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Mailed: September 20, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Silgan Containers LLC

—
Serial Nos. 97016113 and 97016116

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Heidi R. Thole and Daniel E. Kattman of Reinhart Boerner Van Deuren s.c.,
for Silgan Containers LLC.

Michael FitzSimons, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

—
Before Wellington, Pologeorgis and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:


Applicant, Silgan Containers LLC, has applied to register on the Principal
Register the terms CHILL-CUP and CHILL-CUPS, in standard characters, both for

Disposable metal cups; cups; mugs; bottles, sold empty; drinking
glasses; water bottles sold empty; insulated beverage containers;
drinking bottles for sports

in International Class 21.¹

¹ Application Serial Nos. 97016113 (CHILL-CUP) and 97016116 (CHILL-CUPS) were filed on September 8, 2021 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's allegations of a bona fide intention to use the marks in commerce. We will refer to Applicant's marks collectively as "Applicant's CHILL-CUP Marks."

The Trademark Examining Attorney has refused registration of Applicant's CHILL-CUP Marks on grounds that they are (i) likely to cause confusion with the

stylized mark  for "Cork coasters"² in International Class 21 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); and (ii) merely descriptive of a characteristic or feature of Applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), 15 U.S.C. § 1052(e).

Applicant appealed the final refusal in each application and submitted requests for reconsideration, which the Examining Attorney subsequently denied. Applicant and the Examining Attorney have filed their respective briefs.³

For the reasons discussed below, we affirm the refusals on both grounds.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d), *quoted in In re Charger Ventures LLC*, 64 F.4th 1375, 2023


² Registration No. 5664050, issued January 29, 2019.

³ We consolidate the appeals and decide them in a single opinion because they involve common issues of law and fact with similar records. *See In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board sua sponte consolidated two appeals). All record references are to the file of Serial No. 97016116 (CHILL-CUPS) unless otherwise noted. Citations to documents are to the downloadable .pdf documents contained in the Trademark Status & Document Retrieval (TSDR) database, and citations to the briefs refer to TTABVue, the Board's online docketing system.

USPQ2d 451, at *2 (Fed. Cir. 2023).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. duPont deNemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont* factors”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “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.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (internal punctuation omitted).

A. Strength of Registrant’s Mark

We begin with a consideration of the strength of Registrant’s mark, . Applicant contends the mark is “conceptually weak” because “[i]t is not a coined term when considered with the goods identified in the Cited Registration” and therefore is “entitled to a narrower scope of protection such that third parties may come closer

without invading the relatively limited rights associated with the mark.”⁴ As the Examining Attorney notes, however, “Applicant has not explained why it views registrant’s mark as conceptually weak, nor has it provided any evidence supporting this assertion,” and “[at]ttorney argument is not a substitute for evidence.”⁵ *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).⁶ Because Applicant has failed to demonstrate that Registrant’s mark is weak, either commercially or conceptually, we accord it the normal scope of protection to which it is entitled. 15 U.S.C. § 1057(b); *see also Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

B. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps.*, 73 USPQ2d at 1692. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re*


⁴ 14 TTABVUE 10 (Applicant’s Brief).

⁵ 16 TTABVUE 13 (Examining Attorney’s Brief).

⁶ Applicant also did not introduce any evidence of third-party uses that would establish any diminished commercial strength of Registrant’s mark under the sixth DuPont factor. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

Inn at St. John's, LLC, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd*, 777 Fed. App'x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). The focus is on the recollection of the average purchaser – here, an ordinary purchaser of drinkware and accessories including coasters – who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).




CHILL-CUPS is virtually identical to Registrant's mark  because it is in standard characters and therefore could be displayed in the same slanted format, font style and size as Registrant's mark. *See, e.g., In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.”) (citing *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)); *see also In re Viterra*, 671 F.2d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012) (“[W]e previously have rejected an applicant's argument that its standard character mark was distinct from a mark registered in stylized lettering with a design.”). The only difference is Applicant's use of a hyphen between CHILL and CUPS, but that hyphen fails to meaningfully distinguish the marks. *See e.g., Pierce-Arrow Soc'y v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, at *31 (TTAB 2019) (“The presence of the hyphen in Applicant's mark does not distinguish it from Opposer's mark.”); *Mag Instr., Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (In comparing the marks MAG-NUM STAR to


MAGNUM MAXFIRE, “the hyphen ... does not distinguish them.”); *In re Champion Int’l Corp.*, 196 USPQ 48, 49 (TTAB 1977) (“no distinction, vague or otherwise, can be drawn between ‘CHECK MATE’ with or without a hyphen between the words”); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 807.14(c) (May 2024) (“Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.”).

