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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85498107
Applicant	David Copeland-Smith
Applied for Mark	BEAST MODE SOCCER
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Date	05/11/2018

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

David Copeland-Smith,  
Appellant,

v.

United States Patent and Trademark Office,  
Trademark Trial and Appeal Board,  
Appellee.

**NOTICE OF APPEAL**

Appellant David Copeland-Smith (“Appellant”) hereby gives notice of his appeal of the Order of the Trademark Trial and Appeal Board refusing registration of BEAST MODE SOCCER in Classes 25 and 28, Serial No. 85/498,107, entered on March 9, 2018 (the “Order”). Appellant received the Order on March 9, 2018, which is also the mailing date. A copy of the Order is attached hereto.

Respectfully submitted,

Dated: May 11, 2018

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CERTIFICATE OF MAILING

I hereby certify that the foregoing Notice of Appeal has been served upon the Trademark Trial and Appeal Board by submitting a copy thereof via ESTTA and depositing a copy thereof in an envelope addressed to Office of the General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450, on this 11<sup>th</sup> day of May, 2018. A copy of the foregoing Notice of Appeal has also been filed with the United States Court of Appeals for the Federal Circuit.

/LaTrina A. Martin/  
LaTrina A. Martin

SMRH:486312520.1

This Opinion is not a  
Precedent of the TTAB

Hearing: February 28, 2018

Mailed: March 9, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re David Copeland-Smith*  
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Serial No. 85498107  
———

Jill M. Pietrini of Sheppard Mullin Richter & Hampton LLP,  
for David Copeland-Smith.

Bridgett Smith, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.<sup>1</sup>

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Before Zervas, Kuczma and Lynch,  
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

David Copeland-Smith (“Applicant”) seeks registration on the Principal Register of the standard character mark BEAST MODE SOCCER for “T-shirts” in International Class 25 and “sporting goods and equipment for soccer training, namely, balls” in International Class 28.<sup>2</sup> Applicant disclaimed the term SOCCER.

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<sup>1</sup> Mr. Brody argued for the USPTO in the oral hearing.

<sup>2</sup> Application Serial No. 85498107, filed on Dec. 17, 2011, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On Nov. 1, 2017, the USPTO accepted Applicant’s

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on the following two registrations, both for the standard character mark BEAST MODE for International Class 25 goods:

- Reg. No. 3650781 ("the '781 registration," Section 8 and 15 affidavit accepted) for "T-shirts"; and
- Reg. No. 4254213 ("the '213 registration") for "Men's, women's and children's clothing, namely, shirts, sweatshirts; headwear, namely, hats, caps."

Both registrations issued to Marshawn Lynch ("registrant"), who played football professionally and is now retired.<sup>3</sup>

After the Examining Attorney made the refusal final, Applicant appealed to this Board and requested reconsideration. The Examining Attorney denied the request for reconsideration, the Board resumed the appeal, and both Applicant and the Examining Attorney filed briefs. An oral hearing was held on February 28, 2018. We affirm the refusal to register.

#### I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on

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Amendment to Allege Use, claiming first use and first use in commerce on April 16, 2012 for the goods in International Class 25, and first use and first use in commerce on June 6, 2012 for the goods in International Class 28.

<sup>3</sup> Nov. 25, 2016 Resp., Exh. M., TSDR 464-76. There is no indication in the cited registrations that the registered mark consists of or comprises the name identifying a particular living individual. Trademark Act § 2(c), 15 U.S.C. § 1052(c).

a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

#### A. The Goods, Trade Channels and Purchasers

We turn first to the similarity between the respective goods, trade channels and purchasers, and consider the goods as they are identified in the application and the cited registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (goods as identified in involved application and cited registration compared); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Neither the application nor the cited registrations include any restrictions regarding channels of trade; we must therefore presume that the recited goods are sold in the ordinary

or normal trade channels for such goods. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”).

The International Class 25 goods are identical; both Applicant and registrant’s ‘781 registration goods are identified as “T-shirts,” and the “shirts” in registrant’s ‘213 registration encompass T-shirts. When the goods overlap or are identical and their identifications have no restrictions as to nature, type, channels of trade, or classes of purchasers -- as is the case here -- the identified goods are presumed to travel in the same channels of trade to the same class of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983) (“absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”)). Of course, T-shirts are sold to the general public.

