THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

TBT Licensing I, LLC

v.

Carl Walther GmbH

Opposition No. 91244468

Jon A. Schiffrin of Schiffrin & Longo, P.C.,
for TBT Licensing I, LLC.

Joshua Paul and John F. Renzulli of Renzulli Law Firm LLP,
for Carl Walther GmbH.

Before Mermelstein, Wolfson, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Applicant, Carl Walther GmbH, seeks registration on the Principal Register of the mark (the "WALTHER Banner Logo")

for

> clothing, namely, shirts, t-shirts, jerseys, hooded sweatshirts, sweatshirts; hats; caps being headwear; (based on Section 1(a), 15 U.S.C. § 1051(a)); and
>
> clothing, namely, scarves, head scarves, neckties, mufflers, neck scarves, socks, polo shirts, gloves, performance underwear, stockings, trousers, vests, jackets, suspenders; clothing for shooting, namely, vests and jackets for shooting, trousers for shooting, and gloves for shooting; headwear, namely, headbands; headwear, namely, caps for shooting; footwear, namely, shoes; footwear, namely, boots for shooting (based on Section 44(e), 15 U.S.C. § 1126(e))

in International Class 25.[1]

TBT Licensing I, LLC ("Opposer") opposes registration of Applicant's mark, claiming likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and alleging prior use and registration of the following marks (collectively, "Opposer's Marks"):[2]

- WALTER, in standard characters, for "Women's dresses, blouses, jackets, pants, skirts," in International Class 25;[3]

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[1] Application Serial No. 8745476, filed May 18, 2017, pursuant to Trademark Act § 1(a), 15 U.S.C. § 1051(a), based on Applicant's first use and first use in commerce of January 1, 2014 as to "clothing, namely, shirts, t-shirts, jerseys, hooded sweatshirts, sweatshirts; hats; caps being headwear" and pursuant to Trademark Act § 44(e), 15 U.S.C. § 1126(e), based on European Union registration No. 5789536, registered March 27, 2008 for the remaining goods. The application contains a description of the mark statement that "[t]he mark consists of a stylized banner design with the wording 'WALTHER' inside of the banner." Color is not claimed as a feature of the mark.

[2] Opposer claims unity of control among the owners of these marks as a result of their corporate status as sister companies owned by WW LLC. This issue is discussed more fully infra.

[3] Registration No. 3103294; issued June 13, 2006; renewed.

- WALTER BAKER, in standard characters, for "Women's dresses, blouses, jackets, pants, skirts," in International Class 25; [4]
- VIEW BY WALTER, in standard characters, for "Blouses; Coats for men and women; Dresses; Evening dresses; Footwear for women; Men and women jackets, coats, trousers, vests; Men's suits, women's suits; Skirts and dresses; Women's shoes," in International Class 25; [5] and
- W118 BY WALTER BAKER, in standard characters, for "clothing, namely, dresses, blouses, pants, jeans, skirts, shirts, suits, sweaters, belts, vests, shorts, jackets and coats," in International Class 25.[6]

1 TTABVUE.

As further grounds for opposition, Opposer claims that Applicant's mark is merely ornamental and fails to function as a trademark in connection with apparel pursuant to Trademark Act Sections 1, 2, and 45; 15 U.S.C. §§ 1051, 1052 and 1127.

In its answer, Applicant admitted that Opposer owns Reg. No. 3103294, 18 TTABVUE 2, and that Opposer's sister companies own the other pleaded registrations. *Id.* at 3. Applicant otherwise denied the salient allegations in the Notice of Opposition and asserted that Opposer failed to state a claim upon which relief may be granted.

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[4] Registration No. 3103295; issued December 3, 2004; renewed. The registration includes the statement: "The name 'WALTER BAKER' identifies a living individual whose consent is of record."

[5] Registration No. 3265169; issued July 17, 2007; renewed.

[6] Registration No. 4542714; issued December 8, 2015; Sections 8 and 15 combined declaration accepted and acknowledged. The registration includes the statement: "The name(s), portrait(s), and/or signature(s) shown in the mark identifies 'Walter Baker', whose consent(s) to register is made of record."

Citations to the briefs refer to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

Prior to answer, Applicant filed a motion to dismiss, alleging that Opposer failed to properly assert a family of marks, or claim any of the pleaded registrations individually, as a basis for opposition.[7] The Board, in denying Applicant's motion to dismiss, found that Opposer had adequately pleaded ownership of a family of marks based on the term WALTER as the common characteristic of the family. 11 TTABVUE 5. The Board, however, made it clear that Opposer would be held to prove its priority and "whether there is a likelihood of confusion based on its purported family of marks" at final hearing. *Id.* at n.4.

