

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

Mailed: October 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

No Fear, Inc.
v.
David B. Clayton

Cancellation No. 92046824

Kit M. Stetina of Stetina, Brunda, Garred & Brucker for No Fear, Inc.

David B. Clayton, appearing *pro se*.

Before Rogers, Mermelstein, and Wellington, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

No Fear, Inc. has petitioned to cancel Registration No. 2930168, owned by David B. Clayton, for the mark:

**PRO
FEAR**

for "wearing apparel, namely hats, shirts, t-shirts, warm-up suits, swimsuits, sweatshirts, sweatpants, shorts, pants, sweaters, vests and jackets" in International Class 25.¹

¹ The underlying application was filed on August 4, 2003. Respondent claimed January 12, 1999 as its date of first use anywhere and date of first use in commerce.

Petitioner filed the petition for cancellation on the ground of priority of use and likelihood of confusion, alleging, *inter alia*, that it "has used, or filed federal applications with an intent to use, in interstate commerce, the marks NO F'EAR, NO FEAR, FEAR THIS, NO FEAR (PLUS DESIGN), FEAR ME, FEAR GOD, KNOW FEAR, FEAR SPORTS, LOTS OF FEAR, SOME FEAR, JUST FEAR, FEAR NOT, FEAR NO. 1, SHOW FEAR, FEAR NO FISH, FEARLESS, FEARLESS FACTORY, FEAR, FACE YOUR FEARS LIVE YOUR DREAMS, AND FACE YOUR FEARS (hereinafter collectively referred to as the NO FEAR TRADEMARKS) ... since long prior to Respondent's date of first use" stated in its registration. Specifically, petitioner alleges use of its NO FEAR marks since "at least as early as April 1986" on, *inter alia*, a variety of apparel products, including, many of the same goods identified in the involved registration. Overall, petitioner pleaded ownership of thirty-one (31) registrations containing the term FEAR.

Respondent denied "any and all claims" contained in the petition for cancellation. Respondent also attached copies of printouts from his website to the answer.²

Only petitioner filed a trial brief.

² Generally materials accompanying the pleading are not considered part of the evidentiary record. Trademark Rule 2.122(c); see also, TBMP § 317 (2d ed. rev. 2004). However, the same materials were later made of record as exhibits (B10-B31) to the discovery deposition of Mr. Clayton.

The Record

By operation of the rules, the record includes the pleadings and the subject registration file.

Only petitioner took testimony and introduced evidence. Specifically, petitioner filed the testimony deposition of Mark Simo, petitioner's CEO, with attached exhibits, and filed a notice of reliance on the following: the discovery deposition of respondent (with exhibits); respondent's answers to petitioner's interrogatories nos. 1-3, 5, 8-9, 12, 14-19, 26 and 28; respondent's responses and documents produced in response to petitioner's document requests nos. 9-10, 18, 41 and 49;³ and respondent's responses to petitioner's admission requests nos. 1-21.

As to petitioner's pleaded registrations, only fifteen of them were properly made of record through the testimony of Mr. Simo who identified the registrations during his deposition, confirmed that they are owned by petitioner, and are valid and subsisting.⁴ Of these, we have focused our decision on the following:

³ Respondent admitted that all documents produced by respondent were authentic in response to petitioner's admission request. no. 21. Accordingly, petitioner may introduce the documents produced by respondent by notice of reliance alone. TBMP § 704.11 (2d ed. rev. 2004).

⁴ Simo deposition, pp. 8-28 (Exhibit Nos. 1-15). For each of these registrations, Mr. Simo identified petitioner as the current owner, stated that each copy of the registration (attached as an exhibit) was a "true and correct" copy, and that petitioner has "continuously and uninterruptedly" used the registered mark. This suffices for purposes of making these registrations of record. Trademark Rule 2.122(d)(2)(2); see also

Mark: SHOW FEAR
Registration No.: 2267558
Goods: wearing apparel, namely, shirts, T-shirts, shorts, pants, sweatshirts, sweatpants, hats, visors, shoes and belts;

Mark: FEAR
Registration No.: 2402250
Goods: wearing apparel, namely T-shirt, shirts, shorts, pants, sweat shirts, sweat pants, hats, visors, shoes, sandals, and belts;

Mark: NO FEAR (stylized)
Registration No.: 1737420
Goods: wearing apparel; namely, T-shirts, shirts, shorts, pants, sweat shirts, sweat pants, hats, visors, shoes, sandals, and belts;

Mark: NO FEAR
Registration No.: 1855031
Goods: *inter alia*, clothing and footwear; namely, pants, shirts, shorts, T-shirts, bathing suits, jackets, sweat shirts, visors, sandals and shoes;

Mark: NO FEAR (stylized)
Registration No.: 2055148
Goods: wearing apparel, namely, shirts, T-shirts, shorts, pants, sweatshirts, sweatpants, hats, visors, shoes and belts;

Mark: NO FEAR (stylized)
Registration No.: 2055158
Goods: wearing apparel, namely, shirts, T-shirts, shorts, pants, sweatshirts, sweatpants, hats, visors, shoes and belts; and

Mark: KNOW FEAR
Registration No.: 2105774
Goods: wearing apparel, namely shorts, pants, shirts, T-shirts, sweatshirts, sweatpants, visors, belts and shoes.