With regard to Applicant’s International Class 28 goods, “sporting goods and equipment for soccer training, namely, balls,” and registrant’s articles of clothing, we note that the respective goods need not be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis, but need only be “related in some manner and/or if the circumstances surrounding their

marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

In support of her contention that Applicant’s International Class 28 goods and registrant’s goods are related, the Examining Attorney submitted third-party registrations showing the same mark registered for both sporting equipment and clothing. *See*, for example:

- Reg. No. 3548830 for the mark WILSON for various clothing items including polo shirts and knit hats and soccer balls.
- Reg. No. 3879555 for the mark BECOME ENLIGHTENED for various clothing items including long sleeved shirts, hats, and “balls for sports.”
- Reg. No. 4689418 for the mark HESED for various clothing items including sweatshirts and sports shirts and “sports balls.”
- Reg. No. 4689420 for a design mark for sports shirts and polo shirts and “sport balls.”<sup>4</sup>

Although third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind that may emanate from a single source under a single mark. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (citing *In re Albert Trostel & Sons Co.*, 29

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<sup>4</sup> May 19, 2016 Office Action, TSDR 4-20.

USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)).<sup>5</sup> In addition, webpages from Applicant's website depict an UnderArmour brand ball and an UnderArmour brand T-Shirt.<sup>6</sup> The evidence in the record persuades us that Applicant's International Class 28 goods are commercially related to registrant's International Class 25 goods. We also find that both Applicant's International Class 25 and registrant's International Class 28 goods are both offered to the general public; the nflshop.com, soccer.com and dicks.com webpages demonstrate that such goods are offered through the same websites to such purchasers.

Applicant argues that registrant's identified goods are "marketed as apparel associated with [r]egistrant and his nickname, as well as [r]egistrant's college football years at Cal Berkeley," and Applicant's goods have "never been associated with [r]egistrant or football, and Applicant's apparel products are marketed primarily to Applicant's customers for Applicant's soccer coaching and training services."<sup>7</sup> These arguments are not persuasive because there is no restriction in Applicant's identification of goods limiting the marketing of Applicant's goods to customers of Applicant's soccer coaching and training services, and there is no restriction in registrant's identifications of goods limiting marketing as apparel associated with

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<sup>5</sup> The Examining Attorney submitted several webpages from third-party websites (nflshop.com, soccer.com and dicks.com) to show that the same marks are used on sports related clothing and sporting equipment. However, while this material shows websites selling both types of goods, it does not demonstrate use of one mark on both clothing and sports balls. *See* Jan. 23, 2017 Office Action, pp. 2-20.

<sup>6</sup> Nov. 25, 2016 Resp., Exh. L, TSDR 429.

<sup>7</sup> 7 TTABVUE 18-19.

registrant and his nickname, or registrant's "football years at Cal Berkeley." Rather, as noted above, we consider the goods as they are identified in the application and the cited registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1162 (appropriate to "focus on the application and registrations rather than on real-world conditions, because 'the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application'") (quoting *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 16 USPQ2d at 1787).

We therefore find the International Class 25 goods to be identical, the International Class 25 and 28 goods to be related, and the purchasers and trade channels for all of such goods to be at least overlapping.

#### B. The Marks

We compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. The test 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*, 101 USPQ2d at 1721. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259

(TTAB 1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the United States Army*, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be analyzed to determine whether the marks are similar. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013) (citing *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955)). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Nat'l Data Corp.*, 224 USPQ at 751.

Finally, where, as in the present case, the marks are used in connection with in part identical goods, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines, at least as to those goods. *Bridgestone*

*Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In this case, both marks are presented in standard character form, which allows for the display of the respective marks in any typeface or stylization. Applicant has merely added to registrant's mark the generic or highly descriptive term SOCCER, which Applicant has disclaimed.<sup>8</sup> Because merely descriptive and generic terms are accorded less weight in forming the commercial impression of a mark, see *Motion Picture Assoc. of America, Inc. v. Respect Sportswear, Inc.*, 83 USPQ2d 1555, 1561 (TTAB 2007) (RATED R SPORTSWEAR for clothing confusingly similar to RATED R mark for film ratings), the term SOCCER does little to distinguish the marks. Also, there is no question BEAST MODE is the portion of the mark most likely to be remembered and used by consumers in calling for and referring to Applicant's goods. For this reason, we are not persuaded by Applicant's arguments that the marks "are visually dissimilar because Applicant's mark contains the word SOCCER" and that the marks are "phonetically dissimilar because the word SOCCER in Applicant's mark contains two additional syllables."<sup>9</sup> Due to the shared term BEAST MODE, we

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<sup>8</sup> Likelihood of confusion has been found where a term is added to a registered mark. *In re Mighty Leaf Tea*, 94 USPQ2d at 1260 (finding ML in standard character form for use with personal care products and skin care preparations similar to ML MARK LEES (stylized) for skin care products); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant's mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant's mark MACHO COMBOS for food items confusingly similar to MACHO for restaurant entrees).

