

Mailed:

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

January 23, 2006
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re JTMX.LLC

Serial No. 78231571

Tawnya R. Wojciechowski of Sheppard, Mullin, Richter & Hampton
for JTMX.LLC.

Curtis W. French, Trademark Examining Attorney, Law Office 115
(Tomas V. Vlcek, Managing Attorney).

Before Quinn, Hohein and Zervas, Administrative Trademark Judges.
Opinion by Hohein, Administrative Trademark Judge:

JTMX.LLC has filed an application to register on the
Principal Register the mark "ALIAS" and design, as shown below,



for, *inter alia*, "BMX-, motocross- and bicycling-related
clothing, namely, shirts, t-shirts, jackets, sweat shirts, pants,
footwear and headwear" in International Class 25.¹

¹ Ser. No. 78231571, filed on March 28, 2003, which is based on an allegation of a bona fide intention to use the mark in commerce. Although the application also seeks registration of the mark for "BMX,

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the mark "ALIAS," which is registered on the Principal Register in standard character form for "clothing, namely[,] skirts, dresses, blouses, sweaters, tops, sweatshirts, sweat pants, shorts, pants, t-shirts, coats, jackets, tank tops, vests, scarves and loungewear" in International Class 25,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but 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. 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 or services at issue and the

motocross and bicycling protective gear, namely, goggles and helmets" in International Class 9 and "BMX, motocross and bicycling protective gear, namely, face masks and safety padding" in International Class 28, the Examining Attorney notes in his brief that "[t]he ... refusal [to register in this case] applies to [International] Class 25 (clothing) and does not bar registration in the other classes."

² Reg. No. 2,735,167, issued on July 8, 2003, which sets forth a date of first use anywhere of January 1, 2003 and a date of first use in commerce of January 21, 2003.

similarity or dissimilarity of the respective marks in their entireties.³

Turning first to consideration of the respective goods, applicant contends in its brief that "not all clothing is related." Applicant asserts, in particular, that as identified in its application, its "BMX clothing must necessarily be clothing for the sport of BMX" and that "[t]he same is true regarding motocross and bicycling clothing." By contrast, applicant maintains that "[i]t is obvious from the description [in the cited registration] that Registrant's goods are specifically not intended for BMX, motocross or bicycling." Applicant also insists that unlike registrant's goods, which are typically sold in such retail outlets as department stores, its "BMX, motocross and bicycling clothing is considered athletic clothing, and, as such, is sold in stores that sell athletic clothing." Applicant urges, furthermore, that "even in the event that Applicant's athletic clothing were sold in a department store, ... there is still no overlap of goods as its athletic clothing would be sold in a different department."

Applicant concludes that "[i]t is, therefore, highly unlikely that potential consumers of Applicant's goods or Registrant's goods would believe that the goods originated from the same source." Moreover, according to applicant:

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." 192 USPQ at 29.

[L]ikelihood of confusion is less probable where the goods are expensive and purchased after careful consideration. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, [954 F.2d 713,] ... 21 USPQ2d 1388 ([Fed. Cir.] 1992), *Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 217 USPQ 649 (Fed. Cir. 1983), and *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489, 212 USPQ 246, 252 (1st Cir. 1981). In the instant case, Applicant respectfully contends that because its goods specifically target persons interested in BMX, motocross and bicycling, they are generally not impulse type products, but rather, constitute goods that are purchased by quite sophisticated, discriminating purchasers who can be expected to exercise more than a little care in purchasing these goods.

The Examining Attorney, on the other hand, argues in his brief that the respective goods need not be identical or directly competitive in order for there to be a likelihood of confusion. Citing *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 156, 223 USPQ 1289 (Fed. Cir. 1984), he properly notes that the respective goods need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. Here, the Examining Attorney points out, "[a]ll of the items are clothing and apparel." Moreover, according to the Examining Attorney, "[n]either the application nor the registration contain any limitations regarding trade channels for the goods and therefore it is assumed that the Registrant's and the Applicant's goods are sold everywhere that is normal for such items, i.e., clothing and department stores." Furthermore, in

view thereof, the Examining Attorney maintains that "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," citing *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) and *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

In support of his position, the Examining Attorney notes that he "has made of record various articles obtained from the Internet on April 8, 2005, illustrating that many manufacturers of BMX clothing or clothing used by BMX riders, also manufacture a broad range of clothing styles." One Internet excerpt, which is particularly relevant, refers to "Dirty Habit" t-shirts and states that: "Dirty Habit t-shirts are not just for ... BMX riders and anyone can wear them" Additionally, the Examining Attorney asserts that the Internet excerpts show that "many mainstream clothing styles are adopted by BMX aficionados, thus blurring what styles are actually designed specifically for the sport of BMX," contending that:

For instance, many "BMX'ers" wear clothing styles from the 1970s, yet these clothing styles are now very popular and sold in major department stores. Stores such as Hot Topic® sell clothing to extreme sports (such as BMX racing) participants, as well as to punk rockers.

