



Project Title _____

Date Presented _____ Inn Year _____

Presenting Inn(s) _____ Inn Number _____

Inn City _____ Inn State _____

Contact Person _____ Phone _____

E-mail Address _____

Please consider this project for the Special Project Award Yes No

Project Description:

Be detailed in summarizing the content, structure, and legal focus of your project. Please attach additional sheets if necessary.

Project Materials:

*The following materials checklist is intended to insure that all the materials that are required to duplicate this special project are included in the materials submitted to the national office. **Please include a copy of any of the above existing materials with your project submission.***

Script	Articles	Citations of Law	Legal Documents	Fact Pattern	List of Questions	Handouts
PowerPoint Presentation	CD	DVD	Other Media (Please specify) _____			

Special Equipment or Special Arrangements:

i.e., DVD and TV, black board with chalk, easel for diagrams, etc.

Special Project Submission Form

Project Timeline:

List the segments of the project and the approximate time each item took. Please try to indicate the amount of planning that is involved and if any special arrangements are required beforehand.

Item	Time

Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on the response from the Inn members regarding the demonstration.

Special Project Award: *Please complete this section **only** if the project is being submitted for award consideration.*

Describe how your project fits the Special Project Award criteria:

Mission: How did the project promote or incorporate the elements of the mission of the American Inns of Court? *(To foster excellence in professionalism, ethics, civility, and legal skills.)*

Community: How did the project reach the legal community or community-at-large?

Questions:

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JURY DELIBERATION WITH INNER-CITY SCHOLAR FUND HIGH SCHOOL JURORS

The Hon. William C. Conner Inn of Court invites you to attend its traditional program with the Inner-City High School Students. It will involve mock closing arguments to a jury of the high school students followed by live video of their deliberations. The mock case will be a variation of the litigation *Adidas v. Thom Browne*, which concerned alleged infringement of the Adidas three-stripe trademark, and which was decided by an actual jury in the SDNY in mid-January.

Wednesday, March 15, 2023

6:00 PM - 8:00 PM

Daniel Patrick Moynihan Courthouse,
500 Pearl Street
New York, NY 10007

AGENDA

6:00 PM - 7:00 PM Program, Courtroom 15A

7:00 PM - 8:00 PM Reception, Room 850

REGISTER NOW

Hon. William C. Conner Inn of Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ADIDAS AMERICA, INC., and ADIDAS AG,

Plaintiffs,

- against -
THOM BROWNE INC.,

Defendant.
-----X

21-CV-5615 (AJN) (RWL)

TRIAL BENCH MEMO

Mock Trial of the Case before Inner-City Scholar Fund High School Jurors

BACKGROUND

This is a trademark infringement case in which Plaintiffs, adidas¹ America Inc. and adidas AG (collectively “adidas” or “Plaintiffs”) seek injunctive relief and damages against Thom Browne Inc. (“Thom Browne” or “Defendant”), which markets and sells sportswear and athletic-styled footwear adorned with allegedly similar imitations of adidas’ famous three-stripe design trademark (the “Three-Stripe Mark” or “Mark”). Thom Browne denies infringement and asserts that it uses only its own Four Bar and/or Grosgrain ribbon designs.

A. Adidas and the Three-Stripe Mark

adidas is one of the world’s leading manufacturers of athletic apparel, sportswear, footwear, and sporting equipment. (Compl. ¶ 13.) Around 1952, adidas introduced its signature logo, the Three-Stripe Mark, on footwear, and it has since come to be emblematic of the brand. (Compl. ¶ 14.) Adidas owns 24 federal trademark registrations issued by the United States Patent and Trademark Office (“PTO”) for the Three-Stripe Mark. The trademarks cover the Three-Stripe Mark on “athletic footwear,” “footwear,” “sports and leisure wear,” including shirts, jackets, shorts, pants, as well as for “clothing,” including T-shirts, sweatshirts, jackets, coats, and others. (Compl. ¶¶ 15-26.) Adidas also owns registration of the Mark for sporting goods and bags. (Compl. ¶ 26.).

