

This Opinion is Not a
Precedent of the TTAB

Mailed: April 15, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Just a Pinch Recipe Club, LLC
—

Serial No. 88463841
—

Amy J. Everhart of Everhart Law Firm PLC, for Just a Pinch Recipe Club, LLC.

Sally Shih, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

—
Before Cataldo, Larkin, and Lebow,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Just a Pinch Recipe Club, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark PINCH IT! RECIPE BOX (RECIPE disclaimed) for “Downloadable computer application software for mobile phones, namely, software for enabling users to discover, access, share, bookmark, annotate, index, and store information about, and media content concerning, goods, services, experiences, recipes, cooking, and food, and to interact online with information and media content that other users share concerning goods, services, experiences, recipes, cooking, and food; Downloadable computer software for enabling users to discover,

access, share, bookmark, annotate, index, and store information about, and media content concerning, goods, services, experiences, recipes, cooking, and food, and to interact online with information and media content that other users share concerning goods, services, experiences, recipes, cooking, and food; Downloadable computer application software for mobile phones and portable handheld devices, namely, software for enabling users to discover, access, share, bookmark, annotate, index, and store information about, and media content concerning, goods, services, experiences, recipes, cooking, and food, and to interact online with information and media content that other users share concerning goods, services, experiences, recipes, cooking, and food,” in International Class 9.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard character mark THE RECIPE BOX (RECIPE disclaimed) registered on the Principal Register for “Computer application software for mobile phones, tablet computers, and portable and handheld digital electronic devices, wireless communication devices, namely, software for creating, obtaining, editing, displaying and managing recipes, food and beverage information,” in International Class 9,² as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

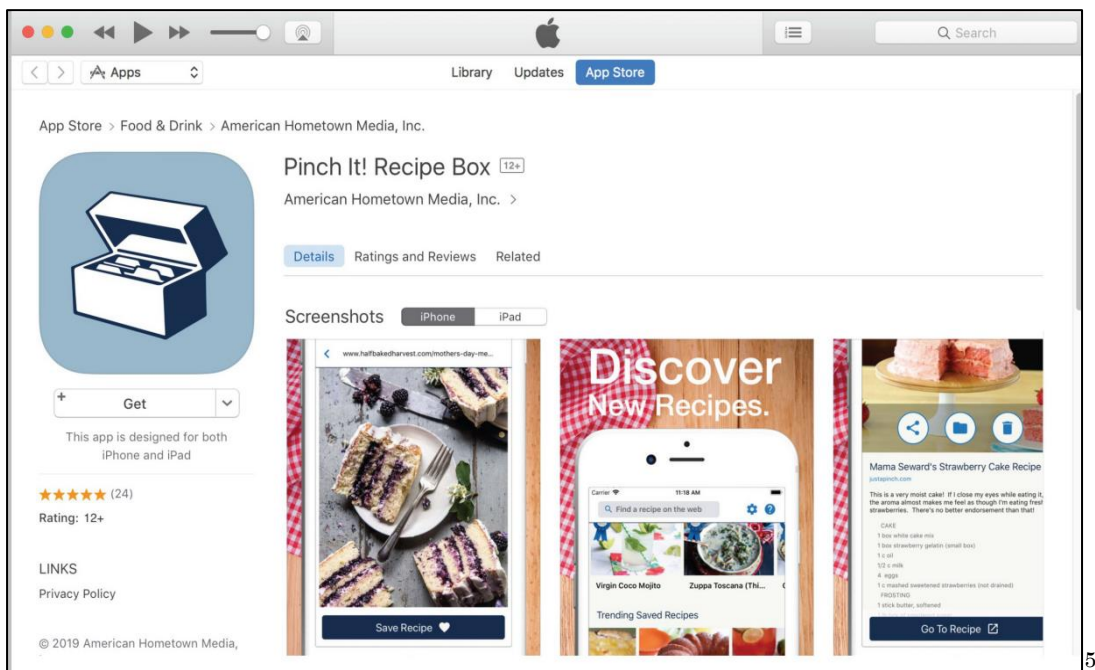
¹ Application Serial No. 88463841 was filed on June 7, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant claim of first use of the mark at least as early as August 7, 2012 and first use of the mark in commerce at least as early as June 6, 2019.

² The cited Registration No. 5080405 issued on November 15, 2016.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. The appeal is fully briefed.³ We reverse the refusal to register.

I. Record on Appeal⁴

The record on appeal includes Applicant's specimen of use from the website of Apple's App Store, a portion of which we depict below:



and the following materials:

³ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. Applicant's appeal brief appears at 6 TTABVUE and its reply brief appears at 9 TTABVUE. The Examining Attorney's brief appears at 8 TTABVUE.

