

**Appeal No. 11-3940**

---

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

**KOYONO CO.,**  
Plaintiff-Appellant,

v.

**SEVEN FOR ALL MANKIND, LLC,**  
Defendant-Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
Case No. 3:11-cv-047  
The Honorable Thomas M. Rose

---

**PLAINTIFF-APPELLANT'S BRIEF**

---

Victor J. Wasylyna  
WALTERS & WASYLYNA, LLC  
1185E Lyons Road  
Dayton, Ohio 45458  
Telephone: (216) 785-0044  
Facsimile: (216) 395-0115  
Email: victor@wwiplaw.com

*Attorney for Plaintiff-Appellant*

Case: 11-3940 Document: 006111065715 Filed: 09/07/2011 Page: 1

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations  
and Financial Interest**

Sixth Circuit

Case Number: 11-3940

Case Name: Koyono Co. v. Seven For All Mankind

Name of counsel: Victor J. Wasylina

Pursuant to 6th Cir. R. 26.1, Koyono Co.

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on September 7, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Victor J Wasylina

Counsel for Koyono Co.

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

## TABLE OF CONTENTS

Corporate Disclosure Statement.....	2
Table of Contents.....	3
Table of Authorities.....	5
Statement in Support of Oral Argument.....	7
Jurisdictional Statement.....	8
Statement of Issues.....	9
Statement of the Case.....	10
Statement of Facts.....	14
Summary of Argument.....	19
Argument.....	21
(1) <b>The district court erred by adopting the “relevant product market” test from antitrust law as the “essential test” for the “relatedness of goods” factor.....</b>	<b>23</b>
(2) <b>The district court erred by holding that the “similarity of marks” factor is neutral even though the parties use the identical SLIMMY trademark.....</b>	<b>26</b>
(3) <b>The district court erred by holding that the “marketing channels used” factor is neutral even though both parties sell their</b>	

	<b>SLIMMY-branded fashion products in the same channels of trade to the same customers.....</b>	<b>27</b>
(4)	<b>The district court erred by evaluating the “likely degree of purchaser care” factor only with respect to 7FAMK’s full-priced SLIMMY-branded jeans giving no consideration to evidence of 7FAMK’s inexpensive SLIMMY-branded shirts and discounted SLIMMY-branded jeans.....</b>	<b>30</b>
	<b>Conclusion.....</b>	<b>32</b>

## TABLE OF AUTHORITIES

### Cases:

<i>Abercrombie &amp; Fitch v. American Eagle Outfitters</i> , 280 F.3d 619 (6th Cir. 2002)...	19
<i>Autozone, Inc. v. Tandy Corp.</i> , 373 F.3d 786 (6th Cir. 2004).....	20
<i>Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center</i> , 109 F.3d 275 (6th Cir. 1997).....	24
<i>Frisch’s Restaurants, Inc. v. Elby’s Big Boy, Inc.</i> , 670 F.2d 642 (6th Cir. 1982).....	10, 19
<i>Homeowners Group, Inc. v. Home Marketing Specialists, Inc.</i> , 931 F.2d 1100 (6th Cir. 1991).....	20, 22, 24, 25
<i>Paccar Inc. v. Telescan Technologies, L.L.C.</i> , 319 F.3d 243 (6th Cir. 2003)....	20, 24
<i>Therma-Scan, Inc. v. Thermoscan, Inc.</i> , 295 F.3d 623 (6th Cir. 2002).....	21, 23
<i>United States v. E.I. DuPont de Nemours &amp; Co.</i> , 351 U.S. 377 (1956).....	21
<i>Worldwide Basketball and Sport Tours, Inc. v. Nat’l Collegiate Athletic Ass’n</i> , 388 F.3d 955 (6th Cir. 2004).....	19
<i>Wynn Oil Co. v. Thomas</i> , 839 F.2d 1183 (6th Cir. 1988).....	20, 24

**Statutes:**

15 U.S.C. § 1121.....8

28 U.S.C. § 1292(a)(1) .....8

28 U.S.C. § 1331.....8

28 U.S.C. § 1338(a) .....8

28 U.S.C. § 1338(b) .....8

28 U.S.C. § 1367(a) .....8

**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Plaintiff-Appellant Koyono Co. respectfully requests oral arguments because Koyono believes oral arguments will assist this Court's understanding of the factual and legal issues on appeal.

