

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 14, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re SuperDraft, Inc.*  
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Serial No. 88255895  
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Nathan T. Harris of Lando & Anastasi, LLP for SuperDraft, Inc.

David I, Trademark Examining Attorney, Law Office 114,  
Laurie Kaufman, Managing Attorney.

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Before Cataldo, Adlin, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

SuperDraft, Inc. (“Applicant”) seeks registration on the Principal Register of the mark shown below for goods ultimately identified as “Apparel, namely, shirts, hats, sweatshirts, and jerseys,” in International Class 25:



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<sup>1</sup> Application Serial No. 88255895 was filed on January 9, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. The application originally covered goods in Classes 9, 21, and

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the registered mark shown below



for "clothing, namely t-shirts,"<sup>2</sup> as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

Applicant appealed when the Examining Attorney made the refusal final. Applicant and the Examining Attorney have filed briefs.<sup>3</sup> We reverse the refusal to register.

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25, and services in Class 41, but Applicant divided the application during prosecution. Only the original "parent" application containing the Class 25 goods is before us on appeal. Applicant describes its mark as consisting of the "white lettering 'SD' inside of a black shield with aqua trim to the left of the wording SUPER in black letters above the word DRAFT in aqua." The colors aqua, black, and white are claimed as features of the mark.

<sup>2</sup> The cited Registration No. 4921467 issued on March 22, 2016. Color is not claimed as a feature of the mark.

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

## I. Record on Appeal<sup>4</sup>

The record on appeal consists of USPTO electronic records regarding the cited registration,<sup>5</sup> and dictionary definitions of the words “super” and “draft.”<sup>6</sup>

## II. Analysis of Likelihood of Confusion Refusal

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ

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<sup>4</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

<sup>5</sup> March 26, 2019 Office Action at TSDR 17-19.

<sup>6</sup> *Id.* at TSDR 2-16.

24, 29 (CCPA 1976). Applicant focuses solely on the similarity or dissimilarity of the marks, which it argues “is a dispositive *DuPont* factor.” 4 TTABVUE 5.

**A. Similarity or Dissimilarity of the Goods and Channels of Trade**

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). The Examining Attorney need not prove, and we need not find, similarity between each good identified in the application and the goods identified in the cited registration. It is sufficient if one of the goods identified in the application is similar to the goods identified in the cited registration. *See, e.g., Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). “Apparently conceding the issue, Applicant does not address these *du Pont* factors in its brief, so we offer only a brief explanation of our conclusion.” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

The goods identified in the application include “shirts,” while the goods identified in the cited registration are “t-shirts.” The goods identified broadly in the application as “shirts” encompass the subset of those goods identified more narrowly as “t-shirts” in the cited registration, and the involved goods are thus legally identical in part. *Cf. In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (goods identified in

application as “formal shirts,” “hooded shirts,” “polo shirts,” and “sports shirts” were encompassed within goods identified in the cited registration as “shirts”). The second *DuPont* factor strongly supports a finding of a likelihood of confusion. *Id.*

The identifications of these legally identical goods do not contain any restrictions as to their channels of trade, and these legally identical goods are thus “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). The third *DuPont* factor also strongly supports a finding of a likelihood of confusion.

### **B. Similarity or Dissimilarity of the Marks**

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely

to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *i.am.symbolic*, 127 USPQ2d at 1630 (citations omitted).

The partial legal identity of the goods reduces the degree of similarity between the marks that is required for confusion to be likely. *See, e.g., Viterra*, 101 USPQ2d at 1912; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)).

The marks must be considered in their entireties, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

The involved marks are both composite word-and-design marks. The Examining Attorney argues that in such marks, “the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar . . . .” 6 TTABVUE 7. Neither he nor Applicant addresses the

application of this principle to Applicant's mark per se, but we find that it is applicable to that mark, which we reproduce again below for ease of reference in following our analysis:



The words SUPER DRAFT are set apart from the smaller design element of the mark, and the design consists largely of the stylized letters “SD,” which in the context of the mark as a whole is an obvious abbreviation of the accompanying words SUPER DRAFT. We find that the words SUPER DRAFT are the dominant element of Applicant's mark because they are “likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908 (internal citation omitted)).