⁴ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the USPTO's Trademark Status & Document Retrieval ("TSDR") database.

⁵ June 7, 2019 Specimen of Use at TSDR 1.

- USPTO electronic records of the cited registration, made of record by the Examining Attorney;⁶
- The declaration of Applicant’s counsel Amy J. Everhart (“Everhart Decl.”), and Exhibits A-C thereto, consisting of screenshots of Internet websites and social media pages on which the words “recipe box” are used in connection with physical or digital products or services, or are otherwise displayed, made of record by Applicant;⁷
- Internet webpages displaying Applicant’s product offered under the PINCH IT! RECIPE BOX mark, made of record by the Examining Attorney;⁸ and
- USPTO electronic records of a third-party Application Serial No. 88765146 to register RECIPE BOX in standard characters for “Business development services; Incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits,” made of record by the Examining Attorney.⁹

II. Analysis of Refusal

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C.

⁶ September 3, 2019 Office Action at TSDR 2-4.

⁷ March 3, 2020 Response to Office Action at TSDR 14-247. We will cite the Everhart Declaration by paragraph number and the exhibits thereto by exhibit letter and TSDR pages in the Response (e.g., “Everhart Decl. ¶ 2; Ex. A (TSDR 19-21)”).

⁸ March 21, 2020 Final Office Action at TSDR 2-8.

⁹ October 9, 2020 Denial of Request for Reconsideration at TSDR 2-3.

§ 1052(d). Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). 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).

Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Both Applicant and the Examining Attorney discuss the first factor, 6 TTABVUE 2-8; 8 TTABVUE 4-6; 9 TTABVUE 2-6, but only the Examining Attorney discusses the second. 8 TTABVUE 6. Applicant also invokes the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods,” *DuPont*, 177 USPQ at 567. 6 TTABVUE 8-16; 9 TTABVUE 6-7.

A. Similarity or Dissimilarity of the Goods

The second *DuPont* factor “considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir 2018) (quoting *DuPont*, 177 USPQ at 567). The goods need not be identical, but “need only be related in some manner and/or if the circumstances surrounding their marketing are such that they

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)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

In re Ox Paperboard, LLC, 2020 USPQ2d 10878, *5 (TTAB 2020) (citing *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014)).

Applicant and the Examining Attorney provide virtually no input on this key *DuPont* factor. As noted above, Applicant does not address the factor in its briefs,¹⁰ thus “[a]pparently conceding the issue,” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016), and the Examining Attorney’s entire argument on it is as follows:

The compared goods and/or services need not be identical or even competitive to find a likelihood of confusion. . . . They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” . . . Accordingly, the goods offered by the applicant and the registrant are related and likely to be encountered in the same trade channels.

¹⁰ Applicant states offhandedly in its discussion of the sixth *DuPont* factor that “both Registrant and Applicant offer services involving computers and/or the Internet (specifically software applications),” 6 TTABVUE 15, but neither the application nor the cited registration covers services.

8 TTABVUE 6 (citations and quotations omitted). The Examining Attorney also did not make of record any evidence of relatedness of the sort described in *Ox Paperboard*.¹¹ Accordingly, we “begin [and end] with the identifications of goods . . . in the registration and application under consideration.” *Country Oven*, 2019 USPQ2d 443903 at *5.

The goods identified in the cited registration are “Computer application software for mobile phones, tablet computers, and portable and handheld digital electronic devices, wireless communication devices, namely, software for creating, obtaining, editing, displaying and managing recipes, food and beverage information.” The goods identified in the application include “Downloadable computer application software for mobile phones, namely, software for enabling users to discover, access, share, bookmark, annotate, index, and store information about, and media content concerning, goods, services, experiences, recipes, cooking, and food, and to interact online with information and media content that other users share concerning goods, services, experiences, recipes, cooking, and food.”¹²

¹¹ The Examining Attorney bears the initial burden of showing that the goods are related. See *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *10 (TTAB 2019) (finding that third-party registrations covering the involved goods and services were sufficient “to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.”) (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)).

¹² “The Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. ‘[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.’” *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, *3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); see also *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

The goods broadly identified in the cited registration as “computer application software for mobile phones . . . for creating, obtaining, editing, displaying and managing recipes . . .” either encompass the goods more narrowly identified in the application as “downloadable computer application software for mobile phones . . . for enabling users to discover, access, share, bookmark, annotate, index, and store information about . . . recipes,” or are intrinsically very similar to them, because both sets of goods involve mobile phone application software for managing recipes. We find that the second *DuPont* factor supports a finding of a likelihood of confusion.