The same is true with respect to Applicant’s proposed mark CHILL-CUP because the singular or plural form of a registered mark is essentially identical to the registered mark in sound, appearance, meaning, and commercial impression. *Swiss Grill Ltd., v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (“[I]t is obvious that the virtually identical marks [SWISS GRILLS and SWISS GRILL] are confusingly similar ...”); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (“[S]ervice marks consisting of the singular and plural forms of the same term are essentially the same mark.”) (citing *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“[T]here is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark.”)).

Applicant argues that its marks have “a different meaning and connotation from the Cited Mark.”⁷ According to Applicant, “by using the separated words ‘cups’ and

⁷ 14 TTABVUE 18 (Applicant’s Brief).

‘chill,’”  “appears to use the word ‘chill’ as a verb,” thus “indicating that the Cited Goods, cork coasters, makes cups cool or makes cups become cold. In contrast, Applicant uses the term ‘chill’ as an adjective to describe a feature of a cup.”⁸ Applicant’s marks, therefore, refer to “a laid-back style cup and indicates that a consumer should use Applicant’s Goods when they want to create a relaxing atmosphere.”⁹

Applicant’s contention that CHILL “appears” as a verb when separated from the descriptive/generic word CUP by a space as in Registrant’s , but an adjective a hyphen connect the terms as in Applicant’s proposed CHILL-CUP and CHILL-CUP marks, has no evidentiary support. *See e.g., Cai*, 127 USPQ2d at 1799. Nor is it necessarily logical to perceive CHILL as verb in the context of Registrant’s cork coasters. A “coaster” is “an item used to protect the surface where the user might place a glass, from condensation from a cold glass ... to show that a drink is not fished or to prevent from contamination ... [and] to stop hot drinks from burning the table surface.”¹⁰ As the Examining Attorney points out, “cork coasters’ are not goods designed to reduce the temperature of the contents of the cups with which they are used, and there is no evidence on the record that suggests registrant’s coasters cool,

⁸ *Id.*

⁹ *Id.*

¹⁰ July 24, 2023 Request for Reconsideration, TSDR 87 (from Wikipedia.com).

chill, or make cold the cups with which they are used.”¹¹

On the other hand, though Applicant argues without evidence that the word “CHILL” in its CHILL-CUP Marks “means laid-back style cups and indicates that a consumer should use Applicant’s Goods when they want to create a relaxing argument,”¹² its website (as shown in the excerpt here) indicates that Applicant’s steel CHILL CUPS provide cooling and therefore are “Chill to The Touch.” As the Examining Attorney notes, “Chill” in this



instance “apparently refers to temperature.”¹³ See *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1957-58 (TTAB 2018) (noting that “an applicant’s own website or marketing materials may be probative, or even, ... ‘the most damaging evidence,’ in indicating how the relevant public perceives a term.” (citations omitted).

We agree with the Examining Attorney that “applicant's argument that the wording ‘CHILL’ in registrant’s mark has a different meaning than the identical wording ‘CHILL’ in applicant's mark is unconvincing,” and that, “taking into account various potential meanings of ‘CHILL,’ the commercial impression is likely identical

¹¹ 16 TTABVUE 6 (Examining Attorney’s Brief).

¹² 14 TTABVUE 18 (Applicant’s Brief).

¹³ 16 TTABVUE 7 (Examining Attorney’s Brief).

whether applied to applicant's or registrant's goods."¹⁴

The respective marks are legally or virtually identical in appearance, sound, connotation and commercial impression, and the first *DuPont* factor weighs heavily in favor of finding a likelihood of confusion.

C. Similarity of the Goods, Channels of Trade, and Classes of Customers

We turn now to the second *DuPont* factor, which concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor regarding the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567.

A proper comparison of the goods “considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). We keep in mind that the greater the similarity between an applicant's mark and a cited registered mark, the less the degree of similarity between the applicant's goods and the registrant's goods that is required to support a finding of likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001), *cited with approval in In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003). “Where, as in this case, the applicant's mark[s] [are identical] or virtually identical to the

¹⁴ *Id.*

registrant's mark, there need only be a viable relationship between the goods to find that there is a likelihood of confusion." *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009) (finding WAVE and THE WAVE to be virtually identical), citing *In re Shell Oil*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993 ("even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source").

It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods in a particular class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Applicant's goods, once again are:

Disposable metal cups; cups; mugs; bottles, sold empty; drinking glasses; water bottles sold empty; insulated beverage containers; drinking bottles for sports,

and Registrant's goods are "cork coasters."

