

This Opinion is Not a
Precedent of the TTAB

Mailed: February 14, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Nautica Apparel, Inc.
v.
Majestique Corporation
—

Opposition No. 91212653
—

Stephen L. Baker of Baker and Rannells PA,
for Nautica Apparel, Inc.

Gino Negretti of Gino Negretti Law Offices,
for Majestique Corporation.

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Before Bergsman, Adlin and Masiello,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Majestique Corporation (“Applicant”) seeks registration on the Principal Register
of the mark shown below for the goods listed below:



Adult novelty gag clothing item, namely, socks; athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; athletic footwear; belts; belts for clothing; bottoms; clothing shields, namely, pads applied to the underarms of shirts, blouses and sweaters; footwear; footwear for men and women; footwear not for sports; headbands for clothing; jackets; leather belts; short sets; ties; tops; travel clothing contained in a package comprising reversible jackets, pants, skirts, tops and a belt or scarf; wearable garments and clothing, namely, shirts; women's clothing, namely, shirts, dresses, skirts, blouses.¹

The application includes the following description of the mark: “The mark consists of a ‘Sailboat.’”

Nautica Apparel, Inc., (“Opposer”) opposed the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles Opposer’s registered mark shown below for the goods listed below as to be likely to cause confusion:



Men’s, women’s and children’s wearing apparel, namely, hosiery, shoes, sneakers, boots, moccasins, undershirts, boxer shorts, shirts, blouses, trousers, pants, jackets, coats, suits, bathing suits, bathrobes, slippers, shorts, ties, neckwear, scarves, socks, hats and caps, gloves and

¹ Application Serial No. 85883577 was filed on March 23, 2013, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as June 27, 2012.

mufflers, belts and suspenders and foul weather gear, in Class 25.²

Opposer also pleaded that Applicant's mark is likely to dilute the distinctiveness of Opposer's marks pursuant to Section 43(c) of the Trademark Act, 15 U.S.C. §1125(c). However, because Opposer did not discuss this claim in its brief, it is waived. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013).

Applicant, in its Answer, denied the salient allegations in the Notice of Opposition.

I. Preliminary Issues

A. Applicant's motion to vacate the January 3, 2018 Order.

On January 3, 2018, the Board issued a final decision sustaining the opposition. Applicant, on January 9, 2018, filed a "Motion to Set Aside Decision for Cause" because Applicant and Applicant's counsel are located in Puerto Rico where Hurricane Irma (September 7, 2017) and Hurricane Maria (September 20, 2017) caused major damage to that island's infrastructure making it impossible for Applicant to file a timely brief.³ Applicant's motion includes Applicant's brief.

² Registration No. 2769600, registered September 30, 2003; renewed.

In its Notice of Opposition, Opposer pleaded ownership of 16 registrations for its sailboat design in various classes. Because the description of goods in the above-noted registration is in part identical to the description of goods in the application, we focus the likelihood of confusion analysis on that registration. If we do not find likelihood of confusion with respect to the marks at issue for goods that are, in part, identical, then there would be no likelihood of confusion with the other pleaded marks for goods that are not identical. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

³ 57 TTABVUE. Pursuant to the Board's March 16, 2017 Order and Trademark Rule 2.128(a), 37 C.F.R. § 2.128(a), Applicant's brief was due October 19, 2017. In a telephone conference with the Chief Clerk of the Board, on December 6, 2017, Applicant's counsel reportedly stated that he would file a request to reopen the time for Applicant to file its brief. Because the

Opposer does not object to Applicant's motion to set aside the January 3, 2018 final decision.⁴ Opposer's response includes Opposer's reply brief.

In view of the circumstances causing Applicant's failure to file a timely brief and Opposer's consent, Applicant's motion to set aside the January 3, 2018 final decision is granted and the January 3, 2018 final decision is set aside.

B. Opposer's objection to the exhibits attached to Applicant's brief.

Applicant did not introduce any testimony or evidence during its testimony period.⁵ Nevertheless, Applicant attempted to introduce three exhibits attached to its brief.⁶ Opposer, in its reply brief, objects to the evidence attached to Applicant's brief.⁷

Exhibits attached to a party's brief can be given no consideration unless the evidence was introduced during the time for taking testimony and introducing evidence. *See Syngenta Crop Protection v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1116 (TTAB 2009); *Bass Pro Trademarks LLC v. Sportsman Warehouse, Inc.*, 89 USPQ2d 1844, 1848 (TTAB 2008); *Life Zone Inc. v. Middleman Group, Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008). Accordingly, Opposer's objection to the exhibits attached to Applicant's brief is sustained and we give those exhibits no consideration.

