

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 25, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Lacoste Alligator S.A.*  
*v.*  
*Southern Smocked Company, LLC*

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Opposition No. 91244445

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Richard Z. Lehy and Daniel M. Nuzzaci of Fross Zelnick Lehrman & Zissu, P.C.  
for Lacoste Alligator S.A..

Stephen C. Aertker, Jr. of Aertker Legal, L.L.C.  
for Southern Smocked Company, LLC.

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Before Cataldo, Adlin and Allard,  
Administrative Trademark Judges.

Adlin, Administrative Trademark Judge:

On August 20, 2021 the Board issued a final decision in this proceeding which incorrectly identified one of Opposer's registrations (Registration No. 3220138) as pleaded when it was not. The error does not affect the substance of the decision. A corrected version of the final decision is attached. Applicant's time to appeal from the decision remains unchanged, and runs from August 20, 2021, the date the original decision issued.

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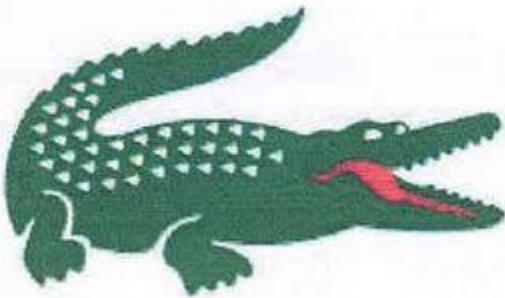
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Before Cataldo, Adlin and Allard,  
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Opinion by Adlin, Administrative Trademark Judge:

Applicant Southern Smocked Company, LLC seeks registration of the mark shown  
below



(SMOCKED COMPANY disclaimed) for “children's and infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; dresses for babies and children; shirts for babies and children; shortalls; shorts for babies and children; swimsuits,” in International Class 25.<sup>1</sup> In its notice of opposition, Opposer Lacoste Alligator S.A. alleges prior use and registration of “crocodile or alligator logos” for clothing, including the following design marks:



all of Opposer’s pleaded registrations are over five years old. As grounds for opposition, Opposer alleges that use of Applicant’s mark would be likely to cause confusion with, and dilute, Opposer’s pleaded marks. In its answer, Applicant denies the salient allegations in the notice of opposition, and raises affirmative defenses

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<sup>1</sup> Application Serial No. 87902522, filed May 1, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on claimed first use dates of March 3, 2014. The application includes color claims and this description of the mark: “The mark consists of the words ‘SOUTHERN SMOCKED COMPANY’ in navy blue situated inside a circular seal comprised of two interior pink lines of varying width and a pink scalloped edge. A cartoonish, two-dimensional, right-facing alligator featuring a mint green body and outlined in kelly green is depicted within the center of the circular seal, below the concave-curved words ‘SOUTHERN SMOCKED’ and above the convex-curved word ‘COMPANY’.”

<sup>2</sup> Registration Nos.: 1108987, issued December 12, 1978; 2004314, issued October 1, 1996; and 3129817, issued August 15, 2006 (reproduced above on the left) (the “817 Registration”). All three of Opposer’s pleaded registrations have been renewed.

which it did not pursue or prove at trial and which are accordingly waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

## **I. The Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced the testimony declaration (with exhibits) of Michael Azran, the Head of IP Prosecution & Enforcement Americas at Sporloisirs S.A. ("Azran Dec."). 26-29 TTABVUE.<sup>3</sup> Sporloisirs is Applicant's "affiliate." Mr. Azran testified that he is "familiar with the history, intellectual property, and operations of Opposer," including "Opposer's use and registration of its famous alligator trademark and service mark." 26 TTABVUE 2, 3 (Azran Dec. ¶¶ 1, 4).

Applicant did not take any testimony or introduce any evidence. Only Opposer filed a Trial Brief.