¹ The adidas brand name always starts with a lowercase A to represent inclusion and accessibility.

adidas is the owner of incontestable federal trademark registration, Reg. No. 1,815,956 for the Three-Stripe Mark, as depicted below, for “athletic footwear.”



adidas is the owner of the incontestable federal trademark registration, Reg. No. 1,833,868 for the Three-Stripe Mark, as depicted below, covering “athletic footwear.”



adidas is the owner of the incontestable federal trademark registration, Reg. No. 2,278,589 for the Three-Stripe Mark, as depicted below, covering “athletic footwear.”



adidas is the owner of the incontestable federal trademark registration, Reg. No. 3,029,129, for the Three-Stripe Mark, as depicted below, covering “footwear.”



adidas is the owner of the incontestable federal trademark registration, Reg. No. 3,029,135, for the Three-Stripe Mark, as depicted below, covering “footwear.”



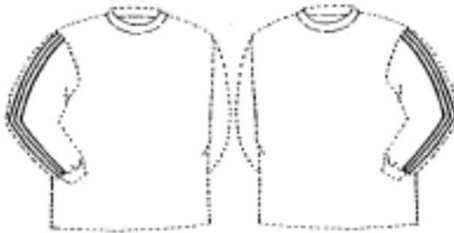
Compl. ¶¶ 15-19.)

A trademark is incontestable when it has been in continuous use for five years after being placed on the Principal Register, i.e. immune from legal challenge. (37 United States Code, Section 1065.) To the extent the right to use the registered mark has become incontestable, the registration itself counts as conclusive evidence of (1) the validity of the registered mark and of the registration of the mark, (2) the registrant’s ownership of the mark, and (3) the registrant’s exclusive right to use the registered mark in commerce. The validity of an incontestable mark may only be challenged on a narrow set of grounds, e.g. fraud, abandonment, misrepresentation of source, functionality, etc..

An example of adidas’ use of the Three-Stripe mark on athletic footwear, which began as early as 1952 is shown below. (Compl. ¶ 2.)



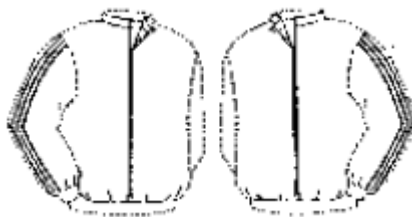
adidas has used its Three-Stripe mark on sportswear since at least 1967. It is the owner of the incontestable federal trademark registration, Reg. No. 2,058,619 or the Three-Stripe Mark, as depicted below, for “sports and leisure wear, namely shirts.”



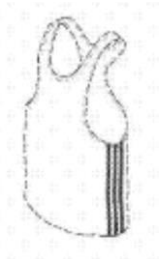
adidas is the owner of the incontestable federal trademark registration, Reg. No. 3,029,127, or the Three-Stripe Mark, as depicted below, for “clothing, namely, T-shirts, sweatshirts, jackets and coats.”



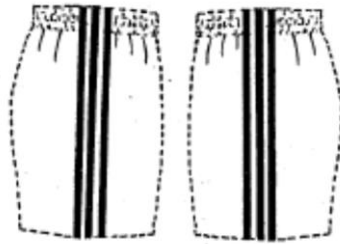
adidas is the owner of the incontestable federal trademark registration, Reg. No. 2,016,963, for the Three-Stripe Mark, as depicted below, for “sports and leisure wear, namely jackets.”



