

This Opinion Is Not a
Precedent of the TTAB

Mailed: September 19, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

—
Tribe of Two, LLC

v.

Eritaj Design Corporation

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Opposition No. 91254933

—
G. Roxanne Elings of Davis Wright Tremaine LLP for Tribe of Two, LLC.

Eritaj Design Corporation, acting pro se.

—
Before Bergsman, Lykos, and Dunn, Administrative Trademark Judges.




Opinion by Dunn, Administrative Trademark Judge:

Eritaj Design Corporation (Applicant) filed an application to register the mark



on the Principal Register for “clothing, namely, belts, hats, shirts, t-shirts, pants, socks and shorts, sweat shirts, jackets, hoodies, joggers, sweat pants, athletic pants and tops, headbands, wristbands” in International Class 25.¹

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¹ Application Serial No. 88622661 filed September 19, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intent to use the mark in commerce. The application states that color is not claimed as a feature of

Tribe of Two, LLC (Opposer) filed a notice of opposition pleading a claim under Trademark Act Section 2(d), 15 U.S.C. 1052(d), that Applicant's mark  is likely to be confused with Opposer's marks based on Opposer's prior common law use and pleaded Registration No. 5924569 for the mark  for "handbags, shoulder bags, tote bags, satchels, purses, clutches, and wallets," in International Class 18² and Registration No. 4377523 for the mark  for "purses and wallets," in International Class 18.³

Applicant's answer admits that its goods bearing the mark are "only sold online" at Applicant's website (Par. 5); that since at least as early as 2012, Opposer has

the mark, and with respect to the description "[t]he mark consists of two capital letter 'T's with one upright and the other appearing upside down next to it with an additional straight line across the top of each 'T'."

References to the application are to the downloadable .pdf version of documents available from the TSDR (Trademark Status and Document Retrieval) database. The TTABVue citations refer to the Board's electronic docket, with the first number referring to the docket entry and the second number, if applicable, referring to the page within the entry.

² Registration No. 5924569 issued December 3, 2019 on the Principal Register. Color is not claimed as a feature of the mark. The description of the mark is "The mark consists of two capital letter 'T's displayed next to each other with the second letter upside down, the vertical lines that form the letters next to one another with the horizontal lines on the side closest to the adjoining letter extended above the adjoining letter and longer than the opposite horizontal side of the letters."

³ Registration No. 4377523 issued July 20, 2013 on the Principal Register, Section 8 accepted. Color is not claimed as a feature of the mark. The description of the mark is "The mark consists of a set of two adjacent positive and negative shaded designs; the design on the left is a shaded rectangle containing two stylized interlocking capital letter 'T's forming a Roman numeral 'II' where the left side is upright and the right side 'T' is inverted and which appears above the terms 'TRIBE OF TWO' inside the rectangle; the right design is negative version of the design consisting of two shaded and stylized capital letter 'T's forming a Roman numeral 'II' where the left side is upright and the right side 'T' is inverted and which appears above the shaded terms 'TRIBE OF TWO'."

substantially, exclusively and continuously used the trademarks TRIBE OF TWO and the pleaded design marks on “luxury handbags and wallets” (Par. 7); that Opposer’s goods are sold in retail stores and through Opposer’s website (Par. 8); and that pleaded Registration Nos. 4377523 and 5924569 are “valid [and] subsisting” (Par. 9). Applicant’s answer otherwise denies the salient allegations of the notice of opposition and did not plead any affirmative defenses.⁴

I. The Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the opposed application.

Opposer submitted four notices of reliance: status and title copies of Opposer’s pleaded Registration Nos. 4377523 and 5924569;⁵ Internet materials in the form of webpages offered to show the strength of Opposer’s pleaded marks;⁶ third-party registrations offered to show the relationship between Applicant’s and Opposer’s goods;⁷ and Internet materials in the form of webpages offered to show the relationship between Applicant’s and Opposer’s goods.⁸

Applicant submitted neither trial testimony nor a brief. Nonetheless, Opposer, as plaintiff in this proceeding, bears the burden of establishing its entitlement to a

⁴ 5 TTABVUE.

