

This Opinion is not a
Precedent of the TTAB

Oral Hearing: July 27, 2017

Mailed: September 29, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Khalid Akil White dba BLKMPWR
—

Serial No. 86644303
—

Herbert T. Patty of The Law Office of Herbert T. Patty,
for Khalid Akil White.

In Pyo Lee, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

—
Before Mermelstein, Kuczma and Goodman,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Khalid Akil White dba BLKMPWR (“Applicant”) seeks registration on the
Principal Register of the mark:



for: T-shirts in International Class 25.¹

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark:



set forth in Registration No. 2547979, owned by Everett Staten, for clothing, namely, hats and shirts.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the request for reconsideration was denied, the appeal was resumed. Applicant and the Examining Attorney filed briefs, including Applicant's reply brief, and an oral hearing was held. We affirm the refusal to register.

¹ Application Serial No. 86644303 was filed on May 28, 2015, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the following description: "The mark consists of a black background with a trace of the continent of Africa thereon in the color gold. Within the perimeter of Africa is a black image of the United States. The portion of the image of Africa above the image of the United States, and the open areas therein, including the Great Lakes, is in red which extends to the gold perimeter portion of the African continent and the top portion of the image of the United States. The portion of the image of Africa below the image of the United States is in green such that the green portion of the mark extends to the gold perimeter border of the African continent." The colors black, gold, red, green are claimed as features of the mark.

² Registration No. 2547979 issued March 12, 2002; renewed.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address the Examining Attorney's objection to Applicant's attempt to introduce new evidence at page 10 of Applicant's appeal brief.³ The Examining Attorney requests that the new evidence, or any references to it, be excluded from the record.⁴

In response, Applicant admits that he included "basic information concerning indisputable facts; namely, that Africa is often referred to as 'the dark continent' with a Wikipedia link ... , and that in the United States of America white Americans comprise the majority ethnic group at approximately 62% of the population again for which Wikipedia statistics were included as a source to support this fact."⁵ Applicant explains that "known information was submitted [on appeal] to corroborate arguments that the Applicant submitted on the record during prosecution."⁶

No evidence was introduced by Applicant to support the foregoing statements in its brief as copies of the Wikipedia and other articles cited by Applicant are not in the record. Moreover, even if copies were submitted, they would have been untimely. The evidentiary record should be complete prior to the filing of the notice of appeal. 37 CFR 2.142(d); *see In re Fiat Group Marketing & Corporate Comm'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014) (examining attorney's objection to applicant's submission of registrations with appeal brief sustained); *In re Pedersen*, 109 USPQ2d

³ Brief for Appellant p. 10 (6 TTABVUE 11).

⁴ Examining Attorney's Appeal Brief (8 TTABVUE 4-5).

⁵ Applicant's Reply Brief p. 2 (9 TTABVUE 3).

⁶ *Id.*

1185, 1188 (TTAB 2013) (copies of documents pertaining to district court litigation submitted with applicant's appeal brief not considered); *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002) (evidence submitted with applicant's brief not considered). To the extent Applicant requests that we take judicial notice of the indicated facts, we decline to do so. First, the matter in question is beyond the scope of our usual exercise of judicial notice, and second Applicant has not submitted in the record copies of the referenced materials. The record of the proceeding must be complete; the Board will not follow hyperlinks or look for evidence which is not actually submitted. *In re HSB Solomon Assocs.*, 102 USPQ2d 1269, 1274 (TTAB 2012) ("reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record"). *See also Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (because of the transitory nature of internet postings, evidence referenced only by links may later be modified or deleted). Therefore, the Examining Attorney's objection is well taken and the information cited on page 10 of Applicant's opening brief noted above has not been considered.

II. Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities

between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”).

Inasmuch as Registrant’s mark is registered for shirts, which is broad enough to encompass Applicant’s T-shirts⁷, the goods are identical in part. Given the identity of the goods, at least in part, and the lack of restrictions on trade channels and classes of consumers in the recitations of the goods, it is presumed that these goods travel through the same channels of trade, to the same classes of customers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board entitled to rely on this legal presumption in determining likelihood of confusion even though there was no evidence regarding channels of trade and classes of consumers); *Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (citing *Hewlett Packard Co. v. Packard Press, Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)); *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).

