

This Opinion is not a
Precedent of the TTAB

Hearing: June 5, 2019

Mailed: August 12, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Abercrombie & Fitch Trading Co.

v.

Isabella Elisabeth Schnittger

Opposition No. 91218738

Susan M. Kayser, Jessica D. Bradley and Allison Prevatt of Jones Day
for Abercrombie & Fitch Trading Co.

Isabella Elisabeth Schnittger, *pro se.*

Before Wolfson, Kuczma and Adlin,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

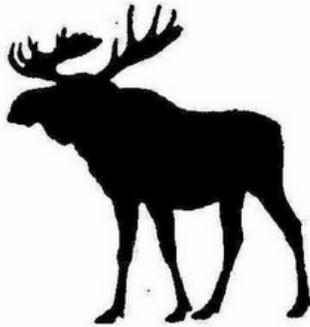
Applicant Isabella Elisabeth Schnittger seeks registration of the mark shown
below



Red Deer

for “Caps; Hats; Hooded sweatshirts; Jackets; Long-sleeved shirts; Socks;

Sweatshirts; T-shirts; Underwear.”¹ In its notice of opposition, Opposer Abercrombie & Fitch Trading Co. alleges prior use and registration of a “Moose Design logo” in the forms shown below



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and



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for clothing, and, in the case of the “solid form” moose design on the left, retail clothing stores. Several of Opposer’s pleaded registrations are over five years old. As grounds for opposition, Opposer alleges that use of Applicant’s mark is likely to cause

¹ Application Serial No. 86152857, filed December 26, 2013 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce. The application includes this description of the mark: “The mark consists of a deer silhouette with 7 point antlers. Below there is the stylized text ‘Red Dear’.”

² Registration Nos. 3065016 (issued March 7, 2006; renewed) for “clothing, namely, shirts and sweaters;” 4551991 (issued June 17, 2014; Section 8 Affidavit accepted, Section 15 Affidavit acknowledged) for “Clothing, namely, beach cover-ups, bras, camisoles, halter tops and night shirts;” 3964371 (issued May 24, 2001; Section 8 Affidavit accepted, Section 15 Affidavit acknowledged) for “Retail store services, and on-line retail store services featuring clothing, footwear, accessories, fragrances and jewelry;” and “Clothing, namely, polo shirts, blouses, sweaters ...;” and 4168384 (issued July 3, 2012; Section 8 Affidavit accepted, Section 15 Affidavit acknowledged) for “Clothing, namely, beachwear, belts, blazers, dresses, footwear, gloves, knee highs, loungewear, mittens, and vests.”

³ Registration Nos. 3212644 (issued February 27, 2007; renewed) for “Clothing, namely, polo shirts, sweaters, t-shirts, shirts, knit tops ...;” and 3574198 (issued February 10, 2009; renewed) for “Clothing, namely, footwear” and “Jewelry, namely, necklaces and bracelets.”

confusion with, and dilute, Opposer's marks. In her answer, Applicant denies the salient allegations in the notice of opposition.

I. The Parties' Stipulations Regarding Trial, the Resulting Record and Opposer's Evidentiary Objections

The parties agreed to simplify the trial of this case by, *inter alia*, submitting testimony through affidavits, stipulating to certain facts and limiting documentary trial evidence to materials produced during discovery. 11 TTABVUE ("Trial Stipulation").⁴ The Board approved their Trial Stipulation. 12 TTABVUE.

A. Stipulated Facts

After their Trial Stipulation was approved, the parties filed their "Stipulation of Facts," which includes the following stipulated facts, among others:

Opposer owns its pleaded registrations and they are "valid, subsisting and have never been abandoned."

Opposer has been using its solid form moose design for clothing since at least as early as February 2002 and its "outline form" moose design for clothing since at least as early as November 1, 2004.

"Applicant did not sell or offer to sell any products or services bearing Applicant's Mark" or use her mark, prior to December 26, 2013.