B. The Number and Nature of Similar Marks in Use on Similar Goods

The sixth *DuPont* factor “considers ‘[t]he number and nature of similar marks in use on similar goods.’” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). This factor potentially impacts our analysis of the similarity or dissimilarity of the marks under the first *DuPont* factor because the “purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Id.* (quoting *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). “The Federal Circuit has held that evidence of the extensive registration and use of a term by others can be powerful evidence of the term’s weakness.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v.*

Millennium Sports, S.L.U., 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 12015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Applicant argues that the “traditional ‘recipe box’ is a physical box in which people store and organize their recipes,”¹³ that “[w]ith the advent of the digital age has come the digital version of the recipe box,” and that “the use of the marks ‘THE RECIPE BOX’ and ‘RECIPE BOX’ in connection with the online recipe databases and software applications for the storage and organization of recipes is very commonplace, and thus such marks are very weak in connection with such goods and services.” 6 TTABVUE 8. Applicant claims that “[a]n Internet search reflects a large number of third-party uses of the terms ‘RECIPE BOX’ and ‘THE RECIPE BOX’ or marks containing those terms in connection with software applications, web applications, and websites enabling users to find, organize and store recipes (essentially, digital or online recipe collections or ‘recipe boxes’).” *Id.* at 10-11.

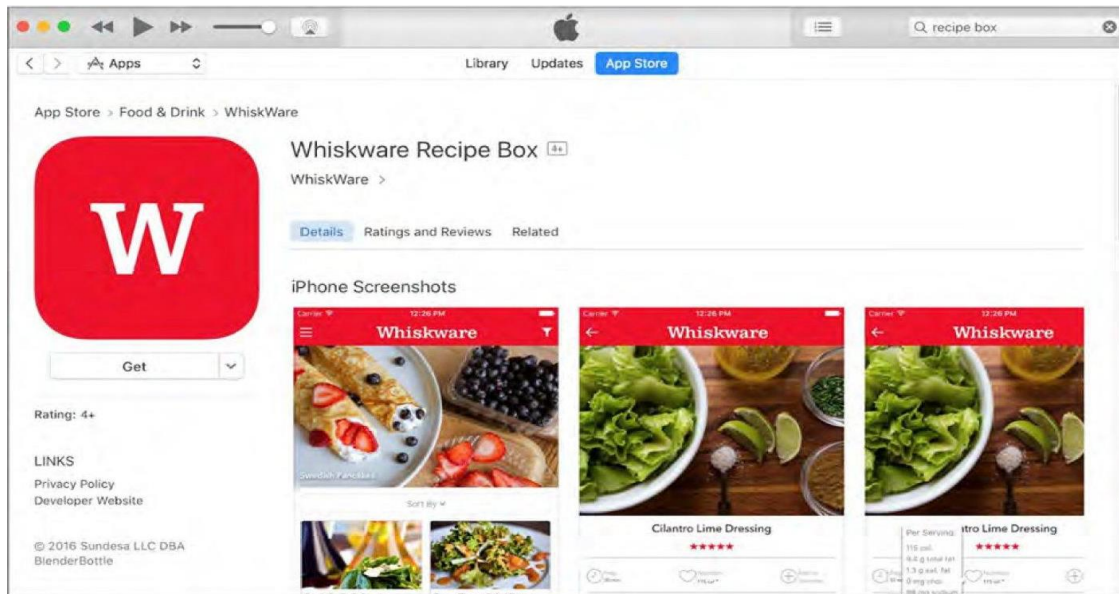
The Examining Attorney does not address the third-party use evidence in her brief beyond stating, in her discussion of the first *DuPont* factor, that Applicant’s “search reflects ‘third-party use’, not registration of the wording RECIPE BOX.” 8 TTABVUE 6.¹⁴ She effectively concedes that the term “recipe box” is weak in the context of mobile

¹³ Applicant made of record webpages showing and describing physical recipe boxes. Everhart Decl. ¶ 2; Ex. A (TSDR 19-46). Like a dictionary definition, this evidence explains the meaning of the term “recipe box” in the brick-and-mortar world and provides context for understanding its meaning when it is used in the digital world.

¹⁴ The Examining Attorney made of record during prosecution USPTO electronic records of what she called “the only registered mark containing the said wording.” October 9, 2020 Denial of Request for Reconsideration at TSDR 1-3. She also argues that the “owner of a registration without specified limitations enjoys a presumption of exclusive right to

phone application software by arguing that “the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed ‘weak’ or merely descriptive are still entitled to protection under Section 2(d) against the registration by a subsequent user of a similar mark