

This Opinion is not a  
Precedent of the TTAB

Mailed: August 23, 2019

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Striker Brands LLC.*

Serial No. 87552915

Tye Biasco of Patterson Thuento Pedersen, P.A.  
for Striker Brands LLC.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,  
(Hellen M. Bryan-Johnson, Managing Attorney).

Before Cataldo, Shaw and Hudis,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Striker Brands LLC, filed an application to register on the Principal  
Register the mark HYDRAPORE (in standard characters) identifying

Breathable waterproof fabric sold as an integral component of fishing and hunting apparel, namely, coats, jackets, bib overalls, vests, pants, hoodies, sweatshirts, shirts, base layer tops and bottoms, mid layer tops and bottoms, gloves, mittens, balaclavas, scarves, bandanas, gaiters, shoes, boots, socks, hats, caps, beanies, and rain wear; breathable waterproof fabric sold as an integral component of wear, namely, shirts, jackets, sweatshirts, hoodies, pants, shorts, gloves, mittens, scarves, bandanas, hats, caps, beanies, and rain wear

in International Class 25.<sup>1</sup>

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), on the ground of likelihood of confusion with the cited registered mark HYDRO PORE (in standard characters) identifying, "Clothing, namely, tops, bottoms, jackets, headwear, and footwear" in International Class 25.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### **I. Evidentiary Matter**

Applicant submitted eighty-eight pages of evidence as exhibits to its appeal brief.<sup>3</sup> We hereby exercise our discretion to take judicial notice of the definitions of "hydro" and "hydra" submitted as part of this evidence, for such probative value as they may possess.<sup>4</sup> To the extent the remainder of the evidence Applicant submitted with its appeal brief is duplicative of evidence previously submitted during prosecution, we

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<sup>1</sup> Application Serial No. 87552915 was filed on August 2, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting September 11, 2012 as a date of first use of the mark in commerce.

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs and orders on appeal are to the Board's TTABVUE docket system.

<sup>2</sup> Registration No. 5194957 issued on the Principal Register on May 2, 2017.

<sup>3</sup> 9 TTABVUE 13-101.

<sup>4</sup> The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

need not and do not give this redundant evidence any consideration.<sup>5</sup> Further, any of the evidence submitted with Applicant's appeal brief that was not previously submitted during prosecution is untimely and will not be considered.<sup>6</sup> See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); TBMP § 1203.02(e) and § 1207.01 (June 2019) and authorities cited therein.

## II. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. \_\_\_, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) ("In every case turning on likelihood of confusion, it is the duty of the examiner, the board and this court to find, upon consideration of **all** the evidence,

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<sup>5</sup> The Board discourages the practice of the submission of duplicative evidence. *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1220 n.9 (TTAB 2008) (attaching as exhibits to brief material already of record requires Board to determine whether attachments had been properly made of record and adds to the bulk of the file); *In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and is unnecessary).

<sup>6</sup> The proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination. See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). See also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (June 2019) and authorities cited therein.

whether or not confusion appears likely. (Citation omitted) ... In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’ (Citations omitted). This is true even though ‘not all of the *DuPont* factors are relevant or of similar weight in every case.’ (Citations omitted).”

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

#### **A. The Goods, Channels of Trade, and Classes of Customers**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as

related enough to cause confusion about the source or origin of the goods and services.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

The cited registration identifies “Clothing, namely, tops, bottoms, jackets, headwear, and footwear.” In support of the refusal of registration, the Examining Attorney introduced with his December 3, 2018 denial of Applicant’s Request for Reconsideration,<sup>7</sup> the following definitions from merriam-webster.com:

top – a garment worn on the upper body;

bottom – the part of a garment worn on the lower part of the body;

headwear – apparel for the head; and

footwear – wearing apparel (such as shoes or boots) for the feet.

Applicant’s goods include “breathable waterproof fabric sold as an integral component” of apparel, including shirts, sweatshirts and hoodies (tops); jackets; pants and shorts (bottoms); hats, caps and beanies (headwear), as well as hunting and fishing apparel, including, jackets, tops and bottoms, shoes and boots (footwear). Thus, as identified, Applicant’s goods consist of “breathable waterproof fabric sold as an integral component” of items of clothing in general as well as hunting and fishing apparel that are included among the broadly identified tops, bottoms, jackets, headwear and footwear identified in the cited registration. In other words, Applicant’s fabric may be sold as components of Registrant’s goods.

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<sup>7</sup> At .pdf 7-17; 7 TTABVUE 9-19.

