

Mailed:

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

September 22, 2006
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

**Trademark
Trial and Appeal Board**

In re Peek & Cloppenburg KG

Serial No. 76051090

William D. Raman and H. Lisa Calico of Wong, Cabello, Lutsch,
Rutherford & Brucculeri, L.L.P. for Peek & Cloppenburg KG.

Connie Kan, Trademark Examining Attorney, Law Office 107 (Leslie
Bishop, Managing Attorney).

Before Quinn, Hohein and Zervas, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Peek & Cloppenburg KG has filed an application to register on the Principal Register in standard character form the mark "JAKE'S" for "outer clothing, namely, shirts, pants, blouses, skirts, T-shirts, tank tops, dresses, belts, footwear, coats, hats, gloves, jackets, pajamas, robes, shorts, swimwear, vests, caps and baby clothing" in International Class 25.¹

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

¹ Ser. No. 76051090, filed on May 16, 2000, which is based on both an allegation of a bona fide intention to use such mark in commerce and ownership of German Reg. No. 1098578, which issued on September 16, 1986 and expires on September 30, 2006. The above identification of goods is as ultimately set forth by applicant in an amendment, which was approved, that it included with a request for reconsideration.

applicant's mark, when applied to its goods, so resembles the following marks, which are registered by the same registrant on the Principal Register in standard character form in International Class 25 for the goods set forth below, as to be likely to cause confusion, or to cause mistake, or to deceive:

(i) the mark "JAKE & CO.," which is registered for (a) "men's and boys' boxer underwear shorts";² (b) "adult, children['s] and infants['] knit underwear, thermal undergarments and boxer shorts";³ and (c) "men['s] and boys['] socks and hosiery";⁴ and

(ii) the mark "JAKE JR.," which is registered for "boys' woven knit and thermal underwear, boxer shorts, undershirts, briefs, socks, hosiery and neckties."⁵

Applicant has appealed. Briefs have been filed,⁶ but an oral hearing was not held. We affirm the refusal to register.

² Reg. No. 1,687,935, issued on May 19, 1992, which sets forth a date of first use of the mark anywhere and in commerce of November 8, 1990; renewed. The phrase "& CO." is disclaimed.

³ Reg. No. 2,009,330, issued on October 22, 1996, which sets forth a date of first use of the mark anywhere and in commerce of December 13, 1993; combined affidavit §§8 and 15. The phrase "& CO." is disclaimed.

⁴ Reg. No. 2,014,746, issued on November 12, 1996, which sets forth a date of first use of the mark anywhere of November 8, 1990 and a date of first use thereof in commerce of May 18, 1994; combined affidavit §§8 and 15. The phrase "& CO." is disclaimed.

⁵ Reg. No. 2,021,696, issued on December 10, 1996, which sets forth a date of first use of the mark anywhere of November 3, 1991 and a date of first use thereof in commerce of March 31, 1992. The term "JR." is disclaimed.

⁶ With respect to the evidence attached as Exhibit A to applicant's brief, which applicant states consists of "copies of records from the Canadian Intellectual Property Office's Trademark Database," the Examining Attorney in her brief has objected to consideration thereof, accurately observing that "applicant improperly submits evidence that was not previously provided to the trademark examining attorney." Inasmuch as such evidence is clearly untimely under Trademark Rule 2.142(d), the objection is sustained. It is pointed out, however, that even if such evidence, which applicant maintains shows the coexistence of Canadian registrations for the mark "JAKE & CO" for

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.⁷

Turning first to consideration of the goods at issue, applicant notes in its brief that while it "realizes that the ... respective goods can be classified as clothing items," it insists nonetheless that "there cannot be a *per se* rule that all clothing items are necessarily similar or related goods" such that "there must be a likelihood of confusion from the use of similar marks in relation thereto." According to applicant, "clothing is a very broad, general category, having an entire classification of goods (Class 25) devoted to it," and thus "[t]he mere fact that the respective goods may fall into the broad category of clothing is insufficient to establish that the goods are so related."

"shorts, being underwear for men and boys," and the mark "JAKE'S" for various items of "clothing," were to be given consideration, it would make no difference in the disposition of this appeal. See, e.g., Person's Co. Ltd. v. Christman, 900 F.2d 1565, 14 USPQ2d 1477, 1479 (Fed. Cir. 1990) ["[t]he concept of territoriality is basic to trademark law; trademark rights exist in each country solely according to that country's statutory scheme"].

