

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 28, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re MassDrop, Inc.*

Serial No. 87869354

Richard M. Assmus, Kristine M. Young and Madelaine M. Thomas  
of Mayer Brown LLP for MassDrop, Inc.

Pauline Ha, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

Before Zervas, Adlin and Lebow, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant MassDrop, Inc. seeks registration of DROP, in standard characters, for “belts for clothing; leather belts; jeans; denim jeans; blue jeans; baseball caps and hats; clothing, namely, t-shirts, long sleeve t-shirts, sweatshirts, sweaters, jackets; clothing for men, namely, tops, bottoms, headwear, footwear; sneakers; all of the foregoing excluding gloves and not specifically for skiing or snowboarding” in International Class 25.<sup>1</sup> The Examining Attorney refused registration under Section

<sup>1</sup> Application Serial No. 87869354, filed April 9, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged bona fide intent to use the mark in commerce.

2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles an identical registered mark (DROP in typed form) for, *inter alia*, "gloves for use in skiing and snowboarding,"<sup>2</sup> also in International Class 25, that use of Applicant's mark in connection with Applicant's goods is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. The appeal is fully briefed.

## **I. Evidentiary Objection**

The Examining Attorney's objection to evidence attached to Applicant's Appeal Brief which was not previously made of record is sustained. Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal.")<sup>3</sup>

## **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, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *du Pont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two

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<sup>2</sup> Registration No. 2508470, issued November 20, 2001; renewed.

<sup>3</sup> We hasten to add that if the list of third-party registrations provided in the body of Applicant's Appeal Brief is accurate, and the underlying registrations had been timely introduced, our ultimate decision on the merits would be the same. Indeed, as the Examining Attorney points out, the third-party registrations on which Applicant seeks to rely are apparently not for the mark DROP alone, which is the mark at issue in this case.

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, 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.”).

#### **A. The Marks**

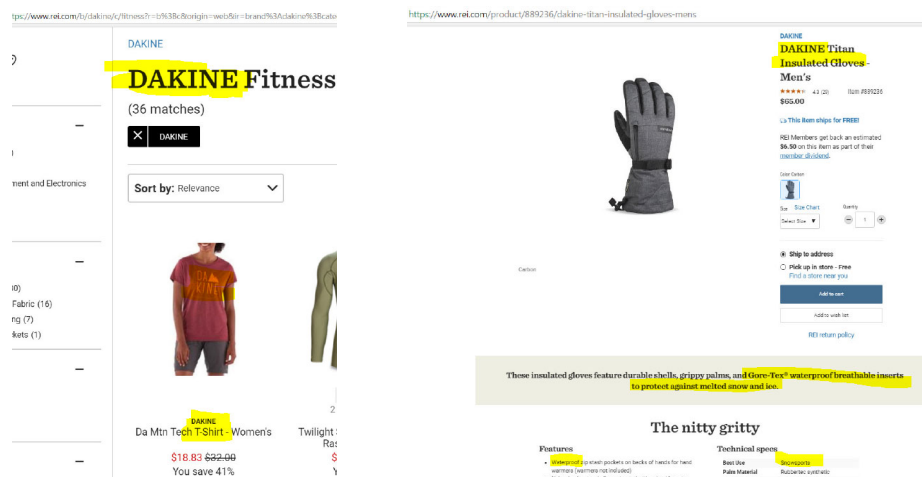
The marks are identical in appearance, sound, meaning and commercial impression, because there is no substantive difference between marks in standard characters and marks in typed form. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks, but the preferred nomenclature was changed in 2003 to conform to the Madrid Protocol ... we do not see anything in the 2003 amendments that substantively alters our interpretation of the scope of such marks”). Applicant does not argue that the marks are different in any way. This factor not only weighs heavily in favor of finding a likelihood of confusion, but also reduces the degree of similarity between the goods required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

#### **B. The Goods, Channels of Trade and Classes of Consumers**

Applicant’s suggestions to the contrary notwithstanding, the goods need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that “could give rise to the

mistaken belief that [the] goods emanate from the same source.” *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, the Examining Attorney has established through Internet printouts that a number of third parties use the same marks for ski gloves on the one hand and the types of clothing Applicant intends to offer on the other. For example, DAKINE is used for t-shirts such as those identified in the involved application, and snowsports gloves, such as those identified in the cited registration:




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September 10, 2018 Office Action TSDR 49-50. Similarly, the marks SMARTWOOL and THE NORTH FACE are each used (by different owners) for ski gloves, identified in the cited registration, and jackets, identified in the involved application:


### Smartwool Men's Jackets

(10 matches)


Sort by: Relevance





**REI OUTLET**  
3 colors available  
**Smartwool**  
Corbet 120 Insulated Jacket - Men's  
~~\$200.00~~  
**\$139.73**  
You save 30%



**Smartwool**  
Corbet 120 Jacket - Men's  
~~\$200.00~~  
**\$99.83**  
You save 50%



**Smartwool**  
**Smartwool Ridgeway Gloves**  
★★★★★ 4.5 (48) Item #835548  
~~\$80.00~~  
**\$39.83**  
Orders of \$50 or more ship for free.

Color:  

Size: [Size Chart](#)  
Select size: 1

Quantity: 1

☒ Ship to address  
☐ Pick up in store - Free  
Find a store near you

[Add to cart](#)  
[Add to wish list](#)  
[REI return policy](#)


**The nitty gritty**

**Features**  
Nine leather exteriors combine with merino nylon panels to provide great dexterity and grip. Side-layer thumbs and index fingers are reinforced to hold up to regular use on mountain adventures.

**Technical specs**

Best Use	Snowsports
Palm Material	Leather
Fabric	(Main) leather / (panels) 80% merino wool/20% nylon



s://www.rei.com/product/119210/the-north-face-montana-gore-tex-insulated-gloves-womens



**The North Face**  
**The North Face Montana GORE-TEX Insulated Gloves - Women's**  
★★★★★ 4.5 (26) Item #119210  
~~\$70.00~~  
**\$34.83**  
REDUCED PRICE You Save 50%

Orders of \$50 or more ship for free.

**HURRY! This item is discontinued. Shop now for best selection.**

Color:  

Size: [Size Chart](#)  
Select size: XS

Quantity: 1

[Shipping restrictions apply](#)

☒ Ship to address  
☐ Pick up in store - Free  
Find a store near you

[Add to cart](#)  
[Add to wish list](#)  
[REI return policy](#)

\* Immediate markdowns may have been taken.

**The nitty gritty**

**Features**

- GORE-TEX inserts provide dexterity and waterproof, breathable protection
- High-pile fleece lining and 250g Heatseeker synthetic insulation provide extra warmth

**Technical specs**

Best Use	Snowsports, Snowboarding, Skiing
Palm Material	Synthetic leather

**REI OUTLET**


Search for deals

Your REI Account [Account](#) [REI Cart](#)

Activities Men Women Kids Footwear Brands More Deals

Extra 20% off one item with code EXTRA20 at checkout thru 9/3. [Details](#)





Men's Clothing > Men's Jackets > Men's Insulated Jackets > Men's Synthetic Insulated Jackets



**The North Face**  
**The North Face ThermoBall Insulated Full-Zip Jacket - Men's**  
~~\$190.00~~  
**\$148.73**  
Save \$40.27 (21%)

**Special Offer**  
Extra 20% off one item with coupon code EXTRA20 through Sept. 3. [Terms & Conditions](#)

★★★★★ 5.0 (1) Item #125572

Select Color:    

Select Size: [Size Chart](#)  
XS S L XL XXL

**The nitty gritty**

For lightweight, cold-weather comfort, layer on The North Face

5

Serial No. 87869354

*Id.* at 51-52, 55-56. The mark OUTDOOR RESEARCH is used for men's footwear, such as identified in the involved application, and ski gloves, such as identified in the cited registration, while MARMOT is used for both sweaters, identified in the involved application, and ski gloves, identified in the cited registration:


Outdoor Research

### Outdoor Research Footwear


(11 matches)

Sort by: Relevance


View



Outdoor Research  
Crocodile Gaiters - Men's  
\$95.00  
★★★★★ (8)



Outdoor Research  
Verglas Gaiters - Men's  
\$65.00  
★★★★★ (24)



Roc

Outdoor Research

### Outdoor Research Arete Gloves

★★★★★ 37 (4) Item 185206 \$80.00

✓ This item ships for FREE!