⁷ See definitions of “T-shirt” from <http://www.collinsdictionary.com/dictionary/english/t-shirt>, attached to Examining Attorney’s Appeal Brief (8 TTABVUE 16), which is defined as “a cotton shirt with no collar or buttons...” and “1. a collarless, cotton undershirt with short sleeves; 2. a similar pullover knit sport shirt.” The Board routinely takes judicial notice of dictionary definitions when supplied with a copy of the definition, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

We now turn to the remaining relevant *du Pont* factor requiring examination of “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *du Pont*, 177 USPQ 567. Where the marks at issue are both design marks, as they are here, the similarity of the marks must be decided primarily on the basis of their visual similarity. *See, e.g., Volkswagenwerk Aktiengesellschaft v. Rose Vear Enters.*, 592 F.2d 1180, 201 USPQ 7, 9 (CCPA 1979) (quoting *In re ATV Network Ltd.*, 552 F.2d 925, 193 USPQ 331, 332 (CCPA 1977)); *Fort James Operating Co. v. Royal Paper Converting Inc.*, 83 USPQ2d 1624, 1628 (TTAB 2007); *In re Vienna Sausage Mfg. Co.*, 16 USPQ2d 2044, 2047 (TTAB 1990); Trademark Manual of Examining Procedure (“TMEP”) § 1207.01(c) (April 2017).

Although there are specific differences in appearance between Applicant’s and Registrant’s marks, it is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether the marks in their entireties are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. This requires us to keep in mind the fallibility of memory of the average purchaser over a period of time resulting in their normally retaining a general overall impression of the mark or of the theme generated by the mark rather than a specific recollection of a trademark. *See Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Grandpa Pidgeon’s of Mo., Inc.*

v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc.*, 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972); *In re Solar Energy Corp.*, 217 USPQ 743, 745 (TTAB 1983); *Carl Karcher Enters., Inc. v. MTS Franchise Corp.*, 213 USPQ 254, 257-58 (TTAB 1980); *In re Barnhardt Farms, Inc.*, 196 USPQ 309, 311 (TTAB 1977) (purchasers normally retain only a general or overall rather than a specific recollection of the various elements or characteristics of design marks). Thus, when comparing Applicant's and Registrant's design marks, the focus is on the overall commercial impression conveyed by such marks, not on their specific differences.

Turning to the marks, the Examining Attorney notes they are design-only marks that feature undetailed maps of the continent of Africa and the United States, stacked on top of the other, contending the only difference is that "Applicant's mark features the U.S. map inside the continent of Africa, whereas Registrant's mark features the continent of Africa on top of the U.S. map." The foregoing similarities, according to the Examining Attorney, support finding that "Applicant's mark creates the same overall commercial impression as Registrant's mark, specifically, that of two particular geographic regions."⁸

Applicant disagrees that the marks have the same overall commercial impression, noting that the dominant portion of each mark is different. According to Applicant, the "African map element appears to be the dominant portion of the cited mark whereas the United States' map element appears to be the dominant portion of

⁸ Examining Attorney's Appeal Brief (8 TTABVUE 6).

[Applicant's] applied-for mark.”⁹ Applicant further notes that the cited registration features an exact map of Africa stacked on top of a map of the United States, suggesting that the African continent is dominant to the United States.¹⁰ Applicant observes that his mark features a stylized drawing of Africa that has been artistically altered to encompass the precise shape of the United States within its borders, which is an integral part of the meaning of his mark maintaining this difference is more than a slight nuance, profoundly affecting the overall shapes and impressions of the two marks.¹¹

Applicant argues that the use of scale, positioning, and placement of the United States' map element in his mark creates a commercial impression that symbolizes cultural and ethnic unity whereas the cited mark appears to create the impression of Africa's (or African people's) dominance of the United States (or its citizens). Thus, Applicant argues, Applicant's mark is not merely a transposition of two elements overlapping one another and creates a vastly different commercial impression than that of the cited mark.¹² The Examining Attorney acknowledges that the word “transpose” was used once in the Final Office Action to mean “put into a different order,” to indicate the different order as to how Applicant's mark and the cited mark

⁹ Brief for Appellant p. 8 (6 TTABVUE 9); Applicant's Reply Brief p. 5 (9 TTABVUE 6).

