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Mailed: March 6, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re Twisted X, Inc.

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Serial No. 90002268
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Brian K. Yost and Kiala E. Ellingson of Decker Jones, P.C.,
for Twisted X, Inc.

Tatiana Tway,¹ Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

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Before English, Thurmon, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

Twisted X, Inc. (“Applicant”) seeks registration on the Principal Register of the mark ECOTWEED, in standard characters, for “Footwear made of a tweed-like material,” in International Class 25.² The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), as

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¹ The application was reassigned from the original examining attorney to the above-named examining attorney after the filing of Applicant’s appeal brief.

² Application Serial No. 90002268, filed June 15, 2020, based on an intent to use the mark in commerce, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

deceptive when applied to the identified goods, and, in the alternative, under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), as deceptively misdescriptive of the identified goods.

After the Examining Attorney issued a final refusal, Applicant appealed and requested reconsideration, prompting the Examining Attorney to issue a subsequent final Office action to address new evidence included in the request. Following issuance of the subsequent final Office action, the appeal resumed and was fully briefed.

For the reasons explained below, we affirm both refusals.

I. Section 2(a) – Deceptive Matter

Trademark Act Section 2(a) serves as an absolute bar to registration on either the Principal Register or the Supplemental Register of any mark that “consists of or comprises . . . deceptive . . . matter.” 15 U.S.C. § 1052(a); *see* 15 U.S.C. § 1091; *In re White Jasmine LLC*, Ser. No. 77115548, 2013 TTAB LEXIS 9, at *17 (TTAB 2013).³ “It is well established that a mark may be found deceptive on the basis of a single deceptive term that is embedded in a larger mark.” *White Jasmine*, 2013 TTAB LEXIS 9, at *17. Whether a mark, or a term within it, is deceptive is determined in

³ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, case citations in this opinion are in a form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director of the USPTO, this opinion cites to the Lexis legal database and, in the initial full citation of a case, also identifies the number of the Board proceeding. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

relation to the goods for which registration is sought. *See id.* at *18 (“The issue on appeal is whether the mark is deceptive as applied to any of the goods in the application.”); *In re ALP of S. Beach Inc.*, Serial No. 75819306, 2006 TTAB LEXIS 198, at *39 (TTAB 2006) (“Registrability of a mark is always considered in conjunction with the identified goods or services, for an applicant cannot obtain rights in a mark in the abstract, only in connection with specified goods or services.”).

A proposed mark must be refused as deceptive if:

- (1) it consists of or comprises a term that misdescribes the character, quality, function, composition, or use of the goods;
- (2) prospective purchasers are likely to believe that the misdescription actually describes the goods; and
- (3) the misdescription is likely to affect the purchasing decision of a significant or substantial portion of relevant consumers.

In re Budge Mfg. Co., 857 F.2d 773, 775 (Fed. Cir. 1988); *see also In re Tapco Int’l Corp.*, Serial No. 86075950, 2017 TTAB LEXIS 126, at *7-8 (TTAB 2017); *cf. In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1356-57 (Fed. Cir. 2009) (“In this case, as in every case, in order to establish a prima facie case of materiality there must be some indication that a substantial portion of the relevant consumers would be materially influenced in the decision to purchase the product or service by the geographic meaning of the mark.”).

A. Does Applicant’s Mark Misdescribe the Identified Goods?

Turning to the first part of our analysis, a mark, or a term within it, misdescribes goods if it is “merely descriptive of a significant aspect of the goods which the goods

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could plausibly possess but in fact do not.” *White Jasmine*, 2013 TTAB LEXIS 9, at *19 (citing *In re Phillips Van Heusen Corp.*, Ser. No. 75664835, 2002 TTAB LEXIS 45, at *14 (TTAB 2002)). And “[a] term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.” *In re Zuma Array Ltd.*, Serial No. 79288888, 2022 TTAB LEXIS 281, at *6 (TTAB 2022) (internal quotations and citations omitted). Thus, the operative question is “whether someone who knows what the goods . . . are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 974 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1252, 1253 (Fed. Cir. 2012) (internal quotation omitted)). To make that determination, the mark must be considered “in relation to the goods . . . for which registration is sought, the context in which the mark is used, and the possible significance that the mark is likely to have to the average purchaser encountering the goods . . . in the marketplace.” *Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, Opp. No. 91272143, 2024 TTAB LEXIS 575, at *23-24 (TTAB 2024).

Here, we must determine the perceived meaning of ECOTWEED as applied to “footwear made of a tweed-like material.” The record shows that “tweed” is defined as “a rough woolen fabric made usually in twill weaves and used especially for suits

and coats.”⁴ Another definition of record indicates that “tweed” refers to a “rough-surfaced woolen cloth, typically of mixed flecked colors, originally produced in Scotland.”⁵ A third defines “tweed” as “a coarse wool cloth in a variety of weaves and colors, either hand-spun and handwoven in Scotland or reproduced, often by machine, elsewhere.”⁶ All of these definitions use the term “woolen” or “wool,” to describe the material composition of “tweed.” “Woolen” refers to things “made of wool”⁷ and “wool,” in turn, is defined as “the soft wavy or curly usually thick undercoat of various hairy mammals and especially the sheep.”⁸

These dictionary entries are competent evidence of the relevant public’s understanding of the term “tweed.” *Princeton Vanguard, LLC. V. Frito-Lay North Am., Inc.*, 786 F.3d 960, 965 (Fed. Cir. 2015); *In re Empire Tech. Dev. LLC*, Ser. No. 85876688, 2017 TTAB LEXIS 232, at *17 (TTAB 2017). But the Examining Attorney has also provided evidence corroborating what these definitions indicate, namely,

⁴ September 2, 2021 Nonfinal Office Action at TSDR 2 (definition of “tweed” from the online version of MERRIAM-WEBSTER DICTIONARY).

The TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations in this opinion refer to the docket and electronic file database for the involved application.

⁵ *Id.* at 10 (definition of “tweed” from the online U.S. version of the OXFORD ENGLISH AND SPANISH DICTIONARY).

⁶ *Id.* at 16 (American English definition of “tweed” from the online version of COLLINS DICTIONARY).

⁷ March 13, 2023 Final Action at TSDR 58 (definition of “woolen” from the online version of MERRIAM-WEBSTER DICTIONARY).

⁸ December 5, 2022 Response to Office Action at TSDR 11 (definition of “wool” from online version of MERRIAM-WEBSTER DICTIONARY). Applicant also submitted a copy of a Wikipedia entry for “wool,” which states that it “is the textile fibre obtained from sheep and other mammals.” *Id.* at 18.

that tweed is a fabric traditionally composed of or containing wool.⁹ This evidence includes:

- An online guide from clan.com indicating that “proper tweed is almost always made of pure new wool”;¹⁰
- An online article from tissura.com noting that tweed was originally made of pure wool but may now contain blends of wool and other materials, like silk, alpaca, and cashmere;¹¹
- A Wikipedia entry describing tweed as a “rough, woolen fabric” and describing types of tweed, including “Harris Tweed,” which is “made from pure virgin wool.”¹²
- A blog post from barringtonayer.co.uk describing various types of tweed, including “Cheviot Tweed,” which “is made from the wool of Cheviot sheep”;¹³
- A post from studiosuits.com explaining that tweed “consists of wool that’s tightly woven with a twill or herringbone structure” and noting that, while

⁹ While the Board is generally more permissive regarding the use of hearsay in ex parte appeals, we note that, here, we are considering this evidence not for the truth of its contents but for what it shows on its face, as it relates to consumer perception of the nature of tweed. *See In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, at *6 n.19 (TTAB 2021) (noting Board’s permissive stance on hearsay evidence in ex parte proceedings, but indicating that online articles in evidence were being considered for what they show on their face insofar as they are relevant to consumer perception of certain phrases at issue).