To establish relatedness between Applicant's various drinking vessels, bottles and containers and Registrant's cork coasters, the Examining Attorney introduced printouts from 17 third-party websites to show that "applicant's and registrant's goods tend to be sold by the same manufacturers, often under the same marks, in the same website sections, and often categorized together as drinkware, or the like, and/or shown in the same photograph, with a drink vessel appearing on top of a

coaster.”¹⁵ See *Made in Nature, LLC v. Pharmavite, LLC*, 2022 USPQ2d 557, at *46 (TTAB 2022) (third-party websites promoting sale of both parties’ sorts of goods showed relatedness); *In re Embiid*, 2021 USPQ2d 577, at *28-29 (TTAB 2021) (evidence of third-parties offering goods of both applicant and registrant pertinent to relatedness of the goods); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (relatedness found where Internet evidence demonstrated goods commonly emanated from the same source under a single mark). For example:

- Counter Couture (counter-couture.com) offers various coasters and drinking glasses, such as the following, under its Counter Couture mark:



Bee Cork Coasters



Gnome Cork Coasters



Bumble Bee Rocks Glass



Garden Gnome Pint Glass

;16

- Esmeralda (esmeraldastore.com) offers coaster, drinking glasses, mugs and insulated beverage containers, such as the following, under its Esmeralda mark:

¹⁵ *Id.* at 10. See June 22, 2022 Office Action, TSDR 10-28; January 24, 2023 Final Office Action, TSDR at 10-47; and September 4, 2023 Reconsideration Letters, TSDR 15-78.

¹⁶ June 22, 2022 Office Action, TSDR 10-11, 14.



Stand Tall Darling Coaster



You Got this Girl! Coaster



Mom Mug



Book Blanket Coffee Mug

;17

• Buster & Lou Pet Accessories and Gifts offers various mugs and coasters, such as the following, under its Buster & Lou mark:



I Love Chickens matching chicken mug and coaster set

¹⁷ *Id.* at 18, 21, 24.



Funny Cat Mug - I'd Rather Be With My Cat



Funny Cal Coasters - buy single, any four coasters or whole set of six. Real Men Love Cats, Everything ;18

• KY Supply Co. (kysupplyco.com) offers coasters and drinkware, including mugs and cups, such as the following, under the mark KY Supply Co.:



BOURBON ONLY CORK COASTERS



DON'T FUCK UP THE TABLE COASTERS



PROBABLY BOURBON MUG



Y'all Glass Mug ;19

¹⁸ *Id.* at 27.

¹⁹ January 24, 2023 Final Office Action, TSDR 10-17.

- Huck Performance Buckets (thehuckbucket.com) offers coasters, including insulated beverage containers, mugs and cups, such as the following, under its Huck Performance Buckets mark:



;²⁰ and

- The Colorado Store (coloradostore.co) offers coasters, mugs, drinking glasses, and insulated containers, such as the following, under its Colorado Store mark:



.²¹

²⁰ *Id.* at 18-24.

²¹ *Id.* at 27-41.

These are but several of the 17 examples in the record that show third-party companies offering both Applicant's and Registrant's kind of goods together under the same mark, but they are fairly representative of the lot and support the Examining Attorney's contention that the goods are closely related. Notably, even Registrant appears to offer drinkware and cork coasters together under its

Chill cups mark as shown in the below excerpts from Amazon:



Chill Cups 30oz Insulated Stainless Steel Tumbler with Straw | Double Wall Vacuum Cup, BPA-Free Clear Lid, Metal Straw, Cleaning Brush, Cork Coaster - Reusable Travel Mug for Coffee, Water, Smoothie

Brand: Chill Cups

4.6 ★★★★★ 2,277 ratings

100+ viewed in past month

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²² September 24, 2023 Reconsideration Letter, TSDR 79.

In addition to third-party use evidence, the Examining Attorney also made of record 13 use-based third-party registrations of marks that identify both cork coasters and beverage containers of the type described in the Application and Cited Registration or that these goods are complementary, i.e., cork coasters are for use with beverage containers.²³ “As a general proposition, third-party registrations that cover goods and services 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 Country Oven, Inc.*, 2019 USPQ2d 443903, at *8 (citations omitted). *See also In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998) (same). The registrations are as follows:

Reg. No.	Relevant Goods
3369822	Cork coasters, drinking glasses
4728293	Cork coasters, glass and plastic beverageware, ceramic cups, ceramic mugs, glassware for beverages
4168480	Cork coasters, household containers for beverages, dinnerware, namely, cups, mugs
1758396	Cork coasters, cups, coffee mugs
5944536	Cork coasters, glass and plastic drinking containers, namely, tumblers and shot glasses, flasks, ceramic mugs, pitchers, ceramic mugs, household beverage containers, glassware for beverages, plastic water bottles sold empty
5258503	Cork coasters, mugs, cups
4650772	Cork coasters, mugs, cups

²³ January 24, 2023 Final Office Action, TSDR 49-74.

