

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: December 28, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Srastr Inc.*  
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Serial No. 88185284  
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Amy J. Tindell and Larry Tronco of Holland & Hart,  
for Srastr Inc.

Laura Golden, Trademark Examining Attorney, Law Office 103,  
Stacy Wahlberg, Managing Attorney.

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Before Mermelstein, Greenbaum and Lebow,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Srastr Inc. (“Applicant”) seeks registration on the Principal Register of the mark  
TECHGEAR (in standard characters) for

Downloadable mobile application software for use to connect and control internet of things (IoT) electronic devices for consumers and businesses in the fields of 3D printing, home entertainment, cloud services, computer hardware, content and streaming services, cyber security and privacy, digital health, digital imaging, digital photography, drones, education, fitness, gaming, technology driven toys, beauty, pets, family lifestyle, accessibility, robotics, sensors and biometrics, smart cities, smart home, software and applications, sports technology and e-sports, sustainability, telecommunications, travel

and mobility, vehicle technology, wireless devices, wireless services, artificial intelligence enabled devices, internet of things (IoT) enabled devices, gadgets, and appliances, in International Class 9;

On-line retail store and computerized on-line retail store services featuring technology products, namely, Internet of Things (IoT) enabled devices and accessories; retail store services featuring technology products, namely, Internet of Things (IoT) enabled devices and accessories; on-line trading services, namely, operating on-line marketplaces for sellers and buyers of goods and/or services in the fields of 3D printing, home entertainment, cloud services, computer hardware, content and streaming services, cyber security and privacy, digital health, digital imaging, digital photography, drones, education, fitness, gaming, technology driven toys, beauty, pets, family lifestyle, accessibility, robotics, sensors and biometrics, smart cities, smart home, software and applications, sports technology and e-sports, sustainability, telecommunications, travel and mobility, vehicle technology, Wireless Devices, Wireless Services, Artificial Intelligence enabled devices, Internet of Things (IoT) enabled devices, gadgets, and appliances for use to connect and control internet of things (IoT) electronic devices, in International Class 35;

Education, entertainment, and training services, namely, organizing and conducting computer game competitions and classes, seminars and workshops in the fields of teaching people how to use internet of things (IoT) enabled devices; **software as a service (SAAS) services featuring software for tutorials, coursework, projects, learning assessments, hosting an on-line community web site featuring online non-downloadable software tools in the field of 3D printing, home entertainment, cloud services, computer hardware, content and streaming services, cyber security and privacy, digital health, digital imaging, digital photography, drones, education, fitness, gaming, technology driven toys, beauty, pets, family lifestyle, accessibility, robotics, sensors and biometrics, smart cities, smart home, software and applications, sports technology and e-sports, sustainability, telecommunications, travel and mobility, vehicle technology, wireless devices,**

**wireless services, artificial intelligence enabled devices, internet of things (IoT) enabled devices, gadgets, and appliances for use to connect and control internet of things (IoT) electronic devices, in International Class 41; and**

Online non-downloadable computer software for use in providing retail and ordering services for a wide variety of goods, services and experiences; Software as a service (SAAS) services featuring computer software to connect and control internet of things (IoT) electronic devices for consumers and businesses in the field of 3D printing, home entertainment, cloud services, computer hardware, content and streaming services, cyber security and privacy, digital health, digital imaging, digital photography, drones, education, fitness, gaming, technology driven toys, beauty, pets, family lifestyle, accessibility, robotics, sensors and biometrics, smart cities, smart home, software and applications, sports technology and e-sports, sustainability, telecommunications, travel and mobility, vehicle technology, wireless devices, wireless services, artificial intelligence enabled devices, internet of things (IoT) enabled devices, gadgets, and appliances; software as a service (SAAS) services featuring software for tutorials, coursework, projects, learning assessments, and hosting an on-line community web site featuring online nondownloadable software tools in the field of 3D printing, home entertainment, cloud services, computer hardware, content and streaming services, cyber security and privacy, digital health, digital imaging, digital photography, drones, education, fitness, gaming, technology driven toys, beauty, pets, family lifestyle, accessibility, robotics, sensors and biometrics, smart cities, smart home, software and applications, sports technology and e-sports, sustainability, telecommunications, travel and mobility, vehicle technology, wireless devices, wireless services, artificial intelligence enabled devices, internet of things (IoT) enabled devices, gadgets, and appliances for use to connect and control internet of things (IoT) electronic devices, in International Class 42.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88185284 was filed on November 7, 2018, 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 bolded wording in the Class 41 identification of

