

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 21, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Armature Works (Hotel) TRS, LLC

Serial No. 90091318
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David V. Radack and Jenna P. Torres of Eckert Seamans Cherin & Mellott LLC,
for Armature Works (Hotel) TRS, LLC.

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Before Wolfson, Greenbaum and Lebow,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Armature Works (Hotel) TRS, LLC (“Applicant”) seeks registration on the Principal Register of the mark THE MORROW HOTEL (standard characters, HOTEL disclaimed), for “Hotel services” in International Class 43.¹

The Trademark Examining Attorney has refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with the identified services, so resembles the

¹ Application Serial No. 90091318 was filed on August 4, 2020, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

registered mark MORROW (in standard characters) for “Bed sheets; Towels; Bed blankets” in International Class 24 as to be likely to cause confusion, mistake or deception.²

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

I. Likelihood of Confusion

Our determination under Section 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *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.”). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between

² Registration No. 5188372 issued on April 18, 2017.

the goods and services. *See 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 services] and differences in the marks.”).

A. Similarity or Dissimilarity of the Marks

We compare Applicant’s mark THE MORROW HOTEL and the cited registered mark MORROW, both in standard characters, “in their entirety as to appearance, sound, connotation and commercial impression.” *In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018). Further, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). We focus on the recollection of the average consumer – here, an ordinary consumer – who normally retains a general rather than a specific impression of trademarks. *Id.*; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, “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.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, as the Federal Circuit has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark” *Id.*

When considered in their entireties, we find Applicant’s mark THE MORROW HOTEL and Registrant’s mark MORROW to be very similar in appearance, sound, connotation and commercial impression, due to the shared term MORROW. Applicant’s mark incorporates Registrant’s entire mark, to which Applicant has added the words THE and HOTEL. While there is no rule that a likelihood of confusion is present where one mark encompasses another, in this case, as in many others, the fact that Applicant’s mark includes the entirety of Registrant’s mark increases the similarity between them. *See, e.g., Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (finding CALIFORNIA CONCEPT

marks substantially similar to prior mark CONCEPT); *Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin).

There is no evidence that MORROW has any meaning or significance when applied to the identified goods or services, and there is no evidence of use by third parties of similar marks on similar goods or services that might dilute the source-identifying capacity of MORROW for those goods and services. *Cf. Juice Generation, Inc. v. GS Enters LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). On the other hand, "HOTEL" is generic for Applicant's identified "hotel services," and appropriately has been disclaimed. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed generic term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ and design). Descriptive or generic matter typically is less significant or less dominant when comparing marks. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *Nat'l Data.*, 224 USPQ at 752 (the "descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion")). We find that to be the case here, where consumers likely will view the term HOTEL in Applicant's mark in its generic sense, rather than as a source-distinguishing element.

Moreover, the word “THE” at the beginning of Applicant’s mark does not distinguish the marks because as used in Applicant’s mark, “THE” is a definite article with little to no source-identifying significance. *See In re Thor Tech*, 90 USPQ2d 1634, 1635 (2009) (“The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance. ‘The’ is a definite article. When used before a noun, it denotes a particular person or thing.”); *In re The Place, Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (definite article THE adds “no source-indicating significance to the mark as a whole”); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (in comparing THE MUSIC MAKERS and MUSICMAKERS, the definite article “the” is “obviously insignificant”). Here, the word “THE” simply emphasizes the term it precedes, MORROW, which is identical to the cited registered mark. *See Dixie Rests.*, 41 USPQ2d at 1533-34 (affirming Board’s finding that DELTA is confusingly similar to THE DELTA CAFÉ).

Applicant argues that the marks convey different commercial impressions because “THE MORROW HOTEL reinforces the overall commercial impression of the mark as the name of a hotel” while Registrant’s mark MORROW “is lacking the same connotation as the name of a hotel.” App. Br., 5 TTABVUE 8, 9. We agree that Applicant’s mark refers to a hotel and Registrant’s mark does not refer to anything in particular. However, Registrant’s mark MORROW need not include the term HOTEL in order for the mark to be associated with bedding for hotels. And, because marks are considered in association with the goods and services with which they are used, rather than in a vacuum, when Applicant’s mark THE MORROW HOTEL is

viewed in connection with the identified hotel services, it would convey the impression of a hotel even without the nondistinctive terms THE and HOTEL. In other words, the additional words THE and HOTEL in Applicant's mark are not sufficient to distinguish the marks because they do not change the meaning or commercial impression of the source-identifying term MORROW in the way that, for example, the additional word CLEAR in ALL CLEAR changes the meaning of the single word ALL. *Lever Bros. Co. v. Barcolene Co.*, 463 F.2d 1107, 174 USPQ 392 (CCPA 1972). *See also Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) ("In addition, the pronunciation of THE RITZ KIDS sounds like 'The Rich Kids,' leaving the impression of wealth, a concept tied strongly to [defendant] and not associated in any way with [plaintiff's] RITZ mark."). Rather, the shared term MORROW remains equally arbitrary in both marks.

