

This Opinion is not a
Precedent of the TTAB

Mailed: September 28, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Moxie Apparel Inc.
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Serial No. 90100833
—

David A. Lowe of Lowe Graham Jones PLLC,
for Moxie Apparel Inc.

Tasha Pulvermacher, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.

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Before Goodman, English and Hudis,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:


Moxie Apparel Inc. (“Applicant”) seeks registration on the Principal Register of

the mark  (SCRUBS disclaimed) for

“Footwear; Headwear; Pants; Shirts; Shorts; Socks; Uniforms; Jackets; Scrub tops
and pants not for surgical purposes” in International Class 25.¹

¹ Application Serial No. 90100833 was filed on August 7, 2020, based upon Applicant’s
assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the
Trademark Act, 15 U.S.C. § 1051(b). Applicant provided the following description of the

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the following Principal Register marks, all owned by the same entity, as to be likely, when used in connection with the identified International Class 25 goods to cause confusion, to cause mistake, or to deceive:

 for "T-shirts"²;

MOXIE (typed drawing) for "T-shirts";³ and

MOXIE (in standard characters) for "t-shirts; shirts; polo shirts; sweatshirts; athletic shirts; athletic jackets."⁴

mark: "The mark consists of the terms MOXIE and SCRUBS on either side of the design of a nurse's cap with a Greek cross on it."

Page references to the application record refer to the online database pages of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. Applicant's brief is at 4 TTABVUE; the Examining Attorney's brief is at 9 TTABVUE. The Examining Attorney also submitted dictionary definitions at 8, 10-12 TTABVUE.

² Registration No. 1460942 issued on October 13, 1987; second renewal. A typed mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks."). The registration also covers mugs in International Class 21; the refusal is based on the goods in Class 25 only.

³ Registration No. 1460943 issued on October 13, 1987; second renewal. Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing.

⁴ Registration No. 5718670 issued on April 9, 2019. The Registration also includes goods in International Classes 6, 9, 16, 18, 21, 32, 35 and 43; the Examining Attorney has not cited these goods and services against Applicant's application.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.⁵ We reverse the refusal to register.

I. Submission of Dictionary Definitions with Appeal Briefs

Both Applicant and the Examining Attorney attached dictionary definitions with their appeal briefs. Applicant attached dictionary definitions for “scrubs,”⁶ and the Examining Attorney attached dictionary definitions for: “moxie,” “max,” “zen,” “chic,” “mettle,” and “bare.”

We do not encourage the practice of applicants or examining attorneys attaching evidence to briefs, since “[the record should be complete prior to the filing of an appeal” and “[e]vidence should not be filed with the Board after the filing of a notice of appeal.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). However, the Board may take judicial notice of dictionary definitions including online dictionaries that exist in printed format or have regular fixed editions. *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); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Therefore, we have considered these dictionary definitions.⁷

⁵ The application was mistakenly abandoned and the appeal terminated on April 28, 2022 based on the abandonment. After reinstatement of the application on May 6, 2022, the appeal was reinstated on the same day.

⁶ The definition from the MERRIAM-WEBSTER DICTIONARY was submitted in an Office Action by the Examining Attorney. December 7, 2020 Office Action at TSDR 10.

⁷ Applicant also attached evidence to its appeal brief that is already of record and, thus, its submission with the appeal brief was unnecessary. *See ITC Entm’t Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and is a burden on the Board).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

For purposes of our likelihood of confusion analysis, we focus on the typed drawing and standard character MOXIE registrations (Registration Nos. 1460943 and Registration No. 5718670). If we find a likelihood of confusion as to these cited marks, which can be displayed in any font style, size or color, we need not find it as to the other cited MOXIE (Stylized) mark (Registration No. 1460942). On the other hand, if we don’t reach that conclusion, we would not find confusion as to this stylized MOXIE mark either. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Strength of the Mark

Because the strength or weakness of the cited MOXIE marks informs our comparison of the marks, we address Applicant's arguments that MOXIE is weak in the clothing field and entitled to a narrow scope of protection. 4 TTABVUE 12. Applicant asserts the evidence of third-party registration and third-party use of MOXIE and MOXIE-formative marks in the clothing industry confirms that consumers have been conditioned to look to other elements or characteristics of MOXIE (and phonetic equivalent MOXI, MOXY, MOXXY) marks to distinguish the source of goods. *Id.* at 13.

