

Mark: WHAT2WEAR
Serial Number: 88/373,537

Likelihood of Confusion

The Examiner has refused registration of the above-referenced mark on the basis that it is purportedly confusingly similar to Reg. No. 4,245,726. For the reasons described in more detail below, Applicant respectfully requests that the registration refusal be withdrawn.

I. The Goods Offered Under the Marks are Not Related to Such a Degree That Confusion is Likely

The cited registration covers a narrow and vague description of goods, namely, “Computer application software for mobile phones, tablets, and desktop computers, namely, software for maintenance of an individual's wardrobe and building online social communities built around wardrobe of members within the online community.”

This description does not mention fashion. It simply mentions wardrobes, which suggests that the conduct on the application and within the online social community is all directed to the wardrobes that its users possess.

Examining the Registrant’s specimen of use (included as Attachment A), it appears that the use of the mark does not go beyond the narrow description included in the trademark. Specifically, the description of the application states that “What to Wear’s virtual closet and social networking makes it easy and fun to manage your wardrobe and your look; and share it with your best friends.” The accompanying pictures reinforce this narrow application – the users post photos of themselves in their outfits and friends have the ability to comment.

Turning to the developer’s publisher summary for the WHAT TO WEAR application (Attachment B), the same images from the Registrant’s specimen appear and the description remains minimal. Clearly, there is no more content to the application beyond the narrow services listed in the description.

Additionally, Applicant notes that the country designated for the WHAT TO WEAR application is China (see Attachment B). The developer’s publisher summary lists a second WHAT TO WEAR application as “inactive” (Attachment C), and the application does not appear on the Apple app store (though a number of other “What to Wear” applications exist, see Attachment D). Under these circumstances, it appears that not only is the Registrant’s application directed to a narrow function relating to existing wardrobes, but it also may not even be in use in US commerce.

The evidence of Registrant’s use of the mark should be considered to interpret what Registrant means by its vague reference to “wardrobe.” Where, as here, the language in an identification is unclear or undefined, the Trademark Trial and Appeal Board has permitted an applicant to provide extrinsic evidence to show that the registrant’s identification has a specific meaning to members of the trade. *See e.g. In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 & n.10 (TTAB 2009) (noting that, although extrinsic evidence may not be used to limit or restrict the identified

goods, it is nonetheless proper to consider extrinsic evidence in the nature of dictionary entries to define the terminology used to describe the goods); *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990). *See also* TMEP § 1207.01(a)(iii). In particular, in *In re Trackmobile Inc.* the Board noted that “when the description of goods for a cited registration is somewhat unclear . . . it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade” (emphasis added). *Id.* at 1154.

Here, the evidence that the Registrant itself has submitted in support of its continued use of the mark shows clearly that the description in the identification is directed to existing wardrobes for its users, and not the fashion field at large nor potential new wardrobes. To infer any potential interpretation despite the presence of this evidence is improper.

However, in the refusal to register, the Examining Attorney argued the registration “covers a software for building online social communities and interacting with members of these communities in the field of fashion.” This interpretation is broader than what is contemplated in the Registrant’s description and shown in Registrant’s use. The application simply relates to its users’ existing wardrobes and it allows users to take pictures and share them with friends. It does not provide links to the websites of others, opportunities to purchase clothing, advertising for third parties, fashion consultation, nor does it even concern itself with the fashion field at large. Further, to the extent the application relates to the user’s wardrobe, it does not provide the real-time inventory management.

Applicant’s goods and services, by contrast, cover much broader ground within the fashion field. They are also directed to different functionalities. For instance, in managing wardrobes, Applicant’s software provides real-time inventory tools. Additionally, Applicant’s software includes personal stylist services and generates recommendations, as opposed to merely receiving feedback from friends.

Furthermore, many of Applicant’s services are completely different from the narrow software functionality in the registered services. This is especially true for advertising and marketing services, providing information in the field of fashion, providing links to retail services, providing useful fashion questionnaires and providing fashion consulting.

