

In the Office Action dated May 7, 2019, Applicant's applied-for trade dress was refused registration on the Principal Register despite Applicant's claim of acquired distinctiveness under Section 2(f) based on more than 11 years of substantially exclusive and continuous use.

Applicant hereby maintains that its applied-for mark as described in the mark description of record (hereinafter "trade dress") has acquired distinctiveness, and requests registration of its trade dress on the Principal Register under Section 2(f). Applicant respectfully submits that its extensive and substantial sales of its products with the trade dress and its use of the trade dress for over a decade, along with the following additional evidence, support its claim of acquired distinctiveness.

Applicant is an industry leader in manufacturing tactical gear, including backpacks, bags and other gear. As previously submitted, Applicant has been distributing its products with the distinctive trade dress since at least as early as September 2007. Through Applicant's use of the trade dress in commerce for over 12 years now, Applicant's trade dress has acquired distinctiveness. Although the last Office Action indicated that five years' use in this case is not sufficient to show acquired distinctiveness, Applicant has used its trade dress for a significantly longer period than 5 years. This use of over 12 years, if not alone sufficient, should be considered a significant and heavily weighted factor in establishing acquired distinctiveness.

Applicant previously indicated that it has enjoyed extensive sales of its products featuring the distinctive trade dress and even just one style of Applicant's packs which include its distinctive trade dress reached over \$10 million in sales as of March 2016. Updated figures show that in 2017 alone, Applicant sold over 58,300 units of its products with this trade dress. In 2018, the number of units sold increased to over 68,000. Revenue for the packs with the distinctive trade dress for these two years exceeded \$9.2 mil. *See* Declaration in Support of 5.11, Inc.'s Claim of Acquired Distinctiveness at Exhibit 1. With such tremendous sales numbers and figures, the recognition of Applicant's trade dress among relevant consumers is compelling and undeniable.

Applicant's products featuring its distinctive trade dress have been extensively reviewed by others on third party websites. Although such reviews also discuss certain functional features of Applicant's backpacks (as would be expected), what is regularly called out is the distinctive look and appearance of Applicant's backpacks which makes Applicant's goods stand out and easily distinguishable from other similar backpacks. Printouts of these reviews are attached as Exhibit 2, and excerpts from some of the reviews are below (with emphasis added):

"The iconic 5.11 RUSH 24. I originally did this review on a popular gear forum and took it down. Since then, I've been getting requests for EDC [every day carry] enthusiasts looking for it so I've decide to re-publish it here with a few updates. This is probably one of the most popular MOLLE packs out there....Honestly, the 5.11 RUSH 24 has so much internal organization that adding more pouches to the outside is usually unnecessary and it just results in cluttering up what I think is a **terrific looking pack.**" (from loadedpocketz.com)

"The Rush 24 has rugged **good looks and is definitely a head turner.** I get asked about it all the time and one dude at my gym purchased his own after checking mine out." (from benogrady.com)

“5.11 Tactical is one of the leading and most recognizable manufacturers of tactical gear. One of their fan favorites is their Rush series of backpacks... I don’t particularly like this bag when I commute because of **how much attention it draws**, but it does offer great versatility.” (from loadoutroom.com)

“It is hard to describe to people who just don’t get it... Regarding subtlety, this bag fails miserably. It virtually jumps up and down **screaming to be the center of attention**, so if you are conscious of drawing attention, then this may not be the best bag for you. (from knowpreparesurvive.com)

“Not only does it **look pretty cool**, it comes with some amazing features as well...” (from bestsurvival.org)

The following are samples of online reviews of third party backpacks. Applicant includes these to demonstrate that reviewers instantly recognized and assumed that these third party packs were knockoffs of Applicant’s backpacks because of the similarity of the trade dress. Printouts of these reviews are also submitted as Exhibit 2.

“The Alpha Ops is a clone of 5.11’s RUSH 12 pack. Knock-offs set off red flag for me. The Alpha Ops wasn’t hard to pick out.



