

This Opinion Is Not a
Precedent of the TTAB

Mailed: January 27, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Atomic Austria GmbH and Amer Sports Winter & Outdoor Company

v.

*Zave US*¹
—

Opposition No. 91266670
—

Oliver D. Yang of Yang Law, LLC and Terence P. O'Brien of Amer Sports Americas for Atomic Austria GmbH and Amer Sports Winter & Outdoor Company.

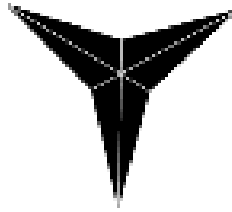
Zave US, acting pro se.
—

Before Bergsman, Wellington, and Dunn, Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Zave US (Applicant) filed an application to register the mark:

¹ The opposed application lists the owner as “Zave US.” During the opposition, both parties refer to Applicant as “Zave US LLC.” To the extent Applicant misidentified its proper corporate name in the application, the proper course is to seek correction by filing a motion to substitute with the Board, explaining the misidentification. Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 512.04 (June 2022).



on the Principal Register for “pants; a-shirts; athletic shirts; graphic t-shirts; gym pants; jogging pants; leather pants; long-sleeved shirts; short-sleeve shirts; short-sleeved shirts; sport shirts; sports pants; sweat pants; sweat shirts; t-shirts; tee shirts; tee-shirts; track pants; yoga pants” in International Class 25.²

Opposers Atomic Austria GmbH (“Atomic”), an Austrian sporting goods and athletic wear manufacturer, and Amer Sports Winter & Outdoor Company (“Amer”), its exclusive U.S. distributor, 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 Atomic Austria GmbH’s mark:



² Application Serial No. 90002906 filed June 15, 2020 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 the mark, and that, with respect to the description, “[t]he mark consists of a three pointed star.”

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.

for “protective gear, namely, ski helmets, snowboarding helmets; goggles for skiing” in International Class 9, “athletic clothing, namely, shirts, t-shirts, crew neck shirts, gloves, jackets, base layer jackets, mid-layer jackets, shorts, sweaters, pullovers, vests, headbands, pants, polo shirts, button down shirts, base layer pants, base layer shirts, headgear, namely, winter caps, baseball caps, hats, caps, and beanies” in International Class 25, and “shin guards for athletic use; body protectors for skiing and snowboarding, namely, back protectors” in International Class 28, the subject of prior common law use and pleaded Registration No. 4707305.³

Applicant’s answer denies the salient allegations of the notice of opposition and did not plead any affirmative defenses.⁴

I. The Record

The pleadings are automatically of record. *Wirecard AG v. Striatum Ventures B.V.*, 2020 USPQ2d 10086, at*2 (TTAB 2020). Pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), so is Applicant’s opposed application.

Opposers submitted the declaration of Jake Strassburger, Market Manager for Amer, and exhibits;⁵ the transcript and exhibits from the discovery deposition of Applicant’s CEO Giuseppe Pugliesi;⁶ and a notice of reliance with status and title

³ Registration No. 4707305 issued March 24, 2015, Sec. 8 accepted, and states “The mark consists of a miscellaneous three point star design with overall triangular shape.”

⁴ The two statements listed as affirmative defenses in fact merely amplify Applicant’s denial of the allegations of a likelihood of confusion. 4 TTABVUE 4.

⁵ 10 TTABVUE.

⁶ 11 TTABVUE. The transcript of the discovery deposition was not submitted under notice of reliance pursuant to Trademark Rule 2.120(k)(3)(i) but merely submitted with a cover sheet describing it as “testimony for plaintiff.” Applicant did not object to consideration of the

copies of, and the underlying application files for, Opposer's pleaded Registration No. 4707305 and its unpleaded Registration No. 1050668 for the same mark.⁷

Applicant submitted the statement of CEO Giuseppe Pugliesi.⁸

Only Opposers filed a brief.

II. Entitlement to a Statutory Cause of Action

“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).⁹ Thus, “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

evidence. Inasmuch as the lack of a notice of reliance is a procedural defect which could have been cured if promptly raised, we will consider the deposition testimony.

⁷ 12 TTABVUE.

⁸ 13 TTABVUE. While titled an affidavit, the statement does not include an oath. Opposers did not object to consideration of the evidence either upon receipt or in its brief. Inasmuch as the statement being unsworn is a procedural defect which could have been cured if promptly raised, we will consider it.

