

This Opinion is Not a
Precedent of the TTAB

Mailed: March 31, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Catskill Resorts TRS, LLC

—
Serial No. 88337961
Serial No. 88338045
(Consolidated)

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Penny R. Slicer of Stinson LLP, for Catskill Resorts TRS, LLC.

Young Wolfe, Trademark Examining Attorney, Law Office 122,
Kevin Mittler, Managing Attorney.

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

Opinion by Larkin, Administrative Trademark Judge:

Catskill Resorts TRS, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark THE KARTRITE,¹ and the composite word-and-design mark shown below

¹ Application Serial No. 88337961 was filed on March 13, 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.



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both for the following goods and services as ultimately identified in the applications:

Rafts, in International Class 12;

Jewelry and jewelry charms; key chains, key rings, lapel pins, clocks, in International Class 14;

Maps; posters; art prints; printed puzzles; blank journal books; notebooks; note cards, stationery; pens; pencils; coloring pencils; coloring books; temporary tattoo transfers; stationery type portfolios; letter openers; photo albums; decals; stickers; paperweights; calendars; post cards; money clips; coasters of cardboard; coasters of paper, in International Class 16;

Tote bags; beach bags; drawstring bags; sack packs, namely, drawstring bags used as backpacks; backpacks; luggage; purses; duffle bags; wallets; umbrellas; pet clothing; leashes for animals; collars for animals, in International Class 18;

Picture frames; plastic key chain tags; mirrors; pillows, in International Class 20;

Drinking steins; mugs; cups; glasses, namely, drinking glasses; plastic water bottles sold empty; shot glasses; insulating sleeve holders for bottles and beverage cans; flasks; ceramic plates; spoon rests; bowls; plastic containers, namely, plastic storage containers for

² Application Serial No. 88338045 was also filed on March 13, 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. Applicant has disclaimed the exclusive right to use "resort & indoor waterpark" apart from the mark as shown. The application describes the mark as follows: "The mark consists of the word 'THE' in gray lettering and the word 'KARTRITE' in black lettering positioned above the words 'RESORT & INDOOR WATERPARK' in gray lettering, all positioned to the right of the letter 'K' in white presented upon a blue rectangle that is curved at the top." The colors white, gray, black, and blue are claimed as features of the mark.

household use; coasters, not of paper or textile; trivets; bottle openers; candle holders; cutting boards; hair brushes; watertight capsules used to hold valuables, namely, plastic containers sold empty to hold wallets and personal items, in International Class 21;

Clothing, headwear and accessories, namely, t-shirts, tank tops, sweatshirts, jackets, coats, pants, sweatpants, yoga pants, shorts, fitness wear in the nature of athletic pants, athletic shorts, athletic shirts and athletic bras, bathing suits, swimming trunks, beach cover-ups, pajamas, nightgowns, nightshirts, hats, caps being headwear, visors being headwear, scarves, gloves, socks, slippers, sandals, water shoes, in International Class 25;

Games and playthings, namely, board games and party games; plush toys and plush animals; dolls; sporting goods, namely, balls for sports, bats for sports, racquets for sports, toy flying saucers for toss games; inflatable balls, namely, inflatable beach balls; playing cards; snow globes; puzzles; jigsaw puzzles, in International Class 28;

Retail store services featuring clothing and sporting equipment; Retail clothing stores; Retail gift and souvenir shops; Retail stores featuring products for recreational activities and sporting goods; Retail stores featuring a wide variety of consumer goods of others; Retail grocery and convenience store services, in International Class 35;

Entertainment services, namely, providing recreational waterpark, swimming pool, bowling alley, arcade, exercise and fitness, rock climbing, laser tag, movie theater, escape room, horseback riding, tennis court, golf course, skating rink, indoor and outdoor recreational activity, snow skiing, amusement park and casino gaming facilities; Providing waterpark services; Providing bowling alley services; Providing amusement arcade services; Providing fitness, exercise and yoga services and instruction, namely, providing fitness and exercise studio services in the nature of yoga instruction; Providing recreational climbing services, namely, providing classes in the field of recreational rock climbing; Providing laser tag services, namely, providing facilities and equipment for playing laser tag games; Providing movie and cinema theater services; Providing escape room services; Providing

horseback riding instruction and trail riding services for recreational purposes; Providing tennis courts and tennis instruction; Providing golf courses and golf instruction; Providing skating rinks; roller and ice skating instruction; Providing casino gaming contests and tournaments; providing gaming services in the nature of live blackjack card game, contests and tournaments; Providing indoor and outdoor recreational activities in the nature of pools and horseback riding facilities; providing nature hikes, namely, arranging and conducting guided nature hiking tours; Providing snow skiing services, namely, ski instruction and ski resorts; Providing amusement park services; Rental services for recreational and sporting goods equipment, namely, rental of sports equipment except vehicles; Entertainment services, namely, dinner theaters and concert venues, in International Class 41;

Resort hotel services; Resort lodging services; Providing bar, coffee shop, restaurant, and dining services; Restaurant and bar services; Providing convention facilities; Providing spa services in the nature of providing temporary accommodations and meals to clients of a health or beauty spa, in International Class 43; and

Health spa services for health and wellness of the body and spirit offered at a health resort; providing beauty spa services in the nature of cosmetic body care services, in International Class 44.

The Examining Attorney has refused registration of both marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that they so resemble the registered mark shown below



for “indoor waterpark services,” in International Class 41,³ as to be likely, when used in connection with the goods and services identified in the application, to cause confusion, to cause mistake, or to deceive. In Application Serial No. 88337961, the Examining Attorney also refused registration on the ground that when the appeal was filed, Applicant had not deleted “rafts” from its Class 28 identification of goods following reclassification of those goods into a new Class 12 in the application, but the application was remanded to the Examining Attorney on appeal and an Examiner’s Amendment was entered deleting “rafts,” which obviated this ground for refusal of registration.