¹⁰ September 2, 2021 Nonfinal Office Action at TSDR 26.

¹¹ *Id.* at 30.

¹² *Id.* at 71. Consistent with the best practice suggested in TBMP § 1208.03, the Wikipedia evidence here is corroborated by other evidence in the record.

¹³ June 3, 2022 Nonfinal Office Action at TSDR 40. We acknowledge that this website appears to originate in the United Kingdom but we find it has some probative value. “Evidence from websites located outside the United States may have probative value depending on the circumstances, including whether it is likely that U.S. consumers have been exposed to the foreign website and whether the website is in English (or has an optional English language version).” TBMP § 1208.03; *see In re Bayer AG*, 488 F.3d 960, 969 (Fed. Cir. 2007) (noting that information originating on foreign websites that are accessible to the United States public may be relevant to discern U.S. consumer impression of a proposed mark).

“there are several unique types of tweed,” “they are generally all made of tightly woven wool”;¹⁴ and

- An excerpt from sewport.com describing tweed as a wool textile, explaining that the first step in producing tweed fabric is to harvest the wool coat of sheep, and noting that “[t]weed fabric certifications are available.”¹⁵

To support the proposition that footwear could plausibly be made from, or otherwise contain, tweed, the Examining Attorney provided multiple examples of shoes and boots being offered for sale with product descriptions including the word “tweed,” as well as other online sources discussing tweed footwear:

- Shopstyle.com offers “KHRISJOY Puff Tweed Boots,” “Voile Blanche Tweed 04 Boots,” “Manebi Tweed Woven Flat[s],” “Hogan InteractiveA Tweed” sneakers, “Maje Tweed Slip-Ons,” and “Mami Tweed Sandals”;¹⁶
- Amazon.com offers the “BC Footwear Women’s Finally Tweed Sneaker,” described as “100% fabric”;¹⁷
- Ebay.com features postings for Nike-branded tweed sneakers, including some described as “Harris tweed”;¹⁸
- ScotlandShop.com offers “MEN’S TWEED SHOES” that are “Made To Order in 225 Tweeds” and feature “wool tweed fabric woven in Scotland”;¹⁹

¹⁴ June 3, 2022 Nonfinal Office Action at TSDR 48.

¹⁵ *Id.* at 68-69.

¹⁶ September 2, 2021 Nonfinal Office Action at TSDR 43-45.

¹⁷ *Id.* at 49.

¹⁸ *Id.* at 64-66. An excerpt from tissura.com describes Harris tweed as being “produced in the Outer Hebrides, Scotland, and protected by the Harris Tweed Act.” *Id.* at 30.

¹⁹ *Id.* at 50-51.

- Scotland House, Ltd, located in Williamsburg, Virginia, offers boots, brogues, sandals, and ballet flats featuring “genuine Harris Tweed from the Outer Hebrides of Scotland”;²⁰
- An article from josefinas.com entitled “What is tweed and how can it be applied to a pair of boots,” discusses, inter alia, combat boots made from tweed;²¹
- An online guide from clan.com identifies “tweed shoes” as one way to wear or use tweed;²² and
- A blog post from my9to5shoes.com explains “How to Style Tweed Shoes.”²³

While some of this evidence does not clearly indicate whether the use of “tweed” is specifically referring to the composition of the footwear’s materials, some does. In either case, this evidence establishes that consumers have been exposed to “tweed” being used to describe a significant aspect of footwear. *See, e.g., In re Cox Enters.*, Ser. No. 76591278, 2007 TTAB LEXIS 6, at *6 (TTAB 2007) (finding that website evidence showing use of a term demonstrates consumer exposure to that term).

For its part, Applicant presents two lines of argument against a finding of misdescriptiveness. First, Applicant contends that “the word ‘tweed’ has no globally accepted precise definition,”²⁴ and that, instead, it “is an evolving and imprecise

²⁰ June 3, 2022 Nonfinal Office Action at TSDR 86-92 (quoted wording appears at TSDR 87).

²¹ *Id.* at 23.

²² September 2, 2021 Nonfinal Office Action at TSDR 26.

²³ *Id.* at 54-55.

²⁴ Applicant’s Brief, 6 TTABVUE 9.

term.”²⁵ Second, Applicant argues that it “is not applying for a mark comprising the separable element ‘tweed,’” but is instead applying for ECOTWEED, which Applicant characterizes as a unitary, “coined term that does not appear in any form on the US [sic] Trademark registry.”²⁶

In support of the first argument, Applicant points to portions of the same online guide from clan.com cited above, indicating that ““a tweed effect can be achieved in almost any material”” and stating that ““some people make the “mistake” of using the word [tweed] as a generic term for almost any flecked fabric with a rough surface.””²⁷ However, the fact that this online guide refers to a “tweed effect” and deems it a “mistake” to refer to non-woolen fabric as “tweed” undercuts Applicant’s argument that the term does not have an “accepted precise definition.” A more accurate interpretation of this evidence is that (1) “some people” **mistakenly** believe that any rough, flecked fabric in earth tones is tweed and are unaware that there is a generally understood meaning of “tweed” (i.e., a particular rough, woolen fabric), and (2) other fabrics with a “tweed effect” are mere simulacra of the actual fabric. Thus, the general thrust of this evidence is that it is incorrect to refer to fabric that does not contain wool as “tweed.” This becomes clearer when Applicant’s selected quotes from the online guide are read together with the surrounding text, as in the following quote:

A tweed **effect** can be achieved in almost any material, **though it’s traditionally woven in pure new wool** Tweed is produced by

²⁵ *Id.* at 11.

