397, 398 (TTAB 1959) (“In view of the common practice of fabric manufacturers supplying tags for use by garment manufacturers in connection with finished apparel, it seems inevitable that purchasers of wearing apparel would attribute common origin to ‘KISMET’ silk, ‘KISMET’ synthetic fabrics and ‘KISMET CASHMERE’ when they are made into finished apparel, such as dresses on the one hand and ladies’ coats on the other.”).

In view of the foregoing, we find that the goods are sufficiently related.

C. Established, likely-to-continue channels of trade.

Applicant focuses its argument that there is no likelihood of confusion on the channels of trade noting that its description of goods is for the commercial manufacture of products by commercial manufacturers.

It is the commercial manufactures that are buying a fabric line that will be incorporated into the identified clothing items. The individual clothing items will be sold under the retailers branding to the consumers.

* * *

... it is the commercial manufacturers that are the applicant’s customers. There is absolutely no

circumstance that the applicant's defined goods will be marketed to the defined market of commercial manufacturers that would give rise to the mistaken belief to these consumers that the goods come from a common source as the raingear of cited registrations as the cited registrations are clearly never to be marketed to such commercial manufacturers.⁴

The essence of applicant's argument is that applicant's products move in the defined channel of trade set forth in applicant's description of goods and, presumably, that the ultimate consumer will not encounter applicant's mark.⁵ However, in one of several examples, the Trademark Examining Attorney submitted an excerpt from the *Gore-Tex.com* website advertising GORE-TEX fabrics used in connection with different clothing products. In fact, as noted above, applicant's specimen is a hangtag which may be placed on finished products. The examining attorney asserts that "applicant's specimens of use in the present application clearly demonstrate that the mark is presented to the purchasers of the finished clothing articles to identify the fabric used in making the clothing."⁶ Applicant did not dispute this characterization of the specimen and the specimen includes the wording "Officially Licensed Product." Thus, although applicant contends that "[t]he examiner is attempting to base the refusal on some remote potential third party usage, which itself is not fairly supported by the record," applicant's own specimen of record supports this conclusion.⁷

⁴ Applicant's Brief, p. 2.

⁵ Applicant's Brief, p. 2.

⁶ Trademark Examining Attorney's Brief, p. 11.

⁷ Applicant's Brief, p. 3.

While applicant is correct that we analyze the du Pont factors based on the goods as identified, this does not preclude us from looking at evidence to understand how these goods and their accompanying marks travel through channels of trade in a particular industry. We further note that applicant's identification of goods does not preclude licensing and use of its mark downstream where registrant's retail consumers will be exposed to applicant's mark on rainwear. Therefore, the same consumers could encounter the marks under circumstances likely to give rise to the mistaken belief that the fabric and the raingear emanate from the same source even though applicant's fabrics are sold only to manufacturers.

[I]t is not an uncommon marketing practice in the clothing field to identify the fabric from which clothing items are made, including identifying the marks associated with such fabrics, in the advertisements for the finished clothing items. This tends to show that consumers of finished clothing items do come in contact with the finished clothing items and the mark used in connection with the fabric from which the clothing items are made.

In re Crompton Company, Inc., 221 USPQ at 472.

In view of the foregoing, we find that the goods may move in the same channels of trade.

D. The conditions under which and buyers to whom sales are made (i.e., "impulse" vs. careful, sophisticated purchasing).

Applicant argues that because its customers are limited to commercial manufacturers, they are sophisticated, careful purchasers thereby minimizing the likelihood of confusion.⁸ While that may be true, applicant's mark appears on

⁸ Applicant's Brief, p. 4.

hangtags affixed to finished products that may be sold to any consumer of camouflage product who may believe that the MARSHLAND fabric is somehow associated with the MARSHLANDER raingear.

E. Lack of any reported instances of confusion.

Applicant argues that its MARSHLAND fabrics and registrant's MARSHLANDER raingear have coexisted for "several full clothing seasons" without any reported instances of confusion.⁹ Applicant claimed February 11, 2011 as its dates of first use anywhere and in commerce. Thus, at the time applicant filed its brief, there had been two years of simultaneous use and without any evidence regarding the extent of the advertising and sales of applicant and registrant, there appears to have been little opportunity of confusion to have occurred.

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case). See: *In re Sieber & McIntyre, Inc.*, 192 USPQ 722 (TTAB 1976). Moreover, the test under Section 2(d) of the Statute is not actual confusion but likelihood of confusion.

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984). While evidence of actual confusion would strongly support a likelihood of confusion, the absence of any reported instances of confusion does not necessarily overcome a finding of likelihood

⁹ Applicant's Brief, p. 4.

of confusion. *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1027 (TTAB 2009).

E. Balancing the factors.

Because the marks are similar, the goods are related and may be encountered by the same consumers under circumstances likely to lead to the mistaken belief that the products emanate from the same source, we find that applicant's mark MARSHLAND and design for "fabrics for the commercial manufacture of camouflage articles by commercial manufacturers; textile fabrics for the commercial manufacture of clothing by commercial manufacturers; textile fabrics for use in the commercial manufacture of garments, bags, jackets, gloves, and apparel by commercial manufacturers; camouflage fabric for use as a textile in the commercial manufacture of hunter clothing and hunter accessories by commercial manufacturers" is likely to cause confusion with the mark MARSHLANDER and design for raingear.

Decision: The refusal to register applicant's mark is affirmed.