Furthermore, as to applicant's argument that its goods are expensive and not subject to impulse purchases, the Examining Attorney observes that "applicant has not provided any evidence to support this contention" and instead insists, although likewise notably without any supporting evidence, that

"[c]lothing is generally considered an inexpensive item that is often purchased on impulse." Citing *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000) and *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984), he correctly notes that inexpensive and impulsively purchased items are more likely to be subject to source confusion, given that consumers typically exercise less care in purchasing such products.

Upon consideration of the evidence and arguments, we find that many, if not most, of applicant's "BMX-, motocross- and bicycling-related clothing, namely, shirts, t-shirts, jackets, sweat shirts, pants, footwear and headwear" are either identical to or otherwise so closely related to registrant's "clothing, namely[,] skirts, dresses, blouses, sweaters, tops, sweatshirts, sweat pants, shorts, pants, t-shirts, coats, jackets, tank tops, vests, scarves and loungewear" that, if marketed under the same or similar marks, confusion as to the source or sponsorship of such goods would be likely. As our principal reviewing court stated in deciding in an analogous situation involving, on the one hand, "golf shirts having collars" and, on the other hand, "clothing, namely, athletic shoes, sweatsuits, and athletic shirts" (citations and footnote omitted):

Applicant suggests that the TTAB employed "creative efforts" in finding that "golf shirts" are within the category of "athletic shirts," and attempts to convince us that golf shirts (i.e., polo shirts with collars), unlike tee shirts and sweat shirts, cannot be considered athletic shirts. We find no merit in this argument. The issue cannot be resolved on a question of

semantics; rather, it is a question of whether a consumer will make the distinction between a shirt intended as a "golf shirt" from one called an "athletic shirt." The likelihood of confusion must be determined from the perspective of the ordinary consumer. "Golf shirts," if not identical to, are without a doubt similar to shirts worn while participating in other athletic events, and it is unlikely that the ordinary purchaser will distinguish one from the other.

.... In this case, regardless of whether or not golf shirts having collars are treated as being specifically different from athletic shirts, the goods are likely to be sold in department stores or specialty shops in close proximity to each other.

Kangol Ltd. v. KangaROOS U.S.A. Inc., supra at 23 USPQ2d 1946.

Similarly, as the evidentiary record demonstrates, there is no meaningful distinction for consumers to make between, for example, applicant's "t-shirts, jackets, sweat shirts, [and] pants" and registrant's "sweatshirts, sweat pants, shorts, pants, t-shirts, ... [and] jackets," just because applicant's goods are intended as "BMX-, motocross- and bicycling-related clothing" while registrant's goods encompass styles of apparel for everyday or casual wear. Instead, it is clear that applicant's t-shirts, jackets, sweat shirts and pants could be worn, like registrant's clothing, as casual attire, while registrant's sweatshirts, sweat pants, shorts, pants, t-shirts and jackets could be utilized, like applicant's goods, as apparel worn while participating in BMX, motocross and bicycling activities. Such goods are plainly suitable for sale to the same classes of consumers, including those who participate in and/or share an affinity with BMX, motocross and bicycling, and respectively would be sold in close

proximity to each other through the same channels of trade, such as department stores, mass merchandisers and specialty clothing retailers. Moreover, and in any event, it is clear that, as identified, applicant's "t-shirts, jackets, sweat shirts, [and] pants," although specifically intended as "BMX-, motocross- and bicycling-related clothing," nonetheless are included within such items of the registrant's apparel as its broadly identified "sweatshirts, sweat pants, shorts, pants, t-shirts, ... [and] jackets." The former are thus legally identical to the latter and hence would be sold to the same classes of purchasers through identical channels of trade.⁴

Furthermore, as to the competing arguments by which applicant contends that because its goods are specifically targeted to BMX, motocross and bicycling enthusiasts, such products would be purchased with care, rather than impulsively, by sophisticated and discriminating customers while the Examining Attorney asserts that such goods are basically inexpensive casual clothing which frequently would be bought on impulse without the

⁴ Inasmuch as it is well settled that a refusal under Section 2(d) is proper if there is a likelihood of confusion involving any of the goods listed in the application and one or more of the goods set forth in the cited registrations, it is unnecessary to rule with respect to the other goods listed in applicant's application and registrant's registration. See, e.g., Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) and Shunk Mfg. Co. v. Tarrant Mfg. Co., 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963). Accordingly, and while the evidence of record appears to lend some support to applicant's contention that footwear for BMX, motocross and bicycling use is a specialized product even though it may also be used as everyday footwear, we need not consider whether contemporaneous use of applicant's "ALIAS" and design mark in connection with its "BMX-, motocross- and bicycling-related ... footwear and headwear" is likely to cause confusion with registrant's "ALIAS" marks for such items as its "skirts, dresses, blouses, sweaters, tops, ... coats, ... tank tops, vests, scarves and loungewear."

exercise of much care in the purchasing decision, suffice it to say that the validity of the arguments would seem to depend on the particular item of apparel. The record shows, for example, that various t-shirts are typically priced for retail sale at no more than \$20.00 apiece, with "Boys BMX Tees" in particular being offered for as low as \$8.00, while a jacket is listed as selling for \$44.95. Nevertheless, even if applicant's t-shirts, jackets, sweat shirts and pants for BMX, motocross and bicycling use, along with registrant's sweatshirts, sweat pants, shorts, pants, t-shirts and jackets, were at a minimum regarded by consumers as items of apparel which are relatively expensive and/or selected with care and deliberation, it is well established that the fact that purchasers are knowledgeable and sophisticated in their choice of goods "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *In re Decombe*, 9 USPQ 1812, 1814-15 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983); and TMEP §1207.01(d)(vii). Consequently, if such goods were to be marketed under the same or similar marks, confusion as to their source or sponsorship would be likely.

