

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: May 17, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Manja Studio SDN BHD*  
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Serial No. 87647277  
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Simon Chen of Muncy Geissler Olds & Lowe,  
for Manja Studio SDN BHD.

Khanh M. Le, Trademark Examining Attorney, Law Office 116,  
Christine Cooper, Managing Attorney.  
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Before Lykos, Greenbaum and Larkin,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Manja Studio SDN BHD (“Applicant”) seeks registration on the Principal Register  
of the mark OUT OF ORDER (in standard characters) for

Overalls; smocks; clothing, namely, T-shirts, sweatshirts,  
sweaters, hoodies, shirts, socks; trousers; pants;  
outerwear, namely, jackets, denim jackets, raincoats, hats;  
uniforms; footwear; caps being headwear; hosiery, in  
International Class 25.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87647277 was filed on October 16, 2017, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

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 on a likelihood of confusion with the registered mark OOO OUT OF ORDER, in stylized form



displayed as **OUT OF ORDER**, for numerous goods in Class 14, including “watches,” “bracelets,” “necklaces,” “earrings,” and “timepieces.”<sup>2</sup>

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

#### I. Evidentiary Issues

Before proceeding to the merits of the refusal, we address three evidentiary matters. First, Applicant attached to its appeal brief the entire application record. This was unnecessary because the appeal brief is associated with the application. An applicant should not, as a general matter, resubmit such evidence as exhibits to its brief. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) §§ 1203.01 and 1203.02(e) (June 2018). Second, Applicant attached to its reply brief new evidence, namely, printouts from its website and an article from Hyperbeast Online. Only evidence filed during examination is timely, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and it should not be submitted on appeal. *See* TBMP

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<sup>2</sup> Registration No. 4876385 issued on December 29, 2015, and includes the following description of the mark: “The mark consists of the letters presenting a special form of writing, namely three letters ‘O’ and the sentence ‘OUT OF ORDER.’” Color is not claimed as a feature of the mark.

§ 1203.02(e). Accordingly, we do not consider this material. *See In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1334 (TTAB 2009) (submissions with reply brief not considered). Third, Applicant referenced in its reply brief six pairs of third-party registrations that are not of record. We do not consider these unsupported evidentiary references. If Applicant wished to introduce additional evidence after it filed the notice of appeal, Applicant should have filed a separately captioned request for remand with a showing of good cause, along with the additional evidence. *See, e.g., In re Adlon Brand GmbH & Co.*, 120 USPQ2d 1717, 1725 (TTAB 2016) (Board denied an applicant's request for remand, included in applicant's brief, explaining that the proper procedure "was to file with the Board, after the filing of the appeal but before briefing, a request for remand with a showing of good cause."). Merely listing third-party registrations in an appeal brief does not make them of record in any event. *In re Compania de Licores Internationales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012).

## II. Applicable Law

When the question is likelihood of confusion, we analyze the 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.*, 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 or services. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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 [or services] and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods [or services]’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

A. The similarity or dissimilarity of the marks

Under this *du Pont* factor, we compare the marks in their entirety for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “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) (quotation omitted). The marks “‘must be considered ... in light of the fallibility of memory ....’” *In re St. Helena Hosp.*, 774 F.3d

747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *St. Helena Hosp.*, 113 USPQ2d at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Our analysis cannot be predicated on a dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. Rather, we are obliged to consider the marks in their entirety. *Id.*; 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.”). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1161.

Applicant argues that the differences in the marks in appearance and sound are sufficient to distinguish them, and that the marks create different commercial impressions due to differences in the meanings of the term OUT OF ORDER when applied to the goods identified in the application and cited registration. The Examining Attorney focuses on the visual and aural similarities between the two marks due to the shared wording OUT OF ORDER, which she contends is the most distinctive portion, and therefore the strongest source-identifying element, of the

cited mark. The Examining Attorney also contends that the marks create similar overall commercial impressions because the shared wording is arbitrary for the identified goods.

