

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: October 24, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Brooks Sports, Inc.*  
*v.*  
*Anta (China) Co., Ltd.*

Opposition No. 91223228  
—

William C. Rava and Jonathon P. Goddard of Perkins Coie LLP,  
for Brook Sports, Inc.

Christina M. Licursi and Ryan M. Van Olst of Wolf Greenfield & Sacks PC,  
for Anta (China) Co., Ltd.

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Before Bergsman, Greenbaum and Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

This case involves different versions of chevron designs. A “chevron” is defined as  
“a shape, pattern, or object in the form of a V or an upside-down V.”<sup>1</sup>

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<sup>1</sup> We take judicial notice of the definition of “chevron” from the Merriam Webster Dictionary, “Chevron.” Merriam-Webster.com. <https://www.merriam-webster.com/dictionary/chevron>.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016)

Anta (China) Co., Ltd. ("Applicant") filed an application for the mark



for the following goods:

Overalls; smocks; linen garments, namely, shirts, pants, shorts, blouses, skirts, coats, and jackets; sweaters; shirts; pants; shorts; sweatshirts; dresses; clothing made of leather, namely, leather pants, leather vests, leather shirts, leather jackets, leather shoes, belts made of leather; suits; breeches; trousers; knitwear, namely, knitted shirts, knitted tops, knitted sweaters, knitted socks, knitted blouses, knitted pants, knitted skirts; coats; skirts; pelisses; pullovers; frocks; overcoats; topcoats; jackets; parkas; clothing of imitation leather, namely, pants made from imitation leather, vests made from imitation leather, shoes made from imitation leather, belts made of imitation leather; dust coats; down clothes, namely, down vests, down jackets, down coats, down pants, down shirts; children clothes, namely, headwear, children's and baby cloth eating bibs, baby bodysuits, baby pajamas, children's pajamas; sports jerseys; T-shirts; fishing vests; vests; singlets; pajamas; dress shields; shoulder wraps; collar protectors; shirt fronts; shirt yokes; cuffs; layettes; cyclists' clothing, namely, cycling shorts, cycling shirts, cycling shoes; clothing for gymnastics, namely, leotards, gymnastics shirts, gymnastics pants, gymnastic shoes, gymnastic shorts; judogi, namely, uniforms worn in the sport of judo; wrestling singlets; raincoats; rain-cloaks; dance clothes, namely, leotards, leg warmers, dance shoes, dance costumes, warm-ups, tights, body suits; footwear; shoes; football shoes; gymnastic shoes; studs for football boots; ski boots; jumping shoes; track shoes; mountain climbing shoes; boots; sports shoes; boots for sports; tips for footwear; inner soles; fittings of metal for shoes and boots; footwear uppers; footwear vamps; gaiters; heelpieces for boots and shoes; welts for boots and shoes; soles for footwear; insoles. headwear; cap peaks; ear muffs; headbands; paper hats; non-electric foot muffs; socks; sports socks; athletic socks; gloves; muffs; shawls; scarves; belts; money belts; strap belts; waist

strings for kimonos; fabric belts; sashes for wear; and wedding gowns in International Class 25.<sup>2</sup>

Applicant entered the following description of the mark: “The mark consists of curving intersecting lines forming half of an arrow.” Applicant’s mark can also be described as a chevron. Color is not claimed as a feature the mark.

Brook Sports, Inc. (“Opposer”) opposed the application on the grounds of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c). Specifically, Opposer pleaded ownership of two registrations shown below (“The Brooks Marks”) consisting, in whole or in part, of a single flair chevron design:



Applicant filed an answer denying all salient allegations.

This case has been fully briefed.

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<sup>2</sup> Application Serial No. 86268523 was filed on May 1, 2014 based upon Applicant’s allegation of a *bona fide* intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>3</sup> U.S. Registration No. 1683840 for the mark  for “athletic clothing; namely, shirts, pants, jackets, caps, shorts, tights and hosiery, and athletic footwear,” which issued on April 21, 1992. Sheridan Test. and Exhibit 3 thereto, 27 TTABVUE 4; 246-247. Opposer first used this mark in 1987. Sheridan Test., 27 TTABVUE 4.

