

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 3, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Nextiva, Inc.*

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Serial No. 88367632

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for Nextiva, Inc.

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Before Lykos, Greenbaum and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Nextiva, Inc. seeks registration of the mark NEXT LEVEL, in standard characters, for “entertainment services, namely, providing podcasts in the field of business, personal growth and professional growth,” in International Class 41.<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark is confusingly similar to the previously-registered mark NEXT LEVEL DAILY (DAILY disclaimed), in standard characters and the composite form of the mark shown below:

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<sup>1</sup> Application Serial No. 88367632, filed April 2, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce.



both for “electronic downloadable publications in the nature of articles and video tutorials in the fields of productivity, organization, and planning” in International Class 9; and “providing a website featuring blogs and non-downloadable publications in the nature of articles and video tutorials in the field of productivity, organization, and planning; On-line journals, namely, blogs featuring articles and video tutorials in the field of productivity, organization, and planning” in International Class 41.<sup>2</sup> After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed.<sup>3</sup>

### **I. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record 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) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d

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<sup>2</sup> Registration Nos. 5994125 and 5994133, respectively, both issued February 25, 2020. The registration for the design version of the mark includes this description: “The mark consists of triangles and solid lines positioned above the element ‘NEXT LEVEL DAILY’.”

<sup>3</sup> We grant the Examining Attorney’s request that we accept his Appeal Brief even though it was filed three days late. The “large snow event” resulting in a loss of power is “an adequate explanation for the late filing.” TBMP § 1203.02(b).

1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *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.”).

We focus here on Registrant’s standard character mark NEXT LEVEL DAILY for the identified Class 9 goods and Class 41 services. If we find confusion likely between Registrant’s standard character mark and Applicant’s involved mark, we need not consider the likelihood of confusion between Applicant’s mark and Registrant’s design mark. On the other hand, if we find no likelihood of confusion between Registrant’s standard character mark and Applicant’s mark, we would not find confusion likely between Applicant’s mark and Registrant’s design mark. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

#### **A. The Marks**

The marks are highly similar “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). Indeed, they are identical but for the descriptive or generic and disclaimed term DAILY at the end of Registrant’s mark. This difference is inconsequential.

In fact, the dominant portion of Registrant’s mark is NEXT LEVEL, and DAILY is entitled to significantly less weight in our analysis. The term NEXT LEVEL is

dominant because it is inherently distinctive for Registrant's goods and services, while the disclaimed term DAILY is merely descriptive of them, as it merely indicates that Registrant's blogs and publications are provided every day, or are intended to be used/read every day. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ).

The term NEXT LEVEL is also dominant in Registrant's mark because it comes first. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) ("the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"); *see also, Palm Bay Imps. Inc.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The dominant portion of Registrant's mark is identical to Applicant's mark NEXT LEVEL, and therefore the marks look and sound highly similar. While we have not ignored the term DAILY in Registrant's mark, it will be perceived not as a source identifier but instead as a mere descriptor of products and services provided or used

every day.

In fact, because DAILY is not distinctive, the marks also convey highly similar meanings and create virtually identical commercial impressions. Specifically, the marks' shared term NEXT LEVEL is "informal" for "surpassing others: uncommonly good or impressive."<sup>4</sup> Thus, the term conveys that Applicant's services and Registrant's goods and services are of high quality, a meaning that is constant whether the goods and services are provided or used daily, weekly, annually or at some other interval. Specifying how often goods or services are used or provided generally does little to change a mark's meaning or commercial impression.

We are not persuaded by Applicant's argument that Applicant's mark "connotes a gentle, supportive interest in professional growth and performing at a higher level," while Registrant's "commands an imperative: achieve a new level every single day (daily), without pausing to rest, slow down, or potentially enjoy the progress along the way." 9 TTABVUE 8. Applicant does not suggest, and the record does not reveal, any reason why the identical term NEXT LEVEL would have one meaning for podcasts and another for blogs, publications and video tutorials, much less when those podcasts, blogs, publications and tutorials address overlapping topics ("business" and "growth" in Applicant's case and "productivity" in Registrant's). In any event, it does not appear that the connotations Applicant suggests are

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<sup>4</sup> merriam-webster.com/dictionary/next-level. 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); *Threshold TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

meaningfully different.

