

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 8, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Patricia A. Towers

Serial No. 75/152,673

Stephen M. Evans of Graybeal Jackson Haley LLP for Patricia
A. Towers

Kim Saito, Trademark Examining Attorney, Law Office 109
(Deborah S. Cohn, Managing Attorney)

Before Simms, **Walters** and Chapman, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Patricia A. Towers has filed an intent-to-use
application to register the mark shown below



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for "clothing, namely, tee shirts, tank tops, sweat shirts, sweat pants, shorts, caps, hats, golf shirts, jackets, boxer shorts, jeans, underwear, swim suits, pants, shirts, dresses, skirts, blouses, head bands, wrist bands, visors, aprons, bandannas, belts, overalls, coveralls, socks, vests, scarves, turtleneck shirts, singlets, sports shirts, trousers, track suits, knitwear shirts, bodysuits, hosiery, jumpers, leotards, sweaters, jerseys, and gloves."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, if applied to her identified goods, would so resemble the registered mark owned by Craddock-Terry Shoe Corporation and shown below

Lifeline

for "leather shoes,"² as to be likely to cause confusion.³

¹ Application Serial No. 75/152,673, filed August 19, 1996. The application is based on applicant's alleged bona fide intention to use the mark in commerce.

² Registration No. 371,821, issued October 10, 1939, republished under Section 12(c) of the Trademark Act of 1946, Section 8 affidavit accepted, Section 15 affidavit acknowledged, second renewal. The claimed date of first use is June 1, 1915.

³ The Examining Attorney also made the requirement for a disclaimer of the term "clothes" final. In applicant's brief on the case, applicant offered a disclaimer of the term "clothes", thus rendering the appeal on this requirement moot. Should applicant ultimately prevail in this appeal, the application shall be returned to the Examining Attorney for entry of the disclaimer.

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney essentially takes the position that the word LIFELINE is the dominant portion of both the cited registered mark and applicant's composite mark; that applicant has adopted registrant's entire word mark as a portion of applicant's mark; that the marks create similar commercial impressions; that the respective goods are closely related; and that the goods are sold to the same general purchasers through the same channels of trade.

Applicant contends that the marks must be considered in their entireties and registrant's mark is the word LIFELINE presented in stylized form, whereas applicant's mark is a composite mark consisting of a globe design with the word LIFE LINE written in a special form representing "a heart beat trace" (applicant's brief, p. 10) with the words CLOTHES FOR LIVING appearing in smaller type in a semi-circle under the bottom half of the globe design. Applicant also argues that while "in the abstract, shoes and clothing are types of apparel," nonetheless the "nature of shoes is radically different than the nature of clothes" (applicant's brief, p. 11); that registrant appears to make only shoes and to sell its private-label shoes through

telephone mail order, shoe stores, and retail mass merchandise stores, and although applicant's channels of trade are not yet certain, she would not sell clothing in shoes-only stores; and that the mark LIFELINE or LIFE LINE (or variants thereof) is "highly diluted" but "use of this mark in conjunction with clothing is essentially non-existent" (applicant's brief, p. 13).

Preliminarily we will address the issue of the Examining Attorney's objection to one of applicant's exhibits in this case. Applicant submitted three exhibits attached to its May 23, 1997 response to the first Office action. Exhibit A is a printout of the results of a commercial search of the cited registrant's name offered to indicate that registrant has not expanded outside the business of leather shoes. Exhibit B is the declaration of Esme S. Bauxar, an employee of applicant's law firm, offered as "market research to determine the extent and manner of registrant's sales" (applicant's May 23, 1997 response, p. 2). Exhibit C is a copy of the results of "applicant's initial screening search" offered to show the weakness of the term LIFE LINE or LIFELINE. The Examining Attorney did not object to applicant's Exhibit C in the final Office action dated June 20, 1997. The Examining Attorney did object to this evidence in the brief on appeal

(p. 5) on the basis that the third-party registrations were not in the appropriate format to be properly of record. It is inappropriate for the Examining Attorney to ignore the evidence and then later object thereto, because applicant could have cured the defect if the objection had been timely raised by the Examining Attorney. That is, the Examining Attorney cannot now object to applicant's Exhibit C. Accordingly, we will deem this objection to have been waived. As to the evidence itself, mere lists of registrations (typed out or the printout of the results of a search service) are not sufficient to make them of record. See *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); and *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Applicant's Exhibit C (the results of applicant's "initial screening search") is of little, if any, probative value because the parameters of the search are stated as "U.S. federal, state, and Canada"; the printout of applicant's initial search results does not set forth the involved goods or services in the listed registrations, but rather lists only the class numbers; and many of the registrations are for goods and services in clearly unrelated classes.

