

This Opinion is Not a  
Precedent of the TTAB

Mailed: July 6, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Ironclad Performance Wear Corp.*

Serial No. 86737035

Jeffrey F. Gersh and James A. Sedivy of Stubbs Alderton & Markiles, LLP  
For Ironclad Performance Wear Corp.

Jeanine Gagliardi, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

Before Cataldo, Wellington, and Adlin,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Ironclad Performance Wear Corp. (“Applicant”) applied to register the mark **IVE**,  
in standard characters, for “protective work gloves” in International Class 9.<sup>1</sup>

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<sup>1</sup> Application Serial Number 86737035, filed August 25, 2015, is based on an allegation of a bona fide intent to use the mark in commerce, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C § 1051(b).

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that use of Applicant's mark is likely to cause confusion with the registered mark **EB & IVE** for various jewelry and watch goods in Class 14, various household linen goods in Class 24 and the following goods in Class 25:<sup>2</sup>

Adult novelty gag clothing item, namely, socks; Belts; Bottoms; Children's and infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; Clothing, namely, crops; Clothing, namely, wrap-arounds; Combinations; Head wraps; Headbands for clothing; Hoods; Jackets; Jerseys; Shifts; Short sets; Shoulder wraps; Shoulder wraps for clothing; Tops; Wearable garments and clothing, namely, shirts; Women's clothing, namely, shirts, dresses, skirts, blouses; Wraps.

The refusal was made final<sup>3</sup> and Applicant appealed. The appeal has been fully briefed. For the reasons discussed below, we affirm the refusal to register.

### *Likelihood of Confusion*

Our 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) (setting forth factors to be considered, hereinafter the “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion

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<sup>2</sup> Registration No. 4469372 issued on January 21, 2014.

<sup>3</sup> In the Office Action, issued on June 30, 2016, making the refusal final, the Examining Attorney cited a second registration as a basis for the likelihood of confusion refusal. The registration (Reg. No. 4512333), for the mark X-S-IVE, covers “Bathrobes; Coats; Jackets and socks; Jeans; Pants; Polo shirts; Shirts; Shoes; Shorts; Sleepwear; Sport coats; Suits; Sweaters; T-shirts; Underwear; Vests.” In her appeal brief, the Examining Attorney expressly withdrew this registration as a basis for refusal. 6 TTABVue 2.

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, 1945 (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.”).

### *Similarity of the Marks*

We turn now to consideration of “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “[L]ikelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark. On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

“The 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 1713, 1721 (Fed. Cir. 2012) (quotation omitted). Where, as here, the goods or services

are “offered to the general public, emphasis must also be placed on the recollection of the average purchaser, who normally retains a general rather than a specific impression of them.” *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

In this case, we find the respective marks more similar than not because Applicant seeks to register IVE, an arbitrary term that is identical to one of the terms comprising the registered mark, EB & IVE, notwithstanding the term EB and ampersand at the beginning of the registered mark.

While there is no correct pronunciation of marks or terms that, like those before us, are not recognized words, *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014), we see no reason why the term IVE would be pronounced differently in Applicant’s mark than Registrant’s; whether the letter “I” is verbalized as a long or short vowel, the result is the same. Ultimately, based on the identity of Applicant’s mark and the latter term in the registered mark, they are visually and aurally similar.

The terms EB and IVE have no demonstrated meaning.<sup>4</sup> Thus, we presume their use in the marks is arbitrary. Applicant argues in its reply brief that the registered mark EB & IVE “brings to mind, ‘ebony and ivory’ whereas IVE makes no such impression.”<sup>5</sup> Applicant does not point to any evidence to support this argument, or

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<sup>4</sup> We acknowledge that the shared term IVE has been used as a suffix. For example, see Note 3 involving a third-party mark X-S-IVE which may be understood as a purposeful misspelling of the word “excessive.” However, there is no indication that Applicant’s mark is a misspelling of a different word or contains an abbreviation or suffix.

