

This Opinion is not a
Precedent of the TTAB

Mailed: June 7, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Wasser
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Serial No. 87487916
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Ryan S. Spiegel, Esq. of Paley Rothman,
for Frances Wasser.

John Sullivan, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

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Before Kuczma, Greenbaum and Larkin,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Frances Wasser (“Applicant”) seeks registration on the Principal Register of the
mark FRANCIEPANTS (in standard characters) for, as amended:

Undergarments, in International Class 25.¹

The Trademark Examining Attorney refused registration of Applicant’s mark
under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing Registration No.

¹ Application Serial No. 87487916 was filed on June 13, 2017, based upon Applicant’s claim
of first use anywhere at least as early as April 19, 2017 and first use in commerce at least as
early as June 5, 2017.

4466618 owned by Western Glove Works (“Registrant”), for the mark FRANCY (in standard characters) for skirts in International Class 25, as a bar to registration.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

I. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 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 and services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, certain other factors were also argued and considered. The remaining factors are treated as neutral.

A. Similarity of Goods, Customers and Trade Channels

We turn first to the *du Pont* factor involving the similarity or dissimilarity of the goods identified in Applicant’s application and the cited Registration. *du Pont*, 177 USPQ at 567. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317,

² Registration No. 4466618 issued on January 14, 2014.

110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“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 the sales of goods are directed.”)); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Thus, the evidence Applicant submits showing the actual use of the respective marks by Applicant and Registrant is not relevant to registration of her mark.

Turning to the identifications of goods, Applicant’s goods are “undergarments,” while the goods listed in the cited Registration are “skirts.” The second *du Pont* factor “considers whether the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.” *Hewlett Packard Co. v. Packard Press, Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)). Applicant’s and Registrant’s goods need not be identical or directly competitive to find a likelihood of confusion. As a general matter, they need only to be related in some manner or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods come from a common source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d

1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

Evidence of the relatedness of the goods may include advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer. See TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(a)(vi) (Oct. 2018). The Examining Attorney submits evidence from the websites of the following recognized brand names advertising products of the type listed in Registrant’s registration and Applicant’s application that are offered under the same trademark:

ASOS, Calvin Klein and GAP
(provided in the September 12, 2017 Office Action),³

Forever21, H&M, Madewell, Tommy Hilfiger and Venus
(provided in the November 8, 2017 Final Office Action),⁴

and

J.Crew, Title Nine, City Chic, Petit Bateau and Wolford
(provided in the Request for Reconsideration Denied).⁵

This website evidence shows “undergarments” and “skirts” being offered for sale by the above-identified well-known brands under the same marks and through the same trade channels. Thus, consumers are accustomed to seeing the goods at issue offered

³ September 12, 2017 Office Action at TSDR 13-15, 21-22, 28-29.

The Trademark Status & Document Retrieval (“TSDR”) citations refer to the electronic file database for the involved application. All Board citations to the TSDR database in this decision are to the downloadable .pdf version of the documents.

⁴ November 8, 2017 Final Office Action at TSDR 12-13; 19-20; 23, 26-27; 33-34; 39-40.

⁵ May 29, 2018 Request for Reconsideration Denied at TSDR 54-55; 56-58; 59-60; 61-63; 64-65.

for sale under the same marks by the same trademark owner, supporting the relatedness of Applicant's and Registrant's goods and that they are sold through the same trade channels to the same classes of consumers. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

The Examining Attorney also submits a representative sample of eight third-party registrations⁶ of marks for use in connection with goods that are identical to or very similar to those of Registrant and Applicant to show that it is common for a single entity to register the same mark for undergarments and skirts. While third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, such registrations that individually cover a number of different items and are based on use in commerce have probative value to the extent that they serve to suggest that the listed goods are of a kind that may emanate from a single source under a single mark. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Indeed, these third-party registrations, which include

⁶ *See* Registration Nos. 5412453 (including dresses and undergarments), 5421675 (including skirts and undergarments), 5429247 (including ladies undergarments and skirts), 5433138 (including dresses and undergarments), 5445159 (including skirts and undergarments), 5461088 (including undergarments and skirts), 5466426 (including skirts and undergarments, underwear), 5470305 (including dresses and undergarments), identified in the May 29, 2018 Request for Reconsideration Denied at TSDR 66, 69, 74, 80, 82, 84, 86, 88. The Examining Attorney also submitted copies of Registration Nos. 5461985 and 5470724 for undergarments and clothing items not including skirts (TSDR 72, 77), which are less relevant as the goods in these registrations cover clothing items that do not include Registrant's goods.