## **II. Opposer and Its Alligator Design Marks**

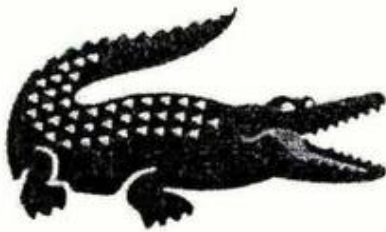
Rene Lacoste, "a legendary French tennis player who, in the 1920s, won Wimbledon twice, the U.S. Open twice, and the French Open three times" founded Opposer. *Id.* at 3-4 (Azran Dec. ¶¶ 7, 9). Lacoste, nicknamed "The Alligator," got his start in the clothing business in 1933, when he teamed up with the owner of France's

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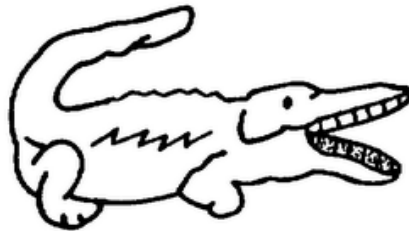
<sup>3</sup> Citations to the record refer to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

largest knitwear manufacturer “to manufacture shirts bearing the Alligator Logo ... The first Lacoste shirts were white tennis shirts.” *Id.* at 4 (Azran Dec. ¶ 9).

The business became successful, and the alligator logo was first used in connection with clothing in the United States in 1950. *Id.* at 4 (Azran Dec. ¶ 10). Today, Opposer “generally” uses the logo on the left on labels and packaging for its goods, and “generally” embroiders the logo on the right onto its garments:



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*Id.* at 4-5 (Azran Dec. ¶¶ 11-12). Opposer refers to these logos collectively as the “Alligator Design Mark.” *Id.*

“All of Opposer’s products prominently display the Alligator Design Mark,” often in multiple places. *Id.* at 5 (Azran Dec. ¶ 15).<sup>6</sup> Today, Opposer operates more than 80 Lacoste boutiques and outlets in the United States, and its products are also sold on the Internet and in other stores including Nordstrom, Bloomingdales and Macy’s. *Id.* at 6 (Azran Dec. ¶¶ 16, 17, 19).

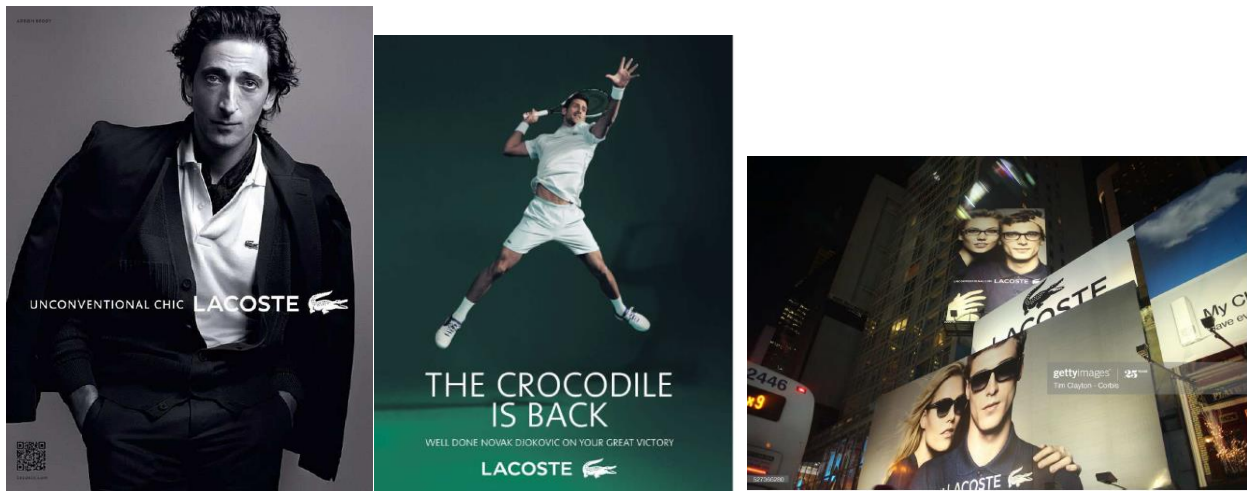
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<sup>4</sup> Pleaded Registration No. 2004314.

<sup>5</sup> Pleaded Registration No. 1108987.

<sup>6</sup> “Because colloquial French does not distinguish between alligators and crocodiles,” Opposer’s logo is sometimes described as a crocodile, and while Mr. Lacoste’s nickname in the United States is “The Alligator,” in France it is “le Crocodile.” 26 TTABVUE 4 n.1.