<sup>4</sup> U.S. Registration No. 2750754 for the mark  for “shoes, footwear, shirts, pants, jackets, shorts, tights and T-shirts,” which issued on August 12, 2003. *Id.* Opposer first used this mark in 2000. *Id.*

## The Record.

The record includes the pleadings, and by operation of Trademark Rule 2.122(b), 37 CFR § 2.122(b), the application file of the opposed application. In addition, Opposer introduced the following evidence:

1. Testimony Declaration of Dan Sheridan, Opposer's Executive Senior Vice President, General Manager of North America and non-confidential Exhibits 1-4, 6-9 and 11-18 (Sheridan Test.) (27 TTABVUE),<sup>5</sup>
2. Confidential Exhibits 5 and 10 to Sheridan Test. (28 TTABVUE); and
3. Rebuttal Testimony Declaration of Dan Sheridan and Exhibits 1-9 thereto (Sheridan Rebuttal Test.) (19 TTABVUE).<sup>6</sup>

Applicant introduced:

- Redacted Notice of Reliance (App. NOR) (17 TTABVUE) consisting of:
  - Opposer's responses to discovery requests (17 TTABVUE 7-34),

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<sup>5</sup> In his declaration, Mr. Sheridan noted Applicant's ownership of prior registrations, Registration Nos. 2750817 (issued August 12, 2003) and 4142897 (issued May 15, 2012) for

the mark for the mark  for shoes and clothing. Opposer petitioned to cancel these registrations on the ground of abandonment and ownership. The petitions are still pending. Opposer requested the consolidation of this opposition with the cancellation actions but then withdrew the request. These registrations demonstrate Applicant's ownership of registrations for a mark containing the design at issue in this opposition, dating back to August 12, 2003.

<sup>6</sup> Opposer also introduced a notice of reliance, however, no documents were attached to the Notice. It is the responsibility of the party making submissions to the Board via the electronic database to ensure that the testimony or evidence has, in fact, been properly made of record. *See Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1506 n.195 (TTAB 2017); *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1350-51 (TTAB 2014) (it is the duty of the party making submissions to the Board via the Board's electronic filing system to ensure that they were entered into the trial record), *appeal dismissed per stipulation*, No. 2014-1461 (Fed. Cir. Oct. 10, 2014). Therefore, we accord no evidentiary value to the notice of reliance.

- Pages from third-party websites (17 TTABVUE 35-75, and
- Printouts of third-party registrations from the United States Patent & Trademark Office Trademark Status & Document Retrieval website (17 TTABVUE 76-152).

**Standing.**

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. To establish standing in an opposition or cancellation proceeding, a plaintiff must show “both a ‘real interest’ in the proceedings as well as a ‘reasonable basis’ for its belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quoting *ShutEmDown Sports, Inc., v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012)); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Because Opposer has made its pleaded registrations of record,<sup>7</sup> Opposer has established its standing in this proceeding. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc.*, 213 USPQ at 189.

**Priority.**

Priority is not at issue with respect to the marks and goods in Opposer’s pleaded registrations, which Opposer properly made of record with its notice of reliance. *See*

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<sup>7</sup> Sheridan Test., 27 TTABVUE 4.

*King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974);  
*Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1167 (TTAB 2001).

### **Likelihood of Confusion.**

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); see also *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); see also *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

#### **1. Similarity or dissimilarity and nature of the goods, channels of trade and class of purchasers.**

We start our analysis with the second and third *du Pont* factors and look at the relationship between the goods at issue, the channels of trade and the class of purchasers. When determining the relationship between the goods,

[t]he authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

*Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014).

Applicant's description of goods is in-part identical to the description of goods in Opposer's registrations since they all include "shoes, footwear, shirts, pants, jackets, shorts, tights, and T-shirts."

It is well established that absent restrictions in the application and registration, identical goods are presumed to travel in the same channels of trade to the same class of purchasers. *See Octocom*, 16 USPQ2d at 1787; *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846 (affirming Board finding that where the goods are identical in part and the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods").

Applicant "does not contest that the involved goods are identical in part, or that the channels of trade or classes of consumers are overlapping ..." Applicant's Brief, 23 TTABVUE 7. Thus, it is not contested that the second and third *du Pont* factors favor a finding of likelihood of confusion.