"Both Applicant's Mark and Opposer's Mark⁵ include profiles of full-bodied, four-legged animals with antlers in silhouette form."

⁴ Citations to the record reference TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

⁵ "Opposer's Mark" is a defined term in the Stipulation of Facts, which encompasses all of Opposer's pleaded marks. 13 TTABVUE 2 n.1 (Stipulation of Facts p. 1 n.1).

“As of May 4, 2015, [Opposer] had over 370 retail store locations across the United States, including over 240 Abercrombie & Fitch retail store locations, and over 120 abercrombie kids retail store locations.”

“Consumers of products bearing Opposer’s Mark could also be consumers of products bearing Applicant’s Mark.”

“From 2001-2006, [Opposer] released and distributed catalogs displaying and offering for sale clothing bearing Opposer’s Mark, with a total U.S. circulation of over 10.3 million copies.”

Actor Cory Monteith wore a polo shirt bearing Opposer’s Mark during an episode of the Fox television show *Glee*, and another polo shirt bearing the mark was worn on an episode of the NBC television show *Will & Grace*. Third-party websites have published photographs of celebrities wearing clothing bearing Opposer’s Mark, including Jennifer Aniston, David Beckham and Jessica Simpson.

Clothing bearing Opposer’s Mark has been featured in national magazines including Teen Vogue, GQ, Details and Men’s Fitness, and The New York Times, Chicago Tribune and Washington Post have published articles regarding Opposer’s Mark.

Opposer has enforced its rights in Opposer’s Mark against third parties using similar marks.

13 TTABVUE 2-8 (Stipulation of Facts ¶¶ 1, 3, 4, 10-12, 19, 29, 31, 33-35, 37, 40).

B. The Record

The record consists of these stipulated facts, the pleadings, and, by operation of Trademark Rule 2.122(b), the file of Applicant’s involved application. In addition, Opposer introduced:

Testimony Affidavit of Jessica D. Bradley, an attorney with Opposer’s law firm, and the exhibits thereto (“Bradley Aff.”). 15 TTABVUE.

Testimony Affidavit of Reid M. Wilson, Opposer's Vice President and Associate General Counsel – Intellectual Property, and the exhibits thereto (“Wilson Aff.”). 16-18 TTABVUE.

Rebuttal Testimony Affidavit of Ms. Bradley (“Bradley Reb. Aff.”). 21 TTABVUE.

Rebuttal Testimony Affidavit of Mr. Wilson, and the exhibits thereto (“Wilson Reb. Aff.”). 22 TTABVUE.

Applicant introduced:

Her own Testimony Affidavit and the exhibits thereto (“Schnittger Aff.”), and a revised version thereof (“Rev. Schnittger Aff.”). 19 and 23 TTABVUE.

C. Evidentiary Objections

The Board previously granted Opposer's motion to strike materials Applicant submitted for the first time with Applicant's revised testimony affidavit, after Applicant's testimony period ended. 25 TTABVUE. Those materials, 23 TTABVUE 25-74 and the materials Applicant submitted via compact disc, have not been considered.

In its Trial Brief, Opposer also objects to portions of Applicant's testimony as hearsay, “irrelevant,” and lacking “foundation,” and to certain documents as unauthenticated or hearsay. 28 TTABVUE 58-71 (Opposer's Trial Brief. Appendix 1). Opposer also objects to the Internet materials attached to the Schnittger Affidavit as Exhibit A because they were not produced during discovery, because of the manner in which the documents' urls were presented and because Applicant failed to include the date the materials were accessed. Finally, Opposer objects to copies of certain

Maine statutes upon which Applicant relies, and to Exhibit D to Applicant's Affidavit, which includes descriptions and photographs apparently from the Internet.

We have not considered Exhibit D to Applicant's Affidavit, because even if the materials are what Applicant claims them to be, neither Opposer's nor third parties' use of marks outside of the United States is relevant to United States trademark rights.