We acknowledge that consumers may refer to Applicant's hotel as "The Morrow" or by its full name "The Morrow Hotel." App. Br., 5 TTABVUE 9. However, even if consumers would not refer to Applicant's hotel simply as "Morrow," without the preceding word "the," in this case, the word "the" is simply a definite article with no trademark significance.³ *See U.S. Nat'l Bank of Oregon v. Midwest Savings and Loan Ass'n*, 194 USPQ 232, 236 (TTAB 1976) ("The definite article 'THE' likewise adds little distinguishing matter because the definite article most generally serves as a means to refer to a particular business entity or activity or division thereof, and it

³ It would be unlikely that any consumer would refer to any hotel as "the 'The [Name of Hotel]'."

would be a natural tendency of customers in referring to opposer's services under the mark in question to utilize the article 'THE' in front of 'U-BANK' in view of their uncertain memory or recollection of the many marks that they encounter in their everyday excursion into the marketplace."). Unlike the defendant in *Shen Mfg.*, 73 USPQ2d at 1356 (Fed. Cir. 2004), a case on which Applicant relies, there is no evidence here that consumers refer to Applicant's hotel as "THE MORROW" or "THE MORROW HOTEL," but not the "MORROW" or the "MORROW HOTEL," such that the term "the' has elevated significance[.]"⁴

On this record, we find MORROW to be the dominant word in Applicant's mark THE MORROW HOTEL, and accord it more weight than the words THE and HOTEL in our likelihood of confusion analysis. In making this finding, we do not ignore the presence of the additional words THE and HOTEL in Applicant's mark. However, for the reasons discussed above, consumers are more likely to remember MORROW than the other words in Applicant's mark. *Nat'l Data*, 224 USPQ at 751. While there are some specific differences between THE MORROW HOTEL and MORROW, when the marks are viewed in their entirety, they are very similar in appearance, sound and connotation, and they convey similar commercial impressions, due to the common presence of the identical arbitrary term MORROW.

The first *DuPont* factor strongly favors a finding that confusion is likely.

⁴ In *Shen*, the Federal Circuit also noted meaningful additional differences in the marks (RITZ and THE RITZ KIDS) and the goods, and these differences further helped distinguish the marks' overall commercial impressions.

B. Similarity or Dissimilarity of the Goods and Services

In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. *See Detroit Ath. Co.*, 128 USPQ2d at 1052; *Dixie Rests.*, 41 USPQ2d at 1534; *see also Stone Lion*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). This factor “considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *St. Helena Hosp.*, 113 USPQ2d at 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004). The parties’ respective goods and services need not be “competitive or intrinsically related” to find a likelihood of confusion. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1737 (Fed. Cir. 2017). Rather, a likelihood of confusion can be found if the respective goods and services 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.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted). *See also In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). Additionally, it is sufficient for a refusal based on likelihood of confusion that relatedness is established for any good encompassed by the identification in the cited registration; likely confusion need not

be shown vis-à-vis each particular good and Applicant's hotel services. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 123 USPQ2d 1744.

To establish the relatedness of the bed sheets and bed blankets identified in the cited registration and Applicant's identified hotel services, the Examining Attorney submitted printouts from the following third-party hotel websites showing that each offers booking options for their hotel services as well as the online retail sale of bedding, shown in parenthesis, under the same name as the hotel:

- The Ritz-Carlton (bed sheets), November 30, 2020 Office Action, TSDR 7-8;
- Marriott (bed sheets), *id.*, at TSDR 9-10;
- W Hotels (various bedding), *id.*, at TSDR 11-2;
- Shinola Hotel (bed blankets), June 24, 2021 Final Office Action, TSDR 2-3;
- Four Seasons (various bedding), *id.*, at TSDR 4-5;
- Wyndham (various bedding), *id.*, at TSDR 6-7;
- Westin (various bedding), November 9, 2021 Request for Reconsideration Denied, TSDR 2-3;
- Courtyard (various bedding), *id.*, at TSDR 4-5; and
- Gaylord Hotels (various bedding), *id.*, at TSDR 6-7.