In determining the strength of the cited mark, we consider inherent strength, based on the nature of the mark itself.⁸ *New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011). In tandem, if there is evidence in the record, we consider whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567 (The sixth *DuPont* factor considers “the number and nature of similar marks in use on similar goods.”); *Tao Licensing, LLC v. Bender Consulting*

⁸ The marks' “commercial strength based on use in the marketplace” is also a consideration. *Tao Licensing*, 125 USPQ2d at 1057. However, in an ex parte appeal, the marketplace strength or “fame” of the cited mark is presumptively treated as neutral, since the owner of the cited registration is not a party to this ex parte appeal, and examining attorneys, with their somewhat limited resources, are not expected to submit evidence of commercial strength. See *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016) (“the Board does not expect Trademark Examining Attorneys to submit evidence as to the fame of the cited mark in an ex parte proceeding, and they do not usually do so. ... Rather, in an ex parte appeal the ‘fame of the mark’ factor is normally treated as neutral because the record generally includes no evidence as to fame.”) (citations omitted).



Ltd., 125 USPQ2d 1043, 1057 (TTAB 2017) (“[Third-party] use evidence may reflect commercial weakness”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016) (We may consider whether an inherently distinctive mark is “weak as a source indicator” in the course of a *DuPont* analysis.). If sufficient evidence of third-party use is provided, it can “show that customers ... ‘have been educated to distinguish between different ... marks on the basis of minute distinctions.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (citations omitted).

Word marks registered without a claim of acquired distinctiveness that are arbitrary, fanciful or suggestive are “held to be inherently distinctive.” *See generally, Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). The Examining Attorney submitted dictionary definitions for MOXIE which is defined as “the ability to face difficulty with spirit and courage,” “courage, determination,” “courage, pluck, perseverance,” and also “aggressive energy; initiative,” “energy, pep.”⁹ Therefore we find that MOXIE is an inherently distinctive term as there is no evidence in the record to indicate that MOXIE has any descriptive meaning in connection with apparel.

As support that MOXIE or its phonetic equivalent (MOXI or MOXY or MOXXY) is weak, Applicant points to eight third-party registrations, for MOXIE formative


⁹ AMERICAN HERITAGE DICTIONARY, and MERRIAM-WEBSTER DICTIONARY, WEBSTER’S NEW WORLD DICTIONARY (4th ed. 2010). Examining Attorney’s Appeal brief, 9 TTABVUE 27-33.

marks (or phonetic equivalent MOXIE formative marks)¹⁰ shown in the chart below, for clothing and related goods (footwear), and retail store services for apparel, all with different owners.¹¹

Mark	Registration No.	Goods
 (Moxie Cycling Co.)	Reg. No. 5034034	cyclists' jerseys
MOXIE JANE	Reg. No. 5068306	footwear for babies, toddlers, and women
	Reg. No. 5738061	for goods that include athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms;
MOXY & ZEN	Reg. No. 5924967	for goods that include hoodies; jerseys; tops as clothing

¹⁰ Phonetic equivalent marks have similar connotations. *See In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; “There is no legally significant difference here between ‘quik’ and ‘quick’”); *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1646 (TTAB 2009) (“CYNERGY and SYNERGIE are highly similar, if not identical, phonetic equivalents”; “[b]oth marks connote “synergy” which dominates the commercial impression of both marks); *In re Organik Tech. Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997) (“ORGANIK, which is the phonetic equivalent of the term ‘organic,’ is deceptive”).

¹¹ June 7, 2021 Response to Office Action at TSDR 12-59.

Mark	Registration No.	Goods
	Reg. No. 6225198	clothing and apparel, namely, tank tops, t-shirts, three-quarter sleeve shirts, long sleeve shirts, and hats focused on female empowerment and confidence, geared toward the celebration of girls and women
BARE MOXIE	Reg. No. 5685373	for retail apparel store
MOJO MOXIE	Reg. No. 4674688	for goods that include boots; canvas shoes; clogs; flip flops; sneakers; women's shoes
MOXXY SPORT	Reg. No. 5450175	for goods including all manners and forms of athletic, exercise, and workout wear and clothing, namely, male and female tops, jerseys, tank tops, polo shirts, tee shirts, jackets, windbreakers, scarfs, anoraks, shorts, bandanas, pants, socks, and uniforms

This third-party registration evidence bears on conceptual weakness of the term MOXIE (or its phonetic equivalents). *Tao Licensing*, 125 USPQ2d at 1057 (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”)).

