

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB SEPT 29,98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Wanted Shoes Inc.**

Serial No. 74/675,265

Ezra Sutton of Ezra Sutton, P.A. for **Wanted Shoes Inc.**

Catherine K. Krebs, Trademark Examining Attorney, Law Office 108
(**David Shallant**, Managing Attorney).

Before **Quinn, Hohein and Hairston**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

Wanted Shoes Inc. has filed an application to register
the mark "WANTED" for "footwear."¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that
applicant's mark, when applied to its goods, so resembles the
mark "WANTED," which is registered for "foundation garments,

¹ Ser. No. 74/675,265, filed on May 16, 1995, which alleges dates of
first use of April 28, 1989.

particularly brassieres,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed,³ but an oral hearing was not requested. We affirm the refusal to register.

² Reg. No. 718,982, issued on July 25, 1961, which sets forth dates of first use of November 22, 1960; renewed.

³ Applicant, with its brief, has attached "as Exhibit A ... a list of 18 registered trademarks which include the word WANTED" and has enclosed "as Exhibit B [a list of] 4 registered trademarks which include [the word] WANTED in [International] Class 25." Although each of such lists includes the mark of the cited registration, applicant asserts that such evidence "is indicative of the degree of dilution" of the term "WANTED," especially in the "clothing field," since none of the third-party registrations is allegedly for footwear. We observe, however, that none of the listed third-party marks includes the goods and/or services for which the marks are registered.

The Examining Attorney, in her brief, has properly objected to consideration of such evidence, correctly noting that the submission thereof is untimely under Trademark Rule 2.142(d). Moreover, it should also be pointed out that mere listings of third-party registrations are insufficient to make such registrations of record inasmuch as the Board does not take judicial notice of registrations which have been issued by the Patent and Trademark Office. The proper procedure for making information concerning third-party registrations of record, instead, is to timely submit either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the Patent and Trademark Office's own computerized database. See, e.g., In re Consolidated Cigar Corp., 35 USPQ2d 1290, 1292 (TTAB 1995) at n. 3; In re Smith & Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994) at n. 3 and In re Melville Corp., 18 USPQ2d 1386, 1388-89 (TTAB 1991) at n. 2. In any event, even if the third-party registrations sought to be relied upon by applicant were properly of record, so that we would additionally have an indication of the goods and/or services for which those marks are registered, it is pointed out that third-party registrations are entitled to little weight in evaluating whether there is a likelihood of confusion. This is because such registrations are not evidence that the marks shown therein are in use or that the purchasing public has become familiar with marks containing the term "WANTED" and is able to distinguish them based on differences in the marks as a whole. See, e.g., AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) and In re Hub Distributing, Inc., 218 USPQ 284, 285-86 (TTAB 1983). Accordingly, even if we were to consider the lists of third-party registrations attached to applicant's brief, the probative value thereof is so limited that it would not change the result in this case.

Inasmuch as the respective marks are identical in all respects, the issue of likelihood of confusion is essentially dependent upon whether applicant's and registrant's goods are sufficiently related in a commercial or other meaningful sense. Applicant argues, without any evidentiary support, that the refusal to register is improper, contending that:

[F]ootwear and brassieres are sold in different stores and in different departments of a store. Moreover, when a woman purchases a brassiere, there is no reason to associate it with footwear. Further, companies which sell brassieres do not normally sell footwear. In fact, the registrant, Maidenform, [Inc.,] has been in business for many years and has never expanded into footwear, and no one would expect them to. Therefore, if a consumer sees the WANTED trademark on footwear, the consumer would not associate the footwear product with Maidenform. Applicant has been using the mark since 1989, and applicant is not aware of any confusion, and there has been no objection from Maidenform. Long use without confusion is strong evidence of no likelihood of confusion.