Several of the aforementioned hotel websites tout the connection between the hotels and their own brand of bedding on the webpages where the bedding is sold. For example, The Ritz-Carlton website promotes its eponymous bed sheets as a way

to “Experience our rich heritage with this luxurious set of The Ritz-Carlton hotel whites... these hotel linens are silky soft to the touch and have a lustrous look that catches the light.” November 30, 2020 Office Action, TSDR 8. The W Hotels website states: “When it’s time to recharge, retreat into your luxurious W Hotels bedding.” *Id.*, at TSDR 12. And the Westin website states: “Our collection of Westin linens allows you to enjoy true luxury at home.” November 9, 2021 Request for Reconsideration Denied, TSDR 3.

Applicant argues that this evidence shows the sale of “collateral goods” by “arguably famous” hotel chains who, like “big box store[s],” also sell other collateral items such as “bath and spa goods,” or goods that a traveler typically purchases, such as “bottled water” and “toiletries,” and not that the identified goods and services are related. App. Br., 5 TTABVUE 10-12. We disagree. Even if we were to accept the premise that hotels sell such items as bath and spa goods, bottled water, or toiletries, there is no evidence that hotels (even those that are “arguably famous”) sell such a wide range of goods that consumers equate hotels with nationally recognized retailers such as Walmart. *See In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *6 (TTAB 2020) (“This evidence is not from ‘big box’ retail stores or online retailers selling a wide variety of goods, but rather from specialty retailers.”). Rather, the Examining Attorney’s evidence supports the relatedness of the identified bedding products and hotel services by showing that hotels market their own brand of bedding to consumers on the same websites that offer hotel services, and hotel customers are accustomed to being able to purchase the type of bedding they used while staying at the hotel and

to encountering such goods and services offered under the same mark as the hotel services. *See, e.g., Detroit Ath. Co.*, 128 USPQ2d at 1050 (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”); *Hewlett-Packard*, 62 USPQ2d at 1004 (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

We find the evidence of third-party use of the same marks for goods such as Registrant’s and services such as Applicant’s sufficient to establish a relationship between them. The second *DuPont* factor also weighs in favor of a finding of likely confusion.

C. Trade Channels

Turning to the trade channels, because neither identification in the application or cited registration includes any restriction as to channels of trade, classes of consumers or price, we must presume that the identified goods and services travel in the ordinary or normal trade channels therefor, to all consumers normal for such goods and services and with no limitation as to price. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The Internet evidence discussed above establishes that bedding such as

Registrant's and hotel services such as Applicant's are offered together through the same hotel websites, and therefore travel in at least one of the same trade channels to the same classes of consumers, who include members of the general public.

This *DuPont* factor favors a finding of likelihood of confusion.

D. Other Arguments

Applicant also argues that there is no likelihood of confusion because (1) the hotel services identified in the application are not within Registrant's zone of expansion, and (2) there is "little risk of reverse confusion" because the markets for the identified goods and services are distinct, and if Applicant ever were to sell bedding, it would do so as collateral goods "under its distinct mark THE MORROW HOTEL." App. Br., 5 TTABVUE 15-16. These arguments are unpersuasive.

First, the expansion of trade doctrine has limited application in *ex parte* proceedings, and usually is applied in *inter partes* proceedings where a plaintiff claims that its priority of use of a mark for its goods or services should be extended to include the defendant's goods or services because they are in the natural zone of expansion of the plaintiff's goods or services. *See Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, 116 USPQ2d 1102, 1119 (TTAB 2015) ("natural zone of expansion" doctrine normally applies in *inter partes* where priority is an issue). The Board considers the concept in *ex parte* proceedings through a traditional relatedness of goods and services approach. *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1266 (TTAB 2011); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1480 n.9 (TTAB 2007). We have done so here. As discussed above, the services identified in the application are related

to the goods identified in the cited registration. Applicant's "zone of expansion" arguments do not compel a different result.

Second, to the extent Applicant's arguments about lack of reverse confusion are based on purported differences in the marks and the channels of trade for the identified goods and services, we reiterate our findings above that the marks are very similar and the channels of trade overlap. To the extent the arguments are based on Applicant's asserted marketing plans, they are purely speculative. *See Cai v. Diamond Hong*, 127 USPQ2d at 1799 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence."); *see also Shell Oil*, 26 USPQ2d at 1690 ("The term 'reverse confusion' has been used to describe the situation where a significantly larger or prominent newcomer 'saturates the market' with a trademark that is confusingly similar to that of a smaller, senior registrant for related goods or services."). (Citations omitted).

II. Conclusion

The overall similarity of the marks for related goods and services that move in at least one of the same channels of trade to the same classes of consumers renders confusion likely.

Decision: The refusal to register Applicant's mark THE MORROW HOTEL is affirmed under Trademark Act Section 2(d).