When considered in their entireties, we find Applicant's standard character mark



OUT OF ORDER and Registrant's mark **OUT OF ORDER** to be very similar in appearance, sound, connotation and commercial impression, due to the shared phrase OUT OF ORDER. As noted above, Registrant's mark consists of the phrase OUT OF ORDER below an element described in the registration as "three letters 'O.'" To the extent consumers would perceive this as a design element, "the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). Greater weight often is given to the wording because purchasers would use the wording to refer to or request the goods. *See, e.g., In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012). Alternatively, to the extent the "three letters 'O'" are considered to appear before the wording OUT OF ORDER, they will be perceived as an abbreviation, initialism or acronym for the wording OUT OF ORDER, which only reinforces the dominant nature of the phrase OUT OF ORDER in Registrant's mark. Accordingly, we find OUT OF ORDER to be the dominant element of Registrant's mark.

In making this finding, we expressly reject Applicant’s unsupported argument that consumers would view the “three letters ‘O’” as the dominant element because they appear first in Registrant’s mark. As the Examining Attorney aptly points out, whether the “three letters ‘O’” constitute the first word in the registration is arguable, as they are centered above the phrase “out of order” and therefore appear after the beginning of that phrase. More importantly, even assuming arguendo that the “three letters ‘O’” appear in the initial position in Registrant’s mark, such placement does not automatically mean that they comprise the dominant element in Registrant’s mark. *Cf. Palm Bay Imps.*, 73 USPQ2d at 1692.

We also observe that Applicant’s reliance on a statement by Registrant’s attorney, made during prosecution of the application underlying the cited registration,<sup>3</sup> is misplaced—we do not view that statement as an “admission” by Registrant that the letters “ooo” comprise the dominant portion of its mark because they appear in the lead position; and even if we were to construe the statement in that manner, it would have no effect on the matter before us as it simply expresses a legal argument and purported intention of that applicant (now Registrant) and does not reflect how the purchasing public views the cited mark. This is but one reason that we follow here the Board’s often repeated principle that every application is examined on its own

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<sup>3</sup> The statement appears in a Response to Office Action in the application file for the cited registration, which Applicant attached to the June 11, 2018 Request for Reconsideration, TSDR p. 32, and reads as follows: “The prefix ‘OOO’ in the Applicant’s mark is distinctive, dominant, and at the forefront of the Applicant’s stylized mark. It would be recognized as such by the consumers, who are ‘generally more inclined to focus on the first word, prefix, or syllable in any trademark’ ... Therefore, consumers would emphasize the ‘OOO’ element of Applicant’s mark....” Citations to the TSDR database are to the downloadable .pdf format.

record. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“[The Federal Circuit], like the Board must evaluate the evidence in the present record to determine whether there is sufficient evidence ...”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the [Trademark Trial and Appeal] Board or this court.”).

Registrant’s mark incorporates the entirety of Applicant’s mark. While there is no rule that a likelihood of confusion is present where one mark encompasses another, in this case, as in many others, the fact that Registrant’s mark includes the entirety of Applicant’s OUT OF ORDER mark increases the similarity between them. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (finding applicant mark ML similar to registrant’s mark ML MARK LEES); *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014) (finding PRECISION and PRECISION DISTRIBUTION CONTROL to be confusingly similar).

As to meaning or connotation, “out of order” is an idiom defined as:

1. : not working properly : not able to be used · The elevator’s out of order again.

2. : not following the formal rules of a meeting, court session, etc. · At the last town council meeting, her proposal was ruled out of order by the mayor. · The mayor ruled her out of order.<sup>4</sup>

Applicant contends, based on Registrant's actual use of the registered mark, that the term "out of order" in the registered mark ironically suggests that the identified goods are distressed and would not be working properly, while the identical term in Applicant's mark, as applied to the identified clothing, suggests unruliness, rebelliousness and edginess. We must consider the marks as they are shown in the registration and application, and in the context of the identified goods. We disagree that the same term "out of order" would have a different meaning for Registrant's goods, including watches, bracelets and necklaces, and Applicant's various clothing items. *Cf. Coach Servs.*, 101 USPQ2d at 1721 (COACH mark was suggestive of carriage or travel accommodations when applied to fashion accessories, but called to mind a tutor when applied to educational materials used to prepare students for standardized tests). And, even if consumers were to discern an ironic connotation when viewing Registrant's mark on its identified goods, we see no reason why they would not perceive Applicant's mark on its identified clothing in the same manner, especially when fashions trend towards torn or "distressed" clothing.