TBMP § 704.03(b)(1)(A) (2d ed. rev. 2004). Although copies of the remaining pleaded registrations were also attached as exhibits, Mr. Simo only testified to those registrations in general terms. The testimony is insufficient for purposes of properly making those registrations of record. *Id.*

Standing

Because petitioner has properly made of record many of the pleaded registrations, petitioner has established its standing to cancel respondent's registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

Because both petitioner and respondent own registrations, neither party has priority simply because it owns a registration. *Brewski Beer Co. v. Brewski Brothers, Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998). In a case such as this, "... the registrations of each party offset each other.. [and] petitioner as a plaintiff, must, in the first instance, establish prior rights in the same or similar mark..." *Id.*

In this case, because respondent has not submitted any evidence of an earlier priority date, the earliest date upon which he can rely is the filing date of his underlying application (for the involved registration), that is, August 4, 2003. *Intelsat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 n. 5 (TTAB 1985). On the other hand, several of petitioner's underlying applications (for the pleaded registrations of record) have earlier filing dates. In particular, Registration No.

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2402250 (for the mark FEAR) has a filing date of February 13, 1995, and Registration No. 1855031 (for the mark NO FEAR) has a filing date of October 19, 1992. Accordingly, the record establishes petitioner's priority.

Likelihood of confusion

Our determination of likelihood of confusion under Section 2(d) of the Lanham Act is based on an analysis of all the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, 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). Again, we have limited our likelihood of confusion analysis to the subject registered mark vis-à-vis petitioner's marks in the seven registrations referenced above.

We also note that although respondent did not take testimony, introduce any evidence, or file a trial brief, it is petitioner who bears the burden of establishing likelihood of confusion by a preponderance of the evidence. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ("[t]he burden of proof rests with the opposer ... to produce sufficient evidence to

support the ultimate conclusion of [priority of use] and likelihood of confusion").

With the above principles in mind, we first consider the *du Pont* factors regarding the similarity or dissimilarity of the goods, trade channels and classes of purchasers. In our evaluation of these factors, we are bound by the goods identified in the involved and pleaded registrations. In the absence of any restrictions or limitations in these registrations, we must assume the goods are sold through all the normal and usual trade channels for such goods to all the usual purchasers of such goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). Here, respondent's and petitioner's goods are identical inasmuch as the subject registration and petitioner's pleaded registrations (identified above) include the following identical goods in their respective identifications: wearing apparel, namely, hats, shirts, t-shirts, sweatpants, shorts and pants.

Because the goods are identical, in part, the factor involving the similarity of the goods therefore weighs strongly in favor of finding a likelihood of confusion. And, because there are no restrictions in the registrations, we must presume that the parties' respective items of

wearing apparel would be found in the same channels of trade and be subject to purchase by the same consumers. See *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400 (TTAB 1998). These factors too favor finding a likelihood of confusion.

This brings us to the similarity or dissimilarity of the marks. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We keep in mind that when marks would appear on identical goods, as they do here, the degree of similarity of marks 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).

In comparing the marks, we find that respondent's mark, PRO FEAR (stylized), is similar to petitioner's mark, FEAR, inasmuch as petitioner's entire mark is incorporated into respondent's mark. Respondent's mark is also similar to petitioner's other six referenced marks in that they all contain the term FEAR preceded only by a single syllable word, i.e., NO, KNOW and SHOW, each of which rhymes with the term PRO in respondent's mark. The overall marks are therefore visually and aurally similar. The stylization

employed in respondent's mark has little effect in distinguishing the marks. Because each of petitioner's marks appears in a registration in typed lettering, these marks may appear in any reasonable font or style of lettering, including that used by respondent.

In terms of connotation and commercial impression, we also find all of the marks to be similar in that they play on the term "fear." In his deposition, respondent even acknowledged that his mark, as well as several of petitioner's marks, may be categorized as "fear affirming" marks, including KNOW FEAR and SHOW FEAR. Clayton deposition, pp. 13-17. As respondent himself stated in regard to petitioner's mark KNOW FEAR, "I would say that it may be fear affirming because I guess you could - you could perceive that knowing fear, as in terms of acknowledging fear, might be an affirmation of fear." Clayton deposition, p. 14.

Considering the marks in their entireties, as we must, we conclude that they are similar. This *du Pont* factor favors finding likelihood of confusion.

Although petitioner has argued and presented (unrebutted) evidence in its favor concerning other *du Pont* factors, we need not address those factors in view of the in part identical nature of the parties' goods and the

similarity of the marks.⁵ We conclude that respondent's use of the mark PRO FEAR, when used on wearing apparel, so resembles petitioner's previously-used and registered marks: FEAR, NO FEAR, SHOW FEAR, and KNOW FEAR, for identical goods that consumers are likely to mistakenly believe that the sources of these goods are the same. As a result, there is a likelihood of confusion.

Decision: The petition to cancel is granted, and Registration No. 2930168 will be cancelled in due course.

⁵ Petitioner also argued that there is a *prima facie* case of abandonment with respect to respondent's registration and that respondent's mark "should be cancelled for non-use in commerce." Brief, p. 14-15. However, neither abandonment nor non-use has been pleaded by petitioner as grounds for cancellation; moreover, petitioner has not moved to amend the complaint. Accordingly, these allegations, to the extent they constituted separate claims, were not given consideration.