

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Viva Maude, Inc.

Serial No. 90269302

Mark A. Watkins and William E. Ryan of Vorys, Sater, Seymour and Pease LLP,
for Viva Maude Inc.

Alexandria Bryant, Trademark Examining Attorney, Law Office 113,
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Before Lykos, Larkin and English,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Viva Maude, Inc. (“Applicant”) seeks registration on the Principal Register of the
standard character mark VIVA MAUDE for the following services, as amended:¹

Television program, film, video and audio recording production;
Creating, directing and production of stage shows, television
programs, radio programs, movies, digital and multimedia televisoin
[sic] programs and television program segments featuring comedy,
fiction, drama, news, documentary, reality, animation, unscripted,

¹ Application Serial No. 90269302; filed October 21, 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.

Applicant amended the recitation of services to the present identification in its May 5, 2021 Office Action Response, TSDR 5.

non-fiction, variety, and music not being advertising material; education and entertainment services in the nature of creating, directing and production of movies, television series, television shows and show segments not being advertising material featuring comedy, fiction, documentary, reality, non-fiction, variety, interviews, talk show elements, animation and musical performances all delivered via radio, television, cable, satellite, a global computer network; Scriptwriting for non-advertising purposes and screenplay writing in International Class 41.

The Examining Attorney has refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the standard character mark MAUDE registered on the Principal Register for “entertainment services, namely, a continuing comedy television series” in International Class 41.² When the refusal was made final, Applicant requested reconsideration and appealed. The request for reconsideration was denied and the appeal was resumed. Both Applicant and the Examining Attorney filed briefs.

We affirm the refusal to register.

I. Analysis

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co. Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d

² Registration No. 6162270; registered September 29, 2020.

1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)); *see also 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 [or services].’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We address the relevant *DuPont* factors below.

A. Similarity or Dissimilarity of the Marks

We start with the first *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to 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); *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re*

Inn at St. John's, LLC, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the goods or services offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1160; *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."). But one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1161 (finding the Board did not err in reasoning that the term LION was

dominant in both applicant's mark STONE LION CAPITAL and opposer's marks LION CAPITAL and LION); *In re Chatam Int'l*, 71 USPQ2d at 1946.

Applicant argues that the marks “do not look or sound similar” due to the addition of the word “viva” in Applicant's mark.³ Specifically, Applicant asserts that, as the first word in its mark, “viva” is dominant and “[t]he enunciation of Applicant's mark will always require pronouncing two words” consisting of three syllables in contrast to pronouncing the one-word, one-syllable cited mark.⁴

The addition of the word VIVA as the first word in Applicant's mark does differentiate it somewhat from the cited mark in appearance and sound, but consumers are unlikely to focus on syllable counting in forming their impressions of the marks. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”). When we consider the marks “in light of the fallibility of human memory,” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014), we find that the marks in their entireties are more similar than dissimilar.

Turning to connotation and commercial impression, the word “viva” is an interjection: (1) meaning “Long live (someone or something specified!)”;⁵ (2) “used to

³ Appeal Brief, 7 TTABVUE 11.

Citations to the briefs refer to TTABVUE, the Board's online docket system. Citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

⁴ *Id.* at 10-11.

⁵ December 17, 2021 Request for Reconsideration, TSDR 23 (YourDictionary).

express goodwill or approval”⁶ or “acclamation, salute or applause”;⁷ and (3) “used before the name of someone or something to show that you support them, *Viva Mexico!*”⁸ Given its meaning, the term VIVA as the first word in Applicant’s mark modifies and is subordinate to the given name MAUDE,⁹ conveying acclamation, approval, applause, or support for a person named Maude. In this way, the term VIVA draws attention to and emphasizes the name MAUDE in Applicant’s mark. Rather than distinguishing Applicant’s mark from the cited mark, the term VIVA in Applicant’s mark highlights and reinforces the connotation and commercial impression created by the given name MAUDE, the entirety of the cited mark. Accordingly, in this case, the fact that Applicant’s mark incorporates the registrant’s mark in its entirety increases the similarity between the marks. *See, e.g., Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (finding mark CALIFORNIA CONCEPT 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 likely to cause confusion with BENGAL); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (finding applicant’s mark VANTAGE TITAN confusingly similar

⁶ March 23, 2021 Office Action, TSDR 30 (Merriam-Webster Dictionary).