6608937	Coasters made of cork; glass mugs, beverage glassware, cocktail glasses, drinking glasses
4505519	Cork coasters, mugs, cups
20190307	Cork coasters, mugs, cups, shot glasses, beer steins, wine glasses, beverage glassware
6754626	Cork coasters, drinking glasses, insulated drinking vessels, drinking flasks, mugs
5891846	Cork coasters, wine glasses, bar glasses, namely, cocktail glasses, margarita glasses, martini glasses, pilsner drinking glasses, glass mugs, beer glasses, shot glasses, champagne flutes, glass beverageware, beer glasses, drinking glasses
6211383	Cork coasters, beer glasses, beer mugs, shot glasses

The foregoing evidence is more than sufficient to show that the goods of both Applicant and Registrant are often offered under the same mark and/or by the same purveyors and thus are related. *See In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir 2018) (crediting relatedness evidence that third parties use the same mark for the goods at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard*, 62 USPQ2d at 1004 (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Moreover, as the Examining Attorney observes, “applicant’s and registrant’s goods, despite having different purposes are complementary in nature.”²⁴ He points

²⁴ 16 TTABVUE 11 (Examining Attorney’s Brief).

out that the record evidence “establishes that coasters are goods designed to be used with drinks, or more specifically, drink vessels, such as those identified in the application.”²⁵ Everyone knows that coasters are with drink containers to protect the surface of furniture. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (“[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.”); *In re Cook Med. Techs. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012) (“If goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion.”).

Turning to the third *Dupont* factor, the channels of trade, we find that the same third-party use evidence in the record, including from Counter Couture, Esmeralda, Buster & Lou Pet Accessories and Gifts, KY Supply Co., Huck Performance and the Colorado Store note above, as well as from other retailers in the evidence not previously discussed including Abraham Lincoln High School of San Francisco Alumni Association (lincolnalumni.com), Voguenest (voguenest.com), Well Told (welltolddesign.com), Sixty Vines (shop.sistyvines.com), Hawkins New York (hawkinsnewyork.com), Franmara (franmara.com), Hudson Grace (hudsongracesf.com), Wine Devices (winedevices.com), Magic Pine (magicpine.com), Sunset Beach Trading Co. (sunsetbeachtc.com), and Hario (hariio-usa.com),²⁶ supports a finding that both Applicant’s and Registrant’s goods are offered and

²⁵ *Id.* at 11.

²⁶ January 24, 2023 Final Office Action, TSDR 42-47; September 4, 2023 Reconsideration Letter, TSDR 15-77.

marketed in a least one common channel of trade, that is, the websites operated by third-party providers of drinkware and related accessories, and often on the same page.

Applicant makes several arguments against these findings, none of which are persuasive. Applicant first argues that “consumers do not expect coasters and cups to be from the same source because they have distinct uses and applications.”²⁷ That is, “coasters ‘protect the surface of any other table’ and ‘absorb condensation dripping along the glass[,]’” whereas “cups hold liquids and people drink from cups.”²⁸ Furthermore, Applicant maintains, “[t]he fact that Applicant’s Goods and the Cited Goods could be used together does [not] automatically support a finding that the goods are related for a likelihood of confusion analysis.”²⁹ However, the evidence of record, including the third-party uses and registrations discussed, plus the fact that the goods are complimentary in their use, belies Applicant’s mere argument that consumers do not expect coasters and beverage containers to emanate from the same source. The evidence suggests that they do. “Attorney argument is no substitute for evidence.” *Cai*, 127 USPQ2d at 1799.

Applicant next argues that “Applicant’s Goods are not offered for sale or marketed in a way as to likely cause confusion with the Cited Goods.” According to Applicant, “stores regularly sell Applicant’s Goods and the Cited Goods in distinct locations.”³⁰

²⁷ 14 TTABVUE 12 (Applicant’s Brief).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

The record, however, does not support Applicant's contentions. As the Examining Attorney notes, though "Applicant points to a single example in the record consisting of a third-party webpage, where the coasters and drinkware products were listed in separate locations on the website," "beverage vessels and coasters are in fact displayed together on [that] website, in various photographs where beverage vessels are placed atop coasters."³¹ As he further notes, all of third-party use examples in the record "feature sales listings for coasters and drinking vessels on the same pages, show images of coasters being used with drinking vessels, or contain textual information about coasters being used with drinking vessels."³² We agree that "the evidence clearly establishes that consumers encounter the same types of goods as applicant and registrant in close proximity at points of purchase, and that they travel in the same or overlapping trade channels"³³

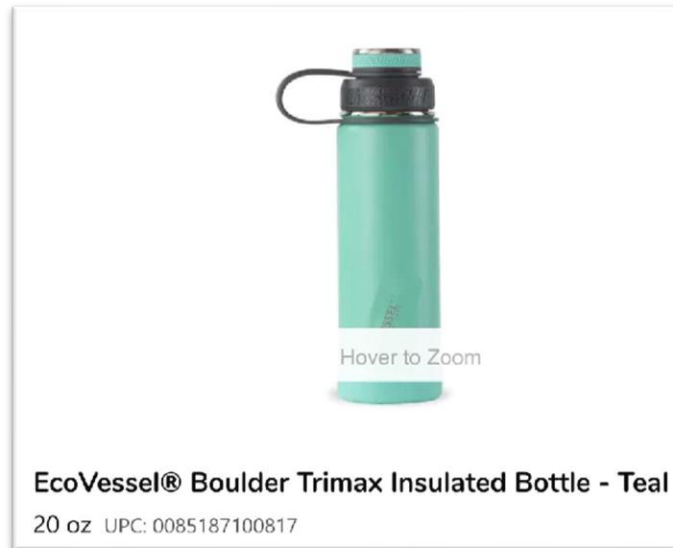
Applicant's third argument against relatedness of the goods is that consumers "are likely to understand that the respective goods do not emanate from the same source because they are not made from the same materials."³⁴ As its sole support for this contention, Applicant points to a printout it provided during prosecution from the website of Krogers (kroger.com), offers the sale of an EcoVessel-branded insulated water bottle shown below:

³¹ *Id.* at 13.

³² *Id.* at 14.

³³ *Id.*

³⁴ *Id.* at 13.



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Applicant is somehow able to conclude from this advertisement, alone, that “Kroger offers an ‘EcoVessel’ brand metal water bottle,” but “does not offer any ‘EcoVessel’ branded drinkware products made from paper or cardboard materials.”³⁶ As the Examining Attorney observes, however, the evidence does not establish “anything other than the fact that Kroger® made a line of metal beverage containers under the EcoVessel Brand.”³⁷ The single, non-precedential case Applicant cites, *In re Clark Door Ltd.*, Serial No. 86513686, 2001 TTAB LEXIS 57 (TTAB 2017), also does not aid Applicant’s position. As the Examining Attorney notes, the Board in *Clark Door* “did not determine that the metal and non-metal doors were unrelated or that consumers would view them as such because of their different material fabrication, only that the record lacked evidence supporting a finding of relatedness.”³⁸ *Id.* at *11.

³⁵ December 22, 2022 Office Action Response, TSDR 57.

³⁶ 14 TTABVUE 13 (Applicant’s Brief).

³⁷ 16 TTABVUE 12 (Examining Attorney’s Brief).

³⁸ *Id.*

Applicant also contends that some of the evidence of third-party use the Examining Attorney provides showing both Applicant's and Registrant's goods being offered under the same mark are actually "examples of house marks that cover a wide variety of goods and services" that are "otherwise unrelated," thereby diminishing its probative value.³⁹ Specifically, Applicant highlights seven third parties in the evidence – including The Colorado Store, KY/S, Franmara, Hario, Well Told, Hawkings New York, and Hudson Grace – that offer other types of goods in addition to Applicant's and Registrant's kind of goods.⁴⁰ The website for The Colorado Store, for example, "show[s] several product categories, such as men & women, kids and babies, accessories, and gift boxes, all separate from the drinkware category."⁴¹ This store, however, which offers various gifts under the theme of the State of Colorado, is not shown to be a big-box or department store, nor are the others. As another example, Franmara, in addition to providing coasters and drinkware, also offers other categories of goods, including "cheese/board accessories, wine bags, barware, retail carded line, pepper mills, and cigar tools, all listed as distinct categories from drinkware/decanter." Some of these items appear complementary.

In any event, the fact that some of the third-party companies identified in the Examining Attorney's third-party use evidence that provide both Applicant's and Registrant's goods may be large companies with substantial product lines does not

³⁹ *Id.* at 14-15.

⁴⁰ *Id.*

⁴¹ 17 TTABVUE 7 (Applicant's Reply Brief).

diminish the probative value of that evidence, and Applicant provides no authority to suggest that it does. We find that the third-party use evidence of record provides a range of types of stores, from gift stores to accessory stores, and is probative of the relatedness of Applicant's drinkware and Applicant's cork coasters. Collectively, the evidence demonstrates consumer exposure to the same source using the same mark for goods like those identified in both the Application and Registration. *See, e.g., In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).⁴²

Finally, Applicant points to the more than 180 third-party registrations it submitted with its requests for reconsideration as a further attempt to demonstrate that its and Registrant's goods are not related.⁴³ According to Applicant, "these pairs of are evidence that (1) customers are already used to distinguishing between even identical or highly similar marks used by one party for drinkware, and another party for coasters; and (2) that businesses permit the coexistence of such marks."⁴⁴ Applicant cites to the Board's decision in *Thor Tech* for support.⁴⁵ There, the Board reversed a Section 2(d) refusal where the marks were identical but the goods were not, and the evidence of nearly 50 pairs of third-party registrations owned by different entities for substantially identical marks for both types of goods (land motor vehicles

⁴² We hasten to add that, even if we were to discount the probative value of the seven third-party use examples Applicant claims are department-type stores, our finding of relatedness would not change.

⁴³ 14 TTABVUE 15-16 (Applicant's Brief).

⁴⁴ *Id.*

⁴⁵ *Id.* at 16.

and towable recreational vehicle trailers) “suggests to us that businesses in these two industries believe that their respective goods are distinct enough that confusion between even identical marks is unlikely.” *Thor Tech*, 113 USPQ2d at 1549.

