

THIS OPINION  
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THE T.T.A.B.

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Olin Corporation  
v.  
S.A.T. Arms Technology

Opposition No. 91172517  
to application Serial No. 78287351  
filed on August 14, 2003

Bryan K. Wheelock of Harness, Dickey & Pierce, P.L.C. for  
Olin Corporation.

Martin Fleit of Fleit Gibbons Gutman Bongini & Bianco for  
S.A.T. Arms Technology.

Before Rogers, Drost and Bergsman, Administrative Trademark  
Judges.

Opinion by Bergsman, Administrative Trademark Judge:

S.A.T. Arms Technology ("applicant") filed an  
application under Section 44(d) of the Trademark Act of  
1946, 15 U.S.C. §1126(d), for the mark "X" and design, shown  
below for goods ultimately identified as follows:

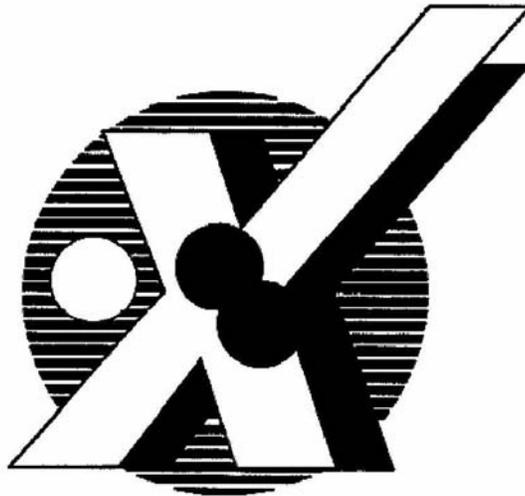
Directional compasses; laser telescopic gun sights;  
electronic shot counters for counting shots fired from  
firearms; optical apparatus, namely telescopic gun  
sights, binoculars, and night vision goggles;  
electromechanical controls for use in positioning  
guidance and protection for shoulder arms and handguns;  
simulation apparatus for shooting firearms; video game  
discs and cartridges; interactive video games of  
virtual reality firearm shooting comprised of computer  
hardware and software; software for simulating shooting

firearms, and spare/replacement parts for the above stated goods, in Class 9;

Firearms; air weapons, namely, air guns, starter pistols, signal guns, signal pistols; bullets and ammunition; accessories for the above stated goods, namely, rifle cases, rifle covers, cartridge pouches, rifle sling straps, and cases for cartridges, in Class 13;

Toys, namely, toys pistols, rifles, and machine guns; toy handguns; toy firearms; toy bullets and ammunition; toy firearms for use with stand alone video game machines with electronic targets; spare/replacement parts for the above stated goods , in Class 28; and,

Communication services, namely, electronic transmission of data and documents among computers and users of computers; delivery of messages by electronic transmission; electronic transmission of data and documents via computer terminals; electronic transmission of messages and data, in Class 38.



Applicant described its mark as the letter "X" over a lined circle with three bullet holes.

Olin Corporation ("opposer") has opposed the registration of applicant's mark on the grounds of priority and likelihood of confusion and dilution. Specifically, opposer alleged that since long prior to the filing date of

applicant's application, it has been using numerous "X" marks comprising a family of "X" marks, in connection with "firearms and ammunition and other hunting or shooting related items"; that opposer's "X" family of marks is famous;<sup>1</sup> and that applicant's mark is likely to cause confusion with and dilute the distinctiveness of the marks comprising opposer's "X" family of marks.

Applicant denied the salient allegations in the notice of opposition. Both parties filed briefs.

#### Preliminary Issues

##### A. The classes of goods and services opposed.

Applicant's application is for goods and services categorized in four International Classes: 9, 13, 28 and 38. In its notice of opposition, opposer did not identify which classes of goods and services it was opposing, and in its brief, opposer simply referenced firearms and ammunition that fall in Class 13.<sup>2</sup> However, we note that (1) in the "Goods/Services Affected by Opposition" on the ESTTA filing system cover sheet accompanying its notice of opposition,

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<sup>1</sup> Because opposer did not allege that any one of its "X" marks or that its "X" family of marks became famous before the filing date of applicant's application, opposer has failed to properly plead a cause of action under dilution. Section 43(c) of the Trademark Act of 1946, 15 U.S.C. §1125(c) ("the owner of a famous mark . . . shall be entitled to an injunction against another person who, **at any time after the owner's mark has become famous**, commences use of a mark or trade name in commerce that . . .") (emphasis added) made applicable by Section 13 of the Trademark Act of 1946, 15 U.S.C. §1063(a).

