

This Opinion is Not a
Precedent of the TTAB

Hearing: June 29, 2023

Mailed: October 11, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Rockport IP Holdings, LLC and The Rockport Company, LLC
v.
Joshua George Savoy

—
Opposition No. 91252440

—
Joshua George Savoy
v.
Rockport IP Holdings, LLC

—
Opposition No. 91255819¹

Stephen P. McNamara and Samantha M. Gerold of St. Onge Steward Johnston &
Reens LLC for Rockport IP Holdings, LLC and The Rockport Company, LLC

James Iaconis of Iaconis Law Office
for Joshua George Savoy

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Before Cataldo, Lynch, and Johnson,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

¹ The Board previously consolidated these oppositions and designated Opposition 91252440 as the parent case. 12 TTABVUE. We cite to the TTABVUE record (the Board's online docketing system) in the parent case, unless otherwise indicated.

I. Background

A. Opposition No. 91252440


Rockport IP Holdings, LLC and The Rockport Company, LLC (collectively, “Rockport”) filed a Notice of Opposition against the goods in International Class 25 only to an application filed by Joshua George Savoy (“Savoy”) to register the mark



on the Principal Register. The Class 25 goods challenged are:

Belts for clothing; Bottoms as clothing; Coats; Footwear;
Gloves; Headwear; Jackets; Pants; Pullovers; Shirts;
Shorts; Swimwear; Tops as clothing; Underwear;
Uniforms; Vests.²

Rockport based its opposition on likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with Rockport’s alleged prior used common law

mark  for footwear and clothing, and with the prior registered mark

² Application Serial No. 88373770 was filed on April 5, 2019 based on alleged bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application also identifies goods in International Class 9 that have not been challenged. Color is not claimed as a feature of the mark, and the mark description states: “The mark consists of the capital letter ‘R’ in stylized font surround by a circle outline that is broken at the bottom left of the design.”



for “footwear,”³ and for “clothing, namely, jackets, coats, socks,”⁴ owned by Rockport IP Holdings, LLC (“Rockport IP”). Rockport also pleaded ownership,



through Rockport IP, of a pending application to register on the Principal Register for “footwear; shoes” in International Class 25.⁵

In his Answer,⁶ Savoy denied the salient allegations in Rockport’s Notice of Opposition. He also included assertions under the heading “Affirmative Defenses,” but they are not true affirmative defenses, and we do not treat them as such. *The Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, at *4 (TTAB 2021); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *1 (TTAB 2020). Regardless, Savoy did not pursue any purported affirmative defenses at trial. We therefore consider any affirmative defenses waived. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff’d*, 565 F. App’x 900 (Fed. Cir. 2014) (mem.); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01

³ 1 TTABVUE 10-15 (TSDR record attached to Notice of Opposition). Registration No. 3142749 issued on the Principal Register on September 12, 2006 and has been maintained.

⁴ 1 TTABVUE 16-22 (TSDR record attached to Notice of Opposition). Registration No. 3382280 issued on the Principal Register on February 12, 2008 and has been maintained.

⁵ Application Serial No. 88615811 was filed on September 13, 2019 based on alleged use of the mark in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a). The application alleges November 22, 2017 as the dates of first use and first use in commerce. Color is not claimed as a feature of the mark, and the mark description states: “The mark consists of an uppercase stylized letter ‘R’ in a circle.”

⁶ 10 TTABVUE.

(2022) (“If a party fails to reference a pleaded claim or affirmative defense in its brief, the Board will deem the claim or affirmative defense to have been waived”).

B. Opposition No. 91255819

Savoy filed a Notice of Opposition to the above-referenced application filed by



Rockport IP to register on the Principal Register for “footwear; shoes” in International Class 25.⁷ Savoy based his opposition on likelihood of confusion under Section 2(d) of the Trademark Act, with the mark in his prior application referred to



above, , and with asserted common law rights in the same mark for footwear, which his Notice of Opposition pleads use of since April 5, 2019.⁸

In its Answer,⁹ Rockport IP denied the salient allegations in Savoy’s Notice of Opposition. It also made assertions under the heading “Affirmative Defenses,” but they are not true affirmative defenses, and we do not treat them as such. Also, Rockport IP did not pursue its purported affirmative defenses at trial, and we therefore consider them waived. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014) (pleaded affirmative defenses not pursued in the brief considered waived).