As the Examining Attorney explains in his brief, he carefully reviewed the third-party registrations submitted by Applicant, then prepared a chart that he included with his denials of Applicant’s requests for reconsideration along “with brief explanations as to why each grouping of registrations fell short of establishing the existence of the marketplace conditions of the kind established in *In re Thor Tech*.”⁴⁶ Having reviewed these registrations ourselves, we agree with the Examining Attorney that “of the approximately 40 groups of registrations, very few of them cover marks that could be reasonable considered substantially similar to one another, and none of them are nearly identical like applicant’s and registrant’s marks.”⁴⁷ We provide an excerpt from the Examining Attorney’s chart depicting the various registrations submitted by Applicant, which shows the first six pairs of registered marks as fairly representative examples of the lot:⁴⁸

Coasters	Beverage containers
BAR DUDES	SURFER DUDES
ALL MAPPED OUT	MAPS
MAPLE KITTY	KITTYHOLD
MAPLE LANDMARK (& design)	MAPLEGRACE
CASA CARTEL	LOVECASA
OUR CASA	CASAINN

⁴⁶ 16 TTABVue 15 (Examining Attorney’s Brief).

⁴⁷ *Id.*

⁴⁸ September 4, 2023 Reconsideration Letter, TSDR 5.

Most of the purported pairs of substantially similar registered marks submitted by Applicant are not actually pairs of substantially similar marks, as they contain additional wording that changes their appearance, sound, connotation and/or commercial impression. Consequently, we agree with the Examining Attorney that Applicant's third-party registration evidence of purportedly substantially similar marks "does not establish the type of marketplace conditions evinced by the record in *In re Thor Tech ...*"⁴⁹

Furthermore, as the Examining Attorney also points out, Applicant offered no evidence showing the extent to which the marks in its registration pairs are actually used in commerce, or consumers' familiarity with them. "[W]here the 'record includes no evidence about the extent of [third-party] uses . . . [t]he probative value of this evidence is thus minimal.'" *Palm Bay Imps.*, 73 USPQ2d at 1693 (citing *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001)); *see also Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973) ("But in the absence of any evidence showing the extent of use of any of [the third-party registrations] or whether any of them are now in use, they provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion. The purchasing public is not aware of registrations reposing in the Patent Office and though they are relevant, in themselves they have little evidentiary value on the issue before us.").

⁴⁹ 16 TTABVUE 15 (Examining Attorney's Brief).

The second and third *DuPont* factors weigh in favor of finding a likelihood of confusion.

D. Conclusion on Likelihood of Confusion

The first, second, and third *DuPont* factors weigh in favor of a finding of likelihood of confusion, the first heavily so, and Applicant was unable to show that Registrant's mark should be accorded a narrower scope of protection. Accordingly, we find that Applicant's marks CHILL-CUP and CHILL-CUPS for "Disposable metal cups; cups; mugs; bottles, sold empty; drinking glasses; water bottles sold empty; insulated beverage containers; drinking bottles for sports" are likely to be confused with

Registrant's mark  for "cork coasters."

II. Mere Descriptiveness

We turn now to Examining Attorney's second ground for refusal, namely that Applicant's proposed marks CHILL-CUP and CHILL-CUPS are merely descriptive of a characteristic of the goods identified in the Applications.

Section 2(e)(1) of the Trademark Act precludes registration on the Principal Register of marks that merely describe an applicant's goods or services. Terms that are merely descriptive cannot be registered on the Principal Register unless they acquire distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f). *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (citing 15 U.S.C. § 1052(f)). Applicant has not claimed that its proposed marks have acquired distinctiveness.

“A mark is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 2021 USPQ2d 1069, *12 (Fed. Cir. 2021) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728 (Fed. Cir. 2012) and *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)) (internal punctuation omitted). We must determine descriptiveness not in the abstract, but in relation to the goods for which registration is sought, the context in which the term is used, and the possible significance that the term is likely to have to the average prospective purchaser encountering the goods in the marketplace. See *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer AG*, 82 USPQ2d at 1831; *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

Evidence of the public’s understanding of a term may be obtained from any competent source, such as listings in dictionaries and other publications, as well as websites and advertising materials directed to the goods. *In re Zuma Array Ltd.*, 2022 TTAB LEXIS 281, at *9-10 (TTAB 2022). It is the Examining Attorney’s burden to show that a term is merely descriptive of an applicant’s goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). Once a prima facie case is established, the burden of rebuttal shifts to Applicant. *Id.*; *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016).

The Examining Attorney relies on four categories of evidence to prove that Applicant’s proposed marks CHILL-CUP and CHILL-CUPS are merely descriptive

within the meaning of Section 2(e)(1) of the Trademark: (A) dictionary definitions; (B) third-party evidence showing use of the term CHILL by competitors in connection with drinking vessels to describe cups that are designed to keep beverages cold or cool to the touch; (C) third-party registrations of marks that disclaim the word CHILL and identify similar goods to those in the application; and (D) evidence from Applicant's own website showing descriptive use of the term CHILL. We address each in turn.