Applicant's and Registrant's goods, provide additional evidence that Applicant's undergarments and Registrant's skirts are products which may emanate from a single source, thus supporting their relatedness.

In support of her position, Applicant cites the Board's decision in *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1729 (TTAB 2008), where the dissimilarity of the marks and of the types of clothing on which the marks were used resulted in the dismissal of the opposition. That case differs from this case. The opposer's evidence that its clothing was related to applicant's undergarments was found not to be persuasive of a likelihood of confusion. 87 USPQ2d at 1725. While the Board noted that women may buy undergarments as part of an ensemble, or that they may purchase an undergarment because the cut of specific clothing requires a certain undergarment, the opposer failed to introduce any evidence, or make any arguments in support of such position. Thus, the opposer did not meet its burden of proving that applicant's intimate apparel and opposer's outerwear were related.

Here, however, the evidence shows that the same entities offer Applicant's and Registrant's goods under the same marks, and that the relevant goods are sold or provided through the same trade channels to the same classes of customers. In further support of the relationship between Applicant's undergarments and Registrant's skirts, the Examining Attorney submits copies of website articles encouraging women to consider the type of undergarments to wear with skirts:

Cosmopolitan⁷:

9 Ways to Banish Panty Lines Without Going Commando

...

2. Camouflage your VPL with a print.
The busier the print, the better it will be at hiding your panty lines.

...

4. Try an old-school slip.
. . . Just make sure to run both the skirt and the slip through a wire hanger a few times before you put them on to discharge any static electricity.

Bustle⁸:

10 Best Undies For Skirts & Dresses When You Want More Coverage, Because Wind

. . . they specifically make female underwear for underneath dresses and skirts.

This Maidenform boyshort panty is ideal for tighter and shorter skirts or dresses

This six pack of full coverage briefs . . . provide coverage and convenience that you're looking for underneath a dress or skirt.

. . . adorable lace tiered safety pants. . . it doesn't show underneath your skirts and dresses

⁷ Request for Reconsideration Denied, Cosmopolitan: <https://www.cosmopolitan.com/style-beautyfashion/advice/a5855/ways-to-banish-panty-lines/> at TSDR 30-32.

⁸ *Id.*, Bustle: <https://www.bustle.com/articles/173512-10-best-undies-for-skirts-dresses-when-you-want-more-coverage-because-wind> at TSDR 36-37, 39, 41.

LooksGud⁹:

How to wear right type of underwear with different dresses?

. . . Girls wear a variety of dresses and hence require different types of underwear for different occasions. . . .

1. Skater skirts or Mini-Dresses
2. Office Wears
Go for a composite piece of underwear with office trousers or skirts . . .
3. Loose Skirts or Dresses

**wikiHow to do anything . . . ¹⁰
How to Keep Your Underwear from Showing**

Method 1 Choosing the Right Underwear

1 Wear a thong. A thong is the go-to underwear of choice for fashion stylists for many reasons – they’re completely invisible under even the tightest pants and skirts . . . Wear a thong underneath a pair of tight fitting jeans or skirt.

2 Try a G-string. . . . G-strings are also a good choice if you’re planning to wear a sheer dress or skirt.

3 Experiment with boyshorts. . . . Boyshorts are cut similar to briefs . . . they are less likely to be noticed underneath tight pants or skirts.

Method 2 Concealing Your Underwear Without Changing It

. . .

3 Add another layer. If you’re wearing a tight skirt, try creating a barrier between your underwear and your skirt. You can do this by adding a layer of tights or pantyhose, or by slipping a light slip under your skirt.

⁹ *Id.*, LooksGud: <https://www.looksgud.in/blog/best-underwear-for-dresses-bodycon-tightfit-wedding/> at TSDR 45-47.

¹⁰ *Id.*, wikiHOW: <https://www.wikihow.com/Keep-Your-Underwear-from-Showing> at 49-50, 53.

These articles highlight that the decision as to which type of undergarment to wear with skirts involves multiple factors, including comfort, style, coverage and avoiding visible lines from the undergarments, confirming the close relationship between Applicant's undergarments and Registrant's skirts.

