

This Opinion is not a
Precedent of the TTAB

Mailed: December 23, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re Sharron Gilty

—
Serial No. 86618610

—
Demitrus Evans of Teil Firm LLC,
for Sharon Gilty.

Zhaleh Delaney, Law Office 116,
Christine Cooper, Managing Attorney.

—
Before Ritchie, Pologeorgis and Heasley,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Sharron Gilty (“Applicant”) seeks registration on the Principal Register of the mark shown below, for “bowties,” in International Class 25¹:

¹ Application Serial No. 86618610 was filed on May 4, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use and first use in commerce on April 11, 2015.



The Trademark Examining Attorney refused registration of Applicant's mark under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1127 on the ground that Applicant's specimen and substitute specimens do not show the applied-for mark in use in commerce for the identified goods. The Examining Attorney also refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when applied to the identified goods, so resembles the previously registered mark, BOW CHIC, in standard character form, for "wristlets and wristlet anchors for corsage, namely, bracelets,"² in International 14, as to be likely to cause confusion, mistake, or to deceive.

When the refusals were made final, Applicant appealed. Both Applicant and the Examining Attorney filed briefs. For the reasons discussed below, we affirm both refusals to register.

² Registration No. 3563847 issued January 20, 2009, and disclaiming the exclusive right to the term "BOW" apart from the mark as shown.

I. Specimen Refusal

An application based on Trademark Act Section 1(a) must include an acceptable specimen of use which shows the proposed mark in use in commerce. 15 U.S.C. § 1051(a)(1); 37 C.F.R. §§ 2.34(a)(1)(iv), 2.56(a). Applicant submitted as her specimen a business card³:



The Examining Attorney deemed this unacceptable as mere advertisement and required a substitute specimen.⁴ Applicant thus included with her Response to Office Action a substitute specimen consisting of web pages⁵:

³ May 4, 2015 Application, at 3.

⁴ August 20, 2015 Office Action.

⁵ December 28, 2015, at 6-9.

Attachment 1

The screenshot shows a web browser window with the URL www.dresschickeepitcheap.com/bowchic-boutique/. The page features a navigation menu with links for "MY BOWCHIC BOUTIQUE", "MY STYLE EXPRESSION", "STYLE COACHING™", "INTRO TO THRIFTING", and "BLOG".

THE BRAND

the idea came to me from my Creator...make bows and add them to shirts and then make individual bow designs. I have been blessed so far with 5 types of designs of which will be launched as they are developed.

With the Love of BowCHIC.
Sharron Miles Gilly

My BowCHIC boutique is a A retail, thrift, consignment, vintage or resale blouse, shirt, t-shirt or any upper body garment that is (de)constructed and (re)designed with the BowChic signature Bow, bow-tie, tie, or any unique design that is hanging from the neck of the garment. The original neckpieces are handmade by Sharron Miles Gilly. Each garment is carefully sewn and completed with a BowCHIC label that distinguishes it as a unique handmade garment.

THE PRICING

***A Basic full length Bow (manually tied) - \$60**
(\$50 for leather or textured material)



***A Basic solid color pattern Bow w/collar - \$60**



INTRO TO THRIFTING

Overcome Your Fears and Thrift Anyway
JANUARY 6, 2015

Know your needs before thrifting
AUGUST 27, 2014

Why I started Thrifting
MAY 12, 2014

How to find and add thrifted jewelry to any look
DECEMBER 9, 2013

Where to start thrift shopping?...
OCTOBER 14, 2013

DRESS CHIC NEWS



Twitter, Inc. (US) <https://twitter.com/dresschiccheap>

Home About Search Twitter Have an account? Log in

BOWCHIC™

boutique

where rock design connects you from the crowd!

TWEETS 1,524 FOLLOWING 316 FOLLOWERS 162 LIKES 160

Sharron Miles Gilty
@dresschiccheap

I am a Certified Style Coach. My passion is fashion! I am obsessed with uniquely styling you from online retail to resale/consignment/vintage stores.

Chicago
dresschiccheap.com
Joined July 2013

25 Photos and videos

Tweets Tweets & replies Photos & videos

Sharron Miles Gilty @dresschiccheap · Nov 10
Another satisfied BowCHIC™(a)

Sharron Miles Gilty @dresschiccheap · Nov 9
HairCHIC DressCHIC StyleCHIC TravelCHIC BowCHIC™...brand new website in 2016 to encompass my entire brand! fb.me/4QW5dagcr

Sharron Miles Gilty @dresschiccheap · Nov 9
An original men's tie BowCHIC™(ed) #notjustanotherbow #foundmyothercalling #standoutfromyourcrowd. fb.me/u1cP,jwZg

Sharron Miles Gilty @dresschiccheap · Nov 8
I would work on negative beliefs #supersunday. Enjoying #deepakchopra and #Oprah meditation series

New to Twitter?
Sign up now to get your own personalized timeline!
Sign up

You may also like Refresh

- Stephanie Logan @EmpowerMany
- NDA Travel @NDATravel
- Upscale Resale @UpscaleResaleCo
- Zach Christman @Zach_Christman
- Danielle @ShopPerfectlyGd

Trends

The Examining Attorney found the substitute specimens unacceptable, as the web pages did not include any means to order the goods.

The Trademark Manual of Examining Procedure provides that advertising material is “generally not acceptable as a specimen for goods.” TMEP § 904.04(b) (Oct. 2016). Business cards are considered advertising material, and are not generally acceptable as a specimen for goods “unless they comprise point-of-sale material.” *Id.* There is no evidence of record that the business card submitted as Applicant’s specimen is a point-of-sale display or anything other than informational or promotional material. Thus we agree that this is an unacceptable specimen.

