

This Opinion Is Not a  
Precedent of the TTAB

Mailed: July 18, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Major League Baseball Properties, Inc.*

*v.*

*Christopher Webb*  
—

Cancellation No. 92060903  
—

Mary L. Kelvin of Cowan, Liebowitz & Latman, P.C.,  
for Major League Baseball Properties, Inc.

Ben T. Lila of Mandour & Associates, APC,  
for Christopher Webb.  
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Before Mermelstein, Bergsman and Shaw,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Major League Baseball Properties, Inc. (“Petitioner”) filed a petition to cancel Registration No. 4472701 for the mark MAJOR LEAGUE ZOMBIE HUNTER and design, shown below, for “clothing, namely, short and long sleeve t-shirts, sweatshirts, jackets, baseball hats, and beanies,” in Class 25, registered on the Supplemental Register.<sup>1</sup>

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<sup>1</sup> Registered January 21, 2014.



In the registration, Respondent, Christopher Webb, described his mark as follows:

The mark consists of a concentric, round-edged rectangle design with the wording “MAJOR LEAGUE ZOMBIE HUNTER” at the bottom of the outer rectangle, and the silhouette of a man holding a shotgun inside the inner shaded rectangle.

As grounds for cancellation, Petitioner alleges likelihood of confusion, dilution, that Registrant’s mark is void ab initio based on Respondent’s lack of bona fide use of Respondent’s mark, and fraud. Petitioner pleaded ownership of numerous registrations including, but not limited to, the following:

- Registration No. 1528807 for the mark MAJOR LEAGUE BASEBALL (typed drawing) for “entertainment services in the nature of baseball exhibitions,” in Class 41;<sup>2</sup>
- Registration No. 1620020 for the mark MAJOR LEAGUE BASEBALL (typed drawing) for “clothing, namely, shirts, shorts, dresses, socks, underwear, jackets, sweaters, pants, visors, caps, bibs, infantwear, namely, baby shorts sets, romper sets, baby pants, coveralls, outerwear, namely,

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<sup>2</sup> Registered March 7, 1989; renewed. The mark is registered under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), with a disclaimer of the exclusive right to use the word “Baseball.”

uniforms and pullovers, ties, robes and loungewear, sweatshirts, knitted headwear, hosiery, wristbands, robes and shoes,” in Class 25;<sup>3</sup>

- Registration No. 1617698 for the mark MAJOR LEAGUE BASEBALL and design, shown below, for “clothing, namely, shirts, shorts, dresses, socks, underwear, jackets, sweaters, pants, visors, caps, bibs, infantwear [sic], namely, baby shorts sets, romper sets, baby pants, coveralls, outerwear, namely, uniforms and pullovers, ties, robes and loungewear, sweatshirts, knitted headwear, hosiery, wristbands, robes and shoes,” in Class 25;<sup>4</sup>



- Registration No. 2573503 for the mark reproduced below for “clothing, namely, caps, hats, visors, knitted headwear, shirts, t-shirts, tank tops, sweaters, turtlenecks, pullovers, vests, shorts, baseball uniforms, jerseys, warm-up suits, sweatshirts, sweatpants, underwear, boxer shorts, robes, sleepwear, jackets, cloth bibs, infantwear, infant diaper covers, cloth diaper sets with undershirt and diaper cover, rompers, coveralls, creepers, baby

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<sup>3</sup> Registered October 30, 1990; second renewal. The mark is registered on the Principal Register.

<sup>4</sup> Registered October 16, 1990; second renewal. The mark is registered on the Principal Register.

booties, ties, belts, wristbands, scarves, footwear, socks, slippers, aprons,”  
in Class 25.<sup>5</sup>



Respondent, in its Answer, denied the salient allegations in the amended petition for cancellation.

In the Board's July 26, 2017 order granting in part and denying in part Petitioner's motion for summary judgment on the grounds of lack of bona fide use and fraud, the Board granted summary judgment on Petitioner's standing and no bona fide use of Respondent's mark on sweatshirts, jackets, baseball hats, and beanies. The Board denied Petitioner's motion for summary judgment on no bona fide use of Respondent's mark on t-shirts and fraud.<sup>6</sup>

#### I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Respondent's registration file. The parties introduced the following testimony and evidence:

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<sup>5</sup> Registered May 28, 2002; renewed.

