

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 29, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Under Armour, Inc.

v.

Evade, LLC

—
Consolidated:
Opposition No. 91195620
Cancellation No. 92052716
—

Leigh Ann Lindquist of Sughrue Mion PLLC
for Under Armour, Inc.

John L. Welch of Wolf, Greenfield & Sacks, P.C.
for Evade, LLC.

—
Before Zervas, Cataldo and Wellington,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Evade, LLC (“Evade”) is the owner of Registration No. 3752925 for the mark **EVADE OFFSHORE ARMOR** (in standard characters), and Registration No. 3752926 for the mark:



The goods identified in each registration are “shirts, hats, visors, sweatshirts, jackets, shorts in the field of fishing” in International Class 25.

Evade is also the owner of Application Serial No. 77794781 for the mark **EVADE OUTDOOR ARMOR** (in standard characters) for “shirts, hats, visors, beanies, sweatshirts, jackets, gloves, shorts” in International Class 25.²

By way of a Petition to Cancel and a Notice of Opposition, Under Armour, Inc. (“UA”) seeks to cancel Evade’s registrations and opposes registration of the applied-for mark on the ground of likelihood of confusion.³ In support of the likelihood of confusion claim, UA pleads, *inter alia*, prior common law rights in the marks **UNDER ARMOUR**, **ARMOUR** and **OFFSHORE ARMOUR**, in connection with clothing, the latter mark being acquired through a predecessor-in-interest.

UA also pleads, collectively in the opposition and the cancellation, ownership of over fifty registrations for marks containing the term **ARMOUR**, mostly in

¹ Both registrations issued on February 23, 2010.

² Filed on July 31, 2009 and based on Applicant’s assertion of its bona fide intent to use the mark in commerce, under Section 1(b) of the Act. The application contains a disclaimer of **OUTDOOR**.

³ The operative complaints, UA’s amended Notice of Opposition and Petition to Cancel, were filed on November 15, 2011 (15 TTABVUE). Record citations are to TTABVUE, the Trademark Trial and Appeal Board’s publically available docket history system, by entry and, where applicable, page number. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

connection with athletic clothing, gear and related services. Two of these registrations are:

UNDER ARMOUR (Reg. No. 2279668) for: clothing, namely, T-shirts, long sleeve shirts, mock turtle necks, hats, shorts, shirts, leggings, jersey's [sic], pants, headwear for winter and summer, under wear, tank tops (male and female), winter caps, sweat shirts/pull overs, women's bra; and

ARMOUR (Reg. No. 3392904) for: clothing, excluding golf clothing, namely, hooded sweat shirts, crew neck shirts, long sleeve shirts, pullover shirts, and sweat pants.

In both the opposition and the cancellation, UA alleges that its "ARMOUR marks⁴ and UNDER ARMOUR trade name have become strong, well known and famous";⁵ and that Evade's registered marks and its applied-for mark so resemble UA's "previously used and registered ARMOUR marks and UNDER ARMOUR trade name as to be likely, when applied to the goods set forth in [the registrations and application], to cause confusion, mistake or to deceive within the meaning of 15 U.S.C. § 1052(d)."⁶

⁴ In both the opposition and the cancellation, UA referenced nearly all of its pleaded common law and registered marks as the "ARMOUR marks," but did not actually include the OFFSHORE ARMOUR mark and thus failed to plead it is a basis for its likelihood of confusion claim. However, UA's rights in this mark and reliance on it for purposes of its likelihood of confusion claim were clearly tried by the parties and argued in substance in the trial briefs. As a result, we deem the pleadings amended to include a claim of likelihood of confusion based in part on UA's alleged prior common law rights in this mark. Fed. R. Civ. P. 15.

⁵ (Amended) Notice of Opposition ¶ 9 (15 TTABVUE 14); (Amended) Petition to Cancel ¶ 9 (15 TTABVUE 228).

⁶ Not. of Opp. at ¶ 12 (15 TTABVUE 16), Pet. to Cancel ¶ 13 (15 TTABVUE 229).

Evade filed answers to the complaints, as amended, denying the salient allegations of UA's likelihood of confusion claims, and the two proceedings have been consolidated.⁷

I. Evidentiary Issues

Evade objects to UA's reliance on (i) the testimony of Mr. Steven Battista, UA's Senior Vice President of Brand Creative (a division of UA), and certain related exhibits, in connection with UA's purported acquisition of rights in the mark OFFSHORE ARMOUR because he lacks personal knowledge of the predecessor-in-interest's prior use of the mark; (ii) UA's pending application for the same mark because it lacks any probative value; and (iii) a prior non-precedential Board decision to establish that its UNDER ARMOUR mark is famous for purposes of this proceeding.