Board did not receive the motion by end of the year, we issued the January 3, 2018 final decision.

⁴ 58 TTABVUE.

⁵ Pursuant to the March 16, 2017 Order, Applicant's testimony period closed June 6, 2017 prior to Hurricane Irma hitting Puerto Rico on September 7, 2017 and Hurricane Maria hitting Puerto Rico on September 20, 2017. Applicant did not seek to reopen its time to introduce testimony or evidence.

⁶ 57 TTABVUE 7-14.

⁷ 58 TTABVUE 3.

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file. Only Opposer introduced testimony and evidence, specifically:

- A. Notice of reliance on copies of its pleaded registrations printed from the USPTO electronic database showing the current status of and title to the registrations;⁸
- B. Notice of reliance on Applicant's responses to Opposer's Interrogatory Nos. 1, 6, 8, 9, 12, 16, 20 and 24 and Applicant's written response to Opposer's Request for Production No. 12;⁹ and
- C. The testimony declaration of Margaret Bizzari, Director of Intellectual Property and Product Liability for VF Sportswear, Inc., Opposer's parent corporation.

III. Standing

Opposer's pleaded registrations are of record and establish Opposer's standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

⁸ 36 TTABVUE.

⁹ 37 TTABVUE.

IV. Priority

Because Opposer has properly made of record its pleaded registrations, and because Applicant has not filed a counterclaim to cancel any of Opposer's pleaded registrations, Section 2(d) priority is not an issue in the opposition as to the marks and the goods covered by the pleaded registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*") (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant or for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant."). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental

inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 303 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The strength and fame of Opposer’s sailboat design mark.

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 marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); *McCarthy on Trademarks and Unfair Competition* § 11:83 (4th ed. 2017) (“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.”). Market strength is the extent to which the

relevant public recognizes a mark as denoting a single source. *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899.

1. The inherent strength of Opposer's sailboat design trademark.

Because Opposer's sailboat design mark has no apparent meaning when used in connection with clothing, it is inherently distinctive and, thus, a conceptually strong trademark. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.2d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as "a known word used in an unexpected or uncommon way" and observing that such marks are typically inherently distinctive)). Applicant concedes that "Opposer's sails design alone has no apparent meaning when used in connection with clothing."¹⁰

2. The commercial strength of Opposer's sailboat design trademark.

Opposer contends that its sailboat design mark "meets all the criteria for being 'famous.'" Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use because they have extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

¹⁰ 57 TTABVUE 4.

“[L]ikelihood of confusion fame ‘varies along a spectrum from very strong to very weak.’” *Joseph Phelps Vineyards, LLC v. Fairmount Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed Cir. 2017) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 USPQ2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003))). Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods and services identified by the mark at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1305-06 and 1309. Although raw numbers of product sales and advertising expenses sometimes suffice to prove fame, raw numbers alone may be misleading. Some context in which to place raw numbers may be necessary (*e.g.*, the substantiality of the sales or advertising figures for comparable types of products or services). *Id.* at 1309.

Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012) (citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007)).

Opposer introduced the following evidence to prove that its sailboat design is a famous mark:¹¹

- Opposer has been using the sailboat design mark on all of its products, including clothing, since 2001;¹²

- The sailboat design mark is featured in Opposer’s advertising and promotional materials;¹³

- Opposer “advertises and promotes its products in practically every media channel, including without limitation, print, outdoor (e.g., billboards, bus shelters, taxi tops, etc.), radio, TV, digital online, POS [point of sale], social media, email blasts, and mail advertising. [Opposer] also participates in sponsorships and cause marketing.”;¹⁴

- Opposer has advertised in magazines such as *GQ*, *In Style*, *People*, *Sports Illustrated*, *ESPN*, *Men’s Health*, *Elle Décor*, *House Beautiful*, and *Coastal Living*;¹⁵

¹¹ We have not considered Opposer’s evidence regarding unsolicited media attention because the evidence refers to the NAUTICA word mark and not the sailboat design. Bizzari Testimony Decl. ¶¶47-50 (53 TTABVUE 13-14) and Exhibit 8 (53 TTABVUE 104). For the same reason, the non-precedential cases cited by Opposer have little probative value. Bizzari Testimony Decl. Exhibit 13 (53 TTABVUE 130-230).

