

This Opinion is Not a  
Precedent of the TTAB

Oral Hearing: December 12, 2023

Mailed: April 4, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Cuts Clothing, Inc.*

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Serial No. 90880357

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Pam K. Jacobson of K&L Gates LLP,  
for Cuts Clothing, Inc.

Amy Schmitz, Trademark Examining Attorney, Law Office 127,  
Mark Pilaro, Managing Attorney.

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

Opinion by Wellington, Administrative Trademark Judge:

Cuts Clothing, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark VERSAKNIT for “textile fabrics for the manufacture of clothing,” in International Class 24.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90880357, filed on August 12, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intent to use the mark in commerce.

The Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act ("the Act"), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the following standard-character, registered marks:

VERSAFLEX (Reg. No. 4232080, hereinafter "Reg. '080") for "non-woven textile fabrics" in International Class 24;<sup>2</sup> and

VERSATECH (Reg. No. 1594293, hereinafter "Reg. '293") for "woven fabric for use in the manufacture of apparel and other related uses" in International Class 24.<sup>3</sup>

The cited registrations are owned by two different entities.

Applicant requested reconsideration of the refusal and filed an appeal with this Board. Applicant's request for reconsideration was denied by the Examining Attorney and this appeal resumed. The appeal has been fully briefed. An oral hearing was held before this panel on December 12, 2023. For the reasons set forth below, we affirm the refusal to register.

### **I. Likelihood of Confusion**

Our determination under Section 2(d) of the Act is based on an analysis of all of the probative evidence of record 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) (setting forth *DuPont* factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities

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<sup>2</sup> Issued on October 30, 2012; maintained.

<sup>3</sup> Issued on May 1, 1990; maintained.

between the services or goods. *See 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.”). We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

#### **A. Legally Identical Goods; Trade Channels**

We first consider the second and third *DuPont* factors, which respectively cover “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels” for the goods. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*19 (TTAB 2021).

We must base our comparisons under the second and third *DuPont* factors on the identifications of goods in the application and cited registrations. *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*6 (Fed. Cir. 2023) (“The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration.”); *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLC*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Here, Applicant's goods, as described in the application, encompass and thus are legally identical to the goods in each of the cited registrations. Specifically, Applicant's goods are "textile fabrics for the manufacture of clothing" and Reg. '080 covers "non-woven textile fabrics." Applicant's and this cited registration's goods thus overlap because textile fabrics for the manufacture of clothing, without limitation as to the types of textile fabrics, include non-woven textile fabrics for the manufacture of clothing.

Likewise, Applicant's goods are legally identical to those listed in Reg. '293 ("woven fabric for use in the manufacture of apparel and other related uses") because each identification includes woven textile fabrics for use in the manufacture of clothing.

In terms of their trade channels, neither the application nor the cited registrations contain any restriction as to trade channels, we presume that the channels of trade and classes of purchasers are the same for the identical goods. *See Viterra Inc.*, 101 USPQ2d at 1908 (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods...")); *see also, Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000); *see also, e.g., Narita Export LLC v. Adaptrend, Inc.*, 2022 USPQ2d

857, at \*7 (TTAB 2022) (“Respondent’s unrestricted identification of goods is not limited by channels of trade, Respondent’s goods are presumed to travel in all ordinary channels of trade which include Petitioner’s proven channel of trade”); *Bell’s Brewery*, 125 USPQ2d at 1345 (Board found that applicant’s unrestricted identification for beer will move in all channels of trade normal for such goods, which includes opposer’s common law trade channels for beer).

In sum, because Applicant’s goods are legally identical to the goods in the cited registrations, and these goods will be offered for sale in the same usual trade channels to the same classes of consumers of fabrics, the second and third *DuPont* factors weigh strongly in favor a likelihood of confusion finding.