⁷ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the

Here, with the obvious exception of "neckties" and "hosiery" items, applicant argues that the goods at issue "are designed for inherently different purposes, [with] the Applicant's being for outerwear, while the registrant's are underwear." Applicant also contends that, aside therefrom, "there is no 'under the same roof' rule that all products with similar marks sold in a store will cause confusion." Applicant asserts, instead, that:

Although the respective goods might be found in similar types of stores, the goods are typically offered in different areas of the stores in which they are sold. Therefore, Applicant respectively submits that the respective products have dissimilarities which support a finding of no likelihood of confusion.

In support of its position, applicant points to the following cases in which the Board "compared identical or nearly identical marks offered in connection with different articles of clothing, and found no likelihood of confusion," as demonstrating that "different clothing items, such as underwear and outerwear, can be sufficiently dissimilar so as to support a finding of no likelihood of confusion, even where the marks are identical" (emphasis in original):

The ... Board has considered several cases similar to the instant case and determined that various clothing goods were sufficiently dissimilar. For example, in *In re British Bulldog, Ltd.*, 224 U.S.P.Q. (BNA) 854 (Trademark Trial & App. Bd. 1984), the ... Board reversed a § 2(d) refusal to register the mark PLAYERS for men's **underwear**, finding no likelihood of confusion with the identical mark PLAYERS for **shoes**. The Board remarked that the goods in question "are distinctly different in nature; when

essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

sold in the same stores, e.g., department stores, they would ordinarily be displayed in different sections thereof; they are not complementary or companion items. *Id.*

Moreover, in *In re Sears[,]* *Roebuck and Co.*, 2 U.S.P.Q. (BNA) 1312 (Trademark Trial & App. Bd. 1987), the Board reversed a § 2(d) refusal to register the mark CROSS-OVER for bras (i.e., **underwear**), and held that the mark was not likely to be confused with the mark CROSSOVER for ladies' sportswear, namely **tops, shorts and pants**. The Board acknowledged that they are "clearly related in that they are all clothing items" but found a competitive difference between the respective products since "they are different types of clothing, having different uses, and are normally sold in different sections of department stores." *Id.* The Board cautioned against "disregarding the competitive distance between different items of apparel considered in light of the particular facts disclosed in each case" *Id.*

Furthermore, in *In re Sydel Lingerie Co.*, 197 U.S.P.Q. (BNA) 629 (Trademark Trial & App. Bd. 1977), the Board reversed a § 2(d) refusal to register the mark BOTTOMS UP for ladies' and children's **underwear**, and held that the mark was not likely to be confused with the identical mark BOTTOMS UP for men's **suits, coats, and trousers**. The Board remarked that "The fact that applicant's underwear and men's coats, suits and trousers may be found in some of the same types of stores, such as department stores and similar establishments, which house a wide variety of products ..., while relevant in a Section 2(d) situation, is not controlling thereon." *Id.* at 630.

Finally, in *In re Palm Beach Inc.*, 225 U.S.P.Q. (BNA) 785 (Trademark Trial & App. Bd. 1985), the Board found no likelihood of confusion between the mark ADLER (stylized) for **pants** and the identical mark ADLER for knitted **socks**. The Board stated that while the respective marks of applicant and registrant are closely related, "pants and knitted socks are specifically different items of clothing which are normally

displayed in different sections of the stores in which they are sold." *Id.* at 787-88.

The Examining Attorney, on the other hand, properly points out in her brief that the goods at issue need not be identical or directly competitive in order for there to be a likelihood of confusion. Instead, it is sufficient that the respective goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 156, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-96 (TTAB 1978); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). Moreover, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the application and the cited registration, and not in light of what such goods may actually be. See, e.g., *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Based upon such principles, the Examining Attorney contends that:

[I]t is therefore assumed that registrant's and applicant's goods are sold everywhere that is normal for such items, i.e., clothing and department stores. Thus, it can also be assumed that the same classes of purchasers shop for these items and that consumers are accustomed to seeing them sold under the same or similar marks. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Moreover, with respect to applicant's argument that its outerwear and registrant's underwear items are such specifically different goods that confusion is unlikely, the Examining Attorney accurately points out that:

[T]he Board [as well as its primary reviewing court] has frequently held many different types of apparel to be related under Section 2(d), including outerwear and underwear. *Cambridge Rubber Co. v. Cluett, Peabody & Co., Inc.*, 286 F.2d 623, 128 USPQ 549 (C.C.P.A. 1961) ("WINTER CARNIVAL" for women's boots v. men's and boys' underwear); *Jockey Int'l, Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992) ("ELANCE" for underwear v. "ELAAN" for neckties); *In re Melville Corp.* [,] 18 USPQ2d 1386 (TTAB 1991) ("ESSENTIALS" for women's pants, blouses, shorts and jackets v. women's shoes); *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985) ("NEWPORTS" for women's shoes v. "NEWPORT" for outer shirts); *In re Mercedes Slacks, Ltd.*, 213 USPQ 397 (TTAB 1982) ("OMEGA" for hosiery v. trousers): *In re Cook United, Inc.*, 185 USPQ 444 (TTAB 1975) ("GRANADA" for men's suits, coats, and trousers v. ladies' pantyhose and hosiery); *Esquire Sportswear Mfg. Co. v. Genesco Inc.*, 141 USPQ 400 (TTAB 1964) ("SLEEX" for brassieres and girdles v. slacks for men and young men).

Furthermore, the Examining Attorney insists, "the similarity between the applicant's mark and the registered marks makes it

all the more likely that consumers would mistakenly believe that the applicant's and the registrants' [sic] goods come from the same source."

We agree with the Examining Attorney that, on the facts of this case, applicant's various items of outerwear must be considered closely related articles of apparel to registrant's underwear, such as undershirts and briefs, and its socks, hosiery and neckties. That is, while we recognize that the respective goods are, for the most part, specifically different items of apparel which would typically be sold in different sections of department and clothing stores, it is nonetheless the case that the purchasers for such goods are identical, namely, ordinary consumers, and that they have become accustomed to encountering lines of clothing under marks which encompass collections of apparel ranging from outerwear garments to underwear items. At the very least, it is clear that applicant's T-shirts, while nominally items of outerwear, could also be worn, like registrant's boxer shorts, undershirts and brief, as underwear and that registrant's neckties could be worn as complementary items to applicant's shirts. Circumstances are thus such that if the goods at issue were to be marketed under the same or similar marks, confusion as to the source or affiliation of such goods would be likely to occur.

Moreover, in finding the respective goods to be closely related in a commercial sense, we have not ignored the cases cited by applicant; instead, we find that they are readily distinguishable from the facts herein. In particular, the *Palm*

Beach case involved two detailed letters of consent to the registration sought therein. The Board, in light thereof, held that (emphasis added):

[W]e are convinced that there is no reasonable likelihood of confusion. In this regard, we note that while the respective marks of applicant and registrant are substantially similar and their goods are closely related (facts which, taken alone, serve as an indication that confusion may be likely), still, pants and knitted socks are specifically different items of clothing which are normally displayed in different sections of the stores in which they are sold. **Added to the specific differences in the goods are certain other, very persuasive, evidentiary factors, namely, the more than forty-five years of contemporaneous use of the respective marks ... without any known instances of confusion, the belief of applicant and two successive owners of the cited registration that there is no likelihood of confusion by reason of the continued use of the marks, and the willingness of both of the successive owners of the cited registration to consent to applicant's use and registration of its mark "ADLER" and design for pants.**

In re Palm Beach Inc., supra at 787-88. By stark contrast, this appeal involves none of the "certain other, very persuasive, evidentiary factors" which were present in the *Palm Beach* case and which led the Board to "conclude that there is no real likelihood of confusion." Id. at 788. Likewise, a critical factor in the *Sears* case, which is missing herein, was the presence of a consent agreement with supporting affidavits. As the Board, in finding no likelihood of confusion, carefully pointed out therein (emphasis added; footnote omitted):

[T]he agreement here was originally executed well prior to the filing of applicant's involved application, in order to settle a

potential opposition by applicant against the application which thereafter matured into registrant's registration. **The consent agreement contains, inter alia, not only consent to use provisions, but also the parties' expressed belief that there is no likelihood of confusion because of the differences in their respective goods, and (in the amended agreement) provisions specifically barring each party from using its mark on the type of goods sold under the other party's mark. The agreement is supported by recent affidavits attesting, on behalf of each party, to an absence of knowledge of instances of actual confusion despite continuous, contemporaneous use of the respective marks of the parties since registrant's first use in April of 1982. In short, ... this agreement ... is entitled to consideration as a factor to be taken into account in our determination of the issue of likelihood of confusion.**

In re Sears, Roebuck & Co., supra at 1314.