⁷ Opposition No. 91255819; Application Serial No. 88615811.

⁸ Opposition No. 91255819, 1 TTABVUE 3-4.

⁹ Opposition No. 91255819, 5 TTABVUE.

II. The Record and Evidentiary Matters

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of the opposed applications. Rockport attached to the Notice of Opposition USPTO electronic database records for the pleaded registrations.¹⁰ Only Rockport introduced additional evidence during trial, supplementing the record with documents filed under notices of reliance, as well as testimony with exhibits. The testimony consists of trial declarations from David Pompel, VP of Men's Business Unit at The Rockport Company, LLC and Steven Holt, President of The Rockport Company, LLC,¹¹ as well as deposition testimony from Savoy¹² and Mr. Pompel.¹³ The additional documents under notice of reliance are USPTO records and discovery materials.¹⁴

Savoy filed a purported notice of reliance on the cross-examination deposition transcript of David Pompel, but did not include the transcript.¹⁵ However, Rockport already had submitted the transcript,¹⁶ and once testimony or any other evidence is introduced, it may be referred to by any party for any purpose permitted by the

¹⁰ 1 TTABVUE 10-22.

¹¹ 20 & 21 TTABVUE.

¹² 19 TTABVUE 247-405 (Savoy transcript and exhibits included in Rockport's Notice of Reliance).

¹³ 28 TTABVUE.

¹⁴ 19 TTABVUE.

¹⁵ 29 TTABVUE.

¹⁶ 28 TTABVUE. While Rockport submitted this as "rebuttal" despite Savoy not having introduced evidence during his trial period, we consider Savoy to have waived any objection, given his notice of reliance at 29 TTABVUE stating his intent to rely on the Pompel deposition testimony.

Federal Rules of Evidence; the adverse party need not take any action in order to rely on it. Trademark Rule 2.122(a), 37 C.F.R. § 2.122(a); *see also Nazon v. Ghiorse*, 119 USPQ2d 1178, 1181 n.6 (TTAB 2016) (“Once evidence is properly of record, it may be relied on by any party for any purpose.”).

Savoy included evidentiary attachments to his Main Brief, some of which appear to reflect materials previously entered into the record by Rockport (Exhibit A), while others reflect materials not in the record (Exhibit B).¹⁷ Evidence should not be submitted with a brief, and can be given no consideration unless it was properly made of record during the trial period of the proceeding. *See Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, *3-4 (TTAB 2020) (exhibits attached to brief stricken); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 704.05(b) (2023). We therefore do not consider the trademark search that is not in the record, attached as Exhibit B. *See The Maytag Co. v. Luskis, Inc.*, 228 USPQ 747, 747-48 n.5 (TTAB 1986) (collection of registrations listed in appendix to brief not considered because not in compliance with rules of practice).

The consolidated proceeding has been fully briefed. A hearing occurred on June 29, 2023.

III. Entitlement to a Statutory Cause of Action¹⁸

Entitlement to a statutory cause of action must be established by the plaintiff in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*,

¹⁷ 31 TTABVUE 14-153.

¹⁸ Although Rockport’s Brief refers to “standing,” we now use the nomenclature “entitlement to a statutory cause of action.” Despite the change in nomenclature, our prior decisions and

965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark when it demonstrates an interest falling within the zone of interests protected by the statute, 15 U.S.C. §§ 1063 & 1064, and a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

Here, Rockport must establish an entitlement to a statutory cause of action in Opposition No. 91252440, and Savoy must establish such an entitlement in Opposition No. 91255819. Because Rockport’s Notice of Opposition was filed by multiple opposers, Rockport IP Holdings, LLC and The Rockport Company, LLC (“Rockport Company”), as discussed below, each one must make the requisite showing:

When a notice of opposition is filed by joint opposers, each opposer must plead, and ultimately prove, that it has a “real interest,” i.e., a direct and personal stake, in the outcome of the proceeding, as well as a “reasonable basis” for its belief of damage. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1063 (Fed. Cir. 2014); *Ritchie v. Simpson*, [170 F.3d 1092], 50 USPQ2d [1023] at 1025-26 [(Fed. Cir. 1999)]. *See also Chem. N.Y. Corp. v. Conmar Form Sys., Inc.*[.] 1 USPQ2d 1139 (TTAB 1986) (each opposer must prove its own standing); TBMP § 303.06.

those of the Federal Circuit regarding “standing” remain applicable. *See Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).




Wise F&I et. al. v. Allstate Ins. Co., 120 USPQ2d 1103, 1107 (TTAB 2016). *See also Chi. Bears Football Club Inc. v. 12th Man/Tenn. LLC*, 83 USPQ2d 1073, 1075 (TTAB 2007) (each opposer must make requisite showing of entitlement to a statutory cause of action); *Chem. N.Y. Corp. v. Conmar Form Sys., Inc.*, 1 USPQ2d 1139, 1142 (TTAB 1986) (same).

In their respective roles as plaintiffs, Savoy, Rockport IP, and Rockport Company each must demonstrate a real interest in the respective proceedings and a reasonable belief of damage from the challenged application in that opposition. *Australian Therapeutic Supplies*, 2020 USPQ2d 10837 at *3; *see also Empresa Cubana Del Tabaco*, 111 USPQ2d at 1062; *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012). Demonstrating a real interest in opposing the registration of a mark satisfies the zone-of-interests requirement, and “[i]n most settings, a direct commercial interest satisfies the ‘real interest’ test.” *Herbko Int’l v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1377 (Fed. Cir. 2002).

A. Opposition No. 91252440

As noted above, Rockport attached to their Notice of Opposition the USPTO database records for the pleaded registrations. Rockport IP’s ownership of the pleaded registrations, for which status and title are established through the record, support its plausible likelihood of confusion claim against Savoy’s application, thereby showing its real interest in this proceeding, and a reasonable basis for its belief of damage. Rockport IP has established a statutory entitlement to oppose. *See*

Coach Servs., 101 USPQ2d at 1727-28; *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

Rockport Company's President, Steven Holt, testified that Rockport IP is an intellectual property holding company and licenses its intellectual property rights to Rockport Company, including a license to use . Rockport Company's VP of Men's Business Unit, David Pompel, testified to Rockport Company's use of  and , noting that the latter "has been used on many ROCKPORT shoe styles."¹⁹

Rockport Company thus has established its common law use of the pleaded marks on goods that overlap with Savoy's identified goods. Based on such common law use, Rockport Company has asserted a plausible likelihood of confusion claim against Savoy's application, thereby showing a real interest in this proceeding beyond that of a mere intermeddler, and a reasonable basis for its belief of damage. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 607 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (plaintiff may establish standing by proving a real commercial interest in its own marks and a reasonable belief that it would be damaged (e.g., a claim of likelihood of confusion that is not wholly without merit)); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (common law use of similar mark sufficient to establish standing); *see also Moreno v. Pro Boxing Supplies, Inc.*, 124 USPQ2d 1028, 1033-34 (TTAB 2017) (plaintiff established standing based on a license granting plaintiff the exclusive right to use the trademark associated with the supplier of

¹⁹ 20 TTABVUE 3-4, ¶10.


sporting goods for purposes of reselling the sporting goods). Rockport Company has established a statutory entitlement to oppose.

B. Opposition No. 91255819


In its prior order consolidating the cases, the Board found that Savoy's Opposition No. 91255819 is equivalent to a counterclaim in Opposition No. 91252440, in which Rockport asserted against Savoy the subject application in this opposition.²⁰ As the equivalent of a counterclaim plaintiff, Savoy's statutory entitlement is inherent. *See Finanz St. Honore B.V. v. Johnson & Johnson*, 85 USPQ2d 1478, 1479 (TTAB 2007); *Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, 116 USPQ2d 1102, 1110 (TTAB 2015); *DAK Ind. Inc. v. Daiichi Kosho Co.*, 35 USPQ2d 1434, 1438 (TTAB 1995).