At first glance, the Fieldline Tactical Alpha Ops Daypack looks very similar to the Rush 12. Notice the crease in the nylon....”



(from loadedpocketz.com)

“I was at Wally World (yuck) today, and I happen to notice a bag in the sporting goods section. Why would such a bag catch my attention? Perhaps, because I couldn’t believe Walmart would sell something awesome like the Rush 12 by 5.11...

Oh wait... That isn’t a Rush 12. Or is it?

Take a look. The knockoff on the left, my rush 12 on the right:”

Take a look. The knockoff on the left, my rush 12 on the right:



(from dentreviews.blogspot.com)

“This Pack Found At Walmart Looks Very Familiar.

Although there are numerous clones in the line, we decided to concentrate on the SOG Squadron Pack which bears a striking resemblance to the 5.11 Tactical Rush 24 backpack. Essentially, both are about the same size and serve the same purpose as backpacks but we don’t believe that the 5.11 Tactical product is patented. Instead, we see something amiss that is going to start showing up a lot; Trade Dress. For those unfamiliar with this term, it’s a form of intellectual property. Trade dress is a legal term of art that generally refers to characteristics of visual appearance of a product or its packaging that signify the source of the product to consumers.

SOG Squadron Pack



5.11 Tactical Rush 24



As you can see, aside from the overall look of the packs, there are several features in particular that are the same. What remains to be seen is if 5.11 Tactical has noticed (we are pretty sure they will after this story) and what, if anything they might do about it.” (from soldiersystems.net)

Applicant submits that these comments regarding the third party knockoffs looking exactly like Applicant’s backpacks indicate that (1) the look of Applicant’s backpacks is distinctive such that a copycat is immediately eye-catching and obvious, and (2) even “non-attorneys” not necessarily versed in trade dress find there to be something that is considered Applicant’s distinctive trade dress.

Below are some additional comments by consumers of Applicant’s products found on Amazon’s product reviews:

Referring first to her existing ECD bag, the Swiss Gear Bag, and then Applicant’s bag:
“Mine is the one that looks like every other EDC bag on the damn plane. I wanted a bag with more storage pockets and a different look.”

“It’s [sic] sleek design makes it look like more of a day pack but it holds considerably more.”

“also impressed me a lot with it’s [sic] look and quality of construction.”

“not only does it have a lot of room for gear, but looks pretty cool”

“I’m no expert in BAB bags, but this looks good.”

“It looks good”

“a rugged army look that stands out among other backpacking packs”

“This bag is sturdy, it looks nice and it has plenty of space.”

“Rugged, roomy, comfortable and great looking. Period.”

“It looks very nice and has tons and tons of compartments.”

“Lots of space and looks good.”

“The look, capacity and durability of this bag are just perfect.”

“This is one good rugged and looking pack too.”

“Holds everything I need for a carry one [sic] on and looks very cool.”

“Strong, durable, versatile, good looking!!”

“Looks are most important and this one is very appealing.”

(from Amazon.com)

These reviews and comments highlight the distinctive look that comprises Applicant’s trade dress and demonstrate that Applicant’s trade dress is well-recognized as a source identifying feature of Applicant’s goods. Of course, Applicant’s backpacks offer functionality, durability and other features that consumers may be looking for in a backpack. But what makes Applicant’s backpacks distinguishable from other packs (and immediately raises alarms of knockoffs) is a certain look and appearance. That distinctive look is Applicant’s recognizable trade dress.

There are also so numerous video reviews of Applicant’s packs on YouTube.com, both by Applicant and third parties. Applicant was unable to tally the number of video reviews, but guesses it is in the hundreds, if not more. Applicant’s attorney acknowledges that it has not viewed all of these videos, but includes screenshots below of a few of these YouTube reviews. These videos illustrate that Applicant’s packs with its distinctive trade dress is noticed and displayed in these reviews, which in aggregate have been viewed well over a million times.