<sup>2</sup> Opposer's Trial Brief, pp. 16-18.

opposer identified the goods in Classes 13 and 28; and (2) opposer submitted a \$600 filing fee, the fee required to oppose two classes of goods and services. Accordingly, we construe opposer's notice of opposition as opposing only the registration of applicant's mark for the goods identified in Classes 13 and 28.

B. The introduction of evidence through notices of reliance.

Trademark Rule 2.122(e), 37 CFR §2.122(e), provides that the parties may introduce through a notice of reliance printed publications, such as books and periodicals, available to the general public in libraries or in general circulation among members of the public, and official records. "Evidence not obtained and filed in compliance with these sections will not be considered." Cf Trademark Rule 2.123(1), 37 CFR 2.123(1).

Both parties submitted notices of reliance comprising documents not contemplated within the Trademark Rules of Practice and Procedure for such submission. The parties did not file a motion or stipulation agreeing to the introduction of such documents through a notice of reliance. We note, however, that neither party objected to the notices of reliance and that they treated all documents submitted by notices of reliance as being of record. Accordingly, we deem the parties to have stipulated to the introduction of all documents through notices of reliance.

The Record

By rule, the record includes applicant's application file and the pleadings. Trademark Rule 2.122(b), 37 CFR §2.122(b). As indicated above, both parties have submitted evidence through notices of reliance. Neither party took testimony. We will address opposer's objections to applicant's evidence as necessary in our discussion of the evidence bearing on the issues in this case.

Standing

Opposer introduced certified copies of its pleaded registrations prepared by the U.S. Patent and Trademark Office showing their current status and title. Because opposer has properly made its pleaded registrations of record, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

Because opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. Whether opposer has proven that it has a family of marks?

Opposer has alleged that it "has had a long history of using 'X' marks and has created a family of X mark for ammunition, firearms and related products."<sup>3</sup> Opposer contends that because it "often marks its packages with one or more of its 'X' marks" and because its "X" marks are inherently distinctive and promoted together, opposer has established that it has a family of X marks.<sup>4</sup>

The Court of Appeals for the Federal Circuit has defined a family of trademarks as follows:

A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There

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<sup>3</sup> Notice of opposition, ¶5.

<sup>4</sup> Opposer's Trial Brief, pp. 13-14. See also Opposer's Reply Brief, p. 14 ("The numerous advertisements and product packaging submitted into evidence by Olin is proof that many of the marks in the family are used and promoted together in such a way as to create a public association between the 'X' marks and Olin").

must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods. . . . Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family.

*J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991).

In order to create the requisite recognition of the common element of the marks or "family surname," the common element must be so extensively advertised that the public recognizes the "family surname" as a trademark. *Reynolds & Reynolds Co. v. I.E. Systems, Inc.*, 5 USPQ2d 149, 1751 (TTAB 1987). The Board has explained the requirements as follows:

In order to establish a "family of marks," it must be demonstrated that the marks asserted to comprise its "family" or a number of them have been used and advertised in promotional material or used in everyday sales activities in such a manner as to create common exposure and thereafter recognition of common ownership based upon a feature common to each mark.

*American Standard Inc. v. Scott & Fetzer Co.*, 200 USPQ 457, 461 (TTAB 1978). In the absence of direct testimony by purchasers, we must place ourselves in the position of average consumers and attempt to understand their reaction to the marks as they are encountered in the marketplace. *Id.* In this regard, the mere fact that opposers have registered many of the purported "family" members is not

sufficient to prove that a family of marks exists.

*Consolidated Foods Corp. v. Sherwood Industries, Inc.*, 177 USPQ 279, 282 (1973) ("the registrations, per se, are manifestly incompetent to establish the extent of use of the registered marks, whether one or more of the registered marks have been promoted, advertised, used or displayed in any manner likely to cause an association or 'family' of marks, or that, at the least, a good number of the registrations have become known or familiar to purchasers of frozen confections and the like").

