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THE TTAB

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Petrielli

Serial No. 78044745

Brian M. Mattson of Patents + TMS for Laura Lyn Petrielli.

Linda E. Blohm, Trademark Examining Attorney, Law Office
110 (Chris F. Pedersen, Managing Attorney).

Before Quinn, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Laura Lyn Petrielli seeks registration on the
Principal Register of the mark VEX CLOTHING in standard
character form for "latex clothing, namely pants, jackets,
dresses, shirts and lingerie;" and "custom made latex
clothing, namely pants, jackets, dresses, body suits,

shirts and lingerie."¹ Applicant has disclaimed CLOTHING apart from the mark as shown.

The trademark examining attorney has refused registration on the ground that applicant's mark, as applied to the identified goods, so resembles the mark VEXX, previously registered in standard character form for, inter alia, "sporting apparel, namely t-shirts, jackets, sweatshirts, long sleeved shirts, board shorts, cargo pants, hats, beanies, windbreakers and golf shirts,"² as to be likely to cause confusion. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

When the refusal was made final, applicant filed this appeal. Applicant and the examining attorney have filed briefs; an oral hearing was not requested. We affirm the refusal to register.

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. duPont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). However, as

¹ Application Serial No. 78044475, filed January 24, 2001. The application is based on an allegation of an intent to use under Section 1(b), 15 U.S.C. §1051(b) of the Trademark Act.

² Registration No. 2,699,347, issued March 25, 2003. The registration also covers various sporting goods, but registration has not been refused in view of those goods.

indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.

Turning first to a consideration of the goods, applicant argues that the latex and custom made latex clothing on which she intends to use her mark is clearly distinguishable from registrant's sporting apparel.

According to applicant:

Sporting apparel is made from comfortable fabrics that breathe easily and/or allow for whisking away of perspiration. Appellant's mark is clearly not associated with clothing that breathes easily or clothing designed for casual comfort. Appellant's mark is specifically associated with latex, a synthetic rubber or plastic. Latex clothing is commonly associated with intimate apparel and/or clothing for "clubbing" or adult parties. Latex clothing is not associated with sporting or golf apparel.
(Brief, p. 5)

Applicant also argues that the respective goods would not be offered in the same channels of trade and that her latex and custom made latex clothing would be purchased by sophisticated purchasers.

We agree with the examining attorney, however, that, at a minimum, applicant's latex clothing and registrant's sporting apparel are so closely related

that their marketing under the same or similar marks would be likely to cause confusion as to their source or sponsorship. It is well settled that goods need not be identical or even competitive in nature to support a finding of likelihood of confusion.

Instead, it is sufficient that the 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 used thereon, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Moreover, it is well established that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are or asserted to actually be. See *Octocom Systems Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of*

Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1
USPQ2d 1813 (Fed. Cir. 1987).

At the outset, we note that there is no evidence to substantiate applicant's assertions that latex clothing is not associated with sporting apparel, but rather with intimate apparel and/or clothing for "clubbing" or adult parties. In any event, applicant's latex clothing and registrant's sporting apparel are complementary and otherwise related articles of clothing. It is not necessary that clothing items be made of the same fabric in order to find that they are related goods. In the past, likelihood of confusion has been found in some cases where the same or similar marks were used by different parties in connection with different articles of clothing. See, e.g.: Jockey Int'l., Inc. v. Mallory & Church Corp., 25 USPQ2d 1233 (TTAB 1992) [use of similar mark on underwear and neckties]; In re Mercedes Slacks, Ltd., 213 USPQ 397 (TTAB 1982) [use of similar mark for hosiery and trousers]; In re Cook United Inc., 185 USPQ 444 (TTAB 1974) [use of same mark for men's suits, coats and trousers and ladies' pantyhose and hosiery]; and Esquire Sportswear Mfg. Co. v. Genesee Inc., 141 USPQ 400 (TTAB 1964) [use of same mark for girdles and men's slacks].

Further, in view of the complementary and closely related nature of applicant's latex clothing and registrant's sporting apparel, and given the absence of any restrictions or limitations in either applicant's or registrant's identification of goods, we must presume that the respective goods are marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods. In re Elbaum, 211 USPQ 639 (TTAB 1981). Thus, we must assume that applicant's latex clothing and registrant's sporting apparel would be sold in some of the same channels of trade, namely, department stores and mass merchandisers, to the same class of purchasers, namely ordinary consumers. It is common knowledge that clothing is purchased by the public at large. Although applicant contends that purchasers of her latex clothing are sophisticated purchasers, applicant offered no evidence to support this contention.

Turning then to a consideration of the marks, the examining attorney contends that VEX is the dominant portion of applicant's mark because the word CLOTHING is generic; and that VEX and VEXX are substantially similar in sound, appearance, connotation and commercial impression.

Applicant contends, on the other hand, that the marks must be viewed in their entirety; that, as such, VEX is

not the dominant portion of her mark; and that the examining attorney has improperly dissected her mark.

Our consideration of the marks is based on whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 24 USPQ 749 (Fed. Cir. 1985).

Considering applicant's mark VEX CLOTHING, the word CLOTHING is generic for applicant's goods. VEX, as the

first word in the mark, followed by the generic word CLOTHING, is likely to be perceived by customers as the dominant portion of the mark.

The cited mark is VEXX, differing from the dominant portion of applicant's mark by only an additional "X." However, we find this difference to be inconsequential. Rather, we are persuaded that the dominant first word of applicant's mark is not only substantially similar in appearance and sound to the term VEXX, but would be regarded as virtually identical thereto. As to the connotation of the marks, although the word VEX has specific meanings³, the word appears to be arbitrary as applied to clothing and the term VEXX, which has no specific meaning, also appears to be arbitrary. Given the fallibility of consumers' memories and the fact that they are unlikely to encounter the marks at the same time or side-by-side, we find that applicant's mark VEX CLOTHING and the cited mark VEXX look and sound substantially

³ "Vex" is defined as 1. "To irritate or annoy, as with petty importunities; bother; pester; 2. To confuse; baffle; puzzle. 3. To debate (a problem) at length; bring up repeatedly for discussion. 4. To toss about or stir up; agitate." The American Heritage Dictionary of the English Language (New College Edition 1976). We take judicial notice of this definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

similar and their meanings and commercial impressions are likewise very similar if not identical.

We conclude that consumers familiar with registrant's sporting apparel, namely t-shirts, jackets, sweatshirts, long sleeved shirts, board shorts, cargo pants, hats, beanies, windbreakers and golf shirts sold under the mark VEXX would be likely to believe, upon encountering applicant's mark VEX CLOTHING for latex clothing, namely pants, jackets, dresses, shirts and lingerie, that the goods originate with or are somehow associated with or sponsored by the same source.

Decision: The refusal to register under Section 2(d) of the Act is affirmed.