## JURISDICTIONAL STATEMENT

Plaintiff-Appellant Koyono Co. (“Koyono”) owns an incontestable federal trademark registration for the SLIMMY mark in connection with men’s fashion goods. Defendant-Appellee Seven For All Mankind, LLC (“7FAMK”) sells men’s fashion products bearing Koyono’s SLIMMY trademark. On February 15, 2011, Koyono brought an action against 7FAMK alleging claims for trademark infringement, unfair competition and violation of the Ohio Deceptive Trade Practices Act. The district court has subject matter jurisdiction over Koyono’s lawsuit in accordance with 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a) and (b) and 1367(a).

On May 10, 2011, Koyono filed a motion for preliminary injunction seeking to prevent 7FAMK from selling goods bearing the SLIMMY trademark. On August 26, 2011, the district court issued an order denying Koyono’s motion for preliminary injunction.

On August 31, 2011, Koyono timely filed a notice of appeal seeking this Court’s review of the district court’s denial of Koyono’s motion for preliminary injunction. This Court has jurisdiction over this interlocutory appeal in accordance with 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

- (1) Did the district court err in adopting a “relevant product market” test from antitrust law as the “essential test” for the “relatedness of goods” factor?
- (2) Did the district court err by holding that the “similarity of marks” factor is neutral even though the parties use identical marks?
- (3) Did the district court err by holding that the “marketing channels used” factor is neutral even though the parties sell their SLIMMY-branded goods in the same channels of trade to the same customers?
- (4) Did the district court err by evaluating the “likely degree of purchaser care” factor only with respect to 7FAMK’s full-priced SLIMMY-branded jeans giving no consideration to evidence of 7FAMK’s inexpensive SLIMMY-branded shirts and discounted SLIMMY-branded jeans?

## STATEMENT OF THE CASE

Koyono owns an incontestable federal trademark registration for the SLIMMY mark in connection with fashion goods, namely wallets, change purses, hip bags and business card cases. On February 15, 2011, Koyono brought an action against 7FAMK for trademark infringement, among other claims, based upon 7FAMK's sale of men's jeans and shirts bearing Koyono's SLIMMY trademark. Koyono's lawsuit is predicated on the likelihood that consumers will mistakenly believe that the fashion products sold by Koyono and 7FAMK bearing the identical SLIMMY mark are affiliated in some way.

On May 11, 2011, Koyono requested a preliminary injunction to prevent 7FAMK from infringing Koyono's SLIMMY trademark. On August 26, 2011, the district court denied Koyono's motion for preliminary injunction. The district court's decision addressed the four elements necessary to obtain a preliminary injunction: (1) the likelihood of Koyono's success on the merits; (2) whether or not injunctive relief will save Koyono from irreparable harm; (3) whether or not the injunctive relief will harm others; and (4) whether or not the public interest will be served by the injunction.

In its analysis of the first element—the likelihood of Koyono's success on the merits—the district court was required to determine whether there is any likelihood of confusion caused by 7FAMK's and Koyono's sale of fashion

goods bearing the identical SLIMMY mark. The district court analyzed the eight factors set forth by this Court in *Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982), to determine if there was any likelihood of confusion. The district court ruled on the eight factors as follows:

- (1) The “strength of the mark” factor favors likelihood of confusion;
- (2) The “relatedness of goods” factor does not favor likelihood of confusion;
- (3) The “similarity of marks” factor is neutral;
- (4) The “marketing channels used” factor is neutral;
- (5) The “evidence of actual confusion” factor does not favor likelihood of confusion;
- (6) The “likely degree of purchaser care” factor does not favor likelihood of confusion;
- (7) The “intent in selecting the mark” factor is neutral; and
- (8) The “likelihood of expansion of product lines” does not favor likelihood of confusion.

