

This Opinion is not a  
Precedent of the TTAB

Mailed: June 16, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

-----  
Trademark Trial and Appeal Board  
-----

*In re Emma Sievers*  
-----

Serial No. 88559109  
-----

Wynne C.S. Reece of Reece Law, P.L.L.C.,  
for Emma Sievers.

Marc S. Davis, Trademark Examining Attorney, Law Office 122,  
Kevin Mittler, Managing Attorney.

-----  
Before Goodman, Heasley and English,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Emma Sievers (“Applicant”) seeks registration on the Principal Register of the  
mark B.A. WOMEN (in standard characters, “women” disclaimed) for

Clothing, namely, t-shirts, long sleeved shirts, hoodies,  
short sets, sport tops, leggings, tank tops, athletic tops and  
bottoms for women in International Class 25.<sup>1</sup>

---

<sup>1</sup> Application Serial No. 88559109 was filed on August 1, 2019, based on Applicant’s assertion 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).

Page references to the application record refer to the online database pages of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal

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 mark B. A. MAN (standard characters, "man" disclaimed) for "Hats; Jogging suits; Pants; Shorts; Yoga pants" 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 Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached "additional evidence" to her brief. The Examining Attorney objects to consideration of this evidence. To the extent this evidence was not previously made of record, the objection is sustained. *See* Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal.").

Applicant also attached a copy of the May 4, 2020 Office Action including exhibits. This is duplicative of evidence already in the record and therefore, unnecessary. *In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence submitted during examination to briefs is duplicative and unnecessary).

---

refer to the Board's TTABVUE docket system. Applicant's brief is at 4 TTABVUE; The Examining Attorney's brief is at 6 TTABVUE.

<sup>2</sup> Registration No. 5662286, issued Jan. 22, 2019.

## II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *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.”).

### A. Similarity or Dissimilarity of the Goods

We first consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc.*

*v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that the goods emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified goods or services within that class in the application or cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Applicant’s goods are “Clothing, namely, t-shirts, long sleeved shirts, hoodies, short sets, sport tops, leggings, tank tops, athletic tops and bottoms for women” and Registrant’s goods are “Hats; Jogging suits; Pants; Shorts; Yoga pants.”

Although Applicant’s goods are limited to clothing items “for women” this limitation is not meaningful as the goods in the cited registration are unrestricted and therefore, could encompass both men’s and women’s clothing. *See e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Registrant’s “pants” encompass “athletic bottoms for women”<sup>3</sup> and Registrant’s “shorts” encompass Applicant’s “short sets for women.” The other items in Applicant’s

---

<sup>3</sup> We take judicial notice that the definition of “Bottoms” is “the pants of a set of loose clothes or sports clothes. The other part is called the top.” <https://www.macmillandictionary.com/us/dictionary/american/bottom> accessed June 11, 2021. The Board may take judicial notice of dictionary definitions retrieved from online

identification, t-shirts, long sleeved shirts, hoodies, sport tops, leggings, tank tops and athletic tops for women, are closely related to Registrant's other clothing items.

The relatedness of men's and women's clothing is demonstrated by the evidence submitted by the Examining Attorney of third-party retailer websites e.g., Adidas, Nike, Under Armour, Lululemon, Alo and Prana offering men's and women's clothing. November 7, 2019 Office Action at TSDR 4-28; May 26, 2020 Office Action at TSDR 2-15. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). This evidence shows that men's and women's clothing are sold on the same website under the same marks. Thus, aside from the in part legally identical goods, Applicant's goods and the goods in the cited registration are related because they are the types of products offered for sale together and sold by the same entity. The fact that these entities are not mass retailers selling all types of products, increases the probative value of this evidence.

The second *DuPont* factor favors a finding of likelihood of confusion.

B. Similarity or dissimilarity of trade channels and classes of purchasers

We turn to the third *DuPont* factor which requires us to consider "the similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567.

---

sources when the definitions themselves are derived from dictionaries that exist in printed form. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

Neither the identification in the application nor the identification in the cited registration includes a limitation to trade channels. Therefore, we find both Applicant's and Registrant's trade channels unrestricted.

Applicant's and Registrant's clothing goods are legally identical in part, and we may presume that these legally identical goods will move in the same trade channels (e.g., clothing stores, specialty stores, department stores, and the like). *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same). In addition, the Examining Attorney's third-party website evidence shows that the channels of trade overlap, as men and women's clothing are offered together by the same online stores. *See, e.g., In re Davey Prods.*, 92 USPQ2d at 1203-04; *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272-73 (TTAB 2009) (website evidence shows same or overlapping channels of trade and classes of customers).

We note that the limitation "for women" in applicant's identification is not a limitation on trade channels, but relates to potential purchasers.

As to the class of purchasers, ordinary consumers are the potential purchasers of Applicant's and Registrant's clothing. As indicated, Applicant's identification includes a limitation that identifies its class of purchasers as women, while Registrant's identification is unrestricted as to its potential purchasers' gender.

