

**This Opinion is Not a
Precedent of the TTAB**

Hearing: June 12, 2014

Mailed: July 3, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re New York Football Giants, Inc.
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Serial No. 85599795
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Jean Clemente Mariani of NFL Properties LLC and Bruce Keller of Debevoise & Plimpton LLP for New York Football Giants, Inc.

David I, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

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Before Cataldo, Taylor and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

New York Football Giants, Inc. (“Applicant”) seeks registration on the Principal Register of the mark G-MEN (in standard characters) for

Shirts; T-shirts; Tops, in Class 25.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant’s mark so resembles the mark GMAN SPORT and design,

¹ Application Serial No. 85599795 was filed on April 17, 2012, based upon applicant’s claim of first use anywhere and use in commerce since at least as early as February 2007.

shown below, for “Boxer shorts; Socks; T-shirts; Tank tops,” in Class 25, as to be likely to cause confusion.²



Registrant disclaimed the exclusive right to use “Sport.”

Preliminary Issue

The essence of Applicant’s argument as to why there is no likelihood of confusion is that its G-MEN mark is (1) so famous that (2) when used in the context of football related merchandise, it has a unique and singular meaning for a distinct set of products. According to Applicant, “[t]here is no more fundamental and grievous error than to conclude that confusion is likely by comparing two marks in the abstract, divorced from marketplace circumstances. ... All evidence of record regarding how the marks appear in the marketplace ‘*must* be considered.’ ... There is ‘no warrant, in the statute or elsewhere, for discarding *any* evidence bearing on the question of likelihood of confusion.” [Internal citations omitted].³ In other words, Applicant contends that because it has introduced evidence, which may not be disregarded, about the fame of the G-MEN mark, as well as about the precise nature of Applicant’s and Registrant’s goods that are actually sold under the respective marks, and their actual channels of trade and classes of consumers, the

² Registration No. 4076634, issued December 27, 2011.

³ Applicant’s Reply Brief, p. 1.

lack of any express restrictions or limitations in the respective descriptions of goods is no longer relevant.

While it is not unusual for an applicant that has been refused registration under Section 2(d) of the Trademark Act to argue that confusion is not likely because of marketplace conditions, typically such arguments fail to recognize that the Board is required, under applicable precedents of its primary reviewing court, to analyze likelihood of confusion based on the involved identifications, broadly construed. In the case at hand, Applicant's counsel appears not to have ignored such precedent, but to have made a direct argument that application of such precedent, over the course of many years, has been improper and the Board's focus, in likelihood of confusion cases, on broadly construed identifications, has been in error. Accordingly, we shall review relevant precedent.

The second *du Pont* factor expressly mandates consideration of the similarity or dissimilarity of the goods "as described in an application or registration." *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). "The description of the goods in an application for registration is critical because any registration that issues will carry that description. Moreover, although a registrant's current business practices may be quite narrow, they may change at any time from, for example, industrial sales to individual consumer sales." *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983).

An argument similar to that of the instant applicant was raised in an appeal to the Federal Circuit and rejected by that court. *See Octocom Systems Inc. v.*

Houston Computers Services, Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). In *Octocom Systems*, Octocom filed an application to register the marks OCTOCOM alone and with a stylized “O” design for modems. On a motion for summary judgment, the Board held that Octocom's marks so resemble the previously used and registered trademark OCTACOMM for computer programs as to be likely to cause confusion, mistake or deception. Octocom appealed.

As in this case, Octocom argued that the Board ignored evidence establishing that there would not be a likelihood of confusion.

[Octocom] argues that the board did not consider its evidence which establishes no likelihood of confusion, namely: that modems differ from computer programs; that it sold its goods principally to large institutions; that it promoted its goods through industrial trade magazines and trade shows relating to data communications hardware; that typical buyers are sophisticated purchasers; that its goods are expensive; and that there is no evidence of actual confusion.

Octocom Systems Inc. v. Houston Computers Services, Inc., 16 USPQ2d at 1787.

The Court noted that Octocom took the following position:

[O]nce evidence is presented on a factor (e.g., on an applicant's specific trade channels), such evidence is controlling regardless of the lack of any limitation in the applicant's description of goods reflecting the newly asserted limitation.

