

This Opinion is not a  
Precedent of the TTAB

Mailed: June 16, 2022

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Atomic Austria GmbH*

Serial No. 90159452

Terence P. O'Brien for Atomic Austria GmbH.

Edward Germick, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

Before Cataldo, Coggins and Dunn,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Atomic Austria GmbH, filed an application to register on the Principal Register the mark MAVERICK (in standard characters), identifying the following goods: "skis, ski bindings, ski poles" in International Class 28.<sup>1</sup>

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 of

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<sup>1</sup> Application Serial No. 90159452 was filed on September 4, 2020 under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based upon European Union Reg. No. 018206014, issued on June 17, 2020.

likelihood of confusion with the cited registered mark MAVERICK, in typed or standard characters,<sup>2</sup> identifying the following goods: “men’s and boy’s jeans, and men’s shirts” in International Class 25;<sup>3</sup> and “bottoms, jackets, jeans, pants, shirts, tops” in International Class 25.<sup>4</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.<sup>5</sup> We affirm the refusal to register.

### **I. Evidentiary Matters**

Applicant appended to its appeal brief evidence in the form of search summaries from the USPTO’s Trademark Electronic Search System (TESS) displaying marks in third-party applications and registrations consisting in whole or in part of the term MAVERICK.<sup>6</sup> This evidence was not introduced into the record by Applicant or the Examining Attorney during prosecution of the involved application. In his appeal

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<sup>2</sup> 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. A mark depicted as a typed drawing is the legal equivalent of a standard character mark.

<sup>3</sup> Registration No. 0608371 issued on the Principal Register on July 5, 1955. Fourth Renewal.

<sup>4</sup> Registration No. 5115896 issued on the Principal Register on January 3, 2017. The cited registrations are owned by the same entity.

<sup>5</sup> All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). 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. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, \*2 n.1 (TTAB 2020).

<sup>6</sup> 4 TTABVUE 18-31 (Applicant’s brief).

brief, the Examining Attorney objected to this “new evidence” as untimely.<sup>7</sup> In response, Applicant submitted a request to the Board for remand of the application to the Examining Attorney for consideration of the evidence attached to its appeal brief<sup>8</sup> simultaneously with its reply brief.<sup>9</sup> The Board subsequently restored jurisdiction to the Examining Attorney for consideration of this evidence.<sup>10</sup> The Examining Attorney construed Applicant’s request for remand as a request for reconsideration; pointed out the evidentiary shortcomings of Applicant’s proffer of a mere listing of third-party registrations, and maintained the Section 2(d) refusal of registration.<sup>11</sup>

We will consider the TESS listings of third-party registrations<sup>12</sup> as being of record for such probative value they may possess.

## **II. Likelihood of Confusion**

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*,

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<sup>7</sup> 6 TTABVUE 3-4 (Examining Attorney’s brief).

<sup>8</sup> 7 TTABVUE.

<sup>9</sup> 8 TTABVUE.

<sup>10</sup> 10 TTABVUE.

<sup>11</sup> April 5, 2022 Denial of Request for Reconsideration at 1-3.

<sup>12</sup> 7 TTABVUE 6-18.

575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). *See also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the relatedness of the goods. *See 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

### A. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of the marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (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) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”).

Applicant’s MAVERICK mark in standard characters is identical in every respect to the registered MAVERICK marks in typed or standard characters. The fact that the marks are identical results in this factor strongly supporting a finding of likelihood of confusion. *In re Shell Oil Co.*, 26 USPQ2d at 1688 (“Without a doubt the word portion of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant.”).

Furthermore, “even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source.” *Id.* at 1689. See also *Ancor, Inc. v. Ancor Indus., Inc.*, 210 USPQ 70, 78

(TTAB 1981) (When both parties are using or intend to use the identical designation, “the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar”).

The first *DuPont* factor thus weighs heavily in favor of finding a likelihood of confusion.

### **B. Strength and Number and Nature of Similar Marks in Use**

There is no evidence that the cited MAVERICK marks possess any meaning in relation to the goods identified thereby, except to suggest an independent spirit of their purchasers or use.<sup>13</sup> We thus find the MAVERICK marks to be inherently distinctive as applied to the identified goods. With regard to commercial strength, the TESS summaries of third-party applications and registrations including the term MAVERICK submitted by Applicant with its request for remand<sup>14</sup> are properly of record. No copies of the applications or registrations were submitted.