The Patent and Trademark Office and the Courts have consistently declared that goods or services are not “related” merely because they “co-exist in the same broad industry,” but are “related” if the goods or services are “marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source, or are somehow connected with or sponsored by a common company.” *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1109 (6th Cir. 1991); *Electronic Data Sys. Corp. v. EDSA Micro Chip*, 1992 T.T.A.B. LEXIS 4, *11, 23, USPQ2d 1460, 1463 (T.T.A.B. 1992); *Information Res. Inc. v. X*Press Info. Serv.*, 6 USPQ2d 1034 (1988); *Reynolds & Reynolds Co. v. I.E. Sys., Inc.*, 5 USPQ2d 1749, 1751 (T.T.A.B. 1987). In other words, it is necessary to assess whether the services offered under Applicant’s mark and the services offered under the Cited Mark are related to such a degree that they are likely to be linked in consumers’ minds. *Fleischmann*

Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 159 (9th Cir. 1963) cert. denied, 374 U.S. 380 (1963).

In this case, the Examiner has determined that the co-existence of the Registrant's goods involving wardrobes will be confused with Applicant's myriad of fashion-related goods and services notwithstanding the fact that Registrant provides a narrow functionality. This conclusion does not consider the way the goods and services are marketed and consumed and how those details affect the likelihood of confusion.

Specifically, consumers are not going to confuse Applicant's comprehensive and sophisticated services for providing fashion information, recommendations and consulting with Registrant's narrowly-defined application for showing the user's contacts what the user is wearing. Further, as discussed in more detail below, the Examiner's evidence does not indicate that common sources provide both the Registrant and Applicant's services.

In these facts, the situation is analogous to King Research, Inc. v. Shulton, where the court found that there was no likelihood of confusion between SHIP-SHAPE for comb and brush cleaner and SHIP-SHAPE for hair spray because, among other factors, the products were intended for different purposes and were applied differently; additionally, the mere similarity of products as involving "hair grooming" was insufficient to support finding a likelihood of confusion. King Research, Inc. v. Shulton, 324 F. Supp. at 631, 169 USPQ at 396. Here, although the goods and services both relate to clothing, their purpose and application is so different that consumers are not likely to confuse them.

Because of the different nature of Applicant and Registrant's goods and services, and the different conditions under which they are consumed, the relevant goods are not marketed in such a way that they would be linked in consumers' minds. This is especially true since Registrant's application has a very narrow focus and appears to not even be available in the US. Thus, confusion is not likely.

II. The Examiner's Evidence Lacks Probative Value

In support of the argument that the respective goods/services were related, the Examiner included evidence purporting to show that Applicant and Registrant's goods/services emanate from the same source. However, the evidence is inapplicable or otherwise lacks probative value.

First, the Examiner included screenshots for an application called FashionTap. The application describes its services as follows: "FashionTap is the social network for the fashion world that lets you make money from sharing and tagging the brands and products that you already love." This application does not function in the way that the Registrant's application functions.

While the FashionTap app's users use the app to upload pictures of the clothes they are wearing, the purpose of doing so is to tag the brands they are wearing. This allows the users to earn money. By contrast, the Registrant's application is for sharing pictures with friends; it does not include tagging or revenue opportunities. Thus, the two applications are fundamentally different,

and the FashionTap application does not demonstrate that the same source provides Applicant and Registrant's goods/services.

Second, the Examiner included a November 11, 2017 story from Medium.com about a social network called Dress'd, which had yet to launch at the time of the publication of the article. This evidence does not show actual use of the Dress'd mark in connection with both Registrant and Applicant's goods/services. It therefore lacks probative value to show actual marketplace use of a common mark for both Registrant and Applicant's goods/services.

The final third party evidence comes from a website called TrendMe. This site invites the user to "Join Fashion Social Network. Create your fashion sets, play the fashion game and show the world your style."