⁹ There is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* [entitlement to a statutory cause of action] and *Empresa Cubana [Empresa Cubana Del Tabaco v. Gen. Cigar Co.]*, 753 F.2d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) [standing]” for determining eligibility requirements for statutory causes of action. *Corcamore, LLC v. SGM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, *7 (Fed. Cir. 2020).

damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Id.* at *7.

Where, as here, there are multiple opposers, each opposer must plead and prove its own entitlement to a statutory cause of action. *Int’l Dairy Foods Ass’n v. Interprofession du Gruyère*, 2020 USPQ2d 10892 at *9 (TTAB 2020); *Wise F&I, LLC, v. Allstate Insurance Co.*, 120 USPQ2d 1103, 1107 (TTAB 2016); TBMP 303.06. Opposer Atomic made of record the pleaded registration, and the registration provides Atomic with a real interest in this proceeding and a reasonable belief of damage from registration of Applicant’s mark.¹⁰ See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

With respect to Opposer Amer, Market Manager Strassburger testified that Amer has used the registered mark, under license by Atomic, on ski and snowboarding helmets and clothing.¹¹ As a competitor in the clothing field, Atomic also has a real interest in this proceeding and a reasonable belief of damage from registration of Applicant’s mark. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 111 USPQ2d at 1062.

III. Priority of Use and 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

¹⁰ 12 TTABVUE 102-105.

¹¹ 10 TTABVUE 4.

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 Atomic’s pleaded registration is of record, and there is no counterclaim against it, priority is not at issue with respect to the mark and the goods identified in the registration.¹² *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, Opposers submitted the testimony of Amer’s Market Manager Strassburger that Amer has used the mark in commerce on clothing since 2013, a date prior to Applicant’s constructive use date of June 15, 2020. *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*

¹² 12 TTABVUE 102-105.

Steaks Int'l, Inc. v. Greater Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018).

Here, Opposers contend that, with the exception of *DuPont* factors seven and eight, “each remaining *DuPont* factor weighs in favor of [Opposers].”¹³ However, there is no requirement that each factor must weigh in favor of one of the parties. *See Stratus Networks, Inc. v. UBTA-UBET Comm’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341 (Fed. Cir. 2020) (“While the Board is required to consider each *DuPont* factor for which it has evidence, the Board ‘may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.’”). *Accord* J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 24:43 (5th ed) (“The *DuPont* multi-factor analysis is merely a guide. It does not involve a mathematical adding up of factors pro and con to decide if confusion is likely.”). In the absence of evidence, or lack of relevant or probative evidence, *DuPont* factors are neutral. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (“In its likelihood of confusion analysis, the TTAB considered the first three *DuPont* factors, treating the rest as neutral because neither party submitted evidence related to them”); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1164 (Fed. Cir. 2014) (“The Board properly determined that the first four *DuPont* factors weighed in favor of finding a likelihood of confusion and that the remaining factors were neutral.”).

¹³ 14 TTABVUE 9.

Contrary to Opposers' contention, for the reasons we point out below, many of the *DuPont* factors are neutral in our determination here. Opposers are correct that Applicant did not submit evidence of third party uses which would narrow the protection accorded Opposers' mark under *DuPont* factor six, but Opposers err in contending that the absence of evidence weighs in favor of Opposers; instead the factor is neutral.¹⁴ See *In re Embiid*, 2021 USPQ2d 577, *38 (TTAB 2021) ("because there is no evidence of use of PROCESS-formative marks in the marketplace, we find that the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.").

While Opposers contend that *DuPont* factors seven and eight addressing actual confusion "are not applicable" because Applicant has not begun use of its mark, we find the factors seven and eight to be neutral.¹⁵ *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) ("We agree that Respondent's limited use and sales created "little opportunity for confusion to have occurred." ... Accordingly, we find the seventh and eighth factors neutral.") (internal citation omitted).

With respect to factor nine, if a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant's related good under a similar mark as an extension of the plaintiff's line. *Devivo v. Ortiz*, 2020 USPQ2d 10153, at *14 (TTAB 2020). However, evidence regarding the

¹⁴ 14 TTABVUE 18.