¹⁰ Brief for Appellant p. 10 (6 TTABVUE 11).

¹¹ February 6, 2016 Response to Office Action at 5.

¹² Brief for Appellant p. 12 (6 TTABVUE 13). This appears to be a change in Applicant's position from that in its Request for Reconsideration at 6 where Applicant argued “[t]he marks in question involve the transposition of the design elements in each mark” arguing that if the transposed mark creates a distinctly different commercial impression, confusion is not likely.

were presented, not to suggest that the applied-for mark is a transposition of the mark in the cited registration. According to the Examining Attorney, the only difference between the marks is that in Applicant's mark, the map of the United States appears unaltered and on top of the African continent, while in the cited registration, the map of the African continent appears unaltered on top of the map of the United States.¹³

While recognizing that the marks share common elements, Applicant challenges the Examining Attorney's failure to "provide any analysis on why this [*i.e.*, the use of the same elements] would necessitate that the marks create the same commercial impression."¹⁴ Contending that his mark conveys a strong historical context which cannot be divorced from the overall likelihood of confusion analysis with the cited mark, Applicant argues that the "use of historical and cultural symbolism [in his mark] creates a unique commercial impression of Pan-African unity and signifies the repatriation of Americans of African ancestry to Africa," and that the "inclusion of the United States, a world superpower and historically-imperialist nation, confined within the interior area of a continent (which was subjected to colonialization by imperialist nations) is rather peculiar and would most likely create a distinct and memorable commercial impression to reasonably prudent purchasers."¹⁵ Applicant also contends that the "applied-for-mark's inclusion of the United States' map

¹³ Examining Attorney's Appeal Brief (8 TTABVUE 8-9).

¹⁴ Brief for Appellant p. 7 (6 TTABVUE 8).

¹⁵ Brief for Appellant p. 9 (6 TTABVUE 10).

element within the central area of the African continent signifies the African-American race is a critical set within the African Diaspora and therefore vital to the repatriation of all persons of African descent to repatriate to Africa in mind, body, and soul. As such, those of African descent which consider themselves members of the African Diaspora would be drawn to Appellant's applied-for-mark as it signifies repatriation or return to their 'motherland.'"¹⁶

According to Applicant, the color scheme of Applicant's mark is consistent with the African flag and symbolizes unity of African American people as members of the African Diaspora.¹⁷ Applicant concludes that most Americans are familiar with this history due to the teaching of the Diaspora as part of social studies education in public schools,¹⁸ and would therefore acknowledge the significance and distinctiveness of

¹⁶ Brief for Appellant p. 9 (6 TTABVUE 10).

¹⁷ Applicant explains that each design element in his mark has been carefully chosen to help evoke this message of unity and repatriation. The colors of the mark have been intentionally selected and arranged to match the horizontal, red, black and green stripes of the Pan-African flag. Request for Reconsideration at 3.

Applicant further argues without offering a copy of the supporting evidence:

The red, black and green stripes of the Pan-African flag have been a symbol of Pan-African unity and African-American repatriation since the Universal Negro Improvement Association's (UNIA) adoption of the flag almost 100 years ago. (<http://www.the-unia-acl.com/index.php/history-red-black-green>). According to the UNIA, the red stripe represents the blood that unites all people of African descent; the black stripe represents all people of African descent, and the green stripe represents the abundant, natural wealth of Africa.

Request for Reconsideration at 3.

¹⁸ Request for Reconsideration at 3. Applicant did not introduce a copy of the article about the African Diaspora at the website address mentioned in Applicant's Request for Reconsideration at 3. Therefore, the article at http://www.socialstudies.org/publications/socialeducation/january-february2012/teaching_and_learning_with_teaching_historyorg is not in the record. Similarly, the record does not contain a copy of the material on Wikipedia at https://en.wikipedia.org/wiki/African_diaspora mentioned in the Request for Reconsideration at 5.

