

This Opinion is not a
Precedent of the TTAB

Mailed: January 20, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Popp

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Serial No. 86140200

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Shane M. Popp of The Law Office of Shane M. Popp
for Lisa Popp.

Paul Ferrer, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Quinn, Wellington and Lykos,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Lisa Popp (“Applicant”) seeks to register on the Principal Register the mark **Stillwater** in standard characters for, as amended, “[c]lothing, namely, women’s shirts, sweatshirts, dresses, pants, and suits” in International Class 25.¹

The Trademark Examining Attorney refused registration of Applicant’s mark pursuant to Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the

¹ Application Serial No. 86140200, filed December 11, 2013 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On August 21, 2014, Applicant filed an amendment to allege use and specimens which were accepted on August 28, 2014. The amendment to allege use claims January 1, 2014 as the date of first use anywhere and in commerce.

ground that Applicant's mark so resembles the registered mark displayed below for "[c]lothing, namely, [m]en's and [w]omen's jackets and vests" in International Class 25,² that, when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive.



When the refusal was made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusal to register and denied the request for reconsideration. Thereafter, the appeal was resumed and is now fully briefed.

For the reasons set forth below, we affirm the Section 2(d) refusal.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont*

² Registration No. 3334168, issued November 13, 2007 on the Principal Register; alleging October 30, 2006 as the date of first use anywhere and November 10, 2006 as the date of first use in commerce; Section 8 affidavit accepted. The description of the mark is as follows: "The mark consists of Stillwater Supply Co. with a fanciful design of a duck against an oval background." Color is not claimed as a feature of the mark. "SUPPLY CO." has been disclaimed apart from the mark as shown.

de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and others are discussed below (see *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006)) keeping in mind that “each case must be decided on its own facts, rather than on the basis of any so-called ‘per se’ rule” when clothing items are involved. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1027 (TTAB 1984).

A. The Marks

We commence with the first *du Pont* likelihood of confusion factor which involves an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (“*Palm Bay*”) (quoting *du Pont*, 177 USPQ at 567). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161

(Fed. Cir. 2014) (“*Stone Lion*”). Rather, we are obliged to consider the marks in their entireties. *Id.* See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

Applicant argues that the involved marks are “quite different in appearance and sound” and offers a side-by-side comparison of the marks in her briefs. See Applicant’s Appeal Brief, pp. 4-6, 7 TTABVUE 5-7. See also Applicant’s Reply Brief, pp. 1-2, 10 TTABVUE 2-3. Applicant contends that the Examining Attorney improperly focused on the element which is identical to both marks (the literal term STILLWATER) while discounting the importance of the disclaimed wording SUPPLY CO. and design in the cited mark. In Applicant’s view, the addition of SUPPLY CO. and the duck design to Registrant’s mark alters the connotation by evoking hunting, sportswear or outdoor apparel. Applicant’s contends that consumers are less likely to attribute this meaning to her single word mark **Stillwater** for goods limited to women’s clothing.

In urging that we make a side-by-side comparison, Applicant misapprehends the first *du Pont* factor analysis. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

Furthermore, contrary to Applicant's assertion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161. Keeping these principles in mind, we observe that Applicant's and Registrant's marks are comprised, either in whole or in part, of the term STILLWATER which is arbitrary in relation to clothing. *See Coca-Cola Bottling Company of Memphis, Tennessee, Inc. v. Joseph E. Seagram & Sons, Inc.*, 188 USPQ 105, 106 (CCPA 1975) ("When one incorporates the entire arbitrary registered mark of another into a composite mark, inclusion in the composite mark of a significant nonsuggestive element does not necessarily preclude the marks from being so similar as to cause a likelihood of confusion."). In addition, STILLWATER is the first element in the cited mark, which when coupled with its arbitrary nature, makes it the dominant element. "[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions." *Palm Bay*, 73 USPQ2d at 1692. *See also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). STILLWATER is also likely to be accorded more weight by consumers because the remaining wording SUPPLY CO. is, at a minimum, descriptive of Registrant's goods as indicated by the disclaimer. As such, SUPPLY CO. is less likely to make an impact in the minds of consumers. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (disclaimed matter that is descriptive of or generic for a party's goods is

typically less significant or less dominant when comparing marks). *See also In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 753 (Fed. Cir. 1985).