When the Examining Attorney made the refusals final, Applicant appealed in each case and requested reconsideration, which was denied. Because the issues presented in the two appeals are essentially the same and the arguments advanced by Applicant

³ The cited Registration No. 4886612 issued on January 12, 2016. We will refer to the owner of the registration as the “Registrant.” The registration describes the mark as follows: “The mark consists of the wording ‘Aquatopia’ in aqua blue outlined in blue above the wording ‘Kartrite's Epic Adventures’ in blue on a sand colored banner with blue stripes, all on an aqua blue, blue, sand and beige oval with compass points.” The colors aqua blue, blue, sand, and beige are claimed as features of the mark.

and the Examining Attorney are very similar in each case, we consolidate the two appeals sua sponte and will decide them in a single opinion. *In re Adco Indus. – Techs., L.P.*, 2020 USPQ2d 85096, *1 (TTAB 2020). Applicant and the Examining Attorney have filed briefs.⁴ We reverse the refusals to register.

I. Records on Appeal⁵

The records on appeal include USPTO electronic records regarding the cited registration and two applications, made of record by the Examining Attorney,⁶ and third-party Internet webpages displaying goods and services offered in connection with water parks, made of record by the Examining Attorney.⁷

II. Analysis of Refusals

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 the likelihood of confusion under Section 2(d) is based

⁴ 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. Where it is not clear from the context of a citation, we will identify the case to which the citation pertains.

⁵ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”). The records in the two cases are virtually identical. Where it is not clear from the context of a citation, we will identify the case to which the citation pertains.

⁶ May 30, 2019 Office Actions at TSDR 2-4, 15-19.

⁷ *Id.* at TSDR 5-14; January 6, 2020 Final Office Actions at TSDR 2-130 (Serial No. 88337961); 3-131 (Serial No. 88338045).

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 24, 29 (CCPA 1976). Applicant focuses in both cases on the first *DuPont* factor, arguing that “the two marks are not remotely similar in overall appearance, sound, connotation or commercial impression.” 6 TTABVUE 6.

A. Similarity or Dissimilarity of the Goods and Services, 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,” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir 2018) (quoting *DuPont*, 177 USPQ at 567), while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052 (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 goods and services need not be identical, but “need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

In re Ox Paperboard, LLC, 2020 USPQ2d 10878, *5 (TTAB 2020) (citing *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014)). *See also Detroit Athletic Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

The services identified in the cited registration are “indoor waterpark services.” Applicant seeks registration of its marks for extensive lists of goods and services in Classes 12, 14, 16, 18, 20, 21, 25, 28, 35, 41, 43, and 44. The Examining Attorney’s argument for relatedness of the involved goods and services is twofold: (1) the services in the cited registration are legally identical to “providing waterpark services” in

Class 41 in the application, 8 TTABVUE 13; and (2) the services in the cited registration are otherwise related to the other goods and services in the application, based on Internet evidence showing that “consumers are accustomed to the same entities providing a variety of waterpark, recreational, hotel, restaurant, and health spa services as well as offering merchandise bearing its mark, such that confusion is likely.” *Id.* at 14.⁸ We address these arguments in turn.

1. Class 41 Waterpark Services

Applicant’s Class 41 identifications of services include “Providing waterpark services.” We agree with the Examining Attorney that these broadly identified services encompass Registrant’s narrower “indoor waterpark services.” *See, e.g., In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, *11-12 (TTAB 2020) (citing *Southwestern Mgmt. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015)).⁹ “[A]ccordingly, we must deem the services at issue to be identical.” *Ocinomled*, 115 USPQ2d at 1025.¹⁰ The second *DuPont* factor strongly supports a finding of a likelihood of confusion as to the entire Class 41 portions of the applications.

⁸ The Examining Attorney need not prove, and we need not find, that each good or service identified in the numerous classes in the application is related to the services identified in the cited registration. “It is sufficient for finding likelihood of confusion that relatedness is established for any item encompassed by the identification of goods [or services] in a particular class in the application.” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, *14 (TTAB 2020) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

⁹ In any event, Applicant’s composite mark includes the phrase “resort & indoor waterpark,” indicating that Applicant actually intends to provide “indoor waterpark services.”

¹⁰ Because these Class 41 services are legally identical, we need not consider whether Applicant’s other Class 41 services are related to Registrant’s services. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015).

Because these services are identical, “we must presume that the channels of trade and classes of purchasers are the same.” *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018) (citing *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). The third *DuPont* factor also strongly supports a finding of a likelihood of confusion as to the entire Class 41 portions of the applications.

2. Goods and Services in Classes 12, 14, 16, 18, 20, 21, 25, 28, 35, 43, and 44¹¹

The Examining Attorney argues that the record shows that “the same entity commonly provides a wide variety of waterpark, resort, dining, spa, and entertainment services and markets these under the same mark,” and that “waterparks commonly offer a variety of branded merchandise in connection with their waterpark services, including those identified in Applicant’s application.” 8 TTABVUE 14. The Examining Attorney concludes that “consumers are accustomed to the same entities providing a variety of waterpark, recreational, hotel, restaurant, and health spa services as well as offering merchandise bearing its mark, such that confusion is likely.” *Id.*

¹¹ The record shows that Coco Key Water Resort, Walt Disney World, Lake Compounce & Crocodile Cove, Noah’s Ark Waterpark, Parrot Island Waterpark, and Schlitterbahn Waterpark & Resort operate outdoor waterparks, but the Examining Attorney did not show that they also operate indoor waterparks. Nevertheless, because we find above that indoor waterparks are a subset of waterparks, we will consider this evidence in our analysis of the relatedness of these goods and services.

a. Services

i. Class 35

Turning first to the Class 35 services identified in the applications, the Examining Attorney focuses solely on Applicant's "resort, dining, spa, and entertainment services," and makes no effort to show the relatedness of the services identified in the cited registration to Applicant's Class 35 retail services. There simply is no evidence to demonstrate a relationship between Registrant's services and Applicant's Class 35 services. The second *DuPont* factor thus weighs against a finding of a likelihood of confusion as to the Class 35 portions of the applications.