Applicant's mark.¹⁹ "This significance cannot possibly be lost on the general public familiar with American history; namely African-American history."²⁰

The Examining Attorney maintains that the general "public would not and, frankly, could not draw such a conclusion or meaning from the applied-for mark where Applicant describes an abstract concept without context and the applied-for mark does not contain any wording that could even imply Pan-African unity or repatriation, particularly as the mark is used on clothing goods." As pointed out by the Examining Attorney, there is no evidence in the record to support Applicant's presumption that consumers would be able to extrapolate such abstract concepts from the proposed mark.²¹ We add that there is nothing in the application before us which would limit Applicant's customers to those familiar with African-American history.

Considering each design mark separately, the map of the African continent is the dominant part of both marks, comprising the dark image superimposed on the outline of the United States in Registrant's mark and forming the large perimeter (inside the black background rectangle) of Applicant's mark. However, the map of the United States is also visible and readily recognizable in each mark, diminishing the focus normally accorded to the dominant portion of a mark. Thus, the viewer's attention to each mark is drawn to the maps of Africa and the United States.

¹⁹ Request for Reconsideration at 4.

²⁰ Applicant's Reply Brief p. 7 (9 TTABVUE 8).

²¹ Examining Attorney's Appeal Brief (8 TTABVUE 10-11).

Applicant's interpretations of his mark indicate merely what Applicant intended his mark to represent. Similarly, Applicant's interpretation of Registrant's mark is only his interpretation. This is not sufficient to show a lack of likelihood of confusion, source or sponsorship. As we have previously found in a likelihood of confusion analysis, an applicant (or registrant's) intended interpretation of the mark is not necessarily the same as the consumer's perception of it. *In re Yale Sportswear Corp.*, 88 USPQ2d 1121, 1125 (TTAB 2008); *Interpayment Svcs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1465 (TTAB 2003) ("... it does not matter what applicant's intentions were in creating its mark or what its characterization of its mark is").

Applicant contends that his goods are being marketed to a particular demographic, he operates under the business name BLKMPWR and his goods are explicitly directed towards African-Americans, particularly those with a strong sense of cultural identity who are able to acknowledge such symbolism. Applicant argues "It should be noted that that a mark's commercial impression should be measured by consumers and persons familiar with the type of products... (*Ilco Corp. v. Ideal Sec. Hardware Corp.*, 527 F.2d 1221, [188 USPQ 485, 487] (CCPA 1976) and therefore the relevant consumers are primarily African-Americans."²² Therefore, Applicant concludes, his mark "could, and does, imply the concept of repatriation as is implied without the use of words through the inclusion of the United States centrally fitted within the native land of African people."²³ We disagree. While commercial

²² Applicant's Reply Brief pp. 4, 8 (9 TTABVUE 5, 9).

²³ Applicant's Reply Brief p. 8 (9 TTABVUE 9).

impression is gauged by the impact of the mark on the relevant purchasers, in this case, that is the general public, since there is nothing in the application restricting the goods to “primarily African-Americans.”

Applicant also argues that the cited registration fails to convey the concepts of Pan-African unity and repatriation because its composition creates the impression that Africa is superior to the United States due to the placement of the African continent covering a vast majority of the depicted map of the United States. This depiction of dominance is incompatible with the philosophy of Pan-African unity and repatriation according to Applicant. Moreover, Applicant characterizes the disparaging depiction of the United States in the cited mark as subordinate to the African nations, arguing that is not found in Applicant’s mark which illustrates how African-Americans are tied to their native land in mind, body, and soul.²⁴

The Examining Attorney contends that even if the general public were able to understand that Applicant’s mark conveys Pan-African unity and repatriation, the cited registration creates the same commercial impression of unity and repatriation.²⁵

Applicant further asserts that consumers have a high comprehension of design mark distinctions in the apparel industry, citing *In re Covalinski*, 113 USPQ2d 1166, [1168] (TTAB 2014), which Applicant asserts “held that in the field of apparel, consumers are more influenced by the visual impressions made by marks (which in

²⁴ Applicant’s Reply Brief pp. 8-9 (9 TTABVUE 9-10).