The objected-to testimony is not stricken because we are able to delineate the matters to which Mr. Battista was testifying based on personal knowledge and weigh, as may be appropriate, any testimony that is not based on personal knowledge. As to UA's pending application, it is admissible and will not be stricken despite its limited probative value. *See Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1956 n.9 (TTAB2014) ("The applications are not evidence of anything except that they were filed."), *reversed and remanded on other*

⁷ Evade's answers were filed on October 2, 2012. 31 TTABVUE (Answer to amended Notice of Opposition) and 32 TTABVUE (Answer to amended Petition to Cancel). On November 18, 2010, the Board granted UA's consented motion to consolidate the proceedings.

grounds, 114 USPQ2d 1827 (Fed. Cir. 2015); *see also*, *Lasek & Miller Associates v. Rubin*, 201 USPQ 831, 833 n.3 (TTAB 1978) (plaintiff's application file is proof only of filing, not of any facts alleged in the application). Furthermore, we see no reason to strike or completely disregard UA's citation to a non-precedential Board decision. Applicant is correct, though, that any factual findings in the prior decision cannot be used as a substitute for evidence or alleviate UA of any burden of proof in these consolidated proceedings. Finally, to the extent that there is other testimony or evidentiary materials relevant to our likelihood of confusion analysis, their probative value or lack thereof, is discussed more fully in this decision.

II. Record

The record in this case consists of the pleadings and, by rule, the files of the involved registrations and application. Trademark Rule 2.122(b)(1).

UA submitted copies of the deposition testimony, with accompanying exhibits, of Steven Battista, and David Bergman, UA's Controller Accounting and Finance.⁸

Pursuant to Rule 2.122(d), UA made the following pleaded registrations of record, some in standard character form, some in stylized form and some including a design element, by attaching USPTO database copies showing current status and title with its complaints or under notice of reliance:⁹

⁸ 73-77 TTABVUE.

⁹ 1 TTABVUE (original Notice of Opposition), 15 TTABVUE (amended Notice of Opposition and amended Petition to Cancel), and 67 TTABVUE (notice of reliance). Printouts obtained from the USPTO Trademark Status and Document Retrieval ("TSDR") database.

Reg. No.	Mark	Reg. No.	Mark
2279668 2917039 3052160 3174498 3178549 3375771 3586005 3500323 3622787 3501771 3777929 3722377 3712050 3944542 3812080 3944953 3929387 3826168 3851123 4225998 4135826	UNDER ARMOUR	3392904 3720012 3766130 3970978	ARMOUR
2954369 3081173 2991124 3138451	UNDER ARMOUR	2509632	UA UNDER ARMOUR
3663142	UNDER ARMOUR PERFORMANCE	3474912	UA UNDER ARMOUR FACTORY HOUSE
3622968	ARMOURSTORM	3541792	BABY ARMOUR
3510702	ARMOUR FLEECE	3504324	ARMOUR STRETCH
3599836	ARMOURBOUND	3596241	ARMOURGUIDE
3556268	UNDER ARMOUR UAI WOMAN	3538889	UNDER ARMOUR ALL AMERICA LACROSSE...
3584365	ARMOURLASTIC	3662480	ARMOURLOFT
3069215	ARMOURBLOCK	3646428	UNDER ARMOUR UAI GIRLS
3800485	ARMOURZONE	3791431	ARMOURBITE
3684394	ARMOUR REACTACK	3684393	ARMOUR GRABTACK
3655849	ARMOURFORM	3938546	ARMOURFIT
3835958	UNDER ARMOUR COMBINES	3880602	ARMOURGRIP
4142942	ARMOUR BRA	3646904	ARMOURFUSION

In addition, UA submitted the following materials under notices of reliance during its trial periods, including rebuttal:

- Copies of Evade's responses to UA's interrogatory nos. 1, 9-11 and 15;¹⁰
- Printouts of third-party applications from the USPTO's Trademark Electronic Search System (TESS) and extensions of time to oppose filed by UA with regard to these applications;¹¹
- PACER (online judicial decision database) copies of complaints filed by UA in federal district courts resulting in "dismissal/ final judgment of the actions or extension of time to file an answer to the complaint";¹² and
- Printouts from a U.S. Customs database showing recordation of UA's trademark registrations with that agency.¹³

For its part, Evade submitted the following materials under notices of reliance during its trial period:¹⁴

- UA's responses to Evade's document production requests nos. 13, 15-19, 21, and 35-36;
- UA's responses to Evade's interrogatories nos. 9, 11-15, 17, and 19-20;
- Printouts from the USPTO TESS database for registrations owned by UA but not pleaded;
- Printouts from the USPTO TESS database for third-party registrations and applications containing a disclaimer of the term ARMOR;
- Copies of dictionary definitions of the words Armor, Armour, Outdoor, and Offshore;

¹⁰ 66 TTABVUE.

¹¹ 88 TTABVUE.

¹² 89 TTABVUE.

¹³ 90 TTABVUE.

¹⁴ 78-84 TTABVUE.

