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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Apparel Limited, Inc.

Serial Nos. 85141163, 85141193 and 85141214

Kathryn Marshall of Wasserman, Comden, Casselman & Esenstein for
Apparel Limited, Inc.

Tasneem Hussain, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Quinn, Holtzman and Wellington,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Apparel Limited, Inc. filed, on September 29, 2010, intent-
to-use applications to register the marks CURVEE, CURVEY and
CURVEEY (in standard characters),¹ all for "clothing, namely,
pants, denims, capri pants, cargo pants, shorts, skirts, skorts,
[and] active wear, namely, jogging outfits" (in International
Class 25).

The trademark examining attorney refused registration in
each application under Section 2(d) of the Trademark Act, 15

¹Application Serial Nos. 85141163, 85141193 and 85141214, respectively.

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U.S.C. § 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark CURVY (in standard characters) for "clothing, namely, shirts, fitted tops, jackets, trousers, skirts, chemises, pajamas, nightgowns, camisoles, short robes, night shirts, long wraps, bath robes; swimwear and underwear" (in International Class 25)² as to be likely to cause confusion.

The examining attorney also refused registration in each application under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark, when applied to applicant's goods, is merely descriptive thereof.

When the refusals were made final, applicant appealed. Applicant and the examining attorney filed briefs.³

The appeals involve common issues of law and fact. Further, the evidentiary records are identical. Accordingly, we will issue a single decision on the appeals.

²Registration No. 3105309, issued June 13, 2006 on the Supplemental Register; Section 8 affidavit accepted.

³Applicant's brief in each case is accompanied by Exhibit A, which is an excerpt of registrant's website. The examining attorney objected to this submission as untimely. Trademark Rule 2.142(d) provides that the Board will ordinarily not consider additional evidence filed after the appeal is filed. Accordingly, the objection is sustained, and we have not considered this evidence in reaching our decision. We hasten to add, however, that even if considered, the evidence does not compel a different decision on the merits. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (an applicant may not restrict the scope of goods in an otherwise unrestricted registration by extrinsic evidence).

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Before turning to the substantive merits of the appeals, we first turn our attention to a procedural matter involving the third-party registration evidence submitted by applicant. With its response filed on July 11, 2011, applicant attached several exhibits, including printouts of search results retrieved from the Office's TESS (Trademark Electronic Search System) database. The results show third-party registrations and applications of CURVE and CURVY formative marks. The examining attorney, in the final refusal dated August 1, 2001, made no mention whatsoever of this evidence; more specifically, the examining attorney did not mention applicant's failure to accompany the search results with copies of the listed registrations or applications. *See In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010); and *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006) (to make a third-party registration of record, a copy of the registration should be submitted; mere listings of registrations are not sufficient to make the registrations of record). However, in the brief (unnumbered p. 6), the examining attorney raises for the first time an objection to this evidence because copies of the official records were not submitted.

If an applicant includes a listing of registrations in a response to an Office action, and the examining attorney does not advise the applicant that the listing is insufficient to make the registrations of record at a point when the applicant

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can correct the error, the examining attorney will be deemed to have waived any objection to consideration of the list itself, for whatever probative value it may have. *In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012) (“[T]he examining attorney’s failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list. Accordingly, we will consider the ...list of registrations...`for whatever limited probative value such evidence may have.’” (citation omitted)). See TBMP § 1208.02 (3d ed. 2011).

Accordingly, the examining attorney’s objection is overruled. The TESS printouts have been considered in reaching our decision.

Insofar as likelihood of confusion is concerned, applicant argues that the cited mark is extremely weak “as it is descriptive of clothes designed for larger busts.” (Brief, p. 2). In this regard, applicant asserts that the term “curvy” is ubiquitous in the marketplace and, therefore, consumers are conditioned to look to other elements as a means of distinguishing the source of the goods in the clothing field. Applicant points to third-party registrations of similar marks and the fact that the cited mark is registered on the Supplemental Register. Applicant also contends that each of its

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marks is different from the cited mark in terms of sound, appearance and commercial impression. In support of its arguments, applicant submitted dictionary evidence, third-party advertisements and, as noted earlier, printouts of search results listing third-party registrations and applications of CURVE and CURVY formative marks.

