

This Opinion is not a
Precedent of the TTAB

Mailed: August 29, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Zeta Tau Alpha Sorority

Serial No. 90090117

Jack A. Wheat and Peter J. Rosene of McBrayer PLLC,
for Zeta Tau Alpha Sorority.

Alberto I. Manca, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

Before Cataldo, Taylor and Kuczma,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Zeta Tau Alpha Sorority (“Applicant”) seeks registration on the Principal Register
of the mark **ZTA** (in standard characters) for

Jewelry in International Class 14, and

Headwear; Jackets; Pants; Shirts; Sweatshirts in
International Class 25.¹

¹ Application Serial No. 90090117 was filed on August 3, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and in commerce on the goods in Class 14 since at least as early as 1915 and its claim of first use anywhere and in commerce on the goods in Class 25 since at least as early as 1940.

The Trademark Examining Attorney refused registration of Applicant's mark for the goods in International Classes 14 and 25 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing Registration No. 5991321 for the mark ZTA (in standard characters) for:

Basins in the nature of bowls; Beer mugs; Blacking brushes; Bottles, sold empty; Bowls; Boxes for dispensing paper towels for household use; Brooms; Cake molds; Camping grills; Cocktail shakers; Cocktail stirrers; Coffee services in the nature of tableware; Coffeepots, non-electric; Combs; Containers for household or kitchen use; Cookery moulds; Cookie molds; Cooking pot sets; Cosmetic brushes; Cosmetic spatulas; Crockery, namely, pots, dishes, drinking cups and saucers, bowls, serving bowls and trays; Cruets; Crumb brushes; Cupcake stands; Cups; Dishes; Dishwashing brushes; Drinking bottles for sports; Drinking vessels; Dustbins; Electric devices for attracting and killing insects; Eyebrow brushes; Eyelash brushes; Fitted vanity cases; Flasks; Floor brushes; Floss for dental purposes; Flower pots; Fruit presses, non-electric, for household purposes; Frying pans; Funnels; Furniture dusters; Gardening gloves; Grills in the nature of cooking utensils; Hair brushes; Hair color application brushes; Hand-operated coffee grinders; Hand-operated salt and pepper mills; Heads for electric toothbrushes; Household utensils, namely, skimmers, kitchen tongs, sieves, graters, pot and pan scrapers, rolling pins, spatulas, turners, whisks; Ice buckets; Ice cream scoops; Ice tongs; Indoor

Applicant also claims ownership of Registration Nos. 2522556 for the standard character mark ZTA for: "Association services for women on college campuses and throughout the United States and foreign countries; promoting life success, friendship, philanthropy, and good health," based upon a claimed first use dating back to 1898 and a first use in commerce on October 9, 1902; and 3801892 for the standard mark ZETA for: "Association services, namely, promoting the interests of members of a collegiate fraternal organization, namely, a sorority, and the organization and support of individual members and chapters of the sorority," based upon a first use and first use in commerce in 1910.

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

aquaria; Indoor terrariums; Insulating flasks; Jugs; Kitchen grinders, non-electric; Kitchen utensils, namely, splatter screens; Knife rests for the table; Lamp glass brushes; Lunch boxes; Make-up brushes; Menu card holders; Mess-tins; Nail brushes; Non-electric food blenders; Non-electric griddles; Non-electric kettles; Oven mitts; Paper plates; Pots; Powder puffs; Serving trays, namely, cabarets; Shaving brushes; Shoe brushes; Strainers for household purposes; Straws for drinking; Sugar basins; Syringes for watering flowers and plants; Table plates; Tea services in the nature of tableware; Tea strainers; Thermal insulated bags for food or beverages; Toilet brushes; Toothbrushes; Toothpicks; Vaporizers for perfume sold empty; Whisks; Wine aerators in International Class 21,²

owned by Guangzhou Chaoyueshikong Trading Co., Ltd., as a bar to registration.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney submitted briefs, including Applicant's Reply Brief.³ We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. The Examining Attorney objects to the new evidence submitted with Applicant's Appeal Brief consisting of a "photograph" of the specimen of use filed in support of Registrant's application for registration of its mark and Applicant's argument related thereto.⁴ The photograph was not made of record during the prosecution of

² Registration No. 5991321 issued on February 18, 2020. The wording "ZTA" has no meaning in a foreign language.

