

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 27, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

*In re Mick Schumacher*

Serial No. 79324040

Paul G. Novak of Orbit IP, LLP,  
for Mick Schumacher.

Jared M. Mason, Trademark Examining Attorney, Law Office 119,  
Brett Golden, Managing Attorney.

Before Adlin, Larkin and Casagrande, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Mick Schumacher seeks registration of the mark shown below on the  
Principal Register for a wide variety of goods in 12 International Classes:



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The Examining Attorney refused registration as to all of Applicant's Class 25 goods,  
and some of Applicant's goods in Classes 18 and 24, under Section 2(d) of the

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<sup>1</sup> Application Serial No. 79324040, filed June 2, 2021 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), requesting an extension of protection of International Registration No. 1621964. The application includes this description of the mark: "The mark consists of a shaded circle with an incomplete stylized number '47' on top of which is the silhouette of a right-facing man's head with a baseball cap." The application identifies goods in Classes 3, 9, 12, 14, 16, 18, 21, 24, 25, 26, 28 and 32.

Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles five commonly-owned registered marks including "47," "FORTY SEVEN" and variations thereof, that it is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed.

This case turns on the similarity or dissimilarity of the marks. In fact, Applicant has never disputed, during prosecution or on appeal, that his goods and Registrant's goods are identical. Applicant's arguments are all about the marks.

Because three classes of goods in the involved application are at issue, and the Examining Attorney cited five registrations in support of the refusal, we set forth Applicant's refused goods and summarize the cited registrations before addressing the likelihood of confusion.

### **I. The Goods at Issue and the Cited Registrations**


The Examining Attorney's refusal applies to the following goods identified in the involved application:

<u>Class 18</u>	<u>Class 24</u>	<u>Class 25</u>
luggage; schoolbags; backpacks	textile flags and pennants	clothing, in particular pants, jackets, leather jackets, shirts, t-shirts, sweaters and gloves; headwear, in particular caps and visors; footwear, in particular shoes for leisure wear and sports shoes <sup>2</sup>

The Examining Attorney cited the following registrations in support of the refusal:

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<sup>2</sup> The refusal applies to all of the identified goods in Class 25, but only some of the goods in Classes 18 and 24.

<u>Mark/Registration No.</u>	<u>Goods</u>
FORTY SEVEN Reg. No. 4239368	baseball caps and hats; bottoms; caps; hats; headwear; pullovers; shirts; sweatshirts; tank tops, in Class 25
47 Reg. No. 4277350 (the "350 Registration")	baseball caps and hats; bottoms; caps; ear bands; gloves; hats; headwear; jackets; mittens; pants; pullovers; shirts; shorts; socks; sweaters; sweatpants; sweatshirts; tank tops; tops; track jackets, in Class 25
FORTY SEVEN Reg. No. 5186718	cloth pennants; felt pennants, in Class 24  socks, in Class 25
'47 Reg. No. 5205191 (the "191 Registration")	cloth pennants; felt pennants, in Class 24  socks, swimwear, in Class 25
 Reg. No. 5551089 (the "089 Registration") <sup>3</sup>	back packs, duffel bags, in Class 18  cloth pennants; felt pennants, in Class 24  athletic uniforms; baseball caps and hats; bottoms; caps; cardigans; ear bands; gloves; hats; headwear; jackets; mittens; pants; pullovers; shirts; shorts; socks; sweaters; sweatpants; sweatshirts; tank tops; tops; track jackets; track pants; sneakers, boxers, swimwear, dress shirts, blazers; bandanas, in Class 25

## II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered);<sup>4</sup> *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir.

<sup>3</sup> The '089 Registration includes this description of the mark: “The mark consists of an apostrophe before the stylized number ‘47’ inside a circle.”

<sup>4</sup> As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in Trademark Trial and

2003). We must consider each *DuPont* factor about which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 1381 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”). As indicated, however, the key factor in this case is the similarity of the marks.