⁵ 15 TTABVUE.

⁶ 14 TTABVUE.

⁷ 16 TTABVUE.

⁸ 17 TTABVUE.

statutory cause of action and Section 2(d) claim by a preponderance of the evidence. *See Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007).

II. Entitlement to a Statutory Cause of Action

An opposer in an inter partes case must prove entitlement to a statutory cause of action. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015). “Under the Supreme Court’s decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014), entitlement to a statutory cause of action under the Lanham Act requires demonstrating (1) an interest falling within the zone of interests protected by the Lanham Act and (2) an injury proximately caused by a violation of the Act.” *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, * 2 (Fed. Cir. 2022). *Accord Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020); *Empresa*, 111 USPQ2d 1162; *see also Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999) (defining a “real interest” as a “direct and personal stake” in the outcome of the proceeding). “[A] party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021).

Opposer made of record its pleaded registrations, and they provide Opposer with a real interest in this proceeding and a reasonable belief of damage from registration of Applicant's mark.⁹ See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). In addition, Applicant's answer admits Opposer's common law use of the marks on luxury handbags and wallets.¹⁰ See *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (“[Entitlement to a claim] will usually be found in an opposition based on likelihood of confusion when the opposer establishes its registration or use of a trademark, which right might be plausibly harmed by registration of applicant's mark.”).

III. Likelihood of Confusion

Under Section 2(d) of the Trademark Act, a mark may not be registered if it “consists of or comprises a mark ... or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion....”

A. Priority

Because Opposer's pleaded registrations are of record, and there is no counterclaim against them, priority is not at issue with respect to the mark and the goods identified in the registrations.¹¹ *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). In addition, Applicant's

⁹ 15 TTABVUE.

¹⁰ 5 TTABVUE 3-4.

¹¹ 15 TTABVUE 17-28.

answer admits Opposer's use of the pleaded marks since 2012, a date prior to Applicant's constructive use date of September 19, 2019.¹² See Trademark Act Section 7(c); 15 U.S.C. 1057(c); *Cent. Garden & Pet v. Doskocil*, 108 USPQ2d 1134, 1140 (TTAB 2013).

B. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (enumerating thirteen factors to be considered when testing for likelihood of confusion). "Whether a likelihood of confusion exists between an applicant's mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors." *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular determination").

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, 192 USPQ 24, 29 (CCPA 1976) ("The

¹² 5 TTABVUE 3-4.

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.”). We must consider each relevant *DuPont* factor for which there are arguments and evidence. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Here, Opposer contends that the similarities between the goods, channels of trade and classes of consumers, the strength of its mark, and the similarities between the marks, are determinative.

1. Similarity or Dissimilarity of the Parties’ Goods

We consider first the similarity or dissimilarity of the parties’ goods. *DuPont*, 177 USPQ at 567. Our determination must be based on the identification of goods in the subject application and pleaded registrations because they define the scope of the benefit of registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). It is sufficient that the goods of the applicant and the opposer are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 14711, 1476 (Fed. Cir. 2000).

To show that Opposer's handbags, shoulder bags, tote bags, satchels, purses, clutches, and wallets¹³ are related to Applicant's clothing, namely, belts, hats, shirts, t-shirts, pants, socks and shorts, sweat shirts, jackets, hoodies, joggers, sweat pants, athletic pants and tops, headbands, wristbands, Opposer submitted forty use-based third-party registrations which list at least one item from Opposer's registrations and one item from the opposed application.¹⁴ The third-party registration evidence serves to suggest that the involved goods are the types of goods that may emanate from a single source under a single mark. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86; *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

¹³ Because the "purses and wallets" of Opposer's pleaded Registration No. 4377523 also are listed in the longer identification of goods in Opposer's pleaded Registration No. 5924569, we compare the goods used with both marks although listing only those in Registration No. 5924569.