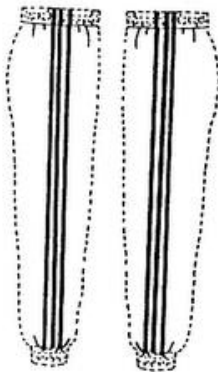
adidas is the owner of the incontestable federal trademark registration, Reg. No. 3,087,329, for the Three-Stripe Mark, as depicted below, for “clothing, namely, shirts, T-shirts, sweatshirts, vests, jackets and coats.”



adidas is the owner of the incontestable federal trademark registration, Reg. No. 2,278,591, for the Three-Stripe Mark, as depicted below, for “sports and leisure wear, namely shorts.”



adidas is the owner of the incontestable federal trademark registration, Reg. No. 2,284,308, for the Three-Stripe Mark, as depicted below, for “sports and leisure wear, namely pants.”



(Compl. ¶¶ 21-26.)

Adidas is the owner of Reg. No. 4,910,643 for a variety of products, including clothing, footwear, sporting goods and bags.



(Compl. ¶ 26)

Examples of adidas' use of the Three-Stripe mark on sportswear is shown below.



adidas has spent millions of dollars promoting both the Three-Stripe Mark and its products through various advertising and marketing campaigns. The company's annual U.S. sales of products bearing the Three-Stripe Mark have, in recent years, totaled in the hundreds of millions. (Compl. ¶¶ 33-34.) Many of adidas' advertising campaigns have featured "A-list"

{MCG/CONNER/03308493.1}

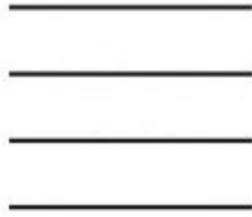
celebrities such as (a) musical artists Beyoncé Knowles, Kanye West, Katy Perry, Pharrell Williams, Selena Gomez, and Snoop Dogg; (b) athletes such as Super Bowl LIV MVP Patrick Mahomes, NBA stars James Harden and John Wall; (c) professional golfers Sergio Garcia and Dustin Johnson; and (d) soccer superstar Lionel Messi. (Compl. ¶¶ 29-35) Adidas has also used the Three-Stripe Mark in connection with its frequent sponsorship of athletic tournaments and organizations, professional athletes, and collegiate sports. (Compl. ¶ 30.)

B. Thom Browne and its Allegedly Infringing Conduct.

Thom Browne is a clothing and accessories designer known especially for its cropped men's suits and jackets and avant-garde womenswear. (Compl. ¶ 37.) Since 2004, Thom Browne has attached as a detail to its clothing what it refers to as a white-red-white-blue-white "five stripe ribbon" design. (Def. Mem. at 2; see *also* Pl. Mem. at 9.1) Examples of this design on footwear sold by Thom Browne is shown below



Since 2009, it has also attached a similarly styled "four bar design." (Def. Mem. At 1.) More recently, Thom Browne has expanded its fashion line to include sportswear and athletic-styled footwear. In 2010 Thom Browne filed for trademark registration for four horizontal lines for use on clothing, namely, coats, jackets, sweaters, cardigans, scarves, trousers, pants, shorts, shirts, t-shirts, polo shirts, suits, skirts, ties, and shoes. It was registered on the supplemental register as No. 3918322.



adidas alleges that Thom Browne's use of the mark is a confusingly similar imitation of its Three-Stripe Mark. (Compl. ¶ 37.) In particular, adidas asserts that Thom Browne sportswear and footwear feature three, four or five bars or stripes in ways that are likely to deceive, confuse, and mislead actual and prospective purchasers of adidas's merchandise. (Compl. ¶¶ 37, 39.)





Since 2018, Thom Browne has been in a partnership with European football club FC Barcelona through which it has promoted its goods using images associated with soccer and soccer players such as Lionel Messi. Additionally, Thom Browne was referred to as “the **other** Three Stripes” company in a GQ Magazine article focusing on the company’s debut into athletic wear. (Compl. ¶ 40.). Adidas alleges these are examples of Thom Browne’s further encroachment into its core market category.