⁷ January 24, 2022 Denial of Request for Reconsideration, TSDR 65 (American Heritage Dictionary).

⁸ *Id.* at TSDR 67 (Macmillan Dictionary).

⁹ March 23, 2021 Office Action, TSDR 23 (Wictionary definition of “Maude”: “A female given name from the Germanic languages[.]”); December 17, 2021 Request for Reconsideration, TSDR 26 (“Maude – Baby Name Meaning, Origin, Popularity”).

to registered mark TITAN); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (finding applicant's CAREER IMAGE marks similar to registered mark CREST CAREER IMAGES).

With regard to connotation, Applicant counters that "Maude alone is a name; VIVA MAUDE is a phrase often in exclamation ... invoke[ing] an expression or cheer that means 'long live!'"¹⁰ In Applicant's view, its mark "is a phrase that would be readily apparent to the consuming public as phrases such as 'VIVA LAS VEGAS,' 'VIVA MEXICO' [and] 'VIVA LA KING[,] are commonly known/pop references. ... In this light, Applicant's mark is a combination of words, playing on a well-known expression and having the capability to dispel consumer confusion that might otherwise arise due to its alleged facial similarity to the Cited Mark. The Cited Mark includes no such word play."¹¹

Applicant's argument, however, reflects that its mark is not a play on one well-known expression; rather, a number of expressions, including those cited by Applicant, use the word "viva" in its ordinary dictionary meaning to express support for or to celebrate a particular person or place, e.g., long live Las Vegas, Long live Mexico, Long live the King. In addition, the Examining Attorney introduced evidence showing how "viva" has been used in the media to show support or acclaim for a person or place:

¹⁰ Appeal Brief, 7 TTABVue 14.

¹¹ *Id.* at 15.

- June 26, 2019 article posted to the website for the national politics section of WLRN 91.3 FM in Miami/South Florida titled “***Viva Trump!***’ Latinos for Trump Coalition and Pence Launce Bid for Florida Voters” describing a political rally: “Chants of ‘Libertad,’ ‘**Viva Cuba,**’ ‘**Viva Venezuela,**’ and even some ‘**Viva Trump,**’ rang out at the DoubleTree Hilton Hotel by the Miami airport where Vice President Mike Pence announced the [Latinos for Trump] coalition.... When Pence praised a specific successful Latina business owner in the crowd, a cry of ‘**Viva Columbia!**’ broke out and was met by ‘**Que viva!**[.]’”¹²
- Undated article in the SOUTH FLORIDA, SUN SENTINEL, titled ***¡Viva Obama!***: “Now that Barack Obama has won the presidency, much is being written about his nearly flawless campaign and his use of the Internet to appeal to young voters. To this we might add Obama’s use of reggaeton and Mexican norteño music to get his message across to Hispanics... **¡Viva Obama!**”¹³
- **VIVA LA BAM:** Identified as “an American reality television series that starred Bam Magera and his friends and family. The show was a spin-off from MTV’s *Jackass*, in which Magera and most of the main cast had appeared.”¹⁴
- **VIVA ZAPATA!:** Identified as “a 1952 biographical film directed by Elia Kazan and starring Marlon Brando. The screenplay was written by John Steinbeck.... The film is a fictionalized account of the life of Mexican

¹² January 24, 2022 Denial of Request for Reconsideration, TSDR 71.

¹³ *Id.* at 69.

¹⁴ *Id.* at 68.

revolutionary Emiliano Zapata from his peasant upbringing through his rise to power in the early 1900s and his death in 1919.”¹⁵

Based on the record, we conclude that Applicant’s mark would not be perceived as a play on words but rather would be recognized as expressing support for a person named Maude, emphasizing the “MAUDE” portion of its mark, which is the entirety of the cited mark.