We are also not persuaded by Applicant's argument that Registrant's mark is weak, as the argument is based on a mere list of 61 third-party registrations for marks containing NEXT LEVEL in Class 41, printed from a USPTO database. July 29, 2021 Request for Reconsideration TSDR 12-14. Contrary to Applicant's argument, 9 TTABVUE 10-13, generally, "third-party registrations, with no evidence of the extent of the use of the marks in commerce, do not diminish the commercial strength of Registrant's mark," though they "may bear on conceptual weakness if a term is commonly registered for similar goods or services." *In re Embiid*, 2021 USPQ2d 577 at \*34 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017)). Here, we cannot determine what services are offered under the listed marks, and therefore these registrations cannot show that the cited NEXT LEVEL DAILY mark is conceptually weak. *Tao Licensing*, 125 USPQ2d at 1057 (TTAB 2017). In any event, the vast majority of the listed marks are less similar to the cited marks than Applicant's mark.

This factor weighs heavily in support of finding a likelihood of confusion.

**B. The Goods and Services, and Their Channels of Trade and Classes of Consumers**

The goods and services need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods and services are marketed in a manner that "could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83

USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, the evidence of record establishes that there is an inherent relationship, on the face of the identifications of goods and services, between Applicant’s “entertainment services, namely, providing podcasts in the field of business, personal growth and professional growth,” and Registrant’s “electronic downloadable publications” and “blogs and non-downloadable publications” in the nature of “articles and video tutorials in the fields of productivity, organization, and planning.” Specifically, the Examining Attorney introduced the following dictionary definitions of “podcast” and “blog”:

**PODCAST**—“a multimedia file, such as a radio program or video, that can be downloaded or streamed from the internet onto a computer or mobile device”<sup>5</sup>

**BLOG**—“a web log: a website containing short articles called posts that are changed regularly”<sup>6</sup>

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<sup>5</sup> <https://www.macmillandictionary.com/dictionary/american/podcast>

<sup>6</sup> <https://www.macmillandictionary.com/dictionary/american/blog>

July 8, 2020 Office Action TSDR 10, 13. These definitions reveal that podcasts and blogs are both offered via the Internet and that podcasts may include videos. Applicant's identification of goods and services reveals that it offers videos ("video tutorials") via the Internet. Thus, Applicant's and Registrant's identifications are both broad enough to encompass videos offered via the Internet, and in any event Applicant and Registrant both provide information via the Internet, whether in the form of articles, videos or other types of files. *See S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration are broadly described, they are deemed to encompass all goods of the nature and type identified); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

Perhaps more importantly, the topics of Registrant's publications and videos ("productivity, organization, and planning") are identified broadly enough to encompass the topics of Applicant's planned podcasts ("business, personal growth and professional growth"), and vice versa. Indeed, businesses, and individuals interested in professional and personal growth, are likely to focus on productivity, organization and planning, as ingredients of success. At the same time, consumers of information about productivity, organization and planning are likely to include businesses and those interested in personal and professional growth, because productivity, organization and planning are a means to increased profits and other types of



“growth.” In short, there is an inherent relationship between Applicant’s and Registrant’s goods and services because those goods and services consist of information on similar and related topics provided via the Internet.

Moreover, the Examining Attorney introduced a “buzzsprout.com” article entitled “15 Best Podcasting Blogs [2021 Update]” which indicates that “Daniel J. Lewis is the host of the highly successful tech podcast The Audacity to Podcast and the curator of a blog by the same name.” August 20, 2021 Denial of Request for Reconsideration TSDR 8. In other words, Mr. Lewis uses the same mark, THE AUDACITY TO PODCAST, for both a podcast and a blog. Similarly, “Pat Flynn’s Smart Passive Income blog is a must read,” and “SPI also has a twice-weekly podcast.” *Id.* at 12. This evidence shows that there is a relationship between Applicant’s services and Registrant’s goods and services. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”).

The same article reveals that the SCHOOL OF PODCASTING podcast is offered on a site that includes “extensive written content, live trainings, tutorials, and guides for more tailored help with your podcast.” August 20, 2021 Denial of Request for Reconsideration TSDR 9. Thus, the SCHOOL OF PODCASTING mark is used for podcasts, such as those Applicant intends to offer under NEXT LEVEL, and “written content” and “tutorials” such as the articles and video tutorials Registrant offers

under NEXT LEVEL DAILY. Moreover, the SCHOOL OF PODCASTING website includes “tailored help with your podcast,” which relates to the fields of “business” and “professional growth,” as does Applicant’s planned podcast, and the fields of “productivity, organization and planning” as do Registrant’s publications and video tutorials.

According to the article, a company that “helps podcasters with the post-production elements of their show,” called WE EDIT PODCASTS, also has a podcast-focused blog. Thus, consumers, specifically podcasters, may encounter the mark WE EDIT PODCASTS in connection with podcast post-production services, and a podcast-focused blog. *Id.* at 10-11.