#### **B. Alleged Weakness of Cited Mark**

Under the sixth *DuPont* factor, we consider the extent to which the strength of a registered mark, or common element of the marks, may be attenuated by “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). In this regard, an applicant may submit evidence of similar marks in actual use on or in connection with the same or similar goods, to show commercial weakness of the registered mark. *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at \*4 (Fed. Cir. 2023); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength...”), *quoted in Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*21 (TTAB 2022).

An applicant may also submit third-party registration evidence to show conceptual weakness, because third party registrations may be used to shed light on what the term at issue may mean to market participants. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015). “Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Id.* at 1339 (citation omitted).

Applicant argues that “it is unlikely that the relevant public will focus solely on the VERSA portion of the mark[s] because of the relatively crowded field in which VERSA is used.”<sup>4</sup> In support, Applicant submitted copies of the following five registrations:<sup>5</sup>

1. VERSA (Reg. No. 6024465) for “cycling apparel, namely, gloves, socks, arm and leg warmers, pants, tights, shorts, jerseys, shirts, t-shirts, vests, sweaters, jackets, warm-up suits, rain suits; anoraks, singlets, tank-tops, cycling shorts, underwear, knickers, warm-up pants, skirts, skorts, pullovers, rainwear, cycling jerseys, cycling bibs, sports bras, crop tops, balaclavas, visors; baselayers, namely, tops, bottoms and underwear; headwear, hats, caps, headbands, all marketed to cyclists” in Class 25;
2. VERSA (Reg. No. 3823017) for “clothing, namely, sweatshirts” in Class 25;
3. VERSA SKINS stylized with design (Reg. No. 5944388) for “attachable outer skin garments provided in combination with a wearable base garment, namely, outer jackets and pants selectively attachable over jacket and pant portions associated with the base garment” in Class 25;

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<sup>4</sup> 6 TTABVUE 10.

<sup>5</sup> Attached to Applicant’s Request for Reconsideration, filed February 16, 2023.

4. VERSA BY DAVID'S BRIDAL (**Cancelled** Reg. No. 5080756) for "formal wear, namely, bridesmaids gowns, special occasion dresses; gloves, shawls, capes, wraps, shrugs, cover-ups, sashes, garters and slips, and head pieces, namely, headbands and veils" in Class 25;<sup>6</sup> and
5. VERSA ADAPTIVE WEAR (Reg. No. 6584441) for "adaptive clothing, namely, shirts, pants, robes, ponchos, blouses" in Class 25.

These third-party registrations, with one having been cancelled, are minimal in number. Moreover, they provide little insight in terms of showing weakness of the shared VERSA element because they cover clothing, in contrast to Applicant's and the cited Registrants' textile fabrics. *See Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (Discounting third-party use and registration evidence as "not only unpersuasive but essentially meaningless," where "[n]one of the third party marks and uses of ACE made of record are nearly as closely related to the activities of the parties as the virtually identical uses of the parties are to each other."); *Key Chemicals, Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) ("Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word "KEY." The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here").

Applicant acknowledges that the third-party registrations are for clothing, not fabrics, but asserts that "while fabric differs from the clothing, they are still closely

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<sup>6</sup> The registration was cancelled on May 26, 2023 for failure to file a Section 8 affidavit.

related goods because clothing is made from fabric.”<sup>7</sup> We disagree. Although textile fabrics logically can be used in the further manufacture of clothing, and this is the stated end use for Applicant’s fabrics and those listed in cited Reg. ’293, there is no evidence demonstrating that consumers would believe that the same entity would be the source for textile fabrics as well as the actual finished articles of clothing. Thus, aside from being so few in number, the four live, third-party registrations involving actual apparel have little relevance in terms of showing weakness for the shared VERSA element in connection with textile fabrics.

Registrants’ marks, VERSAFLEX and VERSATECH, must be considered inherently distinctive. “It is registered on the Principal Register without a claim of acquired distinctiveness, and is therefore presumed distinctive.” *Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, 2023 USPQ2d 753, \*15 (TTAB 2023).