We focus our analysis on the mark in the cited ’089 Registration for Applicant’s Class 18 goods, the marks in the cited ’191 and ’089 Registrations for Applicant’s Class 24 goods, and the marks in the cited ’350 and ’089 Registrations for Applicant’s Class 25 goods. If we find confusion likely between these cited marks and Applicant’s involved mark for the identified goods, we need not consider the likelihood of confusion between Applicant’s mark and the other cited marks. On the other hand, if we find no likelihood of confusion between these cited marks and Applicant’s mark, we would not find confusion likely between Applicant’s mark and the other cited marks. *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 WL 22358, at \*2 (TTAB 2010).

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Appeal Board Manual of Procedure (“TBMP”) § 101.03 (2024). This opinion cites U.S. Court of Appeals decisions by the page numbers on which they appear in the Federal Reporter (e.g. F.2d, F.3d, or F.4th). For Board opinions, this decision cites to the Westlaw legal database.

**A. The Goods, Channels of Trade and Classes of Consumers**

Applicant's goods and Registrant's goods are in-part identical or legally identical in each refused Class. Specifically, in Class 18, the "back packs" identified in Registrant's '089 Registration are identical to Applicant's "backpacks." In Class 24, Applicant's "pennants" encompass the "cloth pennants" and "felt pennants" identified in Registrant's '191 and '089 Registrations. In Class 25: Applicant's "headwear, in particular caps and visors" encompasses Registrant's "baseball caps" identified in the cited '350 and '089 Registrations; and Applicant's "shirts," "jackets" and "pants" are identical to Registrant's "shirts," "jackets" and "pants," respectively, identified in the cited '350 and '089 Registrations. We need not consider the other goods in the refused Classes because it is sufficient for a finding of likelihood of confusion if identity is established for any item encompassed by the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp. Inc.*, 648 F.2d 1335, 1336 (CCPA 1981). Applicant does not dispute that the goods are identical or legally identical in-part.

Because certain of Applicant's goods in each refused Class are identical or legally identical to goods in the cited registrations, we presume that the channels of trade and classes of purchasers for those identical or legally identical goods also overlap. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Rsch. Inst.*, Opp. No. 91190361, 2011 WL 4090447, at \*6 (TTAB 2011).

The legal identity of the goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to conclude that there is a likelihood of confusion. *In re Viterra*, 671 F.3d at 1360; *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed Cir. 2010).

### **B. The Cited Marks' Strength**

Before addressing the marks themselves, we consider the strength of the cited marks, to ascertain the scope of protection to which they are entitled. There are two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength ....”).

Here, Applicant points out that “evidence of the extensive registration and use of a term by others can be powerful evidence of the term’s weakness.” 12 TTABVUE 22<sup>5</sup> (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334 (Fed. Cir. 2015) and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U.*, 797 F.3d 1363 (Fed. Cir. 2015)). But Applicant has not introduced “extensive” evidence of third-party use or registration. Rather, it has only introduced six third-party registrations, and quite limited evidence of use by a single third party.<sup>6</sup>

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<sup>5</sup> Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

<sup>6</sup> Applicant’s evidence falls quantitatively far short of the evidence found to be “extensive” in *Juice Generation* and *Jack Wolfskin*. See *In re Morinaga Nyugyo K. K.*, Ser. No. 86338392, 2016 WL 5219811, at \*9 n.8 (TTAB 2016)

Applicant's third-party registration evidence, "with no evidence of the extent of the use of the marks in commerce, [does] not diminish the commercial strength of" the cited mark, though the registrations "may bear on conceptual weakness if a term is commonly registered for similar goods or services." *In re Embiid*, Ser. No. 88202890, 2021 WL 2285576, at \*17 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, Canc. No. 92057132, 2017 WL 6336243, at \*14 (TTAB 2017)).

The evidence of use of "47"-formative marks in the record shows only that Wrangler Apparel Corp. offers "47"-branded clothing on its website, and that a Wrangler "47" product was available on eBay. December 6, 2022 Office Action response TSDR 97-113.<sup>7</sup> While Applicant has also shown that Wrangler has had sales success in the United States generally, that success is not tied to any specific mark, much less Wrangler's "47"-formative marks. July 5, 2023 Request for Reconsideration TSDR 54-57. This extremely limited and undetailed showing is not sufficient for us to find that any of the marks in the cited registrations are commercially weak.