The Trademark Examining Attorney refused registration of Applicant's proposed mark in each Class under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as merely descriptive of the identified goods and services. The Examining Attorney also refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the Class 35 services, so resembles the registered mark TEKGEAR and Design (TECH



GEAR disclaimed), displayed as , for, inter alia,

Online retail store services featuring virtual reality peripherals, namely, head mounted displays and positional and orientation trackers; online retail store services featuring portable and wearable computing peripherals, namely, wearable computers, keyboards, mice, telecommunications and data networking hardware in the nature of devices for transporting and aggregating voice, data, and video communications across multiple network infrastructures and communications protocols and blank USB flash drives; online retail store services featuring drivers for LCD and OLED micro displays, in International Class 35,

as to be likely to cause confusion, mistake or deception.<sup>2</sup>

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services is misclassified, and also appears in the Class 42 identification of services, where they are appropriately classified. The Board will delete this wording from the Class 41 identification of services. *Cf.* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) (October 2018) § 707.02 (Applicant's authorization unnecessary for changes to international classification).

<sup>2</sup> Reg. No. 4192683 issued on August 21, 2012. Partial Section 8 & 15 Declaration accepted. The registration includes the following description of the mark: "The mark consists of the wording 'tekgear' with the 'tek' displayed in orange and 'gear' displayed in brown with a brown arc around 'tek.'" The colors brown and orange are claimed as a feature of the mark.

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm both refusals to register.

### I. Section 2(e)(1) Refusal

Absent acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant's goods or services, is merely descriptive of them.<sup>3</sup> "A term 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." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). See also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it "requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods [or services]." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. See *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

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<sup>3</sup> "No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive ...." 15 U.S.C. § 1052(e)(1).

Whether a mark is merely descriptive is determined in relation to the goods and services for which registration is sought and the context in which the mark is used, not in the abstract or on the basis of guesswork. *Bayer*, 82 USPQ2d at 1831; *see also In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). In other words, we evaluate whether someone who is familiar with the goods and services 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). A mark need not immediately convey an idea of each and every specific feature of the goods and services in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods and services. *See Gyulay*, 3 USPQ2d at 1010. In addition, the descriptiveness analysis concentrates on the identification of goods and services set forth in the application. *See In re Cordua Rests., Inc.* 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

“Evidence of the public’s understanding of [a] term ... may be obtained from any competent source, such as purchaser testimony, consumer surveys, listing in dictionaries, trade journals, newspapers and other publications,” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)), as well as “labels, packages, or in advertising material directed to the goods ....” *Abcor*, 200 USPQ at 218. It may also be obtained from websites and, in

the case of a use-based application or registration, an applicant's or registrant's own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001).

#### A. Analysis

“Internet of Things” is defined as “a network of everyday devices, appliances, and other objects equipped with computer chips and sensors that can collect and transmit data through the internet. Abbreviation: IoT.”<sup>4</sup> As an article posted on the SoftwareTestingHelp.com website, titled “18 Most Popular IoT Devices in 2020 (Only Noteworthy IoT Products)” (last updated December 25, 2019), explains,

Internet of Things (IoT) devices support the expansion of Internet connection beyond the usual standard devices like computers, laptops, smartphones etc. These IoT devices are purely integrated with high definition technology which makes it possible for them to communicate or interact over the Internet smoothly and can also be managed and controlled remotely when required.

April 9, 2020 Request for Reconsideration Denied, TSDR 4.

Applicant summarizes its identified goods and services as: downloadable mobile application software for use to connect and control IoT electronic devices in Class 9; retail services featuring technology products, namely, IoT enabled devices and

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<sup>4</sup> The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We took judicial notice of this term from Dictionary.com, based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2020).

accessories in Class 35; education, entertainment and training services, namely, organizing and conducting computer game competitions and classes, seminars and workshops in the fields of teaching people how to use IoT enabled devices in Class 41; and software as a service (SAAS) services featuring computer software to connect and control IoT electronic devices in Class 42. 8 TTABVUE 5.