Thus, out of the eight factors for determining likelihood of confusion, the district court held that one factor favors Koyono, four of the factors favor 7FAMK and three of the factors are neutral. Based on its analysis of the eight likelihood of confusion factors, the district court held that Koyono failed to

satisfy the first element necessary to obtain a preliminary injunction. The district court's analysis of the likelihood of confusion factors contains erroneous legal conclusions and disregards evidence submitted by Koyono in support of the likelihood of confusion.

Although the district court concluded that Koyono failed to establish the first element necessary to obtain a preliminary injunction, the district court addressed the remaining three elements required to obtain a preliminary injunction. With respect to the second element—whether the injunctive relief will save Koyono from irreparable harm—the district court acknowledged that irreparable harm is legally presumed when there is confusion in the marketplace and held, “[b]ecause the Court has not found a likelihood of confusion among consumers, it will not find that irreparable harm is likely to result in the absence of a preliminary injunction.” (Opinion, p. 13.) As to the third element—whether the injunctive relief will harm others—the district court held, “[w]ere Koyono likely to prevail on the merits, this factor would weigh in favor of granting the motion.” (Opinion, p. 14.) Regarding the fourth element—whether or not public interest will be served by the injunction—the district court agreed that an injunction would be in the public's interest if there was any likelihood of confusion, but held that the “Court has not found confusion likely to affect the public in this matter.” (Opinion, p. 14.)

Accordingly, the district court would have granted Koyono's request for a preliminary injunction if it had determined that Koyono was likely to succeed on the merits.

## STATEMENT OF THE FACTS

**A. Koyono owns an incontestable federal trademark registration for the SLIMMY mark in connection with fashion goods.**

Koyono Co. (“Koyono”) is a fashion company that sells a variety of products, including clothing and wallets. (R. 14, Ex. 1 (First Affidavit of Mr. Yoo), pp. 1–2.) Koyono’s president, Mr. Jeasung Jay Yoo, invented the word “SLIMMY” with the vision of using it as a trademark in connection with fashion goods. (R. 17, Ex. 1 (Second Affidavit of Mr. Yoo), p. 8.) Prior to using SLIMMY as a trademark, Mr. Yoo conducted a thorough investigation to confirm the SLIMMY mark’s availability for federal trademark registration and to determine if the mark was used by any other fashion companies. (R. 14, Ex. 1, p. 2.) Upon confirming no other fashion entity was using the SLIMMY mark and the mark’s availability for federal registration, Mr. Yoo filed with the United States Patent and Trademark Office an application that eventually matured into U.S. Trademark Registration No. 2,994,987 for the SLIMMY mark. (R. 14, Ex. 1, p. 4.) The SLIMMY mark is now incontestable. (R. 14, Ex. 1, p. 5.)

In 2003, Koyono launched a SLIMMY line of men’s fashion accessories, including the original SLIMMY wallet and the Sport SLIMMY wallet alternative. (R. 14, Ex. 1, p. 2.) The original SLIMMY wallet is a sleek, ultra-thin wallet designed to eliminate the bulk and bulge of traditional bi-fold

and tri-fold wallets. (*Id.*) The Sport SLIMMY is a unique and modern alternative to wallets. (R. 14, Ex. 1, p. 3.) The Sport SLIMMY wallet alternative contains a pouch and an elongated tether connecting the pouch to a key ring. (*Id.*) Koyono's SLIMMY products are priced between \$37.00 and \$53.00. (R. 17, Ex. 1, p. 9.) Koyono's SLIMMY line of fashion accessories is Koyono's most successful product line. (R. 14, Ex. 1, p. 2.)

**B. 7FAMK infringes Koyono's federal trademark registration for SLIMMY by marketing and selling fashion goods bearing the SLIMMY mark.**

7FAMK is a fashion company that sells a wide variety of fashion apparel and accessories, including wallets. (R. 16, pp. 2–3; R. 14, Ex. 1, p. 9.)