Applicant and the Examining Attorney disagree about the dominant portion of the cited mark. Applicant argues that the “only common element, the wording ‘SUPERDRAFT’ (spelled ‘SUPER DRAFT’ in Applicant's mark) is so small in the cited mark as to be inconspicuous, if not illegible,” 4 TTABVUE 3; that the “dominant portion of the cited mark—the design element—creates a different enough impression that confusion is unlikely,” *id.*; that the cited mark “is dominated by the letter ‘P’, which has no particular significance in Applicant's mark,” *id.* at 5; and that the “Examining Attorney's mistaken conclusion that the word portion of the cited mark

must dominate—no matter how inconspicuous and barely legible—must be reversed.”  
*Id.* at 6.

Applicant further argues that the “Board has repeatedly found *no* likelihood of confusion where a prominent design element dominates over common wording between the respective marks.” *Id.* (citing *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014); *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282 (TTAB 2009); *Parfums de Couer Ltd. v. Lazarus*, 83 USPQ2d 1012 (TTAB 2007); *Steve’s Ice Cream v. Steve’s Famous Hot Dogs*, 3 USPQ2d 1477 (TTAB 1987)). Applicant also cites a non-precedential case, *In re Primeway Int’l LLC*, Serial No. 87059786 (TTAB Jan. 9, 2019), involving a composite mark.

The Examining Attorney responds that Applicant’s “assertion that the dominant portion of the cited registered mark is [the] design portion because ‘the wording ‘SUPERDRAFT’ is so small in the cited mark as to be inconspicuous, if not illegible,’ is not supported by any evidence.” 6 TTABVUE 7 (quoting 4 TTABVUE 3). He argues that “[a]ll of the wording in the cited registered mark including the term ‘SUPERDRAFT’ is both highly visible and easily made out,” *id.*, and that “the terms appear not once but twice in the registrant’s mark,” and “are physically set apart in the mark so the terms are highly visible and easily discernable.” *Id.* at 8. He distinguishes *Covalinski* and the other cases cited by Applicant on essentially these grounds. *Id.* at 8-9.

We reproduce the cited mark again below for ease of reference in following our analysis of the dominant portion of the cited mark:





The Federal Circuit has held that “[i]n the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). The court has cautioned, however, that marks “must be considered on a case-by-case basis,” *id.*, and has held that the Board can “in appropriate circumstances, give greater weight to a design component of a composite mark.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135 (Fed. Cir. 2015).

Here, the cited mark’s anthropomorphic crowned figure in right profile in the form of the letter “P” is located in the center of the circular design and is by far the mark’s largest element. It contains no words. This “King P” figure in the middle of the circle is the mark’s “most visually prominent feature,” *id.*, and is the focal point to which the eyes are immediately drawn when the mark is encountered, before attention is given to the smaller words in the ring on the periphery of the circle.

While we agree with the Examining Attorney that the words SUPERDRAFT and THE POST in the outer ring are readable, to the extent that they are read and internalized, their relative significance and import in the cited mark are unclear. The Examining Attorney acknowledges that “there is no identifiable order in which the terms ‘SUPERDRAFT’ and ‘THE POST’ should be considered when looking at the registrant’s mark,” 6 TTABVUE 8, and the words THE POST are at least as likely as the word SUPERDRAFT, if not more likely, to be the primary source-identifying element of the verbal portion of the mark. The letter formed by the “King P” figure could readily be viewed as abbreviating the word POST in the phrase THE POST, as “P” has no other apparent separate meaning and no discernable significance with respect to the word SUPERDRAFT. In any event, we reject the Examining Attorney’s suggestion that the word SUPERDRAFT that appears together with the words THE POST in the outer ring of the mark is its dominant portion. In the context of the mark as a whole, the “King P” figure, not the word SUPERDRAFT, is more memorable. We find that the “appropriate circumstances” noted by the Federal Circuit in *Jack Wolfskin* exist here given that the cited composite mark contains an unusual and uncommon design feature.