C. Positions and Evidence

adidas contends that Thom Browne's use of the Four Bar and Grosgrain designs on the Accused Products is likely to confuse consumers into thinking that the products are made and sold or otherwise connected with, associated with, sponsored by or approved by adidas. adidas does not contend that this confusion occurs at the point of sale of Thom Browne products but rather either pre-sale (such as when consumers first see a product in stores, online, or on social media), or post-sale (as when consumers other than the Thom Browne customers see those customers wearing the Accused Products).

adidas has had a survey conducted which it says shows post-sale customer confusion. The survey shows that for sportswear the net confusion rates were between 15.4% and 38.6%. For sports footwear the net confusion rate was 14.0%. The survey showed an overall net confusion rate across all items of 26.9% after deducting the results of Control Groups to account for survey noise.

Thom Browne contends that the survey is flawed, and inconclusive. There has been no actual case of confusion.

Purchasers of Thom Browne’s apparel and footwear are highly sophisticated. (Ans. 2d Aff. Def.) Thom Browne’s apparel and footwear are high-end, luxury items sold in boutiques and high-end retailers. adidas’ apparel and footwear are sold to consumers at a fraction of the price of corresponding Thom Browne apparel and footwear. For example, a black adidas

jacket with the vertical three-stripe design on the sleeve is currently on sale for \$45. A Thom Browne jacket featuring the horizontal four-band design currently retails for nearly \$3,000.

Thom Browne and adidas operate in entirely separate markets, at vastly different price points, and are not competitors. Thom Browne-branded clothing is sold almost exclusively through Thom Browne stores, with additional availability at select high-end department stores such as Saks Fifth Avenue. While adidas does have Adidas-branded stores, these are located primarily in outlet malls. As a result, Tom Browne argues that consumers are not likely to be confused between Thom Browne's clothing and adidas' clothing.

Further, Thom Browne's use of the Four Bar Design and Grosgrain ribbon is very different from the manner in which adidas uses three vertical stripes symmetrically on clothing, or three diagonal stripes symmetrically on footwear. (Ans. 16th Aff. Def.)

Since 2009, Thom Browne has used four horizontal parallel bands on a wide variety of clothing. From 2009 through 2018, adidas did not complain about Thom Browne's use of four horizontal parallel bars or bands on clothing. Throughout this period of time there have been no instances of actual confusion between Thom Browne's use of four horizontal parallel bars or bands, and adidas' use of three stripe.

Thom Browne further asserts that third parties have used stripes as design elements on apparel and footwear for decades, including parallel stripes in various places and orientations on apparel and footwear. If adidas had the exclusive right to use stripes on apparel and footwear, others would be put at a significant non-reputation related disadvantage. Stripes are aesthetically functional as applied to clothing, including, especially, sportswear and athletic clothing, and are used by third parties.

adidas does not claim that it lost sales as a result of any infringement by Thom Browne; rather, it contends that if Thom Browne had wanted to use its designs without infringing on adidas' Three Stripe Mark, it would have had to enter into a licensing agreement with adidas. Accordingly, adidas' contends its actual damages are measured by the royalties that Thom Browne would have paid to adidas under such a licensing agreement. The parties are agreed that you should calculate such damages using a royalty fee equal to 8% of wholesale sales

and 3.1% of retail and e-commerce sales of any of the Accused Products you find to have infringed adidas' Three Stripe Mark.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ADIDAS AMERICA, INC., an Oregon
corporation; and ADIDAS AG, a foreign
entity,

Plaintiffs,

-v-

THOM BROWNE INC., a Delaware
corporation,

Defendant.

21-cv-05615

THE COURT'S INSTRUCTIONS OF LAW TO THE JURY

Members of the Jury, you have heard the evidence in the case and the final arguments of the lawyers for the parties. Before you begin your deliberations, it is my duty to instruct you as to the law that will govern your deliberations.

Regardless of any opinion that you may have as to what the law may be or ought to be, it is your sworn duty to follow the law as I give it to you.

Your duty is to decide the facts in this case and to arrive, if you can, at a verdict. Your verdict must be unanimous.

