

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
8 August 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jen USA Inc.

Serial No. 76645157

Myron Amer of Myron Amer, P.C. for Jen USA Inc.

Debra Lee, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Walters, Drost, and Kuhlke, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 18, 2005, applicant Jen USA Inc. filed an
intent to use application to register the mark CACHET (in
standard character form) on the Principal Register for
goods ultimately identified as "belt bags" in Class 18.
Serial No. 76645157.

The examining attorney has refused to register
applicant's mark under Section 2(d) of the Trademark Act
(15 U.S.C. § 1052(d)) because of a prior registration for
the mark CACHET (in standard character form) for "women's

garments namely, pants, skirts, shorts, blouses, dresses, jackets and coats" in Class 25.¹

When the refusal was made final, applicant filed this appeal.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must 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 the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

"The first *DuPont* factor requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du*

¹ Registration No. 3,039,502, issued January 10, 2006.

Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In this case, applicant's and registrant's marks are for the identical term CACHET in standard character form. We take judicial notice of the examining attorney's definition of "cachet" as "superior status; prestige." Brief at unnumbered p. 4. This meaning would be applicable to applicant's and registrant's marks. Inasmuch as there are no differences between the marks, the identical nature of the marks is a factor that "weighs heavily against the applicant." *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). Furthermore, "where both parties are using the identical designation, the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981) (mark omitted). See also *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source").

Next, we consider whether the goods of the registrant and applicant are related. Applicant's goods are belt bags

and registrant's goods are pants, skirts, shorts, blouses, dresses, jackets, and coats. In determining whether goods are related, we must consider the goods as they are described in the identification of goods. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

To demonstrate that belt bags are related to pants, skirts, shorts, blouses, dresses, jackets and coats, the examining attorney has submitted internet evidence and copies of trademark registrations. Some of this evidence explains what a "belt bag" is (an example follows).

Ever stared at your plumber's utility belt and thought "convenient, yes, but not altogether fashion-forward enough for me"? Me, too! Thanks to Tarah Smith, I

Ser. No. 76645157

can cease my wonderin' and strap on this chic,
colorful leather belt with two square pouches fit for
carryin' all the essentials - keys, wallet, lip gloss,
you know the drill.

<http://testimo.stores.yahoo.net>



See also www.zappos.com (Dublino Belt Bag - "Hip and cool
belt bag made of leather" and "Adjustable belt allows you
to wear this bag on the waist or hips") and www.amazon.com
(Maxam genuine lambskin leather belt bag").

Other evidence shows that the same trademark is used
on both belt bags and various clothing items.

I. Gucci

Gucci Belt Bag

Adjustable web belt with magnetic closure and rear
zippered pocket

www.saksfifthavenue.com

Gucci Mini Belt Bag

www.neimanmarcus.com

Gucci

Sexy black silk top with leather sides

Gucci black wool blend trousers

Jersey top

Gucci Skirt

www.designerexposure.com

II. Prada

Prada Nylon Sport Belt Bag

www.neimanmarcus.com

Prada

Brown poly stretch suit

Powder blue stretch denim blazer

Ser. No. 76645157

Chocolate wool tic-front jacket
www.bluely.com

III. Fendi
Fendi small black zip code hip belt bag
www.amazon.com

Fendi dress
Fendi shirt
www.designerexposure.com

Furthermore, the examining attorney has included copies of registrations that show that the same entity has registered a common mark for belt bags and various clothing items. See, e.g., Registration Nos. 1,745,799 (Belt bags and skirts, jackets, dresses, and blouses); 2,661,890 (Belt bags and blouses, shorts, jackets, and skirts); 3,022,752 (Belt bags and pants, dresses, blouses, shorts, coats, and jackets); 3,086,192 (Belt bags and coats, pants, jackets, skirts, dresses, blouses, and shorts); 3,060,340 (belt bags and pants, shirts, and coats); 3,060,361 (Belt bags and blouses, dresses, skirts, trousers, shorts, and jackets); and 2,986,568 (Belt bags and shorts, skirts, jackets, pants, coats, and dresses). These registrations are relevant to suggest a relationship between belt bags and registrant's clothing items. See *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001):

The registrations show that entities have registered their marks for both television and radio broadcasting

services. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the services listed therein, including television and radio broadcasting, are of a kind which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Here, the same purchasers are likely to encounter both belt bags and clothing items in stores that sell registrant's clothing and clothing accessories. While belts bags and these clothing items are not identical, we find that they are related.

In order to find that there is a likelihood of confusion, it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources.

McDonald's Corp. v. McKinley, 13 USPQ2d 1895, 1898 (TTAB 1989). See also *In re Opus One Inc.*, 60 USPQ2d 1812, 1814-15 (TTAB 2001).

In response to this evidence, applicant argues that "[i]t makes no difference to the examining attorney that [the] registration being sought is no longer of a fashion accessory to women's clothing but of a belt bag. To applicant it makes a difference for the reasons set forth

in the accompanying Evidentiary Declaration." Brief at 2. The declaration (p. 1) explains that "belts are complementary to women's clothing, but not the bags that are in a drawer or hanging in a closet that a woman will typically use to store her collection of belts for ready reference." In effect, applicant appears to be arguing that its goods are not belt bags as discussed previously but "bags for belts."² However, as we explained previously, we must consider the goods as they are identified in the identification of goods. The examining attorney notes that "the term 'belt bags' describes a common type of fashion bag that is worn on a belt." Brief at unnumbered p. 8. Clearly, applicant's term "belt bags" includes belts that have storage compartment(s). To the extent the term may also include bags for belts, that does not eliminate the likelihood of confusion because the term also includes pocketbook-like belt bags that are related to various items

² The examining attorney has objected to this declaration. Trademark Rule 2.142(d) provides that the "record in the application should be complete prior to the filing of an appeal." If an applicant wishes to present evidence for the examining attorney's consideration, it should do so in a separate, timely request for reconsideration rather than merely attaching it to an appeal brief. TBMP § 1204 (2d ed. rev. 2004). Here, we consider the declaration to be merely further argument that applicant's counsel has in effect adopted and we will consider it as such. Even if it were properly of record, as explained above, applicant's secondary definition of the term "belt bags" would not result in the goods as set out in the identifications being unrelated.

of clothing.³ For example, if an applicant identified its goods as "sport coats," it would not be able to argue that its "sport coats" are not related to suit coats because its sport coats are actually "coats designed for athletes to wear during sporting events." The term "belt bags" clearly includes fashion-type belt bags and our likelihood of confusion analysis properly includes those items in our relatedness determination.

Ultimately, we must consider the fact that the marks are identical and the goods are related. It is likely that a consumer, familiar with the trademark CACHET used on, for example, pants, will likely assume that the source of belt bags designed to be worn with pants and marketed with the identical mark CACHET is related or associated in some way with the source of the clothing. Therefore, we conclude that there is a likelihood of confusion.

Decision: The examining attorney's refusal to register applicant's mark CACHET for belt bags on the ground that it is likely to cause confusion with the identical mark used in connection with registrant's goods under Section 2(d) of the Trademark Act is affirmed.

³ Obviously, we have not addressed whether a more narrow identification limited to bags for belts would be related to the goods in the cited, or any other, registration.