

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: May 13, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Packed House Publications, LLC*  
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Serial No. 85955911  
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Matthew H. Swyers of The Trademark Company, PLLC,  
for Packed House Publications, LLC

Eugenia K. Martin, Trademark Examining Attorney, Law Office 114,  
K. Margaret Le, Managing Attorney.

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Before Cataldo, Wolfson and Shaw,  
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Packed House Publications, LLC (“Applicant”) seeks registration on the Principal Register of the mark MASTERBAITER (in standard characters) for a wide variety of goods in International Class 25:<sup>1</sup>

Apparel for dancers, namely, tee shirts, sweatshirts, pants, leggings, shorts and jackets; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Baseball caps and hats; Capes for use in salons and barber shops; Chef’s hats; Children’s and

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<sup>1</sup> Application Serial No. 85955911 was filed on June 10, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; Children's and infants' apparel treated with fire and heat retardants, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; Children's and infants' cloth bibs; Clothing for babies, toddlers and children, treated with fire and heat retardants, namely, pajamas, jackets, shirts, pants, jumpers; Clothing items, namely, adhesive pockets that may be affixed directly to the inside of clothing for storage and safekeeping of personal items; Clothing shields, namely, pads applied to the underarms of shirts, blouses and sweaters; Clothing, namely, cowls and smoke ring scarves; Coats for men and women; Custom made to measure suits for men and women; Dressing gowns and bath robes; Embossed soles and heels of rubber or of plastic materials; Football boots and studs therefor; Footwear for men and women; Footwear for track and field athletics; Foundation garments worn around the midsection or thighs to keep the stomach in and create a slimming effect; Fur coats and jackets; Fur hats; Gift packages sold as a unit consisting primarily of a sweatshirt and also including a photo frame, a coffee mug, and a tote bag; Gloves for apparel; Golf pants, shirts and skirts; Halloween costumes and masks sold in connection therewith; Hat bands; Hats; Hats for infants, babies, toddlers and children; Headgear, namely, Hats, caps, scarves; Infant and toddler one piece clothing; Infants' shoes and boots; Insoles; Jackets and socks; Japanese style clogs and sandals; Jeggings, namely, pants that are partially jeans and partially leggings; Leather hats; Leg shielding device, attachable to and detachable from a person's pants, comprised of padding to shield the legs from flying debris when mowing with a string trimmer; Leotards and tights for women, men and children of nylon, cotton or other textile fibers; Masquerade costumes and masks sold in connection therewith; Men's and women's jackets, coats, trousers, vests; Mittens modified to cover the hand and an animal leash handle or other loop; Nurse's apparel, namely, Scrubs; Nursing apparel, namely, Scrubs; One piece garment for infants and toddlers; Overalls for use in salons and barber shops; Pajamas treated with fire and heat retardants; Panties, shorts and briefs; Paper hats for use as clothing items; Paper shoes used when going through metal detectors to keep feet and socks clean; Parts of clothing, namely, gussets for tights, gussets for stockings, gussets for bathing suits, gussets for underwear, gussets for leotards and gussets for footlets; Party hats; Perspiration absorbent strap to be used in the bill of a hat; Protective metal members for shoes and boots; Protective neck and arm guards made of neoprene or other materials to prevent wetsuit chafing; Puttees and gaiters; Rain hats; Rubber and latex costumes for use in the fashion industry; Sandals and

beach shoes; Sedge hats (suge-gasa); Shawls and headscarves; Shawls and stoles; Shirts and short-sleeved shirts; Shirts and slips; Shirts for infants, babies, toddlers and children; Shoes with hook and pile fastening tapes; Short-sleeved or long-sleeved t-shirts; Ski and snowboard shoes and parts thereof; Skirts and dresses; Sleepwear treated with fire and heat retardants; Sleeves worn separate and apart from blouses, shirts and other tops; Small hats; Snap crotch shirts for infants and toddlers; Socks and stockings; Sports caps and hats; Sports jerseys and breeches for sports; Swim wear for gentlemen and ladies; T-shirts; Toboggan hats, pants and caps; Tongue or pullstrap for shoes and boots; Top hats; Track and field shoes; Travel clothing contained in a package comprising reversible jackets, pants, skirts, tops and a belt or scarf; Viscous gel polymer sold as a component of finished custom cushioned footwear for non-orthopedic purposes and apparel; Waistband extender consisting of a button and button hole mounted on a strip of fabric that is inserted into the existing waistband of a garment; Water repelling leather shoes and boots; Waterproof jackets and pants; Waterproof leather shoes and boots; Wearable garments and clothing, namely, shirts; Welts for boots and shoes; Wet suits for water-skiing and sub-aqua; Women's hats and hoods; Woolly hats; Work shoes and boots.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), contending that Applicant's use of its mark for its identified goods is likely to cause confusion with



the mark  for "Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Caps; Footwear; Headwear; Ties; Tops" in International Class 25 and "Artificial fishing bait; Fish attractants; Fishing tackle" in International Class 28.<sup>2</sup>

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

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<sup>2</sup> Reg. No. 3762454; registered March 23, 2010.

