

This Opinion is not a
Precedent of the TTAB

Mailed: June 16, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re H.K. Designs Inc.
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Serial No. 90283406
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Max Moskowitz of Ostrolenk Faber LLP
for H.K. Designs Inc.

Christopher McMillan, Trademark Examining Attorney, Law Office 122,
Kristin Dahling, Managing Attorney.

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Before Goodman, Cohen and O'Connor,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

H.K. Designs Inc. (“Applicant”) seeks registration on the Principal Register of the mark BRIGHT STAR (in standard characters) for “Jewelry” in International Class 14.¹

¹ Application Serial No. 90283406 was filed on October 28, 2020, based upon Applicant’s assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record are to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Applicant’s brief is at 4 TTABVUE and the Examining Attorney’s brief is at 12 TTABVUE.

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), on the ground that Applicant's mark is likely to cause confusion with the mark BRIGHT STAR (in standard characters) for the following goods: "Athletic footwear; Caps; Men's dress socks; Socks; T-shirts; Thermal socks; Underwear."²

When the refusal was made final, Applicant appealed. The Examining Attorney then requested a remand, which the Board granted.³ After issuing a subsequent final office action, the appeal resumed.⁴ We affirm the refusal to register.

I. Evidentiary Issues

Before proceeding to the merits of the refusal, we address evidentiary matters. Embedded in Applicant's brief is information related to two third-party registrations which Applicant uses to support its argument regarding the weakness of the cited mark. 4 TTABVUE 9. These registrations were not submitted during examination.⁵ Applicant also embedded into the brief a reference to a pending third-party

As part of an internal Board pilot program, the citation form in this opinion is in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a). For decisions of the Board, this opinion employs citation to the Lexis database. This decision also cites only to the Federal Reporter.

² Registration No. 3860025, Section 8 accepted and Section 15 acknowledged; renewed.

³ A new Examining Attorney was assigned and sought to submit additional evidence. 6 TTABVUE.

⁴ The Board indicated in the resumption order after remand, 9 TTABVUE, that Applicant could file a supplemental brief but Applicant chose not to do so.

⁵ The record in an application should be complete prior to the filing of the appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).

application for the mark BRITESTAR for jewelry to support its arguments. 4 TTABVUE 11.

The Examining Attorney did not object to these references to the third-party registrations and pending third-party application and instead discussed them in his brief. Accordingly, we deem the Examining Attorney to have stipulated that the third-party registrations and third-party application embedded in Applicant's brief are of record.

Applicant asks the Board to take judicial notice that "registered marks that commence with BRIGHT are extremely common, numbering in the hundreds, and there are a few in Class 14 as well." 4 TTABVUE 10. "However, the Board's well-established practice is not to take judicial notice of third-party registrations." *In re Thomas Nelson, Inc.*, 2011 TTAB LEXIS 9, at *20 n. 18 (TTAB 2011). Therefore, we deny the request for judicial notice.

In connection with its argument that the cited mark is weak, Applicant also discusses search results ("hits") for third-party registrations in classes 14 and 25 for marks containing the terms STAR and BRIGHT. 4 TTABVUE 12. Applicant submits that there are hundreds of registered marks containing these terms.⁶ 4 TTABVUE 12. The Examining Attorney argues that this argument should not be considered because these statements are references to registrations not of record. 12 TTABVUE 7.

⁶ Applicant made this argument in the October 4, 2021 Response to Office Action but did not submit the third-party registrations from the search results with the response.

To the extent Applicant is referring to evidence not in the record, we do not consider these statements as they are unsupported by evidence.⁷

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at *2 (TTAB 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the

⁷ Attorney argument is not evidence. *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005).

cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.

A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the similarity or dissimilarity of 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, 1371 (Fed. Cir. 2005). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Davia*, 2014 TTAB LEXIS 214, at *4 (TTAB 2014).

The marks here (both BRIGHT STAR in standard characters) are identical.

In connection with this factor, Applicant discusses the actual marketing conditions and points to evidence in the record that Registrant’s sock goods are unmarked. However, this argument is unavailing. We must consider the marks as represented in the application and the registration drawings and not as actually applied to the goods. *In re Aquitaine Wine USA, LLC*, 2018 TTAB LEXIS 108, at *11 (TTAB 2018) (“we do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings...”).

The first *DuPont* factor weighs heavily in favor of likelihood of confusion. *In re Majestic Distilling Co.*, 315 F.3d at 1315 (citation omitted) (“We have previously held that, when word marks are identical but neither suggestive nor descriptive of the

goods associated with them, the first *DuPont* factor weighs heavily against the applicant”).

B. Similarity or Dissimilarity of the Goods and Trade Channels

We consider “[t]he similarity or dissimilarity and nature of the goods as described in an application or registration” *DuPont*, 476 F.2d at 1361. Relatedness must be assessed according to the identifications of the respective goods in the application and cited registration. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018).