As for the substitute specimens, a web page may be acceptable as an electronic “display associated with the goods.” TMEP § 904.03(i). However, again, the display must not be mere advertisement. *Id.* In order to qualify as an acceptable specimen, a web page should include “sales form, pricing information” or “offers to accept orders” or else “special instructions for placing orders.” See *In re Quantum Foods, Inc.*, 94 USPQ2d 1375, 1378-79 (TTAB 2010); citing *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123, 1124 (Fed. Cir. 2009). Overall, as the Board observed in *Quantum*, “If there is no way for a consumer, when visiting a webpage, to order the goods being promoted, then the use of a proposed mark in connection with the goods on the webpage is nothing more than advertising.” *In re Quantum Foods*, 94 USPQ2d at 1380; see also *In re Osterberg*, 83 USPQ2d 1220, 1224 (TTAB 2007) (Webpage that stated “Where to Buy” but did not include the information on how to order held insufficient as specimen). We find that here, the substitute specimens do not include

information on how to order Applicant's goods, and thus also constitute promotional information. The substitute specimens are therefore also unacceptable.

Applicant did not address the specimen refusals in her appeal brief. With her reply brief, however, she included as Exhibit A "a screen shot of applicants [sic] Etsy store showing the means to purchase the product and the product."⁶ This evidence is untimely and we cannot consider it. *See* 37 CFR § 2.142(d) ("The record in the application should be complete prior to the filing of an appeal."). The specimen refusal is affirmed.

II. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all 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.*, 315 F.3d 1311, 65 USPQ2d 1201 (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 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which arguments or evidence were presented. We consider the other factors to be neutral in our analysis.

⁶ 8 TTABVUE 4.

The Similarity/Dissimilarity of the Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In comparing the marks, we are mindful that the test 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 so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 2-3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, No. 92-1086 (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 Ind., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration is BOW CHIC, in standard character form. Applicant's mark is:



Applicant's mark includes the literal element BOWCHIC BOUTIQUE, where "Boutique" is descriptive of the goods and disclaimed. Applicant's mark also includes, in very small print, the literal element "Where neck designs separate you from the crowd." The Examining Attorney argues that the dominant portion of Applicant's mark is "BOWCHIC," whereas Applicant argues that "the dominant element of its [sic] mark is BOWCHIC BOUTIQUE."⁷ Applicant asserts that the term "BOWCHIC BOUTIQUE," is an alliterative, unitary element, with a distinctive, rhythmic pattern. Even if we were to consider the term "BOWCHIC BOUTIQUE" together, despite Applicant's arguments, there is no evidence that it has any commercial impression other than "BOWCHIC" being offered in a "BOUTIQUE," which is very much the same commercial impression of the mark in the cited registration. Considering Applicant's mark as whole, the additional literal element merely adds the commercial impression of referring to Applicant's bowties.

Regarding the design element of Applicant's mark, the "B" in "BOWCHIC" is shaped like a bowtie, and does not alter the commercial impression of referring to Applicant's goods as a boutique for "BOWCHIC." See *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"). Overall, we find that consumers are likely to believe that

⁷ 5 TTABVue 2.

Applicant's mark is a variation on the registered BOW CHIC, offered in connection with "bowties."

We find that differences in sight and sound are overcome by similarities in connotation and commercial impression and the first *du Pont* factor favors a finding of likelihood of confusion.

Goods/Channels of Trade

We next consider the relatedness of the goods and the channels of trade. The application identifies "bowties" and the cited registration identifies "wristlets and wristlet anchors for corsage, namely, bracelets." Applicant does not really dispute the similarity of the goods and the channels of trade, but rather argues that even if the goods are legally identical, the marks are so dissimilar as to support a finding of no likelihood of confusion.⁸ *Citing Kellogg Co. v. Pack'Em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991).

The Examining Attorney submitted evidence of bracelets and bowties being sold together on the same web sites under the same mark. These include claires.com; refinery29.com; toktokdesigns.com; <https://kieljamespatrick.com>; and <http://usa.hermes.com>.⁹ Although the bracelets featured in these websites are not bracelets in the form of wristlets or wristlet anchors for corsages and that the bowties are bowties for women, we nonetheless find that this evidence is sufficient to

⁸ 5 TTABVue 7-8.

⁹ The Examining Attorney also included evidence of five third-party registrations, but only one identified bracelets and bowties.

demonstrate that bracelets and bowties, in general, are commonly sold together under the same mark.

We further note that it is a matter of common knowledge that “bowties” identified in the application and “wristlets and wristlet anchors for corsage, namely, bracelets” identified in the cited registration constitute articles of clothing that may be worn as formalwear. Neither identification limits the type of goods identified therein or their respective trade channels. Thus consumers may expect them to travel in the same channels of trade.

We find that the second and third *du Pont* factors weigh in favor of finding a likelihood of confusion as well.

III. Conclusion

We find that Applicant’s submitted specimen and substitute specimens are unacceptable as they show mere advertisement or promotional activity. We do not consider the untimely proposed specimen submitted with Applicant’s reply brief. The specimen refusal is affirmed.

Regarding the refusal on likelihood of confusion, we find that the marks, when viewed in their entirety, are similar, and in particular are substantially similar in connotation and commercial impression, and the goods are sufficiently related and would be expected to travel through some of the same channels of trade to some of the same consumers. Accordingly, we find a likelihood of confusion between Applicant’s mark for “bowties” and the mark in the cited registration, BOW CHIC, for “wristlets and wristlet anchors for corsage, namely, bracelets.”

Decision: The refusal to register for failure to submit an acceptable specimen under Sections 1 and 45 is affirmed. The refusal to register under Section 2(d) of the Trademark Act is also affirmed.