In January of 2011, Koyono discovered that 7FAMK sells men's clothing bearing Koyono's SLIMMY trademark. (R. 14, Ex. 1, p. 5.)

7FAMK markets its version of men's "slim straight leg" fit jeans as "The Slimmy." (R. 17, Ex. 1, p. 4 and Ex. J.) In 7FAMK's own words, "The Slimmy is **our** slim straight leg fit of jeans." (*Id.* (emphasis added).) Based upon 7FAMK's success with its SLIMMY-branded jeans, 7FAMK began selling a line of men's shirts marketed as "THE SLIMMY SHIRT." (R. 17, Ex. 1, p. 8 and Ex. K.)

7FAMK contends that its SLIMMY-branded products are "expensive," and that prices for its jeans range from "\$149.00 to \$325.00." (R. 16, pp. 15–

16; R. 16-1, p. 4.) However, 7FAMK's SLIMMY-branded shirts are sold to the public for as little as \$69.00 and its SLIMMY-branded jeans are sold to the public for as little as \$99.79. (R. 17, Ex. 1, p. 10 and Exs. K and M.)

**C. Consumers are likely to be confused by 7FAMK's adoption of Koyono's SLIMMY mark.**

7FAMK and Koyono both sell men's fashion goods using the unique and fanciful term "SLIMMY" as a trademark to identify their products. Not only do they use the identical SLIMMY mark on related goods, 7FAMK and Koyono market their SLIMMY-branded fashion products in the same channels of trade, most notably on Amazon.com. (R. 14, Ex. 1, pp. 6–8.)

Amazon.com is currently the world's largest online retailer, with various shopping departments ranging from "Appliances" to "Watches." (*Id.*) Of particular importance, Koyono and 7FAMK market their SLIMMY-branded men's fashion goods within the same "Clothing & Accessories" department on Amazon.com. (*Id.*)

Amazon.com's customers are presented with both Koyono's and 7FAMK's products when shopping for SLIMMY products. (R. 14, Ex. 1, Ex. N.) That is, when a customer enters Koyono's trademark "SLIMMY" as a search term, consumers are presented with side-by-side pictures of both

Koyono's and 7FAMK's SLIMMY products creating the false impression that the parties' products are affiliated with one another. (*Id.*)

In addition to Amazon.com's search results commingling 7FAMK's and Koyono's SLIMMY products, when Amazon.com customers view 7FAMK's fashion products—including 7FAMK's non-SLIMMY fashion lines—Amazon.com's "recommendation engine" automatically recommends that its customers consider for purchase Koyono's SLIMMY products. (R. 14, Ex. 1, pp. 7–8.) By way of example of this recommendation feature, on April 22, 2011, Koyono's president cleared his browser's temporary internet files, history and cookies, and then searched Amazon.com for 7FAMK's products. (*Id.*) Upon placing a pair of 7FAMK's jeans, specifically the "Seven For All Mankind Men's Austyn Pant," into his online shopping cart, Amazon.com recommended for purchase several of Koyono's SLIMMY-branded products. (*Id.*) The recommendation included images of Koyono's SLIMMY-branded products preceded by a note that "Customers with Similar Searches Purchased" these recommended products. (*Id.*)

Amazon.com is not the only overlap between Koyono's and 7FAMK's marketing channels. 7FAMK and Koyono also market and sell their SLIMMY-branded products through Google Shopping and thisnext.com, among other Internet sites. (R. 14, Ex. 1, p. 8.) These sites also present their

customers with both 7FAMK's and Koyono's SLIMMY-branded products.