## **2. Fame of Opposer's marks.**

Opposer asserts that its marks are strong because they are famous. Opposer refers to both of its marks as "Brooks Single-Flare Chevron Marks," which it depicts as:

Brooks Single-Flare Chevron Marks



This depiction is of the design only mark, and ignores the fact that the other pleaded mark also includes the word BROOKS with a non-identical chevron:



. Opposer refers to this mark as “a ‘classic’ formulation of the Single-Flare Chevron mark used in combination with the company name. Brooks first used this version of the Single-Flare Chevron mark in 1987.”<sup>8</sup> Opposer refers

to its design only mark  as “the ‘modern’ formulation of the Single-Flair Chevron mark ... Brooks first used this version of the Single-Flare Chevron mark in 2000.”<sup>9</sup>

To determine whether the design mark alone is famous or whether consumers viewing the Brooks and design mark  focus on the design element when considering fame, we must look at Opposer’s use and promotion of its marks.

Fame for confusion purposes arises as long as a significant portion of the relevant consuming public ... recognizes the mark as a source indicator.” *Palm Bay Imps. Inc.*,

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<sup>8</sup> Sheridan Test., par. 5, 27 TTABVUE 4.

<sup>9</sup> *Id.*

73 USPQ2d at 1695. The relevant consuming public consists of the “class of customers and potential customers of a product or service, not the general public.” *Id.* at 1695. Opposer defines its customers as “athletes desiring high-quality athletic shoes and apparel.”<sup>10</sup>

Factors which are relevant to a determination of fame in a likelihood of confusion analysis “include sales, advertising, 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).

Opposer did not provide any sales figures, however, in his testimonial declaration, Dan Sheridan, Opposer’s Executive Senior Vice President, General Manager of North America, declared that “in part based on its business and marketing strategies, between 2010 and 2015, Brooks revenue increased more than 127%.”<sup>11</sup> Without specific information about sales, we cannot determine the extent of Opposer’s revenue and how Brooks appears in comparison to other vendors of clothing and footwear, or more specifically, vendors of athletic footwear and apparel. To demonstrate the breadth of its products, Mr. Sheridan introduced Opposer’s 2015 footwear and apparel catalogs.<sup>12</sup> However, in these catalogs the usage of Brooks’ design mark alone is minimal.

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<sup>10</sup> *Id.*, par. 4, p. 3.

<sup>11</sup> *Id.*, par. 10, p. 7.

<sup>12</sup> *Id.*, par.4, p. 4, 12-131 and 133-210.

Mr. Sheridan provided more extensive information about Opposer's advertising activities: "Brooks commenced national advertising decades ago, and Brooks currently engages in nation-wide marketing and advertising. Brooks's promotional activities incorporate print advertising; online advertising; outreach through various social media platforms; and dynamic advertising, including sponsorship of races and events. Brooks's - 2Q15 marketing budget in the United States was approximately \$32.5 million ..." <sup>13</sup> Marketing efforts included (1) print advertising in national magazines with immense readership, <sup>14</sup> such as Men's Fitness, Runners World and Shape Magazine; (2) operation of the website [www.brooksrunning.com](http://www.brooksrunning.com); <sup>15</sup> (3) active participation on popular social media websites, including Facebook, Twitter, Instagram, YouTube and Pintrest, where Brooks has had over "4.4 million fans, followers, subscribers, and the like"; <sup>16</sup> and (4) "sponsorship of the prominent 'Rock N' Roll: Marathon Series held throughout the United States and organizing the 'PR Invitational'" ... for high school runners to compete in an Olympics-style, world class meet. <sup>17</sup> Opposer introduced three sample advertisements, none of which appear to have been distributed prior to April 2016, which was two years after the May 1, 2014 filing date of the opposed application:

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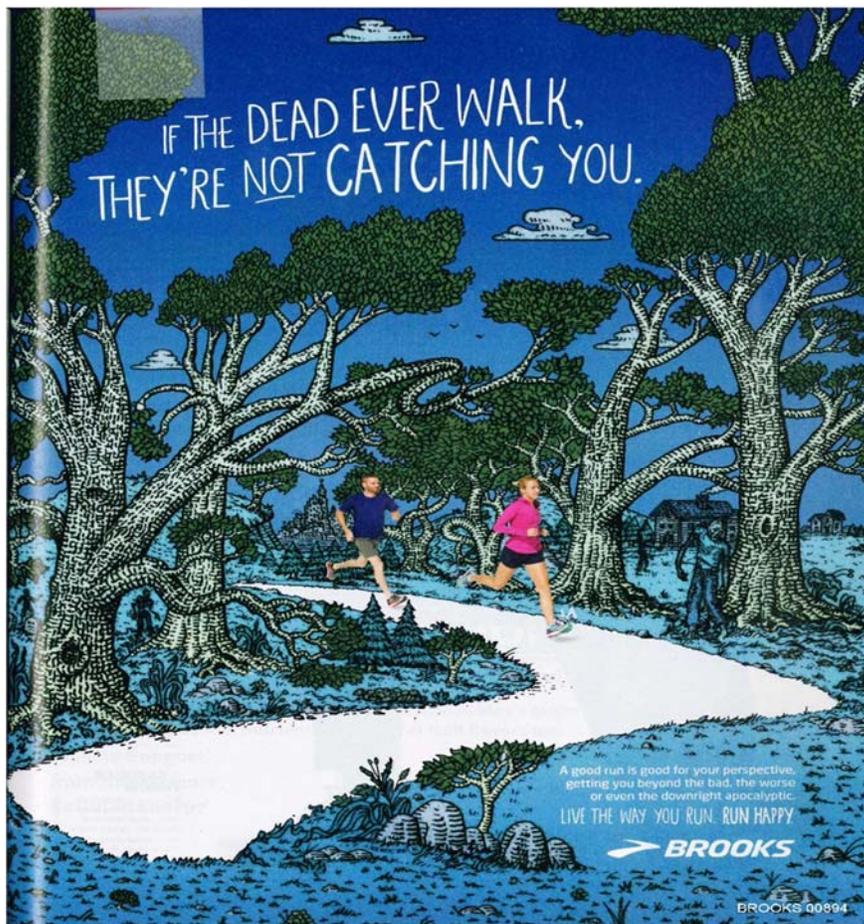
<sup>13</sup> *Id.*, par. 9, pp. 5-6.

<sup>14</sup> Opposer did not define "immense readership" or provide any readership statistics to assist us in defining it.

<sup>15</sup> *Id.*, p. 6.

