

This Opinion is Not a
Precedent of the TTAB

Mailed: September 19, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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V.F. Corporation

v.

Anthony Fisher

—
Opposition No. 91236399
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Lynn E. Rzonca and Jenna M. Loadman of Ballard Spahr LLP,
for V.F. Corporation.

Kevin Keener and Rishi Nair of Keener & Associates PC,
for Anthony Fisher.

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Before Taylor, Mermelstein and Lynch,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Anthony Fisher (“Applicant”) has filed an application seeking registration on the
Principal Register for the mark VF, as shown below, for:

Bumper stickers; Magnetic bumper stickers in
International Class 16; and

Shirts; Sleepwear; Sweatshirts; Beanies; Hats; Long-sleeved shirts; Shorts; T-shirts in International Class 25.¹



The application includes the following description: “The mark consists of two fish hooks connecting in the middle to form the stylized letters ‘VF.’” Color is not claimed as a feature of the mark.

V.F. Corporation (“Opposer”) has opposed registration of Applicant’s mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on its claim of priority of use and likelihood of confusion with the following registered marks:²

Registration No.	Mark	Goods/Services
2893250 ³		Men’s, women’s and children’s tops, bottoms, jeans, jackets, vests, caps, hats, coveralls, gloves, mittens, lab coats; uniforms and bandanas (Class 25)
4547305 ⁴	VF (standard characters)	Retail store services featuring apparel, backpacks, and outdoor gear and equipment (Class 35)

¹ Application Serial No. 87279700 was filed on December 23, 2016, and is based upon Applicant’s bona fide intention to use the mark in commerce for the goods identified in both international classes under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² 1 TTABVUE. Citations in this opinion are to the TTABVUE docket entry number and, where applicable, the electronic page number where the document appears.

³ Issued October 12, 2004, renewed.

⁴ Issued June 10, 2014.

3045108 ⁵		Retail services and on-line retail services in the fields of apparel, backpacks and luggage (Class 34)
4987243 ⁶		Business services, namely, the business administration of companies and of retail store operations featuring apparel, apparel accessories, luggage and outdoor gear; business management and business administration services relating to the fields of apparel, apparel accessories, luggage and outdoor gear (Class 35)
4987245 ⁷		Business services, namely, the business administration of companies and of retail store operations featuring apparel, apparel accessories, luggage and outdoor gear; business management and business administration services relating to the fields of apparel, apparel accessories, luggage and outdoor gear (Class 35)
4987246 ⁸	VF (standard characters)	Business services, namely, the business administration of companies and of retail store operations featuring apparel, apparel accessories, luggage and outdoor gear; business management and business administration services relating to the fields of apparel, apparel accessories, luggage and outdoor gear (Class 35)
4987249 ⁹	VF WE FIT YOUR LIFE (standard characters)	Business services, namely, the business administration of companies and of retail store operations featuring apparel, apparel accessories, luggage and outdoor gear; business management and business administration services relating to the fields of apparel, apparel accessories, luggage and outdoor gear (Class 35)

⁵ Issued January 17, 2006; renewed.

⁶ Issued June 28, 2016.

⁷ Issued June 28, 2016.

⁸ Issued June 28, 2016.

⁹ Issued June 28, 2016.

Opposer submitted with its Notice of Opposition copies of its pleaded registration from the Trademark Electronic Search System (“TESS”) database of the USPTO showing the then-current status and title of the registration.¹⁰

Applicant, in its answer, has denied the salient allegations in the notice of opposition. In making its denials, Applicant denied in total the allegations set forth in paragraph 13, which include that: “Applicant’s mark consists of two fish hooks connecting in the middle to form the stylized letters ‘VF.’”¹¹

I. Opposer’s Motion to Amend the Application

Before turning to the merits of the appeal, we address Opposer’s deferred “Motion to Correct Application Serial No. 87/279,700.” By that motion, Opposer seeks an amendment of the description of the mark in Applicant’s application to “state that the applied-for design consists only of a stylized letter “V”; the “correction” being warranted “because Opposer conclusively establishe[d] ... that the applied-for mark does not consist of the letters ‘VF’ and instead consists only of the letter ‘V.’” (Opposer’s motion p. 1).¹² Not only do we find that Opposer has no authority to seek

¹⁰ 1 TTABVUE 14-27.

¹¹ 5 TTABVUE. Notwithstanding any alleged “admission” made by the denial, as more fully explained *infra*, it is not the description but the drawing that depicts the mark for which registration is sought. *See* Trademark Rule 2.52, 37 C.F.R. § 2.52.

