

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 6, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Huttopia
v.
BoomShout, LLC
—

Opposition No. 91251604
—

Brian D. Wassom of Warner Norcross + Judd LLP,
for Huttopia.

Anna Kuhn, Travis R. Wimberly, and Alexandra Bistline of Pirkey Barber PLLC,
for BoomShout, LLC.

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Before Bergsman, Greenbaum and Johnson,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

BoomShout, LLC (“Applicant”) seeks registration on the Principal Register of the mark YURTOPIA (in standard characters) for “providing hotel accommodation,” in International Class 43.¹

¹ Application Serial No. 88322432 was filed on March 1, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s claim of first use anywhere since at least as early as February 14, 2019, and first use in commerce since at least as early as February 21, 2019.

Huttopia (“Opposer”) filed a Notice of Opposition against the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles Opposer’s previously registered mark HUTTOPIA, in standard character form, for, inter alia, “providing campground facilities; catering of food and drinks at recreational camps and on camp grounds; providing temporary housing accommodations in hotels, boarding houses and tourist homes; providing a website for the organization, arrangement and booking of temporary accommodation and lodging, and campgrounds; organization, booking and arrangement of temporary international accommodation and lodging and campgrounds,” in International Class 43, as to be likely to cause confusion.²

Applicant, in its Answer, denied the salient allegations of the Notice of Opposition.

Citations to the record and briefs refer to TTABVUE, the Board’s online docket system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Thierry Bernard, a member of Opposer’s Board of Directors and Opposer’s Director of North American Operations, testified regarding purported instances of confusion.

In many informal presentations of Huttopia to friends and business contacts in the US, people sometime asked if it was related to Yurtopia. I then realized that this was really creating confusion on the market.³

² Registration No. 5475706 registered May 22, 2018.

³ Bernard Decl. ¶27 (17 TTABVUE 6).

Although Applicant cross-examined Mr. Bernard regarding the purported instances of actual confusion,⁴ Applicant objected to this testimony during the cross-examination deposition.⁵ Applicant reasserted the objection in its brief on the following grounds:⁶

- Opposer's pretrial disclosures did not list instances of actual confusion as a subject on which Mr. Bernard would testify;⁷
- In response to Applicant's interrogatory No. 9, Opposer stated that it was unaware of any instances of actual confusion;⁸ and
- Opposer never supplemented its written discovery to disclose any purported instances of actual confusion.

Opposer contends that it learned of the purported instances of actual confusion when Mr. Bernard executed his declaration.

Opposer cannot change the timing of when it became aware of and disclosed Mr. Thierry's [sic] experience with third parties who had expressed confusion between the parties' marks.⁹

⁴ Bernard Cross-Examination Testimony, pp. 90-92 (36 TTABVUE 93-95).

⁵ *Id.* at pp. 93 and 95 (36 TTABVUE 96 and 98).

⁶ Applicant's Brief, pp. 8-10 (42 TTABVUE 14-16).

⁷ Opposer's Pretrial Disclosures (12 TTABVUE 2).

⁸ Opposer's response to Applicant's interrogatory No. 9 (40 TTABVUE 277). In addition, in response to Applicant's interrogatory No. 7, inquiring as to the facts supporting Opposer's likelihood of confusion claim, Opposer did not identify any reported instances of actual confusion. (40 TTABVUE 275-276).

⁹ Opposer's Reply Brief, p. 11 (43 TTABVUE 15). In fact, Mr. Bernard encountered these purported instances of actual confusion prior to August 6, 2020, two months before Opposer filed its initial disclosures on October 5, 2020. Bernard Cross-Examination Testimony Dep., p. 90 (36 TTABVUE 93). We are astounded Opposer's counsel would make this argument and even more astounded that counsel believed it would persuade us.

In addition, Opposer asserts that its failure to disclose Mr. Bernard's testimony regarding the purported instances of actual confusion is harmless because Applicant cross-examined Mr. Bernard regarding these purported instances of actual confusion.¹⁰

Trademark Rule 2.123(e)(3), 37 C.F.R. § 2.123(e)(3), reads as follows:

If pretrial disclosures or the notice of examination of witnesses served pursuant to paragraph (c) of this section are improper or inadequate with respect to any witness, an adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. Promptly after the testimony is completed, the adverse party, to preserve the objection, shall move to strike the testimony from the record, which motion will be decided on the basis of all the relevant circumstances.

(i) A motion to strike the testimony of a witness for lack of proper or adequate pretrial disclosure may seek exclusion of the entire testimony, when there was no pretrial disclosure, or may seek exclusion of that portion of the testimony that was not adequately disclosed in accordance with § 2.121(e).