¹⁴ 16 TTABVUE. More specifically, the third party registrations comprise Registration Nos. 6263160 stylized B, 6405224 IMPACT COLLECTION UNITED BY BLUE, 6407251 RWC, 6410290 SKIPORTY, 6413331 PIJUT, 6414664 DON'T SIT HOME, 6415030 FILTHY CLIQUE and design, 6418272 SHOPQUEEN, 6419016 LEE GOLISH, 6419640 CASEY JONES, 6425252 L2R and design, 6426107 ZIYOU&ZIJIAN, 6430018 AO and design, 6433793 BODY GLOVE and design, 6435764 M MARYAM and design, 6435824 SASSY HEIFER BOUTIQUE, 6436003 MINT PLUS PINK, 6437735 LEROLI, 6438313 JAZMIN CHEBAR, 6439559 TRICHAMP, 6439769 face design, 6442657 EMPIRE COVE, 6442847 VRST, 6442849 LA COMUNIDAD DE AWAKE NEW YORK, 6443176 ELIZO stylized, 6444753 MYSAVANNASTYLE and design, 6448024 HERWET, 6448263 TOGETHER IN WEATHER and design, 6450335 WALK WITH ME and design, 6450614 SOTARIUS, 6450689 MOUNTAIN VIEW PRINTHOUSE, 6451873 TRAVELOXICITY GEAR, 6451898 BOICHICK, 6452814 LINDA GAIL, 6452914 CRAFT & LORE and design, 6457310 lobster and Nantucket design, 6459466 IN THIS FAMILY WE FIGHT TOGETHER!, 6462477 XINSELECT, 6463030 stylized O, and 6464893 dragon head design.

Opposer also submitted excerpts from third-party websites offering at least one item from Opposer’s registrations and one item from the opposed application.¹⁵

Excerpts from two websites are shown below.¹⁶

CK SWEATSHIRTS ¹⁷	CK HAND BAGS ¹⁸
	
MK ATHLETIC PANTS ¹⁹	MK HANDBAGS ²⁰
	

¹⁵ 17 TTABVUE. Not all of the websites show the third party mark used on goods from both parties. Applicant’s goods do not include masks. (No. 38, 17 TTABVUE 51-60). A webpage listing of “women” and “men,” presumably tabs which would lead to separate pages which includes photos of apparel bearing the mark, is not the same as showing the mark on items that overlap with Applicant’s goods. (No. 39, 17 TTABVUE 61-65). We give no weight to the exhibits which show the mark on bags such as sold by Opposer but not on clothing items such as sold by Applicant.

¹⁶ While the third party websites feature pages with the different goods, the mark generally appears on the top of the page and could be identifying the source of retail services rather than the source of the depicted goods, which generally do not display the same mark on or in close proximity to the goods.

¹⁷ 17 TTABVUE 6.

¹⁸ 17 TTABVUE 9.

¹⁹ 17 TTABVUE 73.

²⁰ 17 TTABVUE 67.

Third-party webpage evidence showing the same mark used for goods offered by both parties is probative to demonstrate the relatedness of Applicant's goods and Opposer's goods for likelihood of confusion purposes. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both.”).

Opposer also contends that handbags are complementary to clothing because both contribute to an outfit, “the scheme of presenting oneself in a desired, stylish manner.”²¹ We agree that the third-party websites showing clothing and handbags indicate that handbags are considered an accessory which contribute to the style or look created by the clothing.²² *Nike, Inc. v. WNBA Enters., LLC*, 85 USPQ2d 1187, 1195 (TTAB 2007) (“Wearing apparel is complementary in nature to accessories for clothing such as purses and tote bags, and items which are used to transport clothing or carry personal articles such as backpacks, duffel bags and garment bags”).

In view of the foregoing, we find that Applicant's goods and Opposer's goods are related. As a result, this *DuPont* factor weighs in favor of finding a likelihood of confusion.



²¹ 17 TTABVUE 20.

²² 17 TTABVUE.