³ Trademark Examining Attorney Anna C. Burdecki, Law Office 108 handled the examination of Application Serial No. 90090117. The application was assigned to Trademark Attorney Alberto I. Manca, Law Office 108, to represent the USPTO in this appeal.

⁴ See Applicant's Appeal Brief pgs. 3-4 (4 TTABVue 4-5).

Applicant's application. Because the evidence included in Applicant's Appeal Brief was untimely submitted during this appeal, the Examining Attorney objects to this evidence and requests that the Board disregard it along with attendant arguments. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).

The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. §2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §§ 1203.02(e), 1207.01 (2022); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.01(c) (July 2022).

Materials not previously made of record during prosecution of an application are untimely if submitted for the first time at briefing. The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board and exhibits attached to a brief that were not made of record during examination are untimely, and generally will not be considered. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also In re Jimmy Moore, LLC*, 119 USPQ2d 1764, 1766-67 (TTAB 2016) (excluding as untimely the first page of the applicant's patent submitted with its appeal brief); *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1080 (TTAB 2010) (to the extent evidence submitted with applicant's appeal brief had not been previously submitted, it is untimely and not considered); *In re Trans Continental Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002) (materials from web search engines submitted with appeal brief not considered); TBMP §§ 1203.02(e) and 1207.01.

Therefore, the Examining Attorney's objection to the inclusion of a copy of the specimen filed in connection with Registrant's application for registration of its mark and Applicant's argument regarding the specimen in its opening brief, is sustained inasmuch as a copy of Registrant's specimen was not made of record prior to appeal. Accordingly, we give no consideration to that specimen or to Applicant's accompanying argument.

II. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion enunciated in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

Marks are compared in their entireties for similarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Inn at St. John's*, 126 USPQ2d at 1746.

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.symbollic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed.

Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”).

We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered); *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (“[T]he factors have differing weights.”); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

A. Similarity of the Marks

Applicant’s mark ZTA in standard characters is identical to the cited standard character ZTA mark. Applicant does not argue otherwise and does not address this factor. Moreover, the identical mark of Applicant and Registrant is a letter mark which is neither descriptive or suggestive of Applicant’s applied-for goods or the goods identified in the cited registration. “When word marks are identical but neither suggestive nor descriptive of the goods associated with them, the first *DuPont* factor weighs heavily against the applicant.” *In re Majestic Distilling*, 65 USPQ2d at 1204;

see also In re i.am.symbolic, 123 USPQ2d at 1748; *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed.Cir.1984). The virtual identity of the marks strongly favors a finding of likelihood of confusion. *See In re Shell Oil*, 26 USPQ2d at 1688 (“The identity of words, connotation, and commercial impression weighs heavily against the applicant.”). Thus, the first *DuPont* factor, the similarity of the marks, weighs heavily in favor of finding a likelihood of confusion.

B. Similarity of the Goods, Channels of Trade and Class of Customers

We turn to the next *DuPont* factors involving the similarity and nature of the goods, and the channels of trade and classes of customers. In determining the similarity or dissimilarity of the goods, the more similar the marks at issue, the less similar the goods or services need to be for the Board to find a likelihood of confusion. *In re Shell Oil*, 26 USPQ2d at 1689 (“[E]ven when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *11 (TTAB 2020); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015). Where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil*, 26 USPQ2d at 1689), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *11 (citing *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015)).

It is well settled that the goods of Applicant and Registrant do not have to be similar or competitive, or even offered through the same channels of trade, in order to find that there is a likelihood of confusion. The confusion which the Trademark Act is concerned with is not only that a consumer would mistakenly choose Applicant's or Registrant's goods but also whether such a consumer, familiar with Registrant's goods, would believe that Applicant's goods emanated from Registrant (or vice versa), or that the goods provided by each were somehow associated with the same source. *Hilson Rsrch., Inc. v. Soc. for Human Resource Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Uncle Sam Chem. Co.*, 229 USPQ 233, 235 (TTAB 1986). The goods and channels of trade need not be similar or competitive, or even offered through the same trade channels to support a finding of likelihood of confusion.