As for conceptual strength, the six registrations of "47"-formative marks for clothing and footwear upon which Applicant relies fall quantitatively far short of "evidence of the extensive registration," 12 TTABVUE 22, of "47" as a mark. Moreover, four of the registrations Applicant relies upon have the same owner. December 6, 2022 Office Action response TSDR 63-96. Specifically, Wrangler owns Registration Nos. 4418839, 3749779, 5715872 and 4567812, *id.* at 63-85, for the

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<sup>7</sup> Citations to the application file are to the USPTO's Trademark Status & Document Retrieval ("TSDR") online database, in the downloadable .pdf format.

marks ROCK 47, WRANGLER 47 and R47 in various forms for clothing. These third-party registrations only show registration of “47” for relevant goods by a single registrant and are less persuasive than they would be if separately-owned; if separately-owned, that would imply that “47” has a descriptive or suggestive connotation within the clothing field. *See e.g. Specialty Brands, Inc, v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675 (Fed. Cir. 1984) (third-party registration evidence can be used to “demonstrate the ordinary dictionary meaning of a term or the meaning of a term to those in the trade”) (citation omitted). The other third-party



registrations Applicant relies upon are: Registration No. 5117747 for the mark for football jerseys; and Registration No. 5483442 for the mark A-47 for “flip flops; footwear.” *Id.* at 86-96. While all of these third-party registrations are entitled to at least some weight, there are not enough registrations (or third-party owners of the registrations) to establish that the cited marks are conceptually weak enough to not be entitled to protection against confusingly similar marks for in-part identical Class 25 goods.<sup>8</sup> Moreover, Applicant has not introduced any evidence of weakness of the cited marks in Classes 18 or 24.

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<sup>8</sup> Even if the few third-party registrations Applicant introduced showed some level of conceptual weakness, it is settled that likelihood of confusion “is to be avoided as much between weak marks as between strong marks.” *In re Colonial Stores, Inc.*, Ser. No. 209079, 1982 WL 52041, at \*3 (TTAB 1982).



Because Applicant has not introduced evidence sufficient to show that Registrant's marks are commercially or conceptually weak under the sixth *du Pont* factors, these factors are neutral.

### **C. The Marks**

We consider marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Here, the marks are similar because they each contain "47" or variations thereof, and dissimilar because Applicant's mark includes a distinctive design and Registrant's marks do not. As explained below, we find that the similarities between the marks outweigh the dissimilarities.

However, before addressing the marks as they appear in the drawing pages of the cited registrations and involved application, we first summarize evidence and arguments Applicant presented about himself during prosecution, which he calls "General Remarks"; Applicant continues to pursue these arguments on appeal. December 6, 2022 Office Action response TSDR 21-22, 34-38; 12 TTABVUE 11-13.

#### **1. Applicant's "General Remarks"/Arguments About His Involved Mark**

Applicant claims to be "a well-known German automobile racing driver, who is the son of famous racing driver Michael Schumacher and who is already known to the general public and in particular to the automobile racing scene." 12 TTABVUE 11; December 6, 2022 Office Action response TSDR 34-37. Applicant drives for "the Haas

F1 team in the world's most famous car race, the 'Formula 1.'" 12 TTABVUE 12; December 6, 2022 Office Action response TSDR 34.