2. Channels of Trade and Classes of Consumers



Turning now to the established, likely-to-continue channels of trade and classes of consumers, inasmuch as neither Opposer's pleaded registrations nor the opposed application include any restriction in the identification of goods, we must presume that the goods travel in all channels of trade appropriate for such goods, which as the record shows includes brick-and-mortar retail stores as well as online websites. *Stone Lion Capital Partners*, 110 USPQ2d at 1161. Applicant's answer admits that its goods are sold online at Applicant's website, and that Opposer's goods are sold in retail stores and through Opposer's website.²³ Based on the third-party website evidence showing the goods of both parties are sold through the same websites, presumably to the general consumer with access to such websites, we find that the goods of both parties travel in some of the same channels of trade to some of the same general consumers. This factor also weighs in favor of finding a likelihood of confusion.

3. Strength of Opposer's Mark

To ascertain the scope of protection to which they are entitled, we consider the strength of Opposer's  and  marks. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) ("The weaker an opposer's mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection."). A mark can be conceptually strong or commercially strong. *See In re*

²³ 5 TTABVUE 4.


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 ... and its marketplace strength”). The fifth *DuPont* factor enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use).”²⁴

With respect to its conceptual strength, Opposer’s pleaded marks  and  are registered on the Principal Register without a claim of acquired distinctiveness, and so are treated as inherently distinctive. *See New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020). In addition, we note that the record includes no evidence of any descriptive significance of the literal components and so Opposer’s marks are arbitrary as applied to its goods. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (an arbitrary term is “conceptually strong as a trademark”).

With respect to its commercial strength, Opposer contends that its marks attract “unsolicited media, including in connection with popular TV shows such as *Scandal* and *Animal Kingdom* and as a result, are commercially strong.”²⁵ This is not borne out by the record. Opposer submitted two screen shots alleged to be from television

²⁴ While *DuPont* factor five specifies the “fame” of the mark, the Court of Appeals for the Federal Circuit also considers the “strength” of the mark under that factor. *See Stone Lion Capital Partners*, 110 USPQ2d at 1160 (“the Board found factor five—the strength of Lion’s marks—was neutral because Lion failed to show “that its marks are well-known in the financial services field.”); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed Cir. 1992) (“Famous or strong marks enjoy a wide latitude of legal protection.”).

²⁵ 24 TTABVUE 12.

shows in which a character carries a handbag, but no mark is discernible on the handbag.²⁶ The record evidence of media or third party references to Opposer similarly do not show either of Opposer's pleaded marks, but mention Opposer's name Tribe of Two.²⁷ Some media references do not mention either Opposer's name or its mark but include interviews with one of Opposer's founders.²⁸ The remaining evidence offered to show the strength of Opposer's mark are merely pages from Opposer's website or Instagram account, most of which show Opposer's  mark at the top of the page.²⁹ A single third party (Issuu Inc.) website features an advertisement featuring the mark:



The record includes no information as to whether either the Issuu website or Opposer's website receives any visitors. In view of such minimal public exposure to Opposer's marks, there is no support for a finding of commercial strength. This factor

²⁶ 14 TTABVUE 17, 31.

²⁷ 14 TTABVUE 41, 43, 47, 55, 66, 74-75, 80, 82-83.

²⁸ 14 TTABVUE 45, 64.




²⁹ 14 TTABVUE 8, 14, 19, 22, 25, 27, 29, 33, 35, 49, 57, 59, 61, 70, The mark does not appear on one page bearing only a photo. 14 TTABVUE 51. Another Opposer webpage features photos in thumbnail size which when enlarged become illegible. 14 TTABVUE 53.

is therefore neutral. Nonetheless, we find Opposer’s marks are accorded the normal protection accorded inherently distinctive and arbitrary marks. *See Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017).

4. Similarity or Dissimilarity of the Parties’ Marks

We consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *See Cai v. Diamond Hong*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018). The test under the first *DuPont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).