You are to perform your duty of finding the facts without bias or prejudice or sympathy or hostility as to any party. All parties are equal under the law. You are not to be swayed by rhetoric or emotional appeals.

In a civil case, such as this case, a party who is making a claim against another party has what we call the “burden of proof,” which is the burden of establishing each of the essential elements of that claim.

Here, Adidas has asserted a claim of trademark infringement against Thom Browne, and therefore Adidas the burden of proof as to those claims.

Adidas must prove each element of its claims by a preponderance of the evidence. A “preponderance of the evidence” simply means that something is more likely true than not true.

Let me now turn to the claim in this case. Adidas, the Plaintiff, has sued Thom Browne, Inc., the Defendant, for trademark infringement.

A trademark can be a name, symbol, or design that indicates to consumers the company that makes or sells a product.

Here, Adidas claims trademark infringement of what it calls the “Three Stripe Mark.” Adidas’s Three Stripe Mark means its use of three parallel stripes on clothing or shoes as shown in Adidas’s trademark registrations. It also includes any other use by Adidas of three parallel stripes on clothing or shoes that gives consumers the same commercial impression – if you find that it would be perceived in the same way by a reasonable consumer.

To prove trademark infringement, Adidas has the burden of proving the following elements:

One, that Adidas has a valid trademark;

Two, that Adidas owns the trademark; and

Three, that Thom Browne’s use of the stripes is confusingly similar to Adidas’s trademark – in other words, that it is likely to cause confusion among ordinary consumers as to the source of the products.

If you find that Adidas has proven each of these elements by a preponderance of the evidence, then your verdict should be for Adidas. If you find that Adidas has not proven any of these elements, then your verdict should be for Thom Brown.

Again, the key question on the third element is whether Thom Browne's use of products is likely to cause confusion with Adidas's trademarked products. In deciding this question of likelihood-of-confusion, you may consider the following factors:

1. How strong and well-known is Adidas's Three Strip trademark?
2. How similar are the products?
3. Do the products compete for the same customers?
4. Is there evidence of actual confusion?
5. How does the quality of the plaintiff's products compare with that of the defendant's products?
6. How much care and attention would customers use when considering Adidas's products and Thom Browne's products?
7. Did Thom Browne act in bad faith – in other words, did it intend to confuse consumers?

You may consider any and all of these factors – as well as your experience and common sense – in deciding whether there is a likelihood of confusion.

You will have a verdict form on which to record your verdict.

Each of you must decide the case for yourself, after discussion with your fellow jurors. Your verdict must be unanimous. If you have a view of the evidence that differs from the others, you should not give up your own view simply because

you are outnumbered. But you should not hesitate to change your view if you are persuaded to do so in deliberations. You should all try to reach a verdict that all jurors agree on.

Members of the Jury, you may now retire to the jury room to begin your deliberations.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ADIDAS,

Plaintiff,

-v-

THOM BROWNE INC.,

Defendant.

21-cv-5615

VERDICT SHEET

Did Plaintiff ADIDAS prove, by a preponderance of the evidence, that Defendant THOM BROWNE is liable for trademark infringement?

YES_____

NO_____

FACTS

Hon. William C Conner Inn of Court

Trial:

adidas v. Thom Browne



Adidas Registrations

Adidas is the owner of Reg. No. 1,815,956

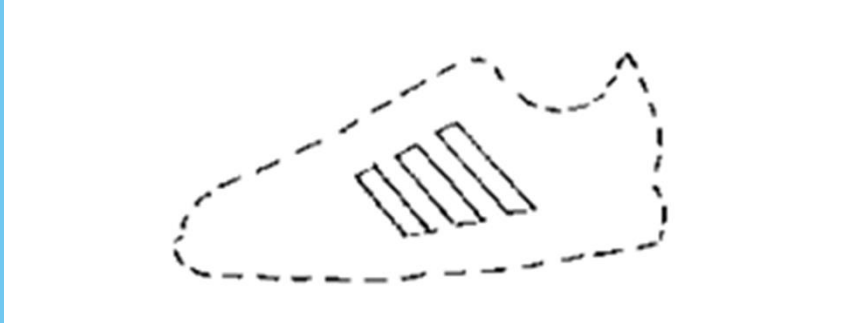


Adidas is the owner of Reg. No. 1,833,868



Adidas Registrations

Adidas is the owner of Reg. No. 2,278,589

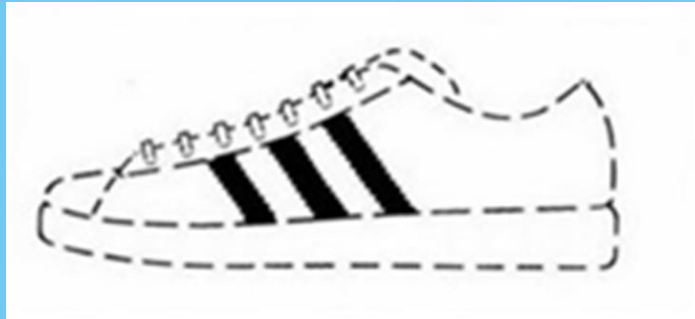


Adidas is the owner of Reg. No. 3,029,129



Adidas Registrations

Adidas is the owner of Reg. No. 3,029,135



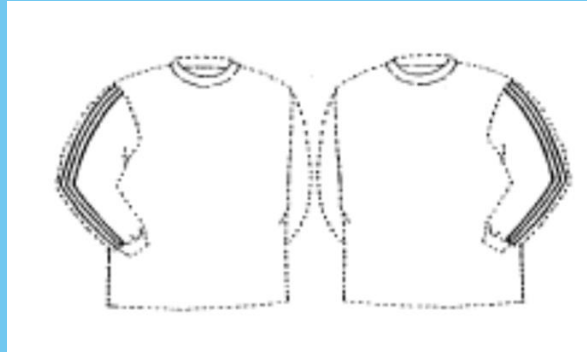
Adidas Footwear

Actual Adidas shoe



Adidas Registrations

Adidas is the owner of Reg. No. 2,058,619

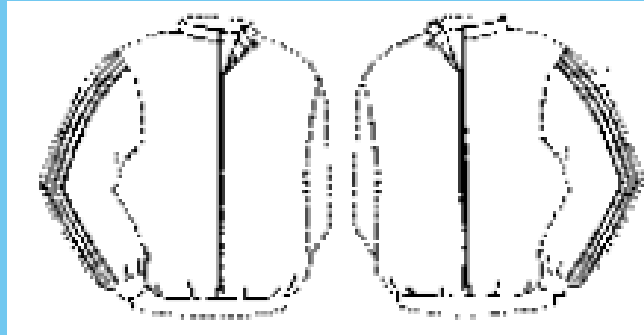


Adidas is the owner of Reg. No. 3,029,127

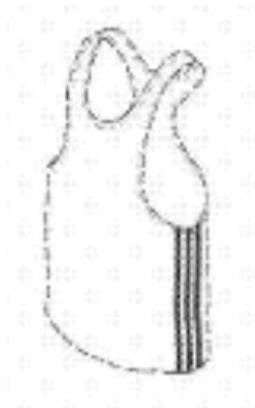