Because Applicant did not file a motion to strike the paragraph in the Bernard declaration referring to a purported instance of actual confusion shortly after the cross-examination deposition but waited until its brief to lodge the objection, which was timely raised during the cross-examination, has not been preserved. *See Carl Karcher Enters. Inc. v. Carl's Bar & Delicatessen Inc.*, 98 USPQ2d 1370, 1372-73 n.4 (TTAB 2011) (“[A]n objection to exhibits or testimony based upon the substance being beyond the scope of the pretrial disclosure can be made during the taking of testimony

¹⁰ *Id.* at pp. 11-12 (43 TTABVUE 15-16).

and preserved by a motion to strike the testimony or evidence on that basis.”). *Cf. Societe Des Produits Nestle S.A. v. Taboada*, 2020 USPQ2d 10893, at *7 (TTAB 2020) (objection that evidence was not adequately disclosed in pretrial disclosures overruled as untimely when first raised in trial brief; objection is curable and should have been made via motion to strike promptly after testimony declaration and exhibits were filed).

Nevertheless, Bernard’s testimony regarding the purported instances of actual confusion has little, if any, probative value. In essence, Bernard testified that unidentified people at unidentified meetings at unidentified times sometimes asked Bernard whether YURTOPIA and HUTTOPIA are related.

Q. You testify that you know from personal experience that consumers sometimes asked if Huttopia was related to Yurtopia, and you claim that that was “in many informal presentations of Huttopia to friends and business contacts in the US.’

Did these informal presentations you referenced take place prior to August 6, 2020?

A. Yes.

Q. And none of these individuals who sometimes asked if Huttopia was related to Yurtopia are involved in this proceeding; is that correct?

A. Not to my knowledge, because, again, those were informal presentations, yes.

Q. In any of these instances, did any of these people purchase goods or services from Yurtopia thinking that Yurtopia was affiliated with or associated with Huttopia?

A. I do not know.

Q. Did any of these people purchase goods or services from Yurtopia thinking that Yurtopia was Huttopia?

A. I don't know.

Q. You're not specifically aware of any instance where a consumer purchased goods or services from Yurtopia thinking that those goods or services were from Huttopia, are you?

A. I'm not.

Q. And you're not specifically aware of any specific instance where a consumer purchased goods or services from Yurtopia thinking it was affiliated with Huttopia; right?

A. I'm not.

Q. And you're not specifically aware of any instance where a consumer purchased goods or services from Huttopia thinking that those goods and services were from Yurtopia; right?

A. I'm not.

Q. And you're not specifically aware of any specific instance where a consumer purchased goods or services from Huttopia thinking it was affiliated with Yurtopia; right?

A. I am not.

Q. So your testimony in the affidavit is the extent of your knowledge about people sometimes asking if it was related to Yurtopia; is that correct?

A. Like the rest of my testimony, yes.¹¹

In addition, we often interpret inquiries of the kind to which Bernard testified as an indication that the inquirer is alert to the differences between the marks and

¹¹ Bernard Cross-Examination Testimony, pp. 90-92 (36 TTABVUE 93-95).

skeptical of any relationship between them. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1443-42 (TTAB 2014); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1479 (TTAB 2014) (inquiry is not evidence of confusion because the inquiry indicates that the prospective customer had a reason to suspect that there were two different companies); *Marshall Field & Co. v. Mrs. Field's Cookies*, 25 USPQ2d 1321, 1334 (TTAB 1992) (inquiries indicate that the declarants were aware that there may be two different entities); *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 USPQ 162, 164 (TTAB 1984) (“That questions have been raised as the relationship between firms is not evidence of actual confusion of their trademarks.”); *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) (“The fact that questions have been raised as the possible relationship between firms is not by itself evidence of actual confusion of their marks.”).

Such inquiries are ambiguous and do not clearly provide evidence of consumers who are confused about the source of the services. For example, Mr. Bernard’s testimony did not explain the circumstances that led these unidentified people to make their inquiry. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1475 (TTAB 2016) (disregarding inquiry evidence as hearsay or entitled to little weight: “Without direct testimony from these individuals, there is insufficient evidence to ascertain what they were thinking, or what caused their purported confusion.”).

In sum, these isolated, vague and unidentified purported instances of confusion are insufficient to prove actual confusion, let alone likelihood of confusion.