Id.

The Federal Circuit rejected Octocom's argument.

The issue in an opposition is the right of an applicant to register the mark depicted in the application for the goods identified therein. The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth

in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042, 216 USPQ 937, 940 (Fed. Cir. 1983); *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 1337, 209 USPQ 986, 988 (CCPA 1981); *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 684-85, 196 USPQ 1, 2 (CCPA 1977); *Broderick & Bascom Rope Co. v. Goodyear Tire & Rubber Co.*, 531 F.2d 1068, 1070, 189 USPQ 412, 413 (CCPA 1976); *Pennwalt Corp. v. Center Laboratories, Inc.*, 524 F.2d 235, 236, 187 USPQ 599, 601 (CCPA 1975); *Paula Payne Prods. Co. v. Johnson Publishing Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973); *International Paper Co. v. Valley Paper Co.*, 468 F.2d 937, 938, 175 USPQ 704, 705 (CCPA 1972); *Vornado, Inc. v. Breuer Elec. Mfg. Co.*, 390 F.2d 724, 726, 156 USPQ 340, 342 (CCPA 1968); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 957, 119 USPQ 139, 140 (CCPA 1958); and *Miles Laboratories, Inc. v. Naturally Vitamin Supplements, Inc.*, 1 USPQ2d 1445, 1450 (TTAB 1986) (amended 1987).

As the predecessor of this court stated in *Tuxedo Monopoly*, 648 F.2d at 1337, 209 USPQ at 988:

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this appeal prevent likelihood of confusion. We cannot take such facts into consideration unless set forth in its application. *Toro Co. v. Hardigg Industries, Inc.*, 549 F.2d 785, 790, 193 USPQ 149, 155 (CCPA 1977).

In this appeal, as well, the factors which Applicant asks to have considered are not reflected, either expressly or inherently, in its application. Thus, where there is no specific limitation in the description of goods and nothing inherent in the nature of Applicant's mark that restricts Applicant's usage to football related

merchandise or the promotion of a particular football team, the Board may not read such limitations into the application. *Squirtco v. Tomy Corp.*, 216 USPQ at 940.

Applicant's counter to this position is that because its mark is famous, presumably in connection with its entertainment services in the nature of professional football, it creates a unique commercial impression for prospective consumers of applicant's identified products, so that such consumers will, inevitably assume the products to be collateral products related to applicant's services; and therefore G-MEN products will be easily distinguished from Registrant's mark GMAN SPORT and design products. This argument by applicant also fails, for two significant reasons.

First, applicant's contention fails because in an *ex parte* appeal, it is fame of the prior mark (*i.e.*, the mark in the cited registration), not the applicant's mark, that must be considered when evidence of fame is of record. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567 ("The fame of the prior mark.").

Second, Applicant's argument is based on the false premise that the fame of its mark creates an inherent narrowing or limitation of its goods to football related products, namely, football-themed shirts, t-shirts, and tops of interest to a class of consumers that can be characterized as fans of football. In essence, Applicant contends that its mark is famous for a particular subset of products encompassed within the broad description of goods in its application, and that consumers will recognize the inherent limitation or restriction. However, the asserted fame of Applicant's mark does not serve to restrict or limit Applicant's shirts, t-shirts, and

tops for non-football fans, or those unfamiliar with applicant's mark. Further, although we have noted that fame as a du Pont factor means the fame of the prior mark, we accept that evidence of the fame of Applicant's mark may nonetheless bear on our analysis of likelihood of confusion. For example, just as the existence of a plethora of third-party marks similar to the mark of an applicant or a registrant may affect the scope of protection afforded the mark in a cited registration, so too may the fame of either of the marks involved in an appeal affect such scope. However, we reject applicant's contention that the asserted fame of its mark, in the marketplace but not necessarily for the identified goods, means that we must no longer take into account the unrestricted/unlimited description of goods for which Applicant is seeking registration. We reiterate, all consumers that may encounter the mark on or in connection with Applicant's goods are not necessarily football fans who will be familiar with Applicant's mark; and our likelihood of confusion analysis must consider all possible consumers for goods of the type identified, marketed in all possible channels of trade.