*(Id.)* For instance, on April 21, 2011, a search for the keyword "slimmy"

under the "Shopping" tab at Google.com returned results for Koyono's and

7FAMK's SLIMMY-branded products, again creating the misleading

impression that Koyono's and 7FAMK's SLIMMY products are connected

with one another. *(Id.)* On April 21, 2011, a search for the keyword "slimmy"

on thisnext.com (a website dedicated to matching consumers with the hottest

products in fashion, beauty, lifestyle and home) also provided its customers

with Koyono's and 7FAMK's SLIMMY-branded products causing the

appearance that the products come from the same source. *(Id.)*

## SUMMARY OF THE ARGUMENT

- (1) Did the district court err in adopting a “relevant product market” test from antitrust law as the “essential test” for the “relatedness of goods” factor?**

This Court has never required products to be “identical” or “available substitutes” in order to be considered relate goods in the context of trademark infringement. The district court’s narrow, antitrust-based test for the “relatedness of goods” factor severely curtails the protections afforded to trademark owners in this Circuit.

- (2) Did the district court err by holding that the “similarity of marks” factor is neutral even though the parties use identical marks?**

The marks used by Koyono and 7FAMK are not just similar—they are identical. 7FAMK’s placement of its house mark in the vicinity of the SLIMMY mark does not eliminate the fact that both parties use the identical SLIMMY mark.

- (3) Did the district court err by holding that the “marketing channels used” factor is neutral even though the parties sell their SLIMMY-branded goods in the same channels of trade to the same customers?**

Both Koyono and 7FAMK sell their SLIMMY-branded fashion products to retail consumers through the “Clothing & Accessories” department at Amazon.com, as well as through other overlapping Internet channels. The

district court disregarded the evidence of overlap, and instead focused on the existence of marketing channels where there is no overlap. Therefore, the district court erred in holding that the “marketing channels used” factor is neutral.

- (4) Did the district court err by evaluating the “likely degree of Purchaser care” factor only with respect to 7FAMK’s full-priced SLIMMY-branded jeans giving no consideration to evidence of 7FAMK’s inexpensive SLIMMY-branded shirts and discounted SLIMMY-branded jeans?**

Koyono’s SLIMMY-branded products sell at prices ranging from \$37.00 to \$53.00. 7FAMK’s SLIMMY-branded shirts sell for as little as \$69.00 and its SLIMMY-branded jeans sell for as little as \$99.79. Therefore, the district court erred in holding that the price difference (\$16.00) between Koyono’s products and 7FAMK’s products suggests that consumers exercise a greater degree of care when selecting 7FAMK’s products.

## ARGUMENT

In determining whether a district court has properly denied a preliminary injunction, this Court reviews factual findings for clear error and legal conclusions *de novo*. *Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 958 (6th Cir. 2004). The district court denied Koyono's request for a preliminary injunction based on its holding that there is not any likelihood of consumer confusion caused by 7FAMK's and Koyono's concurrent use of the SLIMMY trademark on fashion goods. The district court's determination that there is not any likelihood of confusion contains erroneous legal conclusions and clear factual errors.

When determining if there is any likelihood of confusion, “[w]hat is important is not whether people will necessarily confuse the marks, but whether the marks will be likely to confuse people into believing that the goods ... emanate from the same source.” *Abercrombie & Fitch v. American Eagle Outfitters*, 280 F.3d 619, 648 (6th Cir. 2002). Whether there is a likelihood of confusion is based upon consideration of the following eight factors:

- (1) strength of plaintiff's mark;
- (2) relatedness of the goods;
- (3) similarity of the marks;
- (4) evidence of actual confusion;

- (5) marketing channels used;
- (6) likely degree of purchaser care;
- (7) defendant's intent in selecting the mark; and
- (8) likelihood of expansion of goods.

*Frisch's Restaurants, Inc. v. Elby's Big Boy*, 670 F.2d 642, 648 (6th Cir. 1982).

A party claiming infringement need not show all or even most of the Frisch factors in order to prevail. *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988). Additionally, these eight factors are not accorded equal weight. *Autozone, Inc. v. Tandy Corp.*, 373 F.3d 786, 795 (6th Cir. 2004). The three most important factors are relatedness of goods, marketing channels used and similarity of marks. *Paccar Inc. v. Telescan Technologies, L.L.C.*, 319 F.3d 243, 254-255 (6th Cir. 2003); *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1108-1109 (6th Cir. 1991).