¹² 8 TTABVUE 2. We note that Opposer primarily bases its assertion that it has “conclusively established” the purported error on Applicant’s failure to respond to Opposer’s Requests for Admissions and therefore they are deemed admitted. The requests are as follows:

1. Admit that in your Answer, filed with the TTAB on October 6, 2007, you denied that the mark was comprised of the stylized letters “VF”;

unilateral amendment of Applicant's application but, more importantly, the accuracy of the description statement is an examination issue and not a ground for opposition. *See Arcadia Group Brands Ltd. V. Studio Moderna SA*, 99 USPQ2d 1134, 1136 n.3 (TTAB 2011) (The Board noted that the claim that the recitation of services is overly-broad was an examination issue and not a ground for opposition or cancellation.); *Saint-Gobain Abrasives Inc. v. Unova Indus. Automation Sys. Inc.*, 66 USPQ2d 1355, 1359 (TTAB 2003) (citing *Phonak Holding AG v. ReSound GmbH*, 56 USPQ2d 1057 (TTAB 2000) (The Board found that the plaintiff's allegations of "indefiniteness" of the mark descriptions addressed an ex parte issue, and not a proper ground for an inter partes proceeding)). We thus find Opposer's motion to correct the mark description in Applicant's application is not a proper matter for Board consideration, and we decline to further consider Opposer's motion.¹³

II. The Record

The record in this case consists of the pleadings and, by rule, the file of Applicant's involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). As noted

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2. Admit that the literal element of the mark consists of only the letter "V:" and
 3. Admit that the mark does not contain the letters "VF."

¹³ Opposer was not without a possible avenue to challenge the accuracy of the description statement. If appropriate, on the publication date, or within thirty days thereafter, Opposer could have filed a letter of protest challenging publication. We hasten to add that the letter of protest would be accepted **only** where publication of the mark constituted **clear error**, because the **evidence** included with the letter of protest establishes a prima facie case for refusal of registration. However, letters of protest that merely present adversarial arguments are denied. *See generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1715.03(a) (June 2019), and the authorities cited therein.

above, also of record are copies of Opposer's pleaded registrations obtained from the TESS database submitted with Opposer's Notice of Opposition.

Neither Opposer nor Applicant submitted any evidence or testimony during their assigned testimony periods,¹⁴ and only Opposer filed a brief.

III. Standing and Priority

Opposer's standing to oppose registration of Applicant's mark is established by its seven pleaded registrations, properly made of record with its Notice of Opposition, which the record shows to be valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Because Opposer's pleaded registrations are properly of record, priority is not in issue in the opposition with respect to those marks for the goods listed therein. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177

¹⁴ Opposer, in describing the record, lists Opposer's Requests for Admissions to Anthony Fisher (to which Applicant allegedly did not respond), which were submitted as an exhibit to Opposer's "Motion to Correct Application." Because this document was not resubmitted during Opposer's testimony period, as reset in either the June 5, 2018 or September 29, 2018 Board orders, it is untimely and does not form a part of the record. *See* Trademark Rule 2.122(g); 37 C.F.R. § 2.122(g).

USPQ 563, 567 (CCPA 1973); *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 and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). Inasmuch as the only evidence in this case is the application file and the pleaded registrations, our inquiry will focus primarily on these two factors.

For the sake of economy, we confine our analysis to the mark in pleaded Registration No. 4547305, VF (in standard characters), for use on or in connection with retail store services featuring apparel, backpacks, and outdoor gear and equipment. If the opposition cannot be sustained on the basis of this mark, it could not be sustained on the basis of the other pleaded marks. *See, e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Goods and Services

We first consider the second *du Pont* factor and compare Applicant’s “bumper stickers [and] magnetic bumper stickers” (Class 16) and “shirts; sleepwear; sweatshirts; beanies; hats; long-sleeved shirts; shorts; [and] T-shirts” (Class 25) with Opposer’s “retail store services featuring apparel, backpacks, and outdoor gear and equipment” (Class 35). It is not necessary that the goods be identical or competitive, or even that they move in the same channels of trade, to support a finding of

likelihood of confusion. Rather, it is sufficient that the goods and services are related in some manner, or that the circumstances surrounding their marketing are such that they would or could be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods and services. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-96 (TTAB 1978).

It is also well recognized that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (holding DETROIT ATHLETIC CO. for sports apparel retail services and DETROIT ATHLETIC CLUB for clothing likely to cause confusion); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (holding BIGG'S (stylized) for retail grocery and general merchandise store services and BIGGS and design for furniture likely to cause confusion); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (holding 21 CLUB for various items of clothing and THE "21" CLUB (stylized) for restaurant services likely to cause confusion); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (holding CAREER IMAGE (stylized) for retail women's clothing store services and CREST CAREER IMAGES (stylized) for uniforms likely to cause confusion).