Applicant cites to the following three pairs of registered marks¹⁶ arguing the evidence “clearly shows [the] USPTO believes that ‘VIVA-Term’ marks are distinguishable, and thus registerable, over the ‘Term’ alone for related or identical goods [or services].”¹⁷

Mark, Reg. No. and Owner	Goods/Services	Mark, Reg. No. and Owner	Goods/Services
VIVA DELICIOUS Reg. No. 6028175 Owner: London Moore	Entertainment services, namely, an ongoing television show and online television show in the fields of cooking, travel, dance and music in Cl. 41	DELICIOUS TV (TV disclaimed) Reg. No. 3069320 Owner: All Art Media Inc.	Vegetarian cooking and lifestyle television series in Cl. 41

¹⁵ *Id.* at 70.

¹⁶ December 17, 2021 Request for Reconsideration, TSDR 35-50.

¹⁷ Appeal Brief, 7 TTABVue 13.

Mark, Reg. No. and Owner	Goods/Services	Mark, Reg. No. and Owner	Goods/Services
VIVA SPRITZ Reg. No. 6076122 Owner: Vermont Hard Cider Company, LLC	Alcoholic beverages except beers in Cl. 33	SPRITZ Reg. No. 5676900 Owner: Spritz Beverages, LLC	Non-alcoholic beverages flavored with tea; Non-alcoholic beverages, namely, carbonated beverages; all of the foregoing not being mocktails and not used in connection with cocktails in Cl. 32
VIVA LA REVOLUTION! Reg. No. 5078588 Owner: Monster Energy Company	Nutritional supplements in liquid form in Cl. 5	REVOLUTION Reg. No. 4120395 Owner: Rhino Trading LLC	Dietary and nutritional supplements; herbal supplements; Nutraceuticals for use as dietary supplements; Weight loss dietary supplements; ... in Cl. 5

“Applicant believes it should be afforded similar and consistent treatment given that its mark includes the first additional term ‘VIVA’.”¹⁸ A mere three examples, however, is not particularly significant and hardly supports Applicant’s claim that the Office has taken a “stance” on VIVA-formative marks.¹⁹ Moreover, two of the

¹⁸ *Id.* at 12. Applicant asserts the third-party registration evidence “shows that the word alone and the Viva+word can coexist in the marketplace.” *Id.* at 13. Third-party registrations, however, are not evidence that the registered marks are in use and actually coexist in the marketplace, *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016), and Applicant made of record no evidence of the use of the cited marks.

¹⁹ Appeal Brief, 7 TTABVue 13. Applicant asserts “that the above referenced marks are only a representative sample of marks found on the USPTO database and it is possible, and likely, that other examples exist.” *Id.* at 12-13. We give no consideration to this speculative argument, which is no substitute for evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367,

three sets of registrations are for wholly unrelated goods so they do not support that in the entertainment and production field “the USPTO believes that ‘VIVA-Term’ marks are distinguishable.”²⁰ In addition, and most importantly, each case must be decided on its own merits. *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court”); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983) (“[T]he third party registrations relied on by applicant cannot justify the registration of another confusingly similar mark.”). The records of the cited registrations are not before us and we are not bound by the determination of another examining attorney based on a different record. *Hilson Rsch. Inc. v. Soc’y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1439 (TTAB 1993) (Board is not bound by an Examining Attorney’s determination); *see also In re Ala. Tourism Dept.*, 2020 USPQ2d 10485, at *11 (TTAB 2020) (consistency in examination is desirable but the Board “must yield to proper determinations under the Trademark Act and rules”) (internal quotations omitted).

127 USPQ2d 1797, 1799 (Fed. Cir. 2018); *Embiid*, 2021 USPQ2d 577, at *40 (quoting *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *46 (TTAB 2019)).

²⁰ Appeal Brief, 7 TTABVUE 13.

