

THIS DISPOSITION IS NOT
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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bradley Hicks

Serial No. 75/867,074

Bradley Hicks, pro se.

Douglas M. Lee,¹ Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney)

Before Seeherman, Bucher and Bottorff, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Bradley Hicks has appealed from the final refusal of
the Trademark Examining Attorney to register 420
FOURTWENTY, in the stylized form shown below, for

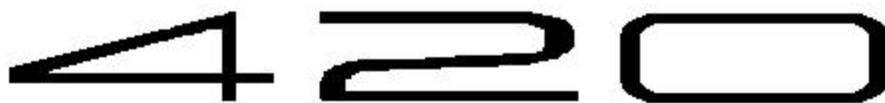
¹ Mr. Lee submitted the brief on behalf of the U.S. Patent and
Trademark Office. Another Examining Attorney handled the
examination of the application.

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"teeshirts, pants, shorts, underwear, tanktops, sweatshirts, sweaters and hats."²



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark 420, in the stylized form shown below, and previously registered for "T-shirts, hats, shorts, polo shirts, sweat shirts, and jackets"³ as to be likely, when used on applicant's identified goods, to cause confusion or mistake or to deceive.



Applicant and the Examining Attorney have filed appeal briefs.⁴ An oral hearing was not requested.

² Application Serial No. 75/867,074, filed December 8, 1999, asserting first use and first use in commerce on December 1, 1999.

³ Registration No. 2,105,217, issued October 14, 1997.

⁴ Applicant confirmed, in a telephone conversation with the Board, that his identical submissions dated January 26, 2001 and April 18, 2001 were intended to be his appeal brief.

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We affirm the refusal of registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, they are in part identical. The identifications in the application and in the cited registration both include tee shirts, shorts, sweat shirts and hats. The goods are otherwise closely related. To the extent that the goods are legally identical, they must be presumed to travel in the same channels of trade and be marketed to the same classes of customers. Applicant contends that the actual marketing channels and customers are different, but it is a well-established principle that in a proceeding such as this the question of likelihood of confusion must be determined on the basis of the identification of goods set for the in the subject application and the cited registration. **In re William Hodges & Co., Inc.**, 190 USPQ 47 (TTAB 1976). See

also **Canadian Imperial Bank of Commerce v. Wells Fargo Bank**, NA, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Because neither applicant's nor the registrant's identifications of goods are restricted as to channels of trade or classes of consumers, we must presume that they travel in all channels appropriate for the goods.

As for the marks, they are identical in pronunciation and connotation and convey the same commercial impression. Although applicant's mark repeats the number "420" depicted in words, and although the number "420" is shown in a different font from the cited mark, these differences are insufficient to distinguish the marks. The word portion FOURTWENTY of applicant's mark merely reiterates and emphasizes the number portion. As for the differing type fonts, as the Board stated in **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255, 259 (TTAB 1980), while "there are distinct design differences between [the parties' mark] which can readily be detected when they are placed side by side, actual marketing conditions do not generally allow purchasers this luxury. They must rely upon past recollections which are usually hazy...."

In the present case, even if consumers were to notice the differences in the type fonts, they would be likely to assume that the marks are merely variations of each other,

used by the same owner to indicate origin in a single source. As far as we can ascertain from this record, "420" is an arbitrary term for clothing items. Because there is no evidence of third-party use of other "420" marks, we cannot assume that consumers would differentiate between trademarks consisting of this identical term on the basis of the fonts in which the number is displayed.

Applicant also asserts that the registrant is doing business under the mark 420 EYEWEAR. Aside from the fact that there is no evidence to support this assertion, we must determine the issue of likelihood of confusion based on the mark as it appears in the cited registration. As registered, the registrant's mark is 420 in stylized form, and we find that applicant's mark 420 FORTY, when used on identical or closely related goods, is likely to cause confusion with the cited mark.

Finally, although neither applicant nor the Examining Attorney have discussed any other du Pont factors, another factor favoring a finding of likelihood of confusion is that the goods are purchased by the general public, rather than discriminating or sophisticated purchasers, and that in view of the nature of the items, at least some could be impulse purchases.

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Because there is no evidence with respect to the remaining du Pont factors, we have treated them as neutral in making our determination.

Decision: The refusal of registration is affirmed.