

This Opinion is not a  
Precedent of the TTAB

Mailed: May 11, 2016

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Comfortband, LLC

Serial No. 86174491

David C. Jenkins of Eckert Seamans Cherin & Mellott LLC for Comfortband, LLC.

Karen K. Bush, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).<sup>1</sup>

Before Seeherman, Cataldo and Adlin,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Comfortband, LLC, seeks registration on the Principal Register of the mark PRECISION SENSABAND (in standard characters) for “identification bracelets, not of metal, for hospitals; identification bracelets, not of metal; identification wristbands, not of metal, for hospitals” in International Class 20.<sup>2</sup>

<sup>1</sup> The involved application was reassigned to the above-identified Examining Attorney during prosecution.

<sup>2</sup> Application Serial No. 86174491 was filed on January 24, 2014 under Section 1(b) of the Trademark Act, based upon Applicant’s allegation of a *bona fide* intent to use the mark in commerce.

**Serial No. 86174491**

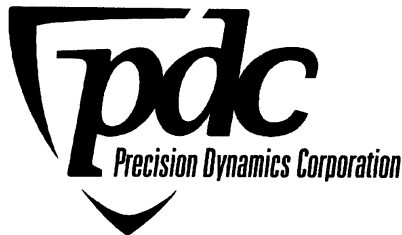
The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based upon the following registrations, both issued to the same entity:

Registration No. 0932356 for the mark shown below, in connection with "plastic hospital identification bracelets" in International Class 5;<sup>3</sup>

*Precision*

and

Registration No. 2945641 for the mark shown below ("Corporation" disclaimed), in connection with "non-metallic identification wristbands for use in healthcare, patron management and law enforcement, plastic wristband tags" in International Class 20.<sup>4</sup>



After the Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney filed briefs.

---

<sup>3</sup> Registered on the Principal Register on April 11, 1972. Section 8 affidavit accepted; Section 15 affidavit acknowledged; Second Renewal.

<sup>4</sup> Registered on the Principal Register on May 3, 2005. Section 8 affidavit accepted; Section 15 affidavit acknowledged. First Renewal. The registration includes the statement that color is not claimed as a feature of the mark.

*Evidentiary Matters*

Applicant introduced into the record with its May 13, 2015 response printed copies of third-party registrations for marks consisting in whole or in part of the term PRECISION for a variety of medical and wellness-related goods and services. With its appeal brief, Applicant included evidence in the form of Internet advertisements, not previously made of record, accompanying its discussion of these registrations.<sup>5</sup> Applicant explains that “the image below each trademark description is the mark in use on November 20, 2015.”<sup>6</sup> In her appeal brief, the Examining Attorney discussed Applicant’s third-party registration evidence, but not the images attached to Applicant’s brief.

Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. The Board ordinarily will not consider additional evidence filed after the appeal is filed. Thus, because the exhibits attached to Applicant’s brief were not made of record during examination and are untimely, in keeping with our general policy we have not considered them. *See, e.g., In re District of Columbia*, 101 USPQ2d 1588, 1591-92 (TTAB 2012). On the same point, we have not considered the evidentiary references made in Applicant’s brief that were not supported by timely submissions. *See In re Procter & Gamble Company*, 105 USPQ2d 1119, 1120 (TTAB 2012).

---

<sup>5</sup> 4 TTABVUE 7-21. Citations to the briefs refer to TTABVUE, the Board’s public online database that contains the proceeding file, available on the USPTO website, www.USPTO.gov. The first number represents the prosecution history number listed in the electronic case file and the second represents the page number(s).

<sup>6</sup> *Id.* at 7.

*Likelihood of Confusion*

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in 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). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We discuss the *du Pont* factors for which Applicant or the Examining Attorney have presented evidence or arguments.

We concentrate our analysis on Applicant's involved mark and the mark that is the subject of cited Registration No. 0932356. If likelihood of confusion is found as to the mark and goods in this registration, it is unnecessary to consider the other cited Registration No. 2945641 because it is for a mark that is less similar to the mark in Applicant's involved application. Conversely, if likelihood of confusion is not found as to the mark and goods in Registration No. 0932356, we would not find likelihood of confusion as to the mark and goods in the other cited registration.