Applicable Law

Our determination under Trademark Act Section 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

The Goods

We start with a comparison of the goods, which are in part identical. For example, both the registration and Applicant’s application include in their identification of goods the following: “athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms.” In addition, the cited registration covers “caps” and “headwear” of all types while Applicant’s goods include various types of caps and headwear such as “baseball caps,” “hats,” “headgear, namely, hats, caps, scarves,” and “headscarves.” The registered mark also covers “footwear” and “tops”; Applicant’s goods include “footwear for men and

women; footwear for track and field athletics” as well as “shirts and short-sleeved shirts” and “short-sleeved or long-sleeved t-shirts.” Although Applicant argues that the goods are unrelated because its mark “is used with humorous t-shirts and apparel”<sup>3</sup> while the cited mark “is used exclusively with fishing bait,”<sup>4</sup> it is well established that the goods must be compared as they are identified in the application and registration, and not as how they may be used in the marketplace. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application”) (quoting *Octocom Sys., Inc. v. Houston Comps. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009) (“we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application and the registration at issue ... we may not limit or restrict [the goods] listed in the cited registration based on extrinsic evidence”). Nonetheless, the registrant’s webpages (attached to Joseph Sewall’s declaration), upon which Applicant relies, do not support Applicant’s statement that registrant sells clothing exclusively in connection with fishing bait.<sup>5</sup> Accordingly, the second *du Pont* factor strongly favors a finding of likelihood of confusion. *See In re Max Capital Group*

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<sup>3</sup> 4 TTABVUE at 14.

<sup>4</sup> 4 TTABVUE at 15.

<sup>5</sup> We also discount the overall probative value of Mr. Sewell’s declaration in that his position (if any) with the company has not been disclosed; as the declaration is written he appears to be an unrelated third party without first-hand knowledge of registrant’s business.

*Ltd.*, 93 USPQ2d 1243, 1244 (TTAB 2010); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008) (“The identity, at least in part, between applicant’s and registrant’s goods is a factor that weighs heavily against applicant in the likelihood of confusion analysis.”).

Channels of Trade; Classes of Purchasers

Because the goods in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers for these goods 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). Moreover, the goods are basic consumer items that would be sold to ordinary consumers having no special sophistication. The goods are not expensive; Applicant indicates it prices its t-shirts at \$24.99 per shirt.<sup>6</sup> Registrant’s apparel ranges in price from £12.95 to £33.95.<sup>7</sup> “When products are relatively low-priced and subject to impulse buying, the risk of

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<sup>6</sup> Exhibit 3, affidavit of Joseph Sewell, attached to Applicant’s response of March 21, 2014. We note the statement in Applicant’s brief of a price point of \$19.99 for the shirts, but consider this to be a typographical error.

<sup>7</sup> *Id.* There is nothing in the record to confirm the conversion rate into U.S. dollars for registrant’s goods, but the price range would be about \$20 to \$53. See, e.g., conversion websites [www.google.com](http://www.google.com); [www.advfn.com](http://www.advfn.com); and [www.currencyconverter.co.uk](http://www.currencyconverter.co.uk).

likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); see *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). Accordingly, the third and fourth *du Pont* factors also favor a finding of likely confusion.

### The Marks

We next consider the marks in their entirety as to appearance, sound, connotation and commercial impression, to determine the similarity or dissimilarity between them. *In re Vittera Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *du Pont*); *Palm Bay*, 73 USPQ2d at 1692. When marks appear on identical goods or services, as they do here, the degree of similarity between the marks necessary to support a conclusion of likely confusion is less than would be the case if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The test, under the first *du Pont* factor, 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 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 Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014).