Of the three most important factors, the district court determined that the “marketing channels used” factor and the “similarity of marks” factor were neutral and held that the “relatedness of goods” factor weighed against a finding of likelihood of confusion. The district court should have granted Koyono's request for a preliminary injunction because all three of these important factors support the likelihood of confusion. For the sake of argument, however, a preliminary injunction would have been proper if the

district court had held that only one of these three critical factors weighed in favor of likelihood of confusion, while finding that the other two significant factors were neutral.

**1. The district court erred by incorrectly adopting from antitrust law the “relevant product market” test as the “essential test” in its analysis of the “relatedness of goods” factor.**

In its analysis of the “relatedness of goods” factor, which is one of the three most important factors when determining likelihood of confusion, the district court clearly erred by adopting the “relevant product market” test used to determine if there is monopoly power in violation of the Sherman Act. The district court held that “[t]he essential test for ascertaining the relevant product market involves the [sic] identifying products or services that are either (1) identical to or (2) available substitutes for the defendant’s product or service,” citing *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956). *E.I. DuPont* does not involve trademark infringement, but instead involves claims of monopolizing, attempting to monopolize and conspiracy to monopolize in violation of the Sherman Act. *E.I. DuPont*, 351 U.S. at 378. The “relevant product market” test is used to determine the extent of a defendant’s market control when assessing whether or not the defendant has monopoly power in violation of the Sherman Act, and has no bearing on the relatedness of goods in the context of trademark infringement. *Id.* at 380. Relying on the “relevant

product market” test used in antitrust matters, rather than the appropriate “relatedness of goods” factor applied in trademark infringement cases, the district court held that the “relatedness of goods” factor favors 7FAMK because “SLIMMY cut Seven For All Mankind jeans and shirts are neither identical to, nor a substitute for Konoyo [sic] SLIMMY wallets.” (Opinion, p. 9.)

Contrary to the district court’s holding, this Court does not require products to be “identical” or “available substitutes” in order to be related goods in the context of trademark infringement. The “relatedness of goods” factors focuses on “whether goods or services with comparable marks that are similarly marketed and appeal to common customers are likely to lead consumers to believe that they ‘come from the same source, or are somehow connected with or sponsored by a common company.’” *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 633 (6th Cir. 2002). Therefore, the district court committed reversible error when it held that the “relatedness of goods” factor favors 7FAMK because “SLIMMY cut Seven For All Mankind jeans and shirts are neither identical to, nor a substitute for Konoyo [sic] SLIMMY wallets.” (Opinion, p. 9.)

The application of the appropriate legal standard for the “relatedness of goods” factor supports likelihood of confusion. That is, it is likely that the

consuming public will mistakenly associate 7FAMK's SLIMMY jeans and SLIMMY shirts with Koyono's SLIMMY wallets. 7FAMK and Koyono are both in the fashion industry. They both sell wallets. They both sell fashion apparel. They both sell fashion accessories.

Moreover, 7FAMK and Koyono market their SLIMMY-branded fashion goods within the same channels of trade, such as Amazon.com, further supporting the likelihood that consumers will believe that 7FAMK's and Koyono's SLIMMY-branded products are related. As this Court has noted, "[t]he question is, are the [goods] related so that they are likely to be connected in the mind of a prospective buyer." *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1109 (6th Cir. 1991). The answer to this touchstone question is, yes, Koyono's and 7FAMK's goods are related so that they are likely to be connected in the mind of a prospective buyer because Koyono and 7FAMK sell similar products bearing the identical SLIMMY mark within the same channels of trade.

Based on the district court's adoption of the incorrect legal standard with respect to the "relatedness of goods" factor, Koyono respectfully requests that this Court reverse the district court's denial of Koyono's motion for a preliminary injunction with instructions that the district court grant the injunction.