<sup>9</sup> 7 TTABVUE 16.

find the marks to be similar in sound, meaning, appearance and commercial impression.

Applicant argues that SOCCER in Applicant's mark indicates that his goods are directed to the game of soccer while BEAST MODE in the cited mark refers to Marshawn Lynch's personal nickname developed during his career as a professional football player."<sup>10</sup> Applicant asserts:

Registrant's mark contains absolutely no association with soccer, because Registrant is not associated with soccer, only football. It is extremely rare for high caliber athletes to switch sports or become famous for playing multiple sports. In other words, Babe Ruth is known as a baseball player, Michael Jordan is known as a basketball player, and Tiger Woods is known as a golfer. The word "soccer" does not conjure any of these athletes to mind. In a similar vein, Applicant's mark BEAST MODE SOCCER does not have any association with Registrant Marshawn Lynch.<sup>11</sup>

There are several problems with Applicant's argument. First, it assumes that Beast Mode is widely known as Mr. Lynch's nickname. The Wikipedia pages, which discuss Mr. Lynch's life and accomplishments, do not contain sufficient facts for us to determine the notoriety of this nickname. Second, the urbandictionary.com<sup>12</sup> definitions in the record indicate that there are multiple meanings of "beast mode" which are not specific to Mr. Lynch. *See*, for example, "a hype, energetic, outgoing, wilding out state of mind," identified as "TOP DEFINITION"; and "when in a state of

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<sup>10</sup> 7 TTABVUE 17.

<sup>11</sup> 7 TTABVUE 17-18.

<sup>12</sup> Nov. 25, 2016 Resp., Exh. A, TSDR 12-49.

serious training of at a level of high effort.”<sup>13</sup> Consumers will likely perceive the same meanings from BEAST MODE for Applicant’s and registrant’s goods (which are not restricted to football-themed clothing), and the record does not convince us that consumers generally will perceive the term “beast mode” as registrant’s nickname. Third, it ignores the fact that registrant’s identifications of goods are unrestricted and hence encompass clothing sold through retail outlets and websites where soccer equipment and soccer-related clothing are sold. Thus, registrant’s goods would not be associated **only** with football, and the trade channels are not as distinct as Applicant would have us believe. Fourth, registrant’s identification of goods in the ‘319 registration, which includes “shirts and sweatshirts,” encompasses soccer team jerseys and soccer team sweatshirts, such as those worn by the players depicted in Applicant’s webpages.<sup>14</sup> Fifth, the Federal Circuit rejected a similar argument in *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). There, applicant included within its identification of goods a restriction that the goods will be “all associated with William Adams, professionally known as ‘will.i.am.’” The Federal Circuit affirmed the Board’s finding that the applicant’s and the cited registrant’s goods and trade channels were identical despite the limitation in the identification of goods, noting that the applicant’s “ownership of the class 25 registration and use of that mark in promoting and selling Adams's clothing line does not compel a finding that Adams is known by I AM or i.am.” *Id.* at 1749. Thus, here

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<sup>13</sup> Nov. 25, 2016 Resp., Exh. A, TSDR 12.

<sup>14</sup> Nov. 25, 2016 Resp., Exh. L, TSDR 442-43.

too, registrant's ownership of registrations and use of his mark does not compel a finding that registrant is known as "Beast Mode."

### C. Third Party Uses and Registrations

Applicant argues that the cited mark is weak and entitled to a narrow scope of protection because third parties have used and registered marks incorporating the term BEAST MODE. This argument pertains to the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods.

Evidence of third-party use and registration is relevant to show that a term "may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that [term] is relatively weak, and can show that customers have been educated to distinguish between different marks on the basis of minute distinctions." *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016) (quotations omitted). The Federal Circuit has instructed that evidence of extensive use and registration of a term by others as a mark can be "powerful on its face,' even where the specific extent and impact of the usage has not been established." *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (Jan. 25, 2016) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).<sup>15</sup>

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<sup>15</sup> *But see Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) ("As to strength of a mark, however, registration evidence may not be given *any* weight." citing *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them. . . .")) (emphasis in original).

Most of Applicant's evidence to demonstrate weakness is of very limited probative value. With regard to the third-party applications, there is no evidence that any of the applications ever registered, many of the applications indicate that they have been abandoned, and an application is evidence only that the application was filed on a certain date. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) (An application is not evidence of use of the mark and has no probative value). In addition, of the seven subsisting third-party registrations, none identify articles of clothing, and others are, for example, for computer software, dietary and nutritional supplements, beer, advertising and marketing consultancy, personal fitness training services and consultancy, and entertainment in the nature of competitions in the field of fitness, that is, goods and services unrelated to the goods at issue here. *See In re i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for goods in other classes where the proffering party "has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants' marks are weak with respect to the goods identified in their registrations"); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) ("In this case, the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from trailers and recreational vehicles," citing *Key Chemicals, Inc. v. Kelite Chemicals Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972)). Moreover, Applicant has not pointed to evidence showing that the third-party registered marks are in use on a commercial scale. Absent evidence of actual use,

third-party registrations generally have little probative value in assessing the market strength of a mark because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the USPTO).