As to mere descriptiveness, although applicant asserts, as just noted above, that the cited mark CURVY is merely descriptive for clothing, applicant argues that its marks CURVEE, CURVEY and CURVEEY are unique and are not the phonetic equivalent of a merely descriptive term because they may be pronounced differently. Applicant points to the misspellings in its marks, and the absence of these misspelled terms as listings in dictionaries. Applicant also states that its goods are not meant for "curvy" figures.

The examining attorney maintains that, with respect to likelihood of confusion, the marks are similar, and even weak marks, such as those registered on the Supplemental Register, are entitled to protection. The examining attorney also asserts that the goods are closely related. In support of this refusal the examining attorney submitted excerpts of third-party websites.

As to the refusal based on mere descriptiveness, the examining attorney contends that the proposed mark describes a

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significant feature of applicant's clothing, namely, that the clothing has a rounded or "curvy" shape or that the clothing is designed for consumers with a rounded or "curvy" shape. In support of the refusal under Section 2(e)(1) the examining attorney introduced a dictionary definition, excerpts of third-party websites, and third-party registrations issued on the Supplemental Register.

Mere Descriptiveness

A mark is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods or services for which

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registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

The term "curvy" is defined as, in pertinent part, "with a rounded shape." (www.encarta.com). Also of record is applicant's dictionary evidence showing the absence of entries of the misspelled terms sought to be registered.

The record further includes evidence of third-party uses of "curvy" in the clothing field: "women's curvy fit jeans (Proportioned for curves)"; "curvy jeans"; "curvy boot cut [jeans]"; "Curvy Cowgirl Couture - Dress Your Curves In More Than Just Denim"; "curvy sweater"; and "Fashion for a Curvy Figure." And, of course, the cited registered mark CURVY resides on the Supplemental Register.

As noted above, the question of mere descriptiveness must be decided on the basis of the identification of goods in the

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applications. In the present case, the identifications all read "clothing, namely, pants, denims, capri pants, cargo pants, shorts, skirts, skorts, [and] active wear, namely, jogging outfits." Thus, the broadly worded identification encompasses all kinds of these clothing items, including clothing that may be described as "curvy" or clothing that is directed to "curvy" individuals.

Based on the evidence of record, we find that the proposed marks are merely descriptive of a significant characteristic or feature of applicant's clothing. No imagination is required by a purchaser or user to discern that the marks, when applied to the goods, describe "curvy" clothing or clothing directed to "curvy" individuals. A slight misspelling of a merely descriptive word, such as "curvy," does not turn the descriptive word into a non-descriptive mark. See, e.g., *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) (the generic meaning of "togs" is not overcome by the misspelling of the term as "toggs"); and *In re State Chem. Mfg. Co.*, 225 USPQ 687 (TTAB 1985) (FOM, as the phonetic spelling of "foam," is merely descriptive of foam rug shampoo). Thus, applicant's proposed marks CURVEE, CURVEY and CURVEEY are not magically transformed into inherently distinctive marks by the mere slight misspellings of the commonly used and understood descriptive term "curvy." An ordinary consumer encountering applicant's

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marks in connection with applicant's clothing would immediately perceive the misspelled terms as the phonetic equivalents of the merely descriptive term "curvy." Moreover, the fact that none of applicant's proposed marks is found in a dictionary is not controlling. See *In re Orleans, Ltd.*, 196 USPQ 516 (TTAB 1977) (BREADSPRED held merely descriptive of jellies and jams).