The Examining Attorney also introduced into the record with his May 26, 2018 final Office Action,<sup>8</sup> copies of twenty use-based, third-party registrations for marks identifying, *inter alia*, fabric sold as a component of clothing as well as items of clothing. The following examples are illustrative:

Reg. No. 3526320 for the mark CASHMERLON (in standard characters) identifying synthetic fabric sold as a component of women's sweaters and tops; women's clothing, namely, sweaters and tops;

Reg. No. 4158105 for the mark DURALOCK (in standard characters) identifying clothing, namely, shirts, sweatshirts, pants, jackets and coats; textile fabric sold as an integral component of finished clothing items, namely, shirts, sweatshirts, pants, jackets and coats; and

Reg. No. 3974554 for the mark TAC DRY (in standard characters) identifying jackets; rain wear; fabric sold as an integral component of finished clothing items; namely, jackets, rain wear.

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this case, the totality of the dictionary and third-party registration evidence demonstrates that consumers would readily expect that fabrics such as breathable waterproof fabric and clothing could emanate from the same sources.

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<sup>8</sup> At .pdf 11-62.

For this reason, we are not persuaded by Applicant's arguments regarding the distinctions between the goods at issue:

The primary difference is that the Applicant's mark is intended to enable consumers to readily identify the source of the breathable waterproof fabric, which may be used in the construction of a variety of brands of clothing items bearing their own mark to further indicate the source of the clothing item. Registrant's goods, by contrast, merely indicate the source of the clothing item, and not the source of the fabric or material.<sup>9</sup>

Notwithstanding the distinctions between these goods, in order to support a finding of likelihood of confusion it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). The evidence of record clearly establishes that fabrics and items of clothing made of such fabric may emanate from common sources.

With regard to the channels of trade in which the goods may be encountered, the Examining Attorney introduced website evidence with his May 26, 2018 final Office Action<sup>10</sup> and December 3, 2018 denial of Applicant's Request for Reconsideration<sup>11</sup> demonstrating that six third parties, including Eddie Bauer, Helly Hanson, Dick's

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<sup>9</sup> Applicant's brief; 9 TTABVUE 7.

<sup>10</sup> At .pdf 63-65.

<sup>11</sup> At .pdf 19-45.

Sporting Goods, Marmot, REI and Patagonia, advertise both clothing items and the waterproof and weatherproof components from which the clothing is made in whole or in part through their internet websites, i.e., through the same trade channels to the same purchasers. Applicant argues “[w]here the fabric is directed to manufacturers of clothing and the clothing is sold to retailers, there may not be a likelihood of confusion.”<sup>12</sup> However, the above evidence of record demonstrates that third parties advertise clothing designed to withstand weather along with the weather resistant fabrics from which they are constructed to retail consumers seeking durable clothing intended to protect the wearer from the elements.<sup>13</sup>

Evidence of record demonstrates that both Applicant’s goods and Registrant’s goods may be encountered by the same classes of consumers often under the same marks in at least one common trade channel, i.e., the physical locations and corresponding websites of weather resistant clothing and fabric producers and sellers. In addition, the identifications of goods in the cited registration and involved application do not recite any limitations as to the channels of trade in which the goods are or will be offered. In the absence of trade channel limitations on the goods offered under the applied-for and registered marks, we must presume that these goods are offered in all customary trade channels. *See Citigroup v. Capital City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

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<sup>12</sup> Applicant’s brief; 9 TTABVUE 7-8.

<sup>13</sup> We observe that some of these items of clothing and weather resistant fabrics are marketed under different names. Nonetheless, the clothing and fabrics are marketed together in advertisements directed toward end consumers, that is, retail purchasers of weather resistant clothing.

We find that the *DuPont* factors of the relatedness of the goods, channels of trade and consumers weigh in favor of likelihood of confusion.

**B. Strength of the Cited Mark / Number and Nature of Similar Marks**

We next evaluate the strength of the registered mark and the scope of protection to which it is entitled. The fifth *DuPont* factor is the “fame” or strength of the prior mark, and the sixth factor is the number and nature of similar marks in use for similar goods or services. *DuPont*, 177 USPQ at 567. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

Turning first to inherent strength, the Examining Attorney submitted with his final Office Action<sup>14</sup> the following definitions from merriam-webster.com:

- hydr – water; liquid; and
- pore – a minute opening especially in an animal or plant; *especially* one by which matter passes through a membrane.

As noted above, we have taken judicial notice of the following definitions from dictionary.com submitted by Applicant with its brief:<sup>15</sup>

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<sup>14</sup> At .pdf 7-8.

<sup>15</sup> Applicant’s brief; 9 TTABVUE 14-29. (Random House Unabridged Dictionary 2019).

- hydro – hydroelectric power; a combining form meaning “water,” used in the formation of compound words; and
- hydra – a water or marsh serpent with nine heads; a persistent or many-sided problem that presents new obstacles as soon as one aspect is solved.