This video review alone has received over 1.36 million views:



This review produced by Applicant has received over 300,000 views:



5.11 Tactical RUSH™ Backpacks - Choosing the Right One for You

300,229 views • Feb 15, 2016

1.7K 57 SHARE SAVE



5.11 Tactical
138K subscribers

SUBSCRIBE

40,780 views:



5.11 Tactical Rush 72 Backpack -- Full Review | Military, Outdoor, Everyday Carry (EDC) Backpack



BudgetBugout
Subscribe 146K

40,780 views

Add to Share More

650 22

Published on Jul 2, 2016

Check out my video review on my main everyday carry (EDC) backpack that I use for both work and travel. I've purchased both the Rush 12 and the Rush 72 from Amazon.com (links below).

179,061 views:

YouTube Search



511 RUSH 24 Back Pack Review

SensiblePrepper

Subscribe 480K

179,061 views


2,467 likes 98 comments

Published on May 17, 2017

511 RUSH 24 Back Pack Review. The RUSH Backpack series is one of the most popular bags on the market and for good reason. 511 Tactical : <http://www.511tactical.com/>

146,492 views:

YouTube Search



5.11 Rush 24 Review - EDC Backpack Champ

GadgetsNGear

Subscribe 19.4K

146,492 views

802 likes 64 comments

Published on Jul 12, 2013

These videos and the number of views clearly demonstrate that Applicant's goods with its distinctive trade dress are not just seen by a small group of tactical backpack consumers. Exposure of Applicant's goods bearing its distinctive trade dress is significant, extensive and undeniable.

To further promote its backpacks, Applicant regularly attends industry trade shows such as the well-known SHOT show. The SHOT trade show is an annual trade show for the shooting, hunting and firearms industry, and "is the biggest event of this type in the world together with IWA & Outdoor Classics ('IWA Nurember') also taking place annually." *See* wikipedia.org. The SHOT Show was first held in 1979. It is now among the top 25 trade shows in the U.S. and in 2018 had approximately 60,000 attendees. *See* wikipedia.org. Applicant maintains a booth at the SHOT Show and Applicant's booth includes a full wall display of its backpacks featuring its subject trade dress. *See* Declaration at Exhibit 1, Exhibit B. Applicant also attends and displays a wall of its packs featuring the distinctive trade dress at the National Rifle Association Carry Guard Expo, the FBI National Academy Associate Conference, and others. *See* Declaration at Exhibit 1. As a result of Applicant's efforts at these trade shows, Applicant's trade dress is viewed by thousands of potential customers, industry professionals and enthusiasts, and is recognized as distinctive trade dress for Applicant's goods.

Further, Applicant's marketing efforts include the "look for" evidence that calls attention to its distinctive trade dress. Applicant's own website at 511tactical.com highlights "5.11's signature Centerline™ design." *See* Declaration at Exhibit 1, Exhibit A. Applicant specifically identifies the recognizable center seam feature of its packs, which other backpacks do not have. In addition to its website, Applicant actively promotes its distinctive looking backpacks through social media. This YouTube video produced by Applicant to market and promote its distinctive looking backpacks has received over 86,000 views. It contains mostly images of its distinctive looking packs:



5.11 Tactical Backpacks - READY. LIKE YOU.

5.11 Tactical
 Subscribe 139K

86,230 views

Add to Share More

315 5

Published on Feb 10, 2016

Whether it's for an everyday load out, a day hike or an overnight trip, 5.11 Tactical has a bag that is ready for the situation. Our bags are relied on by first responders, military units and outdoor enthusiasts across the globe to help them keep mission critical gear close and ready for action.



