

This Opinion is not a
Precedent of the TTAB

Mailed: June 21, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re V Sky, LLC
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Serial No. 86367112
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Joseph Sutton of Law Offices of Ezra Sutton PA,
for V Sky, LLC.

Cassandra Anderson, Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

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Before Kuczma, Greenbaum and Gorowitz,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

V Sky, LLC (“Applicant”) seeks registration on the Principal Register of the mark

SO FETCH! (in standard characters) for:

Dresses; Jeans; Pants; Shorts; Sweaters; Tops in
International Class 25.¹

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), based on a likelihood

¹ Application Serial No. 86367112 was filed on August 14, 2014, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

of confusion with the marks FETCH (standard characters) set forth in Registration No. 4051134², and FETCH and Design set forth in Registration No. 4054327³:



The Cited Registrations are owned by Fetchsport LLC, for “clothing not for pet or animal use, namely, T-shirts, baseball caps, gym shorts, headgear, namely, hats, shorts, tracksuits, dresses, knit shirts, pique shirts, shirts, shortsleeved [sic] or long-sleeved t-shirts, skirts and dresses, and polo shirts” in International Class 25.

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

I. Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the 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). Here, the relevant considerations are the similarities between the marks, the relatedness of the goods, the similarity of the customers and trade channels of the goods, and the number and nature of similar

² Registration No. 4051134, issued November 8, 2011.

³ Registration No. 4054327, issued November 15, 2011.

marks used on similar goods. See *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1084 (Fed. Cir. 2014); *In re Viterra Inc.*, 671 F. 3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). We considered all of the evidence as it pertains to the relevant *du Pont* factors, as well as Applicant's arguments (including evidence and arguments not discussed in this opinion). To the extent any other *du Pont* factors for which no evidence was presented may nonetheless be applicable, we treat them as neutral.

A. Similarity of the Goods and Channels of Trade

We first consider the *du Pont* factors involving the similarity or dissimilarity of Applicant's goods (dresses; jeans; pants; shorts; sweaters; tops), in relation to the goods in the cited Registrations (t-shirts, baseball caps, gym shorts, headgear, namely, hats, shorts, tracksuits, dresses, knit shirts, pique shirts, shirts, short-sleeved or long-sleeved t-shirts, skirts and dresses, and polo shirts), and their channels of trade and classes of consumers.

To the extent the identifications of goods in the subject application and the Cited Registrations include dresses, shorts and tops (*i.e.*, t-shirts, knit shirts, pique shirts, shirts, short-sleeved or long-sleeved t-shirts and polo shirts), the goods are identical in-part. When determining the similarity of Applicant's and Registrant's goods, it is sufficient if likelihood of confusion is established for any item encompassed by the identification of goods for that Class. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). While the remaining goods are also clothing, we need not discuss the similarity of all of Applicant's goods because 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. *Id.*; *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

Neither the present application nor the Cited Registrations place any significant limitations⁴ on trade channels in which the goods move or the customers who purchase the goods. Because Applicant's and Registrant's goods partially overlap, they are identical in part, and we can presume that they are provided in the same channels of trade and to the same classes of purchasers. *In re Viterra Inc.*, 101 USPQ2d at 1908 (absent restrictions in the application and registration, identical goods are presumed to travel in the same channels of trade to the same class of customers; the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Accordingly, the second and third factors favor a finding of likelihood of confusion.

B. Similarity of the Marks

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in their entirety that confusion as to the source of the goods offered under Applicant's and Registrant's marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

⁴ The Cited Registrant's goods are "clothing not for pet or animal use . . .". Inasmuch as "clothing" is the terminology used to describe items worn by human beings, this language in the Cited Registrant's identification of goods does not limit Registrant's goods.

Because cited Registration No. 4054327 (FETCH and Design) arguably contains additional points of difference with Applicant's mark, we confine our analysis to the issue of likelihood of confusion between Applicant's mark and the cited registration for the mark FETCH in standard character form. That is, if confusion is likely between those marks, there is no need for us to consider the likelihood of confusion with the cited registration for the mark with design elements, while if there is no likelihood of confusion between Applicant's mark and the cited mark in standard characters, then there would be no likelihood of confusion with the mark with design elements. *See, e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

"FETCH" is the dominant feature in Applicant's mark SO FETCH! The addition of "SO" and "!" in Applicant's mark do not change the commercial impression of "FETCH" used in the mark. In this case, adding the term "SO" to the registered mark does not obviate the similarity between the compared marks, unlike, for example, adding "All" to "Clear" (*see Lever Bros. Co. v. The Barcolene Co.*, 463 F.2d 1107, 174 USPQ 392 (CCPA 1972)). Indeed, the additional elements "SO" and "!" in Applicant's mark enhance the similarity conveying that the mark is "very" "fetch," thereby promoting the same commercial impression as Registrant's mark FETCH.

Although we compare the marks in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra*, 101 USPQ2d at 1908. Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Here, FETCH is the term in Applicant's

mark that forms the greatest commercial impression, and it is identical to Registrant's mark.

