

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Jazzman Sportswear Corporation

Serial No. 78429632

John Zaccaria of Notaro & Michalos P.C. for Jazzman Sportswear Corporation.

John M. Gartner, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

Before Seeherman, Quinn and Hohein, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Jazzman Sportswear Corporation has appealed from the final refusal of the Trademark Examining Attorney to register SACRED EARTH, in standard character form, as a trademark for the following goods:

Clothing, namely, men's and boy's shirts, trousers, shorts, jackets and tops; ladies['] and girl's blouses,

pants[,] shorts, jackets, jeans and  
tops.<sup>1</sup>

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground of likelihood of confusion. Specifically, the Examining Attorney has cited Registration No. 2986723 for the mark SACRED PLANET, which includes goods and services in Classes 9, 16, 21, 25, 35 and 41. The basis for the refusal, however, is Class 25 of the cited registration, which sets forth the following goods:

Clothing for men, women and children, namely, shirts, t-shirts, tops, blouses, sweaters, turtle neck sweaters, pants, trousers, jeans, shorts, overalls, sweatshirts, sweat pants, baseball caps, hats, hat visors, gloves, mitts, scarves, suspenders, jackets, vests, socks, shoes, boots, slippers, sneakers, sandals, pajamas, robes, sleep wear, underwear, boxer shorts, swimwear.<sup>2</sup>

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). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed.

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<sup>1</sup> Application Serial No. 78420632, filed June 3, 2004, and asserting first use and first use in commerce as early as December 1, 2002.

<sup>2</sup> Issued August 23, 2005, based on a Canadian registration.

Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the goods, we note that all of applicant's goods are legally identical to the goods listed in the cited registration. (Applicant's use of the words "boy's" and "girl's" in its identification is the equivalent of the word "children's" in the registration.) Because the goods are legally identical, they must be deemed to be sold in the same channels of trade and to the same classes of consumers which, because the goods are clothing, includes the general public.

Applicant states that its customers are "professional buyers [who] visit applicant's showroom and applicant's booth at the Magic Show [clothing trade show] and deal with applicant on a face-to-face basis." Brief, p. 10. In making this statement, applicant does not take into consideration that its clothing would then be resold under its mark to the general public, who are the ultimate purchasers. Applicant has also asserted that the

registrant is the producer of a movie with the title "Sacred Planet," and extrapolates from this that "it is reasonably likely, therefore, that the clothing of the cited registration likely travels in movie-related trade channels or trade channels associated with the movie." Brief, p. 10. Even if applicant had submitted evidence (and there is none) that there is a special "movie-related trade channel" for clothing, and even if applicant's goods were in fact sold only to professional buyers, these assertions can have no effect on our decision. That is because the question of likelihood of confusion must be based on an analysis of the mark as applied to the goods and/or services recited in an application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services actually to be. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re William Hodges & Co., Inc.*, 190 USPQ 47 (TTAB 1976).

Accordingly, the du Pont factors of the similarity of the goods and channels of trade favor a finding of likelihood of confusion.

Also favoring a finding of likelihood of confusion is the du Pont factor of the conditions under which the goods

are purchased. As noted above, the goods are clothing items which must be deemed to be purchased by the public at large. The customers, thus, must be viewed as ordinary purchasers, without any degree of sophistication or specialized knowledge. Further, the identified items include many inexpensive goods, e.g., tops for children, that may be purchased on impulse or without careful consideration.

We turn next to the du Pont factor of the similarity of the marks. Both applicant's mark and the cited mark begin with the word SACRED, followed in the respective marks by the word EARTH or PLANET. Clearly there are strong similarities in the marks because they both have the identical first word. However, the similarity does not end there. There are also similarities in connotation between EARTH and PLANET, in that Earth is a planet. See definition 2 for "earth," taken from The American Heritage Dictionary of the English Language, 3d ed., submitted by applicant: "The third planet from the sun...."