As indicated in the Board's order on Opposer's earlier motion to strike, Opposer's objections to Exhibit A might be appropriate if Applicant had introduced the materials via notice of reliance under *Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031 (TTAB 2010), but here the materials were introduced via an affidavit. 25 TTABVUE 4-5 and fn. 1, 2. In any event, the Trial Stipulation specifically provides that "the parties may submit evidence of which they request that the Board take judicial notice," 11 TTABVUE 2, which is what Applicant did with respect to Exhibit A. 19 TTABVUE 4 (Schnittger Aff. ¶ 4). We have considered Exhibit A to the extent it is probative.

As for Exhibits B and C, we may consider Applicant's cite to Maine statutes just as we may consider cites to caselaw, the Lanham Act and other federal and state statutes, government regulations such as those published in the Code of Federal Regulations and other legal authority. We have considered the Maine statutes.

With respect to Opposer's remaining objections, suffice it to say, "we simply accord the evidence whatever probative value it deserves, if any at all ... Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-

to testimony and evidence in this specific case, including any inherent limitations, and this precludes the need to strike the testimony and evidence.” *Hunt Control Sys. Inc. v. Koninklijke Philips Electronics N.V.*, 98 USPQ2d 1558, 1564 (TTAB 2011). *See also Grote Indus., Inc. v. Truck-Lite Co., LLC*, 126 USPQ2d 1197, 1200 (TTAB 2018) (“We also remind the parties that our proceedings are tried before judges not likely to be easily confused or prejudiced. Objections to trial testimony on bases more relevant to jury trials are particularly unnecessary in this forum.”) (citing *U.S. Playing Card Co. v. Harbro LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006)); *RxD Media, LLC v. IP Application Development LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1478 (TTAB 2017) (quoting *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017)). We have kept Opposer’s objections in mind in considering and determining the probative value of Applicant’s evidence.

II. Standing

Opposer’s pleaded registrations, effectively made of record via the Stipulation of Facts, establish its standing. 13 TTABVUE ¶ 1 (pleaded registrations). *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). “Applicant does not argue that Opposer lacks standing.” 30 TTABVUE 6 (Applicant’s Trial Brief at 5).

III. Priority

Because Applicant has not counterclaimed to cancel any of Opposer’s pleaded registrations, priority is not at issue with respect to the marks and goods identified

therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). In any event, the parties stipulated to Opposer's prior common law use of its pleaded marks for clothing. 13 TTABVUE ¶¶ 2, 3, 8.

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between 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."). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence, and treat the remaining factors as neutral.

A. The Strength/Fame of Opposer's Mark

We begin with the fame factor, because when fame exists, it plays a dominant role in the likelihood of confusion analysis. Indeed, famous marks "enjoy a wide latitude of legal protection." *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting *Recot, Inc. v. Benton*, 214 F.3d 1322, 54 USPQ2d

1894, 1897 (Fed. Cir. 2000)); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame is not “an all-or-nothing factor,” however. *Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). Rather, we must place Opposer’s moose design mark “along a spectrum from very strong to very weak.” *Id.* (quoting *Palm Bay Imps. V. Veuve Clicquot Ponsardin Masion Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). In doing so, we must consider Opposer’s pleaded marks from the perspective of “the class of customers and potential customers” of the relevant products, in this case consumers and potential consumers of clothing. *Palm Bay*, 73 USPQ2d at 1695 (“[A] mark’s renown within a specific product market is the proper standard.”). The stronger the mark, the greater the scope of protection to which it is entitled. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017) (“A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis.”); *Nike, Inc. v. WNBA Enterprises, LLC*, 85 USPQ2d 1187, 1198 (TTAB 2007).