For ease of comparison, we display the marks below:

Opposer’s Mark Reg. No. 4377523	Opposer’s Mark Reg. No. 5924569	Applicant’s Mark
<p>TRIBE OF TWO</p> 		


Because it includes wording, Opposer’s mark in Registration No. 4377523 is less similar to Applicant’s mark than Opposer’s mark in Registration No. 5924569. *See In*


re Viterra Inc., 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (“In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’”)(citation omitted). We include Opposer’s mark in Registration No. 4377523 in this comparison because we accept that Opposer’s use of the design element with the wording makes it more likely that Opposer’s design element in both marks may be perceived as including the letters TT as a shorthand reference to **TRIBE OF TWO**. *In re Electrolyte Labs., Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (“The nature of stylized letter marks is that they partake of both visual and oral indicia, and both must be weighed in the context in which they occur.”).

Opposer contends that the design element of all three marks comprise two letter Ts “juxtaposed in an inverted position to each other,” that the “T’s comprising both parties’ marks are clear and discernible,” and so “the literal element is the dominant feature.”³⁰ Even within the context that Opposer’s design is shown in some instances with the words **TRIBE OF TWO**, making it more likely that Opposer’s design element in both marks may be perceived as including the letters TT, we still do not find it very likely. It appears at least as, if not more, likely that the design will be seemed as an alternate version – the Roman numeral form – of the word **TWO** in **TRIBE OF TWO**. In addition, consumers may perceive the arrangement of lines in the marks as an abstract design.

³⁰ 24 TTABVUE 22.

However, even if we found Opposer's mark would be perceived as stylized letters, we disagree that Applicant's mark would be perceived as stylized letters.³¹ While the letter Ts are discernible if sought in Applicant's mark, they do not form the dominant impression. Instead, the inversion of the letters T, the doubled horizontal lines, and the use of negative space to create a rectangle among the vertical and horizontal lines creates the impression of a rectangular geometric design. *See Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 204 USPQ 697, 699 (CCPA 1980) (the Board

found the mark  "while incorporating the letters 'GP,' can by no means be considered a literal mark" but, instead, "projects the image of a distinctive design mark."); *Diamond Alkali Co. v. Dundee Cement Co.*, 343 F.2d 781, 145 USPQ 211, 213

(CCPA 1965) ("opposer's]  mark, when viewed either as a whole or in part, would normally be regarded as consisting of an arbitrary design which is capable of many different interpretations rather than as a letter 'd.'").

Because the literal element is not the dominant feature of Applicant's mark, we assess the visual similarity of the marks. *In re ATV Network Ltd.*, 552 F.2d 925, 193 USPQ 331, 332 (CCPA 1977); *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990). That is, although the marks of both parties have two discernible letter




³¹ We acknowledge that Opposer's pleaded registrations and the opposed application all include a description of the mark as comprising two letter Ts. However, statements in the application or registration are not evidence of public perception. *See In re Medline Indus., Inc.*, 2020 USPQ2d 10237, *11 n. 38 (TTAB 2020) ("consumers are unaware of the descriptions [of the mark in the application]").

Ts, and the letters are formed of lines of similar thickness, the overall commercial impression of each mark is different, with Opposer's mark creating the impression of a Roman numeral II, or the letters TT, or an abstract design, and Applicant's mark creating the impression of a rectangular geometric design. *See Gen. Foods Corp. v. Ito Yokado Co. Inc.*, 219 USPQ 822, 828 (TTAB 1983) (the comparison of design marks comes down to a "subjective 'eye ball' reaction") (citing *Long John Silver's Inc., v. Lou Scharf Inc.*, 213 USPQ 263, 267 (TTAB 1982) (visual comparison of pirate design marks)).

We find that the dissimilarity between the marks weighs against a finding of likelihood of confusion.

5. Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. Any of the *DuPont* factors may play a dominant role. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. In some cases, a single factor (such as the differences in the marks) may be dispositive. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). Notwithstanding the relationship between the goods, and the overlapping channels of trade and classes

of consumers, because the marks , , and  are visually distinct and create different commercial impressions, we find that Opposer has failed to show by a preponderance of the evidence a likelihood of confusion between Applicant's mark and Opposer's pleaded registered marks.

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Decision: The opposition is dismissed.