ii. Class 43

The services in Class 43 in the applications include "Resort hotel services; Resort lodging services; Providing bar, coffee shop, restaurant, and dining services." The Examining Attorney points to the webpages of Great Wolf Lodge, Kalahari, Massanutten, Coco Key, Walt Disney World, Greek Peak, Rocking Horse Ranch, Wilderness at the Smokies, and Zehnder's as examples of entities which provide waterpark services, resort services, and dining services under the same marks.¹²

The Kalahari webpages, which tout "America's Largest Indoor Waterparks, Resorts & Convention Centers," state that the resort "boasts hair-raising waterslides, world-class spa, kids' play areas, and diverse dining options."¹³ The Massanutten webpages display a variety of recreational options, including an indoor waterpark, as

¹² May 30, 2019 Office Action at TSDR 5-14; January 6, 2020 Final Office Action at TSDR 2-45, 49-68, 83-104, 109-130.

¹³ May 30, 2019 Office Action at TSDR 10.

well as a variety of dining options.¹⁴ The Coco Key webpages display and discuss a waterpark, hotel amenities, and a variety of dining options.¹⁵ The Walt Disney World webpages display and discuss waterparks and food and beverage services.¹⁶ The Greek Peak webpages describe the hotel as a “Mountain Resort,”¹⁷ and display and discuss dining options,¹⁸ and the resort’s indoor waterpark.¹⁹ The Rocking Horse Ranch webpages display and discuss the resort’s dining options,²⁰ and indoor waterpark.²¹ The Wilderness at the Smokies webpages display and discuss the resort’s dining options,²² and indoor waterpark.²³ Zehnder’s “Splash Village” webpages display and discuss its indoor waterpark,²⁴ as well as hotel accommodations.²⁵

This evidence is sufficient to show the relatedness of the “indoor waterpark services” identified in the cited registration to the Class 43 dining and resort services identified in the applications. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198,

¹⁴ *Id.* at TSDR 11-14.

¹⁵ January 6, 2020 Final Office Action at TSDR 2-8, 11-13.

¹⁶ *Id.* at TSDR 41-45.

¹⁷ *Id.* at TSDR 49.

¹⁸ *Id.* at TSDR 49-51.

¹⁹ *Id.* at TSDR 61-62, 66-67.

²⁰ *Id.* at TSDR 83-86.

²¹ *Id.* at TSDR 102-03.

²² *Id.* at TSDR 109-11.

²³ *Id.* at TSDR 118-22.

²⁴ *Id.* at TSDR 123-24.

²⁵ *Id.* at TSDR 125-28.

1202-04 (TTAB 2009). The dining and resort services are offered in the same channels of trade to the same consumers as the waterpark services, and the second and third *DuPont* factors thus support a finding of a likelihood of confusion as to the entire Class 43 portions of the applications.

iii. Class 44

Applicant's Class 44 identifications of services are "Health spa services for health and wellness of the body and spirit offered at a health resort; providing beauty spa services in the nature of cosmetic body care services." The webpages of the Kalahari, Massanutten, Greek Peak, and Rocking Horse Ranch resorts discussed above also display or describe available spa services.²⁶ This evidence is sufficient to show the relatedness of the "indoor waterpark services" identified in the cited registration to the Class 44 spa services in the applications. *Davey Prods.*, 92 USPQ2d at 1202-04. The spa services are offered in the same channels of trade to the same consumers as the waterpark services, and the second and third *DuPont* factors thus support a finding of a likelihood of confusion as to the entire Class 44 portions of the applications.

b. Goods

Given the number of goods identified in the eight goods classes in the applications, the Examining Attorney's approach to proving the relatedness of the services identified in the cited registration to the goods identified in the applications is problematic. The Examining Attorney cites webpages that purportedly show that

²⁶ May 30, 2019 Office Action at TSDR 9, 13; January 6, 2020 Final Office Action at TSDR 63-64, 95-100.

waterpark operators also sell “branded merchandise in connection with their waterpark services, including those identified in Applicant’s application,” 8 TTABVUE 14,²⁷ but makes no effort to specify which “branded merchandise” corresponds to which specific goods in the application.²⁸ The Examining Attorney leaves it to us to review the cited portions of the record to determine which, if any, of Applicant’s identified goods are also sold by waterpark operators. The better practice would have been to specify the goods in each class that are sold by specific waterpark operators by reference to specific portions of the record. *Cf.* Trademark Rule 2.142(b)(3), 37 C.F.R. § 2.143(b)(3) (“Citation to evidence in briefs should be to the documents in the electronic application record by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record.”)

²⁷ January 6, 2020 Final Office Action at TSDR 2-13, 31-37, 41-48, 69-82, 105-08, 116-30. The term “branded merchandise” is also essentially meaningless in the absence of evidence of whose brand appears on what merchandise. This is illustrated by the website of Schlitterbahn Waterpark & Resort, which refers variously to “branded merchandise” and “select branded merchandise” sold in the resort’s various shops, *id.* at TSDR 105-06, “Schlitterbahn souvenirs” and “Schlitterbahn sale merchandise,” *id.* at TSDR 106-07, and “Branded Items.” *Id.* at TSDR 107-08. The latter reference to “Branded Items” states that “Schlitterbahn now carries a wide variety of specialty brand name merchandise” from various companies such as Billabong and Quicksilver. *Id.* at TSDR 107-08. Thus, in the context of the website as a whole, the term “branded” appears to refer to merchandise bearing the brands of companies other than the waterpark operator.