A. Dictionary Definitions

The Examining Attorney provides dictionary evidence showing that to “chill” is to “to make cold or chilly” and “to make cool especially without freezing.” “Chill” also refers to something that is “moderately cold.”⁵⁰

A “cup” is “an open usually bowl-shaped drinking vessel.”⁵¹

B. Competitor Use of “Chill”

The Examining Attorney next refers to several competitors that use the term ‘CHILL’ in connection with drinking vessels to describe cups that are designed to keep beverages cold or cool to the touch. Evidence that other companies use a term in combination with their own marks is relevant evidence of the term’s descriptiveness. *Real Foods*, 128 USPQ2d at 1375. A search for “chill cup” on Amazon yields the following listings for cups advertised with the term “chill” to signifying cooling:⁵²

⁵⁰ June 22, 2022 Office Action, TSDR 30 (definition from Merriam-Webster).

⁵¹ September 4, 2023 Reconsideration Letter, TSDR 82 (definition from Merriam-Webster).

⁵² January 24, 2023 Final Office Action, TSDR 75-81.

		
<p>Slush Chill Cup</p>	<p>Acko Tumbler with Coffee Chiller</p>	<p>Ergodyne Chill Its Insulated Water Bottle</p>
		
<p>Contigo Ashland Chill 2.0 Water Bottle</p>	<p>HyperChiller HC2 Patented Iced Coffee/Beverage Cooler</p>	<p>Chill-O-Matic Beverage Cooler</p>
		
<p>Tervis Tie Dye Chill Insulated Tumbler Cup</p>	<p>Host Freezer Gel Chillable Cocktail Glass</p>	<p>Host Insulated Freezable Drink Chilling Tumbler</p>

		
Host Freezable Drink Chilling Tumbler	Host Gel Chiller Pint Glasses	Stanley Classic Stay Chill Vacuum Insulated Pint Glass

Also listed are the prior registrant's Chill Cups:⁵³



In addition, the Examining Attorney also provides a page from WaterBottles.com, showing its 20 oz Chill Thermal Insulated Mugs. “If you’re a fan of cups that can’t keep your drinks warm or cool, then you are going to hate this thing.”⁵⁴

⁵³ *Id.* at 76.

⁵⁴ *Id.* at 92.



And a page from Simply Divine Oil & Wine shows its offering of a Nicholas Collection Copper Chill Beverage Cup with walled that are liquid-filled with a freezer gel:⁵⁵



C. Third-Party Registrations

The Examining Attorney also made of record “several third-party registrations for marks that disclaim the wording ‘CHILL’ and identify goods similar or identical to

⁵⁵ *Id.* at 85.

those in the application,”⁵⁶ as shown below:

Reg. No.	Mark	Relevant Goods
6861813	PERMA CHILL (stylized)	Water bottles sold empty; travel mugs, insulated mugs
5614983	MAGIC CHILL	Beer mugs, mugs, wine glasses
6646550	TWISTED CHILL	Cups
6065358	CERES CHILL	Bottles, sold empty; insulated containers for food or beverages
5413172	CHILL TUB	Cups; portable coolers

Disclaimers in third-party registrations “are evidence, albeit not conclusive, of descriptiveness of the [disclaimed] term.” *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 n.1 (Fed. Cir. 1987).

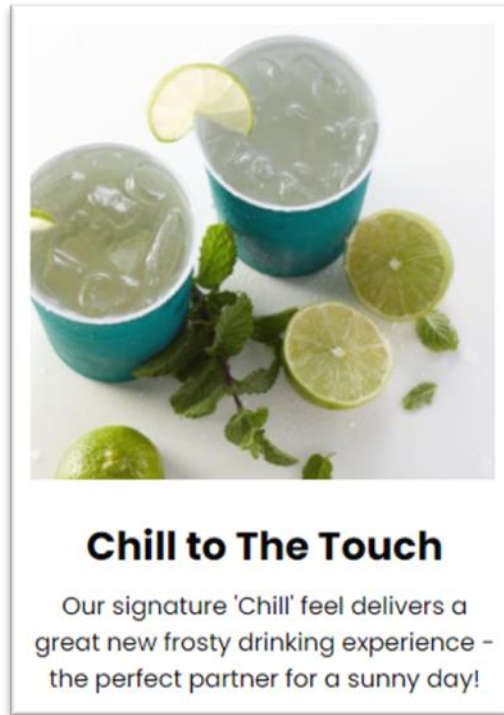
D. Applicant’s Website

Finally, as discussed above, Applicant’s website shows use of the term CHILL in a descriptive manner:⁵⁷



⁵⁶ 16 TTABVUE 17 (Examining Attorney’s Brief); January 24, 2023 Final Office Action, TSDR 97-106 (third-party registrations).