Applicant also argues that the cited mark MAUDE “is somewhat diluted,” not by third-party use of the term as a mark or descriptor in the field of television entertainment, but by “multiple Wikipedia entries of famous Maudes”:²¹ (1) Maude Andrews Ohl (December 29, 1862 - January 7, 1943) an “American journalist, poet, and novelist”; (2) Maude Ballou (September 13, 1925 - August 26, 2019), “an American civil rights activist”; (3) Maude Maggart (born February 24, 1975) “an American cabaret singer and recording artist”; (4) Maude Flanders, a character on “The Simpsons” TV show; and (5) Maude Nugent (January 12, 1873 or 1874 – June 3, 1958) “an American singer and composer.”²² Applicant asserts “[c]onsumers that come across the name Maude must stop and give pause to what Maude may mean or refer to.”²³

To the extent Applicant may be arguing that the cited mark is weak, the evidence does not show common trademark or descriptive use of the term “MAUDE” in the television entertainment industry. Only one identified “Maude” even relates to television, namely, a character on “The Simpsons.” The record also does not support Applicant’s assertion that the identified “Maudes” are “famous” much less that the relevant purchasing public is in any way familiar with them. This evidence falls far short of the type and quantity of evidence sufficient to show that the term MAUDE is weak for a continuing television series or related services. *See In re i.am.symbolic*,

²¹ *Id.* at 15.

²² January 24, 2022 Denial of Request for Reconsideration, TSDR 37-41.

²³ *Id.*

123 USPQ2d at 1751 (evidence of third-party use for the same or similar goods fell short of “ubiquitous” or “considerable” use); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (discussing “voluminous evidence” of registration and use of paw print design elements); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 & n.1 (Fed. Cir. 2015) (referring to evidence of “a considerable number,” 26 third-party marks).

Moreover, even if, as Applicant argues, consumers were to “stop and give pause to what Maude may mean or refer to,”²⁴ the record does not support that consumers would attribute one meaning to the cited mark MAUDE and a different meaning to the name MAUDE in Applicant’s mark based on the nature of the respective services.²⁵ *In re Dare Foods Inc.*, 2022 USPQ2d 291, at *10-11 (TTAB 2022) (nothing in the record to suggest the term RAINCOAST would have one meaning in the mark RAINCOAST TRADING for seafood meals, snacks and appetizers and a second different meaning in the mark RAINCOAST DIP for snack food dips; “both suggest goods emanating from an unspecified ‘rain coast.’”); *Embiid*, 2021 USPQ2d 577, at *21.

In sum, we find that the marks in their entirety are similar overall in appearance, sound, connotation and commercial impression. Accordingly, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

²⁴ Appeal Brief, 7 TTABVue 15.

²⁵ As explained on page 16 below, we cannot treat the services identified in the cited registration as limited to the title of a comedy show from the 1970s that aired on CBS.

B. Similarity or Dissimilarity of the Services

We next consider “[t]he similarity or dissimilarity and nature of the goods or services.” *DuPont*, 177 USPQ at 567; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). We must base our comparison of the services on the identifications in the cited registration and Applicant’s application. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed in the identification of goods or services in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015).

The services need not be identical for there to be a likelihood of confusion, but the evidence must establish that the services are related in some manner or that the conditions surrounding their marketing are such that they would 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. *See Coach Servs.*, 101 USPQ2d at 1722; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.*, 223 USPQ 830, 831 (TTAB 1984). In addition, the issue is not whether the services are likely to be confused but whether there is

likely to be confusion as to the source of the services.²⁶ *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *Rexel Inc.*, 223 USPQ at 831.

For ease of reference, the cited registration identifies “entertainment services, namely, a continuing comedy television series.” The involved application covers:

Television program, film, video and audio recording production; Creating, directing and production of stage shows, television programs, radio programs, movies, digital and multimedia televisoin [sic] programs and television program segments featuring comedy, fiction, drama, news, documentary, reality, animation, unscripted, non-fiction, variety, and music not being advertising material; education and entertainment services in the nature of creating, directing and production of movies, television series, television shows and show segments not being advertising material featuring comedy, fiction, documentary, reality, non-fiction, variety, interviews, talk show elements, animation and musical performances all delivered via radio, television, cable, satellite, a global computer network; Scriptwriting for non-advertising purposes and screenplay writing in International Class 41.