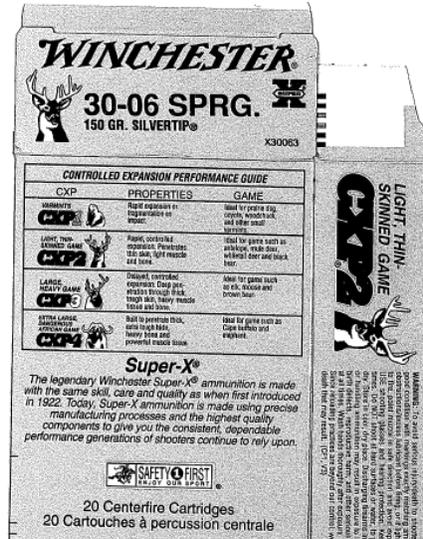
Based on this record, opposer has not proven that it has a family of marks. First, opposer has never identified the common characteristic of its marks. Presumably, opposer is arguing that the letter "X" is the common characteristic of its family of marks, and that therefore the public will associate any mark that has the letter "X" anywhere in it used in connection with firearms and ammunition with opposer.

Second, with only few exceptions, opposer has not used and advertised its "X" marks together in such a manner as to create common exposure and recognition of common ownership based upon the use of the letter "X." Opposer's evidence supporting its family of "X" marks consists of the following documents:

1. Opposer's packaging and an advertisement that show two different versions of its SUPER-X mark (Exhibit 208);
2. An advertisement touting opposer's brands, including SUPER-X and XPERT (Exhibit 211); and,
3. An excerpt from opposer's website (Exhibit 250) advertising opposer's brands, including SUPER-X, XPERT and "XP<sup>3</sup>."

However, the record is silent regarding the extent of opposer's advertising of its multiple "X" marks and there are simply not enough examples of opposer's "X" marks advertised or promoted together. The promotional activity showing the use of opposer's multiple "X" marks is not sufficient in quantity or quality to establish in purchasers' minds a recognition or awareness of the existence of a family of marks. Therefore, the record in this case falls short of presenting the type of evidence necessary to support opposer's allegation that it has a "family" of "X" trademarks.

With respect to how opposer uses its "X" marks together, the packaging shown below is representative. As illustrated below, opposer often uses two different versions of its SUPER-X mark on the same package. However, consumers will not perceive the two versions of SUPER-X as different marks; they will perceive them as variations of one mark.



By the same token, we do not believe that consumers will perceive the letter "X," in the CXP series of marks displayed on the package above, as a common feature of the marks CXP and SUPER-X. We do not believe that there is a discernable pattern in opposer's use of CXP and SUPER-X to establish that the letter "X" is a common feature of a family of marks.

Likewise, we do not believe that consumers will perceive the "X" in XPERT and SUPER-X, as displayed in the excerpt of opposer's website shown below, as common features of the two marks indicating common ownership.



**Super-X®**

Want better, more dependable knock-down power? Then load up with the legendary Super-X ammunition – made with the same skill, care and quality as when first introduced in 1922. Today Super-X is made using precise manufacturing processes and the highest quality components to provide consistent, dependable performance that generations of shooters continue to rely upon.

- Full Metal Jacket
- JHP
- Lead Round Nose
- #12 SHOT
- Blank
- Dyna Point - Plated
- Lead Flat Nose
- Lead Hollow Point
- Lead Round Nose - Standard Velocity
- Power Point® - Lead Hollow Point



**Xpert®**

Designed to provide great performance at a value price.

- Lead Hollow Point

**Wildcat®**

Performs well at a great price.

- Lead Round Nose

On the other hand, opposer has promoted SUPER-X and "XP<sup>3</sup>" together on its website as shown below.



In view of the foregoing, we find that opposer has not proven that it has a family of "X" marks. Accordingly, opposer's claim of likelihood of confusion must be based solely on its use of the individual "X" trademarks. In this regard, we focus our likelihood of confusion analysis on the following federally-registered marks because they are closer in appearance to applicant's mark than opposer's other pleaded marks:

1. DOUBLE X, in typed drawing form, for "ammunition";<sup>5</sup>
2. SUPER-X, in typed drawing form, for "firearms, namely, shotguns";<sup>6</sup>
3. SUPER-X, in typed drawing form, for "shot shells, rifle and pistol cartridges";<sup>7</sup> and,
4. XX, shown below, for "ammunition."<sup>8</sup>



B. Whether opposer's "X" marks are famous?

This *du Pont* factor requires us to consider the fame of opposer's marks. 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 and renown. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

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<sup>5</sup> Registration No. 1027881, issued December 23, 1975; Sections 8 and 15 affidavits accepted and acknowledged; second renewal.