Applicant also submitted as weakness evidence specimens from the third-party registration files showing their use in the marketplace. While the specimen evidence from the third-party registrations is not evidence that the marks are in use today or that the marks have ever been used to the extent that they have made an impression on the public, they can be supportive of weakness of the term MOXIE (and its phonetic equivalent). See *Syndicat des Proprietaires Viticulteurs de Chateauf-Du-Pape v. Pasquier Desvignes*, 107 USPQ2d 1930, 1942 (TTAB 2013) (in connection with the sixth *DuPont* factor, the Board found specimens of use submitted with evidence of two use-based third-party registrations were relevant when considered with other uses in the record) (citing *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“evidence of third-party registrations coupled with evidence of prior use ‘could reasonably support an inference that [the applicant’s] mark is weak”); *Allied Mills, Inc. v. Kal Kan Foods, Inc.*, 203 USPQ 390, 397 n.11 (TTAB 1979) (specimen evidence from the previously cited registrations are not evidence that the marks are in use today or that such specimens have ever been used to the extent that they have made an impression on the public).

The Examining Attorney argues that the third-party registration evidence is insufficient to establish weakness of the cited marks because these registrations are small in number and because these marks all have different commercial impressions. 9 TTABVUE 17-18. In particular, the Examining Attorney submits that these marks differ in commercial impression from MOXIE SCRUBS due to the combination of MOXIE (or MOXY/MOXXY) with distinctive non-descriptive terms; or if MOXIE is

used with descriptive terms, the marks are differentiated as being used with “niche clothing in a sport.” *Id.* at 17-18.

Notwithstanding the Examining Attorney’s arguments, we find that these eight MOXIE-formative (or phonetic equivalent) third-party registered marks, combined with either distinctive or descriptive wording and that cover clothing, related goods such as footwear, or retail store services featuring apparel, are probative to show that marks containing the term MOXIE in connection with clothing and related footwear can be distinguished by additional matter. *See In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012) (seven registrations incorporating Grand Hotel show that the Patent Trademark Office views the marks “as being sufficiently different from the cited registrant’s mark, and from each other, such as not to cause confusion” and “we presume that the owner of the cited registration did not have a problem with the registration of these third-party marks, as they all issued after the registration of the cited registrant’s registration without challenge by the registrant”); *Plus Prods. v. Nat. Organics, Inc.*, 204 USPQ 773, 779 (TTAB 1979) (numerous PLUS marks on the trademark register for vitamins reflect the Office’s belief, trademark owners’ belief, and plaintiff’s belief that PLUS marks can be registered side by side for vitamins without confusion provided there are minimal differences between the marks); *Jerrold Elecs. Corp. v. Magnavox Co.*, 199 USPQ 751, 758 (TTAB 1978) (third-party registrations “reflect a belief, at least by the registrants, who would be most concerned about avoiding confusion and mistake, that various ‘STAR’ marks can coexist provided that there is a difference.”).

We find that the evidence of the common registration of marks that contain MOXIE or its phonetic equivalents for clothing, retail store services featuring clothing, and related footwear shows conceptual weakness of the term MOXIE (or its phonetic equivalent) in the clothing and footwear industry. *In re Embiid*, 2021 USPQ2d 577 at *34 (TTAB 2021) (quoting *Tao Licensing*, 125 USPQ2d at 1057).

Applicant also submitted third-party use evidence of MOXIE and MOXIE formative marks (including MOXIE formative phonetic equivalent marks) in connection with clothing and footwear as shown in the chart below.¹² Evidence of third-party use of similar marks or portions of marks for the same or similar goods is relevant to a mark’s strength or weakness. *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017); *Tao Licensing*, 125 USPQ2d at 1057.

Mark		Goods
Moxie & Co.		clothing
Moxie Made		apparel, accessories, bags
Moxie Skates		clothing & accessories, skates, skate gear

¹² *Id.* at TSDR 60-93. The dates of access of the website evidence appears omitted. The Examining Attorney did not object in the July 27, 2021 Office Action and addressed this evidence in the brief. Therefore, any objection to our consideration of this material has been waived. *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018). One of the third-party uses Applicant submitted, regarding the mark THE MOXY FOX, is not associated with clothing or related goods and thus has not been shown in the chart.

Mark		Goods
Merely Moxie		footwear
Moxie		clothing, accessories, bags, skincare
Moxie Cloth	Moxie Cloth	clothing
Mettle+Moxie	METTLE + MOXIE	clothing, accessories, home goods
Moxy Boutique	MOXY BOUTIQUE	clothing, accessories, jewelry
Moxie Wrrld		clothing, swimwear
Moxie Shop		apparel, gifts
Moxi Boutique	MOXI BOUTIQUE	clothing, accessories
Moxie Mae	MOXIE MAE	clothing
Moxie Fitness		fitness apparel
Moxie		clothing

As shown in the above chart, there are fourteen third-party uses of MOXIE or MOXIE formative marks relating to clothing or footwear. Of those uses, two show

MOXIE alone; the twelve remaining uses show MOXIE (or phonetic equivalents) with additional wording that is either descriptive or non-descriptive.

