

**THIS DISPOSITION  
IS NOT CITABLE AS  
PRECEDENT**

Paper No. 31  
RFC

8/17/00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re Dick's Clothing and Sporting Goods, Inc.

---

Serial No. 74/541,544

---

**Hugh D. Jaeger** of Hugh D. Jaeger, P.A. for Dick's Clothing  
and Sporting Goods, Inc.

Andrew D. Lawrence, Trademark Examining Attorney, Law  
Office 108 (David Shallant, Managing Attorney).

---

Before **Cissel**, Hanak and Hairston, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On June 21, 1994, applicant filed the above-referenced  
application to register the mark shown below

on the Principal Register for what were subsequently  
identified by amendment as "running gear, namely, footwear,  
shorts, pants, sweatshirts; and, outdoor clothing, namely,  
jackets, scarves, insulated (sic) vests, and hats," in Class

**Ser No. 541544**

25. The basis for filing the application was applicant's assertion that it possessed a bona fide intention to use the mark in commerce on or in connection with these goods.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act on the ground that applicant's mark so resembles the mark "NEO-SPORT," which is registered<sup>1</sup> for "flights suits; jump suits; snowmobile suits; wetsuits; shirts; vests; sports shirts; boots; socks; shorts; fleece jackets; pullovers; drawstring pants; and water clothing, namely hoods, socks, gloves, mittens, visors, fishing waders, and surf fishing jackets;" in Class 25, that if applicant's mark were used in connection with the goods specified in the application, confusion would be likely.

When the refusal to register was made final, applicant filed a timely Notice of Appeal, which was followed sequentially by nine different requests to extend the time for filing applicant's brief on appeal.

Finally, after being advised by the Board that no further extensions would be granted in the absence of extraordinary circumstances, applicant did file a brief,

---

<sup>1</sup> Reg. No. 1,939,378, issued on the Principal Register to Henderson Acquits, Inc. on December 5, 1995. Use of the mark since January of 1998 is claimed in the registration.

but the document for which we had waited almost two years contains only six sentences of argument against the refusal to register, after which counsel for applicant requests that he be contacted "... [i]f there are any further issues yet to be resolved to advance the prosecution of this patent application to issue..." We are left to wonder whether the extensions were useful.

The Examining Attorney then filed a comprehensive brief in support of his position on the issue of likelihood of confusion. Applicant did not request an oral hearing before the Board.

Based on careful consideration of the record and the written arguments presented in this appeal, we hold that confusion is likely.

In *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor of our primary reviewing court listed the principal factors to be considered in determining whether a likelihood of confusion exists. Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the commercial relationship between the goods or services in question, including the channels of trade through which the goods or services move and the

level of sophistication of the respective purchasers of them.

In the instant case, confusion is likely because the mark applicant seeks to register is similar to the cited registered mark and the goods specified in the application are in part identical to and are otherwise closely related to the goods set forth in the registration.

Turning first to consideration of the goods in question, we note that the application lists "shorts," "jackets" and "vests" among the goods with which applicant intends to use the mark sought to be registered. The cited registration specifies, inter alia, "shorts," "fleece jackets" and "vests." Obviously, confusion would be likely if similar marks were used on these identical products. Further, we note that when marks are used on identical goods, the degree of similarity necessary to support a conclusion that confusion is likely is less than would be the case if the goods were not the same. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant's mark is similar to the cited registered mark because, although distinctions between the two marks can be made, they both create similar commercial impressions. Applicant's mark, as shown above, is

**Ser No. 541544**

essentially the letters "NEO." Even counsel for applicant, in his brief brief, refers to applicant's mark as "NEO."

The rectangular design around the letters would have little, if any, source-identifying significance.

Similarly, the periods which appear after each letter would not be sufficient to distinguish between these two marks, particularly in view of the fact that the items of clothing listed in both the application and the cited registration are purchased by ordinary, unsophisticated consumers without an excessive amount of consideration. Purchasers of these kinds of products do not necessarily carefully compare the trademarks used on them on a side-by-side basis. Instead, this type of clothing can be bought in different places at different times, based on imperfect recollections of the marks with which the purchasers think they are familiar.

The primary difference between applicant's mark and the cited registered mark is that the registered mark includes the term "SPORT." As the Examining Attorney points out, however, "SPORT" is merely descriptive in connection with the products specified in both the application and the registration. Although we must compare the marks in their entireties in determining whether confusion is likely, it is not improper to recognize that

the dominant portion of the registered mark is "NEO," and that in "NEO-SPORT," the descriptive term "SPORT" has less source-identifying significance than "NEO" has.

Recognition of this fact leads to the conclusion that applicant's mark, characterized as "NEO" by applicant, creates a commercial impression which is similar to the one created by the registered mark, "NEO-SPORT."

Applicant's brief arguments to the contrary are not persuasive of a different result. Applicant contends that confusion is not likely because applicant's mark is derived from applicant's previously registered mark "NORTHEAST OUTFITTERS." The record, however, does not include any basis upon which the Board could conclude that the mark sought to the registered would be viewed by prospective purchasers of clothing as a shortened form of another mark belonging to applicant, rather than as a slightly different version of the registered mark cited by the Examining Attorney.

Applicant's second argument is that the goods in the application are "significantly different" such that confusion would not occur. As pointed out above, however, the goods listed in the application are in part identical to those specified in the registration.

Ser No. 541544

Next, applicant contends that the registered mark has been abandoned, but it is well settled that in the absence of the filing of a petition to cancel the cited registration, such an argument constitutes an impermissible collateral attack on the registration.

The final argument applicant makes is that counsel for applicant "... has also explored discussions for rights in the cited mark, but this has been to no avail." We are at a loss to understand how this allegation could be persuasive of applicant's contention that confusion is not likely.

For the reasons set forth above, we hold that confusion would be likely if applicant were to use its mark in connection with the goods specified in the application. Accordingly, the refusal to register is affirmed.

R. F. Cissel

E. W. Hanak

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

**Ser No.** 541544

**Ser No.** 541544