²⁶ *Id.*

²⁷ *Id.* at 9 (quoting evidence attached to September 2, 2021 Nonfinal Office Action at TSDR 23-24) (quotations around “mistake” added by Applicant).

dying raw wool, after washing, but before it is spun. . . . You'll sometimes find fabrics being described as tweed, **when they are not. Some people make the mistake** of using the word as a generic term for almost any flecked fabric with a rough surface, particularly when in earthy, natural colours. . . . **But that's wrong.** At best these fabrics could be termed "tweedy"[] or tweed-like. But unless they're made of blended fibres prior to spinning, **they shouldn't be considered tweeds.** . . . Real tweed is [sic] too rich a heritage to discard so carelessly.²⁸

Applicant also draws our attention to an article from PermanentStyle.com, entitled "The Guide to Tweed," which states that "[i]n the United States . . . simply having windowpane check can be enough for a jacket to be called tweed."²⁹ The article goes on to say that "traditional tweed is perhaps best thought of as a reference point, an archetype from which many others draw inspiration" and that "[w]hether [other cloths] really deserve to be called 'tweed' isn't that important."³⁰ Again, though, Applicant's selective quotes omit other portions of the article indicating that "tweed" refers to a particular type of fabric with particular characteristics. For instance, an earlier part of the article includes the following passage:

Tweed today is a generic term for a flecked fabric made of woollen (rather than worsted) yarn, with a rough surface, and made in mixes of earth, natural colours. Its influence is so broad, however, that these various elements are often used in other cloths, and referred to as tweed or "tweed-like." For example, Italian mills occasionally offer

²⁸ September 2, 2021 Nonfinal Office Action at TSDR 23-25 (emphasis added). This evidence also states that "it's a historical accident that tweed weavers normally used wool, and even mixed fibres such as silk or linen may sometimes have been included," and that "[t]weed's essential nature lies ultimately not in its material nor in its weaving, but in its spinning." *Id.* at 25. We find that these statements reinforce, rather than refute, the notion that "tweed" is a particular fabric with particular characteristics, and thus do not support Applicant's position.

²⁹ Applicant's Brief, 6 TTABVUE 11 (quoting evidence attached to September 13, 2023 Request for Reconsideration at TSDR 107).

³⁰ *Id.*

a jacketing that has the same nepped style as a donegal tweed, but woven from cashmere. This is lovely, and a very versatile material for a jacket – **but it is unlike tweed in every other way.**³¹

Further, Applicant asserts that the evidence of record is “murky” as to the nature of “wool” or “woolen fabric,” whether tweed must contain wool, and, if so, what amount of wool it must contain to be considered tweed.³² Applicant’s arguments are unavailing, however, because the evidence already discussed clearly establishes that, in the context of “tweed,” “woolen fabric” refers to fabric made from the coat of certain mammals, particularly sheep, and that, while tweed was traditionally made from spun pure wool, it is sometimes composed of a mix of wool and other materials.³³ We acknowledge that the record contains evidence of use of wording like “silk tweed,”³⁴ “Polyester Tweed Fabric”³⁵ “blended cotton tweed,”³⁶ or “acrylic tweed,”³⁷ which appear to refer to fabrics that do not contain wool. However, the fact that qualifiers like “silk,” “polyester,” “cotton,” and “acrylic” are sometimes added to “tweed”

³¹ September 13, 2023 Request for Reconsideration at TSDR 107 (emphasis added).

³² Applicant’s Brief, 6 TTABVUE 9-11.

³³ To support its argument that “tweed” can refer to non-woolen fabric, Applicant identifies a Wikipedia entry concerning tweed, which was attached to the December 5, 2022 Response to Office Action at TSDR 34. The entry states that “[t]he term ‘tweed’ is used to describe coverings on instrument cables and vintage or retro guitar amplifiers, such as the Fender tweed and Fender Tweed Deluxe,” but notes that “[d]espite the common terminology, these coverings were cotton twill, and **not actually tweed.**” *Id.* (emphasis added). Because this entry states that the coverings were “not actually tweed,” this evidence actually supports the conclusion that “tweed” is a particular type of fabric with particular characteristics.

³⁴ September 2, 2021 Nonfinal Office Action at TSDR 71 (excerpt from Wikipedia describing “Silk tweed” as a “fabric made of raw silk with flecks of colour typical of woollen tweed”).

³⁵ March 2, 2022 Response to Office Action at TSDR 45.

³⁶ *Id.* at 46.

³⁷ *Id.* at 47.

suggests that they are necessary to differentiate the non-tweed materials they describe from actual tweed, and, in their absence, consumers may reasonably assume that the tweed is made from, or includes, wool.

In sum, the evidence here establishes not that the term “tweed” is ambiguous or imprecise, as Applicant argues, but that a misconception about the nature of tweed exists among some parties in the relevant marketplace. Applicant essentially asks us to find that “tweed” is not misdescriptive based on this misconception, in the face of evidence showing that there is a meaningful distinction between actual tweed and other tweed-like fabrics or patterns. We decline to do so.

Moving on to Applicant’s second line of argument, Applicant asserts, “the average consumer would see the word ‘eco’ for what it is: a prefix that modifies the root word ‘tweed’ to mean something else other than just ‘tweed,’” and, consequently, “[a] consumer encountering the word ‘ecotweed’ would not be misled.”³⁸

As noted above, it is “well established that a mark may be found deceptive on the basis of a single deceptive term that is embedded in a larger mark.” *White Jasmine*, 2013 TTAB LEXIS 9, at *17. Thus, the fact that a proposed mark may contain other wording, in addition to a misdescriptive term, does not necessarily render the mark registrable. However, “[m]isdescriptiveness of a term may be negated by its meaning in the context of the whole mark inasmuch as the combination is seen together and makes a unitary impression.” *Budge*, 857 F.2d at 776 (citing *A.F. Gallun & Sons Corp. v. Aristocrat Leather Prods., Inc.*, Ser. No. 72094235, 1962 TTAB LEXIS 146, at *5-6

³⁸ Applicant’s Appeal Brief, 6 TTABVUE 12.

(TTAB 1962) (finding COPY CALF not misdescriptive, but suggestive, of imitation calf skin)).

Applicant claims that that is the case here, because consumers “understand that ‘eco’ often refers to recycled plastic materials” and thus “eco” negates “tweed” to create the impression that the mark is referring to imitation tweed.³⁹ Applicant’s evidence to support this position can be summarized as (1) five third-party registrations for “eco”-formative marks,⁴⁰ (2) a small collection of online articles indicating that eco-friendly products may, inter alia, include those made from recycled plastic,⁴¹ and (3) a dictionary entry defining “eco” as “ecological or environmental” or “[n]ot harmful to the environment.”⁴²

The five third-party registrations submitted by Applicant are:

- ECOBUTTER (Registration No. 5734434) for “Chemical additives for use in the manufacture of cosmetics”;
- ECO-IVORY (Registration No. 5353913) for “Holiday ornaments of porcelain; Leather coasters; Plastic coasters; Vacuum pumps for wine bottles; Wine aerators; Wine openers; Wine pourers”;
- ECOSAND (Registration No. 4849506) for “Horticultural natural zeolite that are incorporated into or onto a turf, lawn or soil profile.”;
- ECOSTONE (Registration No. 4627074) for “plastic fencing material, namely, polyethylene fencing consisting of some recycled polyethylene material, fence posts consisting primarily of plastic; plastic fence post

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 12.

⁴¹ *Id.* at 14.