<sup>5</sup> 7 TTABVue 7.

explain why IVE would be perceived as an abbreviation of a word that begins with “ivo.” Moreover, to the extent consumers understand Registrant’s mark as short for “ebony and ivory,” they would also be likely to view Applicant’s mark, IVE, as short for “ivory.” Indeed, consumers may mistakenly believe IVE is an offshoot of the EB & IVE brand. Thus, we are not persuaded that any “ebony and ivory” connotation would distinguish the two marks.

In sum, we find the marks to be more similar than dissimilar in terms of appearance, sound, meaning and overall commercial impression. Accordingly, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

*Relatedness of the Goods/ Channels of Trade/ Classes of Purchasers*

We turn now to the relatedness of the involved goods. In making our determination, we focus on Applicant’s “protective work gloves” vis-à-vis the goods listed in the registration that we find to be the closest, namely, “jackets; ... tops; [and] wearable garments and clothing, namely, shirts.” Based upon the evidence of record, these goods are most closely related to Applicant’s protective work gloves. In this regard, a finding of likely confusion does not require an analysis involving *all* of Registrant’s goods; it is sufficient if *any* of the goods listed in the registration is related to protective work gloves. See *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

We also keep in mind that “it is not necessary that the goods or services be identical or even competitive in nature in order to support a finding of likelihood of

confusion, it being sufficient that the goods or services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks employed thereon, to the mistaken belief that they originate from or are in some way associated with the same producer.” *In re Home Builders Ass’n of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990). The issue is not whether consumers will confuse the goods, but whether they will confuse the source of the goods. *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015); *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1189 (TTAB 2014) (“The issue, of course, is not whether purchasers would confuse the goods or services, but rather whether there is a likelihood of confusion as to the source thereof.”).

The Examining Attorney argues that “the parties’ goods are related because they commonly emanate from the same sources under the same mark and are sold through the same trade channels to the same classes of consumers.”<sup>6</sup> In particular, she argues that printouts from 16 different websites<sup>7</sup> show “the same entity, such as those using the websites ... commonly produces work gloves and clothing and markets the goods under the same mark and that the goods are sold through the same trade channels to the same classes of purchasers.”<sup>8</sup> For example:

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<sup>6</sup> 6 TTABVUE 8.

<sup>7</sup> Attached to Office Actions issued on December 8, 2015 and June 30, 2016.

<sup>8</sup> 6 TTABVUE 10.



[both from the Cabela's website, [www.cabelas.com](http://www.cabelas.com)];<sup>9</sup>

<sup>9</sup> Attached to Office Action issued on June 30, 2016. TSDR at pp. 63-74.