While consumer surveys may provide direct evidence of a mark’s degree of strength, they are not necessary; indeed, they “rarely appear.” *Bose*, 63 USPQ2d at 1305. In the absence of direct evidence, fame or strength “of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Bose*, 63 USPQ2d at 1305. Other relevant

factors include “length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

Here, while Opposer has designated much of its evidence of fame/strength as “confidential,” and we therefore only discuss it generally, suffice it to say that Opposer has been quite successful in selling clothing products bearing its pleaded marks. It has used its solid form pleaded mark for almost 16 years, and its outline form pleaded mark for almost 15 years. 17 TTABVUE 3 (Wilson Aff. ¶¶ 4, 5). Its annual and cumulative sales and advertising figures are impressive by any measure, and a good bit higher than seen in typical Board cases. The number of visits to Opposer’s websites, and subscribers to Opposer’s e-mail distribution lists, are similarly impressive, and both the websites and e-mails feature the pleaded marks. Opposer’s Facebook page has received almost 9 million “likes.” Opposer’s prominence in the clothing market is also obvious from its having 370 retail stores and distributing over 10 million catalogs. Products bearing Opposer’s pleaded marks have appeared in prominent television shows, and prominent print publications have discussed Opposer’s pleaded marks.

Nevertheless, “[w]e have no context for opposer’s advertising and sales figures,” or its other evidence of strength/fame, “such as how the figures for [products bearing Opposer’s pleaded marks] compare with that for other brands of” clothing. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1831 (TTAB 2012); see also *Bose*, 63 USPQ2d at 1309 (“some context in which to place raw statistics is

reasonable”). Moreover, while Opposer has offered other evidence of the strength of its pleaded marks, beyond its sales and advertising figures, the other evidence is also without context, such as circulation figures for print publications or ratings for television shows. The extent to which consumers are exposed to and recognize Opposer’s pleaded marks, as opposed to its various other marks (such as ABERCROMBIE & FITCH and A&F), is unclear.

Ultimately, even if Opposer has not established that its pleaded marks are “famous” for likelihood of confusion purposes, Opposer’s evidence easily establishes that its pleaded marks are “renowned” in the clothing market, and commercially quite strong. Opposer’s pleaded marks are thus entitled to a concomitantly broad scope of protection. *See Joseph Phelps Vineyards*, 122 USPQ2d at 1734-35. This factor weighs heavily in favor of finding a likelihood of confusion.

B. The Goods, Channels of Trade and Classes of Consumers

All of the goods for which Applicant seeks registration are either identical or legally identical to those for which Opposer’s pleaded marks are registered. In fact, both parties offer or intend to offer caps, hats, jackets, socks, sweatshirts, t-shirts and underwear, and Opposer’s “shirts” and “sweatshirts” encompass Applicant’s “long-sleeved shirts” and “hooded sweatshirts,” respectively. Because the goods are identical or legally identical, we must presume that the channels of trade and classes of purchasers are as well. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in

determining likelihood of confusion); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The legal identity of the goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

C. Similarity of the Marks

Having effectively conceded that many of the facts weigh in favor of finding a likelihood of confusion, Applicant relies on the alleged dissimilarity of the marks:

Applicant's argument is really very simple: it is not the purpose of trademark registration to allow one company to try to associate any "antlered animal" with its brand by foreclosing Applicant or anyone using both a trade name and a different "antlered animal", namely a 7 pointed stag (male) deer with the words "Red Dear", in creating a mark for its own brand.

30 TTABVUE 6 (Applicant's Appeal Brief at 5).

This argument does not account for the way we must compare the parties' marks. Our determination is not based on individual features of the parties' marks, such as the type of antler featured in each mark, or the words accompanying Applicant's deer design. Rather, we must consider the marks "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay*, 73 USPQ2d at 1691

(quoting *du Pont*, 177 USPQ at 567). When we do so, we find that the similarities between the marks outweigh the dissimilarities.

In fact, “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). Here, Applicant stipulates that its mark and Opposer’s pleaded solid form mark⁶ both “include profiles of full-bodied, four-legged animals with antlers in silhouette form.” 13 TTABVUE 6 (Stipulation of Facts ¶ 12). Both are facing to the side rather than the front or back, and the parties’ animal designs are similarly-shaped, especially in the torso area.

