

This Opinion is not a
Precedent of the TTAB

Mailed: September 15, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re GFactor Enterprises, LLC

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Serial No. 90286664

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Andrea Evans of The Law Firm of Andrea Hence Evans, LLC,
for GFactor Enterprises, LLC.

Theodore Sotland, Trademark Examining Attorney, Law Office 105,
Katrina J. Goodwin, Acting Senior Attorney.

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Before Shaw, Goodman and Dunn,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:


GFactor Enterprises, LLC, dba Gfactor Films (“Applicant”) seeks registration on

the Principal Register of the mark for “Hats; Shirts; Hoodies; Knit face
masks being headwear” in International Class 25.¹

¹ Application Serial No. 90286664 was filed on Oct. 29, 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 mark: “The mark consists of the stylized letters ‘TH’. The horizontal line in ‘T’ extends above the ‘H’ and the

The Trademark Examining Attorney has 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 Principal Register mark  for "Clothing for men, women and children, namely, shirts, golf shirts, T-shirts, sweatshirts, tank tops, sweaters, jeans, vests, jackets, coats, parkas, underwear, scarves" in International Class 25 as to be likely, when used in connection with these goods, to cause confusion, to cause mistake, or to deceive.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

vertical line in the 'T' extends through the 'H'. Applicant's application originally included Class 41 services which were subject to a request to divide filed on Feb. 11, 2022 and completed on Mar. 21, 2022.

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. Applicant's brief is at 6 TTABVUE. The Examining Attorney's brief is at 8 TTABVUE.

² Registration No. 3264718 issued Jul. 17, 2007; renewed. The provided description of the mark states: "The mark consists of an interlocking design using the letters TH." Color is not claimed as a feature of the mark.

The Examining Attorney also had cited a prior pending application Serial No. 90076066 for a standard character TH mark but it abandoned during examination. The citation was withdrawn by the Examining Attorney in his July 30, 2021 Office Action at TSDR 1.

I. 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.”).

A. Strength of the Mark

Because the strength or weakness of the cited mark informs our comparison of the marks, we address Applicant’s arguments that the cited mark is weak in the clothing and apparel field and entitled to a narrow scope of protection. 6 TTABVUE 11-12.




In determining the strength of the cited mark, we consider inherent strength, based on the nature of the mark itself.³ *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.”); *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 of 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).

³ The commercial strength based on the marketplace recognition of the mark also is a consideration. See *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning”).

However, “[i]n an ex parte analysis of the *du Pont* factors for determining likelihood of confusion ..., the [commercial strength] of the mark’ ... is normally treated as neutral when no evidence as to [marketplace recognition] ... has been provided.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (July 2022). Because there is no evidence of record regarding the marketplace strength of the cited mark, this consideration is neutral.

In this case, the TH initialism is arbitrary with respect to Registrant's goods as there is no evidence in the record to indicate that the initialism has any descriptive, generic, or even suggestive meaning in the relevant field.

As evidence that the TH initialism is weak and that Applicant's and Registrant's marks can coexist, Applicant points to third-party registrations submitted during prosecution.⁴ 6 TTABVUE 9-13. This third-party registration evidence bears on conceptual weakness. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-695 (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")). There is no third-party use evidence in the record which would be reflective of commercial or marketplace weakness. *Tao Licensing*, 125 USPQ2d at 1057.

Applicant submitted TSDR printouts of "T(second letter) marks," namely, "two letter" third-party registrations with the lead letter "t" in combination with another consonant, for apparel and related goods: TB², TB12,  , TF, , TDS, TG CLOTHING and TG THE GYM, TS8, TK BOOTS.⁵ Applicant asserts that these registrations are evidence of the practice in the apparel industry of using initial marks, resulting in consumers being able to distinguish these initial marks from each

⁴ Jun. 24, 2021 Response to Office Action at TSDR 22-49; Jan. 11, 2022 Request for Reconsideration at TSDR 3-16.