⁵⁷ January 24, 2023 Final Office Action, TSDR 88-89.



Applicant does not challenge any of the evidence submitted by the Examining Attorney in support of his descriptiveness refusal, and does not dispute that the word CHILL, itself, is merely descriptive in connection with the identified goods. Applicant, nevertheless maintains that its CHILL-CUP Marks are double entendres, and therefore are suggestive, not merely descriptive of the goods.

A double entendre “is a word or expression capable of more than one interpretation. For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance as applied to the goods or services. ... The multiple interpretations that make an expression a ‘double entendre’ must be associations that the public would make fairly readily.” *In re The Place, Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005) (citing TMEP 1213.05(c)). Our case law dictates that a double entendre must be recognizable from the mark itself and in relation to

the goods or services in the identification. *See The Place, Inc.*, 76 USPQ2d at 1470 (finding THE GREATEST BAR for “restaurant and bar services” is not a double entendre; “A mark is thus deemed to be a double entendre only if both meanings are readily apparent from the mark itself.”).

According to Applicant’s explanation:

Although the Examining Attorney has maintained that “CHILL” means “to make cold or chilly,” “to make cool especially without freezing,” and “moderately cold,” the term “chill” also readily suggests a laid-back attitude or general sense of ease. In this way, Applicant’s Mark[s] suggest[] that a consumer may want to use Applicant’s Goods at events where the consumer wants to create a laid-back atmosphere or a relaxing time.”⁵⁸

We agree with the Examining Attorney that Applicant’s argument “stretches credulity, as applicant has provided no evidence that such a meaning of the term is well-recognized by the public and readily apparent from the mark itself in the context of Applicant’s goods”⁵⁹ and therefore are not double entendres.

Applicant also argues, in the alternative, that the marks create an incongruous meaning when applied to the goods.⁶⁰ A mark is not merely descriptive if the combination of terms has a “bizarre or incongruous meaning” as applied to the goods. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968). According to Applicant:

When the Examining Attorney’s definition of “chill” is applied to Applicant’s Goods, it can create an incongruous meaning in the mind of some consumers because Applicant’s Goods include metal cups. Metal is

⁵⁸ 14 TTABVUE 19-20 (Applicant’s Brief).

⁵⁹ *Id.* at 19.

⁶⁰ *Id.* at 20-21.

known for being a good conductor of heat. Thus, a consumer might expect metal cups to rapidly conduct heat away from the consumer's hand when they hold the product. As a result of this heat conductivity, the metal may feel "cool" to the consumer holding the cup. In contrast, a cup created with Styrofoam (which is an insulator) may feel "warm," to a consumer. This is true even if the respective materials are the same temperature. It would require a consumer to take mental pause and would require a modicum of thought for a consumer to understand the nature of the metal cup and its ability to be cold or make liquid cold.

Further, if "chill" means "to make cold or chilly," then Applicant's Mark[s] presents some questions for the consumer: Does the cup feel cold? Or does the cup keep liquids cold? Is the cup designed for pre-chilled liquids and maintaining the relatively low temperature of the liquids? Or does the cup make liquid placed in it cold? How does the cup make things cold? These questions require consumers to pause and think about Applicant's Mark[s] before determining the nature of Applicant's Goods. As such, the Board should find that Applicant's Mark[s] [are] suggestive.⁶¹

The Examining Attorney asserts, in response, that a consumer's understanding of the nature of a metal cup and its ability to be cold or make liquid cold "is not caused by the mark itself."⁶²

That is to say, consumers are likely, without pause, to understand applicant's mark to mean that its cups chill or maintain chilled its contents, or feel chill to the touch; the mental pause applicant describes here is created by thinking about the circumstances under which metal may feel cold to the touch, not by thinking about the mark itself. Accordingly, this argument is unpersuasive.⁶³

Regarding the various questions purportedly posed to consumers by Applicant's CHILL-CUP Marks, as the Examining Attorney notes, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test"

⁶¹ *Id.*

⁶² 16 TTABVUE 20 (Examining Attorney's Brief).

⁶³ *Id.*

(quoting *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985)), but rather, “whether someone who knows what the [goods] are will understand the mark to convey information about them.” *DuoProSS Meditech Corp., v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

E. Conclusion on Mere Descriptiveness

In view of the foregoing evidence and argument, we find that the Examining Attorney established a prima facie case that Applicant’s CHILL-CUP and CHILL-CUPS Marks are merely descriptive of the identified goods, which Applicant failed to overcome on rebuttal.

Decision: The refusals to register the marks CHILL-UP and CHILL-UPS in Application Serial Nos. 97016113 and 97016113 under Sections 2(d) and 2(e)(1) of the Trademark Act, 15 U.S.C. §§ 1052(d) and 1051(e)(1), are affirmed.