**2. The district court erred by holding that the “similarity of marks” factor for likelihood of confusion is neutral even though the parties use identical marks.**

Despite the district court’s acknowledgment that Koyono and 7FAMK “use the identical SLIMMY mark,” the district court nonetheless held that any likelihood of confusion is sufficiently diminished by 7FAMK’s placement of its house mark on all of its SLIMMY goods. (Opinion, p. 9.) In support of this legal conclusion, the district court misrepresented this Court’s holding in *Therma-scan, Inc.*, 295 F.3d at 634, claiming the Court held that “defendant’s placement of BRAUN house mark near ‘Thermoscan’ mark on product packaging decreases any likelihood of confusion with plaintiff’s ‘Therma-scan’ mark.” (Opinion, at p. 9.) In fact, this Court outright rejected the district court’s position:

Thermoscan contends that despite these similarities [between the THERMA-SCAN and THERMOSCAN marks], the prominent display of the BRAUN name on all thermometers and packaging reduces the likelihood of confusion ... **The presence of the BRAUN label on Thermoscan’s thermometers, however, does not eliminate the similarity between the trademarks.** Instead, this labeling diminishes the likelihood of confusion created by the comparable marks and reduces the importance of this factor ... The similarity of the [THERMA-SCAN and THERMOSCAN] marks thus **increases** the likelihood of confusion, although the presence of the BRAUN name on Thermoscan’s products decreases the significance of this factor.

*Therma-scan, Inc.*, 295 F.3d at 634 (emphasis added).

Simply put, 7FAMK's and Koyono's SLIMMY marks are more than similar—they are identical. Thus, the district court committed clear error when it determined that the “similarity of marks” factor is neutral. Contrary to the district court's holding, 7FAMK's placement of its house mark on its SLIMMY products does not eliminate the fact that 7FAMK and Koyono use identical marks, but only reduces the importance of the “similarity of marks” factor.

Koyono respectfully requests that this Court reverse the district court's denial of Koyono's motion for preliminary injunction based on the district court's incorrect analysis of the “similarity of marks” factor.

**3. The district court erred by holding the “marketing channels” factor is neutral even though the parties sell their SLIMMY-branded products in the same channels of trade.**

The district court erred by holding that the marketing channels factor is neutral, expressly disregarding the parties' overlapping use of the same online retail stores, such as Amazon.com, to market their SLIMMY-branded products:

Seven For All Mankind sells its wares at company-owned retail, stores, high-end department stores and boutiques. The two companies' products are rarely sold in the same traditional retail outlets. The two

companies' products are both retailed over the internet, however, through sites like Amazon.com. This Court will consider this factor neutral.

(Opinion, p. 10.) Contrary to the district court's holding, this Court has held that use of the internet as a marketing channel may **increase** the likelihood of confusion. *Paccar Inc.*, 319 F.3d at 252–253.

The “marketing channels” factor, which requires a twofold analysis, weighs in favor of likelihood of confusion. This factor analyzes (1) how the parties' respective goods are sold and (2) to whom the parties' respective goods are sold. *Homeowners Group*, 931 F.2d at 1110. With respect to “how” the respective goods are sold, the focus is on whether there is any overlap between the parties' channels of trade. *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Center*, 109 F.3d 275, 286 (6th Cir. 1997). The likelihood of confusion increases relative to the extent of overlap between the parties' marketing channels. In *Wynn Oil Co.*, 839 F.2d at 1888, this Court held that even a minimal overlap of marketing channels increases the likelihood of confusion, albeit not significantly. In this case, both 7FAMK and Koyono sell their SLIMMY-branded goods at the same online retail stores, including Amazon.com. When Amazon.com customers shop for SLIMMY products, they are presented with both 7FAMK's and Koyono's SLIMMY fashion products, thereby creating the false appearance that 7FAMK's and Koyono's

SLIMMY products are somehow related. This overlapping use of the same online stores—whether great or small in the context of the parties’ overall sale of goods—weighs in favor of likelihood of confusion. As such, the district court erred when it wholly disregarded the parties’ overlapping use of the Internet to market their respective SLIMMY goods.