When Applicant joined the Haas team he "received" the racing number "47." 12 TTABVUE 12. Applicant chose the number for several reasons. First, it "represents the sum of the added birthdays of his family members." *Id.* Second, Applicant's famous father Michael Schumacher "always chose the number '7'; not least because it is the number of his world championship titles." *Id.* Third, Applicant "adopts the interpretation of his fans that the racing number should be read as 'for' (instead of 'four') '7', with the '7' standing for Michael. The racing number therefore means 'For Michael.'" *Id.*<sup>9</sup>

According to Applicant, his involved mark "was developed for [Applicant], including the racing number '47', in which his shadow outline of [Applicant] with his characteristic cap is shown." *Id.* Applicant more specifically argues that the design feature is shown "dominantly in the foreground," and that the "racing number '47' is strongly alienated in the background of the logo and can only be recognized with the inclusion of additional considerations, since the contours of the numbers are covered and changed by the shadow outline." *Id.*

Applicant's website explains why he chose the number 47, and the explanation is consistent with the arguments in Applicant's Appeal Brief and other evidence, but contains additional details:

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<sup>9</sup> According to Applicant's Wikipedia entry, Applicant "chose to race with the number 47 ... as his two favourite numbers, 4 and 7, were already in use." December 6, 2022 Office Action response TSDR 35.

I chose race number 47 for several reasons, and all of them make it the ideal race number for me. My favourite number is 4. I can find myself in everything it stands for. Responsibility, curiosity, determination. And I have won a championship with it. The 7 stands for my father. The 4 and the 7 together form a unity of the two of us. And the fact that the birthdays of our family add up to 47 feels to me like a confirmation of this choice.

December 6, 2022 Office Action response TSDR 38 (English translation of original statement in German).

## **2. Sound**

The marks will likely be pronounced identically. Indeed, the number “47” is the only portion of Applicant’s mark that is likely to be verbalized, and it is therefore how consumers would call for the goods. *See L.C. Licensing, Inc. v. Berman*, Opp. No. 91162330, 2008 WL 835278, at \*3 (TTAB 2008) (“In terms of sound, obviously the design portion of opposer's mark will be not be spoken, and thus, the marks are identical in this respect. Further, it is well settled that if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods.”); *In re Appetito Provisions Co. Inc.*, Ser. No. 73423405, 1987 WL 124293 at \*1 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services”).

Here the marks will “sound” the same when verbalized, because the cited marks are forms of the number “47,” and that is the literal component of Applicant’s mark. Consumers would not be expected to request a specific hat or other product by asking

a retailer for a good bearing “the silhouette of a right-facing man’s head with a baseball cap,” or by any similar or analogous description. Indeed, such a hypothetical identifier could not be as readily searched via a store’s computer system as text, nor would all consumers be likely to describe the design element of the mark in the involved application the same way, greatly complicating any search for the associated goods. By contrast, all consumers would be expected to pronounce “47” identically, and text and numbers such as “47” are searchable and more easily categorizable than a particular depiction of a man wearing a baseball cap (an ubiquitous sight throughout the United States). As for the cited marks in Registrant’s ’350, ’191 and ’089 Registrations, neither the apostrophe in two of them nor the circle surrounding one of them would be likely to be pronounced. Applicant concedes that the apostrophe would not be verbalized. 12 TTABVUE 21 (in Registrant’s marks, “the apostrophe is not pronounced as a placeholder”).

While Applicant suggests (and we agree) that the apostrophe before “47” in two of the cited marks conveys that “47” represents a year, 12 TTABVUE 13, this portion of the two marks would not be verbalized, as Applicant concedes.<sup>10</sup> Thus, the apostrophe will not distinguish the sound of the number “47” in two of Registrant’s cited marks from the sound of the number “47” in Applicant’s. *Cf. Mini Melts, Inc. v. Reckitt Benckiser LLC*, Opp. No. 91173963, 2016 WL 3915987, at \*5 (TTAB 2016) (“the hyphen in Applicant’s mark MINI-MELTS does not distinguish it from Opposer’s

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<sup>10</sup> There is no evidence that consumers would attempt to verbalize an apostrophe that precedes a year (such as “summer of apostrophe 69”).

mark” MINI MELTS); *Mag Instrument, Inc. v. Brinkmann Corp.*, Opp. No. 91163534, 2010 WL 3253200 (TTAB 2010) (“the initial term in both marks is essentially identical; the hyphen in the Mag Instrument’s mark [MAG-NUM STAR] does not distinguish” it from MAGNUM MAXFIRE).