In sum, the fame of Applicant's mark does not serve to restrict the description of goods and we must analyze the likelihood of confusion based on the marks in the application and the registration and the goods identified in the application and registration.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of

likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. *See also In re Majestic Distilling Company, Inc.*, 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 between the 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”). These factors, and any other relevant *du Pont* factors will be considered in this decision.

A. The similarity or dissimilarity and nature of the goods, the established, likely-to-continue channels of trade and classes of consumers.

Applicant is seeking to register its mark for “Shirts; T-shirts; Tops” and the description of goods in the cited registration is “Boxer shorts; Socks; T-shirts; Tank tops.”⁴ Because both the application and the cited registration include T-shirts and applicant’s tops may encompass tank tops, the goods are in part identical. Under this *du Pont* factor, the Trademark Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the Class 25 description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of

⁴ “Semicolons should generally be used to separate distinct categories of goods or services within a single class.” TMEP § 1402.01(a) (April 2014). For example, in Registrant’s identification of goods, boxer shorts, socks, t-shirts, and tank tops are all separate categories of goods. *See In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in registrant’s identification, its “restaurant and bar services” is a discrete category of services that stands alone and independently as a basis for likelihood-of-confusion analysis, and is not connected to nor dependent on the services set out on the other side of the semicolon).

goods in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

Because the descriptions of goods in the Application and the cited Registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, this Board was entitled to rely on this legal presumption in determining likelihood of confusion).

As noted in the “Preliminary Issue” section, Applicant argues that the channels of trade are different because Applicant uses its mark in connection with football and the promotion of the New York Giants football team and Registrant uses its mark for “underwear marketed to an urban customer base.”⁵ However, as previously stated, our analysis must be predicated upon the identifications of goods as recited in applicant’s application and the cited registration. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. *See also, In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); *Canadian Imperial Bank v. Wells Fargo*

⁵ Applicant’s Brief, pp. 15-16. We note that fans of the Giants football team and “urban customers” are not necessarily mutually exclusive.

Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1992). Put another way, because the scope of the registration applicant seeks is defined by its application (and not by its actual use) it is the application (and not its actual use) that we must look to in determining applicant's right to register:

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Syst. Inc. v. Houston Computers Svcs. Inc., 16 USPQ2d at 1787. Likewise, in considering the scope of the cited registration, we look to the registration itself, and not to extrinsic evidence about the registrant's actual goods, customers, or channels of trade. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958).

As there are no limitations as to channels of trade or classes of purchasers in the description of goods in either the application or the cited registration, it is presumed that applicant's goods and registrant's goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Squirtco v. Tomy Corp.*, 216 USPQ at 940; *Paula Payne Products Co. v. Johnson Publishing Co.*, 177 USPQ at 77; *Kalart Co. v. Camera-Mart, Inc.*, 119 USPQ at 139-140; *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). In other words, facts regarding the actual use of Applicant's mark and Registrant's mark that Applicant argues prevent a likelihood of confusion cannot be taken into

consideration unless those facts are set forth in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 209 USPQ at 988.

Applicant is correct when it contends that the Trademark Examining Attorney did not “acknowledge anything about the Giants, the NFL, or the history of the G-MEN nickname.”⁶ Since those facts are not referenced in Applicant’s description of goods, they may not be considered, in the analysis of this factor.⁷

In view of the foregoing, we find that the goods are in part identical and that they are presumed to move in the same channels of trade and are sold to the same classes of consumers.

B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach*

⁶ Applicant’s Brief, p. 11.

⁷ If, as Applicant contends, Applicant’s Brief, pp. 11-12, the public has come to associate G-MEN with Applicant and Applicant, therefore, has a protectable interest in that term which would be superior to the registrant’s interest in its GMAN SPORT mark, then Applicant’s remedy would be a petition to cancel the cited registration.

Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Further, “[t]he 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 at 1721. *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Since the goods at issue, as identified, are t-shirts and tank tops, we are dealing with average customers who are ordinary consumers.

Applicant’s mark is G-MEN and the cited mark is GMAN SPORT and design shown below.

The logo consists of the word "GMAN" in a large, bold, serif font. Below the "AN" portion of "GMAN", the word "Sport" is written in a smaller, italicized, cursive-style font.