Applicant has argued that the marks have different connotations, with SACRED EARTH conveying the impression of a holy place, holy ground or holy soil, or a location that has been blessed or has spiritual or healing powers, while SACRED PLANET "suggests something that is galactic or

celestial." Brief, p. 5. Applicant also states that, because there are other planets in the solar system, SACRED PLANET suggests planets other than the Earth. In addition, applicant has pointed out, as noted previously, that the registrant is a movie producer that has produced a documentary movie called "Sacred Planet" which features exotic natural places. As a result, applicant contends that the mark SACRED PLANET "suggests an association with the SACRED PLANET movie." Brief, p. 7.

With respect to the latter point, we cannot assume that the public is familiar with the registrant's movie SACRED PLANET, or that upon seeing SACRED PLANET for clothing in the same stores or types of stores in which SACRED EARTH clothing is sold, they will make a connection between SACRED PLANET clothing and the documentary movie. As for applicant's argument that SACRED EARTH has the connotation of soil rather than of the planet EARTH, we agree that in some instances "earth" may mean "soil," e.g., "a church that is believed to be built on sacred earth with miraculous healing powers" ("Silver City Sun-News," May 8, 2005); "a wall-enclosed cemetery where Pisans were buried in sacred earth shipped by sea from the Holy Land" ("Enterprise Record," November 7, 2004). However, other

NEXIS evidence submitted by applicant shows that SACRED EARTH is also used to refer to the planet Earth:

About 30 South Sound pagans gathered Saturday around Tivoli Fountain to celebrate the Earth. ... said Chief Priestess Iris Crain of Our Lady of the Sacred Earth Temple.

"The Olympian," August 29, 2004

"The sacred earth bids us partake of life in a reverential way."—Earth Canticle

In 1997, the Dominican Earth Center was founded on the 740-acre grounds of St. Catharine Motherhouse in Washington County to guide the development of an ambitious organic-gardening and earth-education project that may become a model for others. Collaboration with St. Catharine College is planned in creating options for an Earth Literacy curriculum and degree.

"The Courier-Journal," May 4, 2003

[article about court case in which three nuns were alleged to have broken into the site of the Minuteman missile silo near Greeley, CO and spilled containers of their blood in the shape of crosses]

Then, with the bloody crosses drying in the autumn sun, the nuns sang a song about the sacred Earth and chanted, 'Oh God, teach us how to be peacemakers in a hostile world.'

"The Denver Post," April 6, 2003

Similarly, SACRED PLANET can be viewed as a reference to the Earth. Although applicant suggests that it can refer to anything that is "galactic or celestial," or a planet other than Earth, there is no question that SACRED

PLANET can have the connotation of the Earth. In fact, registrant's documentary film SACRED PLANET, according to the materials that applicant has made of record, "appreciates some of the world's natural wonders, including the forests of British Columbia and the glaciers of Alaska." "The Washington Post," February 1, 2004. "More than a mere travelogue, although it features stunning photography from all over the world, this documentary has been called 'a stirring celebration of the planet we call home.'" "The Orange County Register," April 8, 2005. "Stunning scenery spanning the globe provides the backdrop for a standard environmental message in this 47-minute Imax documentary." "Plain Dealer," April 8, 2005.

Because of the similar connotations of not only the words EARTH and PLANET, but of SACRED EARTH and SACRED PLANET, as well as the similarities in appearance and sound due to the identical first word in each mark, the marks when compared in their entireties convey similar commercial impressions. Given the well-established principle that when, as here, the marks are used on identical goods, "the degree of similarity necessary to support a conclusion of likely confusion declines," *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), we find that the marks are similar, and

that this du Pont factor favors a finding of likelihood of confusion.

Applicant nonetheless argues that the common element SACRED is not sufficient to support a finding of likelihood of confusion because "SACRED" is a weak term for clothing. Applicant bases this assertion on third-party applications, registrations and use of SACRED marks.

