

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: May 14, 2014

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Len Druskin Inc.

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Serial No. 85590018

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Garrett M. Weber of Lindquist & Vennum LLP for Len Druskin Inc.

W. Kay H. Price, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

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Before Quinn, Cataldo and Masiello,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On April 5, 2012, applicant Len Druskin Inc. applied to register the mark shown below for “retail apparel stores” in International Class 35.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85590018, based upon applicant’s assertion of a bona fide intent to use the mark in commerce. The mark consists of the stylized wording “LEN” in all lower-case letters, with Blippo font in the color caramel. The color caramel is claimed as a feature of the mark.



The examining attorney refused registration of applicant's mark on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with the prior registered mark LENS in standard characters for, *inter alia*, "retail store services featuring clothing," in International Class 35.<sup>2</sup> In support of the refusal to register, the examining attorney made of record the following dictionary definition of "apparel" – "a word for clothes, especially in stores or other businesses, *Men's apparel is on the second floor.*"<sup>3</sup>

Applicant timely appealed. Both applicant and the examining attorney filed appeal briefs.

### **Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all 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

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<sup>2</sup> Registration No. 3684924 issued September 22, 2009. This registration also recites goods in Class 25 and additional services in Class 35.

<sup>3</sup> American English definition from macmillandictionary.com, Macmillan Publishers, Ltd. 2009-2012.

any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or 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.”).

Similarity of the Services and Channels of Trade

We turn first to the similarity of the services and the channels of trade, the second and third *du Pont* factors, respectively. Applicant’s services are “retail apparel stores” and registrant’s services include “retail store services featuring clothing.” The commonly understood meaning of “apparel,” as confirmed by the dictionary definition made of record by the examining attorney, is “clothes,” particularly in the context of clothing stores. To state the obvious, applicant’s retail apparel store services are identical to registrant’s retail store services featuring clothing. Because neither recitation of services specifies the types of clothing offered or their prices, both must be presumed to include all types of clothing at all price points. Thus, applicant’s services are identical to certain of the services offered by registrant.

Furthermore, with respect to these services, we presume that they are offered in all normal channels of trade, and that they are available to all potential classes of ordinary consumers. *See Citigroup Inc. v. Capital City*

*Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Because the services recited in the application are legally identical to the “retail store services featuring clothing” in the cited registration, we presume that the channels of trade and classes of purchasers are the same. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding the Board entitled to rely on this legal presumption in determining likelihood of confusion).

It is sufficient for a finding of likelihood of confusion if confusion is likely with respect to use of the mark on any service that comes within the description of services in the application or registration. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007). Accordingly, in our likelihood of confusion analysis, our findings under the second and third *du Pont* factors strongly support a finding of likely confusion.

#### Similarity of the Marks

We next consider the *du Pont* factor focusing on the similarity or dissimilarity of “the marks in their entirety 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) (quoting *du Pont*, 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). We also keep in mind that when, as here, marks would be used in connection with identical services, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007). Slight differences in marks do not normally create dissimilar marks. *See, e.g., In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (CAYNA similar to CANA); *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445-46 (TTAB 1977) (KIKS similar to KIKI).

Here, registrant’s mark is LENS and applicant’s mark is



The absence of the letter “S” from applicant’s mark slightly distinguishes it visually and aurally from the cited registered mark. However, the presence of the letter “S” at the end of registrant’s mark does not create an additional syllable or otherwise significantly change its appearance or sound from that

of applicant's mark. Nor does the presentation of applicant's mark in stylized form create a significant difference inasmuch as registrant's mark, in standard characters, may be depicted in any form, including the stylized lettering shown in the applicant's mark. *Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d at 1258.

With regard to meaning, applicant argues (brief, p. 1) that its mark "is the first name of the owner of the Applicant, Len Druskin, Inc." and thus "is immediately recognizable to consumer[s] as a first name." Applicant further argues (*Id.*) that "By contrast the registered mark is LENS, which is obviously a misspelling of the word LENSE." However, there is nothing in the record to support a finding that registrant's mark LENS will be perceived as anything but the common term "lens."<sup>4</sup> Furthermore, there is no evidence of record to indicate whether or the extent to which consumers viewing applicant's mark will be aware of applicant's corporate name, Len Druskin, Inc., or the name of its owner such that they would make the association between the mark and the first name of applicant's owner. Clearly, there are distinctions between the common optical meaning of the term "lens" and the term "len" which may be perceived as a given name, a coined term or possibly an acronym. However, the difference in connotation is not sufficient to overcome the similarities between the marks in appearance and sound.

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<sup>4</sup> Neither applicant nor the examining attorney made of record a definition of "lens" or "lense" during prosecution of the involved application.

Similarity in any one of the elements of sound, appearance, connotation, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion”); and *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted)). Therefore, even if the marks had different meanings, it would not necessarily mean there was no likelihood of confusion.

Simply put, registrant’s mark appears to be a pluralization, or possibly a possessive form, of applicant’s mark. Considering the marks in their entirety, we find that the marks are very similar in sight, sound, and overall commercial impression. The first *du Pont* factor also supports a conclusion that confusion is likely.

Conclusion as to Likelihood of Confusion

To the extent that any other *du Pont* factors for which no evidence was presented by applicant or the examining attorney may nonetheless be applicable, we treat them as neutral. In view of our findings that the marks are similar and the services are in part legally identical and move in the same channels of trade and to the same customers, we find that applicant’s

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mark is likely to cause confusion with the mark in the cited registration when used in association with applicant's services.

*Decision:* We affirm the examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).