It is settled that similarity in sound alone may be enough to establish that the marks are confusingly similar. *In re 1st USA Realty Prof., Inc.*, Ser. No. 78553715, 2007 WL 2315610, at \*5 (TTAB 2007); *In re White Swan Ltd.*, Ser. No. 617169, 1988 WL 252416, at \*2 (TTAB 1988); *Re/Max of Am., Inc. v. Realty Mart, Inc.*, Opp. No. 91059684, 1980 WL 30159, at \*5 (TTAB 1980) (“Turning first to the similarities between the respective marks, we note that applicant’s mark ‘REMACS’ and the mark of opposer, namely ‘RE/MAX’ are indistinguishable in sound; and it has been consistently held that similarity in any one of the elements of sound, appearance, or meaning is sufficient to indicate a likelihood of confusion.”). *See generally Krim-Ko v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”).

### **3. Appearance**

Not surprisingly, Applicant focuses primarily on the design element of his mark in arguing that the marks look different:

Compared to Registrant’s marks, Applicant’s mark has an overall significantly darker presentation with a black circular area and with the prominent silhouette of a man wearing a peaked cap, which contrasts against a white geometric surface sections within the black circular area.<sup>11</sup> Formula 1 fans within the targeted trade circles recognize

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<sup>11</sup> Color is not claimed as a feature of the involved mark or any of the cited marks.

that it is the silhouette of the head of Formula 1 racing driver Mick Schumacher with a base cap that he typically wears.

12 TTABVUE 19. Applicant contends that it is “unclear that a consumer not familiar with racing would recognize the number ‘47’ in Applicant’s mark at all.” *Id.* More specifically, Applicant contends that the “47” in his mark “is half-hidden and barely legible in the background,” and that recognizing the “47” may “very well be easier for Formula 1 fans among the target public than for the rest of the public, because they are familiar with Mick Schumacher’s racing number ‘47’ in the Formula 1 car.” *Id.* at 19-20.

We agree with Applicant that the design element of his mark is a significant visual distinction between Registrant’s cited marks and Applicant’s involved mark, but disagree with Applicant’s arguments about consumers’ alleged inability to discern the number 47 in his mark. Applicant’s request for extension of protection identifies the “textual elements” of his mark as “47,” describes the mark in the application as including “an incomplete stylized number ‘47,’” and more to the point Applicant concedes in his Appeal Brief that his mark “incorporates his racing number ‘47’ in the background.” 12 TTABVUE 2. Applicant also concedes that the “47” in his mark may be “recognized or assumed from a closer analytical approach,” and understood “as the number of the person silhouetted in the mark.” *Id.* at 21. These are significant concessions, because as explained above, consumers would be unlikely to “call for” the goods by requesting those bearing “the silhouette of a right-facing man’s head with a baseball cap,” or any other attempted description of the design element of Applicant’s

mark. Rather, they would be likely to refer to the mark and call for the associated goods by using the mark's "textual element," the number "47."

In any event, while we agree with Applicant that the "47" in his mark is partially obscured, we disagree that it is unrecognizable or recognizable only with difficulty. Applicant's argument that "the association of the left part of the logo leads to the reproduction of the letter 'A'" is belied by the appearance of the right part of the "4" in Applicant's mark, which is vertical. This vertical right part is consistent with a "4," as is the diagonal left part of the "4" that extends from the top of the vertical part down and to the left. That is how "4"s are depicted. An "A," by contrast, has two diagonal lines that meet at the top of the letter and extend diagonally downwards in opposite directions. It is clear from Applicant's mark that the left and right parts of the "4" are completely consistent with how "4"s are depicted, but the right part is inconsistent with how capital "A"s are depicted.

Similarly, while the silhouette design is "on top" of the "47," it does not disguise that the right part of the mark under the silhouette is a "7." Indeed, the location of the top of the "right-facing man's head with a baseball cap," under the top horizontal part of the "7" and to the left of the diagonal vertical part, makes the "7" apparent. Specifically, as a result of the contrast between the silhouette and what lies under it, the white part under the man's baseball cap is depicted as "7"s are depicted, with a horizontal line extending across the top, and meeting a diagonal line that begins on the far right and extends from the horizontal line at the top of the number down and to the left.