However, we do not find Applicant's purchaser limitation meaningful. Men purchase clothing for women as well as for themselves, and women buy clothing not

just for themselves, but for men as well. Additionally, given the absence of any limitation as to classes of purchasers in the cited registration, we must presume that the prospective purchasers of Registrant's goods would include both men and women. Therefore, both types of goods move through the same channels of trade to the same ordinary consumers, who use them for similar purposes.

We find that the channels of trade and classes of consumers will overlap.

This *DuPont* factor also favors a finding of likelihood of confusion.

### C. Similarity or Dissimilarity of the Marks

We now turn to the first *DuPont* factor, which requires us to determine the similarity or dissimilarity of the marks in terms of appearance, sound, connotation, and overall commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The test under the first *DuPont* factor 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 that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721.

In comparing the marks, we consider them in their entireties. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). It is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and to give those features greater weight. *Stone Lion* 110 USPQ2d at 1161; *In re Nat'l Data Corp.*, 224 USPQ at 751. In this

regard, descriptive and disclaimed terms are entitled to less weight in our analysis. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data*, 224 USPQ at 752); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA was the dominant portion of THE DELTA CAFÉ and design; the generic word “café” and the design were given less weight in the analysis); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Although Applicant acknowledges that the marks have some similarities, she asserts that the marks are “distinguishable.” 4 TTABVUE 3.

Applicant’s mark is B.A. WOMEN and Registrant’s mark is B. A. MAN.

The marks are similar in sound and appearance due to their structure, in that each mark contains the letters B.A. or B. A. followed by a descriptive word for a gender: WOMEN in Applicant’s mark, or MAN in Registrant’s mark. Although there is a space between the letters “B” and “A” in Registrant’s mark, we do not find this significant as they are the same letters in the same sequence. *See, e.g., Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that DESIGNED TO SELL does not create a distinct commercial impression from DESIGNED2SELL).

The dominant feature in each mark is B.A./B. A. as the term WOMEN in Applicant’s mark and MAN in Registrant’s mark have been disclaimed as descriptive



of the type of clothing to be worn or used by men and women. B.A./B. A. is an arbitrary term in relation to Applicant's and Registrant's goods, and being the first term(s) in each mark, B.A./B. A. is most likely to be impressed upon the mind of a consumer and remembered. *See Presto Products v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).

Considering the marks as a whole, the marks are similar in appearance and sound in that both marks contain the term B.A./B. A., and likely would be pronounced as "BE A." Additionally, the suffix "men" contained in the word "women" in Applicant's mark is very close in appearance and sound to the word "man" in Registrant's mark. As a result the marks are similar in sound and appearance.

As to connotation and commercial impression, the marks would have a similar connotation to the extent that B.A. or B. A. has a particular meaning, but otherwise, consumers not familiar with any acronyms using the letters B.A./B. A. would find it to be an arbitrary term. Although each mark has a different term that denotes gender following B.A./B. A., we find these additional end terms do not create significantly different meanings for each mark. Given the identity of B.A./B. A. in each mark, even if the additional disclaimed terms may have slightly different meanings, we find that the marks engender similar commercial impressions.

The marks in their entireties are similar in sound, appearance, meaning and commercial impression. Consumers familiar with the registered mark for clothing are likely to assume, when they encounter Applicant's B.A. WOMEN mark on women's clothing that Applicant's trademark is a variation of Registrant's B. A. MAN

trademark. *See In re Collegian Sportswear, Inc.*, 224 USPQ 174, 176 (TTAB 1984) (“...customers familiar with registrant’s “COLLEGIENNE” clothing might believe that “COLLEGIAN OF CALIFORNIA” clothing was a new line of clothing from registrant featuring a “California” or west coast style.”).

The first *DuPont* factor favors a finding of likelihood of confusion.

D. Arguments Relating to Abandonment of the Registered Mark

Finally, Applicant asserts that, based on the suspension of the limited liability company that owns the cited mark and her online search of Registrant’s use, the cited mark appears to be abandoned. To the extent that Applicant’s assertions constitute a collateral attack on Registrant’s registration, they are impermissible. Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register shall be prima facie evidence of the validity of the registration, of the registrant’s ownership of the mark and of the registrant’s exclusive right to use the mark in connection with the goods or services identified in the certificate. During *ex parte* prosecution, including an *ex parte* appeal, an applicant will not be heard on matters that constitute a collateral attack on the cited registration (e.g., applicant’s claim that the registered mark is abandoned). *In re Dixie Rests., Inc.*, 41 USPQ2d at 1534-1535; and *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(iv) (Oct. 2018) (collateral attack on registration improper in *ex parte* proceeding). Further, there is nothing to indicate that Applicant has sought to cancel

the cited registration. Accordingly, no consideration has been given to Applicant's arguments in this regard.

### III. Conclusion

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We find the marks are similar, the goods are legally identical, in part, and otherwise closely related, the goods move in overlapping channels of trade, and are offered to the same class of consumers. As a result we find confusion likely.

**Decision:** The refusal to register Applicant's mark B.A. WOMEN is affirmed.