⁴² *Id.* at 14-15.

caps; simulated rock plastic fencing; molded plastic fencing and component parts thereof; and structurally reinforced plastic fencing”;
and

- ECOWOOD (Registration No. 4585044) for “outdoor furniture.”⁴³

Applicant argues that, in these registered marks, “eco” serves to suggest that the products to which the marks are applied are imitations or, at least, “something different” than the product referenced by the term modified by “eco.”⁴⁴ For instance, Applicant asserts that ECOSAND “suggests that the [identified] goods (natural zeolite) are something other than sand, with sand-like characteristics.”⁴⁵ Based on these registrations, Applicant claims that that the USPTO “has consistently found that consumers are not deceived by a faux product when the modified by the term ‘eco.’”⁴⁶

As a general matter, we reject the suggestion that a handful of registrations establishes a consistent practice by the Office of treating “eco” as the equivalent of “faux” or “imitation,” such that it would preclude a finding of deceptiveness. *See In re First Draft, Inc.*, Ser. No. 76420605, 2005 TTAB LEXIS 388, at *17 n.10 (TTAB 2005) (“The fact that a few third-party registrations have been allowed over a long period

⁴³ March 2, 2022 Response to Office Action at TSDR 26, 28, 30, 32-33, 41. Registration No. 5353913 (ECO-IVORY) was cancelled on June 28, 2024, after Applicant filed its main brief. Therefore, it is proof only that the registration issued and we have not otherwise considered it. *See, e.g., In re Kysela Pere et Fils Ltd.*, Ser. No. 77686637, 2011 TTAB LEXIS 70, at *7 (TTAB 2011) (“[D]ead’ or cancelled registrations have no probative value at all.”).

⁴⁴ Applicant’s Reply Brief, 9 TTABVUE 6.

⁴⁵ *Id.* at 6.

⁴⁶ Applicant’s Appeal Brief, 6 TTABVUE 13.

of time hardly establishes current Office policy. There may very well be as many or more abandoned applications wherein registration was refused on similar records. The Board's responsibility is to focus on the record at hand."). Further, these third-party registrations cover different goods and different marks (beyond the shared prefix "ECO-") and their registrability was determined on different evidentiary records. Therefore, they have little bearing on whether ECOTWEED is registrable for "footwear made of a tweed-like material." *See, e.g., In re Lizzo LLC*, Ser. No. 88466264, 2023 TTAB LEXIS 22, at * (TTAB 2023) (finding third-party registrations of different marks based on different records to have little persuasive value). In any event, we are not bound by the prior registrability determinations of examining attorneys involving different facts and circumstances; instead, we must assess each mark based on the record before us. *See In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (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.")

The record here contains little evidence that consumers will perceive "eco" as referring to imitation products generally or products made from recycled plastics specifically. The online articles submitted by Applicant do establish that eco-friendly products can include those made from recycled plastics and that sportswear can be made from recycled water bottles. But, as the Examining Attorney points out, the evidence indicates "that apparel goods can be environmentally friendly for a number of reasons, such as being made from organic materials or recycled materials or made

without harmful chemicals.”⁴⁷ For instance, one piece of marketplace evidence shows tweed, in particular, being touted “as an ideal modern fabric for an age of sustainability,” that is “locally produced by craftspeople using traditional methods that are kind to the environment, and cause a minimal carbon footprint in both its production and distribution.”⁴⁸ Thus, as the Examining Attorney notes, tweed may be deemed environmentally friendly because of “its biodegradability, the lack of major pollutants connected with the production of wool, the use of organic or recycled wool, or the use of wool that is otherwise produced sustainably.”⁴⁹

There is otherwise no evidence to convince us that most consumers, even those aware that products may be made from recycled materials, would conclude that ECOTWEED refers to a tweed-like material made from recycled plastics. In fact, some evidence of record indicates that the term may be perceived as referring to actual tweed made from wool. Specifically, excerpts from yarn.com, estelleyarns.com, and ravelry.com show use of “eco tweed” to refer to yarn with a composition of 50% to

⁴⁷ Examining Attorney’s Brief, 8 TTABVUE 11 (citing evidence attached to April 10, 2024 Subsequent Final Office Action at TSDR 95-96, 102, 134).

⁴⁸ June 3, 2022 Nonfinal Office Action at TSDR 40. Another piece of evidence, an excerpt from sewport.com, notes that “[c]ombined with the fact that wool is one of the world’s most sustainable fabrics, it’s clear why wool textiles like tweed remain as popular as they are.” *Id.* at 68.

⁴⁹ Examining Attorney’s Brief, 8 TTABVUE 11. For evidence concerning the environmentally-friendly aspects of tweed and its production, see, e.g., June 3, 2022 Nonfinal Office Action at TSDR 68 (excerpt from sewport.com indicating tweed remains popular because “wool is one of the world’s most sustainable fabrics”); March 13, 2023 Final Office Action at TSDR 10 (excerpt from harristweed.org stating that “Harris Tweed is made from 100% British wool, naturally renewable, biodegradable, and recyclable”); *id.* at 44-52 (excerpt from lovatmill.com, “the Home of Tweed & Sustainability,” indicating that Lovat Mill’s production processes do not adversely impact the natural environment, do not use hazardous chemicals, have a minimal carbon footprint, and involve the recycling of wool waste).

75% wool.⁵⁰ Another excerpt from bellbridge.com shows “Eco Tweed” being used to refer to carpets composed of wool yarn.⁵¹

Viewing the evidence of record together with the general definition of “eco” as meaning “ecological” or “not harmful to the environment,” we conclude that consumers viewing ECOTWEED would conclude that Applicant’s footwear is made of actual tweed (i.e., a particular rough, woven woolen fabric) that is environmentally friendly (i.e., ecological tweed). *Cf. R. Neumann & Co. v. Overseas Shipments, Inc.*, 326 F.2d 786, 789 (CCPA 1964) (concluding that that “DURA-HYDE’ applied to ‘a plastic material of leatherlike appearance’ would support the connotation of ‘durable hide’ thus conveying to the minds of purchasers that the material was composed of leather”); *In re Shapely, Inc.*, Ser. No. 73421127, 1986 TTAB LEXIS 76, at *10 (TTAB 1986) (“[W]e are persuaded that an appreciable number of women would be apt to believe the representation that appellant’s garments [offered under the mark SILKEASE] are made, at least, in part of silk fibers.”).

Accordingly, we agree with the Examining Attorney that, when ECOTWEED is used in connection with footwear, it immediately conveys that the footwear features a particular type of rough, woolen fabric. That is, “tweed” is merely descriptive of footwear made in whole, or in part, of tweed. However, Applicant has acknowledged that its “footwear made of a tweed-like material” does not contain tweed, stating that

⁵⁰ September 17, 2020 Nonfinal Office Action at TSDR 4, 7, 10.

⁵¹ *Id.* at 2.

“the goods associated with the mark are made from recycled plastic bottles.”⁵² Thus, we find that ECOTWEED is misdescriptive because it includes a term that is merely descriptive of a significant aspect of Applicant’s footwear that the footwear could plausibly possess but, in fact, does not.

B. Would Consumers Believe the Misdescription?

Having found that ECOTWEED misdescribes a significant aspect of Applicant’s goods, we must determine whether prospective purchasers are likely to believe that the misdescription actually describes the goods at issue here. *Budge*, 857 F.2d at 775. As the Examining Attorney notes, “[w]here goods similar to the Applicant’s contain or possess the feature described in the mark, evidence of such usage supports a finding that prospective purchasers are likely to believe the misdescription.”⁵³ *See id.* (finding the Board reasonably inferred purchasers would believe that seat covers offered under the terms LAMB or SHEEP were actually made from lambskin or sheepskin in view of evidence showing that such products exist in the marketplace).