Applicant argues “the services of the Applicant and the Registrant could not be more distinct” because “Registrant’s mark is the title of an American Sitcom television series that was originally broadcast on the CBS network from September 12, 1972 – April 22, 1978” while “Applicant’s services are ordered by an entity to produce a television show.”²⁷

²⁶ Applicant’s arguments that consumers will not confuse Applicant’s and the registrant’s services are without merit. Appeal Brief, 7 TTABVUE 22 (“The industry and consumers of media understand the difference between the actual entertainment product (the comedy show) and the production company that creates the show on behalf of another.”); *see also id.* at 20 (“[E]ven the least sophisticated prospective consumer of the comedy shows offered by MAUDE would not be able to haphazardly and/or accidentally hire a fleet of film-industry professionals.”).

²⁷ *Id.* at 15-17.

Although the services in the involved registration are limited to a “comedy” television series, the registrant’s services are not limited to the title of a television series broadcast on CBS in the 1970s. We cannot rely on extrinsic evidence to limit the services in the cited registration. *Embiid*, 2021 USPQ2d 577, at *28 (“[W]e may not import restrictions into the identification[s] based on alleged ‘real world conditions’ of the sort argued by Applicant, or consider extrinsic evidence regarding Applicant and Registrant themselves.”) (internal citation omitted); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (“Evidence of actual marketplace usages that seeks to limit or alter the usages encompassed by the marks, goods and services, or usages listed in the application and registration are not considered in assessing likelihood-of-confusion in the registration context.”); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008) (“[I]t is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods.”). Rather, we must compare the services as described in the cited registration and involved application.

The identifications themselves reflect an inherent relationship between the services because Applicant’s “entertainment services in the nature of creating, directing and production of ... television series ... featuring comedy” result in the type of “continuing comedy television series” identified by the cited registration. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002) (finding goods and services related based on the respective identifications without resort to evidence); *In re Country Oven, Inc.*, 2019 USPQ2d

443903, at *6 (TTAB 2019) (“We find that the identifications in the application and registration themselves support finding the goods and services are related.”); *Cf. In re U.S. Shoe Corp.*, 229 USPQ 707, 708 (TTAB 1985) (retail women’s clothing store services “closely related” to uniforms because the goods fall “plainly within” the services).


The evidence of record further corroborates the commercial relationship between Applicant’s and the registrant’s services. The Examining Attorney submitted 19 third-party use-based registrations for marks covering both ongoing television series generally, including those in the comedy field, and television and film production services:²⁸

Reg. No.	Mark	Relevant Services
5903533	TREEHOUSE DETECTIVES	Entertainment in the nature of an ongoing television series in the field of ... comedy; entertainment services in the nature of development, production and distribution of audio visual television programs in the field of ... comedy, drama and science fiction; entertainment services, namely, production of television programs
5971551	BOSQUE RANCH PRODUCTIONS (“productions” disclaimed)	Entertainment media production services for motion pictures, television and internet; entertainment services in the nature of an ongoing television series featuring comedy

²⁸ March 23, 2021 Office Action, TSDR 8-9, 13-21; June 17, 2021 Final Office Action, TSDR 38-40, 44-49, 53-56, 64-69; January 24, 2022 Denial of Request for Reconsideration, TSDR 7-33.

Reg. No.	Mark	Relevant Services
5233395	PEOPLE OF EARTH	Entertainment services in the nature of a live-action, comedy television series; production of a live-action, comedy television series
5470090	ROAST BATTLE ("roast" disclaimed)	Production of television programs, series and segments; design, creation, production and post-production of audiovisual works, particularly television entertainment services, namely, a continuing competition-based comedy program with actual and/or fictional characters in comedic documental broadcast over television, satellite, audio and video media, and via a global computer network
5356374	OBJECTIFIED	Entertainment services in the nature of an ongoing live-action comedy television series; entertainment multimedia production services for live-action comedy television series
6565241	TR3 PRODUCTIONS DISTRIBUTION MEDIA GROUP ("productions," "distribution" and "media group" disclaimed)	Entertainment media production services for motion pictures, television and Internet; entertainment in the nature of an ongoing special variety, news, music or comedy show
6616726	RYAN'S MYSTERY PLAYDATE: COMMAND CENTER	Television show production; Entertainment in the nature of an ongoing special variety, news, music or comedy show
6566780	KAMI SIMMONS	Entertainment in the nature of an ongoing special variety, news, music or comedy; entertainment services in the nature of development, creation, production, distribution, and post-production of multimedia entertainment content