²⁵ Examining Attorney’s Appeal Brief (8 TTABVUE 11).

the present case emphasize their different meanings) than in other cases.”²⁶ Applicant cites *Covalinski* for the proposition that consumers in the realm of apparel have a high comprehension for visual impressions.²⁷ As such, Applicant argues *Covalinski* supports the notion that consumers exercise great care when making choices about what they will wear concluding that consumers are able to distinguish the marks in the present case due to this heightened care in addition to the distinct design configuration and meaning of Applicant’s mark.²⁸

Covalinski involved the registrability of the word and design mark



(REDNECK RACEGIRL plus design, U.S. Serial No.

85685983) for “[a]thletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms” in view of the cited registration for the mark RACEGIRL (in standard characters, Registration No. 3351313) for “caps; jerseys; leather belts; short sets; tops; shirts; shorts; jackets; blouses; caps with visors; crop tops; hat bands; hats; knitted caps; sweat bands; sweat pants; tank tops; visors.” Thus, the marks in *Covalinski* were the applicant’s word and design mark and the cited registrant’s word mark. The Board in *Covalinski* noted that because consumers are likely to encounter the mark in a retail setting the visual impression of the mark is likely to be more important. 113 USPQ2d at 1168. Here, in contrast to *Covalinski*, we have two design-

²⁶ Brief for Appellant p. 8 (6 TTABVUE 9).

²⁷ *Id.*; Applicant’s Reply Brief p. 9 (9 TTABVUE 10).

²⁸ Applicant’s Reply Brief p. 9 (9 TTABVUE 10).

only marks each consisting of maps of Africa and the United States. Thus, the marks in *Covalinski* are fundamentally different from the marks involved in this case.

While Applicant's mark claims the colors black, gold, red, and green, the Examining Attorney contends that Applicant's depiction of the maps in those colors does not significantly distinguish Applicant's proposed mark from the mark in the cited registration which is depicted in a black-and-white special form drawing. Because Registrant's mark has no color claim, the Examining Attorney asserts that it is presumed to contemplate the use of the mark in any color, without limitation, citing TMEP § 807.14(e)(i).²⁹ As such, the Examining Attorney concludes, Registrant's mark could be displayed featuring the exact same color scheme as the Applicant's mark (at least the African map element of the mark).³⁰ This would not be a material alteration of Registrant's mark, according to the Examining Attorney, because that mark is depicted in a black-and-white special form drawing in which no color is claimed.

On the other hand, Applicant argues that expanding the cited mark (or the cited mark's Africa map element) to Applicant's mark results in a material alteration of the cited mark.³¹ Applicant contends that the Examining Attorney has "improperly broadened [TMEP §807.14(e)] to provide the basis that the cited mark may be amended in any fashion by use of any combination of colors,"³² contending that if the

²⁹ Examining Attorney's Appeal Brief (8 TTABVUE 10).

³⁰ Examining Attorney's Appeal Brief (8 TTABVUE 6).

³¹ Brief for Appellant p. 12 (6 TTABVUE 13); Applicant's Reply Brief p. 6 (9 TTABVUE 7).

³² Brief for Appellant p. 12 (6 TTABVUE 13).

African map in the cited registration is “reconfigured with [Applicant’s] claimed colors – red, black, and green, this would render a material alteration of the cited mark.”³³ Applicant maintains that the two design marks at issue lend themselves to very particular types of coloring which distinguishes the marks as Applicant’s mark adopts the colors of the Pan African flag to denote ethnic unity whereas the cited mark employs the colors black and white to denote “white America” and “black Africa.” According to Applicant, several elements, including the inclusion of segments and borders within the African map element, would need to be altered in order for the cited mark to create the same commercial impression. Thus, Applicant submits if Registrant were to attempt to amend his mark in order to reach the visual impression created by Applicant’s mark, he would not be able to do so as the numerous changes would amount to a materially altered, essentially new, mark.³⁴ Applicant concludes that the TMEP would be improperly broadened if it allowed the cited mark to be amended in any fashion by use of any combination of colors.³⁵

We look to Section 807.14(e)(i) of the TMEP regarding the significance of black-and-white drawings:

Black-and-White Drawings

...