- Printouts from the USPTO TESS database for third-party registrations and applications for marks that include the term ARMOUR or ARMOR; and
- Printouts from third-party websites showing use of the term ARMOUR or ARMOR in marks in connection with goods and services.

III. UA's Standing

There is no dispute that UA has standing to bring the opposition and cancellation proceedings. Based on the testimony of Messrs. Battista and Bergman regarding UA's activity as a sports apparel company, as well as UA's ownership of registrations for marks containing the term ARMOUR, which are of record, UA has clearly established that it is more than a mere intermeddler and has personal interest in these matters. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

IV. Priority

In the context of the opposition proceeding, priority is not at issue with respect to UA's registered marks vis-à-vis Evade's applied-for mark. *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). On the other hand, to the extent UA seeks to rely on any of its pleaded common law rights in marks, it must establish priority of use for those marks.

In the cancellation proceeding, UA must prove priority of use for all of its pleaded marks, whether they have been registered or are based on use. *See Brewski Beer Co. v. Brewski Bros., Inc.*, 47 USPQ2d 1281 (TTAB 1998).

For purposes of establishing priority, the parties may rely on the filing dates of the underlying applications for Evade's involved registrations and the pleaded UA registrations as constructive use dates. *M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1550 (TTAB 2010); *see also, J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 437 (CCPA 1965). The filing date for each of the underlying applications for Evade's registrations is June 19, 2008, and the filing date of its application, subject of the opposition proceeding, is July 31, 2009. Evade does not claim use of its mark earlier than these filing dates. UA is thus able to establish priority for many of its pleaded registrations that have filing dates earlier than June 19, 2008, and Evade acknowledges as much in its Brief (at p. 9, "[t]here is no dispute that Under Armour has priority with respect to many of its registered marks, including UNDER ARMOUR and ARMOUR"). Of these registrations, we note, in particular, the following two which have filing dates of, respectively, August 13, 1996 and May 2, 2005:

UNDER ARMOUR (Reg. No. 2279668) for: clothing, namely, T-shirts, long sleeve shirts, mock turtle necks, hats, shorts, shirts, leggings, jersey's [sic], pants, headwear for winter and summer, under wear, tank tops (male and female), winter caps, sweat shirts/pull overs, women's bra," and

ARMOUR (Reg. No. 3392904) for "clothing, excluding golf clothing, namely, hooded sweat shirts, crew neck shirts, long sleeve shirts, pullover shirts, and sweat pants."

As to UA's asserted prior common law rights in the OFFSHORE ARMOUR mark, it relies on an assignment of rights from Pelagic, Inc. ("Pelagic"). UA's witness, Mr. Battista, testified that Pelagic assigned to UA all rights to the mark

OFFSHORE ARMOUR and a copy of an assignment was introduced as an exhibit with his deposition.¹⁵ However, the assignment agreement was executed after the relevant priority dates for Evade's involved registrations and application.¹⁶ It was also assigned after UA filed its notice of opposition and petition to cancel. Moreover, Mr. Battista testified that he did not have personal knowledge as to when Pelagic first began use of the mark and the assignment was clearly executed after Evade's priority dates.

Aside from the facts that Mr. Battista lacks personal knowledge regarding any prior use by Pelagic and that the assignment of Pelagic's mark was executed after Evade's priority dates, UA relies on statements made in the assignment agreement in order to show that the rights in the mark that it acquired from Pelagic extended back to 2006. Specifically, UA relies on the following averment in the assignment agreement:

4. Representations and Warranties

A. Assignor [Pelagic] represents and warrants that as of the date of its execution of this Agreement:

(i) Assignor owns and controls the Trademark;

...

¹⁵ Battista Dep. Exh. 29 (designated "Confidential"). UA also introduced copies of two related documents titled "Trademark Agreement" and "Trademark License," executed by UA and Pelagic, as exhibits to the Battista Deposition.

¹⁶ The dates of signature in the agreement are "11/1/11" and "10/31/11," and the related documents (identified in the preceding footnote) have the same dates of execution.

(vii) Assignor believes that it first used the Trademark in connection with shirts in interstate commerce at least as early as 2005, though the first actual evidence of use of the Trademark that Assignor can presently locate evidences use of the Trademark in 2006; and

(viii) Assignor has continuously sold and offered for sale shirts in interstate commerce under the Trademark since at least as early as 2005 or 2006.