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's application. The parties introduced the testimony and evidence listed below:

A. **Opposer's Testimony and Evidence.**

1. Testimony declaration of Philippe Bossanne, Opposer's Chief Executive Officer;¹²
2. Testimony declaration of Thierry Bernard, Opposer's Director of North American Operations and Board Member of Opposer;¹³
3. Testimony declaration of Aline Darmouni, "a Partner, Certified Public Accountant, Expert Comptable, FCCA at Exco in Miami, Florida";¹⁴
4. Testimony declaration of Céline Bossanne, Opposer's co-founder;^{15,16}
5. Notice of reliance on copies of copies of news articles printed from the Internet regarding yurts;¹⁷

¹² 16 TTABVUE. Mr. Bossanne simply corroborates the testimony of his wife Céline Bossanne, Opposer's co-founder.

¹³ 17 TTABVUE.

¹⁴ 19 TTABVUE. The Board posted the portions of the Darmouni declaration designated confidential at 18 TTABVUE. Opposer is a client of Darmouni's company and Darmouni is Opposer's certified public accountant.

¹⁵ 21-24 TTABVUE. The Board posted the portions of Céline Bossanne declaration designated confidential at 20 TTABVUE.

¹⁶ 7 TTABVUE 29-50.

¹⁷ 25 TTABVUE 9-41.

6. Notice of reliance on copies of Opposer's pleaded registration printed from the USPTO Trademark Status and Document Retrieval (TSDR) system displaying the status of and title to the registration;¹⁸
7. Notice of reliance on Applicant's responses to Opposer's request for admissions Nos. 3 and 11-16;¹⁹
8. Notice of reliance on Applicant's responses to Opposer's interrogatory Nos. 3-6;²⁰
9. Notice of reliance on excerpts from third-party booking services referring to Opposer's properties;²¹
10. Notice of reliance on excerpts from Applicant's Facebook account;²² and
11. Notice of reliance on excerpts from Applicant's Instagram account.²³

¹⁸ 25 TTABVUE 43-49. Because Opposer attached to the Notice of Opposition a copy of its pleaded registration printed from the USPTO TSDR system, Opposer's pleaded registration was already of record. Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1).

¹⁹ 25 TTABVUE 54-62. Because Opposer introduced all of Applicant's responses to Opposer's requests for admission in the notice of reliance, all of Applicant's responses are of record for us to consider.

However, a party may introduce only an admission to a request for admission through a notice of reliance. Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i). A denial or statement that the responding party cannot respond to the request does not establish the truth or falsity of the assertion, but rather leaves the matter for proof at trial. *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1957 n.10 (TTAB 2008) (denials to requests for admission inadmissible because "unlike an admission (or a failure to respond which constitutes an admission), the denial of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial."). As such, we have considered only the admissions to the requests for admission.

²⁰ 25 TTABVUE 64-70. Again, because Opposer introduced all of Applicant's responses to Opposer's interrogatories in the notice of reliance, all of Applicant's responses are of record for us to consider.

²¹ 25 TTABVUE 135-170.

²² 26 TTABVUE 5-392 and 27 TTABVUE 2-156.

²³ 27 TTABVUE 158-214.

B. Applicant's Testimony and Evidence.

1. Thierry Bernard cross-examination testimony deposition;²⁴
2. Testimony declaration of Brian Kondradi, Applicant's Managing Member and General Counsel;²⁵
3. Notice of reliance copies of third-party registrations with a "topia-formative" suffix;²⁶
4. Notice of reliance on Opposer's initial disclosures;²⁷
5. Notice of reliance on Opposer's responses to Applicant's interrogatory Nos. 4-6, 8, 9, and 14;²⁸
6. Notice of reliance on Opposer's responses to Applicant's request for production of documents Nos. 3, 5, 10, 13 15, 16, 17, 18, 22, 23, and 25;²⁹

²⁴ 36 TTABVUE.

²⁵ 38-39 TTABVUE.

²⁶ 40 TTABVUE 29-264.

²⁷ 40 TTABVUE 266-268.

²⁸ 40 TTABVUE 270-278. Because Applicant introduced all of Opposer's responses to Applicant's interrogatories in the notice of reliance, all of Opposer's responses are of record for us to consider.

²⁹ 40 TTABVUE 278-284. Because Applicant introduced all of Opposer's responses to Applicant's request for production of documents in the notice of reliance, all of Opposer's responses are of record for us to consider.

However, generally, responses to a request for production of documents introduced through a notice of reliance are admissible solely for purposes of showing that a party has stated that there are no responsive documents; documents produced in response to the requests are generally not admissible by notice of reliance alone. Trademark Rule 2.120(j)(3)(ii), 37 C.F.R. § 2.120(j)(3)(ii); *see also City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013) (responses to document production requests are admissible solely for purposes of showing that a party has stated that there are no responsive documents); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 n.7 (TTAB 2012) (written responses to document requests indicating that no documents exist may be submitted by notice of reliance). Accordingly, we consider Opposer's responses only for the limited purpose of showing that Opposer did not have any responsive documents.

