

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: June 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Red Toro Clothing Inc.

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Serial No. 97192675

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Ashley D. Johnson of Dogwood Patent and Trademark Law,
for Red Toro Clothing Inc.

Catherine Caycedo, Trademark Examining Attorney, Law Office 101,
Zachary Sparer, Managing Attorney.

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Before Heasley, Lebow and Elgin,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Red Toro Clothing Inc., appeals from a final refusal to register the mark RED TORO (in standard characters) on the Principal Register for “hats; headwear; pants; shirts; shorts; sweatshirts; bottoms as clothing; jackets; tank tops; tops as clothing; hooded sweatshirts” in International Class 25,¹ on the ground of likelihood


¹ Application Serial No. 97192675 (“the Application”) was filed on December 28, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and in commerce since at least as early as January 19, 2020. According to the Application, “[t]he English translation of TORO in the mark is bull.”

of confusion with the following previously registered marks, all in the name of Registrant, Red Bull GmbH:

- RED BULL (in typed form) for numerous goods and services in nine classes, including, as most pertinent to the refusal, “footwear, clothing, namely, shirts, pants, T-shirts, sweat shirts and sweat pants, shorts, blouses, jumpers, hats, caps; outerwear, namely, jackets; activewear, namely, shorts, shirts, hats, caps and visors; jackets, sweaters” in International Class 25;²
- RED BULL (in standard characters) for “shirts; pants; sweaters; polo shirts; long-sleeved shirts; short-sleeved shirts; t-shirts; sleeveless shirts; blouses; jumpers; tank tops; bandanas; face masks in the nature of face warmers; headbands; scarves; gloves; jerseys; dresses; hooded sweaters; sweatshirts; sweat pants; shorts; hooded sweatshirts; jackets; visors; hats; caps; beanies; scarves; infant and baby bodysuits, creepers, infant and baby cloth bibs” in International Class 25.³
- TORO ROSSO (in standard characters) for “headgear, namely, hats, caps; clothing, namely, t-shirts, shirts for men, women, wind resistant jackets; sportswear, namely, shirts, polo shirts, jackets” in International Class 25;⁴ and

Red Bull



-  for numerous goods and services in seventeen classes, including, as most pertinent to the refusal, “clothing and headgear, namely, t-shirts, blouses, sweaters, tops, jackets, vests, anoraks, wind-resistant jackets, aprons, caps, hats, headbands, sun visors; sportswear, namely, shirts, pants, polo shirts, sweat shirts and sweat pants, hooded shirts and sweat shirts, shorts, blouses, jackets and coats” in International Class 25.⁵

² Registration No. 2494093, issued October 2, 2001; renewed. A typed or typeset mark is the legal equivalent of a standard character mark. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1408 n.4 (TTAB 2015).

³ Registration No. 4647395, issued December 2, 2014.

⁴ Registration No. 3967592, issued May 24, 2011; renewed. According to the registration, “[t]he English translation of the word ‘TORO ROSSO’ in the mark is Red Bull.”

⁵ Registration No. 3561283, issued January 13, 2009; renewed.

For the reasons discussed below, we affirm the refusal to register.

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, or a mark or trade name previously used in the United States by another and not abandoned, 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 USPQ2d 451, at *2 (Fed. Cir. 2023). The fundamental purposes underlying Section 2(d) are to prevent consumer confusion as to source and to protect trademark owners from damage caused by registration of confusingly similar marks. *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146 (2023); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995).

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). But we “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) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

We focus our likelihood of confusion analysis on Registrant’s typed/standard-character RED BULL and TORO ROSSO marks in Registration Nos. 2494093, 4647395, and 3967592. If we find confusion likely between those standard character marks and Applicant’s mark, we need not consider likelihood of confusion with the Registrant’s composite mark in Registration No. 3561283. On the other hand, if we find no likelihood of confusion between those marks, we would not find confusion likely between Applicant’s mark and the composite. *In re Max Cap. Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010), *cited in In re St. Julian Wine Co.*, 2020 USPQ2d 10595, *3 (TTAB 2020).

A. Relatedness of the Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration . . .” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). 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)).