¹⁵ 14 TTABVUE 9.

relationship between the goods under *DuPont* factor nine is not necessary where, as here, the goods are in part identical. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *59 (TTAB 2022) (“Given the relatedness of the parties' identified goods, we find it unnecessary to rely on this factor. We therefore find the ninth *DuPont* factor to be neutral with respect to a finding of likelihood of confusion.”).

As to *DuPont* factor ten, Opposers' testimony that it has “not authorized [Applicant's] use, or proposed use” is not evidence of a market interface, and so that factor also is neutral.¹⁶ See *Devivo v. Ortiz*, 2020 USPQ2d 10153, at *15 (TTAB 2020) (“The tenth *DuPont* factor argued by Opposer regarding the market interface between Opposer and Applicant -- is also neutral. There is no evidence that there has been any interface between the parties.”).

We agree with Opposers' point that Applicant's intent-to-use basis precludes Applicant having any common law right to exclude other users under *DuPont* factor eleven, but this results in the factor being neutral, not favoring Opposers.¹⁷ See *McDonald's Corp. v. McSweet LLC*, 112 USPQ2d 1268, 1285 (TTAB 2014) (“Applicant's sales figures and Applicant's advertising and promotional expenditures are not sufficient to establish an appreciable level of consumer recognition. ... This factor is neutral in our analysis”).

¹⁶ 10 TTABVUE 9 (testimony); 14 TTABVUE 19.

¹⁷ 14 TTABVUE 19-20. To the extent that Opposers argue their own “vested interest in excluding others,” this argument is irrelevant. On its face, *DuPont* factor eleven considers “The extent to which **applicant** has a right to exclude others from use of its mark on its goods.” (**emphasis** added).

We turn to the evidence and arguments on the remaining *DuPont* factors.

Similarity or Dissimilarity of the Parties' Goods, Trade Channels, and Sales Conditions

The second, third, and fourth *DuPont* factors assess the similarity or dissimilarity of the parties' goods, trade channels, and "the conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. We must make our determination under these factors based on the goods as they are identified in the application and cited registration. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017). In assessing the similarity or dissimilarity and nature of the goods, the Board "considers whether 'the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the[ir] source or origin'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)).

As stated, Applicant seeks registration for "pants; a-shirts; athletic shirts; graphic t-shirts; gym pants; jogging pants; leather pants; long-sleeved shirts; short-sleeve shirts; short-sleeved shirts; sport shirts; sports pants; sweat pants; sweat shirts; t-shirts; tee shirts; tee-shirts; track pants; yoga pants" and the pleaded registration includes "athletic clothing, namely, shirts, t-shirts, crew neck shirts, gloves, jackets, base layer jackets, mid-layer jackets, shorts, sweaters, pullovers, vests, headbands,

pants, polo shirts, button down shirts, base layer pants, base layer shirts, headgear, namely, winter caps, baseball caps, hats, caps, and beanies.”

If an application or registration describes goods broadly, and there is no limitation as to their nature, it is presumed that the application or registration encompasses all goods or services of the type described. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). Because Applicant’s clothing, with the exception of “athletic shirts,” is not limited to particular uses, we presume that it encompasses all uses, including the same “athletic clothing” listed in the pleaded registration. Moreover, we presume Applicant’s “pants” to include the registered “athletic clothing namely ... base layer pants” and Applicant’s “athletic shirts” to include the registered “athletic clothing namely ... shirts, t-shirts, crew neck shirts, ... polo shirts, button down shirts, ... [and] base layer shirts.” In sum, the goods are identical in several respects. No more is necessary to demonstrate a finding of similarity that supports a likelihood of confusion. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion).

Where, as here, the goods of the application at issue and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358,

101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Info. Builders Inc.*, 2020 USPQ2d 228, at *3 (TTAB 2021).

We do not find probative Applicant's testimony that the goods are different because Opposers allegedly use their mark on "predominantly winter sport associated products" and Applicant will not use its mark in the winter apparel category; that the trade channels are different because Applicant "sells its products through its own personal website and channels which are way different from [Opposers'] ones," and the sales conditions differ because Opposers "customers are predominantly skiers and winter sports aficionados."¹⁸ The testimony is based on restrictions on how Opposers use the mark which are not present in the identification of goods. That is, while Opposers may use the mark on winter sports clothing, the pleaded registration is not restricted to that use, and so Opposers would be free also to use the mark on other types of clothing, including some of the same items of clothing that will bear Applicant's mark.