⁵ Jun. 24, 2021 Response to Office Action at TSDR 22-49.

other. *Id.* at 9-10. Applicant references statements made by Registrant during examination⁶ of the cited registration that “it is customary for designers to use their initials as a method of identifying the source of the goods” in the apparel field and that consumers understand the difference.⁷ *Id.* at 13-14. Applicant submits that these registrations support coexistence of highly similar initial marks. *Id.*

These coexisting third-party registrations for similar “T” with second consonant marks are some evidence that these registrants’ believe these marks can coexist due to their differences. *See Jerrold Elecs. Corp. v. The 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.”).

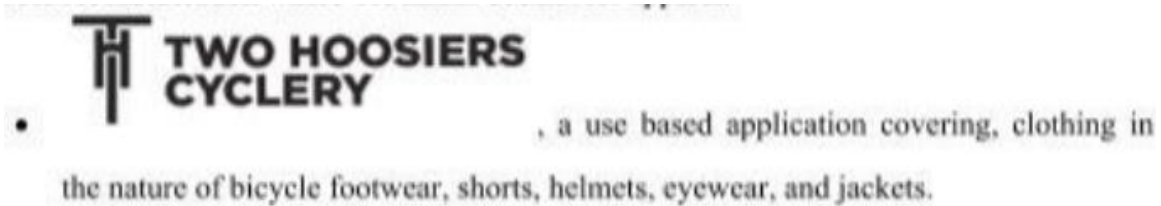
However, because the third-party letter T marks include a second consonant(s) different from the letter H, and some contain additional words or designs, these marks are not particularly probative of the weakness of TH as a whole in connection with clothing goods. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259-60 (Fed. Cir. 2010) (Applicant’s submission of a group of registrations that have the letters “ML” as part of a longer letter string (i.e., MLUXE, M'LIS, JML and

⁶This exhibit to Applicant’s reconsideration request lacks any markings associating it with the underlying application file for the cited registration such as serial number of the application or submission coversheet generated from an electronic filing with the Office. Registrant’s prior statements are not binding judicial admissions on the decision maker but the statement may be received in evidence as “merely illuminative of the shade and tone in the total picture confronting the decision maker.” *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) (quoting *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978)).





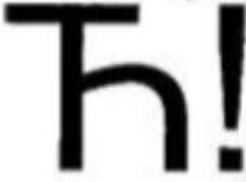
⁷ January 11, 2022 Request for Reconsideration at TSDR 2.

AMLAVI) not persuasive; “The indiscriminate citation of third-party registrations without regard to the similarity of the marks involved is not indicative that the letters ML have a suggestive or descriptive connotation.”); *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *25 (TTAB 2021) (third-party registration evidence discounted where they contained “additional elements that cause many of them to be less similar to Petitioner's mark than Respondent's marks are”); *In re Merck & Co., Inc.* 189 USPQ 355, 356 (TTAB 1975) (third-party registrations showing frequent adoption of the letter “M” as a portion of composite mark do not establish that registrant’s mark M-VAC as a whole is weak and entitled to limited protection).

Applicant also submitted TSDR printouts of TH and TH composite registrations for the marks shown below:⁸



⁸ Jan. 11, 2022 Request for Reconsideration at TSDR 3-16.

-  , a registration for caps being headwear, hats, t-shirts, sweatshirts.
-  , a registration for sports jerseys, sports shirts, vests, t-shirts.
-  , a registration for tops, bottoms, underwear, shirts, shorts.
-  , a registration for hooded sweatshirts.
-  , a registration for belts, dresses, t-shirts, shorts.

Applicant argues that these third-party registrations are evidence that the letter combination TH is diluted and entitled to a narrow scope of protection, “lessening the commercial impact of the letters.” *Id.* at 11-12. Applicant submits that “[g]iven the weakness of the TH design, and other T(second letter) marks in the apparel industry, along with differences of appearance” consumers are able to differentiate the marks. *Id.* at 9, 14.