Evade objects to UA's reliance on the statements made in the agreement because they "constitute classic inadmissible hearsay." Brief, p. 5. Evade asserts that Mr. Battista's testimony involving the assignment was merely a "regurgitation of statements made in [the assignment agreement] apparently provided by [Pelagic] – statements that were offered to prove the truth of the matter asserted" and that "no one with actual knowledge of Pelagic's activities testified in this case." *Id.* Evade points out that Mr. Battista admitted that he has no personal knowledge regarding Pelagic's activities, sales and use of its mark prior to 2010 and he could not properly authenticate any documents purporting to show Pelagic's use of its mark for that time period. In response to these objections, UA argues that it may still rely on the truth of the statements made in the assignment agreement because they fall under an exception to the hearsay rule, Fed. R. of Evidence 803(15), inasmuch as they were made in a document that affects an interest in property. Reply Br., p. 6.¹⁷

¹⁷ Subsection (15) to Fed. R. Evidence 803 ("Exceptions to the Rule Against Hearsay") provides:

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless

We need not decide whether the statements in the assignment agreement concerning Pelagic's first use of OFFSHORE ARMOR fall within the asserted hearsay exception because, even if they do and the statements are considered, we would not find that UA's priority has been established. That is, the statements involving Pelagic's first use in the assignment agreement may have some probative value, but they are not dispositive of the priority issue insofar as it pertains to the OFFSHORE ARMOR mark. *West Florida Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) ("However, whether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use by a preponderance. Rather one should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use."). Inasmuch as the statements in the assignment were not subject to cross-examination, they cannot be given the same weight and are not the equivalent of clear and convincing testimony, *i.e.*, testimony from a witness with personal knowledge of Pelagic's use the term prior in 2006. *Cf. Powermatics, Inc. v. Glebe Roofing Products Co.*, 341 F.2d 127, 144 USPQ 430 (CCPA 1965) (Oral testimony, if "sufficiently probative," may be sufficient to prove priority); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1108 (TTAB 2007). Moreover, given the importance of priority in this proceeding and the

later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

fact that the assignment was executed after UA filed its petition to cancel the registrations, it was incumbent upon UA to make an adequate showing that the common law rights it was acquiring existed prior to any date that Evade may rely upon. UA curiously did not introduce testimony from a witness with personal knowledge of Pelagic's asserted prior use and did not provide a reason why this was not possible.¹⁸ UA instead relies on the assignment agreement and certain exhibits (introduced during the deposition of Mr. Battista) comprising invoices and purported sales numbers for Pelagic for the years 2006 to 2011. With regard to these invoices, it is not clear whether any of the purported sales involved goods being sold under an OFFSHORE ARMOR mark. That is, none of the invoices or sales numbers reference an OFFSHORE ARMOUR mark and, again, Mr. Battista testified he was unfamiliar with Pelagic's use of this term prior to the assignment. Thus, at best, these exhibits demonstrate that Pelagic was in business during those years and, at some point, began using OFFSHORE ARMOR on hangtags and shirts.

Upon consideration of the record as whole, and even assuming *arguendo* that the statements in the assignment agreement fall within the asserted hearsay exception and may be considered for the truth of the matter asserted, UA has not demonstrated by a preponderance of the evidence that the assigned common law rights in the OFFSHORE ARMOUR mark existed prior to either June 19, 2008

¹⁸ We note in this regard that UA, through its counsel, was communicating with an individual identified as Pelagic's president in October 2011. See Battista Dep. Evade's Exhibit 1 (confidential), 76 TTABVUE.

(Evade's priority date for its involved registrations) or July 31, 2009 (Evade's priority date for its involved application). UA therefore cannot rely on this mark for purposes of its likelihood of confusion claim against Evade's registered marks, EVADE OFFSHORE ARMOR (in standard characters and stylized with design), and the mark in the involved application, EVADE OUTDOOR ARMOR.

V. Likelihood of Confusion

We now turn our attention to 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. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. Similarity of the Goods, Channels of Trade and Purchaser Care

The involved goods are, in part, identical inasmuch as the identifications of goods for the involved registrations and application, and UA's pleaded registrations for the marks ARMOUR and UNDER ARMOUR, all include "shirts." Although the identification of goods for the involved registrations has the qualifying language "in the field of fishing," UA's shirts are not limited to use in any field or sport and thus encompass shirts that may be used for fishing. In addition to shirts, the parties' goods are closely related given they include basic articles of clothing, e.g., shorts,

hats, jackets, sweatshirts, etc., that may be bought at the same time or are worn together.

With respect to the goods that are in part legally identical, namely, shirts used for fishing, we must presume that the channels of trade and classes of purchasers for the shirts are the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). Evade seems to acknowledge this much by stating that “in view of certain presumptions to which [UA] is entitled, Evade does not contend that the involved goods are legally different, or that the channels of trade or classes of consumers are different, or that customers will exercise anything more than ordinary care in purchasing the involved goods.” Brief, p. 1. With regard to the goods that are not identical, but closely related because they are basic articles of clothing, the record demonstrates that they too may be found in the same channels of trade and would be encountered by the general public purchasing basic articles of clothing, such as hats, shorts, and sweatshirts.

Accordingly, the second and third *du Pont* factors strongly support a finding of likely confusion. As far as the fourth factor, namely, the conditions under which and buyers to whom sales are made (i.e., “impulse” vs. careful, sophisticated purchasing), this remains neutral or may slightly favor a likelihood of confusion given that “shirts” are broadly identified and could include relatively inexpensive items which would be purchased without much consideration given to the source of the shirts. Furthermore, the record does not show that shirts, or any other articles of clothing, for use in the field of fishing are necessarily any more expensive than clothing in general.