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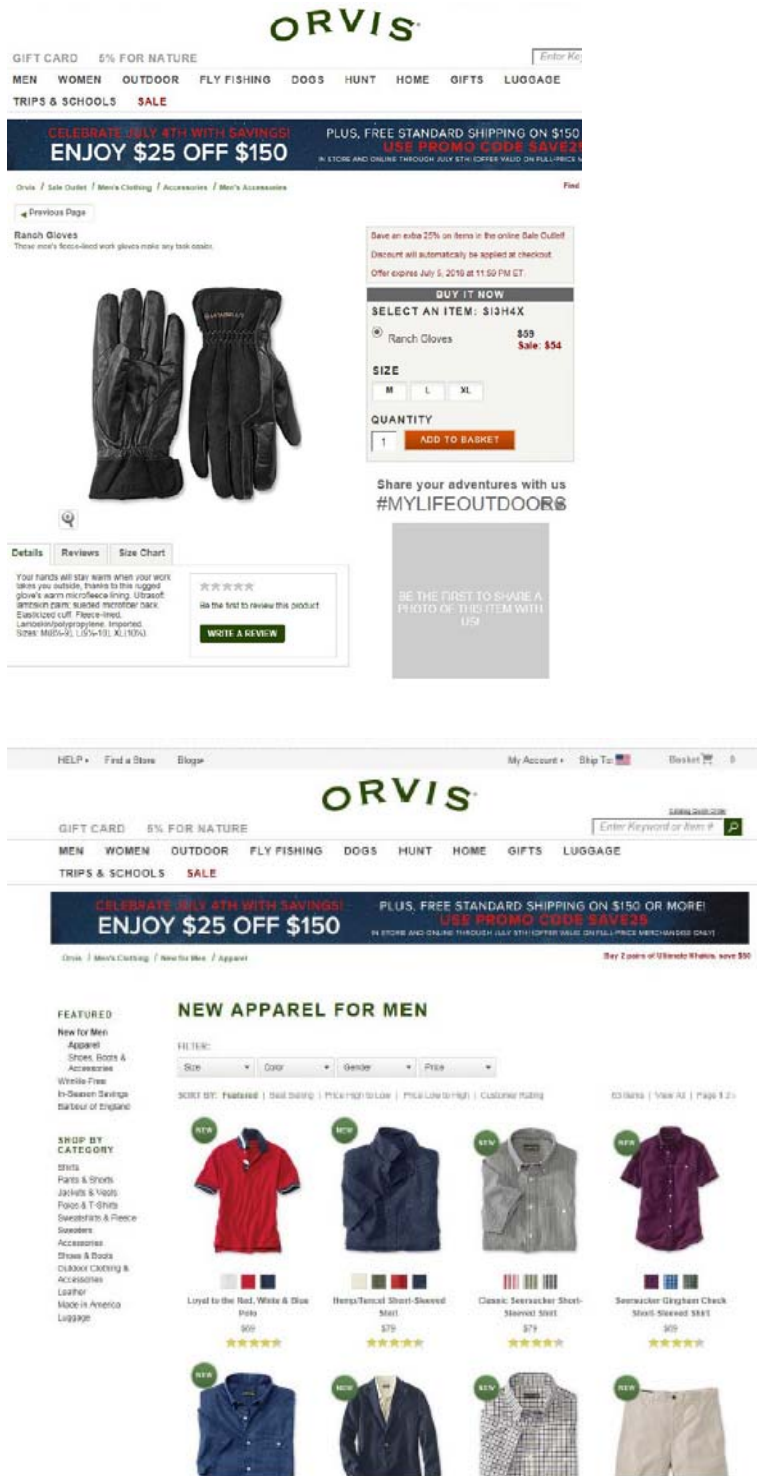
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<sup>10</sup> *Id.* at pp. 150-169.