This third-party registration evidence of TH marks for apparel is probative of the conceptual weakness of TH in connection with these goods and shows that if there are sufficient differences, TH marks can coexist. *See In re Hartz Hotel Servs., Inc.*,

102 USPQ2d 1150, 1153-54 (TTAB 2012) (seven registrations incorporating Grand Hotel show that the 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”); *Jerrold Elecs.*, 199 USPQ at 758 (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.”).

However, none of these third-party TH registrations is as similar to the cited registered mark as Applicant’s mark. Accordingly, we find that these few third-party registrations do not “diminish the distinctiveness of the cited mark or its entitlement to protection against Applicant’s mark.” *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *8 (TTAB 2020) (citing *Palisades Pageants, Inc. v. Miss Am. Pageant*, 442 F.2d 1385, 169 USPQ 790, 793 (CCPA 1971) (discounting the probative value of third-party registrations where “appellant’s mark is closer to appellee’s than even the closest of the third-party registrations”)).

B. Similarity or Dissimilarity of the Marks

The first *DuPont* factor 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.” *Inn at St. John’s*, 126 USPQ2d at 1746 (citing *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.”) (citation omitted).

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). Further, the marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). *See also Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004). (“The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.”). “Similarity is not a binary factor but is a matter of degree.” *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant’s mark is  and Registrant’s mark is .



In analyzing composite letter marks, it is important to consider both the literal and visual elements of the marks. *In re Electrolyte Labs., Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (“[T]he nature of stylized letter marks is that

they partake of both visual and oral indicia. ... [A] stylized letter design cannot be treated simply as a word mark”). Where the letters are so highly stylized that the marks are essentially design marks incapable of being spoken, the decision would turn primarily on the basis of the visual similarity of the marks. *See Textron Inc. v. Maquinas Agricolas “Jacto” S.A.*, 215 USPQ 162 (TTAB 1982).

Applicant argues that the Examining Attorney’s focus on pronunciation overlooks the visual design elements and the design. *Id.* at 8. Applicant submits that “a stylized letter design cannot be treated simply as a word mark” and that it is “viewed, not spoken” as consumers “do not speak highly stylized letter designs.” *Id.*

However, in this case, the marks are not so highly stylized; they are easily recognizable as the letters TH and are the essential features of each mark. *Compare, e.g., In re TSI Brands, Inc.*, 67 USPQ2d 1657, 1663 (TTAB 2002) (“[T]he degree of stylization and integration of the letters forming both of registrant’s ‘AK’ and design marks is so high that they are more properly treated, in our view, as being akin to pure design marks rather than simply stylized displays of word marks”; highly stylized AK marks not confusingly similar with AK American Khakis) *with In re Instruteck Corp.*, 184 USPQ 618, 620 (TTAB 1974) (although the marks containing the terms IC “were presented in different graphic displays,” the letters were readily discernible and would project this significance to individuals viewing them, notwithstanding additional word and design elements in registrant’s mark).

Applicant argues that “the marks at issue are not substantially identical as the top of the T in Applicant’s mark is larger than the T in Registrant’s mark, and Applicant’s T covers the entirety of the H in its mark. The T and H in Registrant’s mark are more symmetrical.” *Id.* Applicant argues that these dissimilarities are significant” and that the marks have “different stylizations.” *Id.*

The visual similarity of the marks  and  is striking. The marks solely contain the same two letters in common, T and H, and the arrangement of the letters, with the letter T superimposed over (Registrant) or bisected by (Applicant) a portion of the letter H, is very similar. The stylization of the letters TH is not particularly distinctive or memorable in either mark. Both marks appear to use a common serif font in block style lettering, and the slight bisection and variation on the top vertical portion of the letter T in Applicant’s mark and the slight difference in size of the letters T and H in Registrant’s mark are not consequential. Thus, the marks are highly similar in appearance. As to similarity in sound, because these marks are not so highly stylized and the letters TH are discernible in both marks, these marks are capable of being spoken as individual letters. To the extent Applicant’s and Registrant’s marks are spoken, they may be pronounced as TH, making them similar in sound.