<sup>6</sup> 31 TTABVUE.

A. Petitioner's testimony and evidence

1. Notice of reliance on Petitioner's pleaded registrations printed from the USPTO electronic database showing the current status of and title to the registrations;<sup>7</sup>
2. Notice of reliance on Respondent's responses to Petitioner's Interrogatory Nos. 1, 2, 4, 5, 6, 7, 10, 11, 12 and 15;<sup>8</sup>
3. Notice of reliance on Respondent's responses to Petitioner's Document Request Nos. 2, 5, 8, 9, 12 and 18;<sup>9</sup>
4. Notice of reliance on Respondent's responses to Petitioner's Requests for Admission Nos. 10, 11, 12, 13, 15, and 16;<sup>10</sup>
5. Notice of reliance on news articles purportedly referring to Petitioner or Petitioner's MAJOR LEAGUE BASEBALL marks;<sup>11</sup>
6. Testimony declaration of Kevin Olsen, paralegal at Cowan, Liebowitz & Latman, P.C., attorneys for Petitioner;<sup>12</sup>
7. Testimony declaration of Lara Pitaro Wisch, Senior Vice President and General Counsel of MLB Advanced Media, Inc., the general partner of MLB Advanced Media, L.P.;<sup>13</sup>
8. Notice of reliance on materials from the Internet;<sup>14</sup>

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<sup>7</sup> 33 TTABVUE.

<sup>8</sup> 34 TTABVUE 27-54.

<sup>9</sup> 34 TTABVUE 56-76. Responses to Document Requests are admissible solely for the purpose of showing that a party has stated that there are no responsive documents. *See City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 n.7 (TTAB 2012).

<sup>10</sup> 34 TTABVUE 85-94.

<sup>11</sup> 36 TTABVUE.

<sup>12</sup> 37 TTABVUE.

<sup>13</sup> 38-46 TTABVUE. The portions of the Wisch declaration designated as confidential are posted at 47 TTABVUE.

<sup>14</sup> 48 TTABVUE.

9. Testimony declaration of Steve Armus, Petitioner's Senior Vice President of Consumer Products;<sup>15</sup>
10. Testimony declaration of Ethan Orlinsky, Petitioner's Senior Vice President of Legal, Business and Club Affairs;<sup>16</sup> and
11. Testimony declaration of Marianne Adams, Petitioner's in-house trademark counsel.<sup>17</sup>

B. Respondent's testimony

Respondent introduced his testimony declaration.<sup>18</sup>

II. Priority

Because Petitioner's pleaded registrations are of record, priority is not at issue with respect to the marks and goods and services identified in its pleaded registrations. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

III. Likelihood of confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*,

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<sup>15</sup> 49-59 TTABVUE.

<sup>16</sup> 60-62 TTABVUE.

<sup>17</sup> 65 TTABVUE.

<sup>18</sup> 63 TTABVUE. The portions of Respondent's testimony declaration that were designated as confidential are posted at 64 TTABVUE.

135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (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)).

A. The strength of Petitioner’s marks

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d

1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (5th ed. June 2018 update) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899.

1. The inherent strength of Petitioner’s trademarks.

The term “Major League” when used in connection with baseball related services has acquired distinctiveness as indicated by Petitioner’s pleaded Registration No. Registration No. 1528807 for the mark MAJOR LEAGUE BASEBALL (typed drawing) for “entertainment services in the nature of baseball exhibitions,” registered under the provisions of Section 2(f) of the Trademark Act.<sup>19</sup> However, where the term MAJOR LEAGUE BASEBALL is used in connection with clothing, MAJOR LEAGUE BASEBALL is inherently distinctive.

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<sup>19</sup> 33 TTABVUE 215. “Where, as here, an applicant seeks registration based on acquired distinctiveness under Section 2(f), the *statute* accepts a lack of inherent distinctiveness as an established fact.” *Yamaha Int’l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988).



The silhouetted batter design in the '698 and '503 Registrations is suggestive of “entertainment services in the nature of baseball exhibitions,” but arbitrary when used in connection with clothing.

As noted above, Petitioner has made of record its pleaded MAJOR LEAGUE BASEBALL registrations, none of which is subject to a counterclaim for cancellation. The registrations are “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate.” Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b).