REI Members get back an estimated \$9.00 on this item as part of their member dividend!

Color: Backcountry

Size: Size Chart

Subst Size: 1

Quantity: 1

Shipping restrictions apply

Ship to address: ☐ Pick up in store - Free Find a store near you

Add to cart

Add to wish list

REI return policy

Outdoor Research Arete alpine gloves offer grip, dexterity and waterproof protection for backcountry ventures. Fleece insulation keeps you warm when it's cold and the grippy liners can be worn alone.

#### The nitty gritty

Features	Technical specs
• Durable ripstop cotton/nylon shell with waterproof, breathable GORE-TEX® membrane and grippy palms help your hands, especially on wet rock surfaces.	Best Use: Mountaineering, Snowshoeing, Backpacking
Palm Material:	

Marmot

### Marmot Randonnee Gloves

★★★★★ 41 (20) Item 284184 \$100.00

✓ This item ships for FREE!

REI Members get back an estimated \$10.00 on this item as part of their member dividend!

Color: Back

Size: Size Chart

Subst Size: 1

Quantity: 1

Shipping restrictions apply

Ship to address: ☐ Pick up in store - Free Find a store near you

Add to cart

Add to wish list

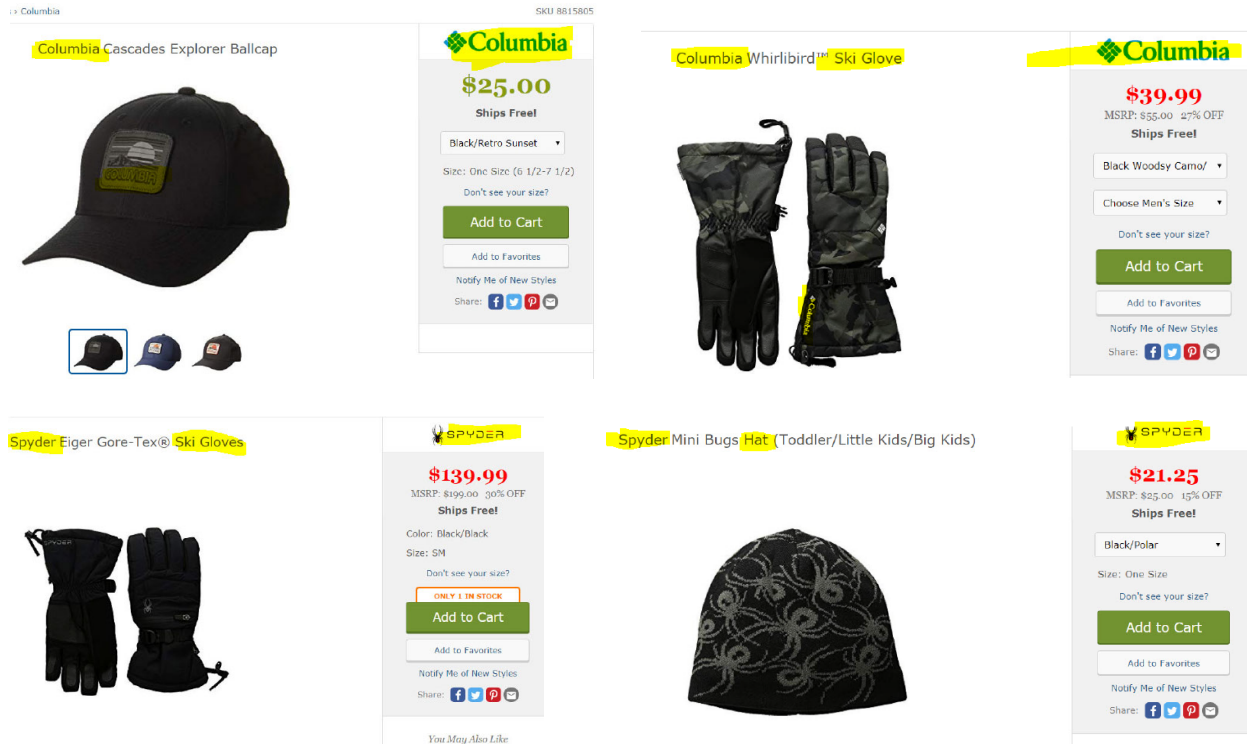
REI return policy

Fingers keep you from having fun. With the Marmot Randonnee gloves on your hands you'll be warm and happy as you carve your way down a backcountry slope.