Where the goods of Applicant and the cited Registrant are identical in part, as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *also see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004). The slight differences between the marks do not overcome the likelihood of confusion particularly when Applicant's mark and Registrant's mark are for clothing. *In re Ithaca Indus., Inc.*, 230 USPQ 702, 704 (TTAB 1986).

C. Number and Nature of Similar Marks in Use on Similar Goods

Applicant contends that Registrant's mark FETCH is weak and that the USPTO has already determined that the mark "SO FETCH" in Registration No. 3955822, and Registrant's marks FETCH and FETCH and Design, are sufficiently different for purposes of whether there is a likelihood of confusion. Thus, Applicant maintains that its mark SO FETCH! can co-exist on the register with the cited mark.⁵

Applicant's contention presumes that the prior registration of a particular term should be of some persuasive authority in handling later applications involving similar marks. However, we are not privy to the record of the prior proceeding and are bound to make a decision based on the record before us. *See AMF Inc. v. Am.*

⁵ Applicant's Appeal Brief (7 TTABVUE 3-4).

Leisure Prods., Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994).

Further, Applicant's argument that because there are "167 live marks on the Register in Class 25 and coordinated (related) classes which include the word FETCH, marks containing the word "FETCH" are entitled to a narrower scope of protection."⁶ This argument is not persuasive, particularly given that of the "167 live marks" mentioned by Applicant, only four registrations for marks containing the word "FETCH" were introduced into the record.⁷

We recognize that third-party registration evidence may show that a term carries a well-recognized descriptive or suggestive connotation in the relevant industry and therefore may be considered somewhat weak. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015).

⁶ Applicant's Appeal Brief (7 TTABVUE 3).

⁷ Registration Nos. 3440111 for FETCH LIFE for knot shirts; long-sleeved shirts; polo shirts; short-sleeved or long-sleeved T-shirts; short-sleeved shirts; sweat shirts; T-shirts; fleece pullovers; fleece vests; jackets; men and women jackets, coats, trousers, vests; wind-jackets; baseball caps; caps; knitted caps; skull caps; 4199544 for FETCH THE DAY for apparel, namely, tee shirt, ball caps, wool caps, socks, hooded sweatshirts, sleepwear, slippers, flip flops (and other goods in Class 9); 4284607 FARFETCH.COM (stylized) for clothing, namely, belts for clothing, arm warmers, corsets, gloves, hoods, jackets, mufflers, ties, tops, bottoms, shirts, dresses, skirts, blouses, shorts, pants, skirts, socks, pants; infant and toddler one piece clothing; clothing for athletic use, namely, padded shorts, padded pants, padded shirts, padded elbow compression sleeves being part of an athletic garment; clothing for wear in judo practices; clothing for wear in wrestling games; maternity clothing, namely, maternity shirts, pants, shorts, skirts and dresses; footwear; headgear, namely, hats, caps (and services in Classes 35, 42 and 45); 4387746 for GET YOUR FEETCH ON for apparel, namely tee shirts.

However, while “... extensive evidence of third-party use and registrations is ‘powerful on its face,’” and is relevant to show that a segment common to both parties’ marks may have “a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak,” such evidence has not been submitted in this case. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 116 USPQ2d at 1136. Applicant submitted no evidence showing third-party use of similar marks. More importantly, as discussed above, Applicant submitted only four registered marks that include the term “FETCH,” all of which are phrases having different connotations from Applicant’s mark, *i.e.*, FETCH LIFE, FETCH THE DAY, FARFETCH.COM and GET YOUR FETCH ON. Thus, such marks convey significantly different commercial impressions from Applicant’s mark SO FETCH! and from Registrant’s mark FETCH. Moreover, the Board is not bound by the prior decisions of examining attorneys in allowing marks for registration. It has been noted many times that each case must be decided on its own facts. *See 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 [applicant’s] application, the USPTO’s allowance of such prior registrations does not bind the Board or this court.”); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987). Thus, the four third-party registrations submitted by Applicant do not compel a different result.

Applicant contends the issuance of the Cited Registration subsequent to the issuance of Registration No. 3955822 for the mark SO FETCH means that the USPTO “already has determined that the marks SO FETCH and FETCH are sufficiently different for purposes of whether there is a likelihood of confusion.” For consistency, Applicant argues that its mark SO FETCH! “should be approved as being distinguishable” from the Cited Registration.⁸ However, Registration No. 3955822 has been cancelled. Cancelled registrations are not evidence of anything except that they were filed. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”). Even if Registration No. 3955822 was not cancelled, the existence of Registrant’s allegedly confusingly similar registered mark cannot aid Applicant’s effort to register another mark which so resembles Registrant’s marks as to be likely to cause confusion. *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); *AMF Inc. v. Am. Leisure Prods., Inc.*, 177 USPQ at 269-70; *In re Total Quality Grp. Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

D. Conclusion

Because the goods are in-part identical, the channels of trade and classes of purchasers are the same, and the marks are similar, confusion is likely between Applicant’s mark SO FETCH! and the mark FETCH in the Cited Registration.

Decision: The refusal to register Applicant’s mark SO FETCH! is affirmed.

⁸ Applicant’s Appeal Brief (7 TTABVUE 4).