In assessing the inherent strength of Petitioner’s marks, we note that there is no testimony or evidence regarding the number and nature of similar marks in use on similar goods or services or third-party registrations consisting in whole, or in part, of the term “Major League” or variations thereof. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (the extent of third-party use or registration may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason).

2. The commercial strength of Plaintiff’s marks.

Petitioner alleges that its marks are famous.<sup>20</sup> Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition

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<sup>20</sup> Amended Petition for Cancellation ¶32 (20 TTABVUE 26).

and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 54 USPQ2d at 1897; *Kenner Parker Toys, Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

“[L]ikelihood of confusion fame ‘varies along a spectrum from very strong to very weak.’” *Joseph Phelps Vineyards, LLC v. Fairmount Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed Cir. 2017) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003))). Fame may be measured indirectly by the volume of sales and advertising expenditures for the goods and services identified by the marks at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice, by independent sources, of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1305-06, 1309. Although raw numbers of product sales and advertising expenses sometimes suffice to prove fame, raw numbers alone may be misleading. Some context in which to place raw numbers may be necessary (*e.g.*, the substantiality of the sales or advertising figures for comparable types of products or services). *Id.* at 1309.

Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its

mark is famous to clearly prove it. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012) (citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007)).

Petitioner submitted the evidence summarized below to demonstrate the commercial strength of its marks:

- Petitioner has used the terms MAJOR LEAGUE, MAJOR LEAGUES and MAJOR LEAGUE BASEBALL for almost 100 years;<sup>21</sup>
- Petitioner has used variations of the logo reproduced below for almost 50 years;<sup>22</sup>



- “[O]ver the last ten years alone, retail sales of products bearing Petitioner’s Marks have been in the billions of dollars. By way of example, sales of goods sold in connection with Petitioner’s Marks in 2014 alone exceeded one billion dollars.”;<sup>23</sup>
- “Between the years 2011 and 2017 alone, Petitioner sold in excess of \$446 million worth of merchandise through the MLB Shop website. Over \$113 million of such goods were sold in 2011 and 2012.”;<sup>24</sup>

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<sup>21</sup> Armus Testimony Decl. ¶4 (49 TTABVUE 5).

<sup>22</sup> Armus Testimony Decl. ¶5 (49 TTABVUE 5).

<sup>23</sup> Armus Testimony Decl. ¶9 (49 TTABVUE 7).

<sup>24</sup> Wisch Testimony Decl. ¶17 (38 TTABVUE 10).

- “Moreover, between the years 2007 and 2017 alone, Petitioner sold in excess of \$103 million worth of shirts alone, including short- and long-sleeve t-shirts. Of that amount, over \$35 million worth of such shirts were sold prior to December 2012.”;<sup>25</sup>
- Merchandise bearing Petitioner’s marks have been produced under license by numerous licensees including VF Imagewear, Inc., Rawlings Sporting Goods Company, Inc., New Era Cap Company Inc., Nike USA, Inc. and Under Armour, Inc.;<sup>26</sup>
- Merchandise bearing Petitioner’s marks are sold at baseball stadiums, individual team stores, and through national retailers, including J.C. Penney, Target, Bed Bath & Beyond, Dick’s Sporting Goods, Modell’s, Wal-Mart, K-Mart, and Walgreen’s;<sup>27</sup>
- Petitioner has licensed the use of its marks in connection with national and local sponsorship programs with companies such as Bank of America, Budweiser, Coca-Cola, Gatorade, General Motors, MasterCard International, Nike, SiriusXM and T-Mobile;<sup>28</sup>

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<sup>25</sup> Wisch Testimony Decl. ¶18 (38 TTABVUE 10).

<sup>26</sup> Armus Testimony Decl. ¶10 (49 TTABVUE 7).

<sup>27</sup> Armus Testimony Decl. ¶11 (49 TTABVUE 8).