To be sure, there are also differences between the animals, as their antlers are not the same and their heads are shaped differently and in somewhat different positions. The mouth in Applicant’s deer is open, perhaps because it is calling out or consuming something.

Despite these and other more minor differences, however, the marks are sufficiently similar in terms of their commercial impressions that clothing consumers who encounter them would be likely to assume a connection between the parties. In so finding, we have focused, as we must, on the recollection of the average purchaser,

⁶ We focus on Opposer’s solid form mark because it is more similar to Applicant’s mark. See *In re Max Capital*, 93 USPQ2d at 1245.

who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975)). See *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971) (finding a likelihood of confusion due in part to “the fallibility of memory over a period of time”). Indeed, “[c]onsideration must also be given to the fact that a purchaser’s recollection of design marks is often of a general and hazy nature.” *Matsushita Elec. Indus. Co., Ltd. v. Sanders Assoc., Inc.*, 177 USPQ 720, 726 (TTAB 1973).

Here, at least some consumers familiar with Opposer’s marks who later encounter Applicant’s mark will not remember which direction Opposer’s animal was facing, what its antlers looked like specifically or how its mouth was depicted. Rather, because of the fallibility of memory, they will have the “general rather than a specific impression” that Applicant’s mark, like Opposer’s, features a “full-bodied, four-legged anima[l] with antlers in silhouette form.” As we stated in analogous circumstances:

There is no doubt but that if the design marks here involved would be placed side-by-side certain differences between them including those enumerated by applicant would be discernible. But in the normal environment of the marketplace where purchases are actually made, individuals would not usually have an opportunity to examine these marks in minute detail. An individual relies on his recollection of the marks that he has previously encountered in the marketplace. And, more often than not, in the case of design marks, his recollection is not obfuscated with minute details or characteristics of the marks, but is governed by an overall or general impression of the many marks that surround him in his daily living experiences. Viewing the marks in question in this light, it is apparent that there are marked resemblances in overall design format, and commercial impression. These

resemblances are sufficient, in and of themselves, to cause individuals, including those described by applicant as discriminating, familiar with either mark and then encountering the other on competitive goods, to mistakenly believe that these products originate from the same producer.

In re Steury Corp., 189 USPQ 353, 355 (TTAB 1975). See also *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990); *In re United Service Distributors, Inc.*, 229 USPQ 237, 239 (TTAB 1986); *Puma-Sportschuhfabriken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064, 1066 (TTAB 1984).

We have not ignored the words RED DEAR appearing at the bottom of Applicant's mark, nor have we forgotten that as a general matter "the verbal portion of a word and design mark likely will be the dominant portion." *In re Viterra*, 101 USPQ2d at 1911. In this specific case, however, the words RED DEAR are dwarfed by Applicant's deer design, which is dominant because of how big it is in relation to the words. Moreover, notwithstanding the difference in spelling, the word "dear" in Applicant's mark may serve to highlight Applicant's deer design because "dear" and "deer" are phonetic equivalents, and perhaps even call to mind Opposer's mark, which could also appear to some consumers as a deer. *Cf. Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1945 (Fed. Cir. 1992) ("applicant's use of the word 'KANGOL' in connection with the kangaroo design is likely to be perceived as slang or foreign usage for kangaroo"); *In re Rolf Nilsson AB*, 230 USPQ 141, 142 (TTAB 1986) ("it is well settled that a picture and the word that describes that picture are given the same significance in determining likelihood of confusion"). In fact,

Applicant admits that “a moose is part of the deer family biologically” 23 TTABVUE 12 (Schnittger Aff. ¶ 4).

In any event, where the designs are similar and prominent, Applicant’s addition of two words, much smaller than the design itself, is insufficient to prevent confusion.

Indeed, in *Kangol*, the Court considered whether the marks  and , both for clothing, were likely to be confused. It held that

the kangaroo design, common to both marks, is likely to be perceived as the dominant feature. In both instances, consumers are likely to ‘read’ what they see, regardless of what the word below the design actually says. ... Though admittedly different in design, the use of the kangaroo by both Kangaroos and Kangol may suggest to the consumer that there is a common source or origin between opposer’s and applicant’s goods.