Reg. No.	Mark	Relevant Services
5978611	NETFLIX	Entertainment services in the nature of ongoing television series and movies in the fields of ... comedy; entertainment services in the nature of development, creation, production, distribution, and post-production of motion picture films, television shows
5773967	SNAP ORIGINALS ("originals" disclaimed)	Entertainment services in the nature of ongoing television series in the fields of comedy; entertainment services in the nature of development, creation, production, distribution, and post-production of television shows and multimedia entertainment content
5715962	SMOKING BABY	Entertainment media production services for television, digital media, film podcast and videos; entertainment services in the nature of movies, ongoing shows and television programs featuring comedy
6289642	HAIL MARY PRODUCTIONS ("productions" disclaimed)	Television, digital media, film, podcast and video production services; entertainment services in the nature of writing, development, producing, recording, production and/or post-production services of television, digital media, video, podcast, theatrical motion pictures, film, music and multimedia entertainment content; entertainment services in the nature of movies, ongoing shows and programs featuring comedy
5692800	BIG BALD HEAD	Television, digital multimedia, film, podcast and video production services; entertainment services in the nature of writing, development, producing, recording, production and post-production services of television, ... film; entertainment services in the nature of movies, ongoing shows and programs featuring comedy

Reg. No.	Mark	Relevant Services
5709303	ADAPTIVE STUDIOS ("studios" disclaimed)	Direction of making audio recordings, digital and television programs and films, namely, direction of making television programs, production of audio recording, and film production; entertainment services, namely, audio, film, multimedia, television, and video in the nature of motion pictures distribution, pre-production in the nature of creation and development, production, recording, and post-production services; entertainment services, namely, providing ongoing television programs in the fields of ... comedy
6146780		Entertainment in the nature of ongoing television programs in the field of children's stories, poetry, fairy tales, bedtime stories, nursery rhymes, children's songs and parenting topics; entertainment services in the nature of ongoing television programs in the field of children's entertainment; production of podcasts; production of radio and television programs
6383920	GETSOME	Entertainment services in the nature of ongoing special variety, news, music or comedy shows; multimedia entertainment services in the nature of development, creation, recording, production and post production services entertainment services in the nature of writing, development, producing, recording, production and post-production services in the fields of television, digital multimedia, video, podcast, film

Reg. No.	Mark	Relevant Services
6611306	MATTIE MOSS CLARK	Entertainment services in the nature of creation, development, and production of television programming; Entertainment services in the nature of ongoing television programs in the field of children's entertainment, music and social media
5874584	PENNYWORTH	entertainment services in the nature of live-action, dramatic comedy television series; production of live action, dramatic comedy television series
6131377	BATWOMAN	Entertainment services in the nature of live-action, dramatic comedy television series; production of live-action, dramatic comedy television series; providing information, non-downloadable images, and non-downloadable videos in the field of television programs and entertainment via a global computer network

Third-party registrations are not evidence that the registered marks are in use or that the public is familiar with them, but they suggest that the registrant's and Applicant's services are likely to emanate from a common source. *See, e.g., DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *13 (TTAB 2020); *Country Oven*, 2019 USPQ2d 443903, at *8 ("As a general proposition, third-party registrations that cover goods . . . from both the cited registration and an Applicant's application are relevant to show that the goods . . . are of a type that may emanate from a single source under one mark."); *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp. of Dall.*, 60 USPQ2d 1214 1217-18 (TTAB 2001)); *In re Davey Prods.*, 92

USPQ2d 1198, 1202-03 (TTAB 2009) (third-party registrations probative); *In re Albert Trostel*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (same). “The registrations are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Country Oven*, 2019 USPQ2d 443903, at *10.