The goods identified in the Application and cited registrations are identical in part and otherwise related. For example, each identifies hats and shirts. It is sufficient for a finding of likelihood of confusion if relatedness is established for any goods encompassed by the identification of goods within a particular class. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); *see also In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

The channels of trade and classes of purchasers are also related because identical goods are presumed to travel in the same channels of trade to the same classes of purchasers. *Viterra*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these . . . items could be

offered and sold to the same classes of purchasers through the same channels of trade”), *quoted in In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

Applicant does not mention relatedness of the goods, channels of trade, or classes of customers in its brief, apparently conceding these points. Consequently, the second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion.

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*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 Fed. App’x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

We do not predicate our analysis on a dissection of the respective marks; we consider them in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Moreover, the proper test regarding similarity “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*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “Similarity is not a binary factor but is a matter of degree.” *St. Helena Hosp.*, 113 USPQ2d at 1085.

“We keep in mind that where, as here, the goods are in-part identical, less similarity between the marks is needed for us to find a likelihood of confusion.” *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

Applicant’s mark, again, is RED TORO, and Registrant’s marks are RED BULL and TORO ROSSO. All are in standard characters.

As noted above, Applicant provided a translation statement that the English translation of TORO is “bull,” and Registrant provided a translation statement with its TORO ROSSO registration indicating that the English translation of TORO ROSSO is “Red Bull.” In addition, we take judicial notice of the fact that TORO means “bull” in Spanish and Italian, and ROSSO means “red” in Italian.⁶ “Under the

⁶ <https://dictionary.cambridge.org/dictionary/spanish-english/toro> (accessed June 11, 2024); <https://dictionary.cambridge.org/dictionary/italian-english/toro> (accessed June 11, 2024); <https://dictionary.cambridge.org/dictionary/italian-english/rosso> (accessed June 11, 2024). The Board may take judicial notice of dictionary definitions, including definitions in translation dictionaries and online dictionaries that exist in printed format or that have regular fixed editions. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

doctrine of foreign equivalents, foreign words from common languages are translated into English to determine . . . similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay*, 73 USPQ2d at 1696. The doctrine is applied when the relevant English translations are “literal and direct” and “there is no contradictory evidence of shades of meaning or other relevant meanings exist,” as is the situation here. As the Examining Attorney observes, “[t]he marks are similar because they all mean RED BULL, are identical in part, and have a similar connotation and commercial impression.”⁷

Applicant, nevertheless, argues that its mark “is significantly different in visual appearance and pronunciation when compared to the Registrations cited by Examiner” because:

- “Applicant’s mark includes the 2 words RED TORO containing 3 syllables (red TORR-oh),” whereas “the cited RED BULL Registrations are limited to 2 words containing 2 syllables (red bool)”;
- “The cited marks lack the term TORO or any phonetic/visual equivalents” and “Applicant’s mark lacks the term BULL or any similar terms”; and
- “The cited TORO ROSSO mark includes 2 words containing 4 syllables (TORR-oh ROSSoh),” which “lacks the term RED or any phonetic equivalents included in Applicant’s mark,” and “Applicant’s mark lacks the term ROSSO or any phonetic equivalents.”⁸

Applicant’s focus on the number of syllables in the marks is unavailing. The Board has long recognized that consumers typically do not focus on such minutia in forming

⁷ 6 TTABVUE 3 (Examining Attorney’s Brief). Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020).

⁸ 4 TTABVUE 12 (Applicant’s Brief).

their general impressions of marks, or in comparing them. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers ... do not engage in trademark syllable counting—they are governed by general impressions made by appearance or sound, or both”).

Applicant also contends that the marks have different commercial impressions. According to Applicant, its RED TORO mark “creates the commercial impression of a brand that pays homage to the owner’s Mexican heritage” because “the term RED is a nod to the Mexican flag, which includes the color red,” and “many of [Applicant’s] apparel items include Mexican flags,” such as those shown in the images below:⁹



Applicant further “notes that the TORO “is an important image in Mexican culture” because “bullfighting “bullfighting was brought to Mexico more than 500 years ago by conquistadores, making the bull an important part of Mexican culture”¹⁰

By contrast, argues Applicant, Registrant’s “RED BULL mark creates the

⁹ *Id.* at 13; May 10, 2023 Office Action Response, TSDR 21-22. Citations to the prosecution record refer to the .pdf version of the TSDR system. *See In re Integra Biosciences Corp.*, 2022 USPQ2d 93, at *7 (TTAB 2022).