7. Notice of reliance on copies of third-party websites featuring entities advertising “topia-formative” suffixes;³⁰ and
8. Notice of reliance on definitions of “Utopia.”³¹

III. Entitlement to a Statutory Cause of Action³²

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, is an element of the plaintiff’s case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, ___ S. Ct. ___ (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *reh’g en banc denied* 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *petition for cert. filed*; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 2020 USPQ2d 11277 at *4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982); *Spanishtown Enters.*, 2020 USPQ2d 11388, at *1.

³⁰ 40 TTABVUE 286-353.

³¹ 40 TTABVUE 355-376.

³² Even though we now refer to standing as entitlement to a statutory cause of action, our prior decisions and those of the Federal Circuit interpreting “standing” under §§ 1063 and 1064 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

Because Opposer has properly introduced into evidence a copy of its pleaded registration showing the status of and title to the registration, Opposer has established its entitlement to a statutory cause of action. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Primrose Ret. Cmty.*, 122 USPQ2d at 1032 (standing established based on pleaded registration made of record).

IV. Priority

Because Opposer has properly made of record a copy of its pleaded registration, and Applicant did not counterclaim to cancel it, priority is not an issue as to the mark and services covered by the registration. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d. 1400, 182 USPQ 108, 110 (CCPA 1974)).

V. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *DuPont*, 177 USPQ at 567 (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also Majestic Distilling Co.*, 65 USPQ2d at 1203. “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.”

Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc., 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1406-07).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). 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 Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”). 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.’”) (quoting *Herbko Int’l v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity and nature of the services.

Applicant is seeking to register YURTOPIA for “providing hotel accommodation.” Opposer identifies the services in its pleaded registration, inter alia, as “providing temporary housing accommodations in hotels.” Applicant and Opposer use different words to identify the same services and, therefore, we find that the services at issue are in part legally identical.

Because the services discussed above are in part legally identical, there is no need for us to consider the relatedness of Applicant's services with the other activities listed in Opposer's pleaded registration. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1588 n.1 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014).

B. Established, likely-to-continue channels of trade and classes of consumers.

Because the services at issue are in part legally identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018) ("Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same."); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

C. Conditions under which and customers to whom the parties make sales.

Applicant, relying on the testimony and evidence of record regarding how Applicant and Opposer render their high-end camping service (“glamping”), contends that relevant consumers are attentive to the qualities and characteristics of the services offered by the parties and will exercise a high degree of care in making their purchasing decisions.³³ However, we must consider the services as the parties describe them in Applicant’s application and Opposer’s pleaded registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an 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 an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”).

Notwithstanding Applicant’s argument and evidence regarding the actual scope of its own services and Opposer’s commercial use of its mark, we may not limit, by resort to extrinsic evidence, the scope of services as identified in the registration or in the subject application. *E.g.*, *Stone Lion*, 110 USPQ2d at 1162 (“It was proper,

³³ Applicant’s Brief, pp. 25-26 (42 TTABVue 31-32).

however, for the Board to focus on the application and registrations rather than on real-world conditions, because the ‘question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application.’”); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Proceedings before the Board are concerned with registrability and not use of a mark. Accordingly, the identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issue.”); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration.”).

In this case, Applicant’s services are “providing hotel accommodation” and Opposer’s services include “providing temporary housing accommodations in hotels.” There are no restrictions or limitations in the descriptions of services as to channels of trade, classes of consumers, or price. Accordingly, the parties’ services may include providing hotel accommodations in exclusive, expensive, luxury hotels for discriminating purchasers, as well as inexpensive, modestly appointed hotels for less discriminating purchasers just looking for a place to lay their head for the night. *See Stone Lion*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”).

This *DuPont* factor is neutral.

D. Strength of Opposer's HUTTOPIA mark.

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. 2021) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899.

For purposes of analysis of likelihood of confusion, a mark’s renown may “var[y] along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted). The proper standard is the mark’s “renown within a specific product market,” *id.*, and “is determined from the viewpoint of consumers of like products,” *id.* at 1735, and not from the viewpoint of the general public.

1. Inherent Strength

Because Opposer's mark is registered on the Principal Register, with no claim of acquired distinctiveness under Section 2(f), we presume it is inherently distinctive, i.e., that it is at worst suggestive of the goods. 15 U.S.C. § 1057(b) (registration is "prima facie evidence of the validity of the registered mark"); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, "we must assume that it is at least suggestive").