Applicant's concession that recognizing the "47" may "very well be easier for Formula 1 fans among the target public than for the rest of the public," 12 TTABVue 19-20, is also significant here. We agree with Applicant that for at least some consumers of the goods broadly identified in the application, the silhouette design and number "47" are mutually reinforcing and referential. *See In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 WL 1620989, at \*6 (TTAB 2018) ("in this case, the house design in Applicant's mark may be interpreted as a large estate home or 'chateau' that would correspond to, or at least call to mind, the word CHATEAU in Registrant's mark"); *In re Rolf Nilsson AB*, Ser. No. 73448244, 1986 WL 83581, at \*1 (TTAB 1986) ("it is well settled that a picture and the word that describes that picture are given the same significance in determining likelihood of confusion"). Registrant's identifications of goods include no trade channel or class of consumer-related restrictions, and thus are presumed to be marketed to all consumers for the goods, including Formula 1 fans, who Applicant admits would recognize the "47" in Applicant's mark because it is Applicant's racing number.<sup>12</sup> These fans could be confused upon encountering Applicant's or Registrant's mark, and wonder if there is some affiliation between Applicant and Registrant.

While all of the cited marks are essentially identical in sound, that is not the case with appearance, as the mark in the cited '089 Registration has features which the marks in the cited '350 and '191 Registrations do not. Specifically, the mark in the

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<sup>12</sup> We can reasonably assume that Applicant intends for his fans to be among the purchasers of the identified goods, and we must assume in any event that they could be purchasers. *See Embiid*, 2021 WL 2285576, at \*13.



'089 Registration, like Applicant's involved mark, depicts the number "47" (in Registrant's case preceded by an apostrophe) inside a circle, with the "47" contrasting in both Applicant's and Registrant's mark with its solid background. This point of similarity sticks out, because in some ways the mark in the cited '089 Registration and Applicant's mark look in part like mirror images of each other. We have not ignored the silhouette design in Applicant's mark, but because both marks include the number "47" inside a circle with contrasting background, Applicant's mark could easily be perceived as a version of Registrant's by a consumer with a general rather than specific recollection of Registrant's mark(s). We find all of the marks on which we focus here to be more similar than dissimilar.<sup>13</sup>

Turning to the marks in the '350 and '191 Registrations in their entireties, we find that although they do not display "47" in a circle like the mark in the '089 Registration, they are also nevertheless more similar than dissimilar to Applicant's mark. And, as standard character marks they could be displayed somewhat similarly. *In re Viterra*, 671 F.3d at 1363; *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011). The "textual element" in each of these marks and Applicant's mark is essentially identical. Some consumers, presented with

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<sup>13</sup> We have not ignored the apostrophe in the marks in the cited '191 and '089 Registrations, but find that some consumers would. The apostrophe is tiny compared to the number "47" in both marks, and therefore does not meaningfully change the marks' appearance. Furthermore, consumers who notice the small apostrophe in these marks may not remember it. Indeed, we must keep in mind: (1) "the fallibility of memory over a period of time;" and (2) that the "average" consumer "normally retains a general rather than a specific impression of trademarks." *Sealed Air Corp. v. Scott Paper Co.*, 1975 WL 20752, at \*3 (TTAB 1975). See also *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) ("marks must be considered in light of the fallibility of memory") (citation, internal quotation marks, and ellipsis omitted).

Applicant's and Registrant's marks for identical goods, could presume that Applicant's mark is a design version of Registrant's "47" mark, even if they remember the apostrophe in some of Registrant's marks.

In short, the marks look more similar than dissimilar.

#### **4. Meaning and Commercial Impression**

In arguing that the marks create "an entirely different commercial impression and connotation," 12 TTABVUE 14-18, Applicant claims that the "dominant feature of Applicant's mark is the silhouette of Mick Schumacher wearing a baseball cap." We disagree.