This evidence does not demonstrate Registrant's goods. First and foremost, it is not a mobile application. Second, based on the description that TrendMe provides, the point of the website is not for users to post pictures of themselves. Rather, they select third party images to create "fashion sets." This website is completely different from the Registrant's application.

Based on the foregoing, the Examiner's evidence lacks probative value to show that Registrant and Applicant's goods/services are commonly provided by a single source under a single mark.

III. The Cited Registration is Exists with Other Similar Marks

The Registered mark coexists with highly similar marks for related and identical goods and services. This renders mark weak and amplifies the differences between WHAT TO WEAR and WHAT2WEAR.

As Applicant notes above and as is demonstrated in Attachment D, the phrase "What To Wear" is commonly used in connection with applications that are similar to those of Registrant's. Under these circumstances, the Registrant's mark is relatively weak.

Section 1207.01(D)(III) ("Third-Party Registrations and Evidence of Third-Party Use") instructs the following:

Generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. E.g., In re Max Capital Grp. Ltd., 93 USPQ2d 1243, 1248 (TTAB 2010); In re Toshiba Med. Sys. Corp., 91 USPQ2d 1266, 1272 (TTAB 2009). However, third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. See, e.g., Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U. 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015); Juice Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, ____, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); In re Hartz Hotel Servs., Inc., 102 USPQ2d 1150, 1153-54 (TTAB 2012); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991); In re Dayco Products-Eagle Motive Inc., 9

USPQ2d 1910, 1911-12 (TTAB 1988); Plus Prods. v. Star-Kist Foods, Inc., 220 USPQ 541, 544 (TTAB 1983). Properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used. See, e.g., Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 917, 189 USPQ 693, 694-95 (C.C.P.A. 1976); In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987); United Foods Inc. v. J.R. Simplot Co., 4 USPQ2d 1172, 1174 (TTAB 1987).

...

Evidence of third-party use falls under the sixth du Pont factor – the “number and nature of similar marks in use on similar goods.” In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). If the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

Due to the weakness of the Registrant’s mark in its field, it does not have a strong enough scope of protection to prevent registration of Applicant’s Mark, which is different in appearance (2 vs TO, with no spaces) and also covers different goods and services. Further, given the crowded field, consumers will focus on Applicant’s unique use of 2 and the configuration of its mark.

In view of the foregoing, the Registrant’s mark should not be cited against Applicant’s mark and confusion is not likely.

Conclusion

For the foregoing reasons, Applicant respectfully requests that the refusal of registration under Section 2(d) of the Lanham Act be reversed.

Description of Services

The Examiner has requested that “providing one or more links to third party retailers to provide additional options” be stricken from the Class 45 description of services. The Examiner has argued that this phrase is ambiguous and could refer to Class 35 advertising services.

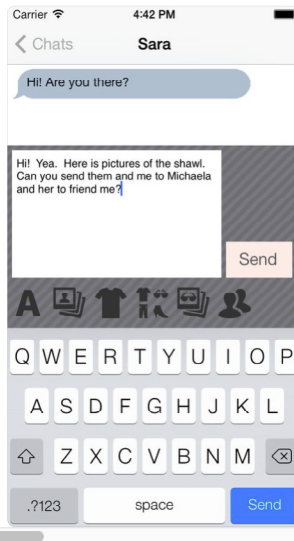
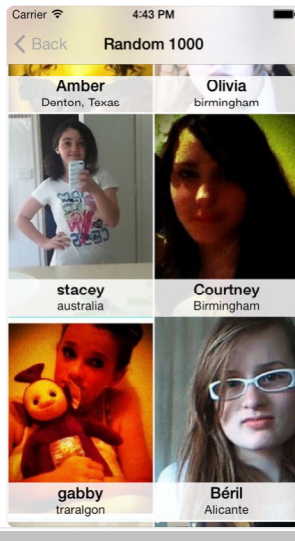
Applicant respectfully asserts that the description is properly classified in Class 45 because it appears in the larger clause “Online social networking services in the field of fashion, lifestyle, motivation, inspiration and self-improvement obtained through social media posting, and providing one or more links to third party retailers to provide additional options.” This clause in its entirety clarifies that the services are tied to social networking, which are classified in Class 45.