It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate 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); *In re Martin's Famous Pastry Shoppe*, 223 USPQ at 1290; *Hilson Rsrch. v. Soc. for Human Resource Mgmt.*, 27 USPQ2d at 1432; *In re Melville*, 18 USPQ2d at 1388. The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the

source of the goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). Thus, even if the goods in question are different from one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis. *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

Applicant's application covers the following goods:

Jewelry in Class 14, and

Headwear; Jackets; Pants; Shirts; Sweatshirts in Class 25,

and Registration No. 5991321 for the identical mark identifies, among others, the following goods:

Basins in the nature of bowls; Beer mugs; Bottles, sold empty; Bowls; Cocktail shakers; Cocktail stirrers; Coffee services in the nature of tableware; Containers for household or kitchen use; Crockery, namely, pots, dishes, drinking cups and saucers, bowls, serving bowls and trays; Cups; Dishes; Drinking bottles for sports; Drinking vessels; Flasks; Ice buckets; Insulating flasks; Straws for drinking; Thermal insulated bags for food or beverages; Wine aerators in International Class 21.⁵

We focus our attention on the goods in Registrant's registration highlighted above, keeping in mind that likelihood of confusion may be found if relatedness is established for any item(s) that comes within the identification of goods in Applicant's application and the cited Registration. *See Tuxedo Monopoly, Inc. v. General Mills*

⁵ The Examining Attorney refers to those particular goods in the cited Registration as "various types of housewares and kitchen items, such as mugs, cups, bottles, drinkware, and tableware." *See Applicant's Appeal Brief* p. 4, citing to the July 15, 2021 Final Office Action at TSDR 5.

Fun Grp., Inc., 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic*, 116 USPQ2d at 1409; *Apple Comput. v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

The Examining Attorney submits internet evidence consisting of webpages from commercial Internet websites showing goods of the types identified in both Applicant's application and the cited registration offered under the same marks and/or trade names as representative examples of instances where third parties are using a single mark or trade name to identify jewelry and clothing items (Applicant's types of goods), as well as houseware and kitchen items (Registrant's types of goods) under the same mark or trade name:

- <https://www.lilypulitzer.com> November 24, 2020 Office Action, at TSDR 9-18. This evidence shows that the fashion label Lilly Pulitzer manufactures, produces, licenses and/or provides jewelry, pants, shirts, and headwear (Applicant's goods), and drinking vessels and cups, (Registrant's goods) under the LILLY PULITZER® mark;
- <https://www.lifeisgood.com> November 24, 2020 Office Action, at TSDR 19-42. This evidence shows that the fashion label Life is Good manufactures, produces, licenses and/or provides jewelry, shirts, sweatshirts, and headwear (Applicant's goods), and drinking vessels (Registrant's goods) under the LIFE IS GOOD® mark;
- <https://www.katespade.com> November 24, 2020 Office Action, at TSDR 43-84. This evidence shows that the fashion label Kate Spade manufactures, produces, licenses and/or provides jewelry, shirts, pants, and jackets (Applicant's goods), and drinking vessels, cocktail shakers and stirrers, serving trays, ice buckets, cups, bottles sold empty, dishes, and bowls (Registrar's goods) under the KATE SPADE trade name;
- <https://www.shoppibetaphi.com> July 15, 2021 Final Office Action, at TSDR 8-18. This evidence shows that the sorority Pi Beta Phi manufactures, produces, licenses and/or provides shirts, sweatshirts, pants, jackets, headwear, and jewelry (Applicant's goods), and drinking vessels, cups,

bottles sold empty, and drinking bottles for sports (Registrant's goods) under the PI BETA PHI trade name;