*Relationship of the Goods, Trade Channels and Classes of Purchasers*

We first turn to the *du Pont* factors involving the similarity or dissimilarity of Applicant's goods and Registrant's goods, and their channels of trade and purchasers. It is settled that in making our determination, we must look to the goods as identified in the application vis-à-vis those recited in the cited registration. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). It is not necessary that the respective goods be competitive, or even that they move in the

same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same producer. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant's goods are "identification bracelets, not of metal, for hospitals; identification bracelets, not of metal; identification wristbands, not of metal, for hospitals." Registrant's "plastic hospital identification bracelets" are subsumed within Applicant's more broadly identified "identification bracelets, not of metal, for hospitals," which include hospital identifications bracelets made of any non-metallic material, including plastic. Registrant's goods are further subsumed by Applicant's "identification bracelets, not of metal," which include identification bracelets made of any non-metallic material, including plastic, that may be used for any purpose, including use in hospitals. As a result, Applicant's goods encompass and are in part legally identical to those identified in the cited registration.<sup>7</sup>

Applicant's "identification bracelets, not of metal, for hospitals" and Registrant's legally identical "plastic hospital identification bracelets" both specify that the goods

---

<sup>7</sup> In addition, with her June 4, 2015 Office action at 4-9, the Examining Attorney introduced evidence from third-party Internet websites in which the terms "wristbands" and "bracelets" used in the fields of healthcare and event management were used interchangeably, suggesting that Applicant's "identification wristbands, not of metal, for hospitals" also are closely related, if not identical, to Registrant's goods.

are for use by hospitals, and thus are sold in the same channels of trade to the same purchasers. In addition, Applicant's "identification bracelets, not of metal" are not restricted to any channels of trade or classes of purchasers, and are therefore presumed to include all normal trade channels for such goods, including hospitals. Therefore, the channels of trade and the purchasers for Applicant's and Registrant's legally identical goods are the same.

*Number and Nature of Similar Marks in Use on Similar Goods*

Prior to our discussion of the similarity or dissimilarity of the marks, we consider the strength of the cited registration, which is comprised of the term "PRECISION." Applicant devotes much of its brief to arguing that

In the medical field and related fields, the term PRECISION is nothing more than a commonly used term. That is, the medical field literally deals with life and death and, as such, "precision" is a requirement of those who provide goods and services.<sup>8</sup>

As support for its position that the term "PRECISION" is conceptually weak as applied to the recited goods, Applicant has introduced into the record copies of approximately 30 use-based third-party registrations issued on the Principal Register, and 6 registrations issued on the Supplemental Register, all to different entities. The following examples are illustrative (all marks noted below are issued on the Principal Register in standard characters):<sup>9</sup>

Registration No. 2957866 for the mark PRECISION for "radiographic and fluoroscopic medical diagnostic imaging equipment;"

---

<sup>8</sup> 4 TTABVUE 5.

<sup>9</sup> Applicant's May 13, 2015 response at 22-96.

**Serial No. 86174491**

Registration No. 3557278 for the mark PRECISION for “gels for use as personal lubricant;”

Registration No. 4647090 for the mark PRECISION for “transarterial chemoembolization pharmaceutical preparations, vaccines and sera...”

Registration No. 2028668 for the mark PRECISION ENDOSCOPY OF AMERICA (ENDOSCOPY OF AMERICA disclaimed) for “repair of endoscopes and surgical accessories;”

Registration No. 3293222 for the mark PRECISION XTRA for “medical device, namely, blood glucose monitor;”

Registration No. 4375840 for the mark PRECISION SCRIBES for “medical dictation and transcription services.”

The “existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Third-party registrations can be used in the manner of dictionary definitions, to show that a term has a significance in a particular industry. *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). However, the probative value of the third-party registrations in this case is significantly diminished by virtue of the fact that the trademarks cover a wide variety of medical goods and services that are not related to the types of goods involved herein. *See Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff’d unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992). The third-party registrations proffered by Applicant recite such diverse goods as medical diagnostic imaging equipment, personal lubricants, pharmaceuticals, and blood glucose monitors and such services as repair of endoscopes and medical dictation and transcription. By contrast, the goods in the

cited registration are legally identical to Applicant's goods. The probative value of Applicant's evidence is further diminished inasmuch as only the 3 third-party registrations reproduced above consist solely of the term "PRECISION." The remainder also include additional wording and design elements not found in the cited registration or involved application.

Therefore, while we can agree that the cited mark is suggestive of the goods, the evidence does not show that it is entitled to such a narrow scope of protection as to permit registration of a confusingly similar mark for identical goods. *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (third-party weakness evidence characterized as "voluminous").

As for the co-existence of the third-party registrations, they simply show that the Office has considered each of the marks and the goods or services in those registrations and determined that the goods and services were sufficiently different from the goods in Registrant's mark to avoid a likelihood of confusion. They do not show that there would be no likelihood of confusion when the goods are in part identical.

*Similarities and Dissimilarities of the Marks*

We turn to consider Applicant's PRECISION SENSABAND mark and Registrant's *Precision* mark, comparing them for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed.



Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). The similarity or dissimilarity of the marks is determined based on the marks in their entireties, and 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. *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 233, 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”).

While we have placed the two marks next to one another for comparison purposes, consumers may not necessarily encounter the marks in such proximity and must rely upon their recollections thereof. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Furthermore, “[w]hen marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). *See also ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

In this case, Applicant’s mark PRECISION SENSABAND wholly encompasses the registered mark *Precision*, the only differences being the addition of the term SENSABAND to Applicant’s mark and the stylization of Registrant’s mark; the latter

cannot distinguish the marks because Applicant seeks a standard character registration and would be entitled to display its mark in a similarly stylized format, including the stylized lettering shown in the registered mark. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011). The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012). In any event, the stylization of the registered mark is not so distinct that it would serve to distinguish that mark from Applicant's mark containing the identical word as a prominent feature. As a result, the presence of the word PRECISION in both marks makes them similar in appearance and sound.

With regard to the term "SENSABAND," the Examining Attorney introduced into the record evidence that similar medical identification bracelets are bar coded to contain information about patients, and their treatment and medication.<sup>10</sup> Thus, "SENSABAND" appears to be highly suggestive of Applicant's goods, namely, that they are bracelets or wrist bands containing information that may be read by equipment such as bar code readers. As a result, the addition of "SENSABAND" to Applicant's PRECISION SENSABAND mark is insufficient to distinguish it from the registered mark.

Furthermore, the significance of "PRECISION" in Applicant's PRECISION SENSABAND mark is reinforced by its location as the first word in the mark. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is

---

<sup>10</sup> June 4, 2015 Office action at 4-9.

often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”). *See also 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 would first notice the identical lead word). Furthermore, likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY’S PIZZA for restaurant services specializing in pizza and PERRY’S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL’ LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

With regard to meaning, as applied to legally identical goods the term “PRECISION” would have the same meaning or connotation in both marks. As a result, we find that the marks, when viewed as a whole, are also similar in connotation and convey commercial impressions that are more similar than dissimilar.

We recognize that, based upon Applicant’s evidence, the mark in the cited registration is entitled to a limited scope of protection. However, because Applicant’s mark is intended to be used on legally identical goods, and because, for the reasons discussed above, the marks are similar overall, the scope of protection to be accorded

the cited registration, even though limited, still extends to prevent the registration of such a similar mark.

*Sophistication of Purchasers*

Finally, Applicant argues that

hospitals and other healthcare providers are sophisticated buyers and hospital supplies are not impulse buys. That is, identification bands will be purchased by discerning customers who will be spending a fair amount of money on these products. Further, the buyers must take into account the quality of the products in terms of potential liability; that is, the purchaser could expose themselves to liability issues if substandard products were purchased. As such, Appellant's products are marketed to sophisticated buyers who are aware of their employer's concerns and are, therefore, careful purchasers.<sup>11</sup>

There is no evidence of record to indicate whether the purchase by hospitals of Applicant's goods or Registrant's goods will be subject to the same level of care as, for instance, medical devices used for diagnostic and treatment purposes that are highly technical in nature and may be presumed to be subject to careful purchase. Even assuming, *arguendo*, that purchases of Applicant's and Registrant's goods would involve a deliberate decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective goods, especially when the goods are legally identical.

In this case, the legal identity of the goods and similarity of the marks outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks

---

<sup>11</sup> 4 TTABVUE 23.

outweigh sophisticated purchasers, careful purchasing decision, and expensive goods.). *See also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”).

*Conclusion*

We have considered all of the *du Pont* factors for which Applicant or the Examining Attorney have introduced evidence or arguments. The rest we treat as neutral. After considering all of the evidence of record, including any evidence not specifically discussed herein, and arguments pertaining to the *du Pont* likelihood of confusion factors, we find the goods are legally identical in part, as are their channels of trade and classes of consumers, and that as applied to such goods, the marks are similar in appearance and sound, and convey a similar connotation and overall commercial impression. The sophistication of consumers we view as neutral or slightly favoring a finding of no likelihood of confusion. However, the legal identity of the goods and the similarity between the marks outweigh any sophisticated purchasing decision. In view thereof, we find that Applicant’s mark, if used in association with the goods identified in the application, is likely to cause confusion with the registered mark used in connection with the goods recited in the registration. Taking into account the third-party registration evidence as to “PRECISION,” the limited scope of protection accorded to Registrant’s mark still

**Serial No. 86174491**

extends to prevent the registration of the similar mark PRECISION SENSABAND for legally identical goods.

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