IV. Priority

To prevail on the likelihood of confusion ground under Section 2(d) of the Act, an opposer bears the burden to prove by a preponderance of the evidence both priority of use and likelihood of confusion. *Cunningham v. Laser Golf*, 55 USPQ2d at 1848; *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ("The burden of proof rests with the [plaintiff] ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion.").

Because Rockport has made its registrations of record, which Savoy has not counterclaimed to cancel, priority is not an issue as to the mark, , and goods, including footwear, covered by the registrations. *See Top Tobacco LP v. N. Atl. Op.*

²⁰ 9 TTABVUE 2.

Co., 101 USPQ2d 1163, 1169 (TTAB 2011) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)); see also *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 181 USPQ 272, 275 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”); *Itel Corp. v. Ainslie*, 8 USPQ2d 1168, 1169 (TTAB 1988) (“because of the existence of opposer’s valid and subsisting registration, it need not prove prior use as to the services recited therein”). However, as discussed below, we focus on Rockport’s common law mark, , which also is the subject of its opposed application.

For priority, Rockport IP and Savoy may rely on their respective application filing dates. Savoy’s April 5, 2019 filing date of his opposed intent-to-use application predates Rockport IP’s September 13, 2019 filing date of its use-based application. See *Larami Corp. v. Talk to Me Programs Inc.*, 36 USPQ2d 1840, 1845 (TTAB 1995) (parties may rely on constructive use filing dates for purposes of priority).

To the extent Rockport and Savoy rely on alleged common law rights, they must prove that, vis-à-vis the opposing party, the asserting party owns proprietary rights in “a mark or trade name previously used in the United States . . . and not abandoned....” *Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1036-37 (TTAB 2010) (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44 (CCPA 1981)); see also *Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987). Such common law use can establish priority, and in the context of opposition proceedings such as these, Savoy

therefore is incorrect in stating that the USPTO “recognizes the party who is first to file as the party with priority, regardless of first alleged use.”²¹

We focus our common law rights inquiry on footwear, as the parties do.²² Savoy’s Main Brief does not assert a specific priority date, other than his application filing date, although he states that “[a]t that time, Savoy was already using the mark on some of the goods, such as shoes.”²³ In testifying, Savoy responded to a question as to his date of first use of his mark on a shoe that he “believe[s] it was in 2019 – was the first time,” confirming “[t]hat was when the first shoe was manufactured.”²⁴ When asked for the date of “the first sale of a shoe with the R logo,” he answered, “[s]ometime in 2019. As far as when exactly, I don’t recall the exact date.”²⁵ But in his Reply Brief, Savoy refers, for the first time, to “May 2018” as his “first use” of his mark. Savoy states that this use is reflected in “a text-message thread between [him] and a customer regarding the quantity of shoes to be purchased.”²⁶ By contrast, Savoy

²¹ 31 TTABVUE 9 (Savoy’s Brief).

²² *See, e.g.*, Notice of Opposition, Opposition No. 91255819 (pleading that Savoy “was using the Mark in connection with goods for sale that include footwear at least as early as April 5, 2019”); 33 TTABVUE 5 (Savoy’s Reply Brief, stating “Savoy marked shoes with his logo at least as early as May 2018”). Although Savoy’s deposition testimony suggests that his business sold clothing earlier (perhaps as early as 2016) under the same mark in his application, 19 TTABVUE 267-70, he later clarified under questioning that the logo may not have been the same as the mark in the application. *Id.* at 295 (“I actually worked on a few different styles before I came up with the R that I have a registration pending for.... I mean, even though it may not start off with the – or the R is not the same.... In the beginning, like I said, I used a – I had a couple different logos....”). We find Savoy’s testimony vague and indefinite about use of his mark on clothing.