“Tech” is defined as “technology,” which in turn is defined as “electronic or digital products and systems considered as a group,” and “gear” is defined as “equipment, such as tools or clothing, used for a particular activity,” and “equipment, paraphernalia.” February 20, 2019 Office Action, TSDR 12-16 (quoting Merriam-Webster.com and AHDictionary.com). The Examining Attorney asserts that the dictionary definitions confirm that “the wording TECH GEAR describes the Class 09 products, which are technology goods, describes the nature of the goods offered in the Class 35 retail stores, describes the fact that applicant’s Class 41 educational services help users use their technology products, and describes the fact that the Class 42 software services allow consumers to use their technology products.” 10 TTABVUE 10. In other words, the term “tech gear” “refers to electronic or digital equipment and services that are used in connection with electronic and digital equipment.” *Id.*

The Examining Attorney also submitted ample evidence from third party websites to demonstrate that sellers, purchasers and users of electronic or digital equipment and services related to such equipment commonly refer to goods and services in the field of technology as “tech gear.” September 17, 2019 Office Action, TSDR 14-31. The most relevant evidence, consisting of various reviews and articles about “tech gear,”



and excerpts from five retail websites that have pages for “tech gear,” is summarized as follows (emphasis added):

- USA Today webpage in the “**Tech Gear**, Gadgets and Reviews” section reviewing “The best Kindles of 2019”
- Wired webpage in the “**Tech Gear**: Gadget News and Reviews” section with links to reviews of various smartphones
- Popular Mechanics webpage in the “Best New **Tech Gear**—Reviews of New **Technology Gear**” section with links to reviews of various “gear” including one titled “Should I Buy a Google Home or Amazon Echo?”
- Sunset Magazine website titled “**Tech Gear & Gadgets**” with links to articles such as “How to Keep a ‘Smart’ Eye on Your Home While You’re Away” subtitled “Smart home devices that give frequent travelers peace of mind”
- June 9, 2016 article on the CNet website titled “Best **tech gear** for dad under \$100” with a photo of various items such as headphones and a remote control
- **Tech Gear** Lab touts itself as “THE WORLD’S MOST IN-DEPTH AND SCIENTIFIC REVIEWS OF **TECH GEAR**” offers reviews of various technology products, with links to the “Most Popular” items such as “The Best Portable Bluetooth Speakers of 2019” and “The Best Home Wireless Speakers of 2019,” and “Categories” including “Cool Gadgets,” “Electronics,” “Kitchen Appliances” and “Smart Home”

- **Tech Gear** Talk describes itself as “a hub for Tech product reviews” and offers links to reviews of various “tech products” such as cameras and a wireless gaming keyboard
- February 27, 2019 (last updated) article by Anil Polat from the website Fox Nomad titled “**Tech Gear** and Gadgets I Travel With” discussing the “technology” and “common gear” that “have made it into [his] backpack” when he travels.
- January 15, 2019 (last updated) You Tube channel page titled “**Tech Gear**, Nerd Products and Technology Product Reviews” about “[c]ell phones, chargers, cases, and other products you probably need to keep your tech life up to speed!”
- Men’s Journal website offers reviews of various “**Tech**” products on the “**Gear**” “**Tech**” webpage, including a link to “Style & Design 2019: 33 Brilliant New Tools, Toys, and Tech”
- Music Radar article titled “The best new music **tech gear** of the month: review round-up (September 2019) noting “all manner of mouth-watering **tech gear** passing through our hands” over the 2019 summer
- Pages from five online stores with pages for “**Tech Gear**,” offering small electronic devices such as cell phones, laptops and tablets, and carrying cases therefor

Based on the evidence, we have no doubt that consumers who see the proposed mark TECHGEAR used on or in connection with the identified goods and services

immediately would understand that the proposed mark describes goods which comprise software to connect and control IoT electronic or digital equipment, and services that relate to IoT enabled devices and accessories. The definitions of the words in the proposed mark show their descriptiveness in the field of technology, and we agree with the Examining Attorney that “the Internet of Things is a subset of technology. Because the wording TECHGEAR describes gear used in the field of technology, and also services related to those devices, the wording also describes goods and services in applicant’s more narrow field of technology.” 10 TTABVUE 14. Also, as discussed below, the combination of TECH and GEAR does not evoke a new and unique commercial impression. Accordingly, the proposed mark is merely descriptive of the identified goods and services.