- 8 -

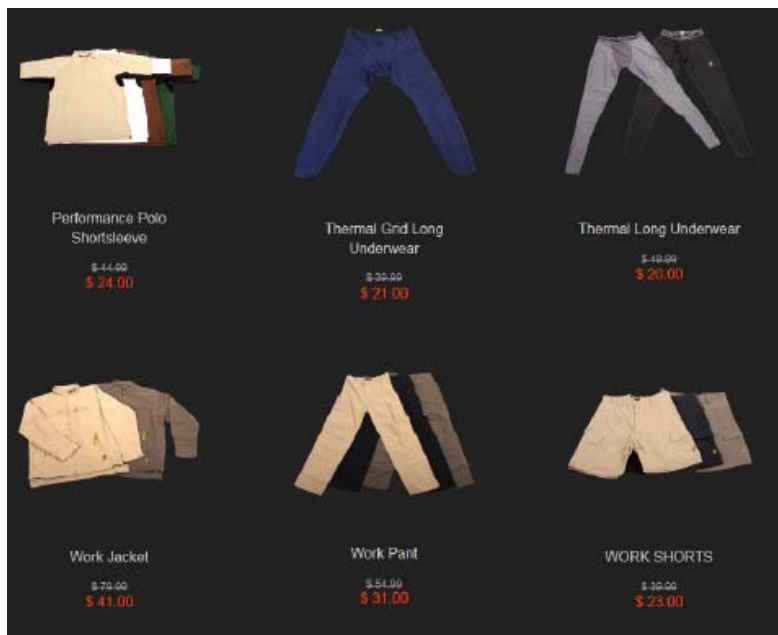
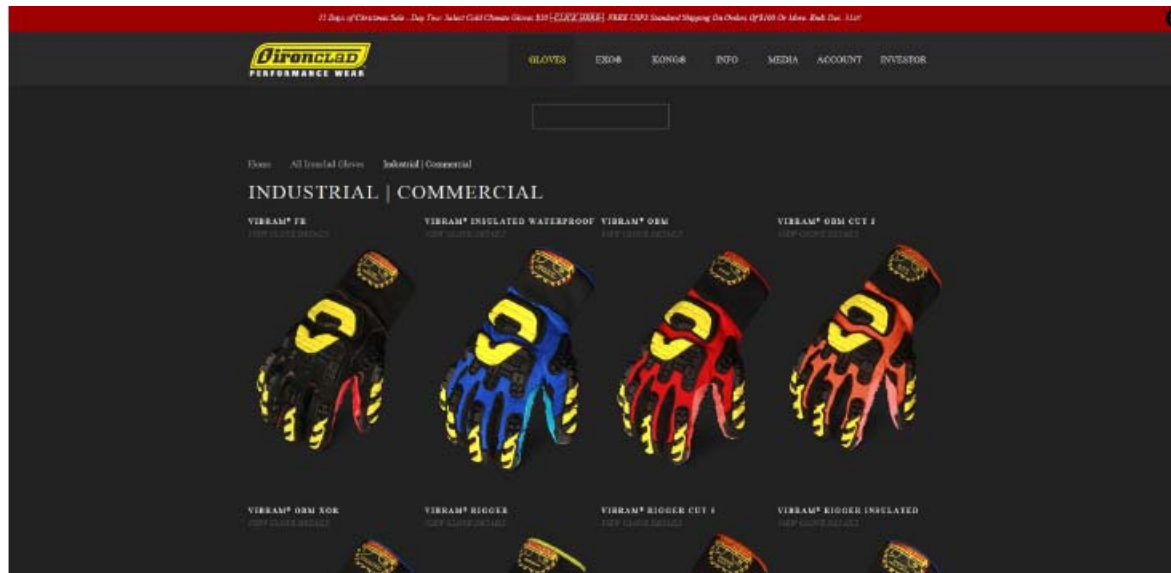




[from Orvis website www.orvis.com].<sup>11</sup>

<sup>11</sup> *Id.* at pp. 182-200.

The Examining Attorney also attached evidence to show that Applicant, itself, offers clothing in addition to work gloves:



[from Applicant's Ironclad website, [www.ironclad.com](http://www.ironclad.com)].

In addition to the website evidence, the Examining Attorney also relies on 20 use-based, third-party registrations of marks covering protective work gloves on the one hand and other types of clothing, including shirts, on the other.<sup>12</sup> These include:

- Reg. No. 4641418 (RED WING SHOES) for, *inter alia*, “work safety protective products, namely, ...protective work gloves” in Class 9 and “casual clothing, namely, jackets, shirts ...” in Class 25;<sup>13</sup>
- Reg. No. 4969790 (DULUTH TRADING COMPANY) for, *inter alia*, “protective work gloves” in Class 9 and “shirts” in Class 25;<sup>14</sup>
- Reg. No. 4835148 (design mark) for, *inter alia*, “protective work gloves” in Class 9 and “shirts” in Class 25;<sup>15</sup>
- Reg. No. 4923138 (FIT FOR WORK, FIT FOR LIFE) for, *inter alia*, “protective work gloves” in Class 9 and “shirts” in Class 25;<sup>16</sup> and
- Reg. No. 3205004 (DEAD ON with design) for, *inter alia*, “protective work gloves” in Class 9 and “shirts” in Class 25.<sup>17</sup>

The website and third-party registration evidence shows a relationship exists between Applicant’s protective work gloves and Registrant’s goods, which include shirts. That is, retailers promote gloves and shirts, on the same website and under the same mark or name. The third-party registrations also show that protective work gloves and clothing, including shirts, may emanate from the same source under a single mark. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing

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<sup>12</sup> *Id.* at pp. 223-285.