The Board also found that "a separate likelihood of confusion claim based on the Opposer-owned registration [No. 3103294 for WALTER] and common law rights, has been properly pleaded." *Id*. The Board did not address the other pleaded registrations.

Opposer has not pursued its claims to a family of "WALTER" marks or that Applicant's mark is merely ornamental or fails to function as a trademark. Accordingly, these claims are waived. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.,* 107 USPQ2d 1424, 1426 n.3 (TTAB 2013) (claim not argued in brief is considered waived). As for the registrations pleaded in their individual capacities, Opposer has pursued its likelihood of confusion claim based on Reg. No. 3103294 for the mark WALTER.

Although Adam Blalock, Chief Executive Officer of Umarex USA, Inc. and Walther Arms, Inc., testified that "Applicant and Umarex jointly exercise a unity of

[7] Applicant had also asserted that Opposer's ornamentation/failure to function claim was insufficient but the Board found the claim sufficiently pleaded. 11 TTABVUE 7.

control over use of the WALTHER Banner Logo based on common management control of the companies," Blalock Decl., 32 TTABVUE 14, Opposer has not proven that the registrations owned by its "sister companies" are subject to its (or any company's) unity of control such that the benefit of use of the marks would inure to Opposer. Accordingly, Opposer has failed to demonstrate a legally cognizable interest in any but Reg. No. 3103294.

Regardless, if likelihood of confusion is not found as to WALTER, the mark of this registration, it would be unnecessary to consider the other registrations, as Opposer's mark WALTER is closest to Applicant's mark than are any of the other marks, which each include additional distinguishing words. *See In re St. Julian Wine Co.,* 2020 USPQ2d 10595 (TTAB 2020); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1734 (TTAB 2018). Accordingly, we focus our analysis on Opposer's mark WALTER and the goods of Reg. No. 3103294.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the subject application.[8] Also of record is a jointly filed addendum to the Board Standard Protective Order, whereby the parties and their counsel certified and agreed that they "will continue to abide by all terms of the Board's Order even after this proceeding has terminated." 24 TTABVUE 2. The

[8] It was therefore unnecessary for Opposer to file copies of the trademark file history for Applicant's application.

parties also jointly filed copies of three of Opposer's catalogs from 2020, under stipulation as to the authenticity thereof. 37 TTABVUE 5-29.

The parties filed the following additional evidence:

A. Opposer

With its Notice of Opposition, Opposer attached TSDR printouts showing status and title in Opposer of pleaded Registrations Nos. 3103294, 3103295, 3265169, and 4542714. 1 TTABVUE 5-22. Opposer filed a First Notice of Reliance on copies of the trademark file histories for these pleaded registrations.[9]

Also under cover of its First Notice of Reliance, Opposer filed a printout from TESS of a list of three registered marks, purporting to show the strength of Opposer's mark. 29 TTABVUE 2. Opposer also filed a Rebuttal Notice of Reliance on Internet materials purporting to assess the significance of the names Walter and Walther. 39 TTABVUE.

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[9] Applicant objected to the admissibility of Opposer's pleaded registrations, other than the one that issued in Opposer's name, on the ground that Opposer has not shown unity of control among the "sister companies." 12 TTABVUE 41. The objection is overruled as the registration copies and their file histories were properly produced pursuant to Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e) (official records). Nonetheless, the evidence does not establish that unity of control is present. *See In re Wella A.G.*, 5 USPQ2d 1359, 1361 (TTAB 1987), *rev'd on other grounds*, 858 F.2d 725, 8 USPQ2d 1365 (Fed. Cir. 1988) (finding unity of control where the applicant, Wella AG, owned substantially all of the outstanding stock of the registrant, Wella (USA), and "thus control[led] the activities and operations of Wella U.S., including the selection, adoption and use of the trademarks"). Here, despite Mr. Blalock's assertion that Umarex and Applicant "jointly exercise a unity of control" based on "common management," 32 TTABVUE 14, Opposer has not shown that it controls the activities or operations of its sister companies, including the selection, adoption or use of the marks.

Applicant further objected to Exhibit F (TESS search) attached to Opposer's rebuttal Notice of Reliance. *Id.* at 13. The objection is also overruled because TESS search results are official records. Trademark Rule 2.122(e).

B. Applicant

Applicant filed two testimony declarations:

- Adam Blalock, Chief Executive Officer of Umarex USA, Inc. and Walther Arms, Inc., "both of which, like Applicant, are members of the Umarex Group of companies." 32 TTABVUE 2.[10] Exhibits 1-21 accompanied the testimony. *Id.* at 15-165.

- Gavin M. Strube, counsel for Applicant, and accompanying Exhibits 1-28. 34 TTABVUE 3-114.