²⁸ The Board has recognized “that the licensing of commercial trademarks on ‘collateral products’ has become a part of everyday life,” *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1889 (TTAB 2008), and that certain products are commonly “used as promotional items for a diverse range of goods and services.” *Turner Entm’t Corp. v. Nelson*, 38 USPQ2d 1942, 1945 (TTAB 1996) (listing video games, t-shirts, beach towels, caps and other logo-imprinted products as examples). But our recognition of these general trends does not relieve the USPTO of its obligation to provide evidence that specific goods and services are related in a particular case because providers of the services commonly offer the goods as collateral products.

i. Class 12

Applicant’s Class 12 identifications cover “rafts.” There is no evidence of the sale of rafts by waterpark operators and the second *DuPont* factor weighs against a finding of a likelihood of confusion with respect to the Class 12 goods in the applications.

ii. Class 14

Applicant’s Class 14 identifications cover “Jewelry and jewelry charms; key chains, key rings, lapel pins, clocks.” The Massanutten and Coco Key Water Park websites offer keychains and key rings sold under the resorts’ marks,²⁹ but the availability of the goods on the website of two waterpark operators is insufficient to show the relatedness of the goods and the services.³⁰ The second *DuPont* factor weighs against a finding of a likelihood of confusion with respect to the Class 14 goods in the applications.

iii. Class 16

Applicant’s Class 16 identifications cover “Maps; posters; art prints; printed puzzles; blank journal books; notebooks; note cards, stationery; pens; pencils; coloring

²⁹ January 6, 2020 Final Office Action at TSDR 9-10, 75, 77.

³⁰ A webpage for The Great Wolf Lodge Kids Store refers to “accessories with jewelry,” but does not further describe or show the goods, and it is not clear whether the goods are sold under both the Great Wolf Lodge mark under which the waterpark is operated, May 30, 2019 Office Action at TSDR 5-8, and marks pertaining to what the webpage calls “your favorite kids characters.” January 6, 2020 Final Office Action at TSDR 48. The Walt Disney World webpages offer a Mickey Mouse Icon Charm by Pandora Jewelry, *id.* at TSDR 33, and a Mickey Mouse Balloon Necklace by Rebecca Hook, *id.* at TSDR 34, but these goods are offered under character marks, not the marks under which Walt Disney World operates its waterparks. The Lake Compounce and Noah’s Ark webpages refer generically to jewelry, *id.* at TSDR 73, 79, but it is not clear that the goods bear the marks of the waterpark operators.

pencils; coloring books; temporary tattoo transfers; stationery type portfolios; letter openers; photo albums; decals; stickers; paperweights; calendars; post cards; money clips; coasters of cardboard; coasters of paper.” The Massanutten website offers stickers bearing the resort’s mark,³¹ but the availability of the goods on the website of a single waterpark operator is insufficient to show the relatedness of the goods and the services. The second *DuPont* factor weighs against a finding of a likelihood of confusion with respect to the Class 16 goods in the applications.

iv. Class 18

Applicant’s Class 18 identifications cover “Tote bags; beach bags; drawstring bags; sack packs, namely, drawstring bags used as backpacks; backpacks; luggage; purses; duffle bags; wallets; umbrellas; pet clothing; leashes for animals; collars for animals.” The Shop Kalahari webpage displays a Kalahari umbrella and drawstring bag, the Coco Key Water Park webpage displays a drawstring backpack, and the Walt Disney World webpages display a Walt Disney World sack tote and a Disney Parks icons mini backpack.³² This evidence is sufficient to show the relatedness of waterpark services and one or more of the Class 18 goods identified in the application. Those goods are offered in the same channels of trade to the same consumers as the waterpark services, and the second and third *DuPont* factors support a finding of a likelihood of confusion with respect to the entire Class 18 portions of the applications

³¹ *Id.* at TSDR 75-77. The Kalahari website offers various goods that could be goods falling within Class 16, but they are unidentified. *Id.* at TSDR 70.

³² *Id.* at TSDR 10, 34, 36-37, 70.

v. Class 20

Applicant's Class 20 identifications cover "Picture frames; plastic key chain tags; mirrors; pillows." The Massanutten website displays a wooden photo frame,³³ but the availability of the goods on the website of a single waterpark operator is insufficient to show the relatedness of the goods and the services. The second *DuPont* factor weighs against a finding of a likelihood of confusion with respect to the Class 20 goods in the applications.

vi. Class 21

Applicant's Class 21 identifications cover "Drinking steins; mugs; cups; glasses, namely, drinking glasses; plastic water bottles sold empty; shot glasses; insulating sleeve holders for bottles and beverage cans; flasks; ceramic plates; spoon rests; bowls; plastic containers, namely, plastic storage containers for household use; coasters, not of paper or textile; trivets; bottle openers; candle holders; cutting boards; hair brushes; watertight capsules used to hold valuables, namely, plastic containers sold empty to hold wallets and personal items." The Coco Key Water Resort website displays an empty water bottle,³⁴ the Walt Disney World website displays a Walt Disney World mug,³⁵ the Shop Kalahari webpage displays a Kalahari mug,³⁶ the Massanutten webpage displays mugs, glasses, cups, insulating sleeve holders, bottle

³³ *Id.* at TSDR 75-76.

³⁴ *Id.* at TSDR 10.

³⁵ *Id.* at TSDR 35.

³⁶ *Id.* at TSDR 70.

openers, and plastic bottles,³⁷ and the Wilderness of the Smokies Retail Shops webpage displays a plastic bottle bearing the resort's mark.³⁸ This evidence is sufficient to show the relatedness of waterpark services and one or more of the Class 21 goods identified in the application. The drinkware is offered in the same channels of trade to the same consumers as the waterpark services, and the second and third *DuPont* factors support a finding of a likelihood of confusion with respect to the entire Class 21 portions of the applications.

vii. Class 25

Applicant's Class 25 identifications cover "Clothing, headwear and accessories, namely, t-shirts, tank tops, sweatshirts, jackets, coats, pants, sweatpants, yoga pants, shorts, fitness wear in the nature of athletic pants, athletic shorts, athletic shirts and athletic bras, bathing suits, swimming trunks, beach cover-ups, pajamas, nightgowns, nightshirts, hats, caps being headwear, visors being headwear, scarves, gloves, socks, slippers, sandals, water shoes." The websites of Coco Key Water Resort, Walt Disney World, Epic Waters Indoor Waterpark, and Zehnder's show the sale of a number of the identified clothing items.³⁹ This evidence is sufficient to show the relatedness of waterpark services and one or more of the Class 25 goods identified in the application. The clothing is offered in the same channels of trade to the same consumers as the waterpark services, and the second and third *DuPont* factors

³⁷ *Id.* at TSDR 75-77.