The district court did not analyze “to whom” 7FAMK and Koyono sell their products in its analysis of marketing channels. When analyzing “to whom” the parties sell their respective products, the focus is on whether one buyer might purchase the products of both parties. *Homeowners Group*, 931 F.2d at 1110. For instance, when one of the parties sells its products to retail buyers while the other party sells its products to commercial buyers, there is little likelihood that one buyer ever purchases both products, which diminishes the likelihood of confusion. *Id.* Both 7FAMK and Koyono sell to **retail** buyers, making it likely that the same buyers will purchase both of the parties’ SLIMMY-branded products. Therefore, the “to whom” analysis of the marketing channels factor weighs in favor of likelihood of confusion.

Based upon the district court’s erroneous holding that the parties’ overlapping use of the Internet did not increase the likelihood of confusion, and its failure to analyze to whom the parties sell their goods, Koyono

respectfully requests that this Court reverse the district court's denial of Koyono's motion for a preliminary injunction with instructions to the district court to grant the injunction.

4. **The district court erred by evaluating the “likely degree of purchaser care” factor only with respect to 7FAMK’s full-priced SLIMMY-branded jeans while disregarding 7FAMK’s inexpensive SLIMMY-branded shirts and discounted SLIMMY-branded jeans.**

The district court found that the likely degree of purchaser care factor favors 7FAMK because “consumers that pay between \$150 and \$200 for jeans practice a greater degree of purchaser care.” (Opinion, p. 11.) In support of this finding, the district court held that “[r]egarding an inexpensive item, for instance, a customer would be less careful in making a purchasing choice than if the item were expensive. A reasonable person would make much more careful inquiry before purchasing an expensive item.” The district court, however, overlooked evidence establishing that 7FAMK sells its SLIMMY-branded jeans on Amazon.com for the discounted price of \$99.79 and its SLIMMY-branded shirts for \$69.00. These prices are much closer to Koyono's prices (\$37.00 to \$53.00) for its SLIMMY-branded products. Based on this evidence, the district court should not have held that the “likely degree of purchaser care” factor weighs against likelihood of confusion.

Accordingly, the district court committed clear error when it disregarded evidence that supports likelihood of confusion. Koyono respectfully requests this Court to reverse the district court's denial of its motion for preliminary injunction with instructions to grant the injunction.

## CONCLUSION

For the foregoing reasons, the District Court's Order denying Plaintiff-Appellant Koyono Co.'s Motion for Preliminary Injunction should be reversed, with instructions to grant a preliminary injunction.

Respectfully submitted,

*/s/ Victor J. Wasylyna*

Date: October 20, 2011

---

Victor J. Wasylyna (0076596)  
WALTERS & WASYLYNA, LLC  
1185E Lyons Road  
Dayton, Ohio 45458  
Telephone: (216) 785-0044  
Facsimile: (216) 395-0115  
Email: victor@wwiplaw.com

*Attorney for Plaintiff-Appellant*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 4,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because the brief is set in 14 point Calisto MT typeface (a proportionally spaced typeface).

*/s/ Victor J. Wasylyna*

---

Victor J. Wasylyna

## CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2011, I electronically filed the foregoing with the Court using the CM/ECF system, which will electronically send notice of such filing to Timothy P. Fraelich, attorney for Seven For All Mankind, LLC.

*/s/ Victor J. Wasylina*

---

Victor J. Wasylina

**DESIGNATION OF DISTRICT COURT DOCUMENTS**

Koyono designates the following portions of the electronic record as an addendum to this brief:

<b>Description of Record Entry</b>	<b>Record Entry Number</b>
Complaint	1
Koyono's Motion for Preliminary Injunction	14
7FAMK's Memorandum in Opposition to Motion for Preliminary Injunction	16
Koyono's Memorandum in Reply to 7FAMK's Memorandum in Opposition	17
Entry and Order Denying Motion for Preliminary Injunction	22
Notice of Appeal	23