<sup>28</sup> Armus Testimony Decl. ¶12 (49 TTABVUE 9)

- GOOGLE search engine searches for MAJOR LEAGUE BASEBALL and “Major League Baseball logo” yield tens of millions of hits. All of the references on the first page of each search refer to Petitioner;<sup>29</sup>
- Petitioner receives extensive unsolicited media exposure;<sup>30</sup>
- Petitioner’s websites feature Petitioner’s MAJOR LEAGUE BASEBALL and its logo on every webpage.<sup>31</sup>

[B]etween the years 2004 and 2016, [Petitioner’s] websites received over 124 billion views and over 19 billion visits; over 79 billion of these page views and 12 billion of these visits occurred before the end of 2012. In 2016 alone, [Petitioner’s] Websites received over 12 billion page views and over 1.5 billion visits. During the same period of 2004 and 2016, mlb.com alone received over 64 billion page views and over 9 billion visits; over 42 billion of these page views and over 6 billion of these visits occurred before the end of 2012.<sup>32</sup>

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<sup>29</sup> Olsen Testimony Decl. ¶¶9-10 and Exhibits H and I (37 TTABVUE 6-7 and 44-49). We find this evidence to have little probative value. Search summaries do not show the context within which the search term is used on the referenced web pages. *In re Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007). Nor do we “give any probative weight” to the large number of hits in Petitioner’s search results. “It is common knowledge that most search engine searches retrieve a large number of hits and that many of the hits retrieved are duplicates.” *In re BetaBatt Inc.*, 89 USPQ2d 1152, 1153 n.1 (TTAB 2008). Moreover, that all of the hits on the first page of the searches were references to Petitioner is entitled to little weight because we are not privy to Google’s algorithm for ranking and displaying search results.

<sup>30</sup> Olsen Testimony Decl. ¶¶11-12 and Exhibits J and K (37 TTABVUE 7 and 50-269). Mr. Olsen testified that his search parameters were “Major League Baseball” within the same paragraph as the term “logo.” However, the list of retrieved articles were not necessarily referring to Petitioner’s logo and, therefore, we find that the probative value of these exhibits is limited showing that Petitioner received extensive media exposure, not that Petitioner’s logo has received extensive media exposure. *See also* 36 TTABVUE (news articles in printed publications).

<sup>31</sup> Wisch Testimony Decl. ¶¶5-6 (38 TTABVUE 6).

<sup>32</sup> Wisch Testimony Decl. ¶11 (38 TTABVUE 8).

- Lukas, “The mystery of the Major League Baseball logo designer,”


*ESPN.com* (November 5, 2008) referred to Petitioner’s logo as follows:


Consider for example, the Major League Baseball logo. It’s a masterpiece of modern brand design, it’s more iconic and visible than ever, and it turns 40 years old next year (an unusually long life span in the logo world, where designs are constantly getting overhauled or at least tweaked), yet its designer has never been publicly acknowledged.<sup>33</sup>

The above-noted evidence is sufficient to establish that Petitioner’s MAJOR LEAGUE BASEBALL mark and logo are commercially strong, if not famous marks, for both Petitioner’s entertainment services and its related clothing and other merchandise. The marks are thus entitled to a broad scope of protection or exclusivity of use.

B. The similarity or dissimilarity and nature of the goods.

As noted above, Respondent’s description of goods has been limited to short and

long sleeve t-shirts. Petitioner’s Registration No. 2573503 for the logo  for, inter alia, t-shirts and Registration No. 1620020 for the mark MAJOR LEAGUE BASEBALL (typed drawing) and Registration No. 1617698 for the mark MAJOR

LEAGUE BASEBALL and the logo  are registered for, inter alia, shirts — which include t-shirts. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’

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<sup>33</sup> 48 TTABVUE 15.

necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'"). Thus, the goods are in part identical.

With respect to the relationship between Petitioner's services and Respondent's t-shirts, the Board, in another case, stated the following, which is equally appropriate in this case:

The licensing of commercial trademarks for use on "collateral" products (such as clothing, glassware, linens, etc.), which are unrelated in nature to those goods or services on which the marks are normally used, has become a common practice in recent years. *See: General Mills Fun Group, Inc. v. Tuxedo Monopoly, Inc.*, 204 USPQ 396, 400 [where we stated that such use is a matter of common knowledge and "has become a part of everyday life which we cannot ignore"], *affirmed* 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) [where the Court of Customs and Patent Appeals noted that "collateral product" use is a matter of textbook discussion (see J. Gilson, *Trademark Protection and Practice* §5.05[10] (1980) and frequent commentary (see Grimes and Battersby, *The Protection of Merchandising Properties*, 69 T.M. Rep. 431 (1979) and references cited therein)].