The Examining Attorney argues that there is an insufficient number of third-party uses to show that the term MOXIE is diluted or commercially weak. 9 TTABVUE 19, 21. The Examining Attorney also argues that the third-party uses are distinguishable, and that only four of these uses combine MOXIE with non-distinctive terms.¹³ *Id.* at 22-23.

We disagree with the Examining Attorney's assessment and find that Applicant's third-party use evidence is highly probative to demonstrate commercial weakness of the cited marks in the clothing and footwear industry. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, at *17 (TTAB 2020) (where plaintiff's and defendant's goods are beer, six local Brooklyn-formative named establishments' use of the term 'Brooklyn' in connection with beer sales have significant probative value as to commercial weakness), *aff'd in relevant part, vacated in part, and remanded*, 17 F.4th 129, 2021 USPQ2d 1069 (Fed. Cir. 2021). This third-party use evidence shows MOXIE or its phonetic equivalent, alone or combined with other wording, is commonly used in the clothing marketplace, and because of its common use, it is commercially weak.

As a whole, the third-party registration and third-party use evidence submitted by Applicant of MOXIE and MOXIE formative marks (or its phonetic equivalent) for

¹³ We identify six uses that contain descriptive or generic terms (co., skates, boutique (2), shop, fitness).

clothing and related footwear are probative of conceptual and commercial weakness of Registrant's MOXIE marks in the clothing and related footwear industry. *Juice Generation*, 115 USPQ2d at 1674 (26 third-party marks used in connection with restaurant services or food products incorporating the three-word phrase "peace love" followed by a product identifying term (e.g., PEACE. LOVE. PASTA. and PEACE LOVE AND PIZZA) found probative of weakness); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 & n.2 (Fed. Cir. 2015) (ubiquitous use of paw prints on clothing as source identifiers, with fourteen examples of use and registration noted by court as probative to show consumers have been educated to look for minute distinctions); *Brooklyn Brewery*, 2020 USPQ2d 10914, at *17 (six local Brooklyn-formative named establishments' use of the term "Brooklyn" in connection with beer sales have significant probative value as to commercial weakness); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1674 (TTAB 2018) (ten uses of "smoking hot" in connection with cosmetics shows consumer exposure and is evidence of weakness of the term when used with such goods).

In sum, the term MOXIE is conceptually and commercially weak in connection with clothing, resulting in consumers being educated to look for minute distinctions in MOXIE (or phonetic equivalent) marks in the marketplace.

B. Similarity or Dissimilarity of the Marks

We now turn to the first *DuPont* factor which requires us to determine the similarity or dissimilarity of the marks in terms of appearance, sound, connotation,

and overall commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

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).

Our analysis cannot be predicated on dissecting the marks into their various components; 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.”). It is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight in the analysis. *See In re Nat’l Data Corp.*, 224 USPQ at 751-52.

Disclaimed matter in a mark is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Similarly, where a mark is comprised of both words and a design, the words are normally accorded greater weight, because consumers are likely to remember and use the word(s) to request the goods. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (“In the case of marks, such as Applicant’s, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.”).

Applicant’s mark is **moxie  scrubs** (“scrubs” disclaimed) and Registrant’s standard character and typed marks are MOXIE.

As indicated above, because Registrant’s marks are either a typed drawing or standard characters, they are not limited to any particular depiction or display. Thus, Registrant’s marks can be depicted in any font style, size, or color, and may be displayed in a font style similar to Applicant’s mark. *In re Viterra Inc.*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011).

The Examining Attorney argues we can consider the display of Registrant’s standard character and typed drawing marks could “include a stylized nurse hat” and “this [also] is true for the stylized wording” mark. *Id.* at 8. We cannot make such an assumption. “[W]hen we are comparing a standard character mark to a word + design mark for Section 2(d) purposes, we will consider variations of the depictions of the

standard character mark *only with* regard to ‘font style, size, or color’ of the ‘words, letters, numbers, or any combination thereof.’” *In re Aquitaine Wine*, 126 USPQ2d at 1187. (citations omitted) (emphasis in original).