However, HUTTOPIA is a coined or fanciful term created by the combination of the words "Hut" and "Utopia." At first blush, it has inherent strength as a trademark. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1949 (Fed. Cir. 2006) ("[Plaintiff] asserts, and [Defendant] does not dispute, that its mark is fanciful, and, therefore, inherently distinctive and deserving of heightened trademark protection."); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1181 (Fed. Cir. 2004) (defining a fanciful mark as "a non-dictionary word concocted by the trademark holder for its product" and observing that such marks are typically strong); *Mishawaka Rubber & Woolen Mfg. Co. v. Bata Narodni Podnik*, 222 F.2d 279, 105 USPQ 432, 437 (CCPA 1955) ("A strong and fanciful mark is entitled to broad protection."); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1479 (TTAB 2007) (completely unique and arbitrary, if not coined, nature of mark in relation to goods entitles the registered mark to a broad scope of protection, and significantly increases the likelihood that the marks, when used in connection with the identical goods would cause confusion).

Applicant contends, to the contrary, that the “topia-formative” suffix in Opposer’s HUTTOPIA mark is entitled to only a narrow scope of protection.

The -TOPIA suffix comprising the latter portion of Opposer’s mark is diluted and weak. As such, the suffix “carries little trademark significance, *Perfectly Posh*, 2020 WL 3429164, at *13, and should be discounted in the similarity-of-the-marks analysis. ... Indeed, Board precedent establishes that when a portion of the senior user’s mark is weak and diluted from third-party use, there need only be “some difference, not necessarily created by a distinctive word, between the marks as a whole.” *In Re Hartz Hotel Servs. Inc.*, 102 USPQ2d 1150, 1153 (TTAB 2012).³⁴

To support its contention, Applicant introduced copies of 46 third-party registrations featuring a “topia-formative” suffix,³⁵ as well excerpts from 32 websites showing use of marks with “topia-formative” suffixes.³⁶

None of the third-party registrations or websites show use of a “topia-formative” suffix used as part of a mark for providing hotel accommodations. However, two of the third-parties offer services related to booking reservations³⁷ and many more offer other travel related services. Nevertheless, we find that the third-party registrations and the third-party websites are probative to show that third parties commonly use “topia-formative” suffixes to create the commercial impression that the prefix term preceding the “topia-formative” suffix is the ideal or perfect form related to whatever the prefix term identifies. For example,

³⁴ Applicant’s Brief, p. 17 (42 TTABVUE 23).

³⁵ 40 TTABVUE 29-264.

³⁶ 40 TTABVUE 286-357.

³⁷ 40 TTABVUE 29-38.

- INNTOPIA for, inter alia, “travel agency services, namely, making on-line reservations and bookings for temporary lodging, restaurants, and meals” is the ideal or perfect travel agency service;³⁸

- TRIPTOPIA for, inter alia, “travel agency services, namely, making reservations and booking for temporary lodging” is the ideal or perfect travel agency service;³⁹ and

- LIFTOPIA for, inter alia, “online retail store featuring ski lift tickets for various alpine ski resorts during the ski season, lift tickets during the non-skiing season for alpine recreational activities, including mountain hiking, biking and other related activities” is the ideal or perfect place to get lift tickets.⁴⁰

In this regard, Applicant introduced the MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) definition of the word “Utopia”: “a place of ideal perfection especially in laws, government, and social conditions.”⁴¹ Wikipedia.org describes “Utopia” as “an imaginary community or society that possesses highly desirable or nearly perfect qualities for its citizens.”⁴² Likewise, we may use the third-party registrations in the manner of a dictionary to show how consumers perceive a term. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (“[a] real evidentiary value of third party *registrations* per se is to show the sense in which ... a mark is used in ordinary parlance.”) (citing 2 MCCARTHY

³⁸ 40 TTABVUE 29-30.

³⁹ 40 TTABVUE 36.

⁴⁰ 40 TTABVUE 40.

⁴¹ 40 TTABVUE 362.

⁴² 40 TTABVUE 370.

ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)); *Institut National des Appellations D'Origine v. Vintners Int'l Co. Inc.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations show the sense in which a word is used in ordinary parlance and that a particular term has descriptive significance as applied to certain goods or services).

As noted above, Opposer's mark HUTTOPIA is a coined term formed by the combination of the terms "hut" and the suggestive "topia-formative" suffix to form an inherently distinctive trademark. However, with respect to the inherent or conceptual strength of HUTTOPIA, it is not entitled to such a broad scope of protection that it will prevent the registration of every mark with a "topia-formative" suffix used in connection with providing hotel accommodations. It will only bar the registration of marks whose resemblance to HUTTOPIA is similar enough to cause one seeing it to assume there is some connection, association or sponsorship between the two. *See Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010); *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983).