¹² Bizzari Testimony Decl. ¶13 (53 TTABVUE 4). Opposer’s products include, but are not limited to, jewelry, watches, eyeglasses, sunglasses, wallets, bags, trunks, sheets, blankets, and curtains. *Id.* at ¶¶10 and 15 (53 TTABVUE 4).

¹³ Bizzari Testimony Decl. ¶¶31 and 32 (53 TTABVUE 10).

¹⁴ Bizzari Testimony Decl. ¶34 (53 TTABVUE 11).

¹⁵ Bizzari Testimony Decl. ¶36 (53 TTABVUE 11).

- The number of “impressions” annually from Opposer’s advertising in print media exceeds 1 billion;¹⁶
- Opposer’s clothing products are sold throughout the United States in department stores and specialty stores, including, but not limited to, Opposer’s own stores, Amazon.com, Macy’s, Dillard’s, Belk, Bloomingdales, Costco, and other independent stores;¹⁷
- Between 2011 and 2016, Opposer’s annual sales in the United States have ranged between \$731,981,000 and \$870,291,000;¹⁸
- Between 2011 and 2016, Opposer’s annual advertising expenses in the United States have ranged between \$19,116,000 and \$27,875,000;¹⁹ and
- Between 2004 and 2007, Opposer ranked second in total sales volume in the men’s sportswear category in the department store channels of trade according to NPD Group.²⁰

On this record, Opposer’s sailboat design mark is not famous because there is no testimony or evidence that refers to the sailboat design mark separate and apart from

¹⁶ Bizzari Testimony Decl. ¶41 (53 TTABVUE 12). “The magazine industry publishes impressions as well as circulation numbers based on one’s media buy. Circulation data calculates the number of pages of media that are circulated. To estimate impressions, the industry standard is to use about four times a publication’s circulation number. It would say that if you have an ad in *People Magazine*, four people would see the ad in each physical magazine.” *Id.* at ¶39 (53 TTABVUE 12).

¹⁷ Bizzari Testimony Decl. ¶19 (53 TTABVUE 7).

¹⁸ Bizzari Testimony Decl. ¶25 (53 TTABVUE 9).

¹⁹ Bizzari Testimony Decl. ¶25 (53 TTABVUE 9).

²⁰ Bizzari Testimony Decl. ¶44 (53 TTABVUE 13). NPD Group is a “recognized data compiling company” that “tracks market share in the U.S. for various brands, monitoring consumer purchase data from over 165,000 stores.” *Id.* at ¶42 (53 TTABVUE 12).

the word mark. A design mark does not acquire fame simply because it is associated with a famous word mark. *Cf. Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1308 (“we think those who claim fame for product marks that are used in tandem with a famous house mark can properly be put to tests to assure their entitlement to the benefits of fame for the product marks.”). There is simply no testimony or evidence regarding the independent trademark significance of Opposer’s sailboat design mark.

Opposer contends, to the contrary, that the fame of its NAUTICA word mark establishes that its sailboat design mark is famous by association.

There is a symbiotic, reciprocal, concurrent and conjoint relationship between the NAUTICA word mark and the Nautica Design Mark. The two marks are used in conjunction with each other and as a result have become synonymous with each other. All of [Opposer’s] products are marketed with the NAUTICA word mark and with the Nautica Logo Mark (either on the product, or on labels attached to the product, or on hangtags, or on product packaging).²¹

Although there is a uniform coupling of the NAUTICA word mark with the sailboat design mark, the testimony and evidence do not indicate that the sailboat design alone is recognized by consumers. *See Am. Lebanese Syrian Assoc. Charities, Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1030 (TTAB 2011) (while consumers have been exposed to CURE4KIDS, it has not been as a standalone mark and it is not clear to what extent consumers have had an opportunity to disassociate CURE4KIDS from ST. JUDE’S CHILDREN’S HOSPITAL and, therefore, the evidence does not support that CURE4KIDS is commercially strong); *H.D. Lee Co. v.*

²¹ Bizzari Testimony Decl. ¶18 (53 TTABVUE 7).