³⁸ *Id.* at TSDR 117.

³⁹ *Id.* at TSDR 9-10, 32-33, 35, 37, 46, 129-30.

support a finding of a likelihood of confusion with respect to the entire Class 25 portions of the applications.

viii. Class 28

Applicant's Class 28 identifications cover "Games and playthings, namely, board games and party games; plush toys and plush animals; dolls; sporting goods, namely, balls for sports, bats for sports, racquets for sports, toy flying saucers for toss games; inflatable balls, namely, inflatable beach balls; playing cards; snow globes; puzzles; jigsaw puzzles." The Coco Key Water Resort, Walt Disney World, Shop Kalahari, and Noah's Ark websites display various plush toys.⁴⁰ This evidence is sufficient to show the relatedness of waterpark services and one of the Class 28 goods identified in the application. The goods are offered in the same channels of trade to the same consumers as the waterpark services, and the second and third *DuPont* factors support a finding of a likelihood of confusion with respect to the entire Class 28 portions of the applications.

To summarize, we have found that the second and third *DuPont* factors support a finding of a likelihood of confusion with respect to Classes 18, 21, 25, 28, 41, 43, and 44, and that the second and third *DuPont* factors weigh against a finding of a likelihood of confusion with respect to Classes 12, 14, 16, 20, and 35.

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

⁴⁰ *Id.* at TSDR 9, 32, 70-71, 79.

impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “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. 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.*, 101 USPQ2d at 1721 (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.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted). Given the nature of the goods and services identified in the application, the average customer is an ordinary consumer.

As discussed above, the involved Class 41 services are legally identical, and this reduces the degree of similarity between the marks that is necessary for confusion to be likely as to the Class 41 portions of the applications. *See, e.g., Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010).

1. The Dominant Portion of the Involved and Cited Composite Marks

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 1050 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). The issue of the relative weight to be given to the elements of the cited composite mark and Applicant’s composite mark is central to both appeals, and we turn first to that issue.

We reproduce below the cited composite mark and Applicant’s composite mark in Serial No. 88338045 for ease of reference in following our discussion:



Applicant argues in Serial No. 88337961 involving its standard character mark that “AQUATOPIA, either alone or in combination with the compass design elements,

serves as the dominant portion of the Registered Mark, not KARTRITE” because “KARTRITE’S EPIC ADVENTURES merely serves as a tag line in the Registered Mark.” 6 TTABVUE 7. Applicant similarly argues in Serial No. 88338045 involving its composite mark that

[t]here is no word similar to AQUATOPIA or any design elements similar to the compass design in [its] mark. Instead, the dominant portion of [its] mark is the blue “K” since it is the only item presented with different coloring, and the word KARTRITE since it appears bolded in black lettering as compared to the other wording. The singular term KARTRITE is not used in the Registrant’s Mark. The possessive term KARTRITE’S EPIC ADVENTURES does appear in the Registrant’s mark, but it merely serves as a tag line and is dominated by AQUATOPIA.

6 TTABVUE 8.

In both cases, the Examining Attorney acknowledges that the word portion of the cited composite mark should be accorded greater weight than the design elements, 8 TTABVUE 9, but argues that “Applicant provides no legal basis for its position that a ‘tag line’ should be given less significance than other wording in a likelihood of confusion analysis,” and that “it is well established that the presence of a house mark will not obviate a likelihood of confusion with an otherwise confusingly similar mark under Section 2(d).” *Id.* at 11. The Examining Attorney further argues that “although the wording KARTRITE’S EPIC ADVENTURES is presented in a smaller font than AQUATOPIA, this wording remains very legible, and the term KARTRITE is dominant within this phrase in communicating that Aquatopia is a place to have remarkable experiences.” *Id.* at 12.

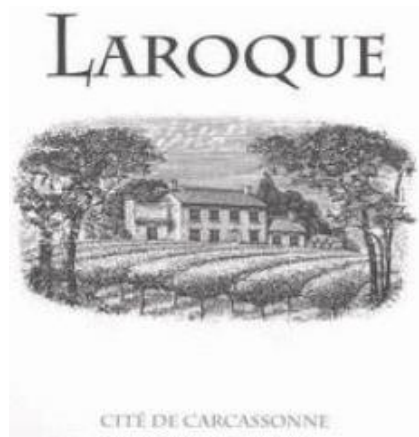
In Serial No. 88338045 involving Applicant's composite mark, the Examining Attorney argues that "the term KARTRITE is dominant in the applied-for mark," 8 TTABVUE 11, and that "the letter K serves merely as an initialization that further reinforces the wording KARTRITE as most dominant." *Id.* The Examining Attorney concludes that in Applicant's composite mark, it is "likely that consumers will recognize or recollect KARTRITE as dominant when making purchase decisions." *Id.*

The Federal Circuit has held that while marks must be considered on a case-by-case basis, "[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 "words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used to request the goods." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908). As discussed above, neither Applicant nor the Examining Attorney disputes the applicability of this general principle to the cited mark, but they differ as to which words in the cited mark are dominant. Applicant has the better of the argument.

