

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 4, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ozy Media, Inc.

Serial No. 90023072

G. Roxanne Elings of Davis Wright Tremaine LLP,
for Ozy Media, Inc.

Janice McMorrow, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Wellington, Heasley, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Ozy Media, Inc. (“Applicant”) seeks registration on the Principal Register of the mark RESET (in standard characters) for goods ultimately identified as “mugs and cups,” in International Class 21.¹

¹ Application Serial No. 90023072 was filed on June 26, 2020, 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 Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with the goods indicated above, so resembles the registered composite mark



(PLASTIC disclaimed) for a variety of household kitchen items, including “tableware, cookware and containers, namely, mugs made of plastic ...; cups made of plastics,” all in International Class 21,² as to be likely to cause confusion, to cause mistake, or to deceive.

After the refusal was made final, Applicant requested reconsideration and appealed. After the request was denied, the appeal was resumed. The appeal is fully briefed. We affirm the refusal to register.

² Registration No. 6285267 was issued on March 9, 2021 from an application filed as a request for extension of protection under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141(a). The mark is described as follows:

[Consisting] of the wording ‘RESET PLASTIC’ in gray stylized font, with ‘RE’ appearing centered above ‘SET’, and ‘PLASTIC’ appearing centered below, with each line in decreasing sized font. A circle appears surrounding the wording, with the beginning and tail ends in gray on the left, and the right side split into five different sections, appearing from top to bottom in light green, turquoise, dark green, light blue, and dark blue. The color white represents background and transparent areas only and is not claimed as a feature of the mark.

The colors gray, light green, dark green, turquoise, light blue, and dark blue are claimed as a feature of the mark. The registration also identifies goods and services in Classes 1, 16, 17, 20, 35, 37, 39, 40, and 42 that are not at issue here.

I. Likelihood of Confusion

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*”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We consider each *DuPont* factor that is relevant or for which there is evidence and argument of record. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. Similarity or Dissimilarity and Nature of the Goods, Channels of Trade and Classes of Consumers

The second and third *DuPont* factors, respectively, consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue

trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). Applicant does not address these *DuPont* factors in its brief, apparently conceding the issue, *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016), so we offer a brief explanation of our conclusion.

Applicant seeks registration of its mark for “mugs and cups,” while the cited registration identifies “mugs made of plastic” and “cups made of plastics.” Applicant’s more broadly worded “mugs and cups” encompass registrant’s more narrowly defined “mugs made of plastic” and “cups made of plastics.” Thus, we find that the goods identified in the involved application are legally identical to those of the cited registration.³ See, e.g., *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019) (“[T]ires” identified in respondent’s registration “encompass, and thus are legally identical to, at least the ‘vehicle wheel tires,’ ‘automobile tires,’ and ‘tires for vehicle wheels’ identified in [petitioner’s] registration.”); *In re Hughes*

³ Because we have found that the goods identified in the involved application are legally identical to some of the goods identified in the cited registration, “there is no need for us to further consider the relatedness of the goods,” *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018), based on evidence made of record by the Examining Attorney. Examining Attorney’s brief (11 TTABVUE 6); April 27, 2022 Denial of Request for Reconsideration at TSDR 4-20, 29-35.

Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. See, e.g., *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number, and after this designation are the page references, if applicable.

Furniture Indus., Inc., 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Because the goods are legally identical, and there are no limitations in the respective identifications as to the channels of trade or classes of consumers, we must presume these overlapping goods move in the same channels of trade and are offered to the same classes of purchasers. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *Double Coin*, 2019 USPQ2d 377409, at *17-18.

In sum, the second and third *DuPont* factors weigh heavily in favor of a finding of 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.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Embiid*, 2021 USPQ2d 577, at *11 (internal quotations omitted).

“The proper test 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.” *i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018). The average customer here is a consumer seeking to purchase mugs and cups.

Where, as here, the goods are legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Viterra*, 101 USPQ2d at 1908; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

The Examining Attorney argues that literal elements RE SET are the dominant portions of the cited mark⁴ and that the term PLASTIC is less significant because it is at least merely descriptive, if not generic, and has been disclaimed.⁵ Because the dominant terms RE SET of the cited mark are nearly identical to Applicant’s mark RESET, the Examining Attorney argues, the marks are “extremely similar.”⁶ Applicant’s brief does not expressly address this issue.

⁴ Examining Attorney’s brief (11 TTABVUE 4).

⁵ *Id.* (11 TTABVUE 4-5).

⁶ *Id.* (11 TTABVUE 3-5).

We agree with the Examining Attorney. In the case of composite marks, the words are normally accorded greater weight than the design 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. This is because the word portion of a word and design mark likely will appear alone when used in text and will be spoken when requested by consumers. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018). Thus, we find that the elements RE SET are the dominant elements of the cited mark.