Opposer heavily promotes itself and its products on television and the Internet, in print, and elsewhere, including through celebrity endorsers. In fact, Opposer has spent more than \$7 million on United States advertising each year from 2009-2019, with total United States advertising expenditures exceeding \$ 110 million during that time. *Id.* at 7-8 (Azran Dec. ¶¶ 22-31). Examples of Opposer’s advertising are reproduced below:



28 TTABVUE 12, 14, 35 (Azran Dec. Exs. 13, 16). Medium and AdAge have featured stories about Opposer’s advertising efforts. *Id.* at 23-33 (Azran Dec. Ex. 15).

Perhaps relatedly, Opposer has been quite successful in the United States, with sales in this country exceeding \$238 million every year from 2009-2019, and totaling more than \$3 billion during that time. *Id.* at 6 (Azran Dec. ¶ 21). Each year from 2015-2019, Opposer’s website received over 10 million visits per year, including 18.2 million visits in 2019. “These numbers far exceed the total website visits of such other famous brands as Brooks Brothers, Tommy Hilfiger, and Banana Republic.” 26 TTABVUE 7 (Azran Dec. ¶ 27). Opposer has more than 15 million “likes” and 15

million followers on Facebook; more than 4.6 followers on Instagram; more than 2.1 million followers on Pinterest; and 79,000 followers of its YouTube channel. *Id.* at 7-8 (Azran Dec. ¶ 28).

Opposer and its alligator marks have also received significant media attention, including articles in Smithsonian Magazine, Time, CNN Money, CBS New York, Details, Golf Digest, Men’s Fitness and Women’s Wear Daily, some of which focus on Opposer’s turnaround in the 2000’s under a new Chief Executive Officer. 27 TTABVUE 23-30 and 28 TTABVUE 85-167 (Azran Dec. Exs. 3, 19). According to the 2005 Time article, “With a look that’s classic, colorful and once again hip, [Opposer’s] polos are go-to shirts for almost anyone.” 28 TTABVUE 85. According to the Smithsonian Magazine article, Opposer’s polo shirt “and its iconic logo spawned many imitators and admirers. Designers and brands from diverse price points have taken to embroidering animals onto polo shirts: ponies (Ralph Lauren), marlins (Tommy Bahama), eagles (American Eagle) ....” 27 TTABVUE 29 (Azran Dec. Ex. 3).

### **III. Opposer’s Entitlement to Statutory Cause of Action<sup>7</sup>**

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff

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<sup>7</sup> Our 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.” We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

may oppose registration of a mark when doing so is within its zone of interests and it has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark). Here, Opposer's pleaded registrations establish that it is entitled to oppose registration of Applicant's mark on the ground of likelihood of confusion. 26 TTABVUE 9-10 and 29 TTABVUE 3-10 (Azran Dec. ¶ 33 and Ex. 20) (Opposer's pleaded registrations); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registrations establish "standing").

#### **IV. Priority**

Because Applicant has not counterclaimed to cancel any of Opposer's pleaded registrations, priority is not at issue with respect to the marks and goods identified therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

#### **V. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key



considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

We focus our analysis on Opposer’s pleaded ’817 Registration. If we find confusion likely between that pleaded mark and Applicant’s involved mark, we need not consider the likelihood of confusion between Applicant’s mark and Opposer’s other pleaded marks. On the other hand, if we find no likelihood of confusion between the mark in the ’817 Registration and Applicant’s mark, we would not find confusion likely between Applicant’s mark and Opposer’s other pleaded marks. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

#### **A. The Goods, Channels of Trade and Classes of Consumers**

The parties’ goods are legally identical in part, because the pleaded ’817 Registration identifies “shirts” and “dresses” without limitation or qualification. Thus, Opposer’s “shirts” encompass Applicant’s more specifically identified “shirts for babies and children,” while Opposer’s “dresses” encompass Applicant’s more specifically identified “dresses for babies and children.” Moreover, because the goods are in-part legally identical, we presume that the channels of trade and classes of

purchasers for these goods overlap. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

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

#### **B. Strength/Fame of Opposer's Mark**

Before addressing the marks themselves, we consider the strength of Opposer's mark, to ascertain the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *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 ... and its marketplace strength ...").