We are not persuaded by this argument. Most importantly, we have found the marks to be similar not simply because they both contain the common element SACRED, but because of the similarity in connotation of the words EARTH and PLANET, and the overall similarity in connotation and commercial impression of the marks as a whole. Second, applicant's reliance on third-party applications for SACRED marks is misplaced. Third-party applications are evidence only of the fact that the applications were filed. They otherwise show nothing about any "weakness" of a term. As for the third-party registrations, applicant has made of record only six third-party registrations for SACRED marks, as follows:<sup>3</sup>

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<sup>3</sup> In its request for reconsideration applicant also listed an application for SOMETHING SACRED, and in its brief referred to this mark as a registration. However, no document evidencing the application or registration was ever submitted, and therefore we cannot treat it as being of record. Even if applicant had submitted a copy of the application/registration, it would not have affected our decision herein.

SACRED TEEZ for various items of clothing, including shorts, pants, shirts, tank tops, sweaters, jackets, hats and pajamas;<sup>4</sup>

SACRED LOVE for clothing items including nightgowns, lingerie, smoking jackets, pants, shirts, dresses and tee shirts;<sup>5</sup>

SACRED SILKS for scarves, ties, dresses, dresses and blouses, all made of silk;<sup>6</sup>

SACRED BLUE for clothing items including blouses, jackets, dresses, footwear, jeans, shirts, and shorts;<sup>7</sup>

SACRED WATER for shirts, T-shirts, jackets and hats, as well as concentrated water additive and printed materials in the field of natural health care;<sup>8</sup> and

SACRED SEVEN for various items of clothing.<sup>9</sup>

These third-party registrations are not evidence of use of the subject marks in the marketplace, nor do they show that

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<sup>4</sup> Registration No. 3041661.

<sup>5</sup> Registration No. 2960508.

<sup>6</sup> Registration No. 2314114.

<sup>7</sup> Registration No. 3098865. Although at the time applicant submitted this document it was still an application, applicant indicated in its brief that it had issued into a registration, and the Examining Attorney has not disputed this.

<sup>8</sup> Registration No. 3122264. Although at the time applicant submitted this document it was still an application, applicant indicated in its brief that it had issued into a registration, and the Examining Attorney has not disputed this.

<sup>9</sup> Registration No. 3196768. At the time applicant submitted this document it was an application; however, in his brief the Examining Attorney provided the registration number, and we have accordingly treated such registration as being of record.

the public is familiar with those marks. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them ..."). Moreover, while third-party registrations may be looked at in the same manner as a dictionary to determine a term's significance in a particular trade, it is not seen how the registrations containing the word SACRED shed any light on this significance. For example, the registration for SACRED BLUE, especially as it relates to jeans, may be a double entendre referencing the French exclamation "sacre bleu," while SACRED LOVE for such items as lingerie and nightgowns may suggest lovemaking, but do not indicate a particular significance to the word SACRED. Accordingly, we do not believe that the registered mark has been shown to be weak. In any event, even if we were to deem the protection to be accorded the cited registered mark as being more limited than that for an undiluted mark, the scope of protection for the cited mark still extends to prevent the registration of a mark which conveys the same commercial impression and which is used for identical goods.

Applicant also relies on evidence of third-party use of SACRED marks. This evidence consists of webpages which advertise clothing products. They include:

NATURAL NIRVANA

Sacred Threads Clothing

[listing, inter alia, "Tops & Shirts by Sacred Threads," "Skirts & Top Sets by Sacred Threads," and "Sacred Threads Skirts"

<http://store.naturalnirvana.com>

Sacred Blue Clothing

[Yahoo! Shopping website,

<http://shopping.yahoo.com>, that lists products and the websites for those products, including:]

Sacred Blue Jeans—New Styles—New styles of Sacred Blue jeans for men and women.