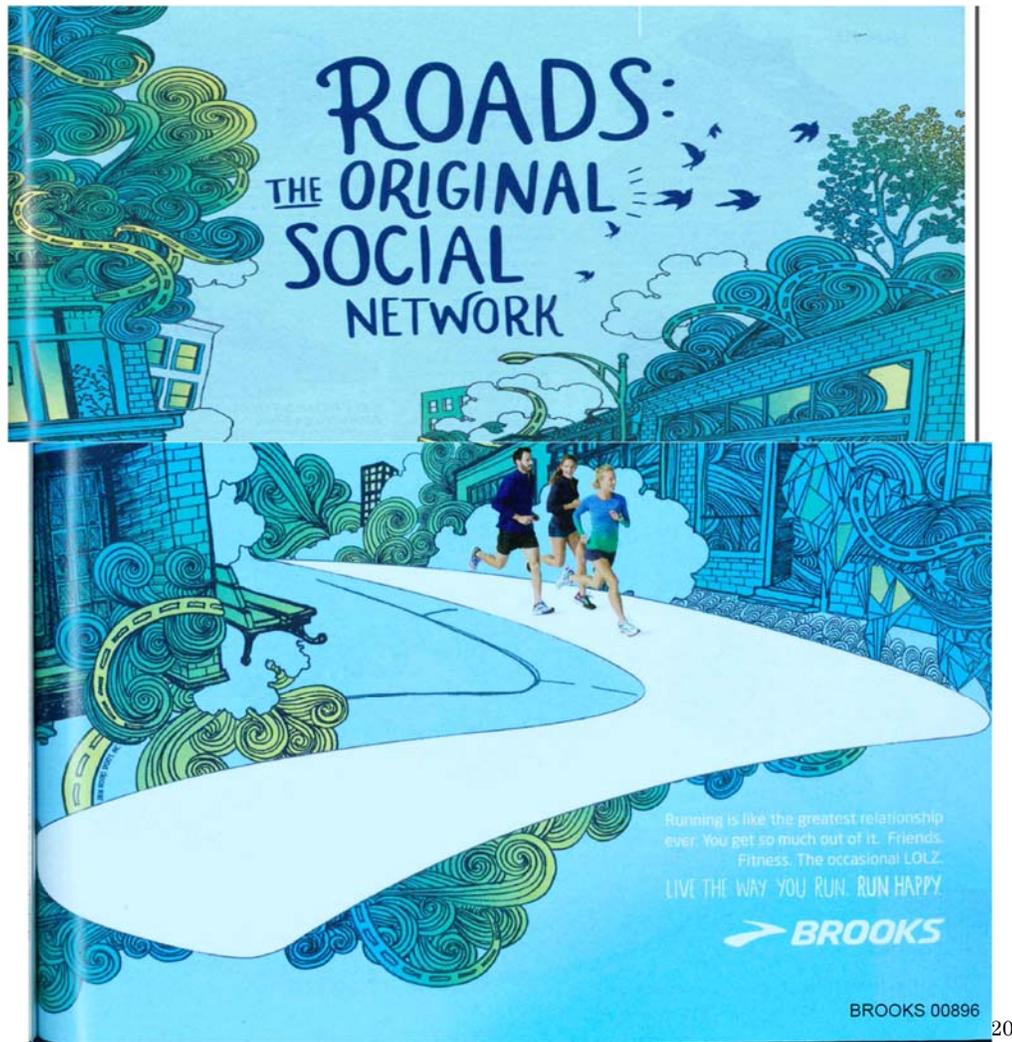
<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, par. 9, pp. 5-7.



<sup>18</sup> Runner's World January/February 2017 issue, *Id.*, par. 9a, pp. 6 and 289.

<sup>19</sup> Men's Fitness April 2016 issue, *Id.*, par. 9a, pp. 6 and 288.

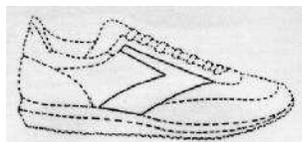


Of note in all three of the advertisements is the prominence of a modified version of the Brooks and design mark and that the only use of the design mark alone is as a “footpath” with people running.<sup>21</sup> In discussing the evolution of its design mark alone, Brooks attested to the following:

<sup>20</sup> Shape.com April 2016 issue, *Id.*, par. 9a, pp. 6 and 290.

<sup>21</sup> Which appears in Exhibits 16 and 17.

By at least the year 1970, Brooks was using its “heritage” chevron logo on shoes:



. Around the year 2000, Brooks began using a chevron with softer edges, designed to look like a running path with and without the oval background:



and



. The more modern chevron (or “path”) is meant to reflect the Brooks focus on running.<sup>22</sup>

Thus, the modified mark is meant to be a running path. There is no evidence that consumers will recognize the running path in the advertisements as a chevron design or, more specifically, as Opposer’s mark, especially because of the presence of runners on the path which makes the chevron design appear simply as a trail.

From a corporate brand and market survey, Mr. Sheridan concluded that “Brooks has #1 market share for total retail dollars sold for the entire retail specialty channel (a category that includes specialty running shops).”<sup>23</sup> Mr. Sheridan did not specifically define the “retail specialty channel.” To demonstrate “Brooks’s prominent position,”<sup>24</sup> Mr. Sheridan introduced a copy of a U.S. corporate brand and market survey.<sup>25</sup> No information was provided about the subjects of the survey, what was

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<sup>22</sup> Opposer’s Response to Interrogatory No. 1 of Applicant’s 1<sup>st</sup> Set of Interrogatories, App. NOR, 17 TTABVUE 21.

<sup>23</sup> Sheridan Test., par. 6, 27 TTABVUE 4.