B. Fame of UA’s UNDER ARMOUR Mark

When a prior user’s mark is found to be famous, this plays a significant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection. A famous mark is one that has extensive public recognition and renown. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

UA asserts that its mark, UNDER ARMOUR, is “famous for clothing” and this factor “strongly favors [UA].” Brief, p. 38. Evade concedes this much in its brief, stating that it “does not contest UA’s assertion that UNDER ARMOUR is a famous

mark for athletic clothing.” Brief, p. 10).¹⁹ Accordingly, we do not discuss the record in detail, but find on this record that the evidence supports UA’s claim that its UNDER ARMOUR mark is famous for athletic clothing. In particular, we note there is testimony, as well as supporting documents, evidencing substantial and impressive sales, advertisements in a variety of media, including sponsorships, endorsements by prominent athletes and product placement, as well as other evidence reflecting that the UNDER ARMOUR has extensive public recognition and renown in connection with athletic clothing.

Accordingly, we find on this record that UA’s UNDER ARMOUR mark is famous and therefore entitled to a broad scope of protection. *Recot*, 54 USPQ2d at 1897. This factor therefore weighs in favor of finding a likelihood of confusion with this mark.

We hasten to add, however, that this factor is limited in relevance solely to our likelihood of confusion analysis involving the UNDER ARMOUR mark. That is, our finding of fame for the UNDER ARMOUR mark does not extend to UA’s other pleaded mark, ARMOUR, is also famous and the record does not support a finding that ARMOUR, by itself, is a famous mark.

C. Relative Strength or Weakness of Term ARMO[U]R For Clothing

¹⁹ We do, however, note UA’s reliance on a prior Board decision (*Under Armour v. Bode*, Opp. No. 91178653) wherein the Board found UA’s mark UNDER ARMOUR to be famous. Evade’s objection UA’s reliance on that decision is well-founded because we are not privy to the evidence made of record in that opposition and we cannot determine in this case the evidentiary bases for the Board’s findings in the unrelated proceeding. Simply put, the Board only looks to the record in this proceeding in making our determination of any fame.

A key contention made by Evade in arguing that there is no likelihood of confusion is that any similarity due to the shared term “Armour” or “Armor” has to be discounted because of the inherent weakness and wide-spread third-party use of that term in marks and in descriptions of goods. In support, Evade relies on the defined meaning of the term “armo[u]r,” third-party registrations for marks containing the term, third-party use of marks containing the term, and disclaimers of the term in third-party applications and registrations.

After reviewing the evidence, we conclude the term “armo[u]r” is slightly suggestive of clothing in general and, indeed, merely descriptive for certain types of protective-type gear and clothing having a specific protective purpose. However, there is insufficient evidence showing third-party use of the term in marks on clothing to conclude that it is weak or diluted.

The term “armor” is defined as:²⁰

Armor 1. A defensive covering, as of metal, wood, or leather, worn to protect the body against weapons. 2. A tough, protective covering, such as the bony scales covering certain animals or the metallic plates on tanks or warships. 3. A safeguard or protection: *faith, the missionary's armor*. 4a. The combat arm that deploys armored vehicles, such as tanks. b. The armored vehicles of an army.

For ordinary clothing, or athletic apparel that does not serve a specific purpose of protection against impact, the term is merely suggestive that there may be a

²⁰ *The American Heritage Dictionary of the English Language* (4th edition) Houghton Mifflin Company. Copy of definition submitted by Evade under notice of reliance (80 TTABVUE 9). “Armour” is defined in the same dictionary as “Chiefly British Variant of armor.” (80 TTABVUE 28).

“protective” quality to the apparel. That is, it can be understood as conjuring athletic clothing allows you to go “into battle” (play sports) or protection from bad weather. On the other hand, for clothing designed to provide a “defensive covering” or “tough, protective covering,” the term identifies a key safety feature of the clothing and would be descriptive. This distinction is generally reflected in the disclaimer evidence and third-party registration evidence submitted by Evade and referenced in its brief. For instance, ARMO[U]R is disclaimed in registrations covering clothing items that provide a protective layer as a purpose or specific feature of the goods, e.g., ARC ARMOR (Reg. No. 3779972 for “protective clothing, namely, jackets, gloves, bibs, and pants for welding, welding boots and welding helmets”) and FORCEFIELD BODY ARMOUR (“protective articles of clothing for protection against accident and injury; insulating articles of clothing for protection against accident and injury.”) In contrast, the involved goods of the parties, as described, have no specific personal protection or safety feature but are general apparel or apparel used in the field of fishing.