2. Commercial Strength of Opposer's mark

Opposer contends that its HUTTOPIA mark "enjoys significant commercial fame."⁴³ To support its contention that HUTTOPIA has "significant commercial fame," Opposer introduced the testimony and evidence listed below:

⁴³ Opposer's Brief, p. 12 (41 TTABVUE 16).

- At least as early as June 30, 2017, Opposer began operating HUTTOPIA campgrounds in the United States: one in New Hampshire and one in Maine;⁴⁴
- Confidential summaries of Opposer’s revenues for the years 2017 through 2019;⁴⁵
- Confidential summary of Opposer’s advertising expenditures for 2016 through 2020.⁴⁶ Céline Bossanne testified that Opposer is a family-owned company, Opposer does much of its advertising in-house and, therefore, Opposer is able “to accomplish more with our marketing dollars than the raw expenditure figures may suggest to an outside observer.”⁴⁷
- Opposer maintains a social media presence on Facebook, Instagram, YouTube and Pinterest.⁴⁸
- “[C]onsumers can find information and reviews about, and book reservations at, [Opposer’s] campgrounds using certain popular third-party reservation services, including Booking.com, TripAdvisor.com, Expedia.com, Gamping.com, and Priceline.com.”⁴⁹

⁴⁴ Céline Bossanne Decl. ¶13 (21 TTABVUE 4).

⁴⁵ Darmouni Decl. Exhibits 1 and 2 (18 TTABVUE 4-7); Céline Bossanne Decl. Exhibits 3 and 4 (20 TTABVUE 19-22).

⁴⁶ Céline Bossanne Decl. Exhibit 7 (20 TTABVUE 58).

⁴⁷ Céline Bossanne Decl. ¶31 (21 TTABVUE 8).

⁴⁸ Céline Bossanne Decl. ¶36 (21 TTABVUE 9).

⁴⁹ Céline Bossanne Decl. ¶37 (21 TTABVUE 9).

- Opposer is a founding member of the American Glamping Association (AGA).⁵⁰

The “AGA engages in a wide variety of efforts on behalf of the glamping industry, such as” offering an accreditation program, providing access to financial resources, and hosting meetings.⁵¹

- Unsolicited media, including the news articles listed below:⁵²

> “The Most Luxurious Staycation Destinations in Every State,” *Cosmopolitan Magazine* (April 5, 2019);⁵³

> “Here, there, and everywhere,” *The Boston Globe* (July 21, 2017);⁵⁴

> “S’more, s’il vous plait? A French company opens its first ‘glampground’ in the U.S.,” *The Washington Post* (August 14, 2018);⁵⁵

⁵⁰ Céline Bossanne Decl. ¶25 (21 TTABVUE 7). “‘Glamping’ ... refers to high-quality camping services that provide comfortable accommodations and various luxuries of civilization within a setting that allows for full enjoyment of the natural world.” *Id.* at ¶17 (21 TTABVUE 5).

⁵¹ Céline Bossanne Decl. ¶26 (21 TTABVUE 7).

⁵² Opposer included a news article “Can camping and comfort go together? Check out these 9 New England spots,” *Summer Travel Magazine* (May 2, 2019) (21 TTABVUE 87) that does not refer to HUTTOPIA.

We do not consider the news article posted at 21 TTABVUE 113-14. The article is the English translation from a presumably unidentified Belgium publication for which there is no evidence that consumers in the United States would have access. *See, e.g., Int’l Dairy Foods Assn. v. Interprofession du Gruyère, & Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, at *7 (TTAB 2020) (“Reference materials from foreign sources pertaining to cheese, even if in English, have limited probative value on the question of genericness because they do not reflect usage, or exposure to consumers, of the term GRUYERE in the United States.”), *appeal filed*, No. 1:20-cv-01174-TSE-TCB (E.D. Va. Oct. 6, 2020).

⁵³ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 62) HUTTOPIA was one of 50 glamping providers the author listed.

⁵⁴ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 86).

⁵⁵ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 89).

> “The Best Glamping Sites in the Northeast,” Forbes Magazine (August 24, 2019);⁵⁶

> “Discovering ‘Huttopia[.]’ in the White Mountains,” The Conway Daily Sun;⁵⁷

> “Not the camping type? Here’s what you need to know about a glamping trip,” The Washington Post (July 21, 2020);⁵⁸

> “AMPED TO GLAMP,” USA TODAY;⁵⁹

> “7 Perfect Summer Cabins You Can Sleep in This Weekend,” Outside Magazine (August 2, 2017);⁶⁰

> “28 Best Glamping Destinations Across the United States,” CountryLiving Magazine (May 12, 2020);⁶¹

Opposer’s testimony and evidence do not persuade us that HUTTOPIA is a commercially strong mark. Opposer only has used the mark in the United States since 2017, in two locations. Its revenues, in terms of raw numbers, is unimpressive.⁶² In this regard, Opposer failed to provide any context for these numbers other than to point out that Opposer is in start-up mode.⁶³ Raw numbers alone may be misleading.

