

This Opinion is not a  
Precedent of the TTAB

Mailed: November 1, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re Sweet and Vicious, LLC*  
—

Serial No. 86636337

Ernest B. Lipscomb of Barnwell Whaley  
for Sweet and Vicious, LLC

John M. Gartner, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

—  
Before Mermelstein, Shaw, and Gorowitz,  
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Sweet and Vicious, LLC (“Applicant”) seeks registration on the Principal Register  
of the mark PICK ME UP (in standard characters) for

“Bodyshaping undergarment clothing worn over the  
buttock that lifts the buttocks without padding,” in  
International Class 25.<sup>1</sup>

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

—  
<sup>1</sup> Application Serial No. was filed on May 20, 2015, based upon Applicant’s allegations of first  
use of the mark anywhere and first in commerce on or before March 31, 2009, under Section  
1(a) of the Trademark Act.

Applicant's mark so resembles the registered mark PICK-ME-UP (in standard characters) for "body tape in the nature of a bra consisting of breathable fabric backed with an adhesive layer for enhancing body contour by lifting the breasts,"<sup>2</sup> as to cause confusion, mistake, or to deceive.

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

I. Likelihood of confusion.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarities or dissimilarities of the marks.

We start our analysis with a determination of the similarity of the marks. In comparing the marks we must consider the appearance, sound, connotation and

---

<sup>2</sup> Registration No. 3442096, issued June 3, 2008; Section 8 declaration accepted.

commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant's mark is PICK ME UP and the cited mark is PICK-ME-UP. The only difference between the marks is the use of hyphens in the cited mark. It has long been held that when the only difference between two marks is the use of hyphens in one of the marks, the marks are substantially identical. *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010). (In comparing the marks MAG-NUM STAR and MAGNUM CROSSFIRE, "the initial term in both marks is essentially identical; the hyphen in the Mag Instrument's mark does not distinguish them."). *See also, Charrette Corp. v. Bowater Communication Papers Inc.*, 13 USPQ2d 2040, 2042 (TTAB 1989) (PRO-PRINT identical except for hyphen to PROPRINT); *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n. 1 (TTAB 1978) ("Fast-Finder" with hyphen is in legal contemplation substantially identical to "Fastfinder" without hyphen); and *In re Champion Int'l Corp.*, 196 USPQ 48, 49 (TTAB 1977) ("[N]o distinction, vague or otherwise, can be drawn between 'CHECK MATE' with or without a hyphen between the words so that for purposes herein they are identical.").

Accordingly, we find that Applicant's mark is essentially identical to the mark in the cited registration and thus, the first *du Pont* factor strongly favors a finding of likelihood of confusion.

B. Number and nature of similar marks in use on similar goods.

Applicant contends that there is no likelihood of confusion because the cited mark is only entitled to a narrow scope of protection because “the USPTO register reflects a plethora of identical PICK ME UP and closely similar marks some of which are in the same class as the Registrant’s mark.” Appeal Brief, 8 TTABVUE 9. With its request for reconsideration, Applicant submitted copies of fourteen applications and registrations from the Trademark Status & Document Recovery Database (TSDR). Three of these documents were applications. Third-party applications have no evidentiary value, other than to show the applications were filed. *In re Toshiba Medical Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 n.7 (TTAB 2007); *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002). Therefore, we give no consideration to the three applications.

As for the registrations, Applicant argues that “[t]he law recognizes the marketplace reality that, where the same and similar marks are widely used, consumers are able to differentiate among them.” App. Brief at 7. According to Applicant, the third-party registrations are evidence that the cited registration has little marketplace strength. We disagree.

While the registrations do show that several parties have seen fit to register RAINIER marks, “[t]he purchasing public is not aware of registrations reposing in the Patent [and Trademark] Office.” *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973). Referring to this type of strength, precedent dictates that “registration evidence may not be given any weight.” *E.g., Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200,


22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (citing *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1407, 177 USPQ 268, 269 (CCPA 1973)). In any event, “the existence of confusingly similar marks already on the register will not aid an applicant to register another confusingly similar mark.” *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (citing *In re Helene Curtis Indus., Inc.*, 305 F.2d 492, 134 USPQ 501 (CCPA 1962)).

*In re Morinaga Nyugyo Kabushiki Kaisha*, — USPQ2d —, App. No. 86338392, slip op. at 16 (TTAB July 16, 2016) (precedential).<sup>3</sup> In addition, Applicant’s third-party registrations are significantly different from the registration Applicant seeks. While ten of the registrations are for marks consisting of or containing the phrase PICK ME UP, none of these are for articles of clothing.<sup>4</sup> The submission of ten registrations for similar marks covering *unrelated* goods and services does not establish that the mark PICK ME UP is only entitled to a narrow scope of protection. *See Juice Generation, Inc. v. GS Enters. LLC*, 740 F.3d 1334, 115 USPQ 2d 1671, 1675 (Fed Cir. 2015)

---

<sup>3</sup> While it is true that other cases indicate that third-party registrations are relevant — sometimes highly relevant — those cases concern not marketplace strength, but rather a mark’s *conceptual* strength, *i.e.*, its distinctiveness. In that situation, third-party registrations are probative of how a term is used, and whether it is suggestive of the relevant goods or services. *See In re Morinaga Nyugyo Kabushiki Kaisha*, slip op. at 15-17. For instance, Applicant quotes *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015). But as can be seen from the quoted passage, “[a] real evidentiary value of third party registrations *per se* is to show the sense in which . . . a mark is used in ordinary parlance.” App. Brief. at 10 (citing 2 McCarthy on Trademarks and Unfair Competition § 11:90 (4th ed. 2015)) (underlining added; alteration in original). But Applicant does not suggest that the registrations demonstrate that the registered marks are suggestive, descriptive, or generic with respect to Applicant’s goods, and therefore weak.