It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application or registration. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981). We also consider “the similarity or dissimilarity of established, likely-to-continue trade channels” and classes of consumers. *DuPont*, 476 F.2d at 1361.

Applicant argues that its goods and Registrant’s goods are non-competitive, do not overlap, and are unrelated. 4 TTABVUE 12.

However, the goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000). They need only be “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. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 2007 TTAB LEXIS 58, at *28-29 (TTAB 2007)).

Additionally, with identical marks, as we have here, when considering the similarity or dissimilarity of the goods, less similarity between the goods is needed to find a likelihood of confusion. *In re Opus One, Inc.*, 2001 TTAB LEXIS 707, at *8-9 (TTAB 2001).

Applicant submits that there has to be a viable relationship between the goods to find relatedness. 4 TTABVUE 13. However, our primary reviewing court, the Federal Circuit, “has never expressly endorsed the ‘viable relationship’ test.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1363 n.3 (Fed. Cir. 2022). Regardless, the “test remains the same” as elucidated above: “even when goods or services are not competitive or intrinsically related, the use of identical [or highly similar] marks can lead to the assumption that there is a common source.” *Id.* (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993)).

Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant’s goods (or similar goods) and the goods (or similar goods) listed in the cited registration. *See In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at *5.

Internet website evidence may also be probative of relatedness. *Made in Nature, LLC v. Pharmavite, LLC*, 2022 USPQ2d 557, at *46 (TTAB 2022) (third-party websites promoting sale of both parties’ goods showed relatedness); *In re Embiid*,

2021 TTAB LEXIS 168, at *39 (TTAB 2021) (evidence of third-parties offering goods of both applicant and registrant pertinent to relatedness of the goods); *In re C.H. Hanson Co.*, 2015 TTAB LEXIS 357, at *14-16 (TTAB 2015) (relatedness found where internet evidence demonstrated goods commonly emanated from the same source under a single mark).

To reiterate, Applicant's goods are "Jewelry." Registrant's goods are "Athletic footwear; Caps; Men's dress socks; Socks; T-shirts; Thermal socks; Underwear."

The Examining Attorney submitted internet website evidence to show that the goods at issue are related. The evidence shows, for example, that some retailers that offer socks, underwear, t-shirts and hats also offer jewelry. For example, Forever 21, Banana Republic, Brooks Brothers, Ralph Lauren, Old Navy, Asos, Guess, and Calvin Klein offer jewelry, socks, underwear, hats and t-shirts. May 10, 2024 Office Action at TSDR 1-36, 43-48, 55-56.⁸

Applicant argues that the focus should be on the purchasers and "not only on where things are sold." 4 TTABVUE 12. In particular, Applicant criticizes the Examining Attorney's internet evidence arguing that large online retailers sell "literally EVERYTHING," leading to "the erroneous conclusion in the modern marketing place that almost all goods are 'related' to each other." (emphasis in original). 4 TTABVUE 12. Applicant states that "clothing and jewelry are sold in large department stores alongside, or in proximity to each other. HOWEVER, so are

⁸ The Examining Attorney also provided some similar internet website evidence in its April 5, 2021 and September 5, 2023 Office Actions.

jewelry and perfumes, skincare products, kitchen utensils, and many food items, being sold alongside each other.” (emphasis in original). 4 TTABVUE 11.

The evidence provided by the Examining Attorney does not show, as Applicant argues, retailers offering a broad range of products in different fields. *Cf. In re Mucky Duck Mustard Co.*, 1988 TTAB LEXIS 11, at *9 n.6 (TTAB 1988) (noting that large department stores sell a wide variety of goods and therefore, third-party registrations owned by department stores listing a wide variety of products have little probative value in showing that goods are related).

Rather, the website evidence submitted by the Examining Attorney appears to be limited to retailers selling clothing and fashion items including accessories (such as hats and belts and jewelry), as opposed to a broad range of goods. Therefore, we find the Examining Attorney’s internet website evidence probative of relatedness.

Applicant also points to a third-party pending application for BRITESTAR for jewelry that has not been blocked by the cited registration for clothing goods but has been suspended by the Office pending disposition of Applicant’s involved application. 4 TTABVUE 11. Applicant uses this pending third-party application as support that jewelry and clothing lack relatedness. 4 TTABVUE 11.

However, each application must be considered on its own record to determine eligibility to register. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016); *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (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 any

event, the third-party pending application evidence shows nothing more than that the application was filed with the USPTO. *In re Binion*, 2009 TTAB LEXIS 701, at *11 n.3 (TTAB 2009).