*In re Phillips-Van Heusen Corp.*, 228 USPQ 949, 951 (TTAB 1986); *see also L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1889 (TTAB 2008) ("It is common knowledge, and a fact of which we can take judicial notice, that the licensing of commercial trademarks on 'collateral products' has become a part of everyday life."); *Turner Entm't Co. v. Nelson*, 38 USPQ2d 1942, 1945 (TTAB 1996) ("It is common knowledge, and in the present case, undisputed that video games, t-shirts, beach towels, caps and other logo-imprinted products are used as promotional items for a diverse range of goods and services."). Thus, consumers will associate t-shirts with

Petitioner's baseball exhibitions because of the fame of Petitioner's mark for baseball exhibitions.

C. Established, likely-to-continue channels of trade and buyers to whom sales are made.

Because the goods described in the registration and some of Petitioner's registrations are in part identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

With respect to Petitioner's services, because t-shirts are collateral merchandising or promotional products, Petitioner sells t-shirts at its baseball exhibitions and therefore, the channels of trade and classes of consumers are the same. Respondent argues to the contrary that it has limited its sales and advertising to an online website forum.<sup>34</sup> This contention is unavailing, as there is no limitation in the registration's identification of goods limiting Respondent's t-shirts to an online website. We must consider the goods as they are described in the Respondent's registration. *Stone Lion*

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<sup>34</sup> Respondent's Brief, p. 9 (68 TTABVUE 13).



*Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”). Thus, Respondent’s t-shirts are presumed to move in all channels of trade that would be normal for such goods, and that they would be purchased by all potential customers. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983).

D. The conditions under which sales are made.

Absent any limitation in the parties’ registrations, their goods must be construed to include t-shirts sold at all usual price points for such items, including relatively inexpensive t-shirts. *E.g.*, *Am. Lava Corp. v. Multronics, Inc.*, 461 F.2d 836, 174 USPQ 107, 108 (CCPA 1972). Such inexpensive t-shirts are likely to be purchased by ordinary consumers. While baseball fans are likely to select t-shirts to demonstrate their affinity for a specific team or for the sport in general, this does not warrant the conclusion that such consumers exercise a heightened degree of purchasing care with respect to their decision to purchase a t-shirt. *See Stone Lion Capital Partners*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”); *see also In re Sailerbrau Franz Sailer*,

23 USPQ2d 1719, 1720 (TTAB 1992) (finding that all purchasers of wine may not be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

E. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prods. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“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 encounter the marks would be likely to assume a connection between the parties.” *Coach Servs.*, 101 USPQ2d at 1721; see also *Midwestern Pet*

*Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992). 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 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As indicated above, the average customer is an ordinary consumer.

For the sake of economy, we confine our analysis of the similarity or dissimilarity of the marks to two of Petitioner's registrations. The first is Registration No. 1617698 for the mark MAJOR LEAGUE BASEBALL and design, shown below, for "shirts."



Of all Petitioner's pleaded registrations, this one is the most similar to Respondent's mark reproduced below. If the petition for cancellation cannot be granted on the basis of this registered mark, it could not be granted on the basis of the marks in the other

pleaded registrations. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).



Both marks consist of off-center, white silhouetted males from the torso up, facing left, wearing baseball caps or helmets, and posed for action inside a shaded, rectangular border, albeit engaged in different activities. Underneath the design in Respondent's mark is the term "Major League Zombie Hunter," while the term "Major League Baseball" appears underneath the design in Petitioner's mark. In view of the commercial strength of Petitioner's mark and the identity of the goods, the overall commercial impressions outweigh any specific dissimilarities (e.g., baseball bat vs. shotgun, backward cap vs. batting helmet, and the words "Major League Zombie Hunter" vs. "Major League Baseball") that might be apparent upon a side-by-side comparison of the marks. Under these circumstances, it is not unreasonable to assume that consumers encountering Respondent's t-shirts displaying a mark which possesses marked similarities in appearance, sound, and commercial impression as Petitioner's mark would likely mistakenly assume that the t-shirts originate from or are sponsored by the same source. That is, consumers could assume that Petitioner modified its MAJOR LEAGUE BASEBALL mark to play on popular entertainment trends such as movies featuring zombies.

The second registration that we rely on is Registration No. 2573503 for the mark reproduced below for t-shirts.



In its Amended Petition for Cancellation, Petitioner alleges that its silhouetted batter marks are often depicted in the trade dress colors of red, white and blue.<sup>35</sup> An example of the mark on a t-shirt is reproduced below:<sup>36</sup>



Respondent uses very similar trade dress to display its mark. The t-shirt Respondent submitted as a specimen of use displaying the mark to support his registration is reproduced below:

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<sup>35</sup> Amended Petition for Cancellation ¶1 (20 TTABVUE 19).

<sup>36</sup> Armus Testimony Decl. Exhibit 2 (51 TTABVUE 276).



“[I]n evaluating the likelihood of confusion, we may take into account whether the trade dress of packages or labels in the application file as specimens, or otherwise in evidence, may demonstrate that the trademark projects a confusingly similar commercial impression.” *Am. Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793, 797 (TTAB 1986). The marks at issue are registered as black-and-white drawings, with no claim of color, and therefore contemplate use of the registered designs in any color. *In re Data Packaging Corp.*, 453 F.2d 1300, 172 USPQ 396, 397 (CCPA 1972); *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973); TMEP § 807.14(e)(i). While it would be inappropriate to consider the parties’ actual use to *limit* the ways in which a registered or applied-for mark could be used, actual use may be considered “[i]n trying to visualize what other forms the mark might appear in.” *Phillips Petroleum Co. v. C.J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971); *see also Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (applicant’s labels for SPICE VALLEY spices depicting a sailing vessel negates applicant’s claim that its mark conveyed a different commercial impression from that of SPICE ISLANDS);

*Sunnex Prods. Co. v. Sunnex Int'l Inc.*, 1 USPQ2d 1744, 1747 n.13 (TTAB 1987) (“Sometimes an applicant’s actual trade dress may be relevant to demonstrate that the mark projects a confusingly similar commercial impression.”); *Nw. Golf Co. v. Acushnet Co.*, 226 USPQ 240, 244 (TTAB 1985) (“Evidence of the context in which a particular mark is used on labels, packaging, etc., or in advertising is probative of the significance which the mark is likely to project to purchasers.”).

It is immediately apparent that Respondent’s actual use of its registered mark is remarkably similar to Petitioner’s. Both feature a central figure with a baseball cap in white against a background that is red to the right of the figure and blue to the left, all of which is surrounded by a rectangular band of white. In addition, the wording in both marks begin with MAJOR LEAGUE. The similarity of trade dress renders Respondent’s argument that his mark conveys a different commercial impression disingenuous.<sup>37</sup>

In view of the foregoing, we find that the marks are similar in their entireties in terms of appearance, sound, and commercial impression.

F. Analyzing the factors

Our primary reviewing court said in *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984):


When an opposer’s trademark is a strong, famous mark, it can never be of “little consequence.” The fame of a trademark may affect the likelihood purchasers will be confused inasmuch as less care may be taken in purchasing a product under a famous mark.


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<sup>37</sup> Respondent’s Brief, p. 9 (68 TTABVUE 13).

Thus, there is “no excuse for even approaching the well-known trademark of a competitor ... and that all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous. ...” *Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989) (quoting *Planter’s Nut & Chocolate Co. v. Crown Nut Co., Inc.*, 305 F.2d 916, 134 USPQ 504, 511 (CCPA 1962)); *see also Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 223 USPQ at 1285. In this case, rather than avoiding Petitioner’s well-known trademark, Respondent approached it.

Accordingly, because the marks are similar, the goods are identical and we presume that the goods are offered in the same channels of trade and to the same

classes of consumers, we find that Respondent’s mark  for “short and

long sleeve t-shirts” is likely to cause confusion with Petitioner’s mark  for “shirts.”

Because we have found that Respondent’s mark is likely to cause confusion with Petitioner’s mark, we need not address Petitioner’s dilution, nonuse, and fraud claims. *See Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1478 (TTAB 2017) (stating that the Board has “discretion to decide only those claims necessary to enter judgment and dispose of the case,’ as our ‘determination of registrability does not require, in every instance, decision on every pleaded claim”) (quoting *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013)).



**Decision:** The petition for cancellation is granted under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).