We have considered the examining attorney's evidence of third-party registrations issued on the Supplemental Register of "CURVY" formative marks as showing that the Office has consistently treated this term as merely descriptive for clothing. Although this evidence is entitled to some probative value, it is not conclusive on the issue of mere descriptiveness. Each case must stand on its own merits. *In re International Taste Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000); and *In re Scholastic Testing Service, Inc.*, 196 USPQ 517, 519 (TTAB 1977). See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We conclude that applicant's marks, when applied to applicant's goods, are merely descriptive thereof under Section 2(e)(1).

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in

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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). In any likelihood of confusion analysis, however, 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).

We first turn to consider the similarity between the goods. We make our comparison of the goods, including between the respective channels of trade and classes of purchasers, based on the goods as they are identified in the applications and the cited registration. *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's argument regarding registrant's specific goods and function, that is, that registrant's clothing is directed to women with "larger busts" must fail because, as noted earlier, an applicant may not restrict the scope of goods in an otherwise unrestricted registration by extrinsic evidence (in this case, registrant's website). See *In re Bercut-Vandervoort & Co.*, 229 USPQ at 764. More significant is applicant's mistaken contention that there is no likelihood of confusion because it has "limited its application[s] to apparel bottoms and deleted all tops and jackets from its application." (Brief, p. 1). What applicant overlooks, however, is that its identification of goods still includes "pants, denims, capri

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pants, cargo pants and skirts." Applicant's "pants" are legally identical to registrant's "trousers," and applicant's and registrant's identifications of goods both include "skirts." Thus, for purposes of our analysis, the goods are identical or otherwise are closely related clothing items.

Because the goods described in the applications and the cited registration are in-part identical, we must presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade."); and *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers."). Additionally, there is nothing in the recital of goods in either the cited registration or the applications that limits either registrant's or applicant's channels of trade. Thus, applicant's assertion that its clothing are sold in brick and mortar retail stores whereas registrant's clothing is sold through mail order is irrelevant. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992)

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(because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). In other words, there is nothing that prevents applicant's "pants" and "skirts" from being sold in the same trade channels (e.g., clothing stores, clothing sections of department stores, and through mail order) and to the same classes of consumers, including ordinary ones, that purchase registrant's "trousers" and "skirts."

Lest there be any doubt about the similarities between the goods and the trade channels therefor, the examining attorney's evidence shows that third parties such as Nike, REI, Eddie Bauer, Athleta and Gap sell a diverse collection of clothing, often under the same mark.

The identity or otherwise close relationship between the goods, and the presumed identity in trade channels and purchasers are factors that weigh heavily in favor of a finding of a likelihood of confusion.

We next direct our attention to the du Pont factor of the similarity/dissimilarity between the marks. Preliminarily, we note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of

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confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1960 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. The test, under the first du Pont factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

There is no question that each of applicant's marks, CURVEE, CURVEY and CURVEEY, is similar to registrant's mark CURVY in appearance. The "-Y," in registrant's mark is simply replaced by "-EE," "-EY" or "-EEY" in applicant's marks. Further, as discussed earlier, the marks have the same meaning. In addition, the marks are phonetic equivalents and, thus, sound the same. Applicant's argument that its marks may be pronounced

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in a variety of different manners is, to say the least, strained; in any event, as often stated, there is no correct pronunciation of a mark. See *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n.3 (TTAB 1987). Given that the marks are so similar, they engender substantially similar, if not virtually identical overall commercial impressions. In sum, the mere differences in spelling are hardly a sufficient means for ordinary consumers to distinguish between each of applicant's marks and registrant's mark.

As should be evident from our discussion of mere descriptiveness above, we appreciate applicant's principal argument grounded on the weakness of registrant's mark, and the proposition that the mark is entitled to a narrow scope of protection, especially given that the cited mark is registered on the Supplemental Register. In support of this argument, applicant relied upon third-party registrations and advertisements.

With respect to the list of third-party registrations, a mere listing, with little specific information regarding the registered marks, is entitled to minimal probative value. See *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1514 (TTAB 2001). In any event, "[t]he existence of [third-party] registrations is not evidence of what happens in the market place or that consumers are familiar with them nor should the

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existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive." *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010). In addition, applications are evidence of only that they were filed.