Here, the Examining Attorney has provided evidence, some of which is discussed above, that footwear of various types made from, or otherwise containing, tweed are offered in the marketplace. Thus, it would not be unreasonable for purchasers of footwear to believe that Applicant’s goods are made from or contain tweed. This is especially so where, as Applicant’s identification of goods specifically indicates, the footwear is “made of a tweed-like material.” In other words, because Applicant’s

⁵² September 13, 2023 Request for Reconsideration at TSDR 142; *see also* Applicant’s Brief, 6 TTABVUE 9.

⁵³ Examining Attorney’s Brief, 8 TTABVUE 11.

footwear is “made of a tweed-like material” it will presumably resemble or otherwise be characteristic of tweed,⁵⁴ such that consumers would be more likely to believe the material is tweed when it is not.⁵⁵

Applicant, in turn, essentially rests on its arguments concerning the first prong of the deceptiveness test. Specifically, Applicant reiterates that the term “tweed” is imprecise and “often used” to describe “tweed-like” materials and thus there is no misdescription here at all.⁵⁶ So, Applicant argues, the second factor concerning the misdescription’s believability “does not come into play.”⁵⁷ However, as discussed above, the evidence supports a finding that “tweed” misdescribes the goods here. It also supports a finding that prospective purchasers are likely to believe that misdescription.

C. Would the Misdescription Affect Consumers’ Purchasing Decision?

Lastly, we must assess whether the misdescription is likely to affect the purchasing decision of a significant or substantial portion of relevant consumers.

⁵⁴ See MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/-like> (accessed on February 18, 2025) (defining the suffix “-like” as “resembling or characteristic of”). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, Opp. No. 91061847, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff’d*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *7 (TTAB 2006); TBMP § 1208.04.

⁵⁵ We also note that the identification’s limitation of “tweed-like material” does not aid Applicant here. Consumers are not aware of limitations to identifications that reside in USPTO’s records; thus, such limitations have no bearing on consumer perception. See *In re Dolce Vita Footwear, Inc.*, Ser. No. 88554717, 2021 TTAB LEXIS 121, at *13 (TTAB 2021) (“We cannot assume that consumers of Applicant’s goods will be aware that its identification is so restricted, and the restriction is not controlling of public perception.”).

⁵⁶ Applicant’s Brief, 6 TTABVUE 15-16.

⁵⁷ *Id.* at 15.

Budge, 857 F.2d at 775. Specifically, we must determine whether being composed of, or otherwise containing, tweed is an appealing or desirable characteristic that would matter in selecting footwear. See *White Lotus*, 2013 TTAB LEXIS 9, at *22-23 (citing *In re Juleigh Jeans Sportswear, Inc.*, Ser. No. 73833721, 1992 TTAB LEXIS 49, at *15 (TTAB 1992)).

Again, Applicant asserts that there is no misdescription here, and thus the question of whether the misdescription is likely to affect consumers' purchasing decision is "not invoked."⁵⁸ The Examining Attorney, however, has submitted ample evidence regarding the desirable characteristics of tweed, including the following:

- A Wikipedia entry indicating that "tweeds" are "desirable for informal outerwear, due to the material being moisture-resistant and durable" and that they "are made to withstand harsh climates";⁵⁹
- An article from josefinas.com describing tweed as a "flexible and warm fabric, being preferentially used for outdoor activities";⁶⁰
- A blog post from barringtonayer.co.uk stating that tweed "had a genuine benefit as a hardy and waterproof material that made it ideal for all kinds of outdoor activities," but "[c]rucially, . . . was also breathable and lighter than similarly strong woolen fabrics, so it could be easily worn in the summer too";⁶¹
- A post on studiosuits.com noting that tweed is comfortable and can protect against cold weather because of its woolen construction;⁶²

⁵⁸ *Id.* at 17.

⁵⁹ September 2, 2021 Nonfinal Office Action at TSDR 70.

⁶⁰ June 3, 2022 Nonfinal Office Action at TSDR 22.

⁶¹ *Id.* at 38.

⁶² *Id.* at 47.

- A post on tweedmaker.com indicating that tweed “is suitable for all weather conditions and different temperatures” because of its dense weave, and “also extremely durable and resistant to damage, but at the same time, soft and flexible”;⁶³ and
- A post on sewport.com stating that “tweed’s ability to resist the environment has won it an enduring place in the international fashion world,” and characterizing it as a “desirable” fabric, and noting that it is weather resistant, durable, insulative, and biodegradable.⁶⁴

This evidence is highly probative to the extent that it reflects information about tweed that relevant consumers might encounter in the marketplace. *See, e.g., Tapco*, 2017 TTAB LEXIS 126, at *15-16 (finding that evidence consisting webpage excerpts, news stories, and “how-to” articles showing how the relevant goods were marketed supported the conclusion that prospective consumers would believe the misdescription at issue); *In re AOP LLC*, Ser. No. 85009094, 2013 TTAB LEXIS 344, at *9 (TTAB 2013) (finding that consumers, through websites, were exposed to and thus aware of wine-related designations of origin). It establishes that the purported attributes of tweed include durability, warmth, and weather resistance. Any of these could be desirable characteristics that would matter to someone in the market for footwear.⁶⁵ We therefore find that the misdescription here is likely to affect the purchasing decision of a significant or substantial portion of relevant consumers.

⁶³ *Id.* at 54.

⁶⁴ *Id.* at 63-65, 79.

⁶⁵ We note that the identification of goods is broad and contains no limitations as to the nature of Applicant’s “footwear,” other than material composition. Thus, we must presume that Applicant’s goods could include footwear for which durability, warmth, and weather

D. Conclusion as to Deceptiveness

Based on our review of all the evidence and arguments of record, we conclude that each of the three prongs of the deceptiveness test is met here. Accordingly, we find that ECOTWEED is deceptive as applied to Applicant's identified "footwear made of a tweed-like material" and therefore affirm the refusal under Trademark Act Section 2(a).

Before turning to the refusal based on deceptive misdescriptiveness under Trademark Act Section 2(e)(1), we are obliged to address the dissenting opinion. Mainly, the Dissent asserts that we overly focused on the meaning and nature of tweed, and thus have not properly credited the identification of goods, specifically its indication that Applicant's footwear is "made from a tweed-like material." If we had given the full identification its proper credit, the Dissent contends, then we would not have reached an illogical conclusion based on two inconsistent propositions, namely that consumers would know that Applicant's footwear is made of a tweed-like material and also believe that Applicant's footwear uses tweed. Contrary to these arguments, however, we have considered the identification in its entirety. But we do not believe that the identification's limitation compels us to find that consumers would be aware that Applicant's footwear does not contain tweed.

The Dissent repeatedly states the relevant consumers would know that Applicant's goods are made from a tweed-like material and thus are not made from

resistance would be desirable characteristics. *See, e.g., Embiid*, 2021 TTAB LEXIS 168, at *37 (presuming that applicant's goods include all goods of the type identified, without limitations as to their nature).

tweed, essentially arguing that, if the identification itself indicates that the goods are made from tweed-like material, then we must imbue the relevant consumers with that knowledge when performing our analysis. That is, if the identification says the footwear is made from tweed-like material, then we must assume all consumers encountering Applicant's goods in the marketplace will know that fact. In support, the Dissent points to the principle stated in our analysis above that, when determining descriptiveness, the operative question is "whether someone who knows what the goods . . . are will understand the mark to convey information about them." *Real Foods*, 906 F.3d at 974. But the Dissent's reliance on the wording "someone who knows what the goods are" is misplaced here and problematic for the Section 2(a) deceptiveness analysis generally.