<sup>4</sup> The final registration, Registration No. 3899206, is for the mark  for “duffel bags; handbags, headwear; hoods; T-shirts; visors.” While this registration includes articles of clothing, given the differences in the marks, this registration does not affect the strength of the mark in the cited registration.

(record of 25 registered or unregistered marks in the food service industry that included the phrase “PEACE LOVE” evidenced that the phrase was weak). Further, our determination would not change if we had found the mark to be weak because even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

C. Similarities or dissimilarities of the goods.

Next, we look at the similarity of the goods, the channels of trade, and the class of customers. When determining the relationship between the goods,

[i]t is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the goods, their channels of trade and/or classes of purchasers.

*In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014).

Applicant’s goods are identified as “bodyshaping undergarment clothing worn over the buttock that lifts the buttocks without padding” and the registrant’s goods are identified as “body tape in the nature of a bra<sup>5</sup> consisting of breathable fabric backed with an adhesive layer for enhancing body contour by lifting the breasts.”

---

<sup>5</sup> A bra or brassiere is “a woman’s undergarment for supporting the breasts.” brassiere. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/brassiere>.

As identified, both Applicant's goods and Registrant's goods are undergarments used to shape portions of the body. The Examining Attorney has established that both products are sold on the same websites. For example,

- Applicant's website – [www.loveybubbles.com](http://www.loveybubbles.com) offers bodywear products, including “breast lift tape,” “padded underwear,” “butt bras,” “butt lifters,” “waist cinchers & body slimmers,” and “bra accessories” (Denial of Request for Reconsideration TSDR pp. 3-8);
- Registrant's website – [www.purestylegirlfriends.com](http://www.purestylegirlfriends.com), offers a number of products, including “rear-enhancing padded briefs,” “convertible adhesive bras,” and “breast tape” (Denial of Request for Reconsideration TSDR pp. 9-14); and
- The Laurensilva website – [www.lauren-silva.com](http://www.lauren-silva.com) offers body shaping products, i.e. “adhesive breast lifts and tape,” “waist cinchers,” “bodysuit shapewear,” “open bottom girdles,” and “butt lifter body shapers” (Denial of Request for Reconsideration TSDR pp. 15-18).

In fact, Applicant acknowledges that it sells both products, however, Applicant argues that the goods are not related because “Applicant sells its ‘breast lift tape’ under an entirely different name than Registrant's PICK-ME-UP breast lift tape.” Appeal Brief, 8 TTABVUE 12. Applicant's choice of trademark for its breast lift tape does not alter our conclusion that the sale of these products in close proximity evidences the relationship of the goods.

---

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014).

Further, Applicant's argument that the goods are not related because "Applicant's butt lift garment and the Registrant's body tape not only are structurally different but use different means to achieve their objective and are offered to the marketplace for entirely different purposes" is not persuasive. *Id.* at 13. This argument implies that the goods must be identical to be related. However, the goods need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007).

Since the purpose of both Applicant's and Registrant's goods is to shape parts of the body and the goods are sold on the same websites in proximity to each other, use of similar (or as in this case, virtually identical) marks could give rise to the mistaken belief that the goods emanate from the same source. On similar evidentiary records, both the Court of Customs and Patent Appeals<sup>6</sup> and the Board have held that for likelihood of confusion purposes, many different articles of clothing are related. *See Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 128 USPQ 549, 550 (CCPA 1961) (women's boots related to men's and boys' underwear); *Jockey Int'l, Inc.*

---

<sup>6</sup> The predecessor to our primary reviewing court, the Court of Appeals for the Federal Circuit.



*v. Mallory & Church Corp.*, 25 USPQ2d 1233, 1236 (TTAB 1992) (underwear related to neckties); *In re Mercedes Slacks, Ltd.*, 213 USPQ 397, 398-399 (TTAB 1982) (TTAB 1982) (hosiery related to trousers). The fact that the goods at issue have a common use and function supports a finding that they are related.

The evidence also establishes that the goods are sold in the same channels of trade to the same customers (on-line on websites selling shapewear clothing to women).

Accordingly, we find that the goods are closely related and that the second and third *du Pont* factors favor a finding of likelihood of confusion.

D. Conclusion.

Having considered all the evidence and arguments on the relevant *du Pont* factors, we find that Applicant's mark PICK ME UP, in standard characters, when used in connection with "bodyshaping undergarment clothing worn over the buttock that lifts the buttocks without padding" is likely to cause confusion with the cited mark PICK-ME-UP, in standard characters, when used in connection with "body tape in the nature of a bra consisting of breathable fabric backed with an adhesive layer for enhancing body contour by lifting the breasts."

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