¹⁰ 4 TTABVUE 13 (Applicant’s Brief).

commercial impression of a beverage that gives the drinker energy (e.g., the energy of a bull)” because, according to Wikipedia, eight years before RED BULL was introduced, one of Registrant’s co-founders had “introduced a drink called Krating Daeng in Thailand (which means ‘red guar’ in English; guar = Indian bison)” that “was popular among truck drivers and laborers [in Thailand], giving them energy and curing hangovers.”¹¹

Apart from the fact that much of Applicant’s argument is nothing more than attorney argument, which is not evidence, *see Cai*, 127 USPQ2d at 1799, Applicant’s reliance on extrinsic evidence to assign commercial impressions to the marks at issue is misplaced. “We compare the applicant’s and registrant’s ‘marks themselves.’” *In re Embiid*, 2021 USPQ2d 577, at *19 (TTAB 2021) (citing *i.am.symbolic*, 123 USPQ2d at 1748) (quoting *Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959)). Our analysis is therefore based on the marks as depicted in the application and cited registrations without regard to actual use. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.”).

Considering the marks in their entireties, *see Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116

¹¹ *Id.* at 13-14; May 10, 2023 Office Action Response, TSDR 28-29.

USPQ2d 1129, 1134 (Fed. Cir. 2015), we find that they have the same connotations, and provide similar commercial impressions. Thus, the first *DuPont* factor also weighs in favor of finding a likelihood of confusion.

C. Consumer Sophistication and Care

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues that Applicant’s and Registrant’s “shirts, hats, and other products of clothing . . . are known to be selected after careful consideration by consumers. As such, the target customers are sophisticated and would be expected to be discerning, brand-conscious, and loyal when deciding what to wear.”¹²

Applicant argument fails because it is unsupported by evidence or legal authority, and because there are no limitations on price point or consumer type in either the Application or cited registrations. We must presume that the clothing items are sold at all price points and to all types of buyers, which would include both the discriminating purchaser and the ordinary bargain hunter. We base our decision “on the least sophisticated potential purchasers.” *Stone Lion*, 110 USPQ2d at 1163 (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011) (internal quotation marks omitted)). Ordinary consumers of clothing are likely to exercise only ordinary care, and given the lack of price restrictions in the identifications, they may buy inexpensive items on impulse. *See e.g., In re Embiid*,

¹² 4 TTABVUE 15 (Applicant’s Brief).

2021 USPQ2d 577, at *32; *New Era*, 2020 USPQ2d 10596, at *15-16.

The fourth *DuPont* factor is neutral.

D. Third-Party Registrations for Other Marks and Their Translations

Under the thirteenth *DuPont* factor, the Board may consider “any other established fact probative of the effect of use.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *15 (TTAB 2019). Applicant provides printouts from the USPTO’s TSDR database for 22 third-party registrations and argues that “there are numerous live marks coexisting at the USPTO for English words and foreign translations of the same word in Class 25. ... Hence, Applicant’s mark is capable of coexisting with the cited Marks on the Principal Register and in the marketplace without any likelihood of confusion.”¹³

This is yet another unavailing argument. As the Examining Attorney correctly notes, “[t]he evidence applicant submits is not for wording similar to its mark, but rather for dissimilar wording. As such, it is irrelevant to the similarity of the marks and goods at issue. Prior decisions and actions of other trademark examining attorneys in applications for other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board.”¹⁴ *See In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). As she further observes, “[e]ach case is decided on its own facts, and each mark stands

¹³ 4 TTABVUE 15-16 (Applicant’s Brief).

¹⁴ 6 TTABVUE 8 (Examining Attorney’s Brief).

on its own merits.”¹⁵ See *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (citing *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)).

E. Conclusion

The first, second, and third *DuPont* factors weigh in favor of a finding of likelihood of confusion; the fourth and thirteenth *DuPont* factors are neutral; and no *DuPont* factors weigh against a likelihood of confusion. Accordingly, we find that Applicant’s mark RED TORO (in standard characters) “hats; headwear; pants; shirts; shorts; sweatshirts; bottoms as clothing; jackets; tank tops; tops as clothing; hooded sweatshirts” is likely to cause confusion with Registrant’s RED BULL and TORO ROSSO marks in Registration Nos. 2494093, 4647395 and 3967592 for the goods identified therein.

Decision: The refusal to register RED TORO in Application Serial No. 97192675 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is affirmed.

¹⁵ *Id.*