Applicant filed a First Notice of Reliance on third-party applications and registrations purporting to show the weakness of Opposer's mark, 33 TTABVUE 9-123; and on registrations and applications owned by Applicant and Umarex GmbH & Co., KG, 33 TTABVUE 124-171, purporting to show the strength of the design portion of Applicant's mark.

Applicant filed a Second Notice of Reliance on Opposer's responses to Applicant's interrogatories, requests for admission, and document production requests. 35 TTABVUE 1-88, Exhibits A-E.

Applicant filed a Third Notice of Reliance on Internet materials consisting of dictionary definitions and online baby name resources. 36 TTABVUE 2-71.

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a threshold issue in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC,* 965 F.3d 1370, 2020 USPQ2d 10837, *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control*

[10] A confidential version of Mr. Blalock's testimony was filed at 31 TTABVUE 3-165.

Components, Inc., 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)).[11] A party in the position of plaintiff may oppose registration of another's mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff's reasonable belief in damage is proximately caused by registration of the defendant's mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, *6-7 (Fed. Cir. 2020).

Opposer's statutory entitlement to oppose registration of Applicant's mark is established by its pleaded registration for the mark WALTER, Reg. No. 3103294, which is properly of record and acknowledged by Applicant as valid and owned by Opposer. This registration forms the basis for a likelihood of confusion claim under 15 U.S.C. § 1052(d) that is not wholly without merit. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). *See also Coach Servs., Inc. v. Triumph Learning LLC,* 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012). Moreover, Applicant does not dispute Opposer's entitlement to a statutory cause of action.

III. Likelihood of Confusion

A. Priority

Because Opposer's pleaded registration is of record, and Applicant did not counterclaim to cancel it, priority is not at issue as to the mark WALTER and the

[11] Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Section 13 and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, *2 (TTAB 2020).

goods covered thereby: "Women's dresses, blouses, jackets, pants, skirts." *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.7 (TTAB 2012). As to Opposer's claim to common law use of its mark, Opposer's evidence of common law use of its mark dates from 2020, which does not pre-date May 18, 2017, the filing date of Applicant's application and its constructive use date. Accordingly, Opposer has not demonstrated common law use of its mark for priority purposes, and relies solely on its pleaded registration.

B. Applicable Law

Our determination of likelihood of confusion is based on an analysis of all 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 (CCPA 1973) (*"DuPont"). See also In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We make that determination on a case-by-case basis, *On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000), aided by the application of the factors set out in *DuPont,* and we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.,* 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Country Oven, Inc.,* 2019 USPQ2d 443903, *2 (TTAB 2019).

"Not all *DuPont* factors are relevant in each case and the weight afforded to each factor depends on the circumstances. … Any single factor may control a particular case." *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020

USPQ2d 10341, *3 (Fed. Cir. 2020). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re Chatam Int'l Inc.,* 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *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."). *See also In re i.am.symbolic, llc,* 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but 'may focus … on dispositive factors, such as similarity of the marks and relatedness of the goods'") (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

C. Relatedness of the Goods

The second *DuPont* factor concerns the similarity or dissimilarity and nature of the goods as described in Applicant's application and Opposer's Reg. No. 3103294. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014). "The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014) (citing *Coach Servs.*, 101 USPQ2d at 1722); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (this factor considers

whether the consuming public may perceive the respective goods of the parties as related enough to cause confusion about their source or origin).

Applicant's "jackets" are unrestricted and encompass Opposer's more narrowly defined "women's jackets." Applicant's "trousers" are likewise unrestricted and encompass Opposer's "women's pants," trousers and pants being equivalent terms for outer leg coverings.[12] Where the description of goods in an application or registration broadly identifies the products, without limitation, we must presume that the goods encompass all products of the type identified. *See In re Solid State Design Inc.,* 125 USPQ2d 1409, 1412-15 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein). Based on the plain wording of the respective identifications, the involved goods are, in part, legally identical.

There is no need for us to further consider the relatedness of Applicant's goods with the other goods identified in Opposer's Reg. No. 3103294. "It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application." *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988

[12] Merriam-webster.com defines "trouser" as "PANTS sense 1-usually used in plural," and defines "Pants sense 1" as "an outer garment covering each leg separately and usually extending from the waist to the ankle." At https://www.merriam-webster.com/dictionary/trousers and https://www.merriam-webster.com/dictionary/pants#h1, accessed August 5, 2021. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

(CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application)). Nonetheless, we find that the remaining goods are related.

As Applicant recognizes, only some of the named clothing items in its application are limited as being "for shooting;" the remaining goods are unrestricted as to, for example, style, type, or gender. Applicant's "shirts," being unrestricted as to whether men's or women's items, are functionally equivalent to "women's blouses." Applicant's "scarves," "gloves," and "stockings," being similarly unrestricted, are likely to be purchased and used together with Opposer's women's dresses, blouses, and skirts. These items are thus considered complementary. *In re Davia*, 110 USPQ2d at 1815 ("conjoint use is a fact proper to be considered along with other facts present in particular cases"); *see also In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) ("[T]he products 'bread' and 'cheese' are often used in combination. Such complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.").