Kangol, 23 USPQ2d at 1946. See also *In re Vienna Sausage*, 16 USPQ2d at 2047-48.

This case also calls to mind a number of other analogous cases in which design marks were found similar, notwithstanding their obvious differences. For example, the following marks have been found confusingly similar:



In re Calgon Corp., 435 F.2d 596, 168 USPQ 278 (CCPA 1971) (both for bath products).



and



Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650 (TTAB 2002) (applicant's road maps found to be within opposer's "natural area of expansion" given its licensing of its mark on a wide variety of goods).



and



Penguin Books, 48 USPQ2d at 1280 (computer programs and books).



and



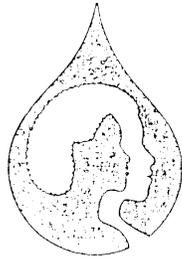
In re Vienna Sausage, 16 USPQ2d at 2044 (both for frankfurters).



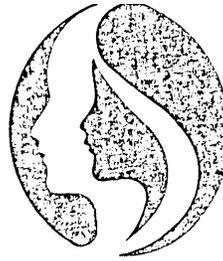
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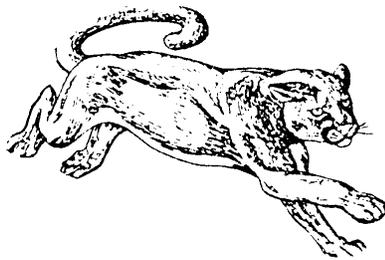
Greyhound Corp. v. Both Worlds Inc., 6 USPQ2d 1635 (TTAB 1988) (both for clothing).



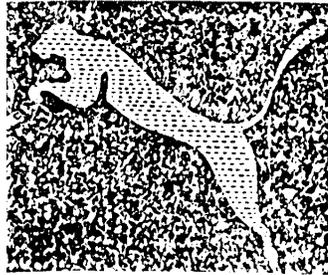
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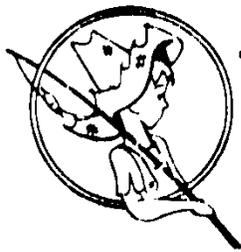
In re United Service Distributors, 229 USPQ at 237 (distributorship services in the field of health and beauty aids and moisturizing skin cream).



and



Puma-Sportschuhfabriken, 224 USPQ at 1064 (both for shirts).



Doskocil

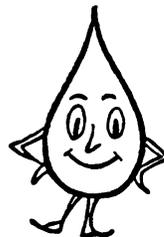
and



Odom Sausage Co., Inc. v. Doskocil Sausage, Inc., 169 USPQ 379 (TTAB 1971) (both for sausage).



and



In re Triple R Mfg. Corp., 168 USPQ 447 (TTAB 1970) (both for oil filters). In *Time Warner*, *Penguin Books*, *Greyhound*, *United Service Distributors* and *Puma*, confusing similarity was found even though the marks in those cases faced different directions, as they do here.

In short, here, as in the cited cases, while there are differences between the marks, they are not sufficient to overcome the various similarities when these “profiles of full-bodied, four-legged animals with antlers in silhouette form” are used on identical goods. This factor also weighs in favor of finding a likelihood of confusion.

V. Conclusion

Applicant’s mark is similar enough to Opposer’s commercially strong mark that use of Applicant’s mark for its identical goods, which move in the same channels of trade to the same classes of consumers, would be likely to cause confusion with Opposer’s pleaded marks.⁷

Decision: The opposition is sustained and registration of Applicant’s mark is refused.

⁷ We need not reach Opposer’s dilution claim. *Yazhong Investing Ltd. v. Multi-Media Tech Ventures, Ltd.*, 126 USPQ2d 1526, 1540 (TTAB 2018); *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013).