As noted by the Examining Attorney,<sup>15</sup> mere listings of or references to registrations are not sufficient to make the registrations of record. *See In re Peace Love World Live, LLC*, 127 USPQ2d at 1405 n.17 (citing *In re 1st USA Realty Prof'ls*, 84 USPQ2d 1581, 1583 (TTAB 2007)); *In re Compania de Licores Internacionales S.A.*,

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<sup>13</sup> The Examining Attorney submitted the following definition of MAVERICK – “an unbranded range animal; an independent individual who does not go along with a group or party.” Merriam-Webster.com. January 12, 2021 first Office Action at 168.

<sup>14</sup> 7 TTABVUE 6-18.

<sup>15</sup> April 5, 2022 Denial of Request for Reconsideration at 2-3.

102 USPQ2d 1841, 1843 (TTAB 2012); *In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010).

A listing of third-party marks and the International Class of the goods or services identified thereby, without any accompanying identification of the goods and/or services associated therewith, has extremely limited probative value. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 n.6 (TTAB 2011) (Board considered TESS listings for whatever probative value they had); *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1380 (TTAB 2006). Further, any pending applications are also of no value. *See. e.g., In re Inn at St. John's*, 126 USPQ2d at 1745 (“[P]ending applications evidence only that the applications were filed on a certain date; they are not evidence of use of the marks.”); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) (third-party applications submitted by applicant have “no probative value other than as evidence that the application was filed.”).

In its reply brief, Applicant argues: “the large number of existing registrations including the word, MAVERICK, including registrations in classes 25 and 28, should have indicated that the large number of existing registrations containing the word, MAVERICK, are relatively weak, and each existing registration should be entitled to a narrow scope of protection.”<sup>16</sup>

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<sup>16</sup> 8 TTABVUE 4.

However, without any indication of the goods identified by the listed registrations, we cannot assess whether any of them identify Applicant’s “skis, ski bindings, ski poles” or related goods or the clothing items enumerated in the cited registrations. “[T]he relevant *DuPont* inquiry is [t]he number and nature of similar marks in use on *similar goods*.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (internal quotation and quotation marks omitted)). As a result, we have little more evidence than a listing of marks and the broad classification of goods identified thereby. We will not infer that these third-party registrations identify related goods in the absence of evidence in support of such a finding.<sup>17</sup> *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (“Classification is solely for the ‘convenience of Patent and Trademark Office administration,’ and ‘is wholly irrelevant to the issue of registrability under section 1052(d)’”) (citations omitted). We further will not base such a finding on attorney argument. Applicant’s “assertions are unsupported by sworn statements or other evidence, and ‘attorney argument is no substitute for evidence.’” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, \*14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

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<sup>17</sup> For example, Class 28 includes not only certain sporting goods, but also games, toys, playthings, amusement and novelty items, and certain decorations for Christmas trees. See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1401.02(a) (July 2021).

In the absence of more probative evidence, we find that the MAVERICK marks in the cited registrations are afforded the ordinary scope of protection for distinctive marks.

### **C. The Goods and Channels of Trade**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Stone Lion*, 110 USPQ2d at 1159; *Hewlett-Packard*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In support of the refusal of registration, the Examining Attorney introduced into the record<sup>18</sup> printouts from the following websites showing use of the same marks and trade names to identify the source of jackets, shirts, jeans pants, tops, and skis, ski poles or ski bindings:

- Evo;
- Rossignol;
- Salomon;

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<sup>18</sup> July 7, 2021 final Office Action at 6-67.

- K2;
- Line;
- Fischer;
- Völkl;
- Armada;
- Icelantic; and
- Atomic (this appears to be Applicant's website, or a website of one of its affiliates).

This evidence establishes that these third parties, and possibly Applicant as well, offer the goods listed in Applicant's involved application, and the clothing items identified in the cited registrations, under the same house marks or trademarks.

The Examining Attorney also introduced into the record<sup>19</sup> copies of approximately thirty-five use-based, third-party registrations for marks identifying, inter alia, both clothing items and skis, ski poles or ski bindings. The following examples are illustrative:

Reg. No. 5320138 for the mark GORSUCH (in standard characters), identifying jackets, jeans, shirts, skis and ski accessories, namely ski poles;

Reg. No. 4629216 for a mark consisting of the stylized design of a bull inside a circle, identifying shirts, jackets, skis, ski bindings; and

Reg. No. 5410437 for the mark START THE MACHINE (in standard characters) identifying jackets, bottoms, jeans, snow skis, skis.