We do not find persuasive Applicant’s arguments that the proposed mark is suggestive, rather than descriptive, because there are multiple definitions of the word “gear,” and that the wording TECHGEAR could refer to other types of products (“gamer backpacks, tools used to fix computer hardware, digital eyeglasses, mouse pads, smartwatches, functional clothing, auto or machine parts, or sleeping bags.” 8 TTABVUE 5.).<sup>5</sup> As we stated above, we must consider the meaning of a term in

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<sup>5</sup> As support for the latter argument, Applicant points to two infringement cases in which the courts addressed the strength of the marks and found them suggestive rather than descriptive: *Playtex Prods., Inc. v. Georgia-Pacific Corp.*, 390 F.3d 158, 73 USPQ2d 1127, 1131 (2d Cir. 2004) (affirming decision by district court that “Wet Ones,” while descriptive of the products, “does not itself conjure up the image of a towelette” and is therefore suggestive), and the unreported case *BIC Corps. v. Far Eastern Source Corp.*, 2000 WL 1855116 at \*3 (S.D.N.Y. 2000) (holding that “Wite-Out” is suggestive, and stating: “The name WITE-OUT could be descriptive of correction products in that most of the WITE-OUT products are white in color and used to take ‘out’ a mistake. However, although the name WITE-OUT is logically related to its use, the phrase without more does not imply a correction product.”). Neither

relation to the identified goods and services, not in the abstract. *See Bayer*, 82 USPQ2d at 1831; *Abcor*, 200 USPQ at 218. The evidence supports a finding that consumers who encounter the term TECHGEAR on Applicant's identified goods and services would immediately understand that they are a type of technological equipment and services, namely, software for IoT enabled devices and services related to such devices. This is particularly true given the various third party reviews and third party sellers of goods and services in the field of technology who use the term "tech gear" to describe products such as smart phones, e-readers, and home assistants (e.g., Google Home, Amazon Echo), and their accessories (e.g., carry cases).

To the extent Applicant is arguing that it is the first user of the designation TECHGEAR specifically to refer to the identified IoT goods and services, such argument is unavailing. The fact that an applicant may be the first or only user of a merely descriptive designation does not necessarily render a word or term incongruous or distinctive; here, the evidence shows that TECHGEAR is merely descriptive of electric or digital devices, including some that are IoT enabled (e.g., Amazon Echo), and services related to those devices (e.g., retail stores that sell carrying cases for laptops). *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); TMEP § 1209.03(c).

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decision is instructive in this Board proceeding, where we follow the well-established precedent of our primary reviewing court, the Court of Appeals for the Federal Circuit, and do not make our descriptiveness determination in a vacuum. *See Bayer*, 82 USPQ2d at 1831; *Abcor*, 200 USPQ at 218.

A combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363, 365 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). However, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its descriptive significance in relation to the goods, the combination results in a composite that is itself descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Comm’r*, 252 U.S. 538, 543 (1920)); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows where the evidence showed that the term “breathable” retained its ordinary dictionary meaning when combined with the term “mattress” and the resulting combination was used in the relevant industry in a descriptive sense). We find that to be the case here.

Finally, the lack of a space between the terms TECH and GEAR does not obviate a finding of mere descriptiveness. Numerous cases have held that combining two words which as a whole are merely descriptive of the goods or services into a single term does not avoid a finding of mere descriptiveness for the combined term. *See, e.g., In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18

(TTAB 2002) (holding SMARTTOWER merely descriptive of “commercial and industrial cooling towers and accessories therefor, sold as a unit”); *Minn. Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967) (“[i]t is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words”).

#### B. Conclusion on Mere Descriptiveness

For the reasons discussed, we conclude that the relevant consumers, who are members of the general public, would immediately understand TECHGEAR, when used on Applicant’s identified IoT products and related services, to immediately describe a key feature of them. Furthermore, Applicant’s competitors who might offer similar goods should have the opportunity to use “tech gear” or variations thereof to explain a significant feature or characteristic of their goods and services. *See In re Boston Beer Co., L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998), *aff’d*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *Abcor*, 200 USPQ at 217 (“[A] major reason[] for not protecting [merely descriptive] marks [is] ... to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.”).

#### II. Likelihood of Confusion (Class 35 Only)

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours*

& Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all [du Pont] factors for which there is record evidence but ‘may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

#### A. Similarity or Dissimilarity of the Marks

Under this factor, we compare Applicant’s mark TECHGEAR (in standard characters) and Registrant’s composite mark TEKGEAR and Design, displayed as



, “in their entirety as to appearance, sound, connotation and commercial impression.” *Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047,

1048 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (citation omitted); *accord Krim-Ko Corp. v Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018).


Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Further, the marks “must be considered ... in light of the fallibility



of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014 (quotation omitted)). We focus on the recollection of the average consumer—here, an ordinary consumer of electronic and digital devices—who normally retains a general rather than a specific impression of trademarks. *Id.* at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Applicant argues that confusion is unlikely because the marks are sufficiently different in overall appearance, and the cited mark is entitled to a limited scope of protection because the literal portion has been disclaimed. The Examining Attorney focuses on the visual and aural similarities between Applicant’s proposed mark TECHGEAR and the literal element TEKGEAR in Registrant’s mark, which she contends is the most distinctive portion, and therefore the strongest source identifying element of Registrant’s mark.