Likewise, the graphics in the cited mark fail to mitigate the similarities with the applied-for mark. It is an often-recited principle that when a mark consists of a literal portion and a design portion, the literal portion is usually more likely to be impressed upon a purchaser's memory and to be used in calling for the goods; therefore, the literal portion is normally accorded greater weight in determining whether marks are confusingly similar. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012); *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). *See also CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011). Moreover, since the dominant word portion of the cited mark is identical in appearance, sound, connotation, and commercial impression to the entirety of Applicant's mark, the addition of a design element does not obviate the similarity of the marks. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). Lastly, to argue that the duck design necessarily engenders a connotation excluding women's clothing is unconvincing since women also participate in outdoor recreational and activities, and purchase sportswear.

Thus, when comparing the marks overall, we find that the involved marks are similar in sound, appearance, connotation and commercial impression. In view of the forgoing, the first *du Pont* factor favors a finding that confusion is likely.

B. The Goods

The next step in our analysis is a comparison of the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration, the second *du Pont* factor. See *Stone Lion*, 110 USPQ2d at 1161; *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration. See, e.g., *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase

the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

The Examining Attorney made of record active third-party, used-based registrations showing that the same entity has registered a single mark identifying Applicant’s and Registrant’s goods or the legal equivalent thereof.³ By way of illustration, we note the following:⁴

Reg. No. 4501077 for the mark LANY on the Principal Register for “... Dresses; ... Jackets; Pants; Shirts; ... Sweat shirts; ... Vests.”

Reg. No. 4501464 for the mark GOALIE MOM on the Principal Register for “Apparel, namely, shirts, pants, jackets ... Vests; ...”

Reg. No. 4842887 for the mark CELERY SEED on the Principal Register for “... Dresses for women; ... Jackets; ... Men’s and women’s jackets ... vests; ... Women’s clothing, namely, shirts, dresses ...”

Reg. No. 4803770 for the mark TREND EMPIRE on the Principal Register for “...Dresses; ... Men’s and women’s jackets ... vests; Pants; ... Shirts; ... Suits; ... Sweatshirts; ...”

Reg. No. 4831903 for the mark FEEL LIBERATED on the Principal Register for “Clothing, namely, pants ... dresses ... shirts ... sweatshirts ... jackets ... vests ...”

Reg. No. 4822244 for the mark JACOBIE BEVERLY HILLS (stylized) on the Principal Register for “... Dresses for women ...; Men’s and women’s jackets ... vests; ... women’s suits; ... Shirts for women ... Sweatshirts for women...”

³ By this we mean that an identification listing “jackets” as unrestricted necessarily encompasses both men’s and women’s jackets.

⁴ We have not considered any third-party registrations not based on use in U.S. interstate commerce. *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007).

Reg. No. 4821894 for the mark GEAR FOR GOALS on the Principal Register for “Clothing, namely, shirts, ... sweatshirts, ... dresses, ... vests, jackets, ... suits, pants, ...”

Reg. No. 4803770 for the mark TREND EMPIRE on the Principal Register for “... Dresses; ... Men’s and women’s jackets ... vests; Pants; ... Suits; ... Sweatshirts; ...”

Reg. No. 4819837 for the mark FELDSPAR BROOK on the Principal Register for “Clothing, namely, shirts, ... vests, ... jackets, pants, ... sweatshirts, ... dresses, ... women’s suits, ...”

As a general proposition, although use-based third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The Examining Attorney also submitted Internet evidence from clothing manufacturers that sell directly to consumers via their own e-commerce websites:

- Eddie Bauer (www.eddiebauer.com) offering for sale men’s and women’s jackets; men’s and women’s vests; women’s shirts, dresses and skirts; and men’s pants under the Eddie Bauer trademark. *See* Office action dated April 4, 2014.
- GAP (www.gap.com) offering for sale women’s jackets, coats and blazers; men’s jacket’s, parkas and zip sweatshirts; women’s and men’s vests; women’s sweaters, dresses, sweatshirts, skirts, khakis, pants, jeans, and shoes; and men’s t-shirts and tank-tops, shirts, sweaters, sweatshirts, jeans, pants shorts, socks and shoes under the GAP trademark. *See* Office action dated April 4, 2014.
- L.L. Bean (www.llbean.com) offering for sale men’s jackets and coats; women’s jackets and coats; men’s and women’s vests; and women’s shirts, fleece tops,

sweatshirts, dresses, pants and capris. *See* Office action dated November 5, 2015.