Similarly, the evidence that Opposers now use certain channels of trade in no way restricts them from employing other channels of trade, including those identical to Applicant's intended channels of trade. *See In re Detroit Athletic Co.*, 903 F3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) ("The third *DuPont* factor—like the second factor—must be evaluated with an eye toward the channels specified in the application and registration, not those as they exist in the real world.").

¹⁸ 13 TTABVUE 3.

We also are not persuaded that there is any significant difference in the sales conditions for Opposers' and Applicant's goods. Opposers and Applicant offer in part identical clothing items with no restrictions as to classes of purchaser or conditions of sale. Applicant's testimony "I believe that customers read very carefully about reviews and other people opinions before buying" is not based on any industry experience but his personal opinion.¹⁹ Moreover, in his deposition, Applicant agreed that, with respect to the T-shirts, consumers do not exercise much care before purchase but "see them and like them."²⁰

We find the *DuPont* factors regarding the similarities between the goods, channels of trade and conditions of sale strongly weigh in favor of finding a likelihood of confusion.

Strength of Opposer's Mark

The fifth *DuPont* factor is the "fame of the prior mark (sales, advertising, length of use)." *DuPont*, 177 USPQ at 567. "In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength." *New Era Cap v. Pro Era*, 2020 USPQ2d 10596, at *10 (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010)).²¹ In

¹⁹ 13 TTABVUE 3.

²⁰ 11 TTABVUE 13.

²¹ 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* 110 USPQ2d at 1160 ("the Board found factor five—the strength of Lion's marks—was

terms of its inherent strength, Opposer's mark is registered on the Principal Register without a showing of acquired distinctiveness, and is presumed to be inherently distinctive under Section 7(b) of the Trademark Act. *New Era*, 2020 USPQ2d 10596, at *10.

Opposers contend that the pleaded mark is entitled to greater protection than that accorded an inherently distinctive design because Opposers' promotional efforts have made the design mark commercially strong.²² We acknowledge the testimony regarding Opposers' use of the mark in commerce since 2013 on clothing and helmets, and in Opposers' catalogs, and on Opposers' YouTube page and website.²³ We also acknowledge the evidence that the mark has appeared alone on clothing as shown below:



Figure 1 Opposers' t-shirt²⁴

However, in consideration of Opposers' evidence of use as a whole, this display is rare. Much of the evidence in support of this contention that the consuming public

neutral because Lion failed to show "that its marks are well-known in the financial services field.").

²² 14 TTABVUE 16.

²³ 10 TTABVUE 3-6.

²⁴ 10 TTABVUE 337.

has come to recognize Opposers' design mark shows use of the design mark in close approximation with the literal term ATOMIC, as shown in the examples below:



Figure 2 excerpt from Opposers' catalog²⁵

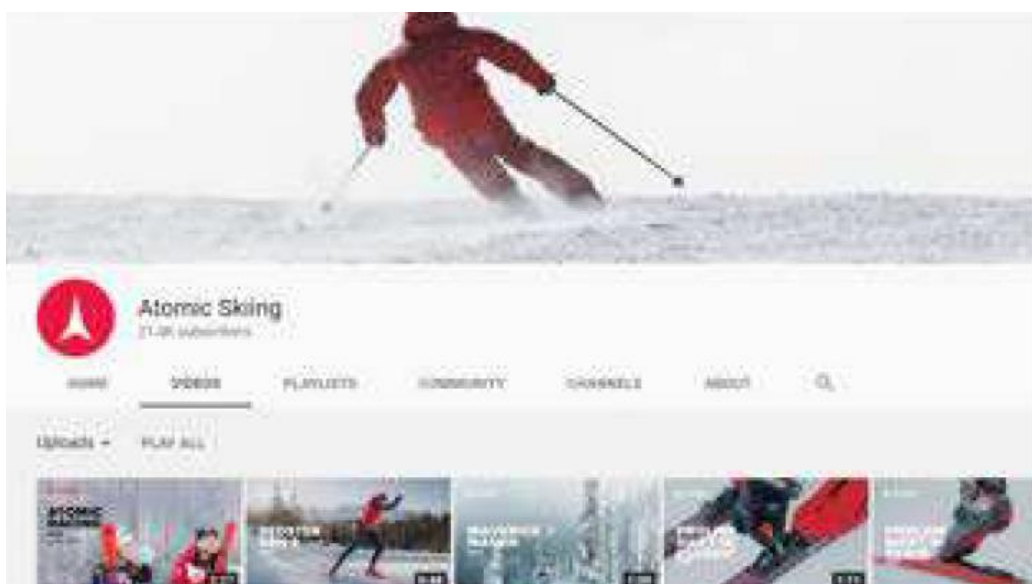


Figure 3 Except from Opposers' YouTube page²⁶

²⁵ 10 TTABVUE 15.

²⁶ 10 TTABVUE 364.

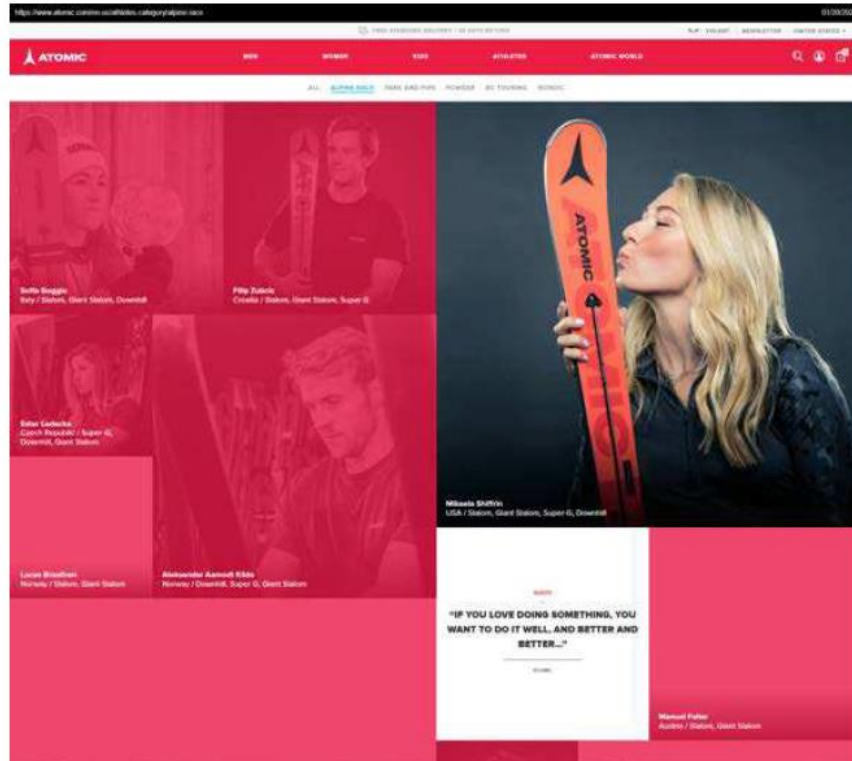


Figure 4 excerpt from Opposers' website²⁷

See *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135 (Fed. Cir. 2015) (“None of the examples in the record, however, conclusively establishes that the paw print alone was used for source identification.”). In addition, the declaration indicates that the literal term ATOMIC has been in use with Opposers’ ski equipment and apparel sold in the United States since 1975, far longer than the use of the design since 2013.²⁸ The record makes no indication what proportion of Opposers’ uses include the design mark alone in contrast to the design mark used with the term ATOMIC. In the

²⁷ 10 TTABVUE 368.

²⁸ 10 TTABVUE 3.

absence of focused evidence demonstrating consistent exposure of the consuming public to the design mark without the term ATOMIC, we cannot find that Opposers' promotional efforts have lent strength to the design mark alone.

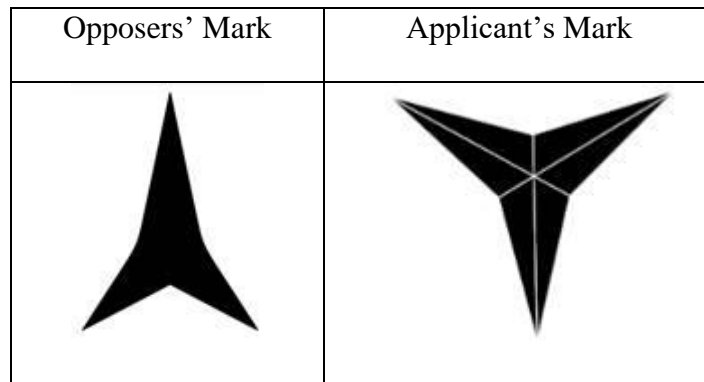
We find Opposers' mark is accorded the normal protection accorded an inherently distinctive mark.