<sup>13</sup> *Id.* at pp. 239-241.

<sup>14</sup> *Id.* at pp. 279-282.

<sup>15</sup> *Id.* at pp. 277-288.

<sup>16</sup> *Id.* at pp. 265-267.

<sup>17</sup> *Id.* at pp. 236-238.

*In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant states that it “sells its protective gloves to stores such as The Home Depot, and similar markets where consumers seek out technical goods” whereas Registrant offers “their products online, and to boutique stores in Australia” and “this does not create sufficient similarity in the channels of trade to result in a likelihood of confusion among consumers.”<sup>18</sup> This line of argument, distinguishing the goods based on their actual trade channels, ignores the well-established principle that a likelihood of confusion analysis must be made based on the goods as they are identified in the application and cited registration. *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). Here, the record establishes that the same online retailers may market and offer for sale protective work gloves as well as other articles of clothing, such as jackets and shirts. See *Wells Lamont Corp. V. Oklahoma Clothing Mfrs.*, 86 USPQ 331 (Comm’r Pat. 1950) and *In re Good Luck Glove Company*, 85 USPQ 509, 510 (Comm’r Pat. 1950) (noting that “work gloves” are not just for use by laborers, but may are also “used in gardening, around the home, and in various sports such as fishing.”)

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<sup>18</sup> 4 TTABVUE 11.

In sum, we find there is a relationship between the involved goods and they move in the same online trade channels.

Accordingly, these *du Pont* factors also favor a finding of likelihood of confusion.

*Sophistication of Purchasers*

Applicant argues that “the purchasers of the parties’ goods are sophisticated,”<sup>19</sup> and that its goods are purchased in bulk and with care:

Applicant’s purchasers are often buying in large volume for commercial purposes. For example, Applicant’s bulk purchasers have ordered Applicant’s product to outfit an entire force of oil rig workers, operators of heavy equipment, and construction company laborers with Applicant’s product. Bulk purchases require a sophisticated buyer who negotiates a deal with Applicant and then places a purchase order pursuant to the negotiated terms of the deal, including (1) price per unit, (2) volume, (3) warranty, and (4) style. Applicant’s purchasers must make a careful and deliberate purchase of Applicant’s product.

Applicant did not submit any evidence to support the aforementioned statements and, in any event, we cannot base our decision on the particular manner in which Applicant sells its goods. The application’s identification of goods does not contain restrictions with regard to consumers, bulk purchases or price point. Furthermore, the protective work gloves may be used for general outdoor work and are not restricted to industrial use, such as “oil rig workers, operators of heavy equipment, and construction company laborers.” Moreover, at least one website offers protective work gloves for under \$10 as well as shirts for under \$12.<sup>20</sup> Given that we must

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<sup>19</sup> 4 TTABVue 12.

<sup>20</sup> Printouts attached to Office Action issued on June 30, 2016. TSDR at pp. 63-64 and 75.

consider the possibility that Applicant's and Registrant's goods will be sold at these prices, we see no reason why the least sophisticated consumer for the goods as identified would exercise a high level of care in making their purchases.

Thus, Applicant's argument is not persuasive and the fourth *du Pont* factor, involving the conditions under which buyers make purchases, remains neutral in our analysis.

### *Conclusion*

We have carefully considered all evidence of record and Applicant's arguments, even if not specifically discussed herein, as they pertain to the relevant *du Pont* factors. We treat as neutral any *du Pont* factors for which there is no evidence.

In view of the similarity of the marks, IVE and EB & IVE, the relatedness of the involved goods and that they have been shown to move in the same trade channels, we find that confusion is likely.

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