The “buzzsprout.com” article goes on to mention that CASTOS “is a podcast hosting company with a great blog curated by a team with over a decade of podcasting experience.” *Id.* at 11. Castos offers “content centered around productivity and improving your workflow, software tutorials, and tons of resources for beginner and experienced podcasters.” *Id.* In other words, the company’s podcast-focused blog and other content focuses on: (1) “productivity” and “workflow,” which fall within the topics of Applicant’s intended podcasts (“business” and “professional growth”) and Registrant’s blogs and publications (“productivity”); and (2) “tutorials,” which encompass the “video tutorials” Registrant offers.

More generally, the “hubspot.com” article “Blog vs. Podcast: Which is the Best Choice for Your Business?” reveals that blogs, such as Registrant offers, and podcasts, such as Applicant intends to offer, perform the same functions. Specifically, “[b]oth

blogs and podcasts nurture customer relationships, validate expertise, deepen brand loyalty, capture search, and generate leads.” *Id.* at 20. Thus, blogs and podcasts operate “in the field of business,” like Applicant intends its podcast to do, and “in the fields of productivity, organization ...” the same fields covered by Registrant’s blogs and publications. *Id.* at 26.

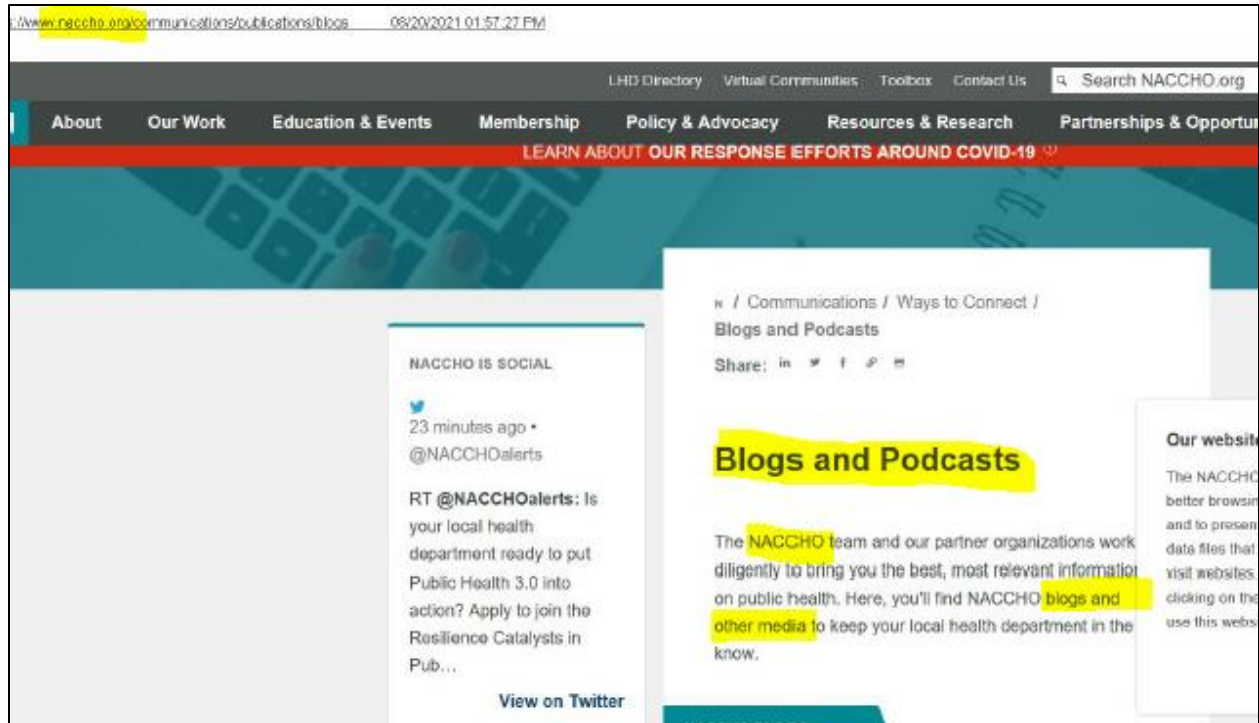
Furthermore, the “Blog vs. Podcast” article reveals that there is overlap between how blogs and podcasts provide information. Specifically, the article states that “voice content is fast shifting from nice-to-have to must-have,” but if producing a podcast isn’t “in your wheelhouse or the budget ... Voozer is an audio marketing solution that extends a blog’s reach with narration by real people and audio players embedded in the blog.” *Id.* at 27. In other words, blogs can provide the same type of content, in the same format (audio) as podcasts. This is corroborated by the ENTREPRENEUR article “Why You Should Use Blogs and Podcasts to Market Your Business.” It states that “[p]eople are adding podcasts to blogs and websites daily.” *Id.* at 33. Thus, the distinction between blogs and podcasts seems to be blurring.