In its brief, Evade identifies approximately two dozen third-party registrations for marks containing ARMO[U]R for purposes of shedding light on the meaning of the term. *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015); see also, *The Institut National des Appellations D'Origine v. Vintners International Co. Inc.*, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (“third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as

applied to certain goods or services.”) (internal citations omitted).²¹ Of these, only three (ARMORPLUS, ARMORTOES, and HEAT ARMOR) involve articles of clothing and it is clear from the goods described in these registrations (respectively identified as “protective cut-resistant gloves for industrial use,” “shoes for protections from accident or injury for industrial use,” and “protective gloves for industrial use”), that they have a specific protective purpose for industrial use. Evade does not reference a single live registration for a mark containing ARMO[U]R for clothing that does not have a stated protective purpose or safety feature in the identification of goods.

As to Evade’s evidence of third-party use of the term ARMO[U]R, “[t]he purpose of a defendant introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694. This factor, the sixth *du Pont* factor, contemplates the “number and nature of similar marks in use *on similar goods*.” *In re E.I. du Pont de Nemours & Co.*, 177 USPQ at 567 (emphasis added). *Cf.*, *SBS Products Inc. v. Sterling Plastic & Rubber Products Inc.*, 8 USPQ2d 1147, 1149 n.6 (TTAB 1988) (“Even if evidence of such third-party uses were submitted, it would be of no aid to respondent herein where the third-party usage was for goods unrelated to either petitioner's skin care products or respondent’s stuffing box sealant.”). In its

²¹ At pp. 14-15 of Evade’s brief (93 TTABVUE 21-22); copies of registrations were submitted under notice of reliance (82-83 TTABVUE).

brief, Evade points to three marks (BODY ARMOUR, ARTIC ARMOR, and URBAN ARMOR) purportedly being used on clothing; however, this evidence consists of printouts from websites without any further information or testimony regarding the exposure of these websites or indicia whether any sales of the advertised goods have occurred. See *Palm Bay*, 73 USPQ2d at 1693-94. Moreover, at least with respect to the URBAN ARMOR mark, it is unclear if the mark is even being used on clothing as the evidence consists of a single page website printout with the following description: “Urban Armour is a collection of DIY wearable electronics that help women exercise control over their personal/public space.”²² Nevertheless, the record includes several additional similar website printouts showing the term ARMO[U]R used on or in connection with clothing, e.g., a SALT ARMOUR (with a design) website showing “New Swimwear” and the mark on shirts. Again, however, it is not possible to verify how long these websites have existed and the extent of sales, if any, for the advertised goods. In sum, and on the record before us, we cannot conclude that there has been significant consumer exposure to marks containing the word ARMO[U]R.

Nevertheless, in determining the degree of weakness, if any, in the shared term ARMO[U]R, we must “adequately account for the apparent force of [third-party use] evidence,” regardless of whether “specifics” pertaining to the extent and impact of such use have been proven. *Juice Generation*, 115 USPQ2d at 1674. “[E]xtensive

²² 84 TTABVUE 45.

evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, No. 2014-1789, 2015 WL 4934553 (Fed. Cir. Aug. 19, 2015), citing to the *Juice Generation*.

The record in this proceeding is distinguishable from that in *Juice Generation* and *Jack Wolfskin* inasmuch as, there are no third-party registrations for marks with this term on general articles of clothing. That is, while there is some evidence of third-party usage of the term ARMO[U]R on clothing, there are no third-party registrations covering apparel, without there being an express protective or safety purpose. Rather, we have a significant number of third-party registrations for marks containing this term covering a wide variety of goods and services having little or nothing to do with clothing. Indeed, the third-party registrations generally involve goods and services where a suggestive protective meaning is obvious and more availing, *e.g.*, security services, surgical drapes, anti-corrosive coatings, secure payment transaction services, etc.²³

Ultimately, on this record, for purposes of comparing the parties’ marks, the term ARMO[U]R, as a source identifier for clothing, is not significantly diminished. Although there is some inherent weakness in the term in connection with goods and services that, by their nature, involve protection, it has not been shown that the

²³ See Evade’s fifth notice of reliance at 82-83 TTABVUE.

same suggestive meaning is applicable in the context of the involved goods, namely, general articles of clothing or apparel used for fishing. We do recognize that, given the possibility that even general articles of clothing may be viewed as protection against inclement weather, *e.g.*, rain, snow, cold, etc., consumers may understand the term in this manner; nevertheless, any degree of weakness based on the term being understood in this manner is minimal.

With respect, in particular, to the sixth *du Pont* factor involving dilution through others' commercial use of the term on the same or similar goods, this factor remains neutral in our likelihood of confusion analysis because there has not been a showing of pervasive third-party use of this term in commerce.

D. Similarity of the Marks

We now consider the similarity or dissimilarity of the marks at issue in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc.*, 73 USPQ2d at 1692.