#### The nitty gritty

Uses	Technical specs
• Durable Membrane® waterproof, breathable fabric works together with GORE-TEX® membrane to keep your hands dry.	Best Use: Snowboarding, Downhill Skiing












*Id.* at 53-54, 59-60. The marks COLUMBIA and SPYDER are each used (by different owners) for ski gloves on the one hand and baseball caps or hats on the other:



*Id.* at 63-66. The record includes numerous similar examples of third parties using the same mark for goods identified in the involved application on the one hand, and snowsport gloves as identified in the cited registration on the other, including: OAKLEY (used for winter gloves and belts); GRENADE (used for snowboard gloves and caps); ARC'TERYX (skiing, snowboarding and winter sports gloves and belts); BACKCOUNTRY (ski gloves, men's shorts, jackets); QUIKSILVER (ski gloves, denim jeans, sweaters, t-shirts and belts); VOLCOM (ski and snowboard gloves, belts, baseball hats, jackets, jeans, sweatshirts, t-shirts); CABELA'S (ski gloves, hats, men's denim jeans, long sleeve t-shirts); EDDIE BAUER (ski gloves, belts, sweatshirts, men's footwear); LL BEAN (ski gloves, belts, baseball caps, men's jeans); PATAGONIA (skiing and snowboarding gloves, baseball caps, men's jeans, sweaters).

March 26, 2019 Office Action TSDR 6-7, 14-33. October 21, 2019 Denial of Request for Reconsideration TSDR 5-45, 60-75.

The Examining Attorney also relies on a large number of use-based third-party registrations showing that the same marks are registered in connection with ski or snowboard gloves on the one hand and one or more of the goods identified in Applicant's involved application on the other, as follows:

<b>SAUCY</b>	 <b>CALIFUL</b>	<b>HAND OUT</b>	<b>SYNC PERFORMANCE</b>
Reg. No. 5536369	Reg. No. 5510848	Reg. No. 5255927	Reg. No. 5484080
	<b>RED RUM</b>	<b>BARELOVE</b>	<b>DEBRA WEITZNER</b>
Reg. No. 5544063	Reg. No. 5511576	Reg. No. 5433440	Reg. No. 5463721
	<b>CLIMIX</b>	<b>ALPINE720</b>	<b>SASSHOLE</b>
Reg. No. 5463844	Reg. No. 5458708	Reg. No. 5468980	Reg. No. 5544595
<b>NAVISKIN</b>	<b>cameljeans</b>		<b>SOPHISTICATED SAVAGE</b>
Reg. No. 5535111	Reg. No. 5540422	Reg. No. 5514624	Reg. No. 5638536
<b>HAPPY HERB</b>	<b>GET AWKWARD</b>	<b>YHIM</b>	<b>BLIPPI</b>
Reg. No. 5703813	Reg. No. 5596408	Reg. No. 5623343	Reg. No. 5335209
<b>SALTY STASH</b>			
Reg. No. 5704021	Reg. No. 5520891	Reg. No. 5493812	Reg. No. 5578409
	<b>VODA</b>		<b>ONCE A CHEERLEADER NOW THE BOSS</b>
Reg. No. 5688613	Reg. No. 5507058	Reg. No. 5572109	Reg. No. 5599102
		<b>CREW 82</b>	<b>SEVEN TIMES SIX</b>
Reg. No. 5625771	Reg. No. 5693276	Reg. No. 5662976	Reg. No. 5594836



ASCENTIX Reg. No. 5600044	FEWCHER Reg. No. 5631506	 Reg. No. 5661425	 Reg. No. 5649339
KV+ Reg. No. 5702047	MARIA HARPER Reg. No. 5703425	OVERWIT Reg. No. 5852097	 Reg. No. 5854200
BELGIUS Reg. No. 5818137	 Reg. No. 5871397	ALCARI Reg. No. 5789761	 SPYDER Reg. No. 5722345
STZ Reg. No. 5763390	 Reg. No. 5869839	I AM NOT INTIMIDATED Reg. No. 5832189	 Reg. No. 5881437
 Reg. No. 5799736	 Reg. No. 5832734	 Reg. No. 5821095	SONEOME Reg. No. 5862128
JAVDA Reg. No. 5879036	DEVEMBR Reg. No. 5873793		

September 10, 2018 Office Action TSDR 8-48; March 26, 2019 Office Action TSDR 34-119; October 21, 2019 Denial of Request for Reconsideration TSDR 76-132. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).

