

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 12

11/17/00
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **American Sporting Goods Corporation**

Serial No. 75/532,079

Michael A. Painter of **Isaacman, Kaufman & Painter** for
American Sporting Goods Corporation.

Douglas M. Lee, Trademark Examining Attorney, Law Office
108 (**David Shallant**, Managing Attorney).

Before **Quinn, Bottorff and Rogers**, Administrative Trademark
Judges.

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

Applicant seeks registration on the Principal Register
of the mark URBAN SPORT, in typed form, for "footwear and
active wear, namely, leotards, unitards, athletic bra tops,
shorts, leggings, tights, sweatshirts, caps and tank tops."¹

Registration has been refused under Trademark Act
Section 2(d), 15 U.S.C. §1052(d), on the ground that

¹ Serial No. 75/532,079, filed August 6, 1998. The application
is based on applicant's bona fide intent to use the mark, under

applicant's mark, as applied to applicant's goods, so resembles the mark URBAN SPORT, depicted below,

which is registered for "retail clothing store - featuring clothing and sportswear for the family,"² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney filed main briefs, and applicant filed a reply brief. No oral hearing was requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in

Trademark Act Section 1(b). Applicant has disclaimed SPORT apart from the mark as shown.

the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We find that applicant's mark is essentially identical to the cited registered mark. The slightly stylized lettering display of the registered mark does not legally distinguish the two marks in terms of appearance, inasmuch as applicant seeks registration of its mark in typed form. The two marks are identical in terms of sound, and essentially identical in terms of connotation. Viewing the marks in their entirety, we find that the marks present essentially identical overall commercial impressions.

We turn next to a consideration of the similarity between applicant's goods, as identified in the application, and the services recited in the cited registration. It is not necessary that these respective goods and services be identical or even competitive in order 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 be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to

² Registration No. 2,161,277, issued June 2, 1998. Registrant has disclaimed SPORT apart from the mark as shown.

a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association or connection between the producers of the respective goods. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). Moreover, the greater the degree of similarity between the respective marks, the lesser the degree of similarity required in the respective goods and services to support a finding of likelihood of confusion, and where the respective marks are essentially identical, there need be only a viable relationship between the respective goods and services in order to find that a likelihood of confusion exists. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

Applying these principles to the facts of this case, we find that applicant's goods are sufficiently closely related to registrant's services that confusion is likely to result from the concurrent use of these essentially identical marks. The Trademark Examining Attorney has presented evidence consisting of twelve subsisting, use-based third-party registrations. In each of these registrations, the identification of goods and services

includes both retail clothing store services as well as various clothing items, including the types of clothing items identified in applicant's application. It is well-settled that third-party registration evidence such as this is probative on the issue of the relationship between the relevant goods and/or services, inasmuch as it suggests that the goods and/or services identified in each of the registrations are of a type which may emanate from a single source. See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).³

We find that the third-party registrations submitted by the Trademark Examining Attorney, which cover both the types of goods identified in applicant's application and the types of services identified in the cited registration,

³ Applicant has attached to its reply brief a copy of an excerpt from Allen's Trademark Digest (Nov. 1999) which digests the Board's October 6, 1999 unpublished decision in *Dayton Hudson Corporation v. Greatland Corporation* (Opposition No. 98,231). Selectively quoting from this digest of that unpublished decision, applicant appears to be arguing that the well-settled and long-standing principle regarding the probative value of third-party registrations, set forth in *In re Azteca*, *In re Albert Trostel*, and *In re Mucky Duck Mustard*, no longer is good law. Applicant's argument is wholly without merit. First, the *Dayton Hudson* decision is unpublished and accordingly is without precedential value. Second, the decision has absolutely nothing to do with the issue of the probative value of third-party registrations in the likelihood of confusion analysis.

are sufficient to establish that applicant's goods and registrant's services are related, for purposes of the second *du Pont* evidentiary factor. This evidence suggests that purchasers reasonably could expect that a single source may offer, under a single mark, clothing items of the type identified in applicant's application as well as retail clothing store services of the type identified in the cited registration. Thus, when purchasers encounter applicant's goods and registrant's services being offered under the essentially identical marks involved here, they reasonably could assume that a source, sponsorship or other connection exists.

There are no limitations as to trade channels or classes of customers in either applicant's or registrant's respective identifications of goods and/or services. We accordingly must presume that applicant's goods and registrant's services are marketed in all normal trade channels and to all normal purchasers of such goods and services. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). We find that retail clothing stores such as registrant's are among the normal trade channels for footwear and active wear such as applicant's, and that the normal classes of customers for applicant's clothing and registrant's retail clothing stores are the same.

In sum, after careful consideration of the evidence of record with respect to the relevant *du Pont* evidentiary factors, we find that a likelihood of confusion exists. Applicant's mark is essentially identical to the cited registered mark, and applicant's goods are sufficiently closely related to registrant's services that use of these identical marks in connection with these goods and services is likely to cause confusion.

Decision: The refusal to register is affirmed.

T. J. Quinn

C. M. Bottorff

G. F. Rogers

Administrative Trademark Judges
Trademark Trial and Appeal Board