App Store



What to Wear™ (4+)
Modular Dreams Inc
Free

Screenshots [iPhone](#) [iPad](#)



Description

What to Wear? What to Wear's virtual closet and social networking makes it easy and fun to manage your wardrobe and your look; and share it with your best friends.

Simply catalog your wardrobe using your iPhone, iPod Touch, or iPad. Add description and notes to your clothes, as well as multiple pictures if you wish.

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What to Wear™

Category: Social Networking | Price: Free | Publisher: Modular Dreams Inc | View in Store | Country / Region: CN

Review Breakdown Per Day

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Description

What to Wear 是一款关注你和你的时尚风格的社交网络应用。What to Wear 让你比以往任何时候更加得心应手地管理自己的衣橱，你可以与好友分享你的着装和风格，发现并追随世界各地的时尚新潮流。

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Screenshots

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Categories: Social Networking Lifestyle

Country: 10/02/2013
Release Date:

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Release Date:

Most Popular Country: China

Last Updated: 10/23/2013

Current Version: 3.1

File Size: 7.2 MB

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

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Modular Dreams Revenue ... x

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8		Annoying Twit ★ ★ ★ ★ ★	INACTIVE	Free	90 months	4/13/2012	< 5k	< \$5k
9		Silly Faces Online ★ ★ ★ ★ ★	84 ▾	Free	103 months	3/25/2011	< 5k	< \$5k
10		Group Album ★ ★ ★ ★ ★	84 ▾	Free	106 months	12/22/2010	< 5k	< \$5k
11		Crystal Mine ★ ★ ★ ★ ★	81 ▾	Free	90 months	5/3/2009	< 5k	< \$5k
12		What to Wear ★ ★ ★ ★ ★	INACTIVE	Free	-	-	< 5k	< \$5k
13		What to Wear™ ★ ★ ★ ★ ★	19 ▾	Free	72 months	10/2/2013	< 5k	< \$5k
14		Orb Storm ★ ★ ★ ★ ★	84 ▾	Free	83 months	12/18/2011	< 5k	< \$5k
15		Photos Without... ★ ★ ★ ★ ★	84 ▾	Free	-	4/29/2016	< 5k	< \$5k

120%



Cats & Dogs Weather

Ad Forecast + Virtual Pet...

GET

★★★★★ 34

In-App Purchases

【 FEATURED in Apple App Store's "4 New Apps We Love" 】

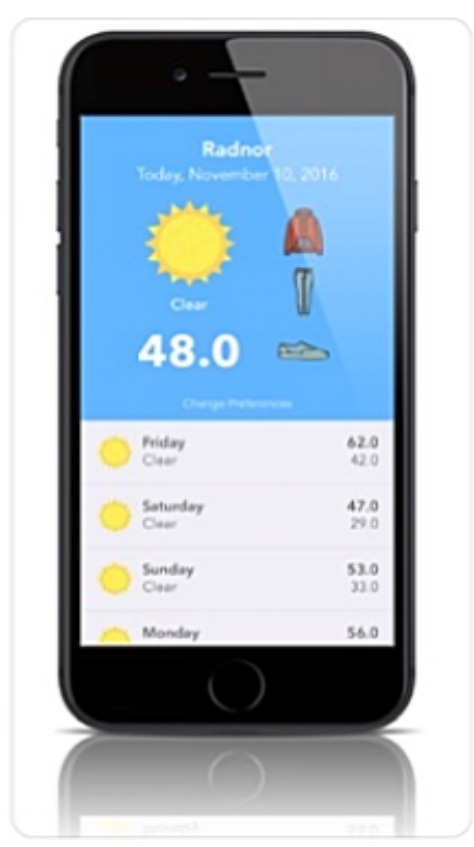


What to Wear

Weather

GET

★★★★☆ 22



Outfit Planner Chicisi...