As to connotation, Applicant argues that “the ultimate meanings of the letter combination are important” and that each mark has distinct commercial meanings. *Id.* at 7. Applicant submits that TH in its mark references Torrance Hampton, “a well-known executive producer and director” while TH in Registrant’s mark

references the company Tommy Hilfiger. *Id.* Applicant submits that the marks “couldn’t be more different” in connotation. *Id.* at 8. To support these assertions, Applicant has submitted evidence in the record of actual use and statements by Registrant in the underlying application.⁹ Applicant submits that the “commercial reality” is that Applicant’s mark refers to an individual, while Registrant’s mark refers to a line of clothing. *Id.* at 13. Applicant argues that “[c]onsumers understand the difference between a Tommy Hilfiger TH design and Torrance Ham[pton] TH design, and it is improper to allow apparel marks to have complete brand name control over name initials.” *Id.* at 14.

However, there is nothing in the marks themselves that alerts consumers to this information. The letters TH, on their face, have no particular meaning, and there is no additional wording that would inform the consumer what the letters TH stand for in either mark.

Moreover, because the application is for registration of the mark TH stylized by itself and the cited mark is TH stylized by itself as well, the similarity of the marks is not mitigated in any respect by the fact that TH in Applicant’s mark may be an initialism for the individual Torrance Hampton and TH in Registrant’s mark may be an initialism for the company Tommy Hilfiger. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993) (indicating that applicant’s assertions that the applied-for mark would appear with applicant’s house mark were not considered in the likelihood-of-confusion determination); *In re Aquitaine Wine USA*,

⁹ Jun 24, 2021 at TSDR 6-21; Jan. 11, 2022 Request for Reconsideration at TSDR 2.

LLC, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application.”). We are not persuaded by Applicant’s argument, based on extrinsic evidence, that Applicant’s mark and the cited mark are initialisms for distinct terms, namely, Torrance Hampton and Tommy Hilfiger, respectively, and thus have different connotations and commercial impressions.

We find that Applicant’s and Registrant’s marks convey the same commercial impression of initials or abbreviations or acronyms and that it is likely that consumers would perceive similar, if not identical, commercial impressions from the similarly stylized TH marks. “Initials, by their very nature, are abbreviations, a shortened version designed to be comprehended at a glance. If the number of letters is the same, and there is a significant overlap in the letters used, that is generally sufficient to sustain a claim of similarity.” *Cont’l Connector Corp. v. Cont’l Specialties*, 492 F. Supp. 1088, 207 USPQ 60, 66 (D. Conn. 1979).

When we consider the marks in their entirety, we conclude that the marks are very similar. The first *DuPont* factor strongly favors a finding of likelihood of confusion.

C. Similarity or Dissimilarity of the Goods

We next consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.”¹⁰

¹⁰ Applicant has not addressed the relatedness of the goods in its appeal brief.

DuPont, 177 USPQ at 567. Our comparison is based on the goods as identified in Applicant's application and the cited registration. See *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 8 USPQ2d 1944, 1947 (Fed. Cir. 2006)) (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)). 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).

Evidence of relatedness 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 "Hats; Shirts; Hoodies; Knit face masks being headwear." Registrant's goods are "Clothing for men, women and children, namely, shirts, golf shirts, T-shirts, sweatshirts, tank tops, sweaters, jeans, vests, jackets, coats, parkas, underwear, scarves. Applicant's "shirts" encompass Opposer's shirts for men, women, and children and 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.'").