Insofar as the evidence of actual use in advertisements is concerned, there is an infirmity in applicant's evidence, namely the absence of any information regarding the extent of use of CURVY-type marks by third parties. That is to say, there is no way to gauge what effect, if any, these uses may have had in the minds of consumers. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1693-94 (third-party use was not "so widespread as to 'condition' the consuming public"); *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1110 (TTAB 2007); and *Fort James Operating Co. v. Royal Paper Converting Inc.*, 83 USPQ2d 1624, 1629 (TTAB 2007). Thus, in the absence of evidence to corroborate the extent of the third-party uses, this evidence is entitled to only minimal probative value.

We acknowledge, of course, that the cited mark resides on the Supplemental Register, and that the information of record

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shows that "curvy" is descriptive in the clothing field. As the Board has noted in the past:

Registration on the Supplemental Register may be considered to establish prima facie that, at least at the time of registration, the registered mark possessed a merely descriptive significance. This is significant because it is well established that the scope of protection afforded a merely descriptive or even a highly suggestive term is less than that accorded an arbitrary or coined mark. That is, terms falling within the former category have been generally categorized as "weak" marks, and the scope of protection extended to these marks has been limited to the substantially identical notation and/or to the subsequent use and registration thereof for substantially similar goods.

In re Hunke & Jochheim, 185 USPQ 188, 189 (TTAB 1975) (citation omitted). As alluded to the Board above, and confirmed by our primary reviewing court, 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). Indeed, even marks that are registered on the Supplemental Register may be cited under Section 2(d). *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978). We are not persuaded by applicant's arguments, however, for the precise reason spelled out in the cited cases, namely, that even the admittedly narrow scope of protection accorded to the cited mark CURVY extends to protect against the substantially similar marks

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CURVEE, CURVEY and CURVEEY for identical or closely related goods.

In reaching our decision, we have kept in mind that there is no *per se* rule governing likelihood of confusion cases involving all types of wearing apparel. See *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984). However, in numerous cases in the past, many different types of apparel have been found to be related products which are sold in the same trade channels to the same classes of purchasers, including to ordinary consumers, and that confusion is likely to result if the goods were to be sold under similar marks.⁴ To state the obvious, we have decided this appeal based on the specific evidence before us, and not on any rule.

We conclude that consumers familiar with registrant's "clothing, namely, shirts, fitted tops, jackets, trousers, skirts, chemises, pajamas, nightgowns, camisoles, short robes, night shirts, long wraps, bath robes; swimwear and underwear"

⁴ See, e.g., *Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 128 USPQ 549 (CCPA 1961) [women's boots related to men's and boys' underwear]; *Jockey Int'l, Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992) [underwear related to neckties]; *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991) [women's pants, blouses, shorts and jackets related to women's shoes]; *In re Pix of America, Inc.* 225 USPQ 691 (TTAB 1985) [women's shoes related to outer shirts]; *In re Mercedes Slacks, Ltd.*, 213 USPQ 397 (TTAB 1982) [hosiery related to trousers]; *In re Cook United, Inc.*, 185 USPQ 444 (TTAB 1975) [men's suits, coats, and trousers related to women's pantyhose and hosiery]; and *Esquire Sportswear Mfg. Co. v. Genesco Inc.*, 141 USPQ 400 (TTAB 1964) [brassieres and girdles related to slacks for men and young men].

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sold under the mark CURVY would be likely to mistakenly believe, upon encountering any of applicant's marks CURVEE, CURVEY and CURVEEY for "clothing, namely, pants, denims, capri pants, cargo pants, shorts, skirts, skorts, [and] active wear, namely, jogging outfits," that the goods originated from or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusals to register under Section 2(d) are affirmed; and the refusals to register under Section 2(e)(1) are affirmed.