My closet & clothes organiz...

GET

★★★★☆ 1.1K

In-App Purchases

What to wear



Cancel

Like that friend
who helps you
decide what to wear,
when you have
nothing to wear"

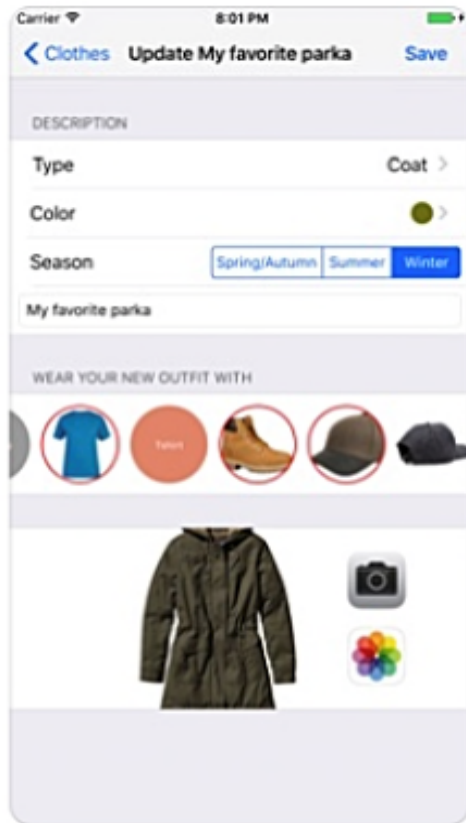
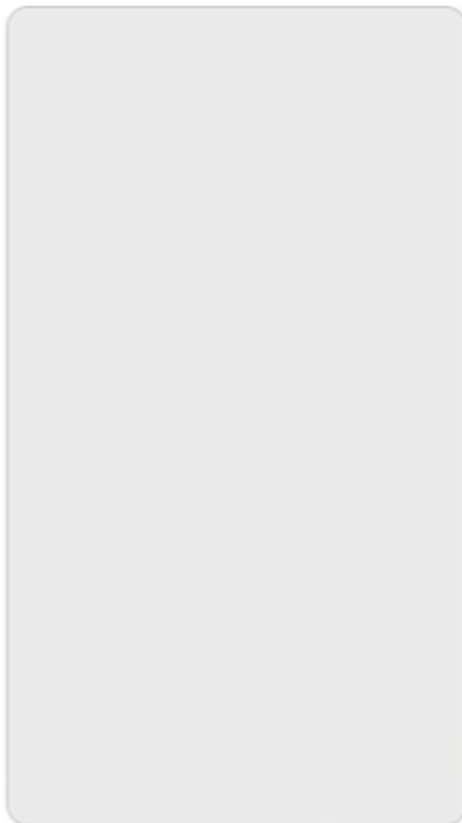


What to wear today

Utilities

★ ★ ☆ ☆ ☆ 28

GET



YourApparel - pick yo...

Manage your daily style

★ ★ ★ ★ ☆ 42

GET

In-App Purchases

What to wear



Cancel

Date Work
 Date Night Meeting

Seasons

Spring Summer
 Fall Winter

Colors

Brand

Not worn in the last days

Show results

Top Jeans

Shoes

Tap to add new apparel to this outfit

No time to take a picture? Just add a description and add the picture later.

Chic casual

Suitable For

Party Date

Date Night Meeting

Seasons

Spring Summer
 Fall Winter

Colors

Brand

Not worn in the last days

Show results



What To Wear Today

Weather

★★★★☆ 4

GET

Carrier 3:45 PM

What to Wear in San Francisco

Jacket
 2 Layers
 Long trousers
 Sneakers

52°

It's cold! Put on something warm like a sweater!

RIGHT NOW: 52°
 TODAY: 59°-50°
 TOMORROW: 60°-45°

Carrier 3:45 PM

Settings

Boy Girl

°F °C

Close

Powered by Dark Sky



Intelistyle: Fashion St...

Outfit ideas from your closet

GET



50