In Applicant’s mark, the word portion MOXIE SCRUBS is more dominant than the nurse’s hat design portion because the wording constitutes the means by which Applicant’s products will be referred to and called for in the marketplace. *See In re Viterra Inc.*, 101 USPQ2d at 1911 (“the verbal portion of a word and design mark likely will be the dominant portion”); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.”).

As to the wording portion of Applicant’s mark, MOXIE SCRUBS, the dominant portion is MOXIE. This is so because the word SCRUBS, defined as “loose fitting clothing worn by hospital staff,”¹⁴ has been disclaimed by Applicant, as this word provides information about Applicant’s clothing goods. However, while the term SCRUBS and the design element in Applicant’s mark may be given less weight, they may not be ignored. *See M2 Software Inc. v. M2 Commc’ns Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) (“When comparing the similarity of marks, a disclaimed term, here ‘COMMUNICATIONS,’ may be given little weight, but it may not be ignored”). Therefore, we must evaluate whether

¹⁴ December 7, 2020 Office Action at TSDR 10.



in its entirety is sufficiently similar to Registrant's MOXIE marks such that consumers would mistakenly believe the goods emanate from a common source.

In comparing Applicant's mark and Registrant's MOXIE marks, Applicant argues that the terms MOXIE/MOXY/MOXI are inherently weak and that the marks are dissimilar due to different commercial impressions. 4 TTABVUE 7-8, 16. Applicant further argues that its mark evokes a "clinical quality" and suggests a medical-related industry. *Id.* Applicant also submits that the Examining Attorney ignored the "unique design element" present in Applicant's mark. *Id.* at 7.

The Examining Attorney argues that "both MOXIE and MOXIE SCRUBS, when viewed in the context of clothing goods, communicate the same commercial impression of clothes with spirit" because the disclaimed term "scrubs" is less impactful and does not change the overall commercial impression of Applicant's mark as MOXIE. 9 TTABVUE 8, 9. The Examining Attorney also argues that MOXIE as the first term in Applicant's mark will be the term most likely remembered by consumers. *Id.* at 9-10. In analyzing the similarity of the marks in their entireties, the Examining Attorney has not addressed the design mark element in Applicant's mark.

The Examining Attorney's argument as to the disclaimed matter in Applicant's mark relies on cases stating that the addition of a term to a registered mark generally does not obviate the similarity between the compared marks. In this case, the Examining Attorney submits that the addition of the disclaimed term SCRUBS to

MOXIE in Applicant's mark does not obviate the similarity with Registrant's MOXIE marks. *See e.g., In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar).

However, there are exceptions to the general principle stated by the Examining Attorney. An addition of a term to another's mark may avoid confusion if the matter shared by the two marks is highly suggestive, merely descriptive, or commonly used or registered in the industry for similar goods or services. *See In re Bed & Breakfast Registry*, 229 USPQ 818, 819 (Fed. Cir. 1986) ("The record shows that a large number of marks embodying the words 'bed and breakfast' are used for similar reservation services, a factor that weighs in favor of the conclusion that BED & BREAKFAST REGISTRY and BED & BREAKFAST INTERNATIONAL are not rendered confusingly similar merely because they share the words 'bed and breakfast.'"). Therefore, for terms commonly used in an industry, the addition of other matter to a mark may be enough to distinguish it from another mark. *In re Hartz Hotel Svcs.*, 102 USPQ2d at 1154. (numerous third-party uses of GRAND HOTEL marks for hotel services show that consumers distinguish between these marks even though the only distinguishing element is a geographically descriptive term).

As we found above, the term MOXIE is in common use in the clothing industry, and therefore the scope of protection to which the cited registrations are entitled is quite limited. We find the additions of the term SCRUBS and the nurse's hat design to the term MOXIE are sufficient to distinguish Applicant's mark from the cited

marks in sound, appearance, connotation and commercial impression, even if used on the same or related goods.

The first *DuPont* factor weighs against a finding of likelihood of confusion.

C. Similarity or Dissimilarity of the Goods

We consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. Our comparison is based on the goods as identified in Applicant’s application and the cited registrations. *See Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 8 USPQ2d at 1947 (in reviewing the second *DuPont* factor, “we consider the applicant’s goods as set forth in its application, and the opposer’s goods as set forth in its registration.”).

The goods need only be “related in some manner and/or if the circumstances surrounding their marketing are 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)).

The application and registration themselves may provide evidence of the relationship between the goods. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310 (Fed. Cir. 2002) (“On the face of the registrations themselves, QSC’s product and the ACOUSTIC WAVE product are related.”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d

1001, 1005 (Fed. Cir. 2002) (finding the Board erred in concluding that there was insufficient evidence of relatedness, because it “did not consider the important evidence already before it, namely the ITU application and [opposer’s] registrations”).