We find the identity of the goods in part, and the otherwise related nature of the goods, favors a finding of likelihood of confusion.

D. Trade Channels and Classes of Consumers

The third *DuPont* factor concerns "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *Stone Lion,* 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567). Because the goods described in Applicant's application and Opposer's Reg. No. 3103294 are in-part legally identical, we must presume that the

channels of trade and classes of purchasers for those goods are the same. *See Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.,* 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra Inc.,* 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *Genesco Inc. v. Martz,* 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade").

The remaining goods, being unrestricted, are presumed to travel through all normal and usual trade channels for such goods, and be sold to all classes of prospective purchasers for those goods. *Stone Lion*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation, "goods are presumed to travel in all normal channels ... for the relevant goods."). In an apparent attempt to rebut this presumption, Applicant asserts that its clothing is ancillary to its core line of business, namely the sale of firearms and other guns, and that "Walther Arms makes WALTHER brand clothing available to consumers through only two distribution channels," namely, through authorized retailers of WALTHER firearms and through Walther Arm's website.

Setting aside the fact that Applicant has not proven that sales by Walther Arms inures to Applicant's benefit,[13] the "authority is legion that the question of

[13] Adam Blalock, CEO of Umarex USA, Inc. and Walther Arms, Inc., testified that "Applicant is a member of the Umarex Group of companies," 31 TTABVUE 10, and states that Umarex

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… ." *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1379 (Fed. Cir. 2018) (citing *In re Cordua Rest.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016) (internal quotation marks and citation omitted); *see also Stone Lion,* 110 USPQ2d at 1161-62 ("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"); *In re La Peregrina Ltd.,* 86 USPQ2d 1645, 1647 (TTAB 2008) ("it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods.").

We find that the presumed overlapping channels of trade and consumers weigh in favor of likelihood of confusion.

E. Similarity of the Marks

We next compare Applicant's and Opposer's marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772,* 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). The 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

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GmbH & Co. KG of Arnsberg, Germany and Applicant "jointly exercise a unity of control over use of the WALTHER Banner logo and other trademarks based on common management control of the companies." *Id.* at 14. Applicant has provided no evidence to explain how, if at all, Walther Arms and Applicant are related.

encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.,* 101 USPQ2d at 1721; *see also Double Coin Holdings Ltd. v. Tru Dev.,* 2019 USPQ2d 377409, *6 (TTAB 2019).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d at 1438. Because Opposer's goods are women's dresses, blouses, jackets, pants, and skirts, and Applicant's goods include common clothing items, the average customer is an ordinary consumer. We are further mindful that where, as here, Applicant's goods are legally identical in part to Opposer's goods, the degree of similarity between the marks as to such goods, which is required to support a finding of likelihood of confusion, is less than it would be if the goods were not the same. *Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); *see also, In re Mighty Leaf Tea,* 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Dixie Rests., Inc.,* 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

Applicant is seeking to register the mark

and Opposer's mark is WALTER. The marks are strikingly similar in appearance and pronunciation. WALTER and WALTHER differ by only a single letter, which is embedded within the term. To the extent consumers even notice this middle letter "h," it affects the

pronunciation of the word very slightly, and barely changes its appearance from that of WALTER.

A point of dissimilarity between Applicant's and Opposer's marks is the banner element of Applicant's mark, . Applicant asserts that the banner element of its mark is not a mere carrier for the literal portion of its mark because it has been registered on the Principal Register, and because "Opposer offers no proof of similar banner-like design elements in composite marks in the clothing field." 41 TTABVUE 36.[14] Applicant argues that due to the presence of the banner element and "undulating, wavy pattern" of the Walther name, the visual impact of the mark "is unusual and striking" and a likelihood of confusion is avoided. 41 TTABVUE 35.

We are not persuaded by Applicant's arguments. First, it is irrelevant whether Applicant's banner is common in the clothing field. Pursuant to Trademark Act Section 7(b), 15 U.S.C. § 1057(b), "[w]e presume the mark is inherently distinctive--at least suggestive--because it is registered on the Principal Register." *Sock It to Me v. Aiping Fan*, 2020 USPQ2d 10611 at *10 (TTAB 2020); *see also New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596 at *10 (TTAB 2020) ("Opposer's mark is inherently distinctive as evidenced by its registration on the Principal Register

[14] Reg. No. 3038946 was registered on the Principal register on January 10, 2006, for "toy weapons, namely, toy replicas of weapons" in the name of Carl Walther GmbH (Applicant). The registration has been renewed. We note that Applicant also owns Reg. No. 5494040 for the design mark for clocks; jewelry; watches," which registered on the Supplemental Register on June 1, 2018. It has been renewed. A copy of the registration is of record at 33 TTABVUE 125-28.

without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.") (citing *Tea Bd. of India v. Republic of Tea Inc.,* 80 USPQ2d 1881, 1899 (TTAB 2006).