In considering the marks, we focus on UA's ARMOUR mark with Evade's registered EVADE OFFSHORE ARMOR and



Marks. Because the latter Evade mark is so highly stylized, we separately analyze this mark. Our third comparison involves UA's ARMOUR and UNDER ARMOUR marks vis-à-vis Evade's applied-for EVADE OUTDOOR ARMOR mark. That is, for

purposes of similarity of the marks comparisons, we have chosen certain marks pleaded by UA, not all, that we believe are most similar to Evade's marks. If we find that there is a likelihood of confusion with these pleaded marks, there is no need for us to consider a likelihood of confusion with the other pleaded marks. Conversely, if we find there is no likelihood of confusion with these pleaded marks, we would find no likelihood of confusion with the other pleaded marks as they incorporate matter that makes them less similar. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

- (i) *Evade's EVADE OFFSHORE ARMOR (in stylized lettering) mark v. UA's ARMOUR mark*

Turning first to Evade's mark,



we initially note it contains the term ARMOUR, the equivalent to UA's mark, ARMOUR. The difference in spelling, "armor" versus "armour," is of little to no consequence because, as previously discussed, they are merely alternative spellings of the same word, the latter being a chiefly British variant of the other (see footnote 19), and they have the same meaning. Moreover, this term is pronounced the same in both marks.

In spite of this point of similarity, we have little hesitation in finding that the two marks are overall dissimilar because it is the arbitrary word EVADE that

appears so prominently, to say the least, that it clearly dominates the entire mark.²⁴ Consumers viewing the mark will, without a doubt, be impressed with this term based on its sheer size. That is, it is likely consumers will place such an emphasis on the EVADE portion that they put less attention to the additional wording and even fail to remember this portion when attempting to recall the mark at a later time.

Because the term EVADE is so dominant visually and it has no shown meaning in the context of the involved goods, it will thus create the overall commercial impression or connotation of Evade's mark. Given the respective meanings of "armor" (or "armour") and "evade," and in spite of Evade's mark incorporating the term ARMOR, we find the marks to be overall more dissimilar than similar.

Accordingly, we find these marks to be dissimilar.

(ii) *Evade's EVADE OFFSHORE ARMOR (in standard characters) mark v. UA's ARMOUR mark*

We now consider Evade's mark, EVADE OFFSHORE ARMOR, in standard character form, in connection with UA's, pleaded and registered mark, ARMOUR. Here, the circumstances are quite different from those in the previous analysis. In contrast to its stylized mark, Evade's standard character mark is not constricted to the term EVADE appearing in such a prominent manner. Rather, we must construe

²⁴ "Evade" is defined as "to stay away from (someone or something): to avoid (someone or something)." *Merriam-Webster's Collegiate Dictionary, Eleventh Edition*. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), and we take judicial notice of this definition of "evade."

the standard character mark as possibly appearing in a variety of stylized manners. *See In re Viterra Inc.*, 671 F3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); *see also*, *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011). Thus, there is no finding here that consumers focus almost exclusively on the term EVADE; instead, consumers are likely to notice and accord source-identifying significance to the ARMOR portion of Evade's mark.

In this case, the fact that Evade's mark incorporates UA's previously-used and registered mark is significant and creates a scenario where a likelihood of confusion has frequently been found. *See, e.g., The Wella Corp, v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design for men's cologne, hair spray, conditioner and shampoo is likely to cause confusion with the mark CONCEPT for cold permanent wave lotion and neutralizer); *Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL and griffin design for fabrics is likely to cause confusion with WEST POINT for woolen piece goods); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (applicant's mark EBONY DRUM for hairdressing and conditioner is likely to cause confusion with EBONY for cosmetics); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) (applicant's mark HEAD START COSVETIC for

vitamins for hair conditioners and shampoo is likely to cause confusion with HEAD START for men's hair lotion and after-shaving lotion). Furthermore, and as previously discussed, the common term, ARMO[U]R, has been shown to be at most only slightly suggestive in connection with common articles of clothing; thus, this is not a situation where the common term is so highly suggestive or weak in connection with the involved goods obviating any similarity of the marks based on the shared term. *See, Cf., In re Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974) (MEN'S WEAR for a semi-monthly magazine not confusingly similar to MMI MENSWEAR for fashion consulting for men because "MENSWEAR" is merely descriptive of such services).

As to the meanings or connotations of the marks, the term EVADE has no apparent meaning in the context of clothing whereas OFFSHORE is somewhat suggestive of clothing used for fishing, *i.e.*, clothing for offshore fishing.²⁵ EVADE is also the name of Applicant and consumers familiar with this information may consider this as merely the addition of a trade name. It has long been held that the addition of a trade name or house mark to a registered mark generally does not avoid confusion. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1364 (TTAB 2007) *citing Menendez v. Holt*, 128 U.S. 514, 521 (1888) (applicant's house mark is a difference between the marks, but it does not result in marks that are dissimilar for likelihood

²⁵ "Offshore" is defined as "from the shore ... at a distance from the shore ... outside the country." Merriam-Webster's Collegiate Dictionary (10th edition). Evade's notice of reliance (80 TTABVUE 72-74).

of confusion purposes). Although Evade has not merely added a house mark, but also the term OFFSHORE, the rationale remains that customers who are already familiar with UA's mark, ARMOUR, will assume that the addition of EVADE OFFSHORE simply identifies a previously unidentified source behind UA's mark in context of some of the involved goods, namely, apparel used for fishing.