²³ 31 TTABVUE 6 (Savoy’s Brief).

²⁴ 19 TTABVUE 277.

²⁵ 19 TTABVUE 277-78.

²⁶ 19 TTABVUE 300.

identified the same text thread in his deposition as a chat “with one of the individuals I was working with to design the shoes.”²⁷ The screenshot of the thread (or chat) shows “5/18.” When asked in his deposition whether it dated from May 18 or May 2018, Savoy responded, “You know what? I honestly – I don’t know either way to be a hundred percent to confirm. It could have been May 18th for that shoe.”²⁸ Based on this record, including the indefinite nature of Savoy’s testimony, we find no basis to accord Savoy common law rights dating earlier than his April 5, 2019 filing date. Thus, April 5, 2019, Savoy’s constructive use application filing date, is the earliest date on which Savoy may rely for priority.

Turning to Rockport’s common law rights in , Rockport Company’s VP of Men’s Business Unit, David Pompel, testified to Rockport Company’s use of  “at least as early as 2017,” noting that it “has been used on many ROCKPORT shoe styles.”²⁹ More specifically, Mr. Pompel stated that:

11. Rockport introduces new shoe styles to customer buyers at its twice yearly Global Sales Meeting. The November 2017 Global Sales Meeting took place at and locations near Rockport’s offices in Newton, Massachusetts. Rockport also from time to time will introduce styles directly to the consumer through its own website or other direct to consumer venues.

12. At the November 2017 Global Sales Meeting, we displayed samples and took orders for the ROCKPORT “Marshall Rugged” collection which included the

²⁷ 19 TTABVUE 300.

²⁸ 19 TTABVUE 300-01.

²⁹ 20 TTABVUE 3-4, ¶¶ 8-10.

Rockport's upper case "R" in a circle,® logo on the outside heel quarter (See Exhibit 2). The Marshall Rugged collection shoes were in due course delivered to retailers and were launched at retail for sale to consumers during the Fall 2018 season.³⁰

In his cross-examination deposition testimony, he elaborated that the mark was first used in connection with "the Rockport Marshall, which we presented in a global sales meeting in November of 2017," and he explained how he is certain of the date by consulting his "confirmation [shoe] samples" that contain tags reflecting their launch dates.³¹ According to Mr. Pompel, the tag for the Rockport Marshall "indicated it was for the fall 2018 season, which means we would have presented it at the global sales meeting in November of 2017."³² When probed regarding the actual sales of these shoes bearing the ® mark, he clarified that the Rockport Marshall shoe "was presented to both internal and external sources in 2017," but the sales were not in November 2017. He stated that "[t]hose were sold over a range of beginning in, at retail, 2018."³³ Mr. Pompel provided testimony and corroborating documentation of Rockport's subsequent consistent and ongoing use of its ® mark on footwear.³⁴

"The oral testimony even of a single witness may be adequate to establish priority, but only if it is sufficiently probative," and the testimony should not be characterized

³⁰ 20 TTABVUE 4, ¶¶ 11-12.

³¹ 28 TTABVUE 16-17.

³² 28 TTABVUE 17-18.

³³ 28 TTABVUE 20.

³⁴ 20 TTABVUE 4-82.

by “indefiniteness but should carry with it conviction of its accuracy and applicability.” *Exec. Coach Builders, Inc. v. SPV Coach Co., Inc.*, 123 USPQ2d 1175, 1184 (TTAB 2017) (quoting *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 66 USPQ 232, 236 (CCPA 1945); citing *Nationstar Mortg. LLC v. Ahmad*, 112 USPQ2d 1361, 1372 (TTAB 2014)). We find Mr. Pompel’s testimony sufficiently definite and probative to establish Rockport’s first use of its common law mark in 2017 and sales under the mark in 2018. Both of these dates precede Savoy’s April 5, 2019 priority date.