- <https://www.simplysouthern.com> July 15, 2021 Final Office Action, at TSDR 19-37. This evidence shows that the fashion label Simply Southern manufactures, produces, licenses and/or provides shirts, sweatshirts, pants, and headwear (identified by Applicant), and drinking vessels (identified by Registrant) under the SIMPLY SOUTHERN® mark;
- <https://www.verabradley.com> July 15, 2021 Final Office Action, at TSDR 38-44. This evidence shows that the fashion label Vera Bradley manufactures, produces, licenses and/or provides jewelry and shirts (Applicant's goods), and drinking vessels, cups, bottles sold empty, and drinking bottles for sport (Registrant's goods) under the VERA BRADLEY trade name;
- <https://www.the1851shop.com> July 15, 2021 Office Action, at TSDR 45-56. This evidence shows that the sorority Alpha Delta Pi manufactures, produces, licenses and/or provides shirts, sweatshirts, pants, jewelry, and headwear (Applicant's goods), and drinking vessels, cups, and straws for drinking (Registrant's goods) under the ALPHA DELTA PI trade name; and
- <https://shop.ncsu.edu> July 15, 2021 Office Action, at TSDR 57-83. This evidence shows that the North Carolina State University manufactures, produces, licenses and/or provides shirts, pants, and jewelry (Applicant's goods) and drinking vessels, cups, bottles sold empty, dishes, serving trays, and drinking straws (Registrant's goods) under the NC STATE mark.

The evidence submitted by the Examining Attorney shows third-party use of identical marks and trade names by a single source for goods of the types identified by both Applicant's application and Registrant's registration. *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 the relatedness analysis"). This evidence demonstrates that entities offering jewelry and clothing goods also offer houseware and kitchen goods under the same mark.

The evidence shows that jewelry and clothing items (headwear; jackets; pants; shirts; sweatshirts), and various types of houseware and kitchen items, such as Registrant's mugs, cups, bottles, drinkware, and tableware, are commonly provided by a single source under the same mark and/or brand name. Therefore, customers familiar with Registrant's goods may well expect that Applicant's goods offered under an identical mark are related and would be provided by Registrant or vice versa i.e., that Registrant's goods are provided by Applicant. *In re C.H. Hanson*, 116 USPQ2d at 1355-56 (relatedness found where Internet evidence from six websites demonstrated goods commonly emanated from the same source under a single mark); *see also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

In further support of the refusal, the Examining Attorney submits evidence from the USPTO's X-Search database consisting of fifteen active, use-based third-party registrations for marks registered for use in connection with the same or similar goods as those of both Applicant (with respect to the jewelry and clothing goods in Classes 14 and 25) and Registrant (with respect to houseware and glassware goods in Class 21).

Although these fifteen registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods identified in Applicant's application and Registrant's registration are of a kind which may emanate from a single source under a single mark, and thus are related for the

purpose of determining likelihood of confusion. *See e.g., In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Anderson*, 101 USPQ2d at 1919; *In re Davey Prods.*, 92 USPQ2d at 1203; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Thus, we find Applicant's and Registrant's goods related for likelihood of confusion purposes. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence 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"); *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878 at *6 (TTAB 2020) ("This evidence shows that consumers may expect to find both Applicant's and Registrant's goods as identified in the involved application and cited registration as emanating from a common source. This evidence is not from 'big box' retail stores or online retailers selling a wide variety of goods, but rather from specialty retailers."); *In re Davey Prods.*, 92 USPQ2d at 1203 ("in none of the third-party registrations are the identified goods so varied, numerous and obviously unrelated that the probative value of the registration [] is negated"); *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009) (holding the goods, while different and not interchangeable, are related because the evidence, including Internet excerpts showing third parties using the same marks for both sets of products, clearly demonstrates that there are entities that are the source of both sets of products).

Applicant contends that "the mere fact that a few on-line gift shops, variety stores, and other merchants sell clothing and jewelry as well as housewares, or the simple

fact that most any department store, or other on-line or brick and mortar store featuring a wide variety of consumer goods might offer jewelry, clothing and kitchenware is simply too tenuous of a connection to support a finding that a consumer of sorority merchandise in the nature of clothing and jewelry is likely to be confused into believing such wearing apparel emanates from the same source as common utilitarian housewares.”⁶ According to Applicant, “even though an on-line or brick and mortar store featuring a wide variety of consumer goods might offer jewelry, clothing, and kitchenware, the relationship of the disparate goods is too tenuous, it is unlikely that a consumer purchasing a jacket or decorative necklace will mistakenly believe the manufacturer of those items is the same as the manufacturer of any coffee cup, coffee services dishes, drinking straws, ice buckets, or other housewares.”⁷

Applicant’s argument misses the point. First, the goods identified in Applicant’s application are jewelry and clothing items not “sorority merchandise in the nature of clothing and jewelry.” The authority is legion that the question of registrability of Applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of Applicant’s goods, the particular channels of trade or the class(es) of purchasers to which sales of the goods are directed. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); *Tuxedo Monopoly v. General Mills Fun Grp.*, 209 USPQ at 988. Second, it is not just whether consumers of online or brick and mortar

⁶ Applicant’s Appeal Brief p. 6 (4 TTABVUE 7).