With regard to the Internet evidence submitted by Applicant, the foreign websites (<http://lazylemon.net> (showing prices in euros), [www.beastmodebrazil.com](http://www.beastmodebrazil.com) (showing prices in Brazilian real), [www.officialbmostore.co.uk](http://www.officialbmostore.co.uk), [www.beastmode.be](http://www.beastmode.be), [www.ebay.co.uk](http://www.ebay.co.uk) and [beastmodesupplements.com.au](http://beastmodesupplements.com.au)), even if in the English language, have no probative value as to consumer perception in the United States. Other websites offering bags, training programs and nutritional supplements have limited probative values regarding the strength of the mark for clothing items inasmuch as they concern goods and services other than clothing. The roughly ten U.S. websites offering clothing articles have relevance to demonstrate weakness of BEAST MODE for registrant's goods, although some have other wording in the marks (e.g. USA and Crossfit). They do not, however, establish that the cited mark BEAST MODE is so weak that confusion is not likely to result from the registration of the very similar mark BEAST MODE SOCCER for identical or even related goods. Applicant's evidence of similar marks in use for similar goods does not appear to approach the quantum of evidence of use in the *Primrose*, *Jack Wolfskin*, and *Juice Generation* cases. We find that the evidence does not establish that customers "have been educated to distinguish between different ... marks on the basis of minute

distinctions,” *Juice Generation*, 115 USPQ2d at 1674 (quoting 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:88 (4th ed. 2015)), particularly the single (possibly generic) word difference at issue here.

It has been stated many times that we must decide each case on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [an applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010) (noting that third-party registrations “cannot justify the registration of another confusingly similar mark”) (citations omitted). Even were we to find that third-party marks dilute and limit the scope of protection afforded to the cited registration, marks considered “weak” are nonetheless entitled to protection from registration by a subsequent user of a confusingly similar mark. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

#### D. Concurrent Use/No Actual Confusion

Applicant argues that the marks have been in concurrent use for more than five years and that Applicant is not aware of a single instance of actual confusion during this time period.

The Federal Circuit in *In re Majestic Distilling Co.*, 65 USPQ2d at 1205, addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

[W]e agree with the Board that Majestic’s uncorroborated statements of no known instances of actual confusion are

of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

#### E. Purchasing Conditions

With regard to purchaser care, Applicant argues:

Registrant's customers are sophisticated consumers seeking apparel associated with Registrant, who is a football star. Registrant is well-known for his football prowess. Registrant's consumers are quite unlikely to confuse Registrant's mark with the mark BEAST MODE SOCCER, because Registrant has never been involved in soccer sports. These purchasing conditions weigh in favor of a finding that there is no likelihood of confusion between Applicant's mark and the Cited Marks.

Applicant's argument is not persuasive; again, we are bound by the parties' respective identifications of goods. *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 16 USPQ2d at 1787 (“[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular

nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed." [citations omitted]). For the clothing goods at issue, including the identical T-shirts listed in both Applicant's and registrant's identifications of goods, as well as soccer balls, we may assume that these can be relatively low priced items, highly accessible to the average consumer and that would not be purchased with a great deal of care or require purchaser sophistication, which increases the likelihood of confusion.<sup>16</sup> *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care") (citations omitted). *See also Brown Shoe Co., Inc. v. Robbins*, 90 USPQ2d 1752 (TTAB 2009) (clothing items would not be purchased with a great deal of care or require purchaser sophistication). We deem this *du Pont* factor to favor finding a likelihood of confusion.

#### F. Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. The T-shirts at issue here are identical, and move through the same trade channels to the same classes of customers. Applicant's soccer balls are commercially related to registrant's clothing items, and travel through the same channels of trade to the same consumers.

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<sup>16</sup> See Nov. 25, 2016 Resp., Exh. B, TSDR 57, depicting a T-shirt for \$10.00.

Applicant's and registrant's marks are similar and Applicant has not established any significant weakness in registrant's mark. The purchasing conditions favor a finding of likelihood of confusion due to the low cost and nature of the goods. We therefore find that Applicant's mark BEAST MODE SOCCER for his T-shirts and soccer balls is likely to cause confusion with registrant's mark BEAST MODE for his T-shirts and other clothing goods.

***Decision:*** The refusal to register under Section 2(d) is affirmed.