Overall, and in contrast to our finding involving Evade's highly-stylized mark, we find Evade's standard-character mark, EVADE OFFSHORE ARMOR, to be similar to UA's ARMOUR mark.

(iii) *Evade's EVADE OUTDOOR ARMOR v. UA's ARMOUR and UNDER ARMOUR*

Again, Evade seeks to register a mark, EVADE OUTDOOR ARMOR, that incorporates the equivalent to UA's registered mark, ARMOUR.

As previously discussed, the initial term EVADE is arbitrary in the context of apparel or, as previously mentioned, may be viewed as a trade name. The last term in the mark, ARMOR, is not descriptive and, at most, is only slightly suggestive of general clothing, including athletic apparel, to the extent that it may conjure a layer of protection. As to the middle word in Applicant's mark, OUTDOOR, this is a descriptive term for clothing used for "outdoors" activity and has been disclaimed in the involved application. Evade acknowledges this much in its brief ("[t]he word 'outdoor' ... is obviously descriptive of the goods ... [and] has no source-identifying

significance for the involved goods.”)²⁶ It is well-settled that disclaimed, descriptive matter, such as OUTDOOR in this proceeding, may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (*quoting In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Indeed, as exemplified by UA’s own use, it would not be unusual for competitors to identify their goods as clothing for the “outdoors” or, in UA’s case, use this term in conjunction with its marks (“UNDER ARMOUR OUTDOOR”) to refer to a line of clothing of “fishing gear, the shorts, button-down shirts as well as the camouflage and the hats.”²⁷

Considering Evade’s mark in its entirety, it is similar to UA’s mark, ARMOUR. Both marks share, at least in part, a common meaning or commercial impression based on the shared term ARMO[U]R. Consumers already familiar with UA’s

²⁶ 93 TTABVUE 28, Brief at p. 18.

²⁷ 73 TTABVUE 100-101. Battista Dep. 101:2-7. Although UA has shown that it uses the mark UNDER ARMOUR OUTDOOR, we hasten to add, however, that UA has not demonstrated prior rights in any mark containing the OUTDOOR term and our comparison is with UA’s marks identified in the subheading above.

ARMOUR mark on clothing are likely to believe there is connection, mistakenly so, with clothing being sold under the EVADE OUTDOOR ARMOR mark. For example, the EVADE OUTDOOR ARMOR may be viewed as an extension or variant of UA's ARMOUR mark. Similar to our explanation in the previous section, we must consider the possibility that consumers already familiar with the UA's ARMOUR mark will mistakenly assume that the addition or prefix of EVADE OUTDOOR simply identifies a previously unidentified source behind UA's mark for an "outdoor" line of clothes.

For these reasons, we find Evade's proposed mark, EVADE OUTDOOR ARMOR (in standard characters) is similar to UA's mark, ARMOUR.

Finally, with regard to UA's UNDER ARMOUR mark and in spite of its fame, we are not persuaded that there is sufficient similarity between it and EVADE OUTDOOR ARMOR.

E. Conclusion

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that Evade's mark:



is sufficiently different from UA's mark, ARMOUR, that there is no likelihood of confusion even though the marks will be used on legally identical goods such as clothing used for fishing.

However, we find Evade's standard character mark, EVADE OFFSHORE ARMOR mark, and UA's mark, ARMOUR, when considered in their entireties, are similar that, given that the goods are in-part identical or otherwise closely related and, where identical, are sold through the same channels of trade to the same classes of purchasers, we find a likelihood of confusion exists between these marks. Any doubts as to whether a likelihood of confusion exists must be resolved in favor of Opposer, the prior user and registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1113 (TTAB 2007).

We further conclude that Evade's applied-for mark, EVADE OUTDOOR ARMOR is sufficiently similar to UA's mark, ARMOUR, to also likely cause confusion. We make this determination keeping in mind that "outdoor" is descriptive of the goods, both marks will be used, in part, on identical goods, shirts, and offered for sale in the same trade channels to the same consumers.

We find no likelihood of confusion between UNDER ARMOUR and EVADE OUTDOOR ARMOR, in spite of the demonstrated fame of former mark.

Decision: The petition for cancellation is denied, in part, as to Registration No. 3792926.

The petition for cancellation is granted, in part, as to Registration No. 3792925 and this registration will be cancelled in due course.

The opposition is also sustained and Application Serial No. 77794781 will be abandoned in due course.