Further, we find that the term PLASTIC is not a dominant element because it appears in very small font compared to the RE SET elements, is at least merely descriptive of the goods, and has been disclaimed. *See, e.g., Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *36 (TTAB 2021) (“DANTANNA’S is the dominant portion of the mark DANTANNA’S TAVERN because the word ‘tavern’ is a generic term for . . . restaurant and bar services, and [the applicant] has accordingly disclaimed the exclusive right to use the word ‘tavern.’ It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations.”).

We also find that the cited mark is not dominated by its design feature, a circle consisting of sections in various colors, as it is an ordinary geometric shape. *See, e.g., In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (The Board found that the word DELTA was the dominant portion of the composite mark consisting of the words THE DELTA CAFE within a diamond design because “the design is an ordinary geometric shape that serves as a background for the word

mark.”). *Cf. In re Serial Podcast, LLC*, 126 USPQ2d 1061, 1073 (TTAB 2018) (“Most common geometric shapes, such as circles, squares, triangles, ovals, and rectangles, when used as backgrounds for the display of word marks, are not considered inherently distinctive, and have difficulty acquiring distinctiveness.”).

Additionally, we find that when Applicant’s RESET mark is verbalized, it sounds the same as RE SET, the dominant elements of the cited mark; this is true regardless of whether the cited mark is perceived by the consumer as one word or two. Similarity in sound alone may be sufficient to support a finding that the compared marks are confusingly similar. *In re 1st USA Realty Profls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (citing *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968)).

Applicant argues that its mark is different in appearance, meaning and overall commercial impression when compared to the cited mark:

The cited mark, as a whole, is different in its appearance, meaning and overall commercial impression. The design feature has a significant affect [sic] on the mark and the stacking of the elements RE and SET distinguishes the alleged common portion and cannot be ignored. The representation of the alleged common element in the cited mark is presented in an unconventional manner that is unfamiliar to the public, who would have no difficulty in distinguishing between the well-known easily recognized word RESET and the stacked presentation appearing in the cited mark.⁷

Because Applicant’s mark is presented in standard characters, Applicant is not limited to any particular depiction of its mark. Thus, Applicant would be entitled to all depictions of its standard character mark regardless of the font style, size, or color.

⁷ Applicant’s brief, p. 2 (9 TTABVUE 3).

Applicant's mark could at any time in the future be displayed in a manner similar to registrant's mark, that is, the words could be displayed in the same font style and size. *See Viterra*, 101 USPQ2d at 1909-10; *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011).

As to meaning, Applicant merely states that the marks have different meanings but does not elaborate.⁸ Here, we find, as applied to legally identical goods, the terms RESET/RE SET would have the same meaning or connotation in both marks. *See e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (“[T]he absence of a space in Applicant's mark MINIMELTS does not meaningfully distinguish it from Opposer's [MINI MELTS] mark.”); *Mag Instrument Inc. v. Brinkman Corp.*, 96 USPQ2d 1701, 1714 (TTAB 2010) (“[P]resence or absence of a space before STAR does very little, if anything, to distinguish the two marks [MAXSTAR versus MAG STAR].”).

Applicant's argument as to commercial impression is similarly not persuasive. There is no evidence of record that consumers would find the stacked presentation of RE SET sufficiently “unfamiliar” to create a different commercial impression. *Cf. D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (“We find that phrase [] on apparel and other souvenirs, whether displayed in the stacked format shown in the Registration or in the horizontal format shown in the Application, would be perceived by purchasers and prospective purchasers as an expression of enthusiasm for the city of Washington, DC.”). Indeed, we take judicial notice of the

⁸ *Id.* at pp. 2, 3 (9 TTABVue 3, 4).

fact that both RE and SET are common English words and defined in the dictionary.⁹ Thus, we conclude that it would be reasonable for consumers to find the RE SET elements familiar, not unfamiliar.

Applicant likens the present appeal to *In re General Electric Co.*, 134 USPQ 190 (CCPA 1962), which, Applicant argues, stands for the proposition that “where one mark is known and the other is unfamiliar, the Board has repeatedly held that the familiar term is readily distinguishable from the unfamiliar.”¹⁰ We disagree. We have already rejected Applicant’s argument that the elements RE SET would be considered unfamiliar. Moreover, there are other important distinctions between the present appeal and Applicant’s cited cases, including, for example, that the involved RESET/RE SET marks sound the same when pronounced. As is often noted, “the Board must decide each case on its own merits.” *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

In sum, we find the marks to be more similar than dissimilar. Thus, the first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

C. Balancing the Factors

In conclusion, we find there is a likelihood of confusion between Applicant’s mark RESET and the mark of the cited registration because the marks are more similar

⁹ THE AMERICAN HERITAGE DICTIONARY, www.ahdictionary.com, accessed on December 23, 2022. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

¹⁰ Applicant’s brief, p. 3 (9 TTABVUE 4).

than dissimilar, the goods are legally identical, and the channels of trade and classes of purchasers of these goods are presumed to be the same. 15 U.S.C. § 1052(d).

II. Decision

The refusal to register Applicant's mark is affirmed.