Evidence of relatedness also may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, *5 (TTAB 2020) (citing *In re Davia*, 110 USPQ2d at 1817).

Applicant’s goods are “Footwear; Headwear; Pants; Shirts; Shorts; Socks; Uniforms; Jackets; Scrub tops and pants not for surgical purposes.” The goods in cited Registration No. 1460943 are “T-shirts,” and the Class 25 goods in cited Registration No. 5718670 are “t-shirts; shirts; polo shirts; sweatshirts; athletic shirts; athletic jackets.”

The cited registrations have no restrictions on the identification of goods, while Applicant’s identification includes the limitation “not for surgical purposes” for its scrub shirts and pants. Applicant’s limitation as to its scrub shirts and pants “is precatory language, and not binding on consumers when they encounter Applicant’s mark.” *In re i.am.Symbolic, LLC*, 116 USPQ2d 1406, 1410 (TTAB 2015), *aff’d* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017) (affirming Board finding that the

language “associated with William Adams, professionally known as ‘will.i.am’” was not a meaningful limitation for purposes of analysis for likelihood of confusion).

Applicant’s declaration submitted during prosecution of its Application states that Registrant offers its goods in connection with a drink product and has provided evidence of same.¹⁵ However, it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of either Applicant’s or Registrant’s goods. *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008).

Applicant’s “shirts” and Opposer’s “shirts” are identical. Applicant’s “shirts” encompass Opposer’s t-shirts, polo shirts, athletic shirts, and sweatshirts; these goods are legally identical. *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Applicant’s “jackets” encompass Opposer’s “athletic jackets” and are legally identical. *Id.*

Applicant argues the Examining Attorney did not “set forth a prima facie case as to why there is any similarity” between Applicant’s and Registrant’s goods. 4 TTABVue 10. Applicant points out that the case law relied upon by the Examining Attorney does not indicate that all clothing goods are related, “particularly where, as here, Applicant’s goods include distinctive items that [are] not typical clothing items, such as “uniforms” and “scrub tops and pants not for surgical purposes.” *Id.*

¹⁵ Tulse declaration, ¶¶ 2, 3, and Exhibits A-B, June 7, 2021 Response to Office Action at TSDR 94, 96-102.

As already stated, the identifications themselves establish that some of Applicant's and Registrant's goods are identical in part. No particular additional evidence is required. Applicant's argument as to the relatedness of "uniforms" and "scrub tops and pants not for surgical purposes" with Registrant's identified goods is not persuasive because the remaining goods in Applicant's identification are typical clothing items with no limitation: pants, shorts, socks, headwear, and footwear. Moreover, it is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified goods within that class in the application or cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) ("We need not consider applicant's remaining goods because likelihood of confusion as to one of the products listed in applicant's description of goods in that class is sufficient to support a conclusion that the opposition should be sustained.").

In addition, as to the non-identical goods, the Examining Attorney established they are related. The Examining Attorney submitted third-party registrations showing that the same entities each have registered a single mark identifying at least one of the goods identified in Applicant's application and Registrant's registration.¹⁶ "As a general proposition, third-party registrations that cover goods from both the cited registration and an Applicant's application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark."

¹⁶ July 27, 2021 Office Action at TSDR 12-51.

In re Country Oven, Inc., 2019 USPQ2d 443903, at *8 (TTAB 2019) (citations omitted).

As additional evidence of relatedness, the Examining Attorney submitted webpages from third-party websites that offer apparel.¹⁷ In particular, the websites J-Crew (jcrew.com), Express, (express.com) and L.L. Bean (llbean.com) show the offering by the same entity of jackets, shirts, t-shirts, and one or more of the following: shoes, pants, shorts.¹⁸ The Examining Attorney's evidence for the websites Koi, Scrubs & Beyond.com, and Affordable Uniforms show the same entity offers for sale scrub shirts and scrub pants with other shirts, or jackets, or socks, or shoes.¹⁹

Website evidence of the type submitted by the Examining Attorney is probative of the relatedness of the respective goods. *See, e.g., In re Embiid*, 2021 USPQ2d 577, at *28 (webpages from three clothing companies that offer shoes, shirts, or sweat shirts under the same mark "is evidence that consumers are accustomed to seeing shoes and clothes sold under the same mark"); *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *6 (website evidence showing how consumers may expect to find both Applicant's and Registrant's goods as emanating from a common source is evidence of relatedness). Therefore, we find this third-party website evidence provides additional proof of the relatedness of shirts, t-shirts, and jackets with pants, shorts, footwear and socks.