The Dissent's position, taken to its logical end, is that a mark may not be deemed deceptive if the identification of goods indicates that the goods do not actually feature the material composition at issue or, as here, that the goods are composed of a material with similar characteristics or resemblance to the material at issue. But Section 2(a)'s bar against the registration of deceptive matter would be no bar at all if it could be so easily dispatched. And, if the Dissent's position were adopted generally, it would lead to an odd result: a deceptiveness refusal would only be appropriate where the identification is silent as to whether the goods feature the relevant characteristic, and not where the identification clearly indicates that the goods do not feature the relevant characteristic. Thus, it is not surprising that the Dissent's position is at odds with a decades-long line of case law holding a mark

deceptive, or deceptively misdescriptive, despite (or perhaps because of) wording in the identification indicating that the goods do not feature the characteristic identified in the mark. *See, e.g., R. Neumann & Co.*, 326 F.2d at 791-92 (DURA-HYDE deceptive as to “plastic material of leatherlike appearance made into shoes”); *Dolce Vita*, 2021 TTAB LEXIS 120, at *1, 18 (CLEAR deceptively misdescriptive as to “Baggage tags, Handbags, Make-up bags sold empty, Purses and wallets, Tote bags, All-purpose sport bags, Allpurpose [sic] carrying bags, Business card cases, Clutches, Coin purses, Credit card cases; all of the foregoing excluding transparent goods”); *Phillips Van Heusen*, 2002 TTAB LEXIS 45, at *25 (SUPER SILK deceptive as to “clothing, namely[,] dress shirts and sport shirts made of silk-like fabric”); *Tanners’ Council of Am., Inc. v. Samsonite Corp.*, 1979 TTAB LEXIS 99, at *12-13 (TTAB 1979) (SOFTHIDE deceptive as to imitation leather material) (no serial number in original). In view of the case law, it also unsurprising that Applicant itself has stayed away from this unavailing argument on appeal.

Unlike the Dissent, we stand by the principle expressed in *Dolce Vita* that limitations to identifications are not controlling of public perception because consumers are not aware of the precise wording in identifications of goods that reside in USPTO records. *See* 2021 TTAB LEXIS 121, at *13. But we need not rely on that principle here, because we find as a practical matter that the full identification supports, rather than obviates, a deceptiveness finding. That is, Applicant has indicated through the identification that its goods are footwear made from fabric that resembles or is otherwise characteristic of tweed. Thus, the question is whether a

consumer who encounters footwear that has the look or feel of tweed and is offered under the mark ECOTWEED would believe that the footwear contains tweed. In answering that question, we cannot, and should not, infer that consumers will know that the footwear here is something other than tweed, either because of the identification itself or because of Applicant's marketing activities, consumer education efforts, product labeling practices, or success in the marketplace. *See, e.g., Budge*, 857 F.2d at 776 (finding the Board properly discounted advertising materials concerning the nature of the goods when determining misdescriptiveness); *Phillips Van Heusen*, 2002 TTAB LEXIS 45, at *28 ("That applicant's dress shirts and sports shirts made of silk-like fabric will disclose, when marketed under the term 'SUPER SILK,' the fact that the fabric from which such goods are manufactured is not genuine silk is . . . irrelevant and immaterial.").

We acknowledge that, as a general matter, it is possible for an identification of goods to obviate any potential for deceptiveness. However, that is not the case here. That is, the limitation in Applicant's identification does not have real-world implications that would prevent consumer deception. For instance, the limitation does not require Applicant to market its goods as being made from imitation tweed or otherwise label them as such. Nor does the limitation render deception unlikely in a practical sense, as might be the case if the identification specified a material composition that is entirely inconsistent with the goods being perceived as being made from tweed (e.g., footwear made only from transparent plastic). Instead, the

identification indicates that Applicant's footwear is made from a material that resembles or is otherwise characteristic of tweed.

Because the Dissent has also asserted that we have given short shrift to Applicant's mark in its entirety, we must reiterate that the evidence here does not support the conclusion that the mark ECOTWEED itself precludes consumer deception. Again, Applicant has not established that consumers would perceive the prefix "ECO-" as meaning "imitation" or "faux." At most, the record establishes that the prefix connotes the words "ecological" or "environmental" or the concept of environmental friendliness. And those connotations do not create the impression that the "tweed" referenced in the mark is not actual tweed.

We agree with the Dissent that consumers are not wholly irrational. And we conclude that even the most rational consumers who encounter shoes made of fabric resembling or characteristic of tweed being offered under Applicant's proposed ECOTWEED mark may be deceived. In short, to side with the Dissent we would need to find either that (1) consumers somehow know the goods are imitation tweed or (2) the mark itself makes that clear. But, based on this record, we cannot, and do not, find that either is true.

II. Section 2(e)(1) – Deceptively Misdescriptive

The deceptiveness refusal under Section 2(a) absolutely bars registration of Applicant's mark, but for completeness, we briefly address the refusal based on deceptive misdescriptiveness under Trademark Act Section 2(e)(1). *See, e.g., White Jasmine*, 2013 TTAB LEXIS 9, at *27-28 (finding WHITE JASMINE deceptive, but, for completeness, considering a disclaimer requirement based on deceptive

misdescriptiveness). The test for deceptive misdescriptiveness is identical to the first two prongs of the deceptiveness test – in this case whether ECOTWEED misdescribes the goods as identified, and whether consumers likely would believe the misdescription. *See id.* at *30-31. For the reasons discussed in the deceptiveness analysis, both prongs of the test for deceptive misdescriptiveness are satisfied. We therefore also affirm the refusal under Trademark Act Section 2(e)(1) in the alternative.

Decision: We affirm the refusal to register Applicant’s proposed **ECOTWEED** mark under Trademark Act Section 2(a) and, in the alternative, under Trademark Act Section 2(e)(1).

Thurmon, Administrative Trademark Judge, dissenting:

Consumers are not wholly irrational. They do not tend to simultaneously hold two inconsistent beliefs about products in the market. And yet, that is exactly the result of the majority’s conclusion. According to the majority, relevant consumers simultaneously believe these two things about Applicant’s goods:

1. They know Applicant’s footwear is “made of a tweed-like material”; and
2. They believe Applicant’s footwear uses real tweed.

These are inconsistent statements, because a “tweed-like” fabric means a fabric that is not traditional tweed (whatever that means), but that has some characteristic or feature of real tweed. I dissent, because the second belief listed above—the majority’s conclusion on the meaning of the ECOTWEED mark—is illogical and unlikely to be held by relevant consumers.

The majority has lost sight of the forest for the trees, basing much of its analysis on only part of the mark and only part of the goods. The majority has shown that some consumers of footwear are familiar with traditional tweed fabric and know that tweed is sometimes used in shoes.⁶⁶ If the applied-for mark were TWEED and the goods were all kinds of footwear, the majority would have a good point.