The terms G-MEN and GMAN are similar. However, because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, ___ F.3d ___, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, 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 a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751. As indicated above, we must focus our analysis on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012).

The dominant element of the mark in the cited registration is the term GMAN and it is that part of Registrant’s mark that is most responsible for engendering the commercial impression with consumers because the word “Sport” is descriptive of sportswear and has been disclaimed.⁸ It is well-settled that

⁸ In its Brief, p. 13 n.8, Applicant acknowledges that the “descriptive word ‘Sport’ was disclaimed.”

disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), *quoting*, *In re National Data Corp.*, 224 USPQ at 752 (“Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression.”).

The significance of the term GMAN as the dominant element of Registrant’s mark is further reinforced by its size. The term GMAN is in a larger font than the word “Sport” and it is the term GMAN that catches the consumers’ attention. Also, GMAN’s location as the first part of the mark reinforces the importance of that term as the dominant element of Registrant’s mark. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“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); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir.

1992) (upon encountering the marks, consumers will first notice the identical lead word).

In comparing G-MEN and GMAN, little if any significance can be attributed to the absence of a hyphen in the registered mark. *E.g.*, *Nahshin v. Prod. Source Int'l LLC*, 107 USPQ2d 1257 (TTAB 2013) (“the presence or absence of a hyphen is insignificant to our . . . decision”); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (hyphen did not distinguish MAGNUM from MAG-NUM); *Goodyear Tire & Rubber Company v. Dayco Corporation*, 201 USPQ 485, 489 n.4 (TTAB 1978) (“Fast-Finder” with hyphen is in legal contemplation substantially identical to “Fastfinder” without hyphen).

Likewise, the difference between the terms “men” in G-MEN and “man” in GMAN does little to distinguish the marks because trademarks consisting of the singular and plural forms of the same term are essentially the same mark. *See Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (C.C.P.A. 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *Weider Publ'ns, LLC v. D&B Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014); *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) (“the difference between the singular form ANYWEAR depicted in the applied-for mark and the plural form ANYWEARS in applicant's existing registration is not meaningful.”); *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985) (noting that the pluralization of NEWPORT is “almost totally insignificant” in terms of likelihood of confusion among purchasers); *In re*

Sarjanian, 136 USPQ 307, 308 (TTAB 1962) (finding no material difference between the singular and plural forms of RED DEVIL).

In addition, because applicant applied to register its mark in standard character form, its display is not limited to any particular font style, size, or color and we therefore must consider that applicant's mark might be used in any stylized display, including one that is similar or identical to the lettering used by Registrant. *See* Trademark Rule 2.52(a). *See also Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). For example: Applicant may display its mark as shown below:

G-MEN

Compare with Registrant's mark shown below:

GMAN
Sport

We find that G-MEN and GMAN are similar in appearance, sound and commercial impression.

Applicant argues that the commercial impression engendered by the marks is different because "the public recognizes the nickname 'G-MEN,' in the context of football-related merchandise, as synonymous with the [New York Football] Giants. ... The record also establishes that the popularity and recognition of NFL football generally, and the G-MEN nickname in particular. ... It shows G-MEN, when used as a mark on football-related goods, is indisputably uniquely associated with the

Giants and the NFL, which serves to dispel any likelihood of confusion.”⁹ However, as discussed above, Applicant’s description of goods is for “Shirts; T-shirts; Tops” *per se*, and it is not restricted to football-related goods. Thus, in determining the commercial impressions engendered by the marks, we must compare G-MEN and GMAN SPORT as marks for, in part, identical goods. Moreover, though Applicant argues that G-MEN is essentially a synonym for the name GIANTS for a football team, this may be known only by football fans, or even only those fans who favor the GIANTS; but in the absence of restrictions expressed in the applicant’s identification, we must consider G-MEN clothing items to be marketed to all possible consumers of the identified items, including non-football fans. Under those circumstances, the commercial impressions of both Applicant’s mark and the cited mark are, at a minimum, very similar. *Compare Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (the word “Coach” had different meanings and engendered different commercial impressions depending on the respective goods and services).