Turning first to conceptual strength, there is no evidence, and Applicant does not argue, that Opposer's mark is conceptually weak. There is thus no reason on this record to find an alligator design anything but arbitrary for clothing. Opposer's mark is therefore conceptually strong.

As for commercial strength, we must determine where to place Opposer's mark on the "spectrum" of marks, which ranges from "very strong to very weak." *Palm Bay*

*Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée 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)). See also, *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017). The record in this case amply demonstrates that Opposer's alligator design is at the very least commercially strong.

While Opposer has not introduced any consumer surveys showing fame or strength, they are not necessary; indeed, they "rarely appear." *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). Rather, fame or strength "may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Id.* Other relevant factors include "length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark." *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

By each of these measures, Opposer's alligator marks are, at the very least, quite strong. Indeed, Opposer has been using what Smithsonian Magazine refers to as its "iconic logo" in this country for almost three-quarters of a century. 27 TTABVUE 29 (Azran Dec. Ex. 3). In addition:

Opposer's goods are offered, and its alligator logo marks are prominently displayed, in more than 80 Lacoste boutiques, as well as Nordstrom, Bloomingdales, Macy's and other retailers. 26 TTABVUE 6 (Azran Dec. ¶¶ 16, 17, 19).

Opposer's marks are also prominently displayed on the Internet, including on Opposer's own website, which receives in excess of 10 million visits per year, outpacing competitors such as Brooks Brothers, Tommy Hilfiger, and Banana Republic. *Id.* at 7 (Azran Dec. ¶ 27).

Opposer has over 20 million followers on social media, including Facebook, Instagram and Pinterest. *Id.* at 7-8 (Azran Dec. ¶ 28).

Opposer has received a great deal of media attention, much of it focused on Opposer's pleaded alligator logo marks, including articles in Time, CNN Money, Golf Digest and Women's Wear Daily. 27 TTABVUE 23-30 and 28 TTABVUE 85-167 (Azran Dec. Exs. 3, 19).

Opposer's United States advertising expenditures from 2009-2019 exceeded \$110 million. *Id.* at 7-8 and 28 TTABVUE 83 (Azran Dec. ¶¶ 22-31 and Ex. 18).

Opposer's United States sales from 2009-2019 totaled over \$3 billion. 26 TTABVUE 6 and 28 TTABVUE 10 (Azran Dec. ¶ 21 and Ex. 12).

This and the other evidence of record easily establishes that Opposer's pleaded alligator design marks are "renowned" in the clothing market, and, at the very least, commercially quite strong.<sup>8</sup> Opposer's pleaded marks are thus entitled to a concomitantly broad scope of protection. *Joseph Phelps Vineyards*, 122 USPQ2d at 1734-35. In fact, a strong mark such as Opposer's "casts a long shadow which competitors must avoid." *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963

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<sup>8</sup> In 2009, we found Opposer's alligator design to be famous "[i]n view of [a competing trademark owner's] admission that opposer's alligator mark is famous." *Lacoste Alligator S.A. v. Maxoly, Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009). The defendant's admission of fame in that case has no relevance in this one. In any event, there is no need for us to find fame on the record presented here, as our finding that Opposer's mark is commercially strong is more than sufficient for us to reach a decision on the merits of this case.

F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). This factor weighs heavily in favor of finding a likelihood of confusion.

### **C. The Marks**

The marks are similar “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *du Pont*, 177 USPQ at 567). Indeed, the involved application accurately describes Applicant’s mark as featuring a green, right-facing alligator. The mark in Opposer’s pleaded ’817 Registration is also a green, right-facing alligator. The parties’ green, right-facing alligators are both used for shirts and dresses.

To be sure, there are also differences between the marks, as Applicant’s mark also includes a “circular seal” and the words SOUTHERN SMOCKED COMPANY, while Opposer’s mark consists solely of a green, right-facing alligator. And the parties’ green, right-facing alligator designs are not identical. But for several reasons, the parties’ similar alligator designs are likely to cause confusion despite the differences between the marks.

