

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 9, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

*In re Master Brands*

---

Serial No. 88892357

---

Joseph Shapiro of Shapiro IP Law for Master Brands.

Christina Riepel, Trademark Examining Attorney, Law Office 124,  
Alyssa Steel, Managing Attorney.

---

Before Greenbaum, Lynch, and Coggins,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

**I. Background**

Master Brands (“Applicant”) seeks registration on the Principal Register of the mark GUARDIAN in standard characters, for “reflective clothing for the prevention

of industrial accidents, namely, shirts, hooded sweatshirts, pants, coveralls and outerwear in the nature of jackets and coats” in International Class 9.<sup>1</sup>

The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the prior registered mark



for the following goods in International Class 25:<sup>2</sup>

Shirts; Shirts and short-sleeved shirts; Shirts for men, women, children; Golf shirts; Golf pants, shirts and skirts; Knit shirts; Open-necked shirts; Polo shirts; Short-sleeved shirts; Sports shirts; T-shirts; Wearable garments and clothing, namely, shirts; Women’s clothing, namely, shirts, dresses, skirts, blouses.

The colors brown, silver, white, gold, red, blue, tan and black are claimed as a feature of the mark. The registration includes the following description of the mark:

The mark consists of warrior rider in a grey and black suit of armor with a white tunic and brown belt and gloves, on a brown horse with a tan mane and tail with black hooves and harnesses. The man is holding a blue flag with white stars on a silver pole with an [sic] silver eagle at the top; shield on the horse has blue with white stars on the top with blue letters “U” “S” “A” over a gold and red strips [sic]; There is a silver shield on the face of the horse; beneath the

---

<sup>1</sup> Application Serial No. 88892357 was filed April 29, 2020, and is based on Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

<sup>2</sup> Registration No. 5662941 issued January 22, 2019.

horse is the brown wording “GUARDIAN” with white trim at the top of the letters.

After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and appealed. The Examining Attorney denied the request for reconsideration, maintaining the likelihood of confusion refusal.<sup>3</sup> The appeal proceeded, and Applicant and the Examining Attorney have filed briefs.<sup>4</sup> As explained below, we affirm the refusal to register.

## II. 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, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*3 (Fed. Cir. 2020). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 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

---



<sup>3</sup> 7 TTABVUE.

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

inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

### A. Similarity of the Marks



We compare the cited mark  to Applicant’s mark GUARDIAN bearing in mind that Applicant’s standard-character mark could appear in any font style or color, and therefore could appear in the same font and color used in the cited mark, as . See *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1908, 1909 (Fed. Cir. 2012); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (registrant “entitled to depictions of the standard character mark regardless of font style, size, or color”). We compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are similar enough that

confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

We find Applicant's mark and the cited mark similar in appearance, sound, connotation and commercial impression. Applicant's mark consists of a single term that is identical to the literal portion of the cited mark, except that in the cited mark, "USA" also appears less prominently on the shield within the design. Thus, at the very least, these marks sound nearly the same.

Turning to appearance and commercial impression, Applicant argues that "[t]he dominant portion of Registrant's mark is the knight/horse depiction."<sup>5</sup> In general, "[i]n the case of a composite mark containing both words and a design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *Viterra*, 101 USPQ2d at 1908 (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) ("In the case of marks, such as Applicant's, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods."). While we recognize that the design in the cited mark is prominent and appears above GUARDIAN, we nevertheless find that consumers would focus more on the word

---

<sup>5</sup> 4 TTABVUE 5 (Applicant's Brief).

GUARDIAN for source indication, in part because the design reinforces the significance of the wording by depicting the knight “guardian.” Applicant asserts that “a word appearing in a logo mark does not have the same breadth of protection as the word by itself.”<sup>6</sup> However, we find that consumers are likely rely on GUARDIAN to call for or search for Registrant’s goods. Also, because Applicant seeks broad protection in standard characters for the word GUARDIAN, any “argument concerning a difference in type style is not viable where one party asserts rights in no particular display.” *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). Thus, even where the cited mark is limited to a particular display of the word within the composite, Applicant’s standard-character GUARDIAN mark would cover the same type of display, as noted and shown above.

Because of the shared wording, the marks also create similar connotations and commercial impressions. The cited mark’s design of a knight on horseback depicts a certain kind of guardian, and consumers could certainly attribute to GUARDIAN in Applicant’s mark the same type of meaning and take the same impression from it. “There is no evidence here, or other reason to find, that the [word GUARDIAN] has one meaning when used with [Registrant’s ordinary clothing], and a second and different meaning when used with [Applicant’s reflective safety clothing], based on the nature of the respective goods.” *In re Embiid*, 2021 USPQ2d 577, at \*21 (TTAB 2021).

---

<sup>6</sup> *Id.*

Given their overall resemblance in appearance, sound, connotation and commercial impression, we find Applicant's mark and the cited mark similar. Consumers likely would view the marks as variations from the same source – one consisting of GUARDIAN only, and the other adding a design element. Also, we must consider that consumers are subject to retaining only a general impression of marks due to “the fallibility of memory.” *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)); *see also In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*4 (TTAB 2020).

#### **B. The Goods, Trade Channels and Classes of Consumers**

The second and third *DuPont* factors address the relatedness of the goods and the trade channels in which they travel. Because Applicant's Brief does not include any argument under these *DuPont* factors, Applicant appears to have conceded these issues. *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

Under the second factor, “likelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). In analyzing such relatedness, we look to the identifications in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston*

*Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion as to a class of goods if relatedness is established for any one of the recited goods within the class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 123 USPQ2d 1744 (Fed. Cir. 2017).