In sum, the mere presence of four live registrations for marks containing the term VERSA on articles of clothing does not demonstrate that said term is weak in connection with textile fabrics. The registered marks are accorded a scope of protection normally given to inherently distinctive marks without any showing of weakness.

### **C. Similarity or Dissimilarity of Marks**

We turn now to the first *DuPont* factor which focuses on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these

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<sup>7</sup> 6 TTABVUE 11.



elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

When the involved goods are identical or legally identical, as in this appeal, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *See Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, at 1701 (Fed. Cir. 1992).

Here, Applicant seeks to register the mark VERSAKNIT and the cited registered marks are VERSAFLEX and VERSATECH. The marks are aurally and visually similar given they begin with the same two-syllable term, VERSA-, followed by a single-syllable word.

Applicant argues that, despite the shared initial term VERSA, its mark is “sufficiently different from the [marks in the] Cited Registrations because a difference in only one element of the marks can preclude a finding of likelihood of confusion.”<sup>8</sup> Applicant argues that “the marks also differ in commercial impression given their

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

distinct meanings” because “[t]he terms KNIT, FLEX, and TECH each have different, unrelated meanings.”<sup>9</sup> Applicant submitted dictionary definitions of these terms and asserts:<sup>10</sup>

As previously noted by the Examiner, the VERSAFLEX mark provides an impression that ‘registrant’s non-woven textile fabrics are flexible.’ Similarly, the VERSATECH mark provides the impression that the registrant’s “fabric goods were made by applying scientific knowledge.’ In contrast, Applicant’s Mark provides an impression that Applicant’s goods are ‘textile fabrics made by knitting.’ This difference in meaning creates different commercial impressions, which decreases the likelihood of consumer confusion.

However, as we often point, consumers are more likely to notice that the marks begin with same lead term, VERSA, and this makes the marks overall similar. *Century 21 Real Est. Corp.*, 23 USPQ2d 1700; *see also Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first

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<sup>9</sup> 6 TTABVUE 10.

<sup>10</sup> 6 TTABVUE 10; internal citations omitted, but we note Applicant references contentions made by the Examining Attorney in a May 16, 2020 Office Action.

Definitions of the terms were submitted by Applicant with its Request for Reconsideration filed on February 16, 2023. The word “knit” is defined, in pertinent part, as “to make clothes” or “made of wool, or made of something that looks like wool.” The word “flex” is defined as “(of a material) to bend without breaking, or to make a material do this.” Lastly, we take judicial notice that the word “tech” is defined as “often attributive” for “technology” which, in turn, is defined as “the practical application of knowledge especially in a particular area.” MERRIAM-WEBSTER.COM DICTIONARY, Merriam-Webster, <https://www.merriam-webster.com/dictionary/technology>. Accessed 2 Apr. 2024. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Also, and contrary to Applicant’s argument, because each of the final terms in the marks, KNIT, FLEX, and TECH, are highly suggestive or descriptive words in connection with fabrics, this actually makes it more likely that consumers will focus on VERSA, not only as the initial term, but also as the more distinctive element in each mark. That is, VERSA plays a more important role in the marks for source-identification purposes because the words at the end of the marks serve to inform the consumer about a quality or characteristic of textile fabrics. Again, we keep in mind that VERSA has not been demonstrated to be weak in the context of the fabrics.

Because the marks are overall similar, the first *DuPont* factor also weighs in favor of a likelihood of confusion.

## **II. Conclusion**

As discussed, Applicant’s VERSAKNIT mark is overall similar to the cited registered marks, VERSATECH and VERSAFLEX. Applicant’s goods are legally identical to Registrants’ goods and there is the presumption that these identical goods will be encountered in the same trade channels by the same consumers. In sum, all relevant factors weigh in favor of finding, and we accordingly find, that confusion is likely between Applicant’s mark and the cited marks.

**Decision:** The refusal to register Applicant’s mark is affirmed based on a likelihood of confusion with both cited registrations.