Looking at Registrant’s composite mark  in its entirety, the literal term TEKGEAR stands out as the most prominent element, conveying the strongest commercial impression in the mark. Generally, it is “the verbal portion of a word and design mark [that] will be the dominant portion.” *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012); *see also CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“[T]he verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.”). We find that to be the case here, where the arc design and brown and gold colors in Registrant’s mark highlight, rather than overwhelm or detract from the literal term TEKGEAR, and neither the design nor the colors would be articulated, separate and

apart from that term. *See Viterra*, 101 USPQ2d at 1908 (normally according greater weight to the word in composite word and design marks because purchasers would use the word to request or refer to the goods or services).

Moreover, contrary to Applicant's arguments (8 TTABVUE 7), the colors in Registrant's mark do not distinguish Registrant's mark from Applicant's proposed mark because the latter is not limited to any particular depiction. The rights associated with a standard character mark reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). We must consider Applicant's standard character proposed mark "regardless of font style, size, or color," *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011), including iterations displaying the proposed mark in the same font and colors as the term TEKGEAR appears in Registrant's composite mark. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018).

The terms TEKGEAR and TECHGEAR are highly similar because they are phonetic equivalents. *See Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985) ("the word portion of applicant's mark 'SEYCOS,' is virtually the phonetic equivalent of opposer's 'SEIKO' mark and is, in fact, the phonetic equivalent of the plural of opposer's mark"). In certain circumstances, similarity in sound alone may be sufficient to find the marks confusingly similar. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). In this case, however, the terms TEKGEAR and

TECHGEAR also are nearly identical in appearance, differing only by the substitution of the letter “K” in the cited mark for the letters “CH” in Applicant’s proposed mark. Such minor differences do not normally create dissimilar marks. *See, e.g., Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1305 (TTAB 2004) (ONCASE is similar to ONCONASE); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 495 (TTAB 1985) (CAYNA is similar to CANA).

Registrant’s mark and Applicant’s proposed mark also create the same commercial impression of “tech gear.” “Tech gear” is at least descriptive of the services identified in the application (see discussion above) and cited registration, and the term appropriately has been disclaimed in the cited registration. We therefore agree with Applicant that the wording “TEKGEAR” is conceptually weak.<sup>6</sup> But we do not agree with Applicant that Registrant’s mark is entitled to a limited scope of protection because of the disclaimer. 8 TTABVUE 7. We consider the marks in their entirety, including any disclaimed term, *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). We do so because we assess likelihood of confusion from the perspective of the purchasing public, who

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<sup>6</sup> Applicant also points to a third-party registration for a TECH GEAR-inclusive mark (first referenced in the March 17, 2020 Request for Reconsideration, TSDR 13-14) as additional support for its scope-limiting argument. 8 TTABVUE 6-7. We do not consider this registration because Applicant did not make it of record during prosecution, and the Examining Attorney did not mention it in the April 9, 2020 Denial of Request for Reconsideration or in her Brief. *See In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1314-15 (TTAB 2011) (examining attorney was not required to advise applicant that reference to a third-party registration as insufficient to make such registration of record when reference was first made in a request for reconsideration, which was denied); *see also* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (“The record in the application should be complete prior to the filing of an appeal.”). We add that consideration of this third-party registration would not have affected our analysis, as we have found the term “tech gear” conceptually weak without the benefit thereof.

generally is unaware of disclaimers in trademark applications and registrations. *Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004) and *Nat'l Data*, 224 USPQ at 751). However, as we just discussed, because consumers are more likely to focus on the literal element of a composite mark such as Registrant's mark, TEKGEAR has more source identifying capability than the other elements of Registrant's mark. In addition, as we found above, the literal portions of Registrant's mark and Applicant's proposed mark are identical in sound and nearly identical in appearance.

In view thereof, in this case, despite the inherent weakness of Registrant's mark and Applicant's proposed mark overall, we find the specific differences insufficient to distinguish them. *See, e.g., King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) ("Confusion is confusion. The likelihood thereof is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and a 'strong' mark."); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010) ("even suggestive or weak marks are entitled to protection from the use of a very similar mark for legally identical [goods or] services").

The *DuPont* factor of the similarity of the marks favors a finding of a likelihood of confusion.