The Examining Attorney argues that the clothing goods identified in the cited registration are closely related to Applicant's reflective clothing for the prevention of industrial accidents. The Examining Attorney submitted third-party use evidence showing consumer exposure to goods such as Applicant's and goods such as Registrant's offered under the same mark. For example:

The Carhartt website shows flame-resistant striped coveralls with "yellow and silver reflective material" that "help you put safety first and stay protected on the job" and a non-protective polo shirt offered under the same mark;<sup>7</sup>

The Dickies website offers polo shirts and various types of reflective safety clothing under the same mark;<sup>8</sup>

The Grainger website shows shirts and high-visibility reflective shirts offered under the same mark;<sup>9</sup>

The Unifirst website features high-visibility reflective clothing and reflective, flame-resistant clothing, as well as work shirts, under the same mark;<sup>10</sup>

---

<sup>7</sup> July 24, 2020 Office Action at TSDR 13-14 (carhartt.com).

<sup>8</sup> August 6, 2022 Office Action at TSDR 12; July 24, 2020 Office Action at TSDR 20 (dickies.com).

<sup>9</sup> August 6, 2022 Office Action at TSDR at 16-18 (grainger.com).

<sup>10</sup> *Id.* at 14-15 (unifirst.com); May 10, 2023 Denial of Reconsideration at TSDR 2-3.



The Tough Duck website offers under its mark jackets and sweatshirts, as well as a reflective safety rain jacket and a reflective safety shirt;<sup>11</sup>

The Big Bill website shows under its mark t-shirts, as well as “high visibility” and reflective clothing, including insulated coveralls, shirts, and pants with “reflective tape” or “reflective material”;<sup>12</sup> and

The Duluth website features under that mark polo shirts, coveralls and reflective safety jackets to “stay safer on the job” with “reflective tape for ANSI Class 3 visibility”.<sup>13</sup>

The Examining Attorney also attached a screenshot from Applicant’s website showing the GUARDIAN mark used on a hooded sweatshirt, t-shirt and coverall that would fall within the scope of the cited registration’s identification of clothing goods.<sup>14</sup>

The foregoing evidence from Applicant’s website and third-party retail websites supports the relatedness of the goods in the application and cited registration by showing that consumers are accustomed to encountering them offered by a single source under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that

---

<sup>11</sup> August 6, 2022 Office Action at TSDR 19 (toughduck.com).

<sup>12</sup> *Id.* at 20-23 (bigbill.com).

<sup>13</sup> July 24, 2020 Office Action at TSDR 9-10; May 10, 2023 Denial of Reconsideration at TSDR 4 (duluthtrading.com)

<sup>14</sup> May 10, 2023 Denial of Reconsideration at TSDR 5 (masterbrands.us).

evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

The Examining Attorney also submitted use-based third-party registrations<sup>15</sup> that identify under a single mark protective, industrial, reflective and illuminated clothing in International Class 9, as well as ordinary clothing in International Class 25. Seven examples identify reflective safety clothing as well as regular clothing.<sup>16</sup> For example, Registration No. 5375904 identifies “high visibility protective clothing ... for safety purposes” in Class 9, and “shirts and other tops” in Class 25.<sup>17</sup> Also, Registration No. 5533347 identifies “Men’s and women’s industrial work related garments for protection against accidents including reflective clothing” in Class 9 and “Men’s and women’s industrial work related garments not for safety or reflective purposes” in Class 25. “The use-based, third-party registrations . . . 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.” *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013); *see also In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d* (unpublished) 864 F.2d 149 (Fed. Cir. 1988).

Under the third *DuPont* factor, the same third-party retail evidence discussed above shows that reflective safety clothing such as Applicant has identified travels in

---

<sup>15</sup> August 6, 2022 Office Action at 2-11.

<sup>16</sup> Another three examples show protective clothing (not specified as reflective or illuminated) in Class 9, along with ordinary clothing in Class 25.

<sup>17</sup> August 6, 2022 Office Action at TSDR 3.

some of the same trade channels to the same classes of consumers as the clothing goods in the cited registration. Accordingly, the trade channels and classes of consumers overlap.

### **C. Conditions Under Which and Buyers to Whom Sales Are Made**

Although neither Applicant nor the Examining Attorney argued the fourth *DuPont* factor, “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, we address it briefly because of the nature of Applicant’s goods. Our analysis under the fourth *DuPont* factor must be based on the identifications of goods in the cited registration and subject application. *Stone Lion Cap. Partners*, 110 USPQ2d at 1162. While Applicant’s goods are reflective clothing for the prevention of industrial accidents, we find that they may be purchased by ordinary members of the public who do industrial work. In fact, the retail website evidence shown above suggests that type of consumer, except for the Unifirst website which appears more geared to industrial entities. Thus, we find that the potential consumers for both Applicant’s and Registrant’s goods include ordinary members of the general public. “Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’” *See id.* at 1163 (citation omitted). Also, the price of reflective safety clothing can be relatively inexpensive, such as Dickies’ “Hi-Vis Safety Short Sleeve

T-Shirt” for \$22.99<sup>18</sup> and Grainger’s “High-Visibility Shirts” for as low as \$14.90.<sup>19</sup>

Thus, we find no basis for an elevated degree of care in purchasing.

**D. Balancing the *DuPont* Factors**

Given the similarity of the marks, relatedness of the goods, and overlapping trade channels and classes of consumers, confusion is likely.

**Decision:** The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.

---

<sup>18</sup> August 6, 2022 Office Action at TSDR 12 (dickies.com)

<sup>19</sup> *Id.* at 17 (grainger.com).