The word "Aquatopia" is by far the largest and most visually prominent part of both the literal elements of the cited mark and the mark as a whole. The word is centrally positioned within the mark above the tagline and is set off from the other elements of the mark by its display in large script and in an eye-catching aqua color that reinforces the "Aqua-" prefix in the word. The word is both larger than the tagline

in size and shorter than the tagline in length, and these features make it more likely than the tagline “to make a greater impression upon purchasers, to be remembered by them, and to be used to request the [services].” *Id.*

In making that determination, we are reminded of the analysis of the Board in *Aquitaine Wine*, in which the word LAROQUE was found to be the dominant portion of the composite mark shown below



id. at 1184-85, and in *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009), in which the Board found no likelihood of confusion between the standard character mark VOLTA for “energy vodka infused with caffeine” and the composite mark shown below for “wines”



because the word TERZA was the dominant portion of the composite mark. *Id.* at 1284. We find that “Aquatopia” is the dominant portion of the cited mark because “it comprises the largest literal portion of the mark in terms of size, position, and emphasis,” and because it “is also the first term in the mark, further establishing its prominence.” *Aquitaine Wine*, 126 USPQ2d at 1184-85 (citing *Palm Bay Imps.*, 73 USPQ2d at 1692).

With respect to Applicant’s composite mark in Serial No. 88338045, the Examining Attorney has the better of the argument. The word “kartrite” is bolded in Applicant’s composite mark and is thus set off visually from the other words in the mark, which are the preceding definite article “the” and the descriptive or generic and disclaimed phrase “resort & indoor waterpark.” We agree with the Examining Attorney that the stylized letter “k” to the left of the words “serves merely as an initialization that further reinforces the word KARTRITE as most dominant,” *id.*, and we find that the bolded word “kartrite” is the dominant portion of Applicant’s composite mark because vis-à-vis the other literal elements, “kartrite” is most “likely to make a greater impression upon purchasers, to be remembered by them, and to be used to request the goods [and services].” *Aquitaine Wine*, 126 USPQ2d at 1184.

We turn now to the required comparisons of the marks in their entirety, giving greater weight in those comparisons to the word “Aquatopia” in the cited composite mark and the word “kartrite” in Applicant’s composite mark than to the other elements of those marks.

2. Applicant's Standard Character Mark and the Cited Mark

Applicant claims that its standard character mark THE KARTRITE and the cited composite mark “are not remotely similar in overall appearance, sound, connotation or commercial impression.” 6 TTABVUE 6. Applicant argues that in the cited mark

the name AQUATOPIA is prominently presented in large stylized lettering over an ornate compass design. It is the first and primary word in the mark. The wording KARTRITE'S EPIC ADVENTURES is presented in much smaller lettering within a banner below. In contrast, Applicant's mark consists of the two words THE KARTRITE. The overall appearance and sound is therefore very different.

Id.

According to Applicant, the “connotation and commercial impression of the two marks is also very different” because the cited mark “invokes the impression that AQUATOPIA is an imagined underwater community or society that is the place of KARTRITE'S EPIC ADVENTURES.” *Id.* at 6-7. Applicant describes KARTRITE'S as a “possessive modifier” that “connotes that KARTRITE is a person,” *id.* at 7, and contrasts that connotation with that of Applicant's mark, which “uses KARTRITE as a singular noun indicating that the name of the place is THE KARTRITE.” *Id.* Applicant concludes that the “only similarity in the two marks is that they both include some form of the word KARTRITE, but the manner of use and impression left by each is very different.” *Id.*⁴¹

⁴¹ In both appeals, Applicant cites *White Rock Distilleries* and *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014), in support of its arguments that the involved marks are dissimilar because of their different dominant elements. 6 TTABVUE 7-9 (Serial No. 88337961); 6 TTABVUE 8-10 (Serial No. 88338045). The Examining Attorney also discusses the cases in both appeals. 8 TTABVUE 11-12 (Serial No. 88337961); 8 TTABVUE 12-13 (Serial No.

The Examining Attorney focuses almost exclusively on the connotation and commercial impression of the marks, arguing that “[s]ince the distinctive term KARTRITE and its formative, KARTRITE’S, appear in both the registered and applied-for marks, the marks convey the impression that they signify a single source, namely, KARTRITE.” 8 TTABVUE 8. The Examining Attorney further argues that “the wording ‘THE’ in Applicant’s mark has minimal, if any, trademark significance in this case” because the Board “has found that inclusion of the term ‘the’ at the beginning of one of the marks will generally not affect or otherwise diminish the overall similarity between the marks,” *id.* at 9, and that the additional apostrophe and letter ‘s’ in the KARTRITE portion of the registered mark has little, if any, trademark significance and does not otherwise affect the overall similarity of the marks in terms of commercial impression.” *Id.* at 10.

The Examining Attorney rejects Applicant’s arguments regarding the different connotations of the marks because the presence of KARTRITE’S in the possessive case in the cited mark “does not necessarily suggest a person. It is just as likely

88338045). We have relied on the *White Rock Distilleries* case above as support for our finding as to the dominant portion of the cited mark and we discuss the case below in connection with our comparison of the marks in their entirety. The *Covalinski* case, in which the Board reversed a refusal to register a composite mark consisting of the highly stylized letters “RR” in which the words “Redneck Racegirl” were displayed within the letters based on the standard character mark RACEGIRL, is inapposite because the composite mark in that case and the cited composite mark here are not comparable in nature. In the composite mark in *Covalinski*, the letters in the word “Racegirl,” which was the element shared by the involved and cited marks, were “difficult to notice” because they were partially obscured by the design elements. *Covalinski*, 113 USPQ2d at 1168. We agree with the Examining Attorney that in the cited mark here, “although the wording KARTRITE’S EPIC ADVENTURES is presented in a smaller font than AQUATOPIA, this wording remains very legible.” 8 TTABVUE 12 (Serial Nos. 88337961 and 88338045).

consumers would perceive KARTRITE'S in the registered mark as modifying a place name, with Aquatopia being an area within the Kartrite resort where 'epic adventures' take place." *Id.* at 10-11.