Further, Applicant's "hats" and "hoodies" are closely related to shirts or vests. The third-party website evidence submitted by the Examining Attorney shows hats and shirts sold by the same retailer, and photographs of models wearing hats and shirts together.¹¹ The evidence also shows shirts and hoodies, or shirts and vests sold by the same retailer.¹² Website evidence such as this has been found probative of relatedness. *See, e.g., In re Joel Embiid*, 2021 USPQ2d 577, at *28 (TTAB 2021) (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*, 2020 USPQ2d 10878,

¹¹ It was unnecessary for the Examining Attorney to resubmit evidence provided in its first office action with its final office action.

¹² Jul. 30, 2021 Office Action, Uniqlo (uniqlo.com) at TSDR 20-22 (hats, shirts, hoodies); Gap (gap.com) at TSDR 16-19 (hats, shirts, hoodies); L.L. Bean (llbean.com) at TSDR 10-11 (shirts and hats); Chadwicks (chadwicks.com) at TSDR 5-6 (shirts and hats), Coat of Arms (coatofarms.com) at TSDR 2 (hats and vests); Jan. 19, 2021 Office Action, Coat of Arms (coatofarms.com) at TSDR 8 (hats and vests); Chadwicks (chadwicks.com) at TSDR 11-12 (shirts and hats); L.L. Bean (llbean.com) at TSDR 16-17 (shirts and hats).

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).

The second *DuPont* factor strongly favors a finding of likelihood of confusion.

D. Similarity or Dissimilarity of the 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.”¹³ *DuPont*, 177 USPQ at 567. We will “also discuss the portion of the fourth *DuPont* factor that addresses the ‘buyers to whom sales are made.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (quoting *DuPont*, 177 USPQ at 567).

As to the channels of trade and classes of purchasers, the basis for our analysis is the identification 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).

Given the in part legal identity of “shirts” we must presume that Applicant's and Registrant's goods will move in the same or similar trade channels (e.g., clothing stores, specialty stores, department stores, and the like) to the same class of purchasers, namely ordinary consumers (men, women and children). *See In re Viterra*

¹³ Applicant did not address trade channels in its brief.

Inc., 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption that legally identical goods move in the same trade channels to the same class of purchasers in determining likelihood of confusion); *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, evidence shows that third-party retailers, some of whom also have brick and mortar locations, offer a variety of shirts and also sell shirts and hoodies, or shirts and hats, or shirts and vests on their websites, showing trade channel overlap.¹⁴ *See e.g., In re Joel 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 and classes of customers). Therefore, the third-party website evidence supports the finding of overlapping trade channels.


¹⁴ Jul. 30, 2021 Office Action, Uniqlo (uniqlo.com) at TSDR 20-22 (hats, shirts, hoodies); Gap (gap.com) at TSDR 16-19 (hats, shirts, hoodies); L.L. Bean (llbean.com) at TSDR 10-11 (shirts and hats); Chadwicks (chadwicks.com) at TSDR 5-6 (shirts and hats), Coat of Arms (coatofarms.com) at TSDR 2 (vests and hats); Jan. 19, 2021 Office Action, Coat of Arms (coatofarms.com) at TSDR 8 (vests and hats); Chadwicks (chadwicks.com) at TSDR 11-12 (shirts and hats); L.L. Bean (llbean.com) at TSDR 16-17 (shirts and hats).

As to the potential consumer, Applicant's identification does not identify the potential consumer, while Registrant's identification identifies "men, women and children." However, Registrant's limitation is not meaningful because it covers essentially the same class of purchasers, as Applicant's unidentified consumers, namely, ordinary adults (male and female) or children who purchase clothing.¹⁵

We find the third *DuPont* factor favors a finding of likelihood of confusion.

II. Conclusion

We find the marks are similar, the goods legally identical in part and otherwise related, and the trade channels and classes of consumers overlap. Accordingly, we find a likelihood of confusion between Applicant's mark and Registrant's mark.

Decision: The Section 2(d) refusal to register Applicant's mark  is affirmed.

¹⁵ As to the classes of purchasers, we note that parents of children often undertake the purchase of children's clothing.