<sup>6</sup> Registration No. 0998963, issued November 26, 1974; Sections 8 and 15 affidavits accepted and acknowledged; second renewal.

<sup>7</sup> Registration No. 0573211, issued April 14, 1953; Sections 8 and 15 affidavits accepted and acknowledged; third renewal.

<sup>8</sup> Registration No. 1027880, issued December 23, 1975; Sections 8 and 15 affidavits accepted and acknowledged; second renewal.

Although opposer has designated its revenues as confidential, and therefore we do not reveal those figures, we, nevertheless find that opposer has enjoyed great success in connection with its sales of ammunition. On the other hand, we note that while in the past raw sales figures may have sufficed to prove fame, in today's marketing environment, raw numbers alone may be misleading. "Consequently, some context in which to place raw statistics is reasonable." *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309. In this regard, opposer has not provided any evidence of its market share in which to place the context of its sales.

Also, we note that opposer has not provided any advertising figures. Opposer contends, without any evidence, that it has spent "considerable money, time and energy marketing its products."<sup>9</sup> Opposer points to its press releases that make reference to the "strong reputation" of its "X" brand.<sup>10</sup> However, self-serving statements in press releases are more in the nature of advertising puffery than probative evidence of public recognition of opposer's marks.

Opposer contends that its "X" marks have attracted substantial unsolicited third-party media coverage.<sup>11</sup> In

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<sup>9</sup> Opposer's Trial Brief, p. 9.

<sup>10</sup> Opposer's Trial Brief, p. 9.

<sup>11</sup> Opposer's Trial Brief, p. 10.

this regard, opposer submitted 19 articles from periodicals that have referenced one of opposer's "X" brands. The articles merely reference "X" brand ammunition as an aside or as part of a product review. With the exception of one reference to SUPER-X as "an old favorite" (Exhibit 237), there is nothing in the articles from we which we can infer that the "X" marks have achieved extensive public recognition and renown.<sup>12</sup>

Opposer has not presented sufficient evidence to show that any one of its "X" marks is famous. While there is some evidence regarding opposer's sales, there is nothing regarding opposer's advertising expenditures or public recognition and renown of the marks. While there is no doubt that opposer has enjoyed considerable success selling ammunition, we do not believe that this success translates to fame for opposer's marks. Without any evidence relating

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<sup>12</sup> The Google search summary (Exhibit 249) introduced by opposer has no probative value. First, a search result summary from an Internet search engine, such as Yahoo! or Google, that shows use of a term or phrase as the search query used by the search engine, is of limited evidentiary value. These summaries generally do not provide sufficient text within which to determine the nature and relevance of the term or phrase. *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002); *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002). Thus, they are considerably less probative than showing actual use of the term or phrase within the context of a website or webpage. Second, to the extent the summaries are comprehensible, none of them prove that opposer's "X" marks have achieved extensive public recognition and renown. Finally, to the extent that opposer's search generated over 75,000 hits, we note that the search term was "Olin Winchester X" and that any one of these terms could have retrieved a hit. Moreover, there is no indication of how many of the hits are duplicates.

to the extent of opposer's advertising, market share, or unsolicited favorable publicity (*i.e.*, the degree of recognition of opposer's marks), we cannot find on this record that consumers have been so exposed to any of opposer's "X" marks, that they can be considered famous for purposes of our likelihood of confusion analysis.<sup>13</sup> *Cf Bose Corp. v. QSC Audio Products, Inc.*, 63 USPQ2d at 1305-1309.

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

Opposer has registered its marks for firearms and ammunition. Applicant is seeking to register its mark for, among other things, firearms, ammunition, toy firearms and toy ammunition. Accordingly, with respect to the firearms and ammunition, the parties' products are in part identical.

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<sup>13</sup> With respect to opposer's dilution claim, we note that fame for likelihood of confusion and dilution is not the same. Fame for dilution requires a more stringent showing. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1170 (TTAB 2001). Likelihood of confusion fame "varies along a spectrum from very strong to very weak" while dilution fame is an either/or proposition - it either exists or it does not exist. *Id.* See also *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1507 (TTAB 2005) (likelihood of confusion "[f]ame is relative . . . not absolute"). A mark, therefore, may have acquired sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution fame. *Toro Co. v. ToroHead Inc.*, 61 USPQ2d at 1170, citing *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 47 USPQ2d 1225, 1239 (1<sup>st</sup> Cir. 1998) ("[T]he standard for fame and distinctiveness required to obtain anti-dilution protection is more rigorous than that required to seek infringement protection"). Because, on this record, opposer has not proven that any of its marks are famous for purposes of likelihood of confusion, it will not be able to prove that any of its marks are famous for purposes of proving its dilution claim.