But the mark is ECOTWEED and the goods are “footwear made of a tweed-like material.” So, the proper question is “whether someone who **knows what the goods and services are** will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d

⁶⁶ The majority notes that some consumers “are unaware that there is a generally understood meaning of ‘tweed’ (i.e., a particular rough, woolen fabric),” and that there is evidence of synthetic tweed-like fabrics used in shoes. From this evidence, the majority concludes “that it is incorrect to refer to fabric that does not contain wool as ‘tweed.’” We are not the Tweed Police. It is for us to declare that Target, for example, was “incorrect” to list a fully-synthetic boot as “tweed.” Target isn’t alone, as there is evidence of several synthetic tweed shoes in the record, as well as synthetic tweed fabrics. This evidence is not “incorrect.” It simply shows that there are mixed uses of the word tweed within the footwear market. This fact is important because it confirms that “tweed-like” fabrics are used in the footwear market.

We cannot be certain of what is in the mind of consumers, but we should avoid declaring that words have only certain meanings and that any other use is “incorrect.” We have a mixed record here, one that shows many footwear products using traditional tweed, and others with fully synthetic fabrics. But even within the “real” tweed category, there are products made from recycled wool, and a tweed shoe from Ann Taylor that contains only 4% wool. With such a wide spread of actual fibers used in fabrics called tweed, I cannot agree with the majority’s view that tweed means one and only one thing.

This point matters much less than the majority’s focus on tweed suggests. The reality is surely that consumers’ understanding of what tweed means varies greatly. And that’s fine. The important point is that most consumers of footwear are familiar, to some extent, with tweed. Going farther than that is both unnecessary and unsupported by the record. Consumers’ general familiarity with tweed shows that will understand what a “tweed-like” fabric is, and that they will realize it is not real tweed, even if they are uncertain about what “real” tweed is.

1252, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). The majority starts with the correct question, but quickly abandons that analysis and instead focuses on the word tweed and ignores the “tweed-like” limitation in the identification of goods. These two mistakes, but especially the majority’s truncation of the goods from “footwear made of a tweed-like material” to the far broader category of footwear,⁶⁷ led to the majority’s nonsensical conclusion.

There are many examples from the majority’s analysis that illustrate its error. For example, when discussing this dissent, the majority states, “Contrary to these arguments, however, we have considered the identification in its entirety. But we do not believe that the identification’s limitation compels us to find that consumers would be aware that Applicant’s footwear does not contain tweed.” Really? That’s totally illogical, because our precedents require us to determine the meaning of the mark from the perspective of a consumer who knows Applicant offers “footwear made of a tweed-like fabric.” How can we start from that point and then conclude that exactly the opposite is true?

The majority’s analysis cannot be reconciled with the required analysis. The only way the majority’s conclusion can be supported is by ignoring the full identification.

⁶⁷ If “footwear” were the proper market category, it would be an exceptionally broad category. Almost all U.S. consumers use footwear and many consumers own multiple pairs. Footwear ranges from ski boots to flip flops. It also includes all commercial footwear, from a fire fighter’s boots to nursing shoes. The majority relies on evidence about tweed from Scottish textile experts (one of whom admits that there is a lot of confusion about what tweed means) and Scottish clothiers. It would be better to have evidence from the U.S. market, and given the breadth of the “footwear” market, this record provides no basis for us to quantify the likely beliefs or understandings of U.S. footwear consumers. The record shows a range of footwear, but I respectfully suggest that the evidence of record covers only the tip of the enormous footwear iceberg.

If the identification is accurate—there is no suggestion to the contrary in the majority’s analysis—we simply cannot ignore it or truncate it to something else. And yet that is exactly what the majority has done. I cannot see any logical basis to say that relevant consumers know Applicant’s footwear uses a “tweed-like” material, but that the shoes also contain real tweed. That makes no sense. Indeed, the majority goes so far as to contend this accurate identification is itself evidence the mark is misdescriptive and deceptive. That’s a conceptual error, and it leaves us adrift. How are we to evaluate the meaning of a mark, if we are free to use just part of the identification in our analysis?

The following conclusion is supported by the record and follows the required analysis:

Consumers of “footwear made of a tweed-like fabric” will understand what “tweed-like” means because such consumers are accustomed to seeing traditional tweed in other parts of the footwear market. These consumers will know what tweed is like and will understand that Applicant’s shoes use an alternative to traditional tweed. No other conclusion makes sense given the identification of goods and footwear consumers’ general familiarity with traditional tweed. Given this understanding of the goods, relevant consumers will not believe Applicant’s ECOTWEED shoes contain real tweed. The mark is not misdescriptive.

This analysis starts from the perspective of consumers who know what the goods are, as we are required to do, and it retains that perspective throughout the analysis. The majority recites the proper approach at the start of their analysis, but then become so engrossed in discovering the real meaning of tweed and its history within

the footwear market, that they lose their focus.⁶⁸ Their conclusion is based on a possible meaning of ECOTWEED within the broader footwear market where consumers know only that the goods are footwear. That is how the majority is then able to use the identification against Applicant, as though this accurate identification of Applicant's goods is itself part of the deception.

The majority acknowledges that "tweed-like" means not tweed, but having some feature or characteristic of tweed. How, then, would consumers who know the footwear uses a "tweed-like" fabric believe the footwear uses real tweed. The majority agrees these two conclusions conflict, but that has no impact on their analysis. Something is missing here. At what point do relevant consumers stop knowing what the goods are and start believing they are something else? That must happen, if the majority's analysis is correct. Either that, or the majority really is contending that consumers will hold these two conflicting beliefs in their minds simultaneously.

The majority's conclusion is based entirely on the meaning of the word "tweed." That's another major mistake, because the ECOTWEED mark is a unitary mark, a coined compound word consisting of the "eco" prefix and the noun "tweed." There is ample evidence in the record of the "eco" prefix altering the meaning of the word to which it is attached. There are the registered marks ECOWOOD for a wood substitute and ECOSAND for a sand substitute. There is Internet evidence showing varied uses

⁶⁸ The focus on tweed is also inconsistent with our long line of decisions holding that it is improper to dissect unitary marks and that consumers tend to focus on and remember the first part of marks more than other parts. The majority's conclusion on whether the mark is misdescriptive is based on the presence of the word tweed in this mark.

of the “eco” prefix, but in every instance, this prefix alters in some way the meaning of the base word to which the prefix is attached. Despite this evidence, the majority bases its conclusion on the word “tweed,” concluding that “eco” does not really alter the meaning of this mark. That’s inconsistent with the evidence of record showing how the “eco” prefix alters meanings.

The majority tries to justify its analysis by noting that an identification of goods may include deceptive language. That is true, but there is nothing deceptive about the identification here. The Examining Attorney accepted the identification, and it appears to be accurate. In these circumstances, we should NOT ignore any part of the identification. And we certainly should not conclude that an accurate identification of the goods is somehow part of the deception. This approach is mistaken for a number of reasons, but first and foremost, because the mark is not misdescriptive. It is entirely improper to decide the mark is deceptive and then use that finding to show that the mark is misdescriptive. These are separate questions, and if the mark is not misdescriptive, it cannot be deceptive. The majority appears to have reached its conclusion first and then tailored its analysis to support that conclusion. It is difficult to see any other explanation for an analysis that uses alleged deceptiveness to support its analysis of whether the mark is misdescriptive. They have literally put the cart before the horse.