⁷ Applicant’s Appeal Brief p. 7 (4 TTABVUE 8).

stores are likely to believe “the manufacturer” of Applicant’s goods is also the same manufacturer of Registrant’s goods. Rather, the question we must decide is whether consumers would be confused by such goods being offered for sale bearing the identical mark, whether or not they are offered in the same stores or made by different manufacturers.

Applicant relies on three Board decisions in support of its argument that “the requisite of likelihood of confusion is more typically found only when goods are ‘complementary’ of each other.”⁸ However, the compared goods 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 [the goods] emanate from the same source.” *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d at 1724). Thus, it is not necessary that goods be similar, complementary or even competitive to support a finding of likelihood of confusion.

While the goods offered under Applicant’s and Registrant’s identical marks are not identical or competitive, as noted, the record demonstrates more than enough of a relationship between them that they would be likely to be seen by the same consumers under circumstances that would lead them to believe that they originate from the same source. Therefore, consumers encountering Applicant’s and Registrant’s marks in the marketplace would expect that Applicant’s and Registrant’s identified goods originate from the same source. *See, e.g., In re Majestic Distilling*, 65

⁸ Applicant’s Appeal Brief pp. 6-7 (4 TTABVue 7-8).

USPQ2d at 1205 (“[T]he . . . mistaken belief that [a good] is manufactured or sponsored by the same entity [as another good] . . . is precisely the mistake that § 2(d) of the Lanham Act seeks to prevent.”); *Paula Payne Prods. Co. v. Johnson’s Publ’g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973) (“[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.”). The relevant inquiry considers “if the respective products are 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.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513 at *8 (Fed. Cir. 2022) (citing *Coach Servs. v. Triumph Learning*, 668 F.3d at 1369, 101 USPQ2d at 1722, quoting *7-Eleven v. Wechsler*, 83 USPQ2d at 1724). Applicant’s arguments “ignore the context-specific realities of the consumer markets” in which [Applicant’s] and [Registrant’s] goods [] are offered.” *Id.*

Furthermore, when there are no limitations as to channels of trade or classes of purchasers in the description of goods in the application and cited registration, as we have here, it is presumed that Applicant’s and Registrant’s goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1162 (“An application with ‘no restriction on trade channels’ cannot be ‘narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers.’”); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir.

2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re I-Coat*, 126 USPQ2d at 1737; *In re Melville*, 18 USPQ2d at 1388.

The evidence of third-party websites offering Applicant’s and Registrant’s types of goods under the identical marks and brand names not only supports that such goods are related, but also supports that Applicant’s and Registrant’s goods are offered or provided through the same trade channels to some of the same customers supporting a finding under the third *DuPont* factor that a likelihood of confusions exists. *See, e.g., In re Davey Prods.*, 92 USPQ2d at 1203-04; *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009).

In its Reply Brief, Applicant describes its mark is an “affinity mark” citing *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883,1889 (TTAB 2008), where the Board took judicial notice that “the licensing of commercial trademarks on ‘collateral products’ has become a part of everyday life,” noting that this is “especially true” “in relation to merchandising fraternity and sorority, college and university, and tourist attractions insignia.”⁹ Applicant’s opening brief sets forth that it is a sorority known by its “nickname” ZTA which is registered as a service mark for “association services for women on college campuses” . . .” and “the sorority nickname is also used for merchandise such as clothing or jewelry.”¹⁰ Applicant explains that its applied-for mark ZTA is an “affinity mark,” “a mark such as those commonly licensed by

⁹ Applicant’s Reply Brief at unnumbered p. 1 (7 TTABVUE 2).