We turn now to the required comparison of the marks in their entirety, giving greater weight in that comparison to the words SUPER DRAFT in Applicant’s mark and to the “King P” figure in the cited mark than to other elements of the marks.

The marks have obvious, in fact striking, differences in appearance when viewed together, but they “must be considered . . . in light of the fallibility of human memory’

and ‘not on the basis of side-by-side comparison.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). We must take into account “the recollection of the average customer, who retains a general rather than specific impression of marks.” *i.am.symbolic*, 127 USPQ2d at 1630. The recalled general impression of the cited mark will surely include the mark’s circular design and the dominant “King P” figure located in the middle, which have no counterparts in Applicant’s mark. Even assuming, however, that the general impression of the cited mark also includes the words THE POST and SUPERDRAFT, a consumer with a general recollection of the circular format of the cited mark and its “King P” figure who separately encounters Applicant’s mark is not likely to view Applicant’s mark as similar in appearance to the cited mark merely because both marks contain the commonly used words SUPER and DRAFT, the first of which is merely descriptive as laudatory. Consumers will generally recall the cartoonish appearance of the cited mark, including its “King P” figure, which contrasts sharply with the sleek, modernistic appearance of Applicant’s mark.

In *White Rock Distilleries*, the Board found that the composite word-and-design mark shown below was dissimilar in appearance to the standard character mark VOLTA:



We find here that the design elements of the cited mark, including its circular carrier for the “King P” figure, and the figure itself, similarly “serve to distinguish the registered mark visually from [A]pplicant’s mark.” *White Rock Distilleries*, 92 USPQ2d at 1284.

With respect to sound, given the dominance of SUPER DRAFT in Applicant’s mark, it will be verbalized as such or possibly as SUPER alone, but it is not clear how the cited mark will be verbalized and recalled aurally, or even if it could be verbalized. The multiple elements comprising the cited mark make a number of verbalizations plausible. Although ordinarily “[a] design is viewed, not spoken,” *In re Electrolyte Labs., Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990), the dominant anthropomorphic king figure contained within the circle design in the cited mark forms the letter “P,” which can be verbalized as the letter alone or perhaps as slang such as “King P.” The cited mark also contains the words THE POST and SUPERDRAFT, which could be verbalized separately or together as “THE POST SUPERDRAFT” or “SUPERDRAFT THE POST,” with the former phrase being more

plausible given the logical sequence of the words and the order in which they appear at the top of the mark above the “King P” figure. We find it decidedly unlikely, however, that a consumer attempting to verbalize the cited mark would verbalize it simply as “SUPERDRAFT.” If the cited mark were verbalized as King P, P, or THE POST, it would have no similarity in sound to Applicant’s mark. If the cited mark were verbalized as King P THE POST SUPERDRAFT or THE POST SUPERDRAFT, there would be some similarity in sound resulting from the presence of the word SUPERDRAFT in both marks, but it would be outweighed by the dissimilarity in sound of the other elements.

Finally, with respect to connotation and commercial impression, the cited mark contains the wording THE POST and SUPERDRAFT, as well as the anthropomorphic “King P” figure. These elements imbue the cited mark with a meaning relating to a thing or entity called THE POST and a cartoonish king creature, a meaning that is entirely absent from Applicant’s mark, which has no comparable elements. Any similarity in meaning resulting from the presence of the words SUPER DRAFT in each mark is outweighed by the dissimilarity in meaning resulting from the presence of the other elements in the cited mark.

We find that the marks are quite dissimilar in appearance, sound, and connotation and commercial impression when they are considered in their entireties, and that the first *DuPont* factor strongly supports a finding of no likelihood of confusion.

**C. Balancing the *DuPont* Factors**

The goods, channels of trade, and classes of consumers are identical in part, but the marks are sufficiently dissimilar to “make confusion unlikely even though the involved [marks] are used on identical goods sold through identical channels of trade to identical customers.” *In re Medline Indus., Inc.*, 2020 USPQ2d 10237, \*13 (TTAB 2020) (citing *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998); *Kellogg Co. v. Pack'em Enters., Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991)).

**Decision:** The refusal to register is reversed.