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*, 127 USPQ2d at 1800. 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).

The marks at issue are described by Opposers and Applicant respectively as "three pointed stars." In contrast to a literal mark, that also may be spoken, the designs are perceived only when they are seen. Accordingly, the similarity or dissimilarity of the marks must be analyzed simply on the visual similarity of the marks and the commercial impression they make. *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”). For ease of comparison, we display the marks below:



Both marks are triangular geometric shapes that can be described as three-pointed stars, each comprised of six straight lines. The differences between the marks, namely, Opposers' mark being elongated and Applicant's mark having intersecting lines, are not very prominent and are likely to go unnoticed by consumers. The overall similarity in the marks' shape outweighs the differences and creates the same commercial impression of a triangular geometric design. *See Grandpa Pidgeon's of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973) (“Both parties employ an elderly man figure in connection with identical services. The figures create a similar commercial impression, likely to be remembered by purchasers. ... That one figure is upright and apparently spry while the other is slightly stooped is, we believe, a difference not likely to be recalled by purchasers seeing the marks at spaced intervals. Purchasers of retail services do not engage in trademark dissection.”); *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990) (“When such marks [comprising a figure of a frankfurter having arms,

legs, a pleasant facial feature and a chef's hat] are seen at different times on such similar goods, the recollection of the first viewed mark will be a general impression most likely devoid of the details noted by applicant.”). *See also Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) “Exact identity is not necessary to generate confusion as to source of similarly-marked goods.”); *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ 1719, 1721 (Fed. Cir. 1988) (“The purchasing public, we believe, does not indulge in such recognitional contortions but sees things as they are.”); *In re Johnson Prods. Co., Inc.*, 220 USPQ 539, 540 (TTAB 1983) (“It is undeniable that if the mark is carefully examined, the two overlapping ‘S’s can be discerned. What is more significant, however, is that this sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”).

We also note that difference in orientation, such as Opposers’ design mark pointing up and Applicant’s design mark pointing down, is not a difference which outweighs the similarities. *In re United Serv. Distrib., Inc.*, 229 USPQ 237, 239 (TTAB 1986) (mark depicting silhouettes of a man and woman facing right within teardrop design and a mark depicting silhouettes of a man and woman facing left within circular design found confusingly similar in spite of differences evident in side-by-side comparison). *See also Visa Int’l Servs. Ass’n v. Life-Code Sys., Inc.*, 220 USPQ 740, 744 (TTAB 1983) (“It is the opinion of the Board that the amendment to the drawing [to reverse the direction in which the airplane points] is not a material alteration of the mark. ... The two marks create the same commercial impression.”).

We find that the similarity between the marks weighs in favor of a finding of likelihood of confusion.

The Extent of Potential Confusion

The twelfth *DuPont* factor assesses the extent of potential confusion, i.e., whether de minimis or substantial. We have no evidence on this factor not previously discussed. However, based on the other factors, we agree with Opposers that the potential confusion here is substantial.²⁹ See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) (“Cunningham next argues that there was no analysis of the ‘extent of potential confusion.’ As described above, however, the Board explained that the relevant goods of both parties were identical, based on the identification of goods in the respective registrations, and, as such, traveled in the same channels of trade to the same purchasers.”). Because the goods are in part identical, of the type that would be found in the same trade channels and marketed to and purchased by the same consumers, and will be used with similar marks, the extent of potential confusion weighs in favor of Opposers.

Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. As set forth above, we find *DuPont* factors six, seven, eight, nine, ten, and eleven, to be neutral. Because the goods, the channels of trade,

²⁹ 14 TTABVUE 20.

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and sales conditions are in part identical, and the parties' marks are similar, we find *DuPont* factors one, two, three, and four weigh in favor of Opposer, and that confusion

between Applicant's  mark and Opposer's pleaded  mark is likely.

Decision: The opposition is sustained.