Turning, therefore, to consideration of the marks at issue, we note as a preliminary matter that as stated by our principal reviewing court in *Century 21 Real Estate Corp. v.*

Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994), "[w]hen marks would appear on virtually identical goods ..., the degree of similarity necessary to support a conclusion of likely confusion declines." Applicant, while conceding in its brief that, in this case, "both marks contain the word ALIAS," argues that "the word portion is not the dominant feature of its mark, but rather the overall design [thereof] is the dominant feature." Specifically, applicant insists that its mark "contains not one design element, but rather two unique design features, i.e., the artistic stylization of the word ALIAS, as well as the added design element abutting the [letter] 'S'," which applicant characterizes as one of "the two different renderings of the letter 'A' in Applicant's mark." Applicant urges that visually, its mark is thus distinguishable from registrant's mark. Applicant also "maintains that vocalization of the word [ALIAS] contained in the highly stylized design of its mark would not, of itself, lead a potential consumer to confuse its mark with that of Registrants [sic], in an oral request for the goods," because "[t]he overall design of Applicant's mark, not the literal element, is most likely to create the commercial impression."

We agree with the Examining Attorney, however, that when considered in their entirety, the marks at issue are highly similar in that they are substantially identical in sound, appearance, meaning and commercial impression. As the Examining Attorney, citing *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987), asserts in his brief:

In this case, the marks are highly similar in that they each feature the arbitrary word "ALIAS." The Applicant's mark displays the term "ALIAS" in stylized form with a design of a rocket while the Registrant's mark displays the term "ALIAS" in typed [or standard character] form. The literal portions of the respective marks are thus identical in appearance, sound and meaning. The literal portions are the dominant and most significant features of [such] marks because consumers will call for the goods ... in the marketplace by that portion, and greater weight must be accorded to them in this analysis.

In view thereof, and inasmuch as the design element which is adjacent to the word "ALIAS" in applicant's mark is so abstract in character that, irrespective of whether it is regarded as a stylized letter "A" as contended by applicant or a rocket design as asserted by the Examining Attorney, it would be unlikely to be vocalized, we find that, overall, due to the dominance of the arbitrary word "ALIAS" in applicant's "ALIAS" and design mark, such mark is substantially identical to registrant's "ALIAS" mark in sound, meaning and appearance.

In particular, with respect to the appearance of the marks at issue, we concur with the Examining Attorney that the fact that registrant's mark is in typed or standard character form does not constitute a basis for finding applicant's mark to be distinguishable from the former. As the Examining Attorney properly notes, registrant's mark could reasonably be depicted in the same or substantially similar stylization as the lettering utilized for the word "ALIAS" in applicant's mark since such lettering "is not overly stylized." See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36

(CCPA 1971) [a mark registered in typed or standard character form is not limited to the depiction thereof in any special form]; and *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233, 1235 (TTAB 1992) ["when a drawing in an application or registration depicts a word mark in typed capital letters, this Board--in deciding the issue of likelihood of confusion--'must consider all reasonable manners' in which the word mark could be depicted," *citing* *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992)]. It is consequently not a valid argument for applicant to contend that there is a distinguishable difference in appearance between the stylized depiction of the word "ALIAS" in its mark and registrant's "ALIAS" mark, which is registered in standard character or typed form. See, e.g., *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983), in which our principal reviewing court pointed out that (*italics in original*):

[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party. Thus, ... the displays must be considered the same.

Applicant's "ALIAS" and design mark, therefore, is substantially identical to registrant's "ALIAS" mark visually. In view thereof, and in light of the above noted substantial identity in sound and meaning, it is apparent that the respective marks overall engender substantially the same commercial impression.

We accordingly conclude that customers and prospective consumers who are familiar or acquainted with registrant's

Ser. No. 78231571

"ALIAS" mark for "clothing, namely[,] ... sweatshirts, sweat pants, shorts, pants, t-shirts, ...[and] jackets," would be likely to believe, upon encountering applicant's substantially identical "ALIAS" and design mark for "BMX-, motocross- and bicycling-related clothing, namely, shirts, t-shirts, jackets, sweat shirts, [and] pants," that such articles of apparel emanate from, or are sponsored by or associated with, the same source. In particular, even among those customers and prospective consumers who happen to notice the additional, highly abstract letter "A" or rocket design in applicant's mark, could still believe that, when used in connection with applicant's goods, that applicant's "ALIAS" and design mark constitutes a new or expanded line of clothing for BMX, motocross and bicycling enthusiasts from the same source as registrant's "ALIAS" line of apparel.

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