We agree with the Examining Attorney, however, that contemporaneous use of the identical mark "WANTED" in connection with "footwear" and "brassieres" is likely to cause confusion as to the source or sponsorship of such goods. As the Examining Attorney points out in her brief, applicant's goods are broadly identified as "footwear," a designation which plainly encompasses such items of women's wearing apparel as "house slippers and bedroom slippers [and] which are companions to intimate apparel [e.g., brassieres,] in both marketing and consumer use." In fact, the Examining Attorney correctly notes, not only have footwear and women's clothing been found to be closely related

for purposes of a likelihood of confusion determination, In re Melville, Corp., supra at 1388, but the very goods at issue herein, namely, brassieres and footwear for women, have also been held to be closely related goods by a predecessor of our principal reviewing court. General Shoe Corp. v. Hollywood-Maxwell Co., 277 F.2d 169, 125 USPQ 443, 444 (CCPA 1960) [contemporaneous use of the mark "INGENUE" on brassieres and women's shoes is likely to cause confusion inasmuch as such goods have "much in common" in that both are articles of women's apparel, they are sold to the same class of purchasers and such goods are commonly sold through the same channels of trade; also, contention that purchasing public is aware that manufacturers of shoes do not ordinarily make other items of apparel and vice versa cannot be accepted as fact].

Moreover, in support of her position that women's footwear is closely related to brassieres, the Examining Attorney has made of record pages from issues of the J.Crew and Talbots catalogs which set forth, in each instance, both brassieres and women's shoes to demonstrate that such goods "are marketed together to the same consumers in the same channels of trade." The Examining Attorney has also furnished copies of 22 use-based third-party registrations for marks which, in each case, are registered among other things for "brassieres" or "bras," on the one hand, and "footwear" or various types of footwear, including "shoes," "slippers," "boots," "sneakers," "sandals" and/or "athletic shoes," on the other. Although such registrations are not evidence that the different marks shown therein are in use or

that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6.

In view of the above authority and evidence, and since as noted previously, applicant's "footwear" encompass all types of goods, including footwear for women, we concur with the Examining Attorney that "footwear" and "brassieres" are closely related wearing apparel which would be sold through at least some of the same channels of trade, such as women's clothing outlets, the women's fashions' sections of department stores and mass merchandisers, and mail-order sellers of women's apparel, to the identical class of purchasers, namely, women. When such closely related goods are sold under the identical, arbitrary mark "WANTED," confusion as to the origin or affiliation thereof is likely to occur.

Our conclusion in this regard is not diminished or otherwise altered by applicant's unsupported assertion that it has not encountered any incidents of actual confusion between its mark and registrant's mark, nor received any objection from registrant, during a period of approximately nine years in which applicant has allegedly used its mark. While we agree with applicant that the absence of any instances of actual confusion over a significant period of time is a factor indicative of no likelihood of confusion, it is a meaningful factor only where the

record demonstrates appreciable and continuous use by the applicant of its mark in the same markets as those served by registrant under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). It is not a mitigating factor where, as here, the record is devoid of information concerning the nature and extent of the marketing activities of applicant and registrant under their respective marks during the asserted period of contemporaneous use.

In the present case, we not only have no details as to the level of sales, advertising expenditures and marketing areas served by applicant, but we have no indication as to what registrant's experience has been, other than applicant's contention that it has received no objection from registrant. Compare In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992). A mere contention, however, plainly does not rise to the level of a detailed, written consent agreement, as between applicant and registrant to the use and registration of applicant's mark, of the type found in In re Four Seasons Hotels Ltd., 987 F.2d 1565, 26 USPQ2d 1071, 1072-74 (Fed. Cir. 1993), to be entitled to controlling weight in a likelihood of confusion determination.

We accordingly agree with the Examining Attorney that purchasers and potential customers, familiar or acquainted with registrant's "WANTED" mark for brassieres, would be likely to believe, upon encountering applicant's identical "WANTED" mark for footwear, that such closely related items of wearing apparel

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emanate from, or are sponsored by or affiliated with, the same source. See General Shoe Corp. v. Hollywood-Maxwell Co., supra.

Decision: The refusal under Section 2(d) is affirmed.

T. J. Quinn

G. D. Hohein

P. T. Hairston
Administrative Trademark Judges,
Trademark Trial and Appeal Board