Under the third *du Pont* factor, channels of trade, Applicant contends that her exclusive trade channel is her website; she has never sold goods in any brick-and-mortar retail establishments.¹¹ In her Affidavit, Applicant explains that her products are sold in an "online catalog at FranciePants website lovefranciepants.com" and that "FranciePants products are not, and have never been, sold in any brick-and-mortar retail establishments. On occasion we have sold our products at tables or booths during an event . . . but otherwise our sales are exclusively through our website."¹² Because Registrant's goods are not sold on Applicant's website, Applicant argues that there is "no likelihood that a consumer would encounter both goods or both marks in the same sales platform."¹³ That Registrant apparently advertises for wholesale inquiries, which Applicant argues is an entirely different channel of trade and customer base than the retail customers to whom Applicant sells,¹⁴ does not matter.

¹¹ Applicant's Appeal Brief p. 11 (9 TTABVUE 15); May 8, 2018 Request for Reconsideration at TSDR 22 (4 TTABVUE 22), Affidavit of Frances "Francie" Wasser ¶¶ 9-10, at TSDR 27 (4 TTABVUE 27); *see also* TSDR 95-103 (4 TTABVUE 95-103). In her Affidavit, Ms. Wasser also states that "on occasion" her products have been sold "at tables or booths during an event."

The TTABVUE citations refer to the electronic docket database.

¹² Wasser Affidavit ¶ 10, at TSDR 27 (4 TTABVUE 26-27).

¹³ Request for Reconsideration at p. 6, at TSDR 22 (4 TSDR 22).

¹⁴ Applicant's Appeal Brief p. 13 (9 TTABVUE 17).

Because there are no limitations as to channels of trade in the recitation of goods in either Applicant's application or the cited Registration, we must presume that the identified goods move in all channels of trade normal for such goods. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re I-Coat Co., LLC.*, 126 USPQ2d 1730, 1737-38 (TTAB 2018); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods."). Based on the evidence showing the relatedness of the goods and the same classes of customers, the channels of trade at minimum overlap favoring a finding of likelihood of confusion under the third *du Pont* factor. *In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001).

Thus, the evidence shows the relatedness between Applicant's and Registrant's goods and that the same entities provide the Applicant's and Registrant's goods in the same trade channels under the same marks to the same classes of customers. The second and third *du Pont* factors weigh in favor of a finding of likelihood of confusion. *In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001).

B. Similarity of the Marks

It is well settled that marks are compared in their entireties for similarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners v. Lion Capital*, 110 USPQ2d at 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Davia*, 110 USPQ2d 1810, 1812

(TTAB 2014); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Looking at Applicant's and Registrant's marks, they both begin with nicknames for "Frances," namely, "Francie" and "Francy," respectively.¹⁵ While "Francie" and "Francy" sound the same Applicant contends that the different spelling in her mark versus the cited mark impacts the meaning of her mark. According to Applicant, her mark is a creative play on the combination of her nickname "Francie" together with the "fancy-pants" expression whereas, the term "Francy" in the cited Registration "is not used in a broader branding or marketing manner, but rather as a descriptor or identifying name of one particular type of denim skirt."¹⁶

Applicant argues that the Examining Attorney fundamentally misconstrues the commercial impression and connotation of her mark,¹⁷ submitting the following online dictionary definitions of "fancy-pants" in support:¹⁸

Pretentious or fancy in an extreme or excessive way. Use of this phrase often indicates the speaker's annoyance.¹⁹

¹⁵ Applicant acknowledges that FRANCIE is a nickname for "Frances." Applicant's Appeal Brief p. 4 (9 TTABVUE 8); October 31, 2017 Response to Office Action at TSDR 8. The evidence submitted by the Examining Attorney confirms that FRANCY is also a nickname for "Frances." Examining Attorney's Appeal Brief at 11 TTABVUE 6; Request for Reconsideration Denied at TSDR 7-11.

¹⁶ Applicant's Appeal Brief pp. 4, 12 (9 TTABVUE 8, 16).

¹⁷ Applicant's Appeal Brief p. 4 (9 TTABVUE 8).

¹⁸ Applicant's Appeal Brief p. 4 (9 TTABVUE 8) citing to "May 8, 2018 Request for Reconsideration, TSDR pp.17-36, 73-79" (TSDR 32-51, 88-94).

¹⁹ *Id.* at TSDR 32, Idioms by The Free Dictionary (<https://idioms.thefreedictionary.com/fancy-pants>).