If a mark is initially depicted in a black-and-white special form drawing in which no color is claimed, the drawing is presumed to contemplate the use of the mark in any color, without limitation. See, *e.g.*, *In re Data Packaging Corp.*,

³³ Brief for Appellant p. 13 (6 TTABVUE 14).

³⁴ Brief for Appellant p. 14 (6 TTABVUE 15).

³⁵ Brief for Appellant p. 12 (6 TTABVUE 13); Applicant’s Reply Brief p. 3 (9 TTABVUE 4).

453 F.2d 1300, 1302, 172 USPQ 396, 397 (C.C.P.A. 1972). The amendment of the black-and-white drawing to one claiming a particular color as a feature of the mark is, therefore, a restriction or limitation of the applicant's rights.

Applicant interprets the foregoing to restrict the use of color to a single color. That is too narrow of a reading. Since the cited mark is depicted in a black-and-white special form drawing in which no color is claimed, the drawing is presumed to contemplate the use of the mark in any colors without limitation.

There are numerous color schemes that could be applied to Registrant's mark including schemes using the red, black and green colors similar to those found in Applicant's mark, resulting in both Registrant's mark and Applicant's mark having the red, black and green colors used in the African flag for the map portions of the marks. That Applicant's mark has a black background is not likely to be recalled by purchasers and is therefore not a sufficient difference to distinguish the marks.

Because Registrant's mark makes no color claim, the drawing is presumed to contemplate the use of the mark in any colors, including those used in Applicant's mark. *See In re Data Packaging Corp.*, 453 F.2d 1300, 172 USPQ 396, 397 (CCPA 1972) (court allowed registration of a mark consisting of a colored band applied to a computer tape reel of contrasting color); *T & T Mfg. Co. v. A.T. Cross Co.*, 178 USPQ 497, 502 (TTAB 1973) ("This narrows down as to whether the use of an identical conical shape in three different colors represents three different marks or but a single mark in different displays. It is our opinion that applicant possesses but a single mark which covers the application of color to an arbitrary selected conical shaped portion of the top of its writing instruments as against a barrel of a contrasting color; ...

applicant possesses rights therein covering all of the different colors in which the conical shaped portion may appear.”).

Both marks include overlaid maps of Africa and the United States. Inasmuch as Registrant’s mark is not restricted to the use of black and white colors, it can appear in the red, black and green colors shown in Applicant’s mark creating a similar commercial impression to Applicant’s mark. *Grandpa Pidgeon’s of Mo.*, 177 USPQ at 574 (the figures create a similar commercial impression, likely to be remembered by purchasers of an aged man in overalls with cane and pipe, *i.e.*, a “grandpa” ... that one figure is upright and apparently spry while the other is slightly stooped is, a difference not likely to be recalled by purchasers seeing the marks at spaced intervals; legal surgery, in which trademarks have parts enhanced or discarded, is of little aid in determining the effect of design marks on purchasers who merely recollect); *Am. Sunbathing Assoc., Inc. v. Am. Health Alliance*, 157 USPQ 586, 589-90 (TTAB 1968) (nothing in the record shows that the sunburst emblem or any of the other features comprising the marks of the applicant and registrant has been used by others in connection with clothing; thus, registrant’s mark ... precludes the registration by a subsequent user of the same or a similar mark for similar goods; the overall commercial impression created by applicant’s mark is sufficiently similar to registrant’s mark as to be likely to cause confusion).

III. Conclusion

We have considered all of the evidence and arguments of record as it pertains to the relevant *du Pont* factors (including any evidence and arguments not specifically

discussed). To the extent that any other *du Pont* factors for which no evidence or argument were presented may nonetheless be applicable, we treat them as neutral.

While there are specific differences in the marks at issue, such differences are not determinative of the issue of likelihood of confusion. The marks create the same overall commercial impression such that a prospective consumer of Applicant's goods bearing his applied-for mark would be likely to associate such mark with Registrant's mark and would be likely to consider that Registrant was the source of goods so marked. Furthermore, it is well established that, when the goods at issue are identical, "the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In light of these considerations, while the marks involved are not identical, any minor differences between them are insufficient to outweigh the remaining factors that favor refusal of the registration in this case. *Viterra*, 101 USPQ2d at 1912.



Decision: The refusal to register Applicant's mark is affirmed.