¹⁷ *Id.* at TSDR 2-11; 52-61.

¹⁸ *Id.* at TSDR 2-11.

¹⁹ *Id.* at TSDR 52-61.

We find that Applicant's and Registrant's goods are identical in part, and as to the remaining non-identical goods, they are closely related. The second *DuPont* factor favors a finding of likelihood of confusion.

D. Dissimilarity or Similarity of Channels of Trade

We now turn to the third *DuPont* factor which requires us to consider "the similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567.

Applicant argues "the Trademark Office should consider not just the marks on paper in the abstract, but the marks as they are actually used in the marketplace." *Id.* at 10-11. Applicant's witness, Alicia Tulsee CEO of Moxie Apparel Inc., submitted a declaration that its trade channels are direct-to-consumer.²⁰ She also states that Registrant's MOXIE product is a drink product and that its clothing goods relate to the drink product.²¹ Lastly, she states that the trade channels for Registrant's goods are directed to those that drink the MOXIE drink product.²² Applicant argues that this testimony and evidence show that the goods in the cited registrations are "collateral swag" to promote the MOXIE drink product and that the channels of trade are separate and do not overlap. *Id.* at 11.

However, we cannot look to extrinsic evidence about the channels of trade as Applicant suggests. The basis for our analysis of trade channels is the identification

²⁰ Tulsee declaration, ¶ 4, June 7, 2021 Response to Office Action at TSDR 94.

²¹ *Id.* at ¶¶ 2, 3, and Exhibits A-B, TSDR 94, 96-102.

²² *Id.* at TSDR 94.

of goods set forth in the application and cited registration “regardless of what the record may reveal as to the particular nature of an applicant’s [or registrant’s] goods, [or] the particular channels of trade or the class of purchasers to which sales of the goods are directed.” *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also In re Detroit Athletic Co.*, 903 F.3d 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.”); *In re Bercut-Vandervoot & Co.*, 229 USPQ 763, 764 (TTAB 1986) (extrinsic evidence and argument suggesting trade-channel restrictions not specified in application rejected). Here, both Registrant’s and Applicant’s identifications are unrestricted as to trade channels.

Because Applicant’s goods are identical in part to Registrant’s goods, we must presume these particular goods travel in the same ordinary trade and distribution channels. *See In re Viterra Inc.*, 101 USPQ2d at 1908 (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 with legally identical goods); *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).

As to the other closely related clothing items, the materials the Examining Attorney made of record show that third-party retailers offer shirts, t-shirts, jackets,

and other related clothing items such as pants, footwear, shorts, and headwear on their websites, reflecting the trade channel overlap. *See e.g., In re Embiid*, 2021 USPQ2d 577, at *31 (“The record shows that shoes and shirts are sold together on the websites of clothing companies The channels of trade and classes of customers plainly overlap.”); *In re Ox Paperboard*, 2020 USPQ2d 10878, at *6 (“[T]here is evidence that several retailers offer products of both the Registrant and Applicant, which only reinforces the presumption” of overlapping trade channels); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272-73 (TTAB 2009) (website evidence shows same or overlapping channels of trade for the goods at issue). Therefore, the third-party website evidence supports the finding of overlapping trade channels for Applicant’s and Registrant’s closely related goods.

The third *DuPont* factor favors a finding of likelihood of confusion.

E. Conditions of Sale

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 73 USPQ2d at 1695.

Applicant's declarant, Ms. Tulsee, states that Applicant's target consumers are nurses.²³ She also states that the consumers of Registrant's MOXIE goods are those that drink the MOXIE drink product.²⁴ Applicant submits that the consumers of Applicant's and Registrant's goods are different as a result. *Id.* at 11.

However, we cannot look to extrinsic evidence about the actual consumers as Applicant suggests but "must consider the identifications of goods set forth in the relevant application and/or registration(s), regardless of what the record may reveal as to ... the class of purchasers to which their sale is, in fact, directed." *Miles Labs. Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1450 (TTAB 1986).

There are no restrictions on the classes of purchasers in either the application or cited registrations, and "absent an explicit restriction," the goods "must be presumed to move ... to all usual prospective purchasers for goods of that type." *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *13 (TTAB 2020). *See In re Embiid*, 2021 USPQ2d 577, at *27 ("neither identification contains any limitation regarding the ... classes of consumers ... so we must presume that ... those ubiquitous, everyday products [shoes and shirts] 'are offered to all the normal potential consumers for those goods, which would include ... 'all members of the general public.'").