5.11 Tactical Backpacks - READY. LIKE YOU.

5.11 Tactical
 Subscribe 139K

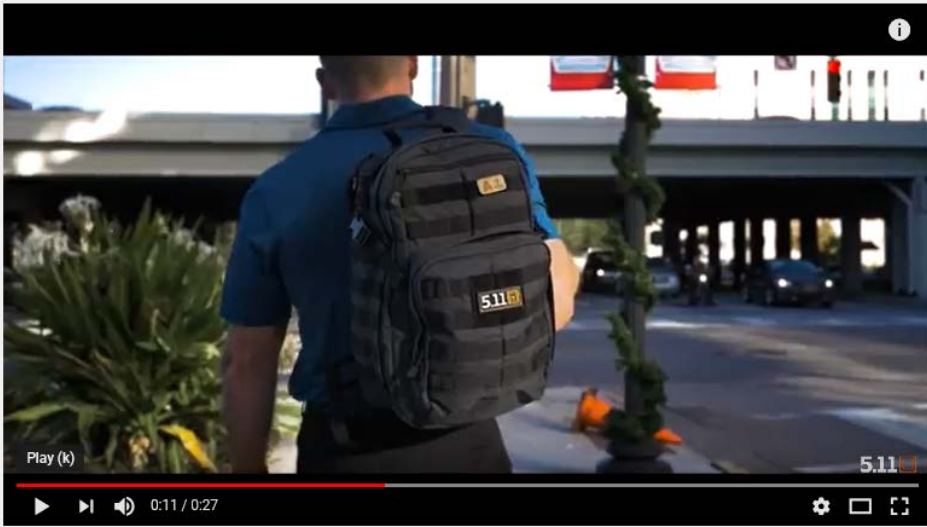
86,230 views

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 Subscribe 139K

86,230 views

+ Add to Share ... More

315 5

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On Instagram, Applicant also posts videos of its backpacks. This 8-second video contains no words or sounds and does nothing but show a time-lapse of Applicant's packs in the outdoors. It has received over 53,000 views:

5.11 511tactical • Follow

104w Reply

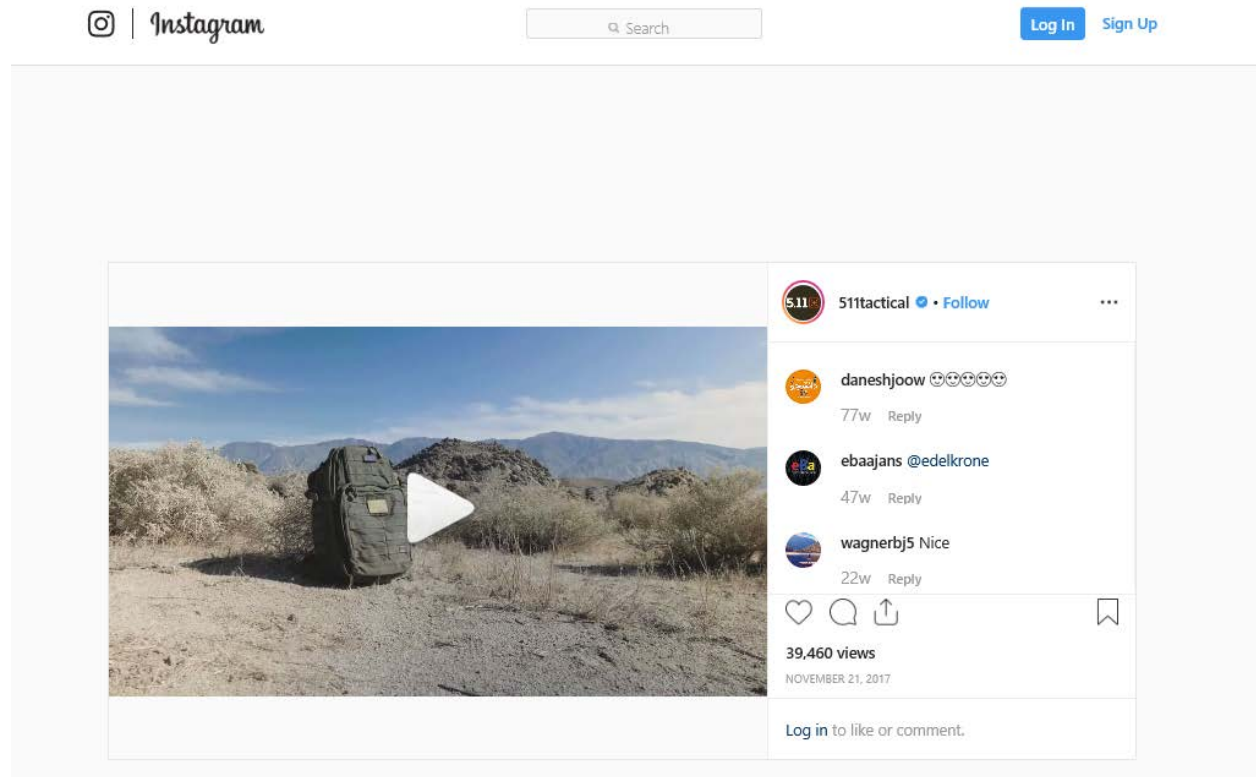
marcwinder153 Not a caption but I have a Rush 12 and was wondering what badder works best for that pack?
101w Reply