Savoy challenges the credibility of Rockport’s alleged use date based on the absence of a trademark clearance search around that time. Savoy considers it suspicious that, given Rockport’s status as a sizable business and an experienced trademark owner, Rockport had no trademark search performed until August 22, 2019, which is the day after Rockport requested an extension of time to oppose Savoy’s application.³⁵ According to Savoy, “[a] trademark search is standard procedure for large and small companies alike and, of course, companies perform the search prior to using a mark, not after.”³⁶ Savoy further notes that “Rockport has never provided *any* documentary evidence to support use of an uppercase-R mark until August 2019.”³⁷ However, Savoy points to no evidence supporting his speculative assertion that a business the size of Rockport necessarily would conduct trademark searches


³⁵ 31 TTABVUE 6 (Savoy’s Brief).

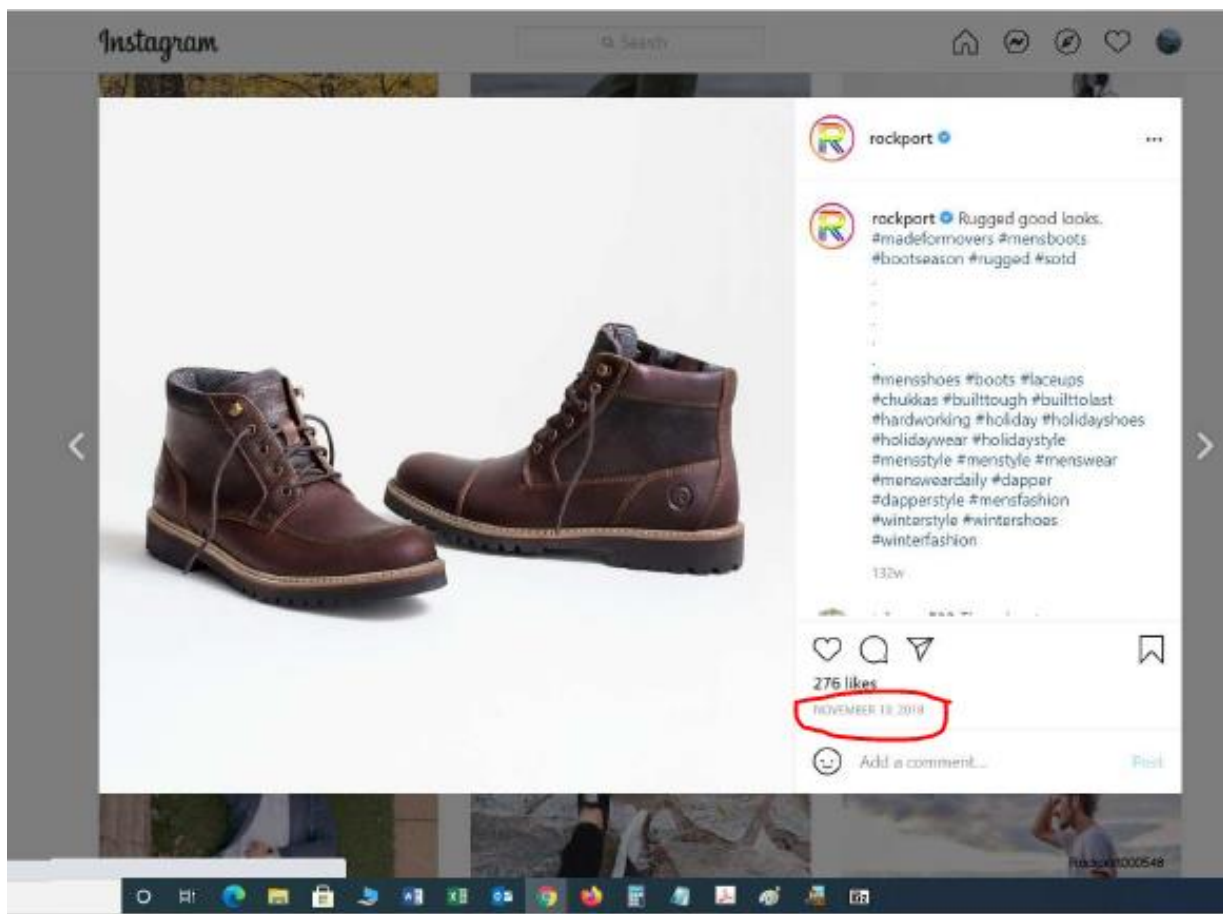
³⁶ *Id.*

³⁷ *Id.* at 7.


prior to undertaking use of a mark. We do not consider Savoy's unsubstantiated arguments sufficient to controvert Mr. Pompel's testimony.