Finally, Applicant's standard character mark OUT OF ORDER is not limited to any particular depiction. The rights associated with a standard character mark reside

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<sup>4</sup> Definition from MERRIAM-WEBSTER ONLINE DICTIONARY at [www.merriam-webster.com](http://www.merriam-webster.com) attached to May 16, 2018 Office Action, TSDR pp. 40-44.

in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). We must consider Applicant's standard character mark "regardless of font style, size, or color" *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011), including in iterations displaying the mark in the same font as the term OUT OF ORDER appears in the cited registered mark. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018).

While there are some specific differences between Applicant's and Registrant's marks, we find that in their entireties, the marks are very similar in appearance, sound, and connotation due to the common presence of the identical literal term OUT OF ORDER, and that the marks convey similar commercial impressions. In making this finding, we note that there is no evidence of use by third parties of similar marks on similar goods that might dilute the source-identifying capacity of OUT OF ORDER for those goods.

The *du Pont* factor of the similarity of the marks thus favors a finding of likelihood of confusion.

#### B. Similarity of the Goods and Channels of Trade

With regard to the goods and channels of trade, we must make our determinations under these factors based on the goods as they are identified in the application and the cited registration. *See Dixie Rests.*, 41 USPQ2d at 1534; *see also Stone Lion*, 110 USPQ2d at 1161; *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).

1. Similarity of Goods

This *du Pont* factor “considers whether the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the source or origin of the ... [goods].” *St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett-Packard*, 62 USPQ2d at 1004). The goods identified in the application are various articles of clothing, while the goods identified in the registration include “watches,” “necklaces,” and “earrings.” While the cited registration also includes numerous other items in Class 14, under this *du Pont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Although the goods identified in the application and registration are not identical, identity is not required to support a finding of likelihood of confusion. *Coach Servs.*, 101 USPQ2d at 1722 (“[I]t is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.”) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (the [goods] need not be identical or even competitive to find a likelihood of confusion). Rather, “likelihood of confusion can be found ‘if the respective products are related in some

manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven*, 83 USPQ2d at 1724).

The Examining Attorney submitted a number of Internet web pages from third-party commercial websites demonstrating that a single entity is likely to offer for sale many of the clothing articles identified in the application, and watches, necklaces and earrings, such as those identified in the registration, under the same mark. For example, [www.katespace.com](http://www.katespace.com) offers watches, shoes and coats under the mark KATE SPADE,<sup>5</sup> [www.jcrew.com](http://www.jcrew.com) offers tops, jumpsuits, shoes, earrings, necklaces and watches under the mark J. CREW,<sup>6</sup> and [www.loft.com](http://www.loft.com) offers jackets, sweaters, sandals, earrings and necklaces under the mark LOFT.<sup>7</sup> In addition, [us.asos.com](http://us.asos.com) offers clothing including pants, socks, T-shirts, jackets and sneakers, as well as watches and jewelry under the mark ASOS, and it offers shoes and earrings under the mark STEVE MADDEN, necklaces, pants and hoodies under the mark DIESEL, and shirts, baseball caps and watches under the mark BOSS.<sup>8</sup> This evidence is probative of the relatedness of the goods. *See, e.g., In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

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<sup>5</sup> January 25, 2018 Office Action, TSDR pp. 19-24.

<sup>6</sup> January 25, 2018 Office Action, TSDR pp. 9-18.

<sup>7</sup> May 16, 2018 Final Office Action, TSDR pp. 31-39.

<sup>8</sup> May 16, 2018 Final Office Action, TSDR pp. 9-30.

In addition, contrary to Applicant's contention that "the goods are not subject to complementary use,"<sup>9</sup> we find that watches, earrings and necklaces are a type of goods that consumers could purchase at the same time as the sort of clothing identified in the application, or with an earlier purchase of such goods in mind, so as to coordinate a fashionable ensemble.

Based upon the identifications of goods in the application and registration, and the ample evidence of record, we find that consumers would believe that the goods identified in the application are closely related to the goods identified in the registration, and that they may emanate from a common source when sold under similar marks.