\$10 Off your first order at

[EuropeModa.com](http://EuropeModa.com), [www.europemoda.com](http://www.europemoda.com)

Sacred Cow Productions

DVDs//CDs//Books&Posters//Apparel//VHS  
//Bundle

Apparel

Sacred Cow Logo Tee

[logo has a design of figures, and words SACRED COW PRODUCTIONS]

[www.amplifier-store.com/sacredcow/apparel.htm](http://www.amplifier-store.com/sacredcow/apparel.htm)

[a website with the heading "Sacred Shopping.com" that lists as a category "Women's Clothes," as well as "Gifts for Women," "Gifts for Men" etc.]

[www.sacredshopping.com](http://www.sacredshopping.com)

Applicant has also made of record some additional webpages in which SACRED appears, but they do not show actual third-party trademark use. Some of the references simply describe a category of clothing, and others are

miscellaneous inclusions of the word, such as the following:

Goddess Bless  
Sacred Site Undies  
Go there! 100% Cotton body, nylon lace elastic waist and leg bands. Bikini style. Black and yellow image with "Sacred Site" slogan and Goddess icon in sign.  
[the slogan and icon are strategically located on the panties, and appear to be more of an ornamental than a trademark use]  
[www.wackyjac.com](http://www.wackyjac.com)

[A website stating, "Hi! Sacred Clothing is taking a little break and working on their new site!"]  
[www.sacred-clothing.com](http://www.sacred-clothing.com)

[A category called "Garments and Sacred Clothing" on the website of The Church of Jesus Christ of Latter-day Saints which appears to use "sacred clothing" as a category name for ceremonial clothing]  
[www.ldscatalog.com](http://www.ldscatalog.com)

[A webpage with the words SACRED CLTOHING and a design above a 2-page story about appropriate attire for church. It ends with the statement, "God's concern is with our spiritual garment. He offers a heavenly robe that only heaven can see..."]  
<http://tomslighthouse.net>

[An article entitled, "Hawley studies sacred clothing of Amish, Mormons"]  
[www.unt.edu](http://www.unt.edu)

[An article by Rabbi Arthur Waskow entitled "Sacred Clothing, Holy Body, Naked Torah" which states that "the

Torah Scroll is holiest not clothed but  
naked."  
www.shalometr.org

The limited evidence of third-party trademark use is not sufficient for us to conclude that consumers are so used to seeing SACRED in trademarks for clothing that they are able to distinguish such marks based on minor differences between them. In any event, the similarity in connotation and commercial impression between SACRED EARTH and SACRED PLANET is much greater than that between SACRED COW PRODUCTIONS, SACRED BLUE, SACRED THREADS and SACRED SHOPPING.COM. Accordingly, the du Pont factor with respect to third-party use is neutral rather than favoring applicant.

Applicant also argues that it has been using its mark since 2003 and there have been no instances of actual confusion. However, we note that the cited registration is owned by a Canadian company, and it is based on a Canadian registration, rather than on use in the United States. Thus, we have no evidence of the nature and extent of the sales and advertising of the registrant's clothing, or even whether the registrant has sold its clothing items in the United States at all. In view thereof, we can give little weight to applicant's statement that there have been no instances of actual confusion. That is, the lack of actual

confusion is a meaningful factor only where the record demonstrates appreciable and continuous use by the applicant and the registrant in the same markets. See, for example, *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992); and *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 541 (TTAB 1979). Because there is no evidence that there has been an opportunity for confusion to occur, we can draw no conclusions as to the likelihood of confusion from applicant's assertion that it has not experienced any incidents of actual confusion. See *In re Majestic Distilling Co., Inc.*, supra, 65 USPQ2d at 1205 ("The lack of evidence of actual confusion carries little weight ... especially in an *ex parte* context"). Accordingly, we consider this du Pont factor to be neutral.

In view of the foregoing, we find that applicant's use of the mark SACRED EARTH for its identified goods is likely to cause confusion with the mark SACRED PLANET as registered for the goods in Class 25.

Decision: The refusal of registration is affirmed.