Second, we see no reason to deviate from the general principle that normally accords greater weight to the words in a mark consisting of words and a design. Basing our decision on the entirety of Applicant's mark, we find the word WALTHER is the dominant feature. *Stone Lion*, 110 USPQ2d at 1161 (although our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks, "there is nothing improper in stating that . . . more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." (citing *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). Here, WALTHER is "the portion most likely 'to be impressed upon the mind of a purchaser and remembered' because it "would be used by consumers to request the products." *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1430-31 (TTAB 2013) (quoting *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) *and In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)). *See also In re Viterra*, 101 USPQ2d at 1908 ("In the case of a composite mark containing both words and a design, 'the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.'").

As noted, WALTER and WALTHER are similar in sight and sound. As for the connotation of each, the parties do not dispute that WALTER is a common boy's name,

and neither Applicant nor Opposer has presented an alternative meaning to WALTHER apart from that of being a German surname.[15] Although Applicant contends that Opposer failed to invoke the doctrine of foreign equivalents to show that Walther is equivalent to Walter in German, the doctrine of foreign equivalents "generally [does] not apply to first names … that are widely recognizable to American consumers… ." *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355 at *6 (TTAB 2019) (finding it "unlikely" that consumers would "stop and translate" a common personal name used as a mark). Moreover, the USPTO "continues to view personal names as inherently distinctive and registrable on the Principal Register." *Brooks v. Creative Arts By Calloway, LLC,* 93 USPQ2d 1823, 1830 (TTAB 2009).

Nonetheless, Applicant argues that Opposer's mark is commercially weak as a large number of unrelated third parties use and have registered marks containing the term "Walter" for similar goods. 41 TTABVUE 30. In support, Applicant submitted TSDR printouts for 14 third-party registrations of marks including the term[16] and pages from company websites for six of these marks showing that they are in use on clothing.[17] The six marks for which registration and use has been shown are:

- Reg. No. 3870490 for the mark WALTER for "clothing, namely, t-shirts," registered November 2, 2010; renewed.
- Reg. No. 5017562 for the mark WALTER GENUIN for "Boots; Cardigans; Chemises; Coats; Gloves; Golf caps; Golf

[15] "The WALTHER brand's founder and namesake" was Carl Walther (1858-1915). Blalock Decl., 34 TTABVUE 4.

[16] Applicant's First Notice of Reliance, 33 TTABVUE 9-102.

[17] 34 TTABVUE 11-58.

pants, shirts and skirts; Golf shorts; Jackets; Jerseys; Pullovers; Shirts; Shoes; Slippers; Sweaters; Trousers; Vests; Wind shirts; Golf shirts; Golf shoes; Golf trousers; Wind vests," registered August 9, 2016.

- Reg. No. 5872119 for the mark LITTLE WALTER for "Clothing, namely, t-shirts, shirts, blouses, sweaters, pants, shorts, dresses, skirts, jackets, suits, coats, sleepwear, loungewear, jogging suits, sweatshirts, hooded sweatshirts, socks, underwear, boxer shorts, nightshirts, lingerie, athletic pants and tops; headwear; footwear; clothing accessories, namely, scarves, gloves, belts, wristbands as clothing, and headbands," registered October 1, 2019.

- Reg. No. 5680942 for the mark WALTER SKY for "Pants; Shirts; Shorts; Sweatshirts; T-shirts; Vests; Clothing, namely, base layers; Outer jackets; Sleeved or sleeveless jackets," registered February 19, 2019.

- Reg. No. 4445494 for the mark WALTER WRAITH for "Clothing and accessories, namely, jeans, shirts, t-shirts, sweaters, jackets, dress pants, pants, blouses, belts, scarves, wrist bands, and gloves; Headwear, namely, hats, caps, and toques; Casual and formal footwear, namely, boots, shoes, and sandals," registered December 10, 2013; partial Sections 8 and 15 combined declaration accepted and acknowledged.

- Reg. No. 2880786 for the mark WALTER HAGEN for "Clothing, namely, shirts, sweaters, socks, belts, pants, shorts, rain wear, and hats," registered September 7, 2004; renewed.

- Reg. No. 2971709 for the mark WALTER HAGEN for "men's golf apparel, namely, knit shirts, pants, rainwear, headwear, socks, shoes," registered July 19, 2005; renewed.