The record includes sufficient evidence, which Applicant does not rebut with evidence of its own, *Country Oven*, 2019 USPQ2d 443903, at *10, to demonstrate that the services in the involved application and cited registration are marketed in ways that they would 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 emanate from a common source.²⁹ Accordingly, we find that the relatedness of the services favors finding a likelihood of confusion.

C. Similarity or Dissimilarity of the Trade Channels and Classes of Consumers

We now assess “the similarity or dissimilarity of established, likely-to-continue trade channels,” *DuPont*, 177 USPQ at 567, and the classes of consumers to which the services are marketed. *Coach Servs.*, 101 USPQ2d at 1723 (considering together “the similarity or dissimilarity of the trade channels in which the parties’ goods are

²⁹ The Examining Attorney also submitted evidence of third-party use, which Applicant only partially challenges. We find the third-party use evidence as a whole generally corroborates the third-party registrations demonstrating relatedness and reflects the intrinsic relationship between the services. *See, e.g.*, June 17, 2021 Final Office Action, TSDR 18-21, 24-27, 56-57, 118, 121; January 24, 2022 Request for Reconsideration Denial, TSDR 44, 46, 50-51, 62-63; *see also, e.g. Dare Foods*, 2022 USPQ2d 291, at *7 (website evidence established relatedness of involved goods).

sold and the purchasers to whom the parties' goods are marketed"); *Dare Foods*, 2022 USPQ2d 291, at *7 (same).

Applicant argues:

Both Applicant and Registrant promote, market and sell their respective services to discrete audiences.... The mark used by Applicant, targets members of the entertainment, television, film, and streaming service industries, including sophisticated on-demand streaming service providers, wherein Applicant's production company is working with HBO/HBO Max. On the other hand, Registrant's mark is the title of an American Sitcom television series that was originally broadcast on the CBS network from September 12, 1972 – April 22, 1978. Registrant's ultimate consumers are the people at home using the streaming services.... The difference in demographic of ultimate consumers between Applicant's mark and the Cited Mark, are illustrative of separate and distinct channels of trade. Because the intended consumers and intended industries are different, the chances for a likelihood of confusion is minimal to non-existent.³⁰

We disagree. Neither the cited registration nor the involved application limits the trade channels or consumers for the services in the manners suggested by Applicant based on extrinsic evidence of actual use. *See Detroit Athletic*, 128 USPQ2d at 1052 ("The third *DuPont* factor—like the second factor—must be evaluated with an eye toward the channels specified in the application and registration, not those as they exist in the real world."); *Stone Lion*, 110 USPQ2d at 1162 ("An application with 'no restriction on trade channels' cannot be narrowed by testimony [or other evidence] that the applicant's use is, in fact, restricted to a particular class of purchasers.") (quoting *Octocom Sys.*, 16 USPQ2d at 1788); *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *20 (TTAB 2021) ("[A]s with the relatedness of the goods, the

³⁰ Appeal Brief, 7 TTABVue 15-17.

similarity or dissimilarity of the channels of trade must be determined based on the identifications of goods in the parties' registrations rather than current real-world conditions."). Accordingly, we must presume that the services "travel in all normal channels and to all prospective purchasers for the relevant [services]." *Coach Servs.*, 101 USPQ2d at 1722; (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000)).

A television audience is not the only group of consumers for the registrant's services. Consumers of an ongoing television comedy show include "media providers" that purchase or license the program to broadcast or stream, including large television networks and streaming providers as well as small independent media companies.³¹ These are the same prospective purchasers of Applicant's identified services.