This evidence establishes that ski and snowboard gloves are related to many of the specific clothing items identified in Applicant's involved application.<sup>4</sup> It also establishes that ski and snowboard gloves move in the same channels of trade, to the same consumers, as many of the specific clothing items identified in Applicant's involved application. Indeed, these goods are often sold under the same marks not only on the same brand owner and specialty store websites, but in the same sections of those websites.

In any event, neither Applicant's nor Registrant's identification of goods contains any trade channel or consumer limitations. Therefore, we must presume that Applicant's and Registrant's goods move in all channels of trade normal therefor, which the evidence shows to be overlapping. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'"); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir.

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<sup>4</sup> Applicant's reliance on *McGregor-Doniger, Inc. v. Drizzle Inc.*, 599 F.2d 1126, 202 USPQ 81 (2d Cir. 1979), an infringement case decided under what was then 2<sup>nd</sup> Circuit law (but has since changed), is misplaced. There, unlike here, the marks were not identical and the Court, unlike this Board, was entitled to and did consider the marketing "milieu" surrounding use of the marks in question, which included use in connection with a house mark and "real world" trade channel differences, among other considerations not relevant in ex parte Board cases. This Board typically may consider only the drawings of the marks and identifications of goods in the involved application and cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *SCM Corp. v. Royal McBee Corp.*, 395 F.2d 1018, 158 USPQ 36, 37 n.4 (CCPA 1968).

2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (goods presumed to be “offered in all channels of trade which would be normal therefor”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).<sup>5</sup> These factors therefore also weigh in favor of finding a likelihood of confusion.

### **C. Consumer Sophistication and Care**

Applicant argues that ski and snowboard glove consumers are “sophisticated” and “very particular” about their purchases. While this may very well be true in many cases, Registrant’s (and for that matter Applicant’s) identification of goods contains no limitations as to price, or type of consumers. We must base our decision on the “least sophisticated potential purchasers” for the goods, which as identified are not necessarily “hi-tech” or “high end.” *Stone Lion*, 110 USPQ2d at 1162-63. Moreover, we do not need evidence to know that there are different types of skiers and snowboarders, some of whom are small children, first timers or spring skiers/snowboarders who enjoy their sport most when it is above freezing, sometimes substantially so. These potential purchasers and users of the goods do not necessarily require the same types of gloves as, for example, racers or other athletes who compete

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<sup>5</sup> This is why Applicant’s citation of “real world” trade channel differences, 10 TTABVUE 10-12, is irrelevant – the identified differences are not reflected in either Applicant’s or Registrant’s identification of goods. In any event, the fact that Applicant “creates consumer products with input from its members,” and “has hundreds of product offerings,” *id.*, increases the likelihood of confusion. Indeed, when consumers learn that Applicant offers products “chosen, created, or inspired by our enthusiast communities,” which include products in fields as varied as “mechanical keyboards,” “quilting,” “watches,” “baking” and “trading card games,” it would not be a stretch for them to assume that Applicant might also offer ski or snowboard gloves. March 7, 2019 Office Action response TSDR 6. In fact, the categories of products highlighted on Applicant’s website include “Men’s Apparel” and “Outdoors.” *Id.*

in brutal, unforgiving conditions. Similarly, purchasers of Applicant's "t-shirts" and "baseball caps" are not necessarily sophisticated or particular, as these are everyday and typically inexpensive items. *See e.g. Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB 2014)). This factor is neutral.

### **III. Conclusion**

The marks are identical, the goods related and the channels of trade and classes of consumers overlap. There is therefore a likelihood of confusion.

**Decision:** The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.