In addition, the *Sears* case, like the *British Bulldog* and *Sydel Lingerie* cases cited by applicant, are distinguishable for the reason that each of such cases featured marks which, when used in connection with the respective goods involved therein, projected significantly different meanings and hence engendered sufficiently different overall commercial impressions so as to preclude a likelihood of confusion. Specifically, as observed by the Board in *Sears* (emphasis added):

The second additional factor to be considered is the different meanings which the involved marks project when they are applied to the differing goods of the applicant and registrant. We agree with applicant that its mark "CROSS-OVER", when applied to brassieres, is suggestive of the construction of the brassieres. Registrant's mark "CROSSOVER", on the other hand, conveys no such meaning when applied to ladies' sportswear, namely, tops, shorts, and pants. Rather, it appears to us that registrant's

mark is likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which "crosses over" the line between informal and more formal wear (i.e., is appropriate for either use), or the line between two seasons. **As a result of their different meanings when applied to the goods of applicant and registrant, the two marks create different commercial impressions, notwithstanding the fact that they are legally identical in sound and appearance.**

In connection with the foregoing, we note that in other close cases of this nature, ... such factor has played an important role in this Board's conclusion of no likelihood of confusion. See, for example: ... In re Sydel Lingerie Co., Inc., 197 USPQ 629 (TTAB 1977) ("BOTTOMS UP" for ladies' and children's underwear versus "BOTTOMS UP" for men's suits, coats, and trousers--marks found to project different meanings as applied to the respective goods); and In re British Bulldog, Ltd., 224 USPQ 854 (TTAB 1984) ("PLAYERS" for men's underwear versus "PLAYERS" for shoes--marks found to project different meanings as applied to the respective goods).

Id. at 1314-15.

Similarly, as specifically stated by the Board in *Sydel Lingerie*:

Thus, if "BOTTOMS UP" can be deemed to have any suggestive connotation as applied to men's suits, coats and trousers, it will be in association with the drinking phrase, "drink up!" This is hardly the connotation that "BOTTOMS UP" would generate as applied to ladies' and children's underwear.

In re Sydel Lingerie Co., Inc., supra at 630. The Board likewise opined in *British Bulldog* that:

[W]e agree with applicant's argument, quoted below, to the effect that the mark "PLAYERS" has somewhat different connotations when applied to ... different goods, namely:

"PLAYERS" for shoes implies a fit, style, color, and durability adapted to outdoor activities. "PLAYERS" for men's underwear implies something else, primarily indoors in nature.

In re British Bulldog, Ltd., supra at 856. In sharp contrast, the marks at issue herein are virtually identical in connotation and overall commercial impression. Clearly, the mark "JAKE'S" for items of apparel would be perceived by consumers to be essentially the same in both meaning and commercial impression as the mark "JAKE & CO." or the mark "JAKE JR." when applied to articles of clothing and such is the case irrespective of the fact that applicant's goods are items of outerwear while registrant's goods, with the exception of neckties and items of hosiery, are items of underwear. Consumers would therefore be likely to regard applicant's mark "JAKE'S" as simply a shortened or informal form of registrant's "JAKE & CO." and "JAKE JR." marks. In view thereof, and inasmuch as such marks, when considered in their entirety, are also substantially similar in sound and appearance due to the presence therein of the arbitrary term "JAKE," in either its possessive or singular form, confusion as to the origin or affiliation of applicant's and registrant's products is likely from contemporaneous use of such marks.

Applicant appears to argue, nonetheless, that the respective marks are not likely to cause confusion because the differences in appearance and sound between the marks at issue outweigh their virtually identical connotations and overall commercial impressions. In this regard, applicant asserts that:

One of the reasons why there is no likelihood of confusion derives from the visual differences between the respective marks. In particular, the Cited Marks comprise the term "JAKE" coupled with the wording "& CO." or "JR." On the other hand, the Applicant's Mark consists of the word "JAKE" immediately followed by an apostrophe and the letter "S," and the terms "& CO." and "JR." are nowhere to be found. In view of the number of similar [third-party] marks, even slight differences between the marks become more significant. Accordingly, the Applicant respectfully submits that the differences between the respective marks are sufficient to distinguish the marks as a whole from one another.