<sup>24</sup> *Id.*

<sup>25</sup> Confidential Exhibit 5 to Sheridan Test., 28 TTABVUE 3

In view of the confidential nature of this exhibit, we will not discuss any specific information revealed and will restrict our discussion to general information provided.

asked, or where the survey was taken. The minimal information provided indicates that the class of the survey is “running”; the category is “performance”; and the “sub channel” is “running specialty.”<sup>26</sup> This appears to be a very narrow class of products, however, without additional information, it is impossible to identify the universe of the survey. The survey covered the following twelve month time periods: December 2014 – November 2015 and December 2015 – November 2016.<sup>27</sup> As such, the only information provided is after Applicant’s prospective rights commenced, at the filing of its application. Moreover, as with the advertisements discussed above, there is no indication of the brand or brands that were included in the survey – BROOKS, BROOKS and design, or design mark alone.

Based on the evidence introduced, we find that Opposer has not established that its design mark alone is famous for likelihood of confusion purposes. Such finding does not favor either party. Therefore, the fifth *du Pont* factor, fame of the mark, is neutral.

**3. Third-party use and registration of similar marks /Strength of the marks.**

The sixth *du Pont* factor requires us to consider evidence pertaining to the number and nature of similar marks in use on similar goods. “The purpose of a defendant introducing third-party uses it to show that customers have become so conditioned by a plethora of such similar marks that consumers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’”

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

*Palm Bay*, 73 USPQ2d at 1691. In this case, while Applicant did not address the issue of fame, Applicant did address the strength of Opposer's marks, arguing that "[t]he inherent strength of the Brooks Marks is minimal in light of the ornamental significance of the chevrons in its mark for clothing and footwear." Applicant's Brief, 23 TTABVUE 17.

Third party registrations are relevant to prove that some segment of the composite marks [or in this case a chevron design] which both contesting parties use has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak. 2 McCarthy on Trademarks and Unfair Competition § 11:90 (4th ed. 2017). *Id.*; see *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917, 189 USPQ 693, 694 (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').

*Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). In this case, the dual significance of the marks, as both source identifiers and ornamentation, is at issue in determining the strength of Opposer's marks.

As indicated above, the chevron used by Opposer is meant to be a running path.<sup>28</sup> Applicant describes its chevron design mark as "a design element featuring a narrow angle consistent line width, sharp corners, and a prominent tip evoking an arrow." Applicant's Brief, 23 TTABVUE 9. These marks consist of or contain different versions of chevron designs. Applicant introduced twenty-five use based registrations

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<sup>28</sup> See fn. 22.

for marks covering clothing that also consist of or contain different chevron designs to establish that chevron design marks are commonly used in connection with clothing and athletic shoes.

Representative samples of the registrations are:

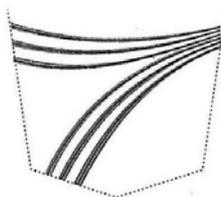
Registration No. 1344540 for  
Goods: Athletic shoes  
Owner: Jeffrey A. Sink;<sup>29</sup>



Registration No. 1102189 for  
Goods: Shoes  
Owner: ABG-TRETORN, LLC;<sup>30</sup>



Registration No. 4996346 for  
Goods: Jeans  
Owner: Seven for All Mankind GMBH;<sup>31</sup> and



Registration No. 4996346 for  
Goods include: Headwear, footwear, pants, jackets and shirts  
Owner: W.L. Gore & Associates.<sup>32</sup>



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<sup>29</sup> App. NOR, 17 TTABVUE 135-136

<sup>30</sup> App. NOR, 17 TTABVUE 137-145.

<sup>31</sup> App. NOR, 17 TTABVUE 76-77.

<sup>32</sup> App. NOR, 17 TTABVUE 99-100.

Applicant also introduced Internet evidence of eight different “chevron” marks used on athletic shoes, examples of which include:



AliExpress<sup>33</sup>



Diadora<sup>35</sup>



Converse<sup>34</sup>



Hi-Tec<sup>36</sup>



Clarks<sup>37</sup>

These registrations and examples of Internet use evidence the common use of chevron designs in the clothing and athletic shoe fields. Such common use indicates that consumers have become conditioned to encountering chevron designs in connection with clothing and athletic shoes, and that they will focus on other features

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<sup>33</sup> [www.aliexpress.com](http://www.aliexpress.com) - Applicant’s notice of reliance, 17 TTABVUE 4.