In addition, Applicant's and the registrant's services ultimately reach the same end "user," namely, the television viewer. Television viewers do not directly purchase the types of television and film production services covered by the involved application, but they are the end recipient of such services as viewers of the resulting television program or film. Likelihood of confusion under Section 2(d) encompasses situations when relevant non-purchasers are confused, mistaken or deceived. *Infinity Broad. Corp. of Dall.*, 60 USPQ2d at 1218 (purchasers of radio broadcasting services include advertisers, but "the public at large who watches television and listens to

³¹ June 17, 2021 Final Office Action, TSDR 9-16 (small independent media companies offering various ongoing series on YouTube).

radio comprises another class of consumers that is relevant to our likelihood of confusion analysis. Although these individuals do not ‘purchase’ broadcasting services in the sense that they pay for such services ... the broadcast services are certainly directed to this class that ‘uses’ the services, and likelihood of confusion among viewers and listeners is relevant.”); *In re Artic Elecs. Co.*, 220 USPQ 836, 838 (TTAB 1983) (“[I]n addition to source confusion among buyers, source confusion among ultimate users of the goods ... is both likely and encompassed within the confusion proscriptions of Section 2(d).”).

Applicant acknowledges “It is possible that viewers of a production (TV show, Movie) may be exposed to the VIVA MAUDE mark in the credits at the end of a production, but never as a show title.”³² Even if the mark VIVA MAUDE is not used as the title of a television series, television viewers encountering both the registrant’s and Applicant’s marks may mistakenly believe that the show and production services emanate from a common source.

Accordingly, we find the similarities between the trade channels and consumers increase the likelihood of confusion.

D. Purchaser Sophistication

Under the forth *DuPont* factor we consider “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d

³² Appeal Brief, 7 TTABVUE 17.

996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive services may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005).

Applicant argues that “its consumers[, namely media producers] are highly sophisticated such that confusion is avoided.”³³ Specifically, Applicant asserts:

the services for VIVA MAUDE are such that its utilization is often expensive or requires substantial judgment as to quality and value. In short, it is nearly impossible to hire the services offered in connection with Applicant on “impulse.” For example, VIVA MAUDE will be credited as a production company for creation of content for HBO. See May 5, 2021, OAR, Exhibit B. The article provides that Production Services thereof were ordered by HBO/HBO MAX, a very large corporate entity, in a decision involving high-ranking company officials including the CEO. Prior to contracting with a production company to undertake hundreds of thousands to millions of dollars’ worth of production work, such a large entity will undoubtedly task one or more of their employees with conducting ample research and due diligence, effectively negating the likelihood that they would confuse VIVA MAUDE and “MAUDE” the 70’s comedy television show.³⁴

It is foreseeable, as Applicant argues, that network studios and streaming services may exercise some degree of care in employing production services and purchasing/licensing television shows. Importantly, however, we must consider all potential consumers of the services and base our decision on the least sophisticated consumer. *Stone Lion*, 110 USPQ2d at 1163 (even though the seller may primarily

³³ *Id.* at 18.

³⁴ *Id.* at 19.

target sophisticated potential purchasers, the analysis must focus on the ‘least sophisticated potential purchasers’ of the goods); *Volkswagenwerk AG v. Rose’Vear Enters., Inc.*, 592 F.2d 1180, 201 USPQ 7, 9 (CCPA 1979) (comparison of marks “must take into account the commercial impression of the marks on casual purchasers”). As discussed above, the relevant consumers include the general television viewing public. There is no evidence that these consumers are likely to exercise anything other than ordinary care in selecting and watching a television show.

On balance, we find the fourth *DuPont* factor slightly favors Applicant as the direct purchasers of Applicant’s and the registrant’s services are relatively sophisticated and are likely to exercise some degree of care in making a purchase. We keep in mind, however, that even sophisticated purchasers are not immune from source confusion. *See In re Rsch. Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”)).

II. Conclusion

We find that the marks are overall similar in appearance, sound, connotation and commercial impression. The services are related and the relevant consumers overlap. In this case, the relative sophistication of the consumers and degree of care do not outweigh the first, second, and third *DuPont* factors. *See In re Integrated Embedded*, 120 USPQ2d 1504, 1516 (TTAB 2016) (finding likelihood of confusion where first and second *DuPont* factors “outweighed any sophisticated purchasing decision”); *HRL*

Assoc., Inc. v. Weiss Assocs., Inc., 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of marks and goods and same class of purchasers outweighed consumer sophistication and careful purchasing decisions). Accordingly, we find that Applicant's mark VIVA MAUDE for television production and related services is likely to be confused with the cited mark MAUDE for a "continuing comedy television series."

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