

<p><b>This Opinion is Not a Precedent of the TTAB</b></p>
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Mailed: August 15, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Forshaw*

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Serial No. 85797042

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Paulo A. Dealmeida and Alex D. Patel of Patel & Almeida, PC,  
for Christian Forshaw.

Daniel S. Stringer, Trademark Examining Attorney, Law Office 103,  
Michael Hamilton, Managing Attorney.

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Before Quinn, Bergsman and Wolfson,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Christian Forshaw (“Applicant”) seeks registration on the Principal Register of  
the mark CALI FO\$HO (in standard characters) for

Hats; pants; shirts, in International Class 5.<sup>1</sup>

Applicant disclaimed the exclusive right to use “Cali.”

The Trademark Examining Attorney has refused registration of Applicant’s  
mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the

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<sup>1</sup> Application Serial No. 85797042 was filed on December 7, 2012, based upon Applicant’s  
claim of first use anywhere at least as early as August 4, 2010 and use in commerce at least  
as early as October 11, 2011.

ground that Applicant's mark is likely to cause confusion with the mark SOFOSHO, in standard character form, for "clothing – namely-shirts, sweatshirts, shorts, T-shirts, jackets," in Class 25.<sup>2</sup>

Our determination 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 goods. *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"). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

A. Similarity or dissimilarity and nature of the goods; established, likely to continue channels of trade and classes of consumers.

Applicant is seeking to register his mark for hats, pants and shirts. Registrant's mark is registered for shirts, sweatshirts, shorts, T-shirts, and jackets. Because shirts are in the description of goods in the application and registration, the goods are in part identical. Under this *du Pont* factor, the Trademark Examining Attorney need not prove, and we need not find, similarity as to each and every product listed

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<sup>2</sup> Registration No. 3266281, registered on July 17, 2007; Sections 8 and 15 affidavits accepted and acknowledged.

in the Class 25 description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in the application. *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, 1398 (TTAB 2007).

Because the goods described in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

B. Similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We now turn 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, 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.’” *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535

(TTAB 1988) (citations omitted). *See also In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Moreover, “[t]he 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*, 101 USPQ2d at 1721. *See also 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 mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, since the relevant goods are shirts, the average customer is an ordinary member of the general public.

Applicant's mark is CALI FO\$HO and the mark in the cited registration is SOFOSHO. The dominant part of Applicant's mark is the term FO\$HO because the term "Cali" is an abbreviation of "California" and, therefore, it is geographically descriptive.<sup>3</sup> It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), *quoting*, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1983) ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion"); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). For this reason, we disagree with Applicant's contention that the term "Cali" is the dominant part of Applicant's mark which engenders a strong commercial impression.<sup>4</sup>

That Applicant's mark CALI FO\$HO has a dollar sign where Registrant's mark has a letter "S" is inconsequential in a comparison of the marks. *See In Home Federal Savings and Loan Association*, 213 USPQ 68, 69 (TTAB 1982) (applicant's mark TRAN\$FUND is similar to TRANSFUND).

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<sup>3</sup> The Free Dictionary (acronyms.thefreedictionary.com) and Wikipedia (Wikipedia.org), "List of U.S. state abbreviations" attached to the March 29, 2013 Office action. In his June 24, 2013 Response to an Office Action, Applicant stated that "the term CALI is an abbreviated, slang term and an intentional misspelling of 'California.'"

<sup>4</sup> Applicant's Brief, pp. 5-6. *See also* Applicant's June 24, 2013 and December 29, 2013 Responses to Office Actions.

The term “Fosho” is a slang term meaning “for sure.”<sup>5</sup> Thus, the two marks have similar meanings and engender similar commercial impressions. Applicant’s mark means and engenders the commercial impression “California For Sure” and Registrant’s mark means and engenders the commercial impression “So For Sure.” As a result, purchasers familiar with Registrant’s SOFOSHO shirts are likely, upon encountering shirts bearing Applicant’s CALI FO\$HO mark, to mistakenly believe that Applicant’s CALI FO\$HO shirts are a line of SOFOSHO shirts made in California or having a California “look”.

Applicant asserts that his mark CALI FO\$HO engenders the commercial impression of “California Money.”

The addition of “\$” to the Applicant’s mark creates a strong commercial impression of *California money*. The cited mark creates no such commercial impression of *California money*. Accordingly, the addition of the dollar sign in Applicant’s Mark clearly distinguishes the marks in appearance, meaning, and commercial impression.<sup>6</sup> (Emphasis in the original).

We disagree. As indicated above, we find that the commercial impression engendered by Applicant’s mark is “California For Sure,” Applicant’s substitution of a “\$” for the letter “S” is inconsequential, and there is nothing in the way Applicant displays his mark that supports his argument. Applicant’s specimen of use of his mark is shown below.

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<sup>5</sup> NTC’S DICTIONARY OF AMERICAN SLANG AND COLLOQUIAL EXPRESSIONS, p. 146 (3rd ed. 2000); AMERICAN SLANG DICTIONARY, p. 126 (2006). 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).

<sup>6</sup> June 24, 2013 Response to an Office Action. See also Applicant’s Brief, pp. 7-8 and Applicant’s December 29, 2013 Response to an Office Action.



In terms of the marks' overall commercial impressions, the basic similarities outweigh any specific dissimilarity that might be apparent upon side-by-side comparison of the marks, whether those dissimilarities are considered alone or in combination.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

C. Balancing the factors.

Because the marks are similar, the goods are in part identical and the presumption that the goods move in the same channels of trade and are sold to the same classes of consumers, we find that Applicant's mark CALI FO\$HO for "hats; pants; shirt" is likely to cause confusion with the registered mark SOFOSHO for "clothing – namely-shirts, sweatshirts, shorts, T-shirts, jackets."

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