Also, we question Savoy's assertion of a lack of documentary evidence corroborating Mr. Pompel's testimony as to priority. Exhibit 2 to Mr. Pompel's declaration includes an Instagram post bearing a date of November 13, 2018 (date

circled in screenshot below) that displays a boot with the  mark near the heel:




³⁸ 20 TTABVue 9.

Based on the evidence of record, we find that Rockport has priority as to its  mark for footwear. As a result, Savoy cannot prevail in Opposition No. 91255819, in which he bears the burden of proving priority as an element of his likelihood of confusion claim. *See Exec. Coach Builders*, 123 USPQ2d at 1199 (if a plaintiff cannot establish priority, likelihood of confusion need not be addressed because, without proof of priority, the plaintiff cannot prevail).

V. Likelihood of Confusion

We turn to consideration of Rockport's likelihood of confusion claim in Opposition No. 91252440. Our determination under Trademark Act Section 2(d) involves an analysis of all of the probative evidence of record bearing on a 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, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). A likelihood of confusion analysis often focuses on 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."). If likelihood of confusion exists with respect to any the identified goods in a particular class of an application, the opposition will be sustained as to that class. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

We focus the likelihood of confusion analysis on Rockport's prior common law rights in  for footwear because that mark is more similar to Savoy's mark than Rockport's prior registered mark.

A. The Goods, Trade Channels and Classes of Consumers

Savoy's identified goods in the opposed Class 25 include footwear, the same goods in which Savoy claims common law rights, and these goods are identical to Rockport's footwear. As noted above, where the relatedness – or in this case identical nature – is established as to at least one item in a class, this suffices to establish it for likelihood of confusion purposes as to the entire class. *Id.*; *Apple Comput. v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

Turning to the trade channels and classes of consumers, because Savoy's recited goods in his application do not contain trade channel limitations, they are presumed to move in all channels of trade normal for those goods. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Cunningham v. Laser Golf*, 55 USPQ2d at 1846 (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”). Because his identification of footwear is unrestricted, we are not persuaded by Savoy's arguments that Rockport failed to show that the parties sell the same type of footwear and that different categories of footwear have “unique or niche intended purchasers.”³⁹ The presumed

³⁹ 31 TTABVUE 5 (Savoy's Main Brief).

normal trade channels and consumers of the footwear in the application include the actual trade channels and consumers of Rockport's common law footwear, described as including e-commerce retail sites and brick-and-mortar retail stores.⁴⁰

We find that the goods, trade channels, and classes of consumers overlap. These *DuPont* factors weigh in favor of likely confusion.

B. Strength of Rockport's Mark

The strength of a mark rests on the extent to which "a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). Rockport does not address the *DuPont* factors related to strength. The only evidence potentially related to commercial strength comes from the Pompel declaration, identifying 13 Rockport shoe collections under various collection names. Rockport's mark is located on the outside heel quarter of the shoes. The collections using the mark totaled "in excess of 400,000 pairs of shoes, with sales revenue (a combination of wholesale and retail sales) in excess of \$15 million."⁴¹ Savoy contends that Rockport's mark at issue is relatively new and cannot be considered famous. In the absence of additional

⁴⁰ See 20 TTABVUE 3 (Pompel's testimony that "Rockport currently sells ROCKPORT footwear to consumers through its website at www.rockport.com, through third party e-commerce sites, such as Amazon.com and Zappos.com," and through brick-and-mortar retailers); 19 TTABVUE 265, 306-08 (Savoy's testimony regarding online sales and sales at gyms and fitness expos and plans for future expansion).