Finally, a number of entities, including MERCURY, DUXBURY FREE LIBRARY, AMERICAN PHILOSOPHICAL ASSOCIATION and NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS (“NACCHO”), provide their blogs and podcasts on the same webpages, which bear the entity’s trademark/service mark, as depicted below:

The screenshot shows the American Philosophical Association website. At the top left is the logo, a stylized 'P' with a red crescent. To its right, the text 'American Philosophical Association' is highlighted in yellow. Below the logo is a dark red navigation bar with white text for 'About', 'Membership', 'Meetings', 'Divisions', 'Publications', 'Resources', and 'Career'. The main content area has a white background with a red 'Links' header. Below it, a 'Filter By Category:' dropdown menu is set to 'Blogs and Podcasts', which is highlighted in yellow. A paragraph of text asks users to report broken links and to suggest new ones. Below this, another yellow highlight covers the text 'Blogs and Podcasts'. A list of three items follows: 'A Philosopher's Take', 'American Pre-College Philosophy', and 'Apply-Degger: A Podcast with Simon Critchley'. Each item has a short description.

The screenshot shows the Mercury website. At the top left is the 'mercury' logo. To its right are navigation links for 'CAPABILITIES', 'PRODUCTS', 'COMPANY', and 'CAREERS'. Below the navigation is a blue and purple abstract graphic with the text 'Blogs and Podcasts' highlighted in yellow. Underneath is a breadcrumb trail: 'HOME / COMPANY / BLOGS AND PODCASTS'. On the left is a large banner for '40 YEARS SHAPING WHAT'S NEXT EST. 1981' with the text 'Mercury is proud to celebrate 40 years of innovation.' Below the banner is the text 'Shaping what's next: 40 years of'. On the right, there are sections for 'FILTER POSTS' (with links for 'SEE ALL', 'BLOG POSTS', and 'PODCASTS AND VODCASTS'), 'BLOGS SEARCH' (with a search box), and 'RECENT BLOGS' (with a short paragraph).

The screenshot shows the Duxbury Free Library website. At the top left is the library's logo, featuring a building illustration and the text 'DUXBURY FREE LIBRARY'. To the right is a search bar with the text 'Search this:' and two tabs: 'Catalog' and 'Site'. Below the search bar is a dark red navigation bar with white text for 'BORROW', 'ATTEND', 'LEARN', 'GET TO KNOW US', and 'HOW DO IT?'. The main content area has a light green background with a breadcrumb trail: 'Home >> Departments >> Library >> Learn'. Below this is the text 'Blogs & Podcasts' highlighted in yellow. Underneath, there is a 'Blogs:' section with two items: 'The View From Circulation: What's Trending, Unique, & Informational' and 'Library Girl's Knitting Notes'.



*Id.* at 37, 51, 53, 57 (emphasis added).

In short, the identifications of goods and services, and the evidence that third parties use the same marks for blogs, publications and video tutorials on the one hand and podcasts on the other establish that the goods and services are related. This factor also weighs in favor of finding a likelihood of confusion.

The third-party evidence also establishes that the channels of trade and classes of consumers for blogs and podcasts overlap. Indeed, the record makes clear that one of the primary purposes of both blogs and podcasts is “marketing,” “nurturing customer relationships” and otherwise engaging with consumers. Thus, blogs and podcasts often include similar content, and are often offered on the same webpages. Consumers access and are exposed to the same types of information on blogs as they are on podcasts, and consumers often read blogs and listen to podcasts that come from the

same source. These factors also weigh in favor of finding a likelihood of confusion.

### **C. Consumer Sophistication and Care**

Finally, Applicant's unexplained and unsupported argument that "the relevant purchasers are discriminating and sophisticated purchasers," 9 TTABVUE 14, is not persuasive. Attorney argument is no substitute for evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel). Moreover, the record reveals that blogs and podcasts are often offered for free on publicly accessible websites. Specialized skills and knowledge are not needed to listen to podcasts or read blogs. This factor is neutral.

## **II. Conclusion**

The marks are quite similar, the goods and services are related, and their channels of trade and classes of consumers overlap. Confusion is likely.

**Decision:** The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.