

This Opinion is not a
Precedent of the TTAB

Mailed: September 1, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Shane Marquess
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Serial No. 86478749
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Matthew H. Swyers of The Trademark Company,
for Shane Marquess.

Brittany Lee-Richardson,¹ Trademark Examining Attorney, Law Office 116,
Christine Cooper, Acting Managing Attorney.

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Before Quinn, Wellington, Kuczma,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

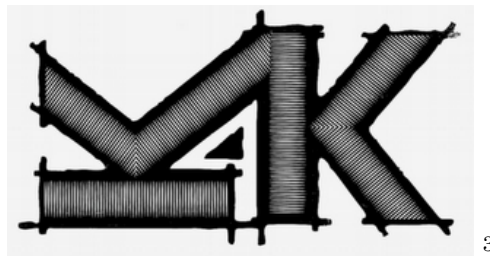
Shane Marquess (“Applicant”), seeks registration on the Principal Register of the mark shown below for “Cycling shorts; Hats; Shirts; Shorts; Socks; Sweatshirts; Tank tops” in International Class 25:²

¹ Ms. Lee-Richardson was assigned responsibility for the Application on April 21, 2016, after the refusal to registration was made final.

² Application Serial No. 86478749 was filed on December 12, 2014, under Section 1(b) of the Trademark Act, based on an intent to use the proposed mark in commerce.



The then-assigned Trademark Examining Attorney refused registration of Applicant's mark, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the registered mark shown below for "sarongs" in International Class 25 that it is likely to cause confusion:



When the refusal was made final, Applicant appealed. The Examining Attorney and Applicant have filed briefs. For the following reasons, we reverse the refusal.

Likelihood of Confusion

Our likelihood of confusion determination is based on facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods

³ Registration No. 4011958 issued on August 16, 2011.

and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

Similarity of the Goods and Channels of Trade

With regard to the goods, channels of trade and classes of consumers, it is well-established that we must make our determination based on the goods as they are identified in the cited registrations and involved application. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

In making her argument that Registrant’s sarongs⁴ are “highly related” to Applicant’s “cycling shorts; hats; shirts; shorts; socks; sweatshirts; tank tops,” the Examining Attorney relies exclusively on printouts from eight different websites.⁵ This evidence can be described as follows:

- Printouts from the Land’s End website (www.landsend.com) advertising a “Women’s Mesh Oval Sarong Cover-up” in three different patterns and colors

⁴ A “sarong” is defined as “a long strip of cloth that is wrapped loosely around the body and worn by men and women of Malaysia and many Pacific islands.” *Merriam-Webster.com*. Merriam-Webster, Web. 29 Aug. 2016, source: *Merriam-Webster's Learner's Dictionary*.

⁵ We note the then-assigned Examining Attorney submitted printouts from a ninth website (www.swimoutlet.com) the Office action that issued on October 23, 2015. However, the printouts from this “Swim Outlet” website are irrelevant and the Examining Attorney does not reference them in her brief.

as well as (on a different page of the website) tank tops and product categories for socks, hats and shorts;⁶

- Printouts from a Fair Winds Sarongs website (www.fairwindssarongs.com) that touts “Stunning, Vibrant Sarongs ... vast selection of colors & designs ... handcrafted by skilled Indonesian artisans” as well as “clothes & dresses” and “hats for numerous occasions”;⁷
- Printouts from the Macy’s website (www.macys.com) with a page that states “Sarongs shop now” but without any single item appearing for sale or displayed. The page appears to be located in the “women’s swimwear” section of the website. Other printouts from the website indicate other clothing categories such as “tops” and “shorts”;⁸
- Printouts from the website Neiman Marcus (www.neimanmarcus.com) shows a “sarong ... sarong coverup ... sarong skirt [and] sarong-style cropped pants” for sale and, on different pages of the website, are indications of “shorts” and “tops” product categories;⁹
- Printouts from the Nordstrom website (www.nordstrom.com) indicates that a search on the website for “sarongs” resulted in several products but none of these are called “sarongs.” Printouts of different pages from the website show product categories for items such as “clothing ... shoes ... handbags ... beauty & fragrance ... topshop”;¹⁰
- Printouts from the JC Penney website (www.jcpenney.com) showing a “Worthington Gathered-Front Sarong Skirt – Petite” and other pages from the website showing product categories such as “tops ... jeans ... pants ... bed & bath ... jewelry & watches ... window ... socks”;¹¹
- Printouts from the Sears website (www.sears.com). The website includes goods for sale from other retailers, *e.g.*, “Sold by Bidlessnow” or “Sold by Overstock.com.” The printouts indicate that the discount online retailer Overstock.com sells a variety of sarongs, but none being sold directly by Sears. The printouts showing items for sale from Sears include “women’s clothing”

⁶ Attached to Office Action issued on March 28, 2015.

⁷ *Id.*

⁸ *Id.*

⁹ Attached to Office Action issued on October 20, 2015.