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<sup>19</sup> January 12, 2021 first Office Action at 15-167.

As a general proposition, although use-based, third-party registrations alone 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 they serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect that jeans, jackets, tops, pants, shirts, and skis, ski poles and ski bindings bearing the same mark are likely to emanate from the same source.

Applicant argues: “clear and significant differences exist between the goods of the Applicant’s mark and the goods of the Cited Registrations.”<sup>20</sup> “The listed goods are entirely different and they address different consumer needs. The goods are listed in separate classes, serve entirely different functions and are intended to be used by different consumers.”<sup>21</sup> Applicant’s arguments regarding the differences between the goods and the unsuitability of jeans as ski wear<sup>22</sup> are inapposite. It is not necessary for us to find that the goods have the same functions, address the same consumer needs, or are even competitive to find a likelihood of confusion. *See, e.g., On-line*

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<sup>20</sup> 4 TTABVUE 10.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.*

*Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They 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 and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

The Examining Attorney’s evidence demonstrates that consumers are accustomed to encountering Applicant’s ski goods and the clothing items identified in the cited registrations emanating from the same sources under the same house marks and trademarks.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the goods are encountered, we must base our likelihood of confusion determination on the goods as they are identified in the application and registrations at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also Octocom*, 16 USPQ2d at 1787 (“The 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.”).

We thus are not persuaded by Applicant's arguments that skis, ski poles and bindings are usually purchased by ski enthusiasts with the assistance of retail professionals, while clothing items may be purchased by anyone in any retail setting.<sup>23</sup> Applicant's contentions rely upon restrictions not present in either identification of goods. Specifically, Applicant's goods do not recite a restriction to sales assisted by retail ski professionals. Similarly, the goods in the cited registration are not limited to any particular trade channel. We cannot consider asserted marketplace realities not reflected in the identifications. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). Further, while not all consumers of clothing are skiers, all skiers wear clothing and evidence indicates that skis, ski equipment and clothing are available to consumers under the same marks and trade names.

In the absence of trade channel limitations in the identifications of goods in the involved application and cited registrations, we must presume that these goods are offered in all customary trade channels therefor. *See Citigroup v. Cap. City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Further, evidence of record demonstrates that both Applicant's goods and the Registrant's goods may be encountered by the same classes of consumers under the same marks in at least one common trade channel, i.e., websites of businesses providing both skis and ski equipment and clothing items.

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<sup>23</sup> *Id.* at 12.

We find that the *DuPont* factors of the relatedness of the goods, channels of trade and classes of consumers weigh in favor of likelihood of confusion.

#### **D. Conditions of Purchase**

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. In its brief, Applicant argues that its goods are relatively expensive, selected with certain specifications in mind, and travel in a specialized niche market that is separate from the larger market in which Registrant’s clothing items are encountered.<sup>24</sup>

The clothing items identified in the cited registrations must be presumed to include both expensive and inexpensive varieties, available in any common channels of trade. There is nothing in the nature of these identified articles of clothing, without any limitation as to their type, price point or intended consumers, to suggest their purchasers are particularly sophisticated or careful. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1739 (TTAB 2018). In fact, the standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163, *cited in In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”).

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<sup>24</sup> 4 TTABVUE 14.

Similarly, in the absence of restrictions in the application, we presume the ski products travel in all channels of trade normal for those unrestricted goods and that they are available to all classes of consumers for those products. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard*, 62 USPQ2d at 1005). *See also In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Even if we accept, in considering the fourth *DuPont* factor, Applicant's assertion that its goods may be the subject of sophisticated purchases, even careful purchasers are likely to be confused by identical marks. As stated by our primary reviewing court, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Therefore, the fact that the purchasers may exercise care before purchasing these goods does not mean there can be no likelihood of confusion.

In the present case, the identity of the marks and the relatedness of the goods as identified outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14

USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

The fourth *DuPont* factor is neutral.

### **E. Conclusion**

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant's arguments relating thereto, including those arguments and evidence not specifically addressed herein, we conclude that consumers familiar with Registrant's goods offered under its mark would be likely to believe, upon encountering Applicant's mark, that the goods in the cited registrations and Applicant's goods originate with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register Applicant's mark is affirmed under Section 2(d) of the Trademark Act.