¹⁰ Applicant’s Appeal Brief at unnumbered p.1 and p. 2 (4 TTABVUE 2-3).

fraternities, sororities, colleges, and universities to multiple manufacturers to sponsor or endorse the production of official merchandise for members, alumni, supporters and so forth to acquire for the purpose of displaying the member, alumnus, or supporter's 'affinity' for their respective fraternity, sorority, college or university."¹¹ "Sorority members often wear with pride such apparel and adornments bearing insignia of their sorority to denote their membership in and 'affinity' for the sorority."¹² Applicant argues that "[i]t would be a dangerous precedent to approve of reliance by the Examination Division on affinity marks usage and registrations to base a 2(d) refusal on a registration which recites 'different' goods or services than those recited in the pending application."¹³ Applicant further expounds that such "ventures typically are not engaged in the manufacturing business, rather the affinity and souvenir products bearing their marks are 'officially' licensed merchandise."¹⁴

The licensing of commercial trademarks for use on "collateral" products, such as Applicant's goods, which are unrelated in nature to the services on which its mark is normally used has become a common practice. *Tiger Lily Ventures v. Barclays*, 2022 USPQ2d 513 at *8 ("in modern consumer markets commercial trademarks are often licensed for use on products that may differ from the original source of the trademark"); *Turner Entm't Co. v. Nelson*, 38 USPQ2d 1942, 1945 (TTAB 1996) ("It is common knowledge, and in the present case, undisputed that video games, t-shirts,

¹¹ Applicant's Reply Brief at unnumbered p. 1 (7 TTABVUE 2).

¹² Applicant's Reply Brief at p. 2 (7 TTABVUE 3).

¹³ Applicant's Reply Brief at unnumbered p. 5 (7 TTABVUE 6).

¹⁴ Applicant's Reply Brief at unnumbered p. 1 (7 TTABVUE 2).

beach towels, caps and other logo-imprinted products are used as promotional items for a diverse range of goods and services.”); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949, 951 (TTAB 1986) (“The licensing of commercial trademarks for use on ‘collateral’ products (such as clothing, glassware, linens, etc.) which are unrelated in nature to those goods or services on which the marks are normally used, has become a common practice in recent years.”); *see also In re Jackson Int’l Trading Co. Kurt D. Bruhl GmbH & Co. KG*, 103 USPQ2d 1417, 1419-20 (TTAB 2012).

Nonetheless, the evidence produced by the Examining Attorney addressed above shows that some of the goods identified in Registrant’s Registration are the same types of goods commonly sold under so-called “affinity” marks of third-parties and registered together in third-party registrations covering both Applicant’s and Registrant’s types of goods. Thus, customers familiar with Applicant’s mark ZTA, upon encountering Registrant’s goods offered under the identical mark, are likely to believe that Registrant’s goods are in some way associated with Applicant, or that Applicant’s goods are associated with Registrant’s goods. Aside from the fact that there is no evidence supporting different consumers for Applicant’s and Registrant’s goods, and given their relationship, and in the absence of any limitations as to classes of consumers in Applicant’s application, at least some of Applicant’s customers are part of the general consuming public for Registrant’s goods. As stated, to the extent that Applicant’s and Registrant’s goods are offered to the general consuming public, the channels of trade and classes of purchasers overlap. *In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001).

Thus, the *DuPont* factors involving the similarity and nature of the goods, and the channels of trade and classes of customers, support a finding of a likelihood of confusion.

C. Conclusion

Applicant's mark and Registrant's mark are identical, and the goods set forth in Applicant's application, i.e., jewelry and clothing items, are related to at least some of the "various types of housewares and kitchen items, such as mugs, cups, bottles, drinkware, and tableware" goods in the cited Registration which travel through overlapping trade channels to overlapping customers. Moreover, in cases such as this where Applicant's mark is identical to the cited registered mark, it is only necessary that there be a viable relationship between the respective goods in order to support a finding of likelihood of confusion. *See In re Shell Oil*, 26 USPQ2d at 1689 ("even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *5 (TTAB 2019) ("Where identical marks are involved, . . . the degree of similarity between the goods and services that is required to support a finding of likelihood of confusion declines.") (citing *In re i.am.symbolic*, 116 USPQ2d at 1411); *In re Iolo Tech. LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010).

Decision: The refusal to register Applicant's applied-for mark ZTA under § 2(d) of the Trademark Act is affirmed.