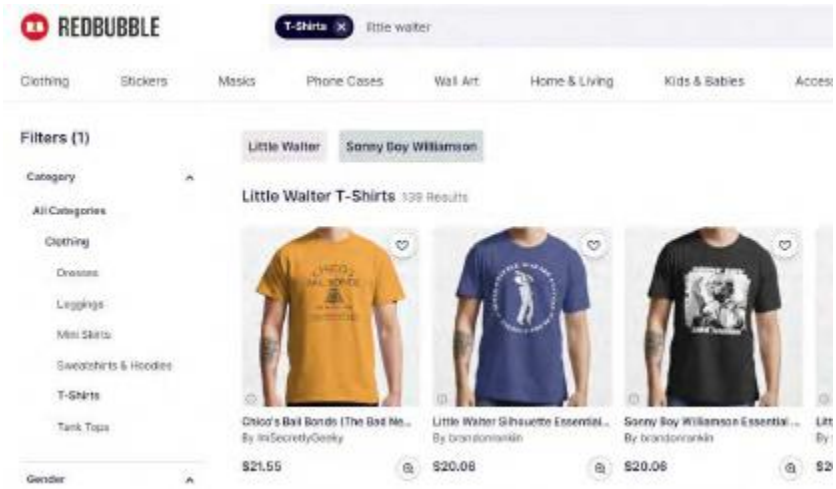
- Reg. No. 5910182 for the mark WALTER MORTON for "Clothing, namely, pants, sport coats and suits," registered November 12, 2019.

The following examples show use of these marks:

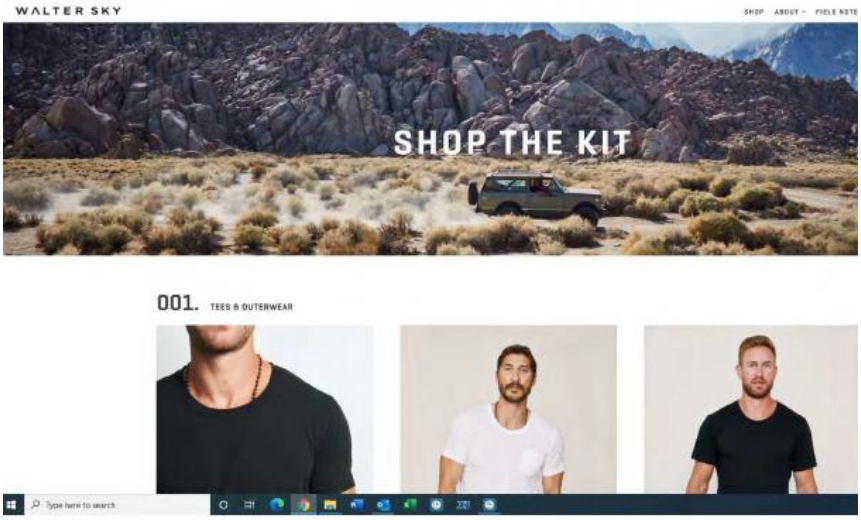
- **WALTER**, 34 TTABVUE 14:

- **WALTER GENUIN, 34 TTABVUE 49-50.**

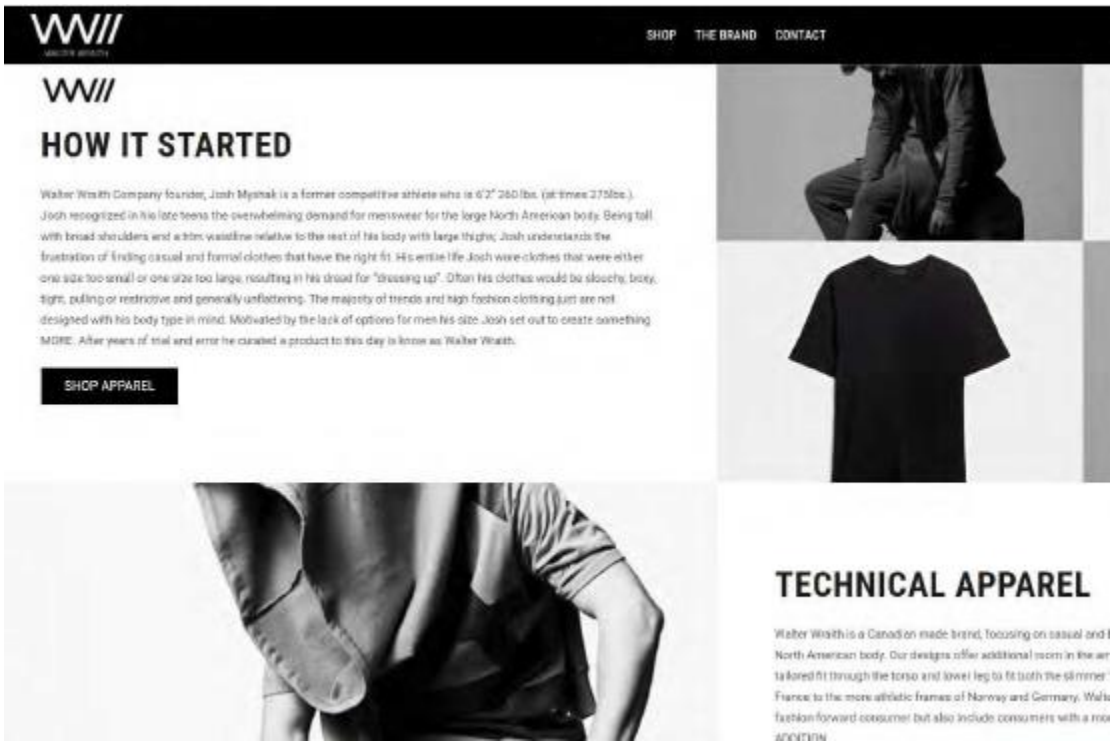
- **LITTLE WALTER, 34 TTABVUE 45.**



- **WALTER SKY**, 34 TTABVUE 25-26.

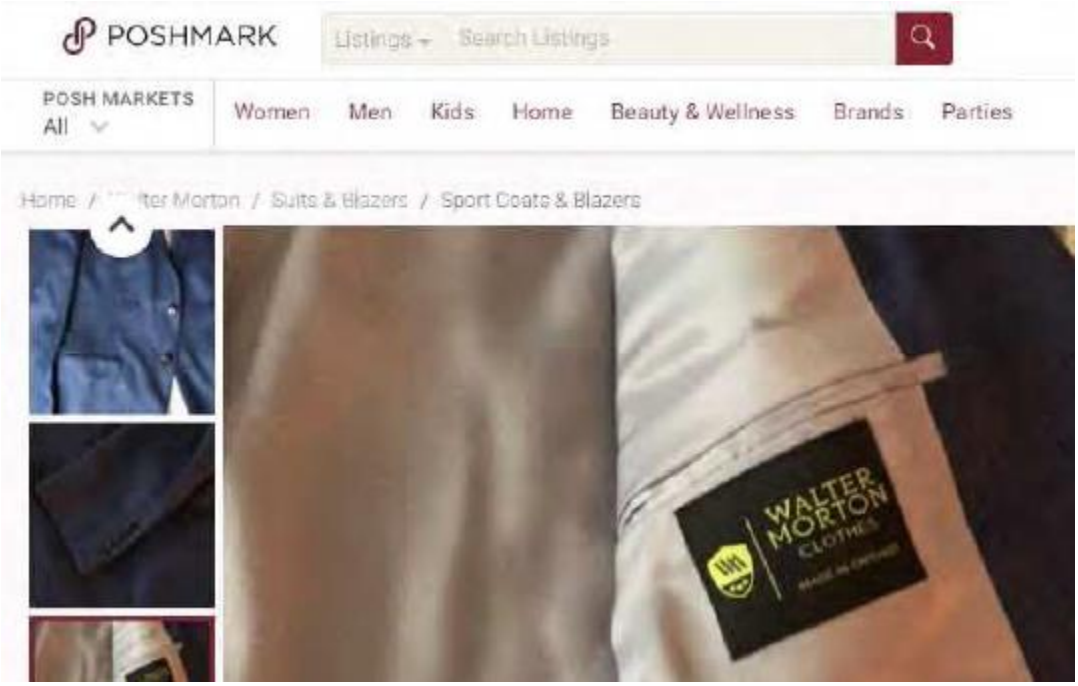


- **WALTER WRAITH**, 34 TTABVUE 35, 37.



- **WALTER HAGEN,** 34 TTABVUE 52.

- **WALTER MORTON**, 34 TTABVUE 56.



In addition, Applicant submitted webpages from the WALTER COLLECTION and ED WALTERS websites, examples of which follow:

- **WALTER COLLECTION**, 34 TTABVUE 17.

- **ED WALTERS**, 34 TTABVUE 40.

We find that the third-party uses and registrations have only limited probative value to show weakness of Opposer's mark because the marks vary from each other and from Opposer's mark in significant ways. Most of the marks use WALTER as the

first name of a complete name, which together with the appended surname forms a unique appellation that is unlikely to be confused with another name. Unlike, for example, where a house mark is used in combination with another's mark in such fashion as to cause the consumer to mistakenly perceive that a new line extension has been created or that the house mark is simply now being used with the previously used product mark, here the combination of WALTER as a first name together with unique and different surnames obviates the likelihood of confusion among the third-party marks and as between each mark and Opposer's mark.