<sup>34</sup> [store.nike.com](http://store.nike.com), *Id.*, p. 3.

<sup>35</sup> [www.diadora.com](http://www.diadora.com), *Id.*

<sup>36</sup> [www.us.high-tec.com](http://www.us.high-tec.com), *Id.*

<sup>37</sup> [www.clarksusa.com.com](http://www.clarksusa.com.com), *Id.*

to determine source. Thus, the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods, does not favor a finding of likelihood of confusion.

#### 4. Similarity or dissimilarity of the marks.

Next, we analyze the first *du Pont* factor to determine the similarity or dissimilarity of the marks at issue. The two marks asserted by Opposer are different and require separate analysis.

The first of Opposer's two marks, which it has used since 1987, consists of the

word BROOKS and a chevron design .<sup>38</sup> To determine

whether this mark is similar to Applicant's chevron design mark 

we compare them "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc.*, 73 USPQ2d at 1691 (*quoting du Pont*, 177 USPQ at 567). "[I]t is improper to dissect a mark when engaging in this analysis, including when a mark contains both words and a design." *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). However, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed because it would be used to request the goods. *See In re Viterra Inc.*, 101 USPQ2d at

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<sup>38</sup> Sheridan Test., par. 5, 27 TTABVUE 4.

11908 1905 *citing CBS Inc. v. Morrow*, 708 F.2d. 1579, 128 USPQ 198 (Fed. Cir. 1983).  
*See also L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008).

The facts in this case are similar to those in the *Jack Wolfskin* case, 116 USPQ2d 1129. As in *Jack Wolfskin*, when the appropriate emphasis is placed on the dominant literal portion of Opposer’s mark, we find that the marks are not similar. Next, we

look at Opposer’s chevron design mark,



to determine whether this

mark is similar to Applicant’s chevron design mark,



. Since the marks at issue are design marks which are not capable of being spoken, “the question of ... similarity ... must be determined primarily on the basis of their visual similarity.” *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990). While there are visual similarities between the marks, the marks consist of different representations of chevron designs, with Opposer’s design representing a running path and Applicant’s design representing the tip of an arrow. Because chevron designs are commonly used, in whole or in part, as marks in connection with clothing and footwear, we find that the dissimilarities in the marks outweigh the similarities and thus, we find that the marks are not similar.

Therefore, based on our analysis of both of Opposer’s marks with Applicant’s mark in their entirety, we find that the marks are not similar and that the first *du Pont* factor does not support a holding of likelihood of confusion.

**5. Balancing the factors.**

While we have found that that the goods are in part identical, the channels of trade and the customers are identical, and that the pleaded marks are not famous, we find that there are significant differences between Opposer's marks and Applicant's mark, particularly in their commercial impressions. In addition, chevron designs are used in many similar ways in the marketplace for clothing and athletic shoes, and therefore a chevron design is not a strong source identifier for those goods. On a similar record, the Board in *Puma-Sportschuhfabriken Rudolf Dassler, K.G. v. Superga S.p.A.*, 204 USPQ 688 (TTAB 1979) held that even with over twenty-years of use of a design mark, an increase in sales of over 120% in a nine year period (from 1968 to 1976), and extensive advertising, third-party use of similar marks rendered Opposer's mark weak, which was sufficient to avoid a finding of likelihood of confusion.

In this case, we have considered all the evidence and arguments on the relevant *du Pont* factors, whether discussed or not, and we conclude that there is no likelihood

of confusion between Applicant's chevron design mark  for numerous articles of clothing, including "shoes, footwear, shirts, pants, jackets, shorts, tights,

and T-shirts," and Opposer's marks BROOKS and design



"for "athletic clothing; namely, shirts, pants, jackets, caps, shorts, tights and hosiery,

and athletic footwear” and the design mark  for “shoes, footwear, shirts, pants, jackets, shorts, tights and T-shirts.”

**Dilution.**

Since Opposer’s pleaded marks do not meet not meet the standard for establishing fame for likelihood of confusion purposes, they do not meet the more stringent standard for establishing fame for dilution purposes. Accordingly, the dilution claim is dismissed.

*Decision:* The opposition is dismissed on both grounds.