Not only are the respective marks visually different, they are also phonetically different. The additional elements "& CO." and "JR." in the Cited Marks are spoken as "AND COMPANY" and "JUNIOR," respectively. The additional wording lengthens the Cited Marks significantly and adds multiple syllables, in contrast to the Applicant's monosyllabic mark "JAKE'S." The Applicant respectfully submits that the phonetic differences between the mark "JAKE'S" and the mark "JAKE AND COMPANY" or the mark "JAKE JUNIOR" are sufficient to avoid a likelihood of confusion.

We disagree. Instead, as the Examining Attorney accurately observes, applicant's mark, which is the possessive form of the term "JAKE," is essentially identical to the dominant and distinguishing portion of each of the registrant's cited marks, namely, the term "JAKE." As she properly points out, while the marks at issue must be considered in their entirety, including any descriptive or other disclaimed matter therein, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a

particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive [or otherwise lacking in distinctiveness] ... with respect to the involved goods ... is one commonly accepted rationale for giving less weight to a portion of a mark" Id.

Here, she correctly notes, "[t]he additional terms '& CO.' and 'JR.' in the registered marks are disclaimed ..., and disclaimed matter is typically less significant ... when comparing marks" due to its descriptiveness, as in the case of the term "JR.," or the lack of inherent distinctiveness, as with the phrase "& CO." Given "the shared, nearly identical, dominant portion, 'JAKE,'" in each of registrant's marks, we concur that, overall, applicant's mark "JAKE'S" is substantially similar to registrant's marks "JAKE & CO." and "JAKE JR."

In addition, the Examining Attorney persuasively observes that:

Moreover, [as a general proposition,] small changes in words (e.g. hyphenation or spacing changes, pluralization, phonetic substitution) are insufficient alone to distinguish marks. Thus, the mere addition of the apostrophe and the letter "S" to the end of applicant's mark does not alter the similarity of the commercial impression ... [to that of each of registrant's] marks, nor does it change the meaning of the applicant's mark. It merely serves to convert the proper name "JAKE" into its possessive form, "JAKE'S."

Applicant, in fact, concedes in its brief that, as quoted previously, the inclusion of an apostrophe followed by the letter "S" in its "JAKE'S" mark and the presence of the terms "& CO." and "JR." after the term "JAKE" in registrant's "JAKE & CO." and "JAKE JR." marks--and which are the sole differences between the marks at issue--are but "slight differences." In view thereof, and since, as the Examining Attorney also correctly points out, "the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison" but rather "whether the marks create the same overall impression," we agree with the Examining Attorney that, when allowance is made for the often less than perfect recollection by consumers of marks which they encounter in the marketplace, "a consumer is likely to remember all the marks as having a common element, JAKE." See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975). Applicant's mark and registrant's marks, when viewed in their entirety, are therefore substantially similar in sound and appearance. Such similarities, when coupled with our earlier finding that the respective marks are virtually identical in connotation and overall commercial impression, thus favor a conclusion that confusion is likely to occur from contemporaneous use thereof.

Applicant further argues, however, that while conceding in its brief that "the respective marks do share the wording

'JAKE,' the term 'JAKE' is hardly a unique term in connection with clothing items." As support for its contention, applicant asserts that the record reveals that:

Indeed, numerous sellers in the market use the term "JAKE," [thus] evidencing its inability to, alone, cause confusion. As evidenced in Exhibit A to the Request for Reconsideration ..., a Google search for the term "JAKE" in connection with clothing yielded 623,000 hits. Thus, numerous sellers in the market frequently use the term "JAKE," making the term ineffective to single-handedly cause confusion. In addition, the Applicant advised the Examining Attorney of 267 marks shown in the U.S. Patent and Trademark Office records to contain the text "JAKE," fifty-three of which were identified with [clothing] goods in International Class 25. (See Exhibits B-D to the Request for Reconsideration)

Referring, in particular, to registrations for the mark "JAKE O'S" for ladies' warm-up and fitness apparel and the mark "LAZY JAKE'S" for clothing items, including underwear, and noting that such registrations co-exist with the cited registrations herein, applicant maintains that:

By registering several marks with the common element "JAKE," the Patent and Trademark Office recognizes that the common element is insufficient to make confusion likely. That is, the consuming public understands and appreciates that marks comprising "JAKE" emanate from multiple different sources rather than from any single source (e.g., the owner of the Cited Marks). As such, the consuming public has learned to distinguish among the various entities using the wording "JAKE." Furthermore, the greater the number of similar marks, the less is the likelihood of confusion. Given the large number of similar marks in the field of clothing, it is implausible that the consuming public would confuse the Applicant's Mark with the Cited Marks. The Applicant's Mark, therefore, is not likely to

cause confusion merely because it shares the term "JAKE" in common with the Cited Marks.