Iarujanjii @511tactical new caption# You can't withstand the toughness!!
91w Reply

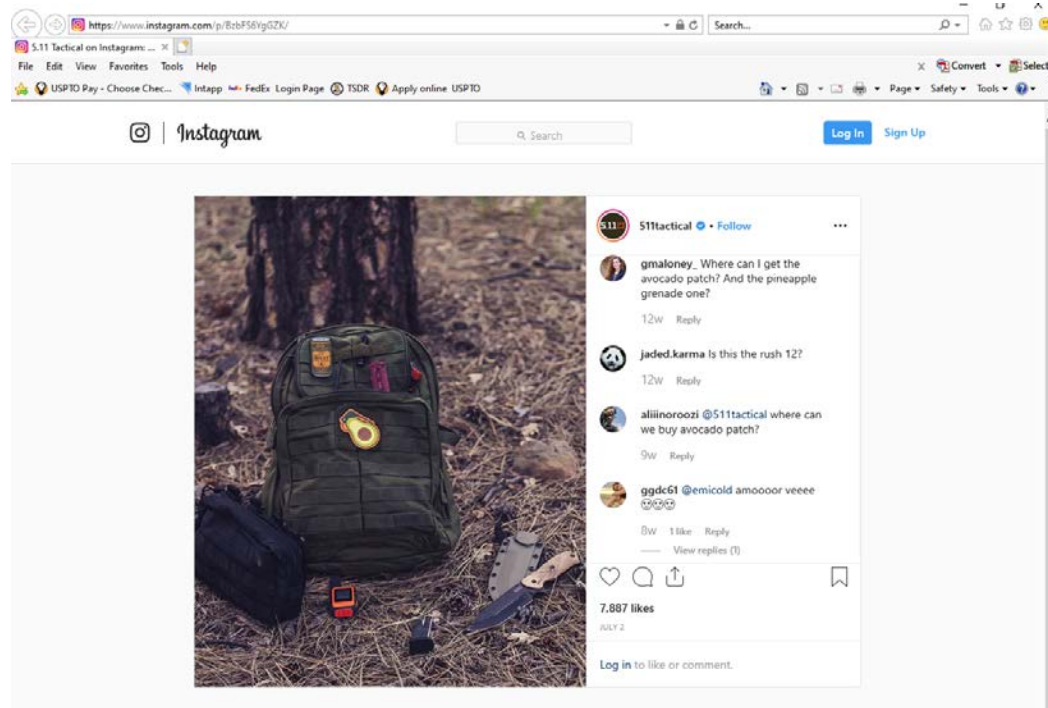
53,084 views
OCTOBER 3, 2017

Log in to like or comment.

Another Instagram video by Applicant that also contains no words or sounds but show a 7-second time lapse of Applicant's packs in the desert. It has received over 39,000 views:



Applicant also regularly posts photographs of its backpacks in interesting locations, such as in the middle of the woods, at the top of snow-capped mountains, even on Machu Picchu.