Further, we note that applicant made the inconsistent arguments that the mark LIFE LINE (or LIFELINE or variants) is a weak, diluted mark, and that there are virtually no

other registrations for this mark in the clothing field. Whether a term is a weak mark must be determined in the context of the particular line or field of merchandise in connection with which the mark is used. See *In re Bayuk Cigars Incorporated*, 197 USPQ 627 (TTAB 1977). Thus, while a term may be weak or commonly used in one field, the same word may be unique and possess strong trademark significance in another field. Here applicant asserts that, with the exception of the cited registrant's mark for leather shoes, there are no registrations of the marks LIFE LINE or LIFELINE (or variants thereof) in the clothing field. Applicant has essentially contended that the mark is strong in the field of clothing and shoes.

Turning to a consideration of the respective goods, the Examining Attorney has made of record copies of pages from four catalogs (Tweeds, J. Crew, Talbots, and Laura Ashley) showing that leather shoes and various clothing items are offered under the same mark by the same entity. In addition, the Examining Attorney submitted three third-party registrations which issued on the basis of use in commerce, to demonstrate the close relationship between leather shoes and various clothing items, by showing that a single entity has registered a single mark for both leather shoes and various clothing items.

Third-party registrations, however, are not evidence of commercial use of the marks shown therein, or that the public is familiar with them. Nevertheless, third-party registrations which individually cover a number of different items and which are based on use in commerce⁴ have some probative value to the extent they suggest that the listed goods emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988).

Moreover, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion; it being sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 596 (TTAB 1978); and *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992).

Based on the record before us, we readily conclude

⁴ The other third-party registrations offered by the Examining Attorney were based on foreign registrations and we did not consider those in reaching our decision.

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that applicant's goods, a variety of clothing items, are closely related to the cited registrant's "leather shoes." See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) (Court affirmed Board holding of likelihood of confusion between KangaROOS and a kangaroo design for clothing, namely, athletic shoes, sweatsuits and athletic shirts and KANGOL and a kangaroo design for golf shirts having collars); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991) (ESSENTIALS in stylized form for women's shoes against ESSENTIALS for women's clothing, namely, pants, blouses, shorts, and jackets); and *In re Apparel Ventures, Inc.* 229 USPQ 225 (TTAB 1986) (SPARKS BY SASSAFRAS in stylized form for women's separates, namely blouses, skirts and sweaters against SPARKS in stylized form for shoes, boots and slippers).

Regarding the respective trade channels and purchasers, applicant's speculation on registrant's trade channels is irrelevant since the goods are broadly identified in the registration. The Board must determine the issue of likelihood of confusion on the basis of the goods as identified in the application and the registration. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). There are no restrictions as

to trade channels or purchasers in either the application or the cited registration. Thus, the Board must consider that the parties' respective goods could be offered and sold to the same class of purchasers through all normal channels of trade. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Turning next to a consideration of the respective marks, the word portion of a mark, i.e., the portion utilized in calling for the goods, is most likely to be impressed in the purchaser's memory and to serve as the indication of origin. See *Consumers Building Marts, Inc. v. Mr. Panel, Inc.*, 196 USPQ 510 (TTAB 1977). In this case, both applicant's mark, and registrant's mark include the identical wording, LIFE LINE or LIFELINE. The only portion of either mark that can be spoken is LIFELINE and LIFE LINE CLOTHES FOR LIVING. The words LIFELINE and LIFE LINE are the dominant feature of each mark, and there is no evidence that the words are other than arbitrary in connection with the respective goods. Registrant's mark has been registered for sixty years, and a purchaser familiar with registrant's goods sold under the registered mark may, upon seeing applicant's mark on closely related goods, assume that applicant's goods come from the same

source as registrant's goods. Moreover, the differences in the marks may not be recalled by purchasers seeing the marks at separate times. The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of the many trademarks encountered; that is, the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *Mucky Duck Mustard Co.*, supra; and *Edison Brothers Stores v. Brutting E.B. Sport-International*, 230 USPQ 530 (TTAB 1986).

To the extent that purchasers notice the differences in the marks, they may believe that applicant's mark is a revised version of registrant's mark, now used on items of clothing. Thus, we find that the marks are substantially similar.

Any doubt on the question of likelihood of confusion must be resolved against the newcomer as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *Hilson Research Inc. v.*

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Society for Human Resource Management, 27 USPQ2d 1423, at 1440 (TTAB 1993).

Based on the identity of the wording LIFE LINE and LIFELINE, the close relationship of the goods, and the similarity of the trade channels, we find that there is a likelihood that the purchasing public would be confused if applicant were to use LIFE LINE and design as a mark for various clothing items. See In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

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

R. L. Simms

C. E. Walters

B. A. Chapman
Administrative Trademark
Judges, Trademark Trial and
Appeal Board