⁴¹ 20 TTABVUE 4-5.


context and evidence from Rockport, and the lack of an assertion by Rockport of any particular degree of commercial strength, we consider the fifth *DuPont* factor neutral.

In turn, Savoy implies that Rockport's mark is weak based on third-party registrations, but Savoy did not properly introduce any supporting evidence, so the argument carries no weight. "Attorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)). Given the absence of evidence under the sixth *DuPont* factor, we consider it neutral.

C. Similarity of the Marks

Next, we compare the marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 73 USPQ2d at 1691

(quoting *DuPont*, 177 USPQ at 567). We find that Savoy's  and Rockport's

 look very similar, would be pronounced identically, and create the same connotation and overall commercial impression. Both marks consist of a capitalized letter R, in a fairly standard font, surrounded by a circle. Although the font differs somewhat, and there is a small break in the circle in Savoy's mark, these minor visual distinctions are insignificant and do not change the phonetic identity, meaning, and overall commercial impression of the marks. *See, e.g., UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1887 (TTAB 2011) (when comparing opposer's MOTOWN

composite word and design mark with applicant's MOTOWN word mark, Board found that "the font and square border [of opposer's composite mark] are insignificant.").

In addressing his opposition to Rockport's application, Savoy agrees that these marks are likely to cause confusion because "the two marks include an uppercase 'R' and most of a circle surrounding the letter."⁴² However, in addressing Rockport's opposition, Savoy asserts that they differ enough to avoid confusion because "the pointed legs of the letter" in his mark "end[] in a point, mimicking a knife point, which is one of the weapons utilized by an army reconnaissance platoon."⁴³ We disagree that consumers would draw the impression of a knife or knife point from Savoy's mark, and instead find that the points at the end of the letter would be perceived as a feature of the font, and not a design element.

The marks are similar overall, and this *DuPont* factor weighs in favor of likely confusion.

D. Actual Confusion

Under the seventh and eighth factors, we consider the parties' respective use "such that we could make a finding as to the 'length of time during and conditions under which there has been concurrent use without evidence of actual confusion.'" *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, *25 (TTAB 2020).

⁴² 31 TTABVUE 12 (Savoy's Main Brief).

⁴³ 31 TTABVUE 9-10 (Savoy's Main Brief).

Savoy mentions the absence of actual confusion evidence in the record as weighing in his favor.⁴⁴ “The absence of reported instances of confusion is meaningful only if the record establishes appreciable and continuous use by Applicant of its marks for a significant period of time in the same markets as those served by Opposer under its mark.” *Entm’t Content, Inc. v. Cooper Holdings, Inc.*, 2020 TTAB LEXIS 32, *35 (TTAB 2020) (citation omitted); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to occur. *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred). However, the record does not provide sufficient contextual information on the length or specific conditions of potentially concurrent use of the respective similar marks that could give rise to actual confusion. In the absence of such evidence of a meaningful opportunity for confusion to have occurred, we consider these *DuPont* factors to be neutral.

VI. Conclusion – Weighing the Factors

Rockport’s pleaded common law mark in which it has priority of use (which also is the subject of Application Serial No. 88615811) is highly similar to Savoy’s mark. Rockport’s footwear overlaps with Savoy’s goods in Class 25, and moves in at least some of the same trade channels to some of the same classes of consumers. These

⁴⁴ 31 TTABVUE 4, 10 (Savoy’s Main Brief).

factors weigh in favor of likely confusion, and the other *DuPont* factors on which there are arguments or evidence are neutral. Therefore, Rockport has proven its likelihood of confusion claim in Opposition No. 91252440.

Decision: Opposition No. 91252440, against Application Serial No. 88373770, is sustained, and the goods in International Class 25 will be deleted from the application. Application Serial No. 88373770 will proceed with the remaining goods in International Class 9.

Opposition No. 91255819, against Application Serial No. 88615811, is dismissed based on Savoy's failure to establish priority as an essential element of his likelihood of confusion claim.