Applicant also argues that “in terms of actual use, G-MEN typically appears with other indicia, including team colors and logos, uniquely associated with NFL football and the Giants.”¹⁰ However, no consideration may be given to allegedly distinguishing features which are not part of the mark sought to be registered. *In*

⁹ Applicant’s Brief, p. 12. Applicant asserts that an important consideration when comparing the marks is the fame of applicant’s mark. (Applicant’s Brief, p. 9; Reply Brief, pp. 5 and 13-14). However, the relevant factor is the fame of the mark in the cited registration, not applicant’s mark. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567 (“The fame of the prior mark.”).

¹⁰ Applicant’s Brief, p. 13.

re Kysela Pere Fils Ltd., 98 USPQ2d 1261, 1268 (TTAB 2011) (“Likelihood of confusion is determined based on the mark as shown in the drawing of an application and the mark(s) shown in the cited registration(s).”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). *See also Kimberly Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1147, 227 USPQ 541, 543 (Fed. Cir. 1985) (only the word mark is to be registered, not the trade dress); *Specialty Brands, Inc. v. Coffee Bean Distribution, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (“Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time.”); *Vornado, Inc. v. Breuer Electric Mfg. Co.*, 156 USPQ at 342 (because the registration for the senior mark, upon which the opposition was based, disclosed only the word, “the [advertising] display of the mark in a particular style is of no material significance since the display may be changed at any time as may be dictated by the fancy of the applicant or the owner of the mark”).

In view of the foregoing, we find that Applicant’s mark G-MEN and Registrant’s mark GMAN SPORT and design are similar in terms of appearance, sound and commercial impression.

C. The degree of consumer care.

Applicant contends that sports fans are sophisticated consumers.

It is well documented that sports fans – including consumers of NFL-licensed merchandise – often make their purchases to display their loyalty to and affinity for certain teams. ... They are passionate and well-informed in terms of their purchasing decisions. ... These sophisticated consumers specifically seek out particular items in order to show affiliation and support for a sports team. There is simply no possibility that such purchasers

would mistakenly purchase urban underwear to show support for their favorite football team or vice versa.¹¹

Applicant's contention is based on the premise that its description of goods references football related promotional clothing; it does not. We cannot resort to such extrinsic evidence to restrict the classes of consumers. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration). We must presume that the t-shirts and tank tops of both Applicant and Registrant would be sold to all classes of such consumers. These general clothing items would not be purchased with a great deal of care or require purchaser sophistication, which increases the likelihood of confusion. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care") (citations omitted). Thus, this factor favors finding that there is a likelihood of confusion.

D. Reported instances of confusion.

Applicant asserts that there has been over four years of simultaneous use of Applicant's mark and Registrant's mark without any reported instances of confusion.

¹¹ Applicant's Brief, pp. 17-18.

Applicant has sold and marketed goods using the G-MEN mark since at least February 1, 2007. The registrant of the GMAN SPORT mark claimed October 1, 2009 as a first use anywhere date, and January 15, 2010 as a first use in commerce date. Despite the four-plus years of coexistence, there have been no reports of any consumer confusion.¹²


The fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. See, e.g., *In re Jeep Corporation*, 222 USPQ 333 (TTAB 1984); *In re Barbizon International, Inc.*, 217 USPQ 735 (TTAB 1983). However, in the case of *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992), the Board identified three factors in an *ex parte* setting which allows it to assess the probative value of the absence of actual confusion: (1) a long period of marketing success;¹³ (2) marketing expensive products and services; and (3) no reported instances of confusion. In this case, there has not been a long period of marketing success and the products at issue are inexpensive clothing items.

In view of the foregoing, we find that the lack of any reported instances of confusion is a neutral factor.

¹² Applicant's Reply Brief, pp. 18-19.

¹³ *In General Motors Corp.*, the PONTIAC GRAND PRIX had been sold for over 27 years. 23 USPQ2d at 1470.

E. Conclusion.

Because the marks are similar, and the goods in part identical and presumed to move in the same channels of trade and to be sold to the same classes of consumers, we find that Applicant's mark G-MEN for "Shirts; T-shirts; Tops" is likely to cause confusion with  for "Boxer shorts; Socks; T-shirts; Tank tops."

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