Maidenform Inc., 87 USPQ2d 1715, 1727 (TTAB 2008) (“there is no evidence from which to infer from opposer’s advertising expenses and revenues the extent to which consumers recognize the ONE TRUE FIT mark standing alone and outside the context of the LEE trademark.”). Compare *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1306-07 (consumer presented with frequent references to the product marks WAVE and ACCOUSTIC WAVE separate and apart from the BOSE house mark). In situations involving words and designs, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the services. Cf. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987).

Nevertheless, the testimony and evidence establish that Opposer’s sailboat design mark has achieved recognition and in view of the distinctive nature of the mark, we find Opposer’s sailboat design mark to be commercially strong. In this regard, the sailboat design used to identify and distinguish the source of Opposer’s clothing is inherently distinctive, as well as commercially strong, and, therefore, entitled to a broad scope of protection.²²

²² Because Applicant did not introduce any testimony or evidence, there is no testimony or evidence regarding third-party use of sailboat designs to identify and distinguish the source of clothing.

B. The similarity or dissimilarity and nature of the goods and established, likely-to-continue channels of trade.²³

The goods are in part identical because the descriptions of goods in the application and Opposer's pleaded registration both include hats and caps, belts, jackets, shirts, blouses, pants, scarves, and footwear, slippers, shoes, sneakers, boots, or moccasins. Under this *du Pont* factor, Opposer need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is sufficient that relatedness is established for any item encompassed by the description of goods in a particular class in the application. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1588 n.1 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014).

Because the goods described in the application and Opposer's pleaded registration are in part identical, we must presume that the channels of trade and classes of purchasers are too. *See In re Viterra Inc.*, 101 USPQ2d at 1908 (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there

²³ The preface "adult novelty gag clothing items" in Applicant's description of goods applies only to socks because "[s]emicolons should generally be used to separate distinct categories of goods ... within a single class." Trademark Manual of Examining Procedure § 1402.01(a) (October 2017); *see also In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in registrant's identification, its "restaurant and bar services" is a discrete category of services that stands alone and independently as a basis for likelihood-of-confusion analysis, and is not connected to nor dependent on the services set out on the other side of the semicolon).

are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d at 1028.

Applicant argues, to the contrary, that the clothing sold by the parties is not offered in the same channels of trade. According to Applicant, Opposer's products are sold only in Opposer's retail stores while Applicant's products are sold in different discount stores.²⁴ Applicant's argument is unavailing because we must consider the goods as they are described in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). Therefore, notwithstanding Applicant's argument regarding where the clothing of the parties is sold, we may not limit the scope of where the goods are sold unless such a restriction appears in the descriptions of goods. *See e.g., In re Dixie Restaurants Inc.*, 105 USPQ2d, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Fisher Scientific Co.*, 440 F.2d

²⁴ 57 TTABVUE 4.

43, 169 USPQ 436, 437 (CCPA 1971); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Accordingly, the nature of the goods and their channels of trade are factors that favor finding that there is a likelihood of confusion.

C. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. However, “where the question of likelihood of confusion to be decided involves design marks which are not capable of being spoken, the question of the similarity of the marks must be determined primarily on the basis of their visual similarity.” *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990).