¹⁰ *Id.*

¹¹ *Id.*

and other product categories such as “tops ... jeans ... shorts & capris ... shoes ... jewelry & watches ... handbags & accessories”; and

- Printouts from the L.L. Bean website (www.llbean.com) showing two “Sarong Tanksuits” for sale in the “Women’s swimwear” section of the website. Other printouts show product categories and goods such as “shorts ... footwear ...tees ... shirts.”¹²

The Examining Attorney asserts in her brief that the Land’s End, Fair Winds Sarongs, and L.L. Bean websites demonstrate use of the same brand for sarongs and certain goods identified in the Application. She also contends that the website evidence “demonstrates that the applicant’s and registrant’s goods travel through the same channels of trade.”

Upon review of the website evidence, we do not agree with the Examining Attorney’s characterization of the evidence in that it shows use of the “same brand” sarongs and goods like those identified in the Application. The three websites that she relies on do not reveal the actual brand or trademark used in connection with the goods. We do acknowledge the possibility that Land’s End and L.L. Bean may sell these goods under a house brand; however, this is not evident from the submitted printouts. In sum, the record fails to show that goods of the type involved in this appeal are ever offered for sale under the same mark. We further note that the L.L. Bean website lists a “sarong tanksuit” that is in actuality a swimsuit. Moreover, we would be remiss if we did not point out the lack of third-party registration evidence that is usually submitted by the Office for purposes of showing certain goods may emanate from a common source under the same mark. *Cf., In re Albert Trostel & Sons*

¹² *Id.*

Co., 29 USPQ2d 1783, 1785-1786 (TTAB 1993) (third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from the same source); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

With respect to the channels of trade for Applicant's and Registrant's goods, the website evidence is of limited probative value for purposes of showing the goods are related. Aside from the Fair Winds Sarongs website, it is evident that the website retailers offer a wide variety of clothing and other goods. Indeed, based on the record, the sarong do not appear to be a common article of clothing as the majority of the websites list very few, in some cases only one, for sale. The only website to advertise more than a handful of sarongs is Sears.com; however, as noted *supra*, this website appears to be merely an online conduit for other retailers. Indeed, nearly all of the sarongs advertised on the Sears.com website are listed as "Sold by Overstock.com," and are located in a different location from where goods are sold directly by Sears. The record does not support a finding that consumers are accustomed to encountering sarongs in the same channels of trade as the more common articles of clothing listed in Applicant's identification of goods.

In sum, Applicant's and Registrant's goods are only related to the extent that they are apparel, and may be sold by the same retailer among a wide and diverse variety of clothing items. *See In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (there is no *per se* rule governing likelihood of confusion involving clothing items). Apart

from this fact, however, the internet evidence submitted by the Examining Attorney does not persuade us that there is a strong relationship between Applicant's articles of clothing and Registrant's sarongs. It has not been shown that a sarong is similar in function or purpose to "hats, shirts, shorts, socks, sweatshirts, and tank tops." The latter are more traditional and common articles of clothing for everyday use whereas a sarong is better known as a traditional Malaysian and Pacific Islands garment (see Note 4 *supra*) or, as demonstrated in the Examining Attorney's evidence, commonly used in the U.S. as wrap to "cover up" other clothing, *e.g.*, a swimsuit.

Similarity of the Marks

We now consider whether Applicant's mark is similar to the registered mark and compare them "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In making our determination we focus on the recollection of the average purchaser, who normally retains a general rather than specific impression of the trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 73 USPQ2d at 1695 ("[G]eneral consumers, not just connoisseurs, occasionally purchase champagne or sparkling wines on celebratory occasions, with little care or prior knowledge").

Applicant's and Registrant's marks are highly stylized composites of the same letter/number combination, K4K; thus, the marks, when verbalized, would sound the

same. Generally, when marks comprise the same characters, in the same order, this would favor a finding of a likelihood of confusion. However, both marks are stylized quite differently, with Registrant's mark taking on a particularly distinct design. We agree with Applicant that the number "4" figures more prominently in his mark and is sandwiched between two smaller K letters, facing each way, i.e., one appearing backwards. On the other hand, the number "4" is somewhat hidden in the registered mark and the emphasis is placed more on the two, significantly larger "K" letters that are comprised of a "spun rope" or "twine-like" design. Moreover, the rotated "face-up" orientation of the first K in Registrant's mark raises a question whether consumers will even perceive the letter K. Thus, while the marks may likely be verbalized in the same manner, they are visually very different. It should also be added that because neither mark appears in standard characters, we only consider the marks based on how they are set forth in the Application and Registration; we make no assumption that either mark will be displayed in a different manner that makes it closer to the other. *Cf. Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (noting that standard character marks are not limited to any particular presentation).

As to the meaning and commercial impressions of the marks, neither Applicant nor the Examining Attorney introduced evidence regarding the significance of the letter/number combination, K4K. Thus, we must assume this is an arbitrary use of the combination.

In sum, viewed in their entirety, the marks are similar to the extent that they incorporate the same letter/number combination, K4K. However, this point of similarity is outweighed by the fact that the marks are highly stylized and visually very different.

Conclusion

While there is a verbal similarity of the marks, they are visually very different and, without a showing of a stronger relationship between Applicant's goods and Registrant's sarongs other than them being items of apparel, we do not find confusion is likely. That is to say, the significant and cumulative differences between the marks and the types of goods sold thereunder persuade us that confusion is unlikely to occur among consumers.

Decision: The refusal to register under Section 2(d) is reversed.