On the other hand, with respect to applicant's toy firearms and ammunition, there is no evidence that the goods are similar or related.<sup>14</sup> For example, there is no evidence that any business makes and sells guns and ammunition under the same mark as toy guns and ammunition. Without evidence, we cannot simply assume that purchasers expect a common source to provide both real guns and ammunition and toy guns and ammunition, even if they were sold under identical marks. *See Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, 1478 (TTAB 1987).

In view of the foregoing, we find that with respect to firearms and ammunition, in Class 13, the identity of the goods favors finding that there is a likelihood of confusion. However, with respect to opposer's firearms and ammunition, in Class 13 and applicant's toy firearms and ammunition, in Class 28, we find that opposer has not met its burden of proving that these products are similar or related, and therefore this factor favors finding that there is no likelihood of confusion.

D. The similarity or dissimilarity of established, likely-to-continue trade channels and classes of consumers.

1. Real firearms and ammunition in Class 13.

With respect to firearms and ammunition, because we have found that the products listed in the opposer's

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<sup>14</sup> In fact, opposer did not even reference applicant's toy guns and ammunition in its brief.

registrations and applicant's application are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part (sic) identical and in-part (sic) 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"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

2. Opposer's real firearms and ammunition in Class 13 vs. applicant's toy firearms and ammunition in Class 28.

Opposer has proffered no evidence regarding how or why the channels of trade and classes of consumers for its firearms and ammunition are similar to the channels of trade and classes of consumers for applicant's toy firearms and ammunition. Accordingly, opposer has not met its burden of proving that the channels of trade and classes of consumers for these products are similar, and therefore this factor favors finding that there is no likelihood of confusion.

E. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

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. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where both parties sell the same products (firearms and ammunition in Class 13), 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. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated*, 207 USPQ 443, 449 (TTAB 1980).

In addition, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that

confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). With respect to the firearms and ammunition in Class 13, the relevant public would be hunters and sportsmen who purchase guns and ammunition. On the other hand, with respect to applicant's toy guns and ammunition in Class 28, the relevant public would include not only hunters and sportsmen, but it would include children and parents.

The visual appearance of the parties' marks are similar because they are dominated by the letter "X." See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark"). Applicant's mark, shown below, is the letter "X" and design.



Applicant contends that its mark is a design mark, and not the letter "X".

Applicant's mark consists solely of design elements, creating an entirely different commercial impression from any of Opposer's marks. Applicant's mark is not a mark that can be easily described with words. The fact that the Applicant described its mark in its application before the USPTO as an "'X' over a lined circle with three bullet holes" is not dispositive of how the consumers would call for the goods. This description is for USPTO administrative purposes and is, in fact, now required by Trademark Rules of Practice, 37 C.F.R. §2.37 and 2.52(5).<sup>15</sup> The dispositive question is how the consumer views the mark. The consumer is likely to view the mark as a composite design consisting of a circle intersected with 2 bars that cross one another and with 3 dots or holes or smaller circles, 2 of which are in the center intersection of the crossing bars and 1 which is to the left of the crossing bars. Consumers might also refer to the crossing bars as a skewed X. There is, however, no evidence in the record that consumers would call for Applicant's goods by the letter X.<sup>16</sup>

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<sup>15</sup> Trademark Rule 2.37 provides, in relevant part, that "[a] description of the mark must be included if the mark is not in standard characters." Trademark Rule 2.52(b)(5) provides that a mark comprising design elements must include a description of the mark.

<sup>16</sup> Applicant's Brief, p. 13-14.

Applicant's argument strains credulity. Despite its protestations, applicant's mark is clearly a stylized letter "X." Statements made by the applicant during the prosecution of its application may be used by the opposer as evidence against the applicant, in the nature of an admission against interest.<sup>17</sup> See *Eikonix Corp. v. CGR Medical Corp.*, 209 USPQ 607, 613 n.7 (TTAB 1981). See also *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984), quoting *Interstate Brands Co. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978) (applicant's earlier contrary position before the Examining Attorney as to the meaning of its mark illustrates the variety of meanings that may be attributed to, and commercial impression projected by, applicant's mark). If applicant's mark was not, in fact, the letter "X" accompanied by other design elements, then applicant should have identified it as two crossing bars with other elements as it has argued before us.