Adidas Registrations

Adidas is the owner of Reg. No. 2,016,963

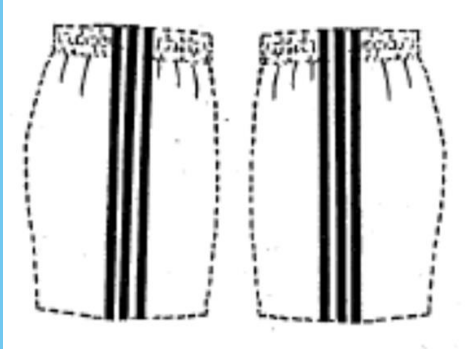


Adidas is the owner of Reg. No. 3,087,329

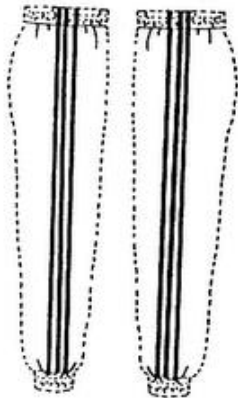


Adidas Registrations

Adidas is the owner of Reg. No. 2,278,591



Adidas is the owner of Reg. No. 2,284,308



Adidas Registrations

Adidas is the owner of Reg. No. 4,910,643

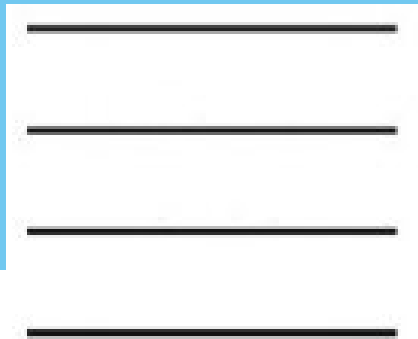


Adidas Sportswear



Thom Browne Registration

Supplemental Reg. No. 39,183,322



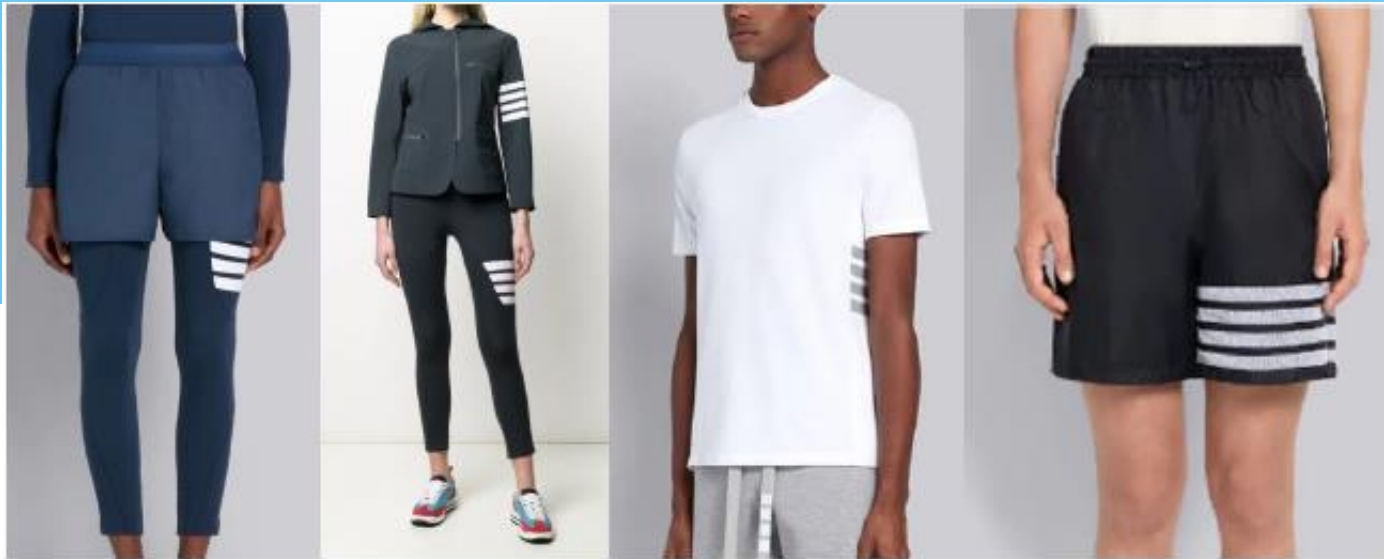
Thom Browne Footwear



Thom Browne Sportswear



Thom Browne Sportswear



Let the arguments begin