#### B. Similarity or Dissimilarity of the Services (Class 35 Only)

Next, we compare the services as they are identified in the application and cited registration. *See Detroit Athletic Co.*, 128 USPQ2d at 1052; *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Stone Lion*, 110 USPQ2d at 1161;

*Octocom*, 16 USPQ2d at 1787; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Applicant argues that the retail store services identified in the application and registration are distinguishable because they focus on different types of technology products. However, the services do not have to be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009). The respective services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted). *See also In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). The issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

To recap, the application identifies retail store services featuring IoT enabled devices and accessories, and the cited registration identifies retail store services featuring virtual reality (“VR”) peripherals, portable and wearing computing peripherals, and drivers for LCD and OLED micro display. As such, the application and registration both identify retail store services featuring technology products.

The record demonstrates that retailers of technology products sell a wide variety of such products, including devices and accessories similar or identical to those identified in the application and registration. For example, printouts from the websites of Acer, Action Computers, Inc., Apple, CDW, Micro Center Computers and Electronics, NewEgg, Best Buy, HH Gregg, Belkin, Dell and Logitech show that each retailer offers IoT enabled devices as well as VR devices, portable and wearing computing peripherals, or drivers for LCD and OLED micro display. September 17, 2019 Final Office Action, TSDR 7-13; April 9, 2020 Denial of Request for Reconsideration, TSDR 12-21, 28-31. And the websites for Best Buy, HH Gregg and NewEgg include specific categories for purchasing VR computer devices and smart home devices. April 9, 2020 Denial of Request for Reconsideration, TSDR 12-21. This evidence is not from “big box” retail stores or online retailers who sell a wide variety of goods, but rather from specialty computer and electronics stores, and thus highly probative of the close relationship between the types of technology products featured in Applicant’s and Registrant’s identified retail stores. *See In re Ox Paperboard, LLC*, 2020 USPQ2d 10878 at \*6 (TTAB 2020).

In addition, some of the retailers offer IoT enabled devices and one or more of the products featured in the cited registration under their own house mark (e.g., Acer, Belkin, Dell, Logitech). This evidence demonstrates consumer exposure to the same source using the same mark for the same or similar types of products offered in Applicant’s and Registrant’s identified retail stores under the same mark. *See, e.g.,*

*In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

The Examining Attorney also submitted evidence demonstrating the wide array of IoT enabled devices available and the functions those devices perform. This evidence includes the above-discussed article from SoftwareTestingHelp.com, which lists the “18 Most Popular IoT Devices in 2020,” including Google Home, Amazon Echo, Amazon Dash Button, and Belkin WeMo Smart Light Switch, and an “Overview of the Most Popular Smart Home Devices” from IoTLineup.com, including smart home security devices (e.g., Bitdefender BOX IoT Security Solution, Nest Cam Indoor camera), smart home appliances (e.g., Mr. Coffee Smart Coffeemaker, Google Home, Amazon Echo), and smart portable speakers (e.g., Tribby). April 9, 2020 Denial of Request for Reconsideration, TSDR 4-11. She also submitted a July 30, 2019 article from CultOfMac.com titled “Apple is the No. 1 IoT company, despite not making any devices,” and a November 11, 2019 article from Bloomberg.com titled “Apple Plans Standalone AR and VR Gaming Headset by 2022 and Glasses Later,” discussing Apple’s plans to offer a number of VR devices. *Id.*, at 22-23. Collectively, this evidence further supports our finding that the identified services feature closely related technology products.

The second *DuPont* factor also favors a finding of likelihood of confusion.

### C. Conditions Under Which and Buyers to Whom Sales are Made

Finally, Applicant argues without evidence that the respective retail store services involve goods that “are highly specialized” and so “the relevant customers of the

respective marks are likely to be sophisticated purchasers who can easily differentiate the marks.” 8 TTABVUE 8. Counsel’s arguments are not evidence, and we will not rely on them. *See Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)). In any event, the record belies Applicant’s contentions and shows, instead, the near ubiquity of the goods featured in Applicant’s and Registrant’s identified retail stores. This factor is neutral.

D. Conclusion on Likelihood of Confusion (Class 35 Only)

In view of the similar marks and close relationship of the goods featured in Applicant’s and Registrant’s identified retail stores, confusion is likely between Applicant’s standard character proposed mark TECHGEAR and Registrant’s

composite mark  .

**Decision:** The refusal to register Applicant’s proposed mark TECHGEAR under Section 2(e)(1) is affirmed in each Class. The Section 2(d) refusal also is affirmed as to Class 35.