Based upon these definitions, the registered mark HYDRO PORE suggests a membrane with minute openings to permit water to pass through, and thus appears to suggest a function or feature of the clothing items identified thereby. There is no evidence regarding the registered mark’s commercial or marketplace strength.<sup>16</sup>

In support of its argument that the cited HYDRO PORE mark is commercially weak, Applicant submitted with its November 2, 2018 Request for Reconsideration<sup>17</sup> copies of 33 third-party registrations consisting of marks retrieved from a search of the USPTO’s Trademark Electronic Search System (TESS) for “HYDRO” formative marks identifying various types of apparel or fabric. These registrations all identify

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<sup>16</sup> Because of the nature of the evidence required to establish the fame of a registered mark, the Board normally does not expect the examining attorney to submit evidence as to the fame of the cited mark in an ex parte proceeding. *See In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006).

<sup>17</sup> At .pdf 12-47; 4 TTABVUE 12-47. The marks include: HYDROMAX 2100; HYDROMOVE; HYDROSKIN; HYDROSPEED; HYDRO-DRI; HYDROHALT; HYDROCORE; HYDROCHIC; HYDROSEAL; HYDRO BREEZE; HYDROTRAK; HYDRO; S HYDRO-GEAR and design; HYDRO-GEAR; HYDROFREAK; HYDROWARMER; HYDROLOFT; HYDRO DOWN; HYDROSELL; HYDRO CARE LIQUID REPELLENT and design; HYDROCORE; HYDROCARBON CLOTHING; HYDROGAUGE; HYDROBASE; HYDROSTOP; HYDROACTIVE (in two registrations owned by the same entity); HYDRO POWER SUPPLY; HYDROFLX; HYDROHUSH BY DRAKE; HYDRO HIGH; HYDROHIGH and design; and HYDROFLY.

clothing items or fabrics under marks beginning with “HYDRO” and a following term or terms. However, the marks all differ from the registered mark inasmuch as none includes the following term “PORE” or a term that sounds or appears similar to “PORE.”

As noted above, we find that the registered mark is at least suggestive as applied to the identified goods. There is no evidence of third-party use; however, there is evidence of third-party registrations of less similar marks for various clothing products or fabrics. *Cf. Juice Generation, Inc. v. GS Enters LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015). We therefore find that the registered HYDRO PORE mark is to be accorded a somewhat narrower scope of protection than that to which inherently distinctive marks are normally entitled due to the presence of the third-party registrations of HYDRO formative marks for clothing products and fabrics. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

### **C. The Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc.*

*v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (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); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018). “The 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*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted). *See also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in proximity to one another and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d at 1468.

Turning now to the marks at issue, we find Applicant’s HYDRAPORE mark to be nearly identical in appearance to the registered HYDRO PORE mark. Both marks are a portmanteau consisting of three syllables and the terms “HYDR-” and “PORE,” the only difference being the center vowel A and O, respectively, comprising the middle syllable. The marks are nearly identical in sound, the different center vowel providing only a slight difference in pronunciation. The only other difference between

the marks is the presence of a space in the registered mark. The presence or absence of a space between nearly identical words is not a significant difference. *Cf. Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical”); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”).

With regard to meaning, Applicant argues that the differences between HYDRO and HYDRA “significantly changes how the marks are perceived.”<sup>18</sup> However, the marks at issue do not consist solely of the terms HYDRO and HYDRA but are HYDRAPORE and HYDRO PORE. There is no evidence in the record regarding the extent to which consumers perceive the meaning of either coined mark or have been conditioned to perceive their meaning as the result of marketing efforts. It further is not clear to what extent consumers will note the difference in the center vowel of the marks such that they would ascribe differences in their meaning. In addition, and as noted above, the Examining Attorney introduced a definition of HYDR as water or liquid. Thus, consumers may view both marks as connoting minute spaces in a membrane allowing water or liquid to pass through.

We find as a result that Applicant’s HYDRAPORE mark is nearly identical to the HYDRO PORE mark in the cited registration in appearance and sound. To the extent

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<sup>18</sup> Applicant’s brief; 9 TTABVUE 6.

consumers may ascribe somewhat different meanings to the marks based upon differences in the definitions of HYDRA and HYDRO, such potential differences are not sufficient to create dissimilar commercial impressions between the marks, particularly given that consumers may also view the marks as having the same meaning. “In any event, it is recognized that there is no correct pronunciation of a trademark.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991) (citing *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969)), *aff’d mem.*, *Satellite Int’l Ltd. v. Kabushiki Kaisha Hattori Seiko*, 979 F.2d 216 (Table).

In coming to our determination on the similarity of the marks, we again emphasize that the applicable test is not whether the marks can be distinguished when subjected to a side-by-side comparison. *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). Rather, the proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

For these reasons, we find that the marks are far more similar than dissimilar. The first *DuPont* factor thus also weighs in favor of finding a likelihood of confusion.

#### **D. Conclusion**

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant’s arguments relating thereto, including any arguments and evidence

not specifically addressed herein, we conclude that consumers familiar with Registrant's goods offered under its mark would be likely to believe, upon encountering Applicant's mark, that the goods originated with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register Applicant's proposed mark is **affirmed** under Section 2(d) of the Trademark Act.