Opposer's retail store services feature, among other items, "apparel" and Applicant's Class 25 goods include apparel such as "shirts, sleepwear, sweatshirts, long-sleeved shirts, shorts, [and] T-shirts." Thus, Opposer's retail store services feature some of the very same goods identified in Applicant's application. While it is debatable whether Applicant's hats and beanies constitute apparel items, we need not find similarity as to each and every product listed in the Class 25 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); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014). We also recognize that Opposer's store services do not offer general merchandise such as would be offered by a big box store such as Target or Walmart. Rather, Opposer's retail store services are tailored to selling many of the Class 25 goods for which Applicant seeks to register his mark. We accordingly find Applicant's Class 25 goods related to Opposer's retail store services.

However, we do not find on the face of the recitations that Opposer's retail store services featuring apparel, backpacks, and outdoor gear and equipment feature goods in the nature of those identified in Class 16 of the application, i.e., bumper stickers or magnetic bumper stickers. It is incumbent upon Opposer, as the party having the burden of proof, to show that such goods and services are related in some viable fashion or that they are marketed or promoted under circumstances and conditions that could bring them to the attention of the same purchasers or prospective

purchasers under circumstances that could cause such purchasers reasonably to assume, that the particular goods and services share a common origin or sponsorship. The record fails to do so and thus we find Applicant's Class 16 goods unrelated to Opposer's retail store services.

We thus find that the *du Pont* factor of the relatedness of the goods and services favors a finding of likelihood of confusion as to the Class 25 goods but not as to those identified in Class 16.

B. The Marks

We next consider the *du Pont* likelihood of confusion factor of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *du Pont*, 177 USPQ at 567). "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.* 101 USPQ2d at 1721. See also *San Fernando Electric Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344

(TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant's applied-for mark is comprised of the following design:  , described as "consist[ing] of two fish hooks connecting in the middle to form the stylized letters 'VF.'" Opposer's pleaded standard character mark is comprised of the letters "VF." Opposer argues that because the "literal portion" of Applicant's mark as set forth in the mark description is identical to Opposer's VF mark – both being made up by the same combination of letters that are the entirety of the mark, i.e., the letters "VF" – the marks are identical in dominant part and engender the same connotation and commercial impression. Opposer further opines that "on inspection of the mark as drawn in the Application ... the literal element of the Applicant's mark is the letter 'V.'"¹⁵ Opposer goes on to state that "if Opposer's requested amendment[, i.e., to change the mark description to limit the two fish hook design "to form the stylized letter 'V,'] to Applicant's application was granted, similarity between the marks decline, each mark having only one letter in common ... [and] Applicant's Mark and Opposer's VF Marks could coexist based on the overall visual differences between the marks."¹⁶

Aside from the fact that the Board did not consider Opposer's motion to amend, Opposer's focus on the description in Applicant's mark to support its likelihood of confusion claim is misplaced. It is the drawing of the mark, not the words an applicant

¹⁵ 10 TTABVUE 9.

¹⁶ *Id.*

uses to describe it that determines what the mark is. *See* Trademark Rule 2.52, 37 C.F.R. § 2.52 (“A drawing depicts the mark sought to be registered.”); *see also Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1488 (“Applicant’s application ‘drawing depicts the mark to be registered.’” (internal citations omitted)); *In re Change Wind Corp.*, 123 USPQ2d 1453, 1459 n.6 (TTAB 2017) (“the drawing of the mark, not the words an application uses to describe it, controls what the mark is”). Accordingly, whether the description of Applicant’s mark reads that the two fishing hook design forms the letters “VF” or the letter “V” is not dispositive in determining whether the involved marks are similar. The issue before us is whether the design mark depicted in the drawing in Applicant’s application is similar to Opposer’s standard character VF mark.

Against that backdrop, and within the legal framework set forth above, we compare the marks and find them dissimilar in appearance, sound, meaning and commercial impression. We find so notwithstanding that Opposer is entitled to all depictions of its standard character mark regardless of the font style, size, or color. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012). As further recognized in *Viterra*, however, a standard character mark may not encompass all possible design elements in a mark. *Id.* Here, while Applicant may have intended that its design mark represent the letters “VF,” we do not discern the letter “F” and it is highly unlikely that prospective consumers would. In fact, consumers likely would not perceive any letters in Applicant’s design mark, but instead may only perceive a stylized checkmark. We simply find no similarity in

appearance, sound, meaning and commercial impression between Applicant's  design mark and Opposer's standard character mark "VF," no matter how Opposer would present those letters.

The *du Pont* factor of the similarity or dissimilarity of the marks thus highly favors a finding of no likelihood of confusion.

C. Conclusion

In conclusion, Applicant's mark is sufficiently dissimilar to Opposer's mark so as to make confusion unlikely. This *du Pont* factor alone is dispositive as regards Applicant's Class 25 goods. *Kellogg Co. v. Pack'em Enter. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive"). As for the Class 16 goods, we additionally find that they are not related to the services in Opposer's pleaded registration.

Decision: Opposition No. 91236399 is dismissed.