As explained above, the literal element of a mark is typically entitled to more weight in our analysis than the design. *In re Viterra*, 671 F.3d at 1362 ("the verbal portion of a word and design mark likely will be the dominant portion"); *In re Appetito Provisions*, 1987 WL 124293 at \*1 (holding that "if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services" and "because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar"). Here, however, we agree with Applicant that the silhouette design is graphically distinctive, and find it distinctive enough to make this the atypical case where the textual element of the mark is not dominant.

But that does not mean that the design is dominant. For that to be the case, the design would have to be much more impactful than the textual element and here it is not. Indeed, the mark's textual element is the only contributor to the mark's sound,

and it is an inescapable part of the mark's appearance. Moreover, in the F1 world, "47" identifies Applicant much more readily than a silhouette of a man whose identity could not be determined from the design alone. The "47" in Applicant's mark, which is Applicant's racing number, is much more likely to identify Applicant than a "right-facing man's" head with no discernible facial features. For these reasons, we find that neither the "47" nor the silhouette design is dominant in Applicant's mark.<sup>14</sup>

In any event, the number "47" is a significant part of the marks' meaning and commercial impression, even though we agree with Applicant that his mark creates the commercial impression of a person, the man with the hat, and Registrant's mark does not. Consumers encountering the mark in Registrant's '350 Registration (without an apostrophe) would be just as likely to associate Registrant's "47" with a person as anything else, and those familiar with Applicant's mark could assume that Registrant's mark is a variation of Applicant's (or vice versa). While some consumers encountering the marks in Registrant's '191 and '089 Registrations (with apostrophes) may assume those marks refer to a year ending in "47," others may not notice the apostrophe or if they do they could forget it and associate Registrant's "47" marks with Applicant's mark. *In re St. Helena Hosp.*, 774 F.3d at 751; *Sealed Air*, 1975 WL 20752, at \*3.

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<sup>14</sup> This is especially so as to the '350 and '089 Registrations, which cover hats, because a hat design may well be perceived not as identifying source, but as descriptive of the goods. *See e.g., In re Singer Mfg. Co.* 255 F.2d 939, 941 (CCPA 1958) (a design depicting the goods is descriptive); *In re Eight Ball, Inc.*, 1983 WL 51789, at \*1 (TTAB 1983) (same).

Ultimately, we find that the marks' shared textual element, "47," even when preceded by an apostrophe, is enough of a similarity in meaning and commercial impression for confusion to be likely where, as here, Applicant and Registrant offer in-part identical or legally identical goods. As mentioned above, the legal identity of the goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 671 F.3d at 1367; *In re Mighty Leaf Tea* 601 F.3d at 1348.

In short, the marks are more than similar enough in their meanings and commercial impressions for confusion to occur when used for in-part identical goods.

#### **5. Conclusion Regarding the Marks**

We find the marks more similar than dissimilar in their entireties, primarily because they sound identical, and secondarily because they look similar in-part, convey similar meanings and create similar commercial impressions. *See Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1119 (Fed. Cir. 2024)

### **III. Conclusion**

The marks are more similar than dissimilar, and Applicant has not shown that Registrant's cited marks are weak. Crucially, the goods are identical and thus presumed to travel in the same channels of trade to the same classes of consumers.

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Because these factors all weigh in favor of concluding that confusion is likely, we so conclude.<sup>15</sup>

**Decision:** The refusal to register Applicant's mark for the Class 25 goods, and some of the goods in Classes 18 and 24, under Section 2(d) of the Trademark Act is affirmed.

The application will proceed as to the goods not subject to the refusal.

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<sup>15</sup> As the Examining Attorney points out, 14 TTABVUE 9, Applicant's reliance on "other decisions" about the involved and cited marks by foreign countries, 12 TTABVUE 25, is misplaced. *Boston Chicken v. Boston Pizza Int'l Inc.*, Canc. No. 25780, 1999 WL 1273346, at \*3 (TTAB 1999).