

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Active Angelz, LLC

Serial No. 86347651

Robert Hart of Apogee Law Group P.C.
for Active Angelz, LLC

Edward Nelson, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

Before Cataldo, Wolfson, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Active Angelz, LLC (“Applicant”) seeks registration on the Principal Register of the mark ALII in standard characters for “Athletic apparel, namely, shirts, pants, jackets, headwear, hats and caps, undergarments, athletic uniforms and specifically

excluding footwear [sic]” in International Class 25.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark ALI COLLECTION in standard characters, with “COLLECTION” disclaimed, for “footwear” in International Class 25.²

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration. When the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a 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 Co.*, 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 relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *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.”).

¹ Application Serial No. 86347651 was filed July 24, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on allegations of first use and first use in commerce of August 30, 2013.

² Registration No. 4163947 issued June 26, 2012.

A. Similarity of the Marks

With respect to the marks, we must compare them “in their entireties 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 test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicant’s proposed mark is ALII in standard characters, and the mark in the cited registration is ALFI COLLECTION, also in standard characters. Both marks contain the nearly identical dominant term ALII and ALFI, and therefore share a significant visual and phonetic similarity. See, e.g., *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (affirming Board’s finding that COMMCASH and COMMUNICASH are “strikingly similar in appearance, sound and in the commercial impression engendered”); *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (considering the singular and plural forms of a term “the same mark” for purposes of a likelihood of confusion analysis). As the first part of Registrant’s mark, the term ALFI is “most likely to be impressed upon the mind of a purchaser and remembered.”

Presto Products Inc. v. Nice-Pak Products, Inc., 9 USPQ2d 1895, 1897 (TTAB 1988). We further find that ALI'I dominates Registrant's mark because the other wording, COLLECTION, is merely descriptive of the goods and has been disclaimed, and consumers would not be inclined to rely on the disclaimed wording as source indicating. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). Considering the marks in their entireties, we find the marks are very similar in appearance, pronunciation, connotation and overall commercial impressions, particularly in the context of the related goods at issue, as discussed *infra*.

Applicant contends that the marks look and sound different because "ALII is one word and one syllable while Registrant's mark is ALI'I COLLECTION, two words and four syllables."³ Even while we remain mindful that "there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner," *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012), Applicant's proposed syllable counts seem impossible. Moreover, this same principle allows for the possibility that consumers would pronounce ALII exactly the same way as they pronounce the ALI'I portion of Registrant's mark. As for the difference in the number of words in the marks, this certainly is not dispositive, and, as noted above, the additional descriptive word, COLLECTION, in the registered mark does little to distinguish the marks.

³ 7 TTABVUE 9.

Given the similarity in sight, sound, connotation and commercial impression of the marks in their entireties, the first *du Pont* factor weighs in favor of likely confusion.

B. Relatedness of the Goods and Trade Channels

We next address the second and third *du Pont* factors, the similarity or dissimilarity of the goods and channels of trade. The test is not whether consumers would be likely to confuse the goods, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding of likelihood of confusion, the goods need not be identical or even competitive. “Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or there is an association or connection between the sources of the goods.” *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). We must focus on the goods as identified in the application and cited registration, not on any extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

While Applicant’s exclusion of footwear in its identification of goods eliminates any direct overlap with the identification of footwear in the cited registration, the

record nonetheless includes evidence of the market relatedness of footwear and the athletic apparel identified in the subject application. For example:

- An article from the Reuters online news outlet discussing a report on “The US Athletic Apparel and Footwear Industry Outlook to 2015.”⁴
- An article on the MarketResearch.com website on the same report, referring to the “athletic apparel and footwear market.”⁵
- A third-party registration for BEBOP for various types of footwear and apparel, Registration No. 4744796.⁶
- A third-party registration for REIGN + STORM for various types of footwear and apparel, Registration No. 4736530.⁷
- A third-party registration for JACQUES VALMONT for footwear and athletic apparel, as well as other clothing items, Registration No. 4737878.⁸
- A third-party registration for WEST COAST LONDON for athletic apparel and various types of footwear, Registration No. 462730.⁹
- A third-party registration for MAVERICK MULTISPORT TRIATHLON TEAM SWIM. BIKE. RUN and design for athletic apparel, specifically including footwear, Registration No. 4631360.¹⁰

⁴ May 28, 2015 Office Action at 5-8 (reuters.com).

⁵ *Id.* at 2-4 (marketresearch.com).

⁶ *Id.* at 13-14.

⁷ *Id.* at 15-17.

⁸ *Id.* at 18-21.

⁹ November 6, 2014 Office Action at 5-6.

¹⁰ *Id.* at 7-9.

- A third-party registration for CRUSH EVERYTHING for athletic apparel, specifically including footwear, Registration No. 4631437.¹¹

The articles discuss athletic apparel and footwear as a single industry. The use-based third-party registrations, which cover both types of goods, suggest that apparel and footwear may emanate from the same source *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (“The use-based, third-party registrations . . . also have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.”); *see also In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). This evidence demonstrates that footwear and athletic apparel are related goods. “Moreover, the greater the 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.” *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

We reject Applicant’s attempt to distinguish the goods based on restrictions outside the identification of goods in the cited registration. Applicant alleges that the registrant’s goods actually are narrower than what is set forth in the identification, as they allegedly are “ultra-premium” and “environmentally conscious” footwear.¹²

¹¹ *Id.* at 10-11.

¹² 7 TTABVUE 13.

Applicant claims that this demonstrates a lack of relatedness to its athletic clothing. However, as the identified “footwear” in the cited registration includes no such limitations, Applicant’s argument runs afoul of the settled principle that “the identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issue.” *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). Thus, the goods in the application and cited registration must be considered related.

Turning to the trade channels, the footwear in the cited registration, for which the identification is unrestricted, is presumed to move in all channels of trade normal for such goods and is presumed to be available to all potential classes of ordinary consumers. *See id.* (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”). While Applicant’s apparel is athletic in nature, the footwear in the cited registration is broad enough to include athletic footwear that moves in the same channels of trade. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (“Thus, where the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described.”). The articles on the athletic apparel and footwear industry, noted above, also support a finding that the goods share the same trade channels. Moreover, footwear and athletic apparel are both ordinary consumer goods sold to the general public. Applicant’s

goods and footwear, as identified in the cited registration, move in the same trade channels to the same class of purchasers.

C. Applicant's Prior Registration

In arguing against likely confusion in this case, Applicant relies on the recent issuance of a registration to it for the mark



for athletic apparel.¹³

According to Applicant, the registration of the mark above and the refusal of the application at issue in this case represent inconsistent actions, given that both marks contain the term ALII. Applicant argues that the mark at issue in this appeal should therefore be approved for publication. As an initial matter, each application must be considered on its own record to determine eligibility to register. *In re Cordua Rests., Inc.*, 823 F.3d 954, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016); *see also In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”). In addition, we note that Applicant’s prior registration involves a composite mark with a design element and multiple words in a stylized font. Thus, unlike the single-term standard character

¹³ Registration No. 4906097 issued February 23, 2016.

mark in the present application, ALII, the mark in the prior registration includes additional matter that could serve to differentiate it from ALFI COLLECTION in the cited standard character registration. For the foregoing reasons, we do not agree with Applicant that its prior registration overcomes the other factors weighing strongly in favor of likely confusion in this case.

II. Conclusion

Based on the similarity of the marks and the relatedness of the goods at issue, moving in the same channels of trade, we find that Applicant's mark is likely to cause confusion with the mark in the cited registration.

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