We find that Applicant's standard character mark and the cited composite mark are dissimilar when considered in their entireties. With respect to appearance, Applicant's standard character mark "may be presented in any font style, size or color, including the same font, size and color as the literal portions of [the cited] mark," *Aquitaine Wine*, 126 USPQ2d at 1186, and we must assume that the words THE KARTRITE may be presented in the same font, size, and aqua color as the words Aquatopia or Kartrite's Epic Adventures in the cited mark. We may not similarly assume, however, that Applicant's mark may be accompanied by the compass design that is the backdrop for the words in the cited mark. *Id.* at 1187 ("We hold that when we are comparing a standard character mark to a word + design mark for Section 2(d) purposes, we will consider variations of the depictions of the standard character *only with regard to* 'font style, size or color' of the 'words, letters, numbers, or any combination thereof.'") (emphasis in original) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) and *Viterra*, 101 USPQ2d at 1909). This is significant because the large compass design against which the words in the cited mark are displayed may be part of the "recollection of the average customer," *i.am.symbolic*, 127 USPQ2d at 1630, and help to form the general impression of the cited mark, and there is no corresponding design feature to be seen in Applicant's standard character mark by consumers who encounter it. *Cf.*

White Rock Distilleries, 92 USPQ2d at 1284 (VOLTA standard character mark and composite TERZA VOLTA and design mark found to be dissimilar in appearance because Board assumed that the standard character mark would not “be presented with the design element appearing in registrant’s mark.”).

But if only the word Aquatopia in stylized aqua script, or the word and the tagline together, form the general visual impression of the cited mark that will be recalled by consumers, and the words THE KARTRITE are assumed to be displayed in stylized aqua script, Applicant’s mark would still remain more dissimilar than similar in appearance to the cited mark because of the visual impact of the words other than “Kartrite’s” in the cited mark.

With respect to sound, the aural similarity between the marks is minimal, and limited to the phrase “Aquatopia Kartrite’s Epic Adventures” including the word “Kartrite’s,” which is heard in its noun form when Applicant’s mark THE KARTRITE is verbalized. But we must “keep in mind the penchant of consumers to shorten marks.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB (2016) (finding that “it is reasonable that such a practice would lead many consumers to drop the highly descriptive/generic term ‘Blonde’ [from the applicant’s mark TIME TRAVELLER BLONDE] when calling for Applicant’s [beer]”) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring: “the users of language have a universal habit of shortening full names — from haste or just economy of words”)). The cited mark is a good candidate for such shortening because the single and most prominent word “Aquatopia” is articulated first and is far easier

to recall and to verbalize than the four-word phrase “Aquatopia Kartrite’s Epic Adventures.” *Cf. Aquitaine Wine USA*, 126 USPQ2d at 1185 (holding that the first word in the applicant’s mark was most prominent because of its position). It is likely that in verbalizing the cited mark, many consumers would not include the tagline and would refer to the registrant and its services as “Aquatopia,” which sounds much more like a waterpark and nothing like “THE KARTRITE.”

Even assuming, however, that the entire four-word phrase “Aquatopia Kartrite’s Epic Adventures” is verbalized, the first word that is heard is “Aquatopia” and the phrase as a whole is more dissimilar than similar in sound to “THE KARTRITE” due to the presence of “Aquatopia” and the words other than “Kartrite’s” in the cited mark. *See White Rock Distilleries*, 92 USPQ2d at 1284 (“because the literal portion of the registered mark begins with the term TERZA, this mark sounds somewhat different from applicant’s mark.”).

Finally, with respect to meaning, we find unpersuasive the Examining Attorney’s core argument that because “the distinctive term KARTRITE and its formative, KARTRITE’S, appear in both the registered and applied-for marks, the marks convey the impression that they signify a single source, namely, KARTRITE.” 8 TTABVue 8. We must examine what KARTRITE connotes in each mark in the context of the marks in their entireties as well as the involved goods and services.

In the cited mark, the dominant word “Aquatopia” identifies a place involving water, as “aqua” connotes water,⁴² and the suffix “-topia” is familiar to United States

⁴² The Board “may take judicial notice of information from dictionaries, encyclopedias, and other standard referenced works.” *In re Info. Builders Inc.*, 2020 USPQ2d 10444, *3 n.6

consumers from the words “utopia” and “dystopia” as identifying a real or imagined place.⁴³ On the face of the mark alone, the word Kartrite in the possessive case in the tagline “Kartrite’s Epic Adventures” would logically be viewed by consumers as identifying someone named Kartrite because people, not places, have “epic adventures.”

The Examining Attorney’s contrary arguments that “a possessive does not necessarily suggest a person” and that it “is just as likely consumers would perceive KARTRITE’S in the registered mark as modifying a place name, with Aquatopia being an area within the Kartrite resort where ‘epic adventures’ take place,” *id.*, are belied by record evidence regarding Application Serial No. 88205555 to register the mark KARTRITE VAN DER BERRIS for “indoor waterpark services” and other services.⁴⁴ This application was filed by an apparent affiliate of the registrant,⁴⁵ and was noted by the Examining Attorney as a prospective Section 2(d) bar to registration of both of Applicant’s marks.⁴⁶ On its face, this mark consists of the full name of a person with the first name “Kartrite” and the surname “Van Der Berris.” In

(TTAB 2020). We take judicial notice that “aqua” pertains to water. MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on March 30, 2021).

⁴³ We take judicial notice that “utopia” means “a place of ideal perfection especially in laws, government, and social conditions,” while “dystopia” means “an imagined world or society in which people lead wretched, dehumanized, fearful lives.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on March 30, 2021).

⁴⁴ May 30, 2019 Office Action at TSDR 17-19.

⁴⁵ The applicant is CBH2O, LP and the cited registrant is CBK Lodge, LP, and both have addresses in Tannersville, Pennsylvania. *Id.* at 17.

⁴⁶ May 30, 2019 Office Action at TSDR 1. The application was subsequently abandoned. January 6, 2020 Final Office Action at TSDR 1.

recognition of that meaning, the applicant entered a “Name/Portrait Statement” in the application that the name “shown in the mark does not identify a particular living individual.”⁴⁷ This application corroborates that “Kartrite’s” in the tagline “Kartrite’s Epic Adventures” in the cited mark refers to a fictitious person, not a place. We find that in the context of the services identified in the cited registration, the word “Kartrite’s” would be understood and recalled as the name of someone who has epic adventures in an indoor water park called Aquatopia.