Applicant's mark is MASTERBAITER. The registered mark is a combination of two design elements and the word MASTERBAIT. The terms "masterbait" and "masterbaiter" are readily recognized as misspellings of the words masturbate and masturbator. The Collins dictionary definition of masturbate is as a verb meaning "to manipulate one's own genitals,"<sup>8</sup> and both the Collins and Merriam-Webster dictionaries indicate that "masturbator" is a noun derived from the verb. The "-er" form used by Applicant serves the same function as the "-or" ending of masturbator.<sup>9</sup> The literal portion of the registered mark and Applicant's entire mark therefore have the same connotation. Indeed, while Applicant asserts that its t-shirts are "designed to attract very specific consumers, namely, men and women aged 20+ with a sense of humor,"<sup>10</sup> registrant's clothing may have a similar humorous bent to them. We note that registrant's web pages, attached to Mr. Sewell's declaration, are slightly off-color; they display the tag line "MasterBait, Keeps Them Coming!" and display a photograph of a man holding a fish while lying on his back in a somewhat lewd or suggestive posture. Whatever prurient meaning Applicant contends will attach to its mark will likely attach as readily to registrant's mark.

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<sup>8</sup> From Collins American English Dictionary at <http://www.collinsdictionary.com>, 6 TTABVUE at 28.

<sup>9</sup> The form is "used with many verbs to make nouns meaning someone or something that performs an action." From MacMillan Dictionary at <http://www.macmillandictionary.com>, attached to the Final Office Action of April 18, 2014.

<sup>10</sup> 4 TTABVUE at 16.



The marks are similar in appearance and pronunciation as well. Applicant argues that the leaping fish design in registrant's mark is the dominant feature of registrant's mark and thus distinguishes it from Applicant's mark. Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). On the other hand, more or less weight may be given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Id.* For a composite mark containing both words and a design, the word portion is usually the dominant feature of the mark because it is more likely to be impressed upon a purchaser's memory and to be used when requesting the goods. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)); TMEP §1207.01(c)(ii); see *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)). Here, the term "MASTERBAIT" is the larger portion of the mark, is emphasized visually by the wavy lines curving underneath the term, and stands out because of the double entendre created by the play on "masturbate." The leaping fish design, on the other hand, reinforces the suggestion that the mark is for fish food, i.e., "bait," intended to be used by one skilled in baiting one's hook and fishing, and thus has a direct

relation to a characteristic of the goods and is of lesser significance. For these reasons, the literal portion of the mark, MASTERBAIT, dominates its overall commercial impression. Both marks share the overall commercial impression of being slightly racy, and the addition of the fish design in registrant's mark, while reinforcing the apparent double entendre created thereby, does not obviate this similarity.

Applicant further argues that the cited mark is weak. In this regard, Applicant submitted copies of ten registrations for marks that incorporate the term "BAIT" or "MASTER" together with other terms. These marks have no probative value.<sup>11</sup> First, such registrations are not evidence of use of the marks shown therein and, therefore, are not proof that consumers are familiar with said marks so as to be accustomed to the existence of similar marks in the marketplace. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Second, only five of these marks have been registered for clothing; the other marks have been registered for fishing products and have no bearing on the likelihood of confusion issue before us, which as discussed above is based upon the identity in part of the clothing items recited in the involved application and cited registration, and not the fishing gear recited in the registration. The five clothing marks are: BAIT, Reg. No. 4329378;

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<sup>11</sup> Indeed, of the ten submitted registrations, only one uses both terms in the mark, namely, the mark BAITMASTER, which has been registered for "preserved fish bait; live fish bait." Reg. No. 1955824; renewed.



, Reg. No. 2608358; SKINBAIT, Reg. No. 4481141; XCITE BAIT, Reg. No. 3965333, and BAM BAIT, Reg. No. 4182503. The marks in these registrations are distinguishable on their face. With the exception of BAIT,<sup>12</sup> they contain additional matter that differentiates them from either the mark of the cited registration or the involved application. And the fact that BAIT has been registered for “tee shirts”<sup>13</sup> does not show that MASTERBAIT is weak for clothing. Thus, the third-party registrations have no probative value for purposes of demonstrating the asserted weakness of registrant’s MASTERBAIT mark for the goods identified therein or for showing that the term “masterbait” has a particular significance when it comes to clothing. *See Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff’d unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). *Cf. In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996).

Accordingly, the first *du Pont* factor favors a finding of likelihood of confusion.

### Conclusion

We have considered all of the evidence of record as it pertains to the relevant *du Pont* factors. We have carefully considered Applicant’s arguments and evidence, even if not specifically discussed herein, but have not found them persuasive. In view of our findings that the goods are in part identical, the marks are confusingly similar, the trade channels are related and the classes of consumers are the same,

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<sup>12</sup> Reg. No. 4329378; issued April 30, 2013.

<sup>13</sup> The registration also covers “bags and cases specially adapted for holding or carrying portable telephones and telephone equipment and accessories; backpacks.”

we find that Applicant's mark, when used on the goods set forth in Applicant's application, is likely to be confused with registrant's mark for the goods set forth in the cited registration.

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