Overly elaborate, swanky or pretentious—especially of dress. Also applied to people who act in that manner.²⁰

Slang. fancy or snobbish; foppish; dandified.²¹

: overly elegant or refined: LA-DI-DA²²

[informal] Superior or high-class in a pretentious way.²³

[adjective] • upscale²⁴

[noun] 1. Alternative spelling of fancy pants. 2. Someone fancy, silly or attractive. [adjective] overly fancy with little function; newfangled; complicated. [noun] 1. (US) A person wearing fancy clothing; a member of a social elite. 2. A person very concerned with their appearance.²⁵

Based on the foregoing definitions, Applicant contends that “fancy-pants” is a “well-established colloquial expression with a definition of snobbish, pretentious, or overly refined.”²⁶ While acknowledging that Registrant’s mark FRANCY has a

²⁰ *Id.* at TSDR 35-36, The Phrase Finder (/index.html) <https://www.phrases.org.uk/meanings/fancy-pants.html>. This evidence is from a British website addressing the questions “What’s the meaning of the phrase ‘Fancy-pants?’” and “What’s the origin of the phrase ‘Fancy-pants?’” Because it notes that “[t]his is an American phrase” and provides the history from its first use in print in a newspaper in the state of Maine, it is deemed probative. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1208.03 (June 2018).

²¹ *Id.* at TSDR 37, Dictionary.com (<http://www.dictionary.com/browse/fancy-pants>).

²² *Id.* at TSDR 39 Merriam-Webster Dictionary, 2018 Merriam-Webster, Incorporated (<https://www.merriam-webster.com/dictionary/fancy-pants>).

²³ *Id.* at TSDR 46, Oxford Dictionaries (<https://en.oxforddictionaries.com/definition/us/fancy-pants>).

²⁴ *Id.* at TSDR 88, The Online Slang Dictionary (American, English, and Urban slang). ©1996-2018 by The Online Slang Dictionary (<http://onlineslangdictionary.com/meaning-definition-of/fancy-pants>).

²⁵ *Id.* at TSDR 93, Your Dictionary, ©1996-2018 Love To Know, Corp. (www.yourdictionary.com/fancy-pants).

²⁶ Applicant’s Appeal Brief p. 4 (9 TTABVue 8).

common pronunciation to the first two syllables of her FRANCIEPANTS mark,²⁷ Applicant asserts that the first portion of her mark “cannot be separated from the second portion and treated as a dominant or independent piece with a stand-alone impression when the suggestive nature of the mark inherently involves the entire phrase holistically.”²⁸ She argues her mark is suggestive of this unitary expression necessarily comprised of the two words “fancy” and “pants,” which has a distinct meaning from the word “fancy” standing alone.²⁹ Thus, according to Applicant, even if the FRANCIE portion of her mark and the entirety of Registrant’s mark are both plays on the word “fancy,” the contexts are so different as to create completely distinct commercial impressions.³⁰

Applicant’s mark is a creative play on the colloquial expression “fancy-pants” resulting from the combination of her nickname (“Francie” from her name Frances Wasser) with the word “pants.”³¹ Thus, Applicant’s mark is a unitary mark that has a different meaning and connotation from Registrant’s mark, resulting in her mark having a different, distinct commercial impression from the cited mark.³² A mark is unitary when “its elements are inseparable,” i.e., they

combine to show that the mark has a distinct meaning of
its own independent of the meaning of its constituent

²⁷ October 31, 2017 Response to Office Action p. 2, TSDR 6.

²⁸ Applicant’s Appeal Brief p. 5 (9 TTABVUE 9); Request for Reconsideration after Final Action p. 2, TSDR 18.

²⁹ Applicant’s Appeal Brief p. 5 (9 TTABVUE 9).

³⁰ Applicant’s Appeal Brief p. 4 (9 TTABVUE 8).

³¹ Affidavit of Frances “Francie” Wasser ¶¶ 5-6, TSDR 26 submitted with May 8, 2018 Request for Reconsideration (4 TTABVUE 26); Applicant’s Appeal Brief p. 4 (9 TTABVUE 8).

³² Applicant’s Appeal Brief p. 4 (9 TTABVUE 8).

elements. In other words, a unitary mark must create a single and distinct commercial impression. This test for unitariness requires the Board to determine “how the average purchaser would encounter the mark under normal marketing of such goods and also ... what the reaction of the average purchaser would be to this display of the mark.

Dena Corp. v. Belvedere Int’l Inc., 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) (quoting *In re Magic Muffler Serv.*, 184 USPQ 125, 126 (TTAB 1974)); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1476 (TTAB 2007); *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1287 (TTAB 2006).

While the marks both begin with the similar woman’s nicknames Francy and Francie, when considered as a whole, Applicant’s unitary mark and the cited mark have different commercial impressions. This key factor weighs strongly against a finding of likelihood of confusion.