- J. Crew (www.jcrew.com) offering for sale men's blazers and vests; men's jackets; women's coats, jackets and vests; and women's shirts, sweatshirts, sweatpants, pants, dresses, and skirts. *See* Office action dated November 5, 2015.
- Brooks Brothers (www.brooksbrothers.com) offering for sale men's jackets, coats, and vests; women's jackets and blazers; women's shirts, dresses, pants, trousers, skirts, and suits. *See* Office action dated November 5, 2016.

This constitutes further evidence that consumers may expect to find both Applicant's and Registrant's goods as identified in the involved application and cited registration as emanating from a common source under a single brand name. Although we acknowledge that these marks may be viewed as house marks, the evidence still demonstrates that the same consumers may encounter the involved goods in the same context. And given that these clothing items could be worn together (for example women's sweatshirts and women's jackets), we can conclude that they are complementary products. As such, the involved goods are closely related.

Applicant dismisses the probative value of the website evidence, arguing that it merely shows that clothing is sold at department stores and online which is an insufficient basis for finding the Applicant's and Registrant's goods to be related. Applicant overlooks, however, that the Examining Attorney's website evidence is not from brick and mortar department stores or "big box" online retailers selling a wide variety of goods but rather from clothing manufacturers' direct-to-consumer sales websites. This targeted type of retailing is narrower in scope, and as such is entitled to a higher degree of probative weight.

In view thereof, we find that the goods identified in the application and registration are closely related and complimentary in nature. Thus, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

C. Trade Channels

We now direct our attention to the established, likely-to-continue channels of trade, the third *du Pont* factor. Applicant argues that pages from the L.L. Bean, J. Crew, and Brooks Brothers e-commerce websites do not demonstrate confusion as to source because “the sale of the product does not take place in a similar type store or similar type centralized location. Rather, a consumer will view the goods of each entity in a discreet marketing environment.” Appeal Brief, p. 11, 7 TTABVue 12.

Because the identifications in the application and cited registration have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods, such as traditional brick and mortar retail stores featuring clothing from a variety of manufacturers under different brand names. *See Octocom*, 16 USPQ2d at 1787. *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.”). In addition, both parties’ goods may be encountered by the same prospective consumers, namely women shopping for clothing. As such, the third *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

D. Conditions of Sale

We turn now to the conditions under which the goods are likely to be purchased, *e.g.*, whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

Applicant argues that the average purchaser of her clothing is “sophisticated in nature and takes the time to carefully select the highest quality goods.” Applicant’s Brief, p. 11, 7 TTABVUE 12. In support thereof, she points to her specimens displaying the mark **Stillwater** on hang tags as well as excerpts from her website of advertising her clothing line as “Style Designed & Made in Los Angeles.”

Applicant’s arguments are unavailing. The identifications in the application and cited registration include women’s apparel items at no specified price point. We cannot assume, as Applicant urges, that these items are rendered to different classes of buyers in different marketing contexts at different prices. Rather, we must assume that the types of buyers overlap to include both the sophisticated fashionista as well as the ordinary bargain hunter. Ordinary consumers of women’s apparel are likely to exercise only ordinary care, and given the lack of price restrictions in the identifications, may even buy inexpensive clothing items on impulse. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood

of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”). Accordingly, this factor is neutral as well.

E. The Number and Nature of Similar Marks in Use on Similar Goods

The next *du Pont* factor raised by Applicant is the sixth, the number and nature of similar marks in use on similar goods.⁵ As to third-party uses, Applicant sets forth the following argument:

[T]he number and nature of marks in use on similar goods (clothing) is relatively high. That is to say, the general category of goods such as clothing and apparel is supported by a substantial number of marks which sell similar types of goods. Specifically, Applicant asserts that there are over several thousand marks that relate to shirts (both men’s and women’s) and consumers are unlikely to be confused as to source.

(Emphasis in original). Applicant’s Brief, p. 12, 7 TTABVUE 13.

Applicant has introduced no evidence of third-party uses or registrations to show that “customers have become so conditioned by a plethora of such similar marks that

⁵ Applicant also argues that the cited mark is inherently weak due to the disclaimer of the wording SUPPLY CO. and therefore entitled to only a limited scope of protection. “In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark.” *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011) (citing *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) and McCarthy on Trademarks and Unfair Competition § 11:83 (4th ed. 2011) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”)). We cannot find, based solely on the disclaimed wording, that Registrant’s mark as a whole is inherently weak. The cited mark is registered on the Principal Register, meaning there is no basis for us to conclude that STILLWATER is descriptive or generic when applied to clothing. Moreover, as explained in the context of the similarity of the marks, *infra*, the disclaimer Applicant references is actually a factor that increases the similarity of the marks and, ultimately, a likelihood of confusion.

customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694. *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). Indeed, Applicant appears to misunderstand the appropriate evidence for consideration of this *du Pont* factor by arguing that there are literally thousands of *other* trademarks for clothing. Evidence of “ubiquitous” use of the term STILLWATER as a source indicator on clothing by third parties would have been relevant. *See Jack Wolfskin*, 116 USPQ2d at 1136. Accordingly, this factor is neutral.⁶

F. Nature and Extent of any Actual Confusion

Applicant points to the absence of evidence of actual confusion, the seventh *du Pont* factor, as weighing in her favor. A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the likelihood of confusion, not actual confusion. *Herbko Int’l Inc. v.*

⁶ Applicant identifies the fifth and sixth *du Pont* factors as “overlapping issues” and “merges” their discussion in her brief. Applicant’s Brief, p. 11, 7 TTABVUE 12. The fifth *du Pont* factor pertains to the fame of the cited mark. As is typical of trademark examination practice, the Examining Attorney in this case did not introduce any evidence regarding the fame of the cited mark during prosecution. *See Trademark Manual of Examining Procedure (“TMEP”) § 1207.01(d)(ix)* (Oct. 2016) (“Because of the nature of the evidence required to establish the fame of a registered mark, the Board normally does not expect the examining attorney to submit evidence as to the fame of the cited mark in an ex parte proceeding.”) (citing *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). This factor is therefore neutral. *See id.*

Kappa Books Inc., 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Further, any suggestion that there has been no actual confusion between the marks based on the coexistence of Applicant's mark and the cited registration is entitled to little probative value in the context of an ex parte appeal. *In re Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205. See also *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Therefore, this *du Pont* factor is neutral.⁷

G. The Right to Exclude Others and Extent of Potential Confusion

Lastly we consider the eleventh and twelfth factors as argued by Applicant, the extent to which Applicant has a right to exclude others from use of her mark on her goods, and the potential for confusion, i.e., whether de minimis or substantial.

Applicant argues that without the benefit of a federal registration, she will be foreclosed from requesting U.S. Customs officials from barring the importation of goods bearing infringing marks. Applicant's argument misses the point. This *du Pont* factor pertains to any evidence showing that Applicant has a right to exclude third parties from using her applied-for mark. There is nothing in the record on this issue. See *McDonalds Corp. v. McSweet LLC*, 112 USPQ2d 1268, 1284 (TTAB 2014) (“[T]he mere assertion of common law use does not in itself sufficient to establish the extent to which an applicant has a right to exclude others from use of the mark.”); *In re*

⁷ As with the fifth and sixth *du Pont* factors, Applicant identifies the seventh, eighth, ninth and tenth factors as “related” and “merges” their discussion in her brief but only offers specifics regarding the seventh factor (lack of actual confusion). Applicant's Brief, p. 12, 7 TTABVUE 13. As such, we deem *du Pont* factors 8-10 neutral.

Davey Products Pty Ltd., 92 USPQ2d 1198, 1205 (TTAB 2009) (“Nor does applicant’s mere assertion of common-law use of its mark for ten years in itself suffice to establish that applicant has any significant right to exclude others from use of the mark). The eleventh *du Pont* factor is therefore neutral.⁸

With regard to the twelfth *du Pont* factor, we cannot find that it favors Applicant. At issue in this case are clothing items. These are the type of goods that would be marketed to and purchased by significant numbers of purchasers exercising only ordinary care. The potential for confusion therefore cannot be deemed to be de minimis. *See In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1205 (TTAB 2009). The twelfth *du Pont* factor therefore is neutral, at best.

II. Conclusion

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, the first, second and third *du Pont* factors discussed above favor a finding of likelihood of confusion. The remaining factors discussed above are neutral, and we treat as neutral any *du Pont* factors for which there is no evidence of record. We therefore find that given the similarities of the Applicant’s and Registrant’s marks in connection with highly related goods in overlapping trade channels as identified in the application and cited registration, there is a likelihood of confusion.

⁸ One prominent commentator suggests that if the other *du Pont* factors indicate that there is a likelihood of confusion, the strength of an applicant or registrant’s rights vis-a-vis third parties should be irrelevant. 4 J. Thomas McCarthy, *McCarthy On Trademarks And Unfair Competition* McCarthy on Trademarks and Unfair Competition, § 24:43 (4th ed. 2016).

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