⁵⁶ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 96). HUTTOPIA was one of seven glamping providers the author reviewed.

⁵⁷ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 101).

⁵⁸ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 109).

⁵⁹ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 115).

⁶⁰ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 120).

⁶¹ Céline Bossanne Decl. Exhibit 10 (21 TTABVUE 143).

⁶² Because Opposer designated its revenues as confidential, we may refer to them only in general terms.

⁶³ Bernard Cross-Examination Testimony Dep., p. 59 (36 TTABVUE 62) (“We are still a kind of, not exactly a startup.”).

Some context in which to place raw statistics may be necessary, for example, market share or sales or advertising figures for comparable types of goods. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018) (citing *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002)). Thus, we can only speculate as to what Opposer's revenues mean vis-à-vis its competitors. In addition, we do not know how many customers have engaged Opposer's services.

Likewise, Opposer's advertising expenditures are unimpressive.⁶⁴ While Opposer maintains it has a full social media presence, Opposer did not provide any testimony or evidence regarding the number of people that "follow" Opposer on its social media accounts. Inasmuch as it is de rigueur for businesses, as well as individuals, to have a social media presence, Opposer's assertion that it maintains a social media presence is not probative, in and of itself, of the commercial strength of the HUTTOPIA mark.

Opposer's membership in the AGA is not probative of the commercial strength of the HUTTOPIA mark. Opposer directs its activities in the AGA to competitors, not to relevant consumers. Opposer failed to introduce any testimony or other evidence explaining how Opposer's activities in the AGA are probative of the commercial strength of HUTTOPIA.

Finally, Opposer is just one of many providers posted on Booking.com, TripAdvisor.com, Expedia.com, Gamping.com, and Priceline.com.

⁶⁴ Because Opposer designated its advertising expenditures as confidential, we may refer to them only in general terms.

With respect to the commercial strength of Opposer's HUTTOPIA mark, we find that it falls on the weak end of from very strong to very weak.

E. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *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) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

In comparing the marks, we are mindful that where, as here, the services are in part legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

"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) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *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); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As discussed above, because the services at issue are providing hotel accommodations, the average customer is an ordinary consumer who uses a hotel.

Applicant is seeking to register YURTOPIA and Opposer's mark is HUTTOPIA. The marks are visually and phonetically similar in that they both include the "topia-formative" suffix, but are different because Applicant's mark begins with the word "Yurt" and Opposer's mark begins with the word "Hut."

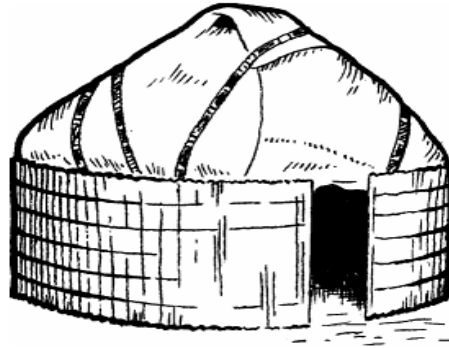
The marks have similar meanings and engender similar commercial impressions. The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) (accessed September 29, 2021) defines "Yurt" as follows:⁶⁵

: a circular domed tent of skins or felt stretched over a collapsible lattice framework and used by pastoral peoples of inner Asia

⁶⁵ The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

also: a structure that resembles a yurt usually in size and design

Illustration of yurt



The MERRIAM-WEBSTER DICTIONARY defines “Hut” as follows:

1 : an often small and temporary dwelling of simple construction: SHACK

2 : a simple shelter from the elements

Glamping.com describes yurts as “round tent-like looking structures that merge the worlds of tents, huts and houses.”⁶⁶ Likewise, the author of “For a wintery escape, spend the night in a hut in the Mount Ranier foothills,” Seattle Times, interchanges his use of “hut” and “yurt.”⁶⁷

Such is the dedication of the Ski Patrol volunteers like Rose Vanderhoof, an Ashford retiree and unpaid manager for the six-person-capacity yurt – aptly called The Yurt – on of four structures maintained by the Mount Tahoma Trails Association (MTTA) ...

While it may lack the alpine grandeur of expensive systems in British Columbia or the Alps, at just \$15 per berth per night, the MTTA’s homegrown huts – The Yurt, High Hut,

⁶⁶ 25 TTABVUE 9.

⁶⁷ 25 TTABVUE 11-18.