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<sup>17</sup> By the same token, similar statements by applicant describing its mark in an opposition proceeding to opposer's European Community Trademark Office application "may be received in evidence as merely illuminative of shade and tone in the total picture confronting the decision maker. To that limited extent, a party's earlier contrary opinion may be considered relevant and competent." *Interstate Brands Co. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978). See also *Oral Surgeons v. Oral and Maxillofacial Surgeons*, 201 USPQ 531, 533 (TTAB 1979) (information concerning controversies between a party and third parties based upon the party's mark may be relevant to show an admission against interest).

With respect to opposer's SUPER-X marks, the letter "X" is the dominant part of those marks because the word "super" modifies the letter "X" telling consumers that the product is of superior quality.<sup>18</sup> By the same token, the letter "X" is the dominant portion of opposer's DOUBLE X mark because the word "double" modifies the letter "X" telling consumers that the product is twofold bigger or better. Finally, the letter "X" is the dominant portion of opposer's XX mark, shown below, because the mark is two Xs.



Because the letter "X" is the dominant portion of the marks, this implies that the marks will have phonetic identity because consumers will refer to the letter "X" in calling for the products as "X," SUPER-X or DOUBLE X.

There is nothing in the record to show that the letter "X" has any descriptive significance in connection with guns and ammunition. Accordingly, applicant's mark and opposer's registrations are considered arbitrary marks engendering similar meanings and commercial impressions.

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<sup>18</sup> The word "super" means "an article of superior quality, grade, size, etc." The Random House Dictionary of the English Language (Unabridged), p. 1907 (2<sup>nd</sup> ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In view of the foregoing, we find that the similarity of the marks favors finding that there is a likelihood of confusion.

F. Balancing the factors.

1. Ammunition and firearms, in Class 13.

In view of the similarity of the marks, the identity of the goods, and the presumption that the goods are sold in the same channels of trade and to the same classes of consumers, we find that applicant's X and design mark for the firearms and ammunition, in Class 13, is likely to cause confusion with opposer's SUPER-X, DOUBLE X, and XX and design marks for firearms and ammunition.

2. Toy firearms and ammunition, in Class 28.

Although the marks are similar, because the goods, channels of trade, and classes of consumers are different, we find that the marks would not be encountered by the same consumers under circumstances likely to give rise to the mistaken belief that real firearms and ammunition and toy firearms and ammunition emanate from a single source. Accordingly, we find that applicant's X and design mark for toy firearms and ammunition, in Class 28, is not likely to cause confusion with opposer's SUPER-X, DOUBLE X and XX and design marks for real firearms and ammunition.

Dilution

In addition to its Section 2(d) claim, opposer has asserted a dilution claim. The Lanham Act provides for a cause of action for the dilution of famous marks. Sections 13 and 43(c) of the Trademark Act of 1946, 15 U.S.C. §§1063 and 1125(c).

The Lanham Act provides as follows:<sup>19</sup>

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

Our dilution analysis, therefore, requires consideration of the following issues:

1. Whether any of opposer's "X" marks is famous;
2. Whether any of opposer's "X" marks became famous prior to the filing date of applicant's "X" and design trademark application; and,
3. Whether applicant's "X" and design mark is likely to cause dilution by blurring of the distinctiveness of opposer's "X" marks.

*7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1727 (TTAB 2007).

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<sup>19</sup> Section 43(c) as it pertains to dilution has been amended effective October 6, 2006.

As indicated above, since we have already determined that none of opposer's "X" marks are famous for purposes of likelihood of confusion, and because the requirements for proving fame for dilution are more stringent than the requirements for proving "fame" for likelihood of confusion, opposer cannot prove that its mark is famous for purposes of dilution. Accordingly, opposer has not proven that the registration of applicant's mark will dilute any of its "X" marks.

Decision: The opposition to the registration of applicant's mark is sustained in connection with the goods in Class 13.

The opposition to the registration of applicant's mark is dismissed in connection with the goods in Class 28.

The application will be forwarded for registration processing in Classes 9, 28, and 38.