C. Other *du Pont* Factors

Lastly, Applicant argues that other *du Pont* factors warrant consideration. Turning to the fifth and sixth *du Pont* factors, which Applicant admits are usually applied to argue that “when a prior mark is famous then it is stronger, and thus there is more likelihood of confusion, and that when there are many similar marks already in use on similar goods, a prior mark is weaker and less entitled to protection under Section 2(d),” Applicant concedes that this does not apply to this case, but asserts that the “contrapositive must also be true.”³³ That is, if Registrant’s mark “is not famous, then it is entitled to less protection. Likewise, if the number and nature of

³³ Applicant’s Appeal Brief p. 14 (9 TTABVUE 18).

similar marks in use on similar goods is de minimis – including [Registrant’s mark] – then such obscurity and nonuse of Registrant’s mark makes it weaker.”³⁴ Applicant is incorrect. Inasmuch as this is an ex parte appeal, the fame of Registrant’s mark is not an issue before us.

Under the seventh and eighth *du Pont* factors, i.e., the nature and extent of any actual confusion and the length of time during and condition under which there has been concurrent use without evidence of confusion, Applicant points to her Affidavit where she states that “Applicant is not aware of any instance of actual confusion, despite at least a year of concurrent use.”³⁵ 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 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, especially in this case where Applicant has indicated that it has only used its mark for “at least a year of concurrent use.” *See, e.g., In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Jeep Corp.*, 222 USPQ 333, 337 (TTAB 1984); *In re Barbizon Int’l, Inc.*, 217 USPQ 735, 737 (TTAB 1983). In any event, Applicant’s uncorroborated statement of no known instances of actual confusion is of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (self-serving

³⁴ *Id.*

³⁵ Applicant’s Appeal Brief p. 14 (9 TTABVUE 18).

testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion).

Relying on the ninth *du Pont* factor, Applicant argues that Registrant's mark "appears to be used only on a single product within a family of brands, cutting against any likelihood of confusion."³⁶ While use on a wide variety of goods (such as with a house mark or family of marks) weighs in favor of likelihood of confusion, *see e.g., In re Wilson*, 57 USPQ2d at 1867, Applicant has not cited any cases, nor are we aware of any, that stand for the reverse proposition.

Applicant next argues that the twelfth *du Pont* factor, the extent of potential confusion, i.e., whether de minimis or substantial, is also a relevant consideration. According to Applicant, any potential confusion (of which Applicant maintains there would be none) would be de minimis at most in view of the differences in the marks, the goods, the trade channels and the limited uses of the marks (namely Registrant's use for only one single product versus Applicant's house mark), and given no actual confusion.³⁷ As set forth above, the relatedness of the goods in this case which are sold in the same trade channels to the same consumers weighs in favor of a likelihood of confusion, and thus the potential for confusion cannot be deemed to be de minimis.

Lastly, Applicant notes that Registrant's registration issued over a prior third-party registration for the mark FRANCIE PANTS, Registration No. 3338692 (for

³⁶ Applicant's Appeal Brief p. 13 (9 TTABVUE 17).

³⁷ Applicant's Appeal Brief p. 14 (9 TTABVUE 18).

shorts; socks; tights; undergarments; which Applicant acknowledges has since been cancelled). While recognizing that this is “perhaps not a direct *DuPont factor*,” Applicant argues that Registration No. 3338692 did not prevent the registration of Registrant’s mark, thus weighing against a likelihood of confusion in this case.³⁸

Neither the Examining Attorney nor the Board is bound to approve for registration Applicant’s mark based solely upon the registration of another assertedly similar mark. Each application must be decided on its own merits, and decisions regarding other registrations do not bind either the agency or this court. *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *see also In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014).

In view of the foregoing, these factors are neutral.

D. Conclusion

The commercial impression conveyed by Applicant’s FRANCIEPANTS mark is “fancy-pants,” which is very different from the commercial impression of a woman’s nickname, or even the descriptive term “fancy,” conveyed by the cited mark FRANCY. In balancing the *du Pont* factors, we conclude that the relatedness of Applicant’s goods, i.e., undergarments, and Registrant’s goods, skirts, and their presumed availability to the same customers in the same trade channels, are outweighed by the

³⁸ Applicant’s Appeal Brief p. 15 (9 TTABVUE 19) citing to “May 8, 2018 Request for Reconsideration, TSDR pp. 166-168” at TSDR 181-183.

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dissimilarity of the marks due to their different commercial impressions, such that there is no likelihood of confusion as to the source or sponsorship of the goods sold under the cited registered mark FRANCY.

Decision: The refusal to register Applicant's mark FRANCIEPANTS under § 2(d) of the Trademark Act is reversed.