## 2. Channels of Trade

The *du Pont* factor on established, likely-to-continue trade channels and classes of consumers also must be assessed according to the identifications of the respective goods in the application and cited registration, not on extrinsic evidence of actual use. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ2d at 1787. "[I]n the absence of specific limitations," which we do not have in these identifications, we must assume that the identified goods move through all normal and usual channels of trade for such goods and to all normal potential purchasers. *i.am.symbolic*, 123 USPQ2d at 1750; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The trade channels for the goods identified in the application and registration would include physical and online clothing and accessory stores, such as

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<sup>9</sup> App. Br., 4 TTABVUE 15.

J. Crew, Loft and ASOS, discussed above. The relevant class of consumers for the identified goods also is the same, i.e., members of the general public. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The relatedness evidence from the commercial websites listed above confirms that clothing of the type identified in the application and watches, necklaces and earrings such as those identified in the registration travel in the same channels of trade and are offered to the same classes of consumer. *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012).

These *du Pont* factors weigh in favor of likely confusion.

### C. Purchasing Conditions and Consumer Care

Pointing to screenshots from Registrant’s website and a May 17, 2016 blog post on the watches.com.uk website,<sup>10</sup> Applicant argues that Registrant’s goods are “luxury designer watches” that “are sold at prices that reflect the high quality of these goods (i.e., on average 400 USD),” and that consumers would exercise considerably more care when purchasing such items as compared to “clothing such as T-shirts, outerwear, and hats[.]”<sup>11</sup> However, as the Examining Attorney points out, we must determine likelihood of confusion based on the identifications of goods in the

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<sup>10</sup> April 24, 2018 Response to Office Action, TSDR pp. 22-23; June 11, 2018 Request for Reconsideration, TSDR pp. 33-85.

<sup>11</sup> App. Br., 4 TTABVUE 15-16.

application and registration, not on extrinsic evidence of actual use. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *i.am.symbolic*, 123 USPQ2d at 1749). The watches and timepieces identified in the registration are not limited to luxury designer watches, and are presumed to include all watches, regardless of price. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (unrestricted and broad identifications are presumed to encompass all goods of the type described).

In addition, some of the relatedness evidence discussed above shows that watches and jewelry such as necklaces and earrings would be considered ordinary consumer goods that do not necessarily sell at particularly high price points, and the same applies to the type of clothing identified in the application. For example, Loft sells various earrings and necklaces in the \$30-\$45 range, a “distressed denim jacket” for “\$79.50,” and a “marled sleeveless sweater” for “\$49.50.”<sup>12</sup>

We consider this factor neutral.

#### D. Other Factors

Applicant argues that the Board should find confusion unlikely because a third-party registration of OUT OF ORDER for clothing, which has now been cancelled, coexisted at one time on the register with the cited registration. We address this argument under the rubric of the thirteenth *du Pont* factor, which allows

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<sup>12</sup> May 16, 2018 Final Office Action, TSDR pp. 31-39.

consideration of “[a]ny other established fact probative of the effect of use.” *du Pont*, 177 USPQ at 567.

Applicant’s argument is unpersuasive. The existence of a prior registration does not overcome evidence that a mark is now unregistrable. As discussed above, it is well settled that we must assess each application on its own record at the time registration is sought, and that we are not bound by the decisions of examining attorneys in other cases. *Cordua Rests.*, 118 USPQ2d at 1635 (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement ... even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”); *Nett Designs*, 57 USPQ2d at 1566 (“[D]ecisions regarding other registrations do not bind either the agency or this court.”).

Moreover, as Applicant notes, the prior registration has been cancelled, and thus is not entitled to any of the presumptions of Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *See Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973) (“Whatever benefits a registration conferred upon appellee were lost by him when he negligently allowed his registration to become canceled.”); *In re Hunter Publ’g Co.*, 204 USPQ 957, 963 (TTAB 1979) (cancellation “destroys the Section [7(b)] presumptions and makes the question of registrability ‘a new ball game’ which must be predicated on current thought.”); *cf. In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018) (“The existence of a cancelled registration—particularly one cancelled for failure to provide a declaration of continued use—does not tend to show that the cited mark is weak due to third-party use”).

This factor also is neutral.

E. Conclusion

Having considered all the evidence and arguments bearing on the relevant *du Pont* factors, we conclude that the marks are overall very similar, the identified goods are closely related and move through the same channels of trade to the same classes of purchasers, and the other factors are neutral. Ultimately, Applicant's mark is likely to cause confusion with the cited registered mark when used in connection with the goods identified in the application.

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