In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

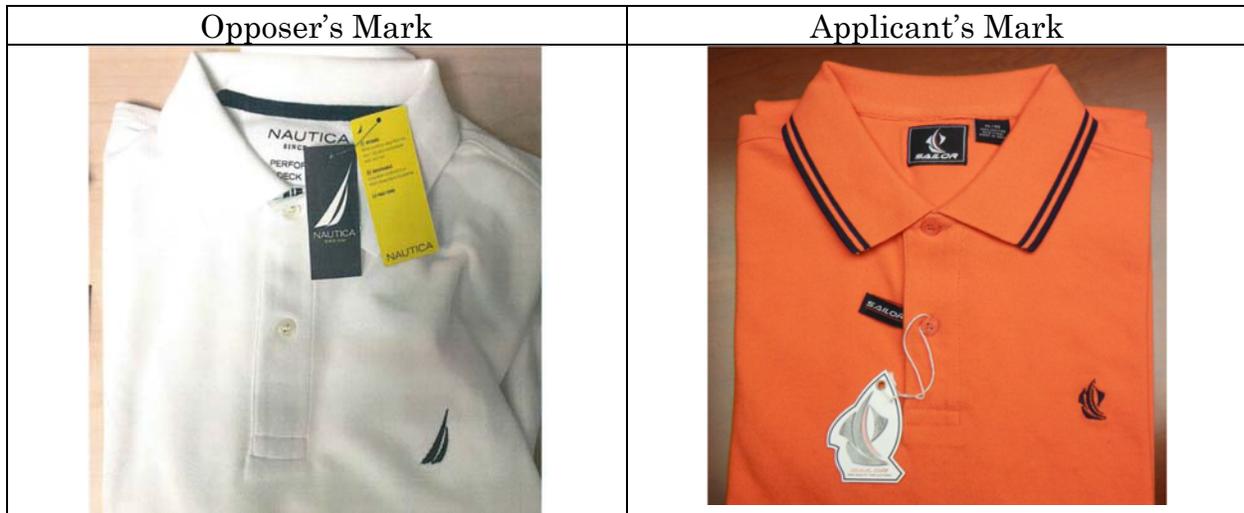
“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection

between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (quoting *Leading Jewelers Guild Inc. v. L’JOW Holdings LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)); see also *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods are clothing items without any restrictions or limitations as to price point, the average customer is an ordinary consumer.

The marks are shown below:

Opposer’s Mark	Applicant’s Mark
	

The marks are displayed on the left breast of knit shirts and on hang tags as shown below:



When the marks are seen by ordinary consumers, what will be remembered is a sailboat with billowing sails. The basic and obvious similarities between the marks outweigh the differences. In fact, in some ways Opposer's mark appears to be a portion of Applicant's mark facing the opposite direction. The differences between the marks, if noticed, may even suggest to viewers that Applicant's mark is another version of Opposer's mark adopted to identify a different line of clothing.

Applicant argues that the marks are not similar because Applicant's sailboat design is used in connection with the word "Sailor" and Opposer's mark is used in connection with the name "Nautica" and that they therefore engender completely different commercial impressions.²⁵ Applicant's argument that the marks at issue are not similar because they are used in connection with totally different words is not relevant. In this proceeding, we are concerned with Applicant's sailboat design as depicted in the drawing of its mark and the drawing of Opposer's sailboat design as depicted in its pleaded registration. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d

²⁵ 4 TTABVue 4.

at 1847-48 (because applicant filed to register a typed drawing of its mark, “it is irrelevant that [applicant] has a particular display for his mark in commerce, and the Board was correct to ignore those features.”); *SCM Corp. v. Royal McBee Corp.*, 395 F.2d 1018, 158 USPQ 36, 37 n.4 (CCPA 1968) (“Certain exhibits reflect the parties’ *current* practice of associating their house marks ‘SCM’ and ‘Royal’ with ‘ELECTRA’ and ‘ELECTRESS’, respectively. However, our concern here, of course, is whether ‘ELECTRA’, the mark actually registered, and ‘ELECTRESS’, the mark for which registration is sought, are confusingly similar when applied to the instant goods.”); *Sealy, Inc. v. Simmons Co.*, 265 F.2d 934, 121 USPQ 456, 459 (CCPA 1959) (“Though appellant’s labels include the house mark ‘SEALY’ in much the same manner that appellee’s label includes ‘SIMMONS,’ this factor is not germane to the question of likelihood of confusion between the secondary trademarks. It is to be presumed that either ‘BABY POSTUREPEDIC or ‘BABY POSTURE’ may be used at any time without the respective house-marks.”); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984) (“The fact that applicant’s stapler kits bear its house mark ‘REXEL’ as well as the product mark ‘LITTLE GOLIATH’ is not persuasive of a different result since applicant is seeking to register the mark ‘LITTLE GOLIATH’ alone.”).

We find that the marks are similar.

D. Analyzing the factors.

Because the marks are similar, the goods are in part identical and we must presume that the goods move in the same channels of trade and are sold to the same classes of consumers, we find that Applicant’s sailboat design mark  for clothing

is likely to cause confusion with Opposer's registered sailboat design mark  for clothing.

Decision: The opposition is sustained under Section 2(d) of the Trademark Act and registration to Applicant is refused.