Considering the evidence as a whole, the website evidence provided by the Examining Attorney shows that consumers are accustomed to seeing jewelry, socks, underwear, t-shirts and caps sold on the same websites under the same mark, which supports a finding that Applicant's and Registrant's goods are related.

Turning to consideration of the trade channels, this factor must be assessed according to the identifications of the respective goods in the application and cited registration. *Octocom Sys. v. Hous. Comput. Servs.*, 918 F.2d 937, 942 (Fed. Cir. 1990). In the absence of specific limitations in the identifications, "the goods are presumed to travel in all normal channels and to all prospective purchasers for the relevant goods." *Coach Servs.*, 668 F.3d at 1370.

The relevant class of consumers for the identified goods, jewelry and clothing items, is the same—members of the general public. As to trade channels, the internet website evidence showing the offering of the various clothing and accessories by the same retailers demonstrates that the identified goods in the application and cited registration travel in the same trade channels and are offered to the same classes of consumers.

The second and third *DuPont* factors weigh in favor of likelihood of confusion.

C. Conceptual Weakness

The sixth *DuPont* factor, “[t]he number and nature of similar marks in use on similar goods [or services],” *DuPont*, 476 F.2d at 1361, “is a measure of the extent to which other marks weaken the assessed mark.” *Spireon Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *Palm Bay Imps.*, 396 F.3d at 1373).

There are two types of strength: conceptual and commercial.⁹ *Id.* (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010)). The strength of the cited mark affects the scope of protection to which a mark is entitled. *Bell’s Brewery, Inc. v. Innovation Brewing*, 2017 TTAB LEXIS 452, at *20 (TTAB 2017). Evidence of third-party registrations for the same or similar marks “on similar goods [or services] can bear on a mark’s conceptual strength.” *Spireon*, 71 F.4th 1363 (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)).

Applicant argues “each of the literal elements, ‘bright’ and ‘star,’ are individually widely used in connection with both ‘clothing’ and ‘jewelry.’ Therefore, they are not strong marks in either class, even when used in combination.”¹⁰ 4 TTABVUE 12. As already discussed, Applicant references two third-party registrations which relate to

⁹ The fifth *DuPont* factor examines the extent to which the public perceives the mark as indicating a single source of origin, i.e., its fame or commercial strength. *DuPont*, 476 F.2d at 1361. In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 2016 TTAB LEXIS 470, at *26 (TTAB 2016). As is normally the case in ex parte proceedings, the fifth *DuPont* factor is neutral. See *In re Thomas*, 2006 TTAB LEXIS 135, at *18 n.11 (TTAB 2006).

¹⁰ Applicant did not submit any evidence of marketplace use of BRIGHT or STAR or the combined term BRIGHT STAR during examination for purposes of showing commercial weakness. “Attorney argument is no substitute for evidence.” *Enzo Biochem*, 424 F.3d at 1284.

conceptual strength: LUSTRO STELLA (translated as “bright shiny star”) for jewelry, precious gems, and BRIGHT MOON for various types of jewelry, which Applicant argues is similar in meaning to BRIGHT STAR. 4 TTABVUE 9-10. Applicant argues that the above registrations co-exist with the cited registration as further support for its argument that BRIGHT STAR is commonly used in connection with the identified goods. 4 TTABVUE 10.

Third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 794 F.3d at 1339; *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015).

We find Applicant has not shown weakness of BRIGHT STAR or the component BRIGHT in connection with clothing. Applicant’s submission of only two third-party registrations for marks that connote either BRIGHT STAR, or contain the term BRIGHT, falls far short of approaching the amount of evidence needed to show conceptual weakness of BRIGHT STAR or the component BRIGHT in connection with the identified goods. *See, e.g., In re Inn at St. John’s, LLC*, 2018 TTAB LEXIS 170, at *12 (TTAB 2018) (two third-party registrations for related but not identical services and two registrations for identical services with a non-identical but similar mark were not sufficient to prove Registrant’s mark was conceptually or inherently weak). Moreover, even if we were to assume that the mark BRIGHT STAR is weak,

“likelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong’ mark.” *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401 (CCPA 1974).

Applicant’s evidence does not contract the strength of Registrant’s mark, conceptually or commercially. The cited mark is registered on the Principal Register without a claim of acquired distinctiveness and is treated as inherently distinctive. *See New Era Cap Co. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *29 (TTAB 2020) (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”). We thus accord the registered mark the normal scope of protection for an inherently distinctive mark.

The sixth *DuPont* factor is neutral.

III. Conclusion

The marks are identical, the goods are related, and the trade channels overlap. Applicant has not shown conceptual weakness of the cited mark, and the sixth *DuPont* factor is neutral. The first, second, and third factors weigh in favor of likelihood of confusion. We find confusion likely.

Decision: The Section 2(d) refusal to register Applicant’s mark BRIGHT STAR is affirmed.