We concur with the Examining Attorney, however, that the third-party uses and registrations do not serve to preclude a finding of likelihood of confusion. While, in particular, we disagree with the Examining Attorney's assertion that "the applicant's Google search lacks probative value" because "only uses of the term 'JAKE' in actual *registered marks*, used on or in connection with clothing, are relevant to this matter" (italics in original), such search is lacking in probative value because applicant actually made of record only a summary of the results of just the first ten hits which were located. Although, to be sure, this is not to suggest that results of the "about 623,000" hits for the search "jake clothing" should have been provided, clearly there is no way to tell whether the first ten results comprise a representative sample of third-party uses of the term "JAKE" in connection with clothing nor, perhaps even more importantly, there is no way to determine the extent and duration of the uses shown, which in several instances are in any event ambiguous. It consequently cannot be said from such evidence that purchasers of clothing are familiar with many third-party uses of marks which include the term "JAKE" or variants thereof, such as "JAKE'S," and have learned to distinguish those marks on the basis of additional matter used therein.

With respect to the third-party registrations relied upon by applicant, the Examining Attorney notes that, of the 53 such registrations, "there are actually only 13 live registrations using the term JAKE in connection with Class 25

goods, and of those 13 marks, 4 are the registrations cited against the applicant and the remaining 9 contain additional elements which create a distinct commercial impression from one another, from the 4 cited registrations, and from the applicant's mark." She also observes that, "[u]nlike the cited registrations which use the term JAKE with generic and disclaimed terms, the other 9 live registrations using the term JAKE in connection with Class 25 goods contain additional elements which are either arbitrary or suggestive at best." In view thereof, the Examining Attorney persuasively contends that:

The crux of the applicant's arguments refuting the 2(d) refusal rests on the mistaken presumption that there are a "large number" of marks using JAKE in connection with Class 25 goods, thereby minimizing the consuming public's likelihood of confusion as to source. In reality, there are only 13 registered marks, 4 of which are being cited against the applicant (and which are all owned by the same entity), and the other 9 of which are readily distinguishable from all other marks using the term JAKE in connection with Class 25 goods, including the applicant's own proposed mark.

We note, in addition, that none of the marks in the third-party registrations relied upon by applicant (and which are live or active) is as similar overall to either applicant's mark "JAKE'S" or to the cited registrant's marks "JAKE & CO." and "JAKE JR." as applicant's mark is to the cited registrant's marks.

Furthermore, and in any event, it is well established that third-party registrations, by themselves, are entitled to little weight on the issue of likelihood of confusion. See, e.g., In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991); and In re Hub Distributing, Inc., 218 USPQ 284, 285 (TTAB 1983).

Such registrations are not evidence of what happens in the marketplace or that the consuming public is familiar with the use of those marks and has learned to distinguish between them. See, e.g., Smith Brothers Manufacturing Co. v. Stone Manufacturing Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); In re Hub Distributing, Inc., supra at 285-86; and National Aeronautics & Space Administration v. Record Chemical Co. Inc., 185 USPQ 563, 567 (TTAB 1975). Consequently, the co-existence of the cited registrations with the third-party registrations made of record and relied upon by applicant does not justify registration of a confusing similar mark by applicant. See, e.g., AMF Inc. v. American Leisure Products, Inc., supra.

Accordingly, we conclude that customers and prospective consumers who are familiar or otherwise acquainted with registrant's "JAKE & CO." mark for its various items of underwear, socks and hosiery and/or its "JAKE JR." mark for those same goods and neckties, would be likely to believe, upon encountering applicant's "JAKE'S" mark for its various items of outer clothing, that such commercially related articles of clothing emanate from, or are otherwise sponsored by or affiliated with, the same source. In particular, even if consumers were to notice the slight differences between the respective marks, they would be likely to think that applicant's "JAKE'S" apparel is but another line of clothing from the same

Ser. No. 76051090

producer that markets "JAKE & CO." underwear, socks and hosiery and/or "JAKE JR." underwear, socks, hosiery and neckties.

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