Bruni's Snow Bowl Hut and Copper Creek Hut – are an undeniably charming grassroots labor of love.⁶⁸

The Colorado Yurt Company (coloradoyurt.com) refers to its yurt as a hut.

YURTS

The Basics

Based on the traditional Mongolian herders' hut (a ger), our modern yurt takes all the ingenuity of those nomadic structures and adds engineered strength, durable outdoor fabrics and handcrafted quality.⁶⁹

The Hinsdale Haute Route website (hinsdalehauteroute.com) provides the following information:

Welcome to the Hinsdale Haute Route the highest hut system in Colorado. Currently offering two yurts on a year round basis.⁷⁰

The MidwestWeekends.com website posted an article entitled “A yurt on an Iowa lake.” Ted Young built a temporary yurt on federal land. He is quoted in the article as saying, “When we started, we called it a hut, because we didn't think anyone would know what a yurt was.”⁷¹

In another article in the MidwestWeekends.com website entitled “A yen for yurts,” the author writes the following:

Why yurts? They rent for the same price as camper cabins. But the round, canvas-sided huts are much cozier, especially in winter, when they're heated by wood stoves.⁷²

⁶⁸ 25 TTABVUE 13.

⁶⁹ 25 TTABVUE 28.

⁷⁰ 25 TTABVUE 31.

⁷¹ 25 TTABVUE 34.

⁷² 25 TTABVUE 38.

Applicant's mark YURTOPIA means and engenders the commercial impression of the ideal or perfect yurt. Opposer's mark HUTTOPIA means and engenders the commercial impression of the ideal or perfect hut. As discussed above, the evidence shows travel writers treat "hut" and "yurt" as synonyms, which is how consumers encounter the terms in these publications. Thus, the two marks have similar, albeit not identical, meanings and engender similar, albeit not identical, commercial impressions. *See Hancock v. Am. Steel & Wire Co. of N.J.*, 203 USPQ 737, 97 USPQ 330, 333 (CCPA 1953) ("Our holding in this case that confusion is likely is based on our belief that the *popular* or *ordinary* meanings of 'Tornado' and 'Cyclone' are identical, although there are certain technical distinctions between the two terms."); *Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970) (MISTER STAIN confusingly similar to MISTER CLEAN because "it conveys, as used, the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning."); *Mohawk Rubber Co. v. Mobiliner Tire Co.*, 217 USPQ 929, 933 (TTAB 1981) ("[T]he impressions conveyed to the ordinary purchaser by 'MOHAWK' and 'MOHICAN' used in respect of tires enhanced by associated imagery of swiftness, sure-footedness, endurance and other characteristics of American Indian lore are likely to be markedly similar in their commercial impact."); *In re M. Serman & Co., Inc.*, 223 USPQ 52 (TTAB 1984) (CITY WOMAN confusingly similar to CITY GIRL); *H. Sichel Sohne, GmbH. v. John Gross & Co.*, 204 USPQ 257 (TTAB 1979) (BLUE CHAPEL similar to BLUE NUN); *In re Oil Well Co.*, 181 USPQ 656, 657 (TTAB 1973) ("[I]f a motorist were to encounter, at different stages of his travels, both

‘SPEEDWAY’ and ‘RACEWAY’ gasoline, there would be a reasonable likelihood of confusion or mistake in trade” because the marks have similar meanings.”).

Applicant contends that the marks are not similar because “yurt” and “hut” are the dominant portions of the parties’ marks inasmuch as the “topia-formative” suffix is a commonly used, highly suggestive term and “hut” and “yurt” are the first part of the marks.⁷³ Applicant is correct that there is nothing improper in stating that for rational reasons, we may give more or less weight to a particular feature of a mark provided the finding of whether the marks are similar rests on a consideration of the marks in their entities. *Viterra*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *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”). However, even if we give more weight to the prefix terms “yurt” and “hut,” as discussed above, we find the marks have similar meanings and engender similar commercial impressions.

Given the similarities of the marks and the identity of the services, consumers familiar with Opposer’s HUTTOPIA are likely to perceive Applicant’s YURTOPIA as a variant of Opposer’s mark denoting a new service offering. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”);

⁷³ Applicant’s Brief, p. 19 (42 TTABVUE 25).

cf. In re Toshiba Med. Sys. Corp., 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN “more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices.”).

We find that the marks are more similar than dissimilar in their entireties as to appearance, sound, meaning and commercial impression.

F. Conclusion

Because the marks are similar, the services are in part legally identical and we must presume the channels of trade and classes of consumers are the same, we find Applicant’s mark YURTOPIA for “providing hotel accommodation” is likely to cause confusion with the registered mark HUTTOPIA for, inter alia, “providing temporary housing accommodations in hotels.”

Decision: We sustain the opposition.