In Applicant’s standard character mark, the noun KARTRITE is preceded by the definite article THE. The Examining Attorney discounts the significance of the definite article almost to zero, 8 TTABVUE 9, but in the context of the involved goods and services, we find that it affects the mark’s meaning because it causes the mark as a whole to connote a place, THE KARTRITE resort and waterpark.⁴⁸ The Examining Attorney tacitly acknowledges this meaning, referring in one argument to “the Kartrite resort where ‘epic adventures’ take place,” *id.* at 11, and claiming in another argument that THE KARTRITE is “the name of the waterpark itself, as well as the source of any related services and merchandised goods or souvenirs.” *Id.*

⁴⁷ May 30, 2019 Office Action at TSDR 17.

⁴⁸ The Board has frequently stated that when the definite article “The” appears as part of a mark, it has no source-identifying significance and does not change the meaning of the rest of the mark or the mark as a whole. *See, e.g., The Pierce-Arrow Soc’y v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, *5 (TTAB 2019) (citing *In re The Place, Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (“we find that the definite article THE and the generic term BAR are not distinctive terms, and they add no source-indicating significance to the mark [THE GREATEST BAR] as a whole.”)). Here, however, at least in the context of the waterpark and other identified resort services, the definite article reinforces that THE KARTRITE is a specific venue, in the manner of hotels such as The Four Seasons, The Ritz Carlton, or The Waldorf-Astoria. As noted below, on the face of Applicant’s composite mark, that reference to a specific venue called “the kartrite” is explicit.

Notwithstanding that both marks include KARTRITE in different forms, Applicant's mark THE KARTRITE differs in commercial impression from the cited mark because the words THE KARTRITE connote a place or venue in Applicant's mark and the word Kartrite in the possessive case identifies a person in the cited mark.

Applicant's standard character mark and the cited mark are dissimilar in appearance, sound, and connotation and commercial impression, and the first *DuPont* factor weighs against a finding of a likelihood of confusion as to the standard character mark.

3. Applicant's Composite Mark

Most of the arguments regarding the similarity of Applicant's standard character mark to the cited mark pertain to Applicant's composite mark as well, as does much of our analysis above. We discuss below our findings that are specific to the composite mark.

Applicant argues that the "significant differences in the words, presentation of the words, and design elements result in an overall very different appearance and sound." 6 TTABVUE 7 (Serial No. 88388045). The Examining Attorney does not specifically address the appearance and sound of the two marks.

We have found that the word Aquatopia in stylized aqua script dominates the cited mark and that the large compass design against which the literal elements of the mark are displayed may also form part of the recalled general visual impression of the mark. We have also found that Applicant's composite mark is dominated by the lowercase bolded word "kartrite" in a plain font, which appears above the disclaimed

words “resort & indoor waterpark.” Applicant’s composite mark as a whole is dissimilar in appearance to the cited mark because the dominant words “kartrite” and “Aquatopia” are entirely different, Applicant’s mark has no design element or stylization that is reminiscent of the non-verbal elements of the cited mark, and all but one of the colors that are claimed as features of the respective marks are different.

With respect to sound, we have found that the cited mark likely would be verbalized simply as “Aquatopia” because of the “penchant of consumers to shorten marks.” *Bay State Brewing*, 117 USPQ2d at 1961. That penchant would be even more likely to apply to the literal elements of Applicant’s composite mark because the words “resort & indoor waterpark” are descriptive of or generic for these types of lodging and entertainment venues, while the preceding and modifying words “the kartrite” identify the specific resort/waterpark venue. We reiterate that “Aquatopia” is entirely dissimilar in sound to “the kartrite,” but find that even if “Aquatopia Kartrite’s Epic Adventures” were verbalized, the phrase is dissimilar in sound to “the kartrite” due to the presence of the first word “Aquatopia” and the words other than “Kartrite’s” in the cited mark.⁴⁹

As to connotation and commercial impression, we have found that in the context of the involved services, Applicant’s standard character mark THE KARTRITE suggests a place. In Applicant’s composite mark, that is suggested more specifically by an express identification of “the kartrite” as a specific “resort & waterpark,” which

⁴⁹ If the phrase “the kartrite resort and indoor waterpark,” comprising all of the literal elements of Applicant’s mark, is verbalized, the marks are even more dissimilar in sound regardless of how the cited mark is verbalized.

further differentiates the composite mark in commercial impression from the cited mark, in which “Kartrite’s” refers to a person who has epic adventures in a different place, Aquatopia, the nature of which is suggested, but not immediately described, by the mark alone.

Applicant’s composite mark and the cited mark are dissimilar in appearance, sound, and connotation and commercial impression, and the first *DuPont* factor weighs against a finding of a likelihood of confusion as to the composite mark.

C. Conclusion

The Class 41 waterpark services in the cited registration and both of Applicant’s applications are legally identical, and the second and third *DuPont* factors strongly support a finding of a likelihood of confusion as to the entire Class 41 portions of the applications. The legal identity of these services also reduces the degree of similarity between the marks that is required for confusion to be likely with respect to Class 41. The second and third *DuPont* factors also support a finding of a likelihood of confusion with respect to the goods in Classes 18, 21, 25, and 28, and the services in Classes 43 and 44.

We have found, however, that Applicant’s standard character and composite marks are both dissimilar to the cited mark, and the first *DuPont* factor weighs against a finding of a likelihood of confusion. We find that the marks are too dissimilar for confusion to be likely even under the lower required standard for similarity triggered by the legal identity of the Class 41 services. In balancing the two key *DuPont* factors, we find that the dissimilarity of the marks outweighs the

legal identity or similarity of the goods and services in Classes 18, 21, 25, 28, 41, 43 and 44. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (the Federal Circuit has “upheld Board determinations that one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Kellogg Co. v. Pack’em Enters., Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991). The first and second *DuPont* factors both weigh against a finding of a likelihood of confusion with respect to the goods in Classes 12, 14, 16, and 20, and the services in Class 35.

Decision: The refusals to register are reversed.