We recognize that there is one identical mark, WALTER of Reg. No. 3870490, and two unregistered marks, WALTER COLLECTION and ED WALTERS,[18] all of which are in use in commerce on apparel. However, this does not sufficiently lessen the scope of protection to which Opposer's mark is due, particularly since we have no evidence of the scope of use of the marks or extent of their public exposure. *Cf. In re Mr. Recipe*, 118 USPQ2d 1084, 1089 (TTAB 2016) ("[O]ne third-party registration has little probative value, especially in the absence of evidence that the mark is in use on a commercial scale or that the public has become familiar with it."). In any event, as previously noted, the ED WALTERS mark consists of a first and last name, which we find distinguishable. As has often been said, we are not bound by the decisions of

[18] We note that Applicant submitted a copy of the TSDR printout for Reg. No. 4733916 for the mark EDWARD WALTERS for "Belts; Belts for clothing; Bottoms; Clothing, namely, khakis; Combinations; Jackets; Jerseys; Leather belts; Short sets; Ties; Tops; Travel clothing contained in a package comprising reversible jackets, pants, skirts, tops and a belt or scarf; Wearable garments and clothing, namely, shirts; Wrist bands; Wristbands." The registration issued May 12, 2015. There is no evidence to support a finding that ED WALTERS and EDWARD WALTERS are owned by the same entity, thus the registration is not listed above. As for WALTER COLLECTION, there is no registration for this mark in the record.

examining attorneys in prior cases. The Board makes its own findings of fact, and that duty may not be delegated by simply adopting without scrutiny the conclusions reached by an examining attorney. *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) ("each application must be considered on its own merits"); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("the PTO's allowance of such prior registrations does not bind the Board").

Finally, we are not persuaded by Applicant's arguments that Opposer's "knowing acquiescence" to the one third-party WALTER registration and Opposer's so-called "half-hearted approach to enforcing its claim of rights" against the others is any evidence in favor of a finding of no likelihood of confusion. Applicant's Brief, 41 TTABVUE 40. Opposer's state of mind is irrelevant to our determination on likelihood of confusion, and to the extent Applicant contends that Opposer by its actions has abandoned its mark for failure to police third-party users, the contention constitutes a collateral attack upon Opposer's registration and as such cannot be considered in the absence of a counterclaim to cancel the registration. 37 C.F.R. § 2.106(b)(2)(ii).

We find Applicant's mark

is similar to the registered mark WALTER in appearance, sound, connotation and commercial impression.

F. Actual confusion

Applicant has used its WALTHER Banner logo for clothing since at least as early as 1994. Blalock Decl., 32 TTABVUE 8-9 and Exhibits 11 through 21, 32 TTABVUE 108-163 (pages from WALTHER brand U.S. catalogs from 1994 to 2020). Opposer's

registration for WALTER has a constructive first use date based on its filing of December 3, 2004. Opposer admitted that its WALTER mark has coexisted in Class 25 since September 1, 2004, with third-party marks that contain the term "WALTER." Request for admissions No. 17, 35 TTABVUE 38.

Applicant argues that despite over 16 years of concurrent use of the parties' marks, the "absence of marketplace confusion … is powerful evidence that Applicant's WALTHER Banner Logo is not likely to cause confusion with Opposer's mark or business." 41 TTABVUE 38. Opposer concurs; it is "unaware of any instances of actual confusion between Applicant's goods and Opposer or the designer, Walter Baker." 35 TTABVUE 55 and 72.

"A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not necessarily true, however. The lack of evidence of actual confusion carries little weight." *Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, 100 USPQ2d 1584, 1603-1604 (TTAB 2011). The lack of evidence of actual confusion occurring over a significant period takes on greater weight if it can be shown that there have been meaningful opportunities for such confusion to occur. Based on this record, there appear to have been only limited opportunities for confusion to occur, inasmuch as Applicant sells its goods exclusively through licensed distributors and on its website only. Blalock Decl., 32 TTABVUE 11 ("We make WALTHER brand clothing available to consumers through only two distribution channels – specifically, Walther Arm's website (https://shop.walther arms.com/) and authorized retailers of WALTHER firearms.").

Accordingly, this factor is neutral.

IV. Conclusion

We have carefully considered all of the evidence and arguments of record. Opposer's mark WALTER is similar in appearance, pronunciation, connotation and overall commercial impression to Applicant's mark WALTHER. Applicant's and Opposer's clothing is legally identical in part and otherwise closely related. The overlap in the trade channels and classes of consumers also favor a finding of likelihood of confusion, while actual confusion is a neutral factor. We thus find that Opposer has established by a preponderance of the evidence that confusion is likely under Section 2(d) of the Trademark Act.

Decision: The opposition under Section 2(d) of the Trademark Act is sustained.