511tactical • Follow

dee_dott_@nailsbygee
74w Reply

gabriellaureano1989 Como eu consigo uma?, meu sonho!!
62w Reply

fedecrolla @vane_alciati lo zaino è molto simile a quello.. Sembra piccolo ma ci sta dentro tutta la casa!
52w Reply
View replies (1)

downsouthdesperado_ Would be nice if y'all stuff was American made
35w Reply

15,997 likes
MARCH 17, 2018

Log in to like or comment.



511tactical • Follow

missions with out my ruck and my laptop getting wet and still be able to carry a MK14 EBR comfortably on my back also with a easy draw velcro wrap for the barrel... if you can make the backpack waterproof I'll buy 2
47w 1 like Reply

tacticalsurvivaltools cool stuff
46w Reply

arger.airsoft Oof
45w Reply

lingotedor Cuál es el precio de esta mochila (72hrs) actualmente?
40w Reply

21,413 likes
NOVEMBER 27, 2018

Log in to like or comment.

511tactical • Follow

33w Reply

emmarosechristie @codymclay I want this bag! Hotshots sell them 😊

29w Reply

tilo6911 ❤️ I miss my Iggy ❤️❤️

29w Reply

alex_mckew Where do you get name tapes from? For your rush 12 and rush 24

21w Reply

bach007hd @laurie_turner_101

19w Reply

11,773 likes

JANUARY 14

Log in to like or comment.

511tactical • Follow

xnandosti Hi everyone am from peru living in New York 5.11 perfect store I can't wait to go to Machu Picchu for vacation

81w Reply

yeechoonwah Mountain biking? Climbing?

52w Reply

karim_odh_dz Machu picchu 😊

45w Reply

scubadiverkora183 french rush12 Bag pack FRFRFRFRFR

45w Reply

8,627 likes

SEPTEMBER 28, 2017

Log in to like or comment.

The reason these backpacks stand alone in these images is because of the unique, attractive and distinctive look of the backpacks. Without any persons or words commenting on any functional feature of the backpacks, the pictures of the packs alone can communicate the distinctive look that originates only with Applicant and distinguishes Applicant's backpacks from others. No other

backpacks offer the same look that Applicant's packs do. Impressively, Applicant notes that on Instagram, it has reached over 1 million followers, on Twitter it has 112,000 followers, and on Facebook it has a community of 1.26 million followers (with 1.25 million "likes"), indicating the extensive reach of its promotional activities via social media. Screenshots from Applicant's website, Facebook, Twitter and Instagram accounts showing Applicant's packs with its distinctive trade dress are attached as Exhibit A to Declaration at Exhibit 1. It is simply not possible for consumers to view Applicant's promotional materials and social media postings and not recognize or associate the distinctive trade dress of Applicant's packs with Applicant.

Applicant is not aware of widespread industry use or any major competitors that currently provide backpacks with trade dress similar to Applicant's packs. To the extent that Applicant has become aware of third party use of its trade dress, Applicant has been diligent in enforcing its trade dress rights against these third parties. Applicant has entered into several agreements with third parties that acknowledge that Applicant's trade dress is valid, distinctive and enforceable. *See* Declaration at Exhibit 1. Some of these agreements are confidential, but Applicant submits as Exhibit 3 one non-confidential agreement as a representative sample of third party recognition of Applicant's trade dress. *See* Exhibit 3.

As a result of the extensive and continuous use of Applicant's mark for over 12 years, the significant sales and promotion of its goods, its well-regarded and extensively-reviewed products, its presence and efforts in the industry, and its promotional efforts online and in social media of its products featuring the distinctive trade dress, Applicant's trade dress has a strong reputation among consumers and has gained substantial recognition as a source identifier, showing that the relevant public associates the claimed trade dress with Applicant alone. Accordingly, Applicant submits that the evidence overwhelming demonstrates that its trade dress has acquired distinctiveness and is registrable on the Principal Register under Section 2(f).