The majority expresses concern that if the identification is accurate, we could never find a mark deceptive under Section 2(a). That is probably correct, because if a mark is not misdescriptive of the goods, then we never reach the question of

deceptiveness under Section 2(a). Again, the majority seems to have reached a conclusion first and then applied the legal standards to support that conclusion.

There is nothing in this dissent that is inconsistent with our precedents. To the contrary, I am following the required analysis. The majority provides examples like DURA-HYDE, which was found deceptive for “plastic material of leatherlike appearance made into shoes,” to show that an identification cannot get in the way of a deceptiveness finding. With respect, the majority is comparing apples and oranges. They pay little or no attention to registered marks like ECOWOOD and ECOSAND, both of which use the “eco” prefix in a manner consistent with the use here. They ignore, too, the other record evidence showing the type of alteration the word “eco” has in the marketplace. Was there any such evidence concerning the prefix “dura” within the applicable market in the DURA-HYDE case? No, the evidence in that case showed that “dura” made sense with “hyde” to suggest durability of a hide. In the LOVEE LAMB case, the mark was not a coined, unitary mark, but a two-word mark. The word “lovee” is not a prefix and there was no evidence in that case showing that the word “lovee” is often used with other words to alter the overall meaning. The majority relies on these cases, all of which are clearly different factually from this appeal, and they ignore the evidence that is most probative, namely the impact of the “eco” prefix.

The decisions the majority relies on for the need to ignore the identification are outlier decisions. These cases simply reinforce the need to focus our analysis on the actual evidence before us. They show that in some instances, there are no plausible

meanings of the mark that are not deceptive. That is clearly not the case here. What is the ECOTWEED mark likely to mean to relevant consumers? I don't think the mixed record before allows for a single answer to that question. Consumers who are familiar with Applicant's actual goods, will understand ECOTWEED as a tweed-like fabric made from recycled water bottles. Those who know only what the identification discloses may not know the fabric is made from recycled water bottles, but given the evidence of various "tweeds" on the market, including synthetic tweeds (there is evidence of synthetic tweed footwear and synthetic tweed fabric in the record), these consumers will understand that "tweed-like" means not tweed, but like tweed, in some respect. There is nothing misdescriptive here, let alone deceptive.

Finally, the majority justifies their truncation of the identification in reliance on an unfortunate line from a recent precedent. According to the majority, "limitations to identifications are not controlling of public perception because consumers are not aware of the precise wording in identifications of goods that reside in USPTO records." This is a gross conceptual error regarding the role of the identification of goods. And while this Board has properly noted that disclaimers or descriptions of non-literal marks are not things that impact consumer perception, it is fundamentally incorrect to propose that this Board is free to ignore parts of an identification it believes consumers may not know about.⁶⁹

⁶⁹ This approach is doubly wrong here, because the market evidence in the record shows that Applicant touts its use of recycled water bottles to make its shoes. In other words, the record evidence shows that consumers of Applicant's footwear, at least those who see Applicant's marketing, will know the shoes are not made of traditional wool tweed. That's a critical point the majority misses throughout their analysis. There is no conflict between this identification

The Lanham Act created a notice-based registration system. The identification of the goods or services is a critical part of that system, equal in importance to the disclosure of the mark itself. But this notice system is not based on the notion that consumers read trademark registrations. It is, to the contrary, based on providing notice to prospective right holders—for example, when clearing a trademark for future use—and those concerned with violating the rights of a registrant.

We do not ignore parts of the identification when we conduct likelihood of confusion analysis under Section 2(d). If the majority is correct--that we should not consider limitations in an identification unless we think consumers are aware of the limitation—why wouldn't we follow the same rule when determining whether consumers are likely to be confused? The answer is obvious. The identification legally limits the rights obtained through registration. We have no discretion to alter an identification because we don't think consumers know about the limitation.

We do have discretion, however, to note when an identification is inaccurate or when a limitation does not work. In a leading case, for example, we found that limitations in an identification were not always present in the actual market.⁷⁰ Or, as we found in the CLEAR case, sometimes a mark is deceptive despite an accurate

and what consumers will see in the market. What basis does the majority have to say relevant consumers will not know Applicant's footwear uses a "tweed-like" material. The record suggests otherwise.

⁷⁰ *In re Aquitaine Wine USA, LLC*, 2018 TTAB LEXIS 108, *18. This is the case the CLEAR decision cites to support the proposition that we can ignore parts of an identification when consumers are not aware of the limitation. This decision, however, provides no support for that broad proposition, and instead notes that when a limitation in an identification is inconsistent with marketplace conditions, we will not consider the limitation.

identification. A review of that case will show why it, too, is an outlier. The primary reason the Board refused registration in the CLEAR case was because so many competitors and others who reported on the market used the word “clear” descriptively. To register such a mark would have a strong adverse impact on the market. When this sort of situation arises, the Board must take the proper action, even though it may seem inconsistent with some of our precedents.

This case is not an outlier. There is evidence that consumers know Applicant’s footwear is made from recycled water bottles, not from traditional tweed. The mark is not simply TWEED, but is ECOTWEED and a fabric that looks like tweed, but made from recycled plastic water bottles, is not inconsistent with the mark. So, even when we look to actual market circumstances, we find no reason to deviate from the normal process of determining the meaning of the mark from the perspective of consumers who know what the goods are.

At the end of the day, the majority has treated this case like the outlier decisions it cites. None of those cases resemble this one. The evidence of registrations and other uses of eco-___ marks is far more probative here than a mark like LOVEE LAMB. But the majority seems determined to treat this simple case as some complex situation requiring us to truncate, and effectively ignore, part of the identification of goods. I see no justification for such treatment, and I worry that decisions like this one will do harm to the law by sowing confusion.

The ECOTWEED mark could be misdescriptive of “footwear made of a tweed-like material,” if Applicant’s footwear uses a fabric that is not like tweed. That is, if

Applicant's shoes purport to use a tweed-like material, but instead use something that is not like tweed, that would be misdescriptive.

This is an intent-to-use application and we have no evidence showing uses of the ECOTWEED mark. Not surprisingly, we also have no performance data for Applicant's footwear in the record. The Examining Attorney never argued that Applicant's goods used a fabric that was not like tweed, and the only characteristic or feature of tweed we could evaluate on our record is appearance. We have many images of footwear with real tweed and some samples of Applicant's footwear with a "tweed-like" material. I will not pull up such evidence, but to my eye, Applicant's fabric looks like tweed seen in other shoes. The "tweed-like" limitation appears accurate based on the evidence in our record.

This appeal is not difficult. The identification was accepted by the Examining Attorney and is consistent with the marketplace evidence in the record. This is not an outlier case. It is similar to ECOWOOD, ECOSAND and other examples in the record showing the many ways the "eco" prefix alters meanings. Just like ECOWOOD is made from a wood substitute that is touted as more ecologically friendly than real wood, the ECOTWEED mark is used with footwear made from recycled water bottles to create a tweed-like fabric. Where is the misdescription? Where is the deception? The majority have misconstrued the law and reached the wrong conclusion.