Clothing is a general consumer good marketed to the general population. *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *14 ("As general consumer goods, [cups; coffee cups, tea cups, mugs, lanyards for holding badge and keys, and hoodies, shirts and

²³ *Id.* at ¶ 4, TSDR 94.

²⁴ *Id.* at ¶¶ 2, 3, TSDR 94.

sweatshirts] they are marketed to the general population.”). Therefore, the class of purchasers for Applicant’s and Registrant’s apparel comprises ordinary consumers.

As to conditions of sale, the applicable standard of care is that of the least sophisticated consumer. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 110 USPQ2d at 1163 (Board properly considered all potential investors for recited services, which included sophisticated investors, “but precedent requires the decision to be based ‘on the least sophisticated potential purchasers’”) (citations omitted); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

Applicant’s declarant testified that its consumers are professionals possessing a sophistication level that would preclude likelihood of confusion.²⁵ Applicant argues that the Examining Attorney has ignored this “key demographic” and “sophistication of the target base,” also failing to rebut this assertion of sophistication. *Id.* at 12.

However, the goods at issue involve apparel, a general consumer good, and nothing specifically related to nursing goods or services. As such, being a professional in the nursing field does not mean that the nursing professional purchasing clothing is equally skilled or concerned with the trademarks that the clothing is marketed under. “[M]embers of the medical and allied professions are also themselves consumers, and the fact that they may be well educated with respect to medical matters does not necessarily mean that they are immune from trademark confusion, especially where ... the goods involved are relatively inexpensive, ... which are not usually purchased with a high degree of care.” *Burroughs Wellcome Co. v. Warner-*

²⁵ *Id.* at ¶ 5, TSDR 94.

Lambert Co., 203 USPQ 201, 210 (TTAB 1979). *See also Medtronic, Inc. v. Medical Devices, Inc.*, 204 USPQ 317, 326 (TTAB 1979) (“The fact is that this tribunal has long since given flight to the illogical and unsupported conclusion that physician care equals trademark care and that physicians, because of their skill and training, are immune from mistake.”).

Applicant also argues there is no evidence to support the Examining Attorney’s assertion that clothing products are relatively low priced. 4 TTABVUE 12; 9 TTABVUE 24. However, because the goods identified in both the application and cited registration are not restricted to any particular price range, we must assume that the goods could be sold at various price points. *In re Embiid*, 2021 USPQ2d 577, at *27 (“neither identification contains any limitation regarding the nature of the identified goodsso we must presume that Applicant’s ‘shoes’ and Registrant’s ‘shirts and sweat shirts’ include ‘all goods of the type identified, without limitation as to their nature or price’”) (citations omitted).

Furthermore, the materials the Examining Attorney made of record show that clothing may be moderately priced. For example, the websites Koi, Scrubs & Beyond, and the Affordable Uniform websites, reflect prices for scrub shirts (between \$14.98-\$27.99); scrub pants (between \$21.99-\$36.99); socks (between \$26.99-48.99); t-shirts (between \$13.98-20.98); and nurses shoes (between \$74.99-149.99).²⁶ On the retail

²⁶ July 27, 2021 Office Action at TSDR 52-61.

websites Express, J.Crew, and L.L. Bean, t-shirts are priced between \$19.95-\$48.00 and shoes between \$34.99-\$149.00.²⁷


Therefore, the fourth *DuPont* factor, involving the conditions under which buyers make purchases, remains neutral in our analysis.

III. Conclusion

Notwithstanding that Applicant's and Registrant's goods are identical in part and otherwise closely related, and that the trade channels overlap, we find the shared term MOXIE is conceptually and commercially weak in the clothing industry such that the additions of the descriptive term SCRUBS and the design element in Applicant's mark are sufficient to distinguish the marks. "[A] single *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." *Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010); *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1461 (Fed. Cir. 1998) ("we have previously upheld Board determinations that one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks"); *In Re Hartz Hotel Svcs.*, 102 USPQ2d at 1155 (finding the sixth *DuPont* factor dispositive) citing *Kellogg Co. v. Pack-Em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive"). In this case, the term MOXIE in the cited registrations is weak for the goods of interest

²⁷ *Id.* at TSDR 4-11.

and is entitled to only a very narrow scope of protection or exclusivity of use. Considering the weakness of the term MOXIE, the dissimilarity of Applicant's and Registrant's marks is dispositive in our likelihood of confusion analysis.

Decision: The refusal to register Applicant's mark **moxie  scrubs** is reversed.