First, and generally, we must keep in mind: (1) “the fallibility of memory over a period of time;” and (2) that the “average” purchaser “normally retains a general rather than a specific impression of trademarks.” *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). *See also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory”) (citation, internal quotation marks, and ellipsis omitted). This is one reason why “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial

impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

Second, and relatedly, the features of Applicant’s mark which are absent from Opposer’s mark are less distinctive than the alligator designs, and thus entitled to less weight in our analysis. In fact, the “circular seal” is quite pedestrian. *See e.g. In re American Academy of Facial Plastic and Reconstructive Surgery*, 64 USPQ2d 1748, 1753 (TTAB 2002) (“However, ordinary geometric shapes such as circles, ovals, squares, stars, etc., are generally regarded as nondistinctive and protectable only upon proof of acquired distinctiveness.”); *In re Benetton Grp. S.p.A.*, 48 USPQ2d 1214, 1215-16 (TTAB 1998); *In re Anton/Bauer, Inc.*, 7 USPQ2d 1380, 1381 (TTAB 1988); J.T. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 7:33 (5th ed. June 2021 update) (“Ordinary geometric shapes such as circles, ovals, squares, etc., *even when not used as a background for other marks*, are regarded as nondistinctive and protectable only upon proof of secondary meaning.”) (emphasis added).

Similarly, the literal element SOUTHERN SMOCKED COMPANY is not distinctive because SMOCKED COMPANY is descriptive and disclaimed, and SOUTHERN is quite suggestive of the geographic origin or style of Applicant’s goods. This makes the literal element of Applicant’s mark weak, and less important in our analysis. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed.

Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); see also *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ). Thus, while we have not forgotten that generally “the verbal portion of a word and design mark likely will be the dominant portion,” *In re Viterro*, 101 USPQ2d at 1911, in this specific case, not only are the words SOUTHERN SMOCKED COMPANY mostly nondistinctive, but those words are smaller than Applicant’s alligator design, which is dominant in part because of how big it is in relation to the size of the words and its prominent position in the logo.

This case thus calls to mind the *Lacoste v. Maxoly* case, in which we found that because the design marks in question, reproduced below,



were “readily discernable as alligators or crocodiles,” and Opposer’s mark was concededly famous, the addition of the words COLBA ISLAND to the defendant’s

mark was not sufficient to avoid confusion. *Lacoste Alligator*, 91 USPQ2d at 1599. That holding is persuasive here by analogy.

Third, the differences between the parties' alligator designs in this case are minor compared to the similarities. The most (and immediately) noticeable feature of both marks is an alligator, which is green and facing to the right in each mark. Furthermore, the parties' alligator designs each depict webbed feet in approximately the same position, and tails which appear to curve up and to the left side of the alligators' bodies.

While the parties' alligators have different facial expressions, and Opposer's alligator has "dots" on its body<sup>9</sup> while Applicant's does not, the marks are similar enough that some of the many consumers familiar with Opposer's strong and "iconic" mark would be likely to assume that Applicant is somehow affiliated with Opposer, perhaps as its subsidiary or licensee,<sup>10</sup> especially because both parties use green, right-facing alligators in connection with identical goods.

There is no doubt but that if the design marks here involved would be placed side-by-side certain differences between them including those enumerated by applicant would be discernible. But in the normal environment of the marketplace where purchases are actually made, individuals would not usually have an opportunity to examine these marks in minute detail. An individual relies on his recollection of the marks that he has previously encountered in the marketplace. And, more often than not,

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<sup>9</sup> Opposer's '817 Registration includes this description of Opposer's mark: "The mark consists of a stylized representation of an alligator or crocodile. The mark is green, with a red mouth and white dots and white eyes."



<sup>10</sup> The Smithsonian Magazine article prominently discusses Opposer's licensing of its marks to Izod in the United States. 27 TTABVUE 26-27. The Time article discusses Opposer's corporate affiliations. 28 TTABVUE 85-86.



in the case of design marks, his recollection is not obfuscated with minute details or characteristics of the marks, but is governed by an overall or general impression of the many marks that surround him in his daily living experiences. Viewing the marks in question in this light, it is apparent that there are marked resemblances in overall design format, and commercial impression. These resemblances are sufficient, in and of themselves, to cause individuals, including those described by applicant as discriminating, familiar with either mark and then encountering the other on competitive goods, to mistakenly believe that these products originate from the same producer.

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

In cases like this, where the designs are similar and prominent, Applicant's addition of three suggestive and descriptive words, which are smaller than the design itself, is insufficient to prevent confusion. Indeed, in *Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992), the Court considered whether

the marks  and , both for clothing, were likely to be confused. It held that

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

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

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



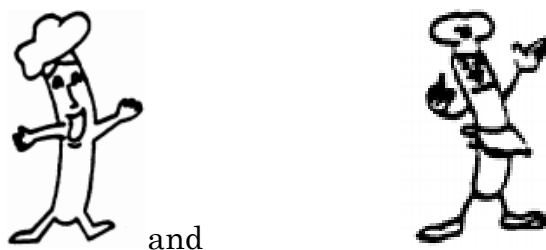
*In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278 (CCPA 1971) (both for bath products).



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



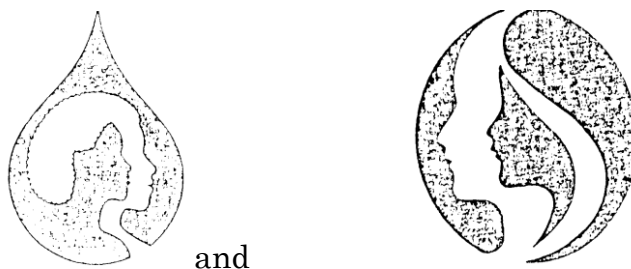
*Penguin Books*, 48 USPQ2d at 1280 (computer programs and books).



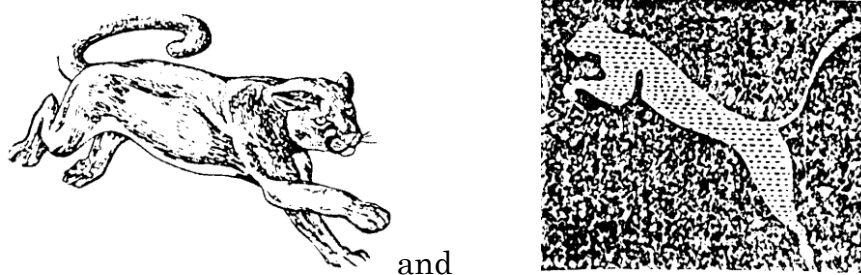
*In re Vienna Sausage*, 16 USPQ2d at 2044 (both for frankfurters).



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



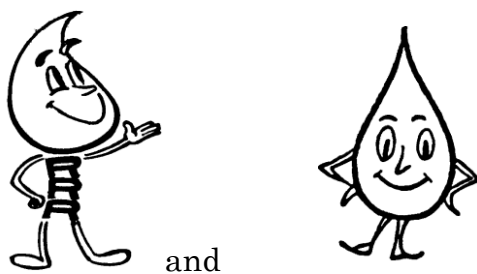
*In re United Service Distributors*, 229 USPQ at 237 (distributorship services in the field of health and beauty aids and moisturizing skin cream).



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



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



*In re Triple R Mfg. Corp.*, 168 USPQ 447 (TTAB 1970) (both for oil filters).

In short, here, as in the cited cases, while there are differences between the marks, they are not sufficient to overcome the various similarities, especially when the parties' marks are used on legally identical goods. This factor also weighs in favor of finding a likelihood of confusion.

## **VI. Conclusion**

Confusion is likely because the goods are legally identical, the channels of trade and classes of consumers overlap, Opposer's mark is strong and the marks are more similar than dissimilar. Applicant has put forward no evidence or argument to the contrary.

**Decision:** The opposition is sustained on Opposer's Section 2(d) claim.<sup>11</sup> Registration of Applicant's mark is refused.

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<sup>11</sup> We need not reach Opposer's dilution claim. *Yazhong Investing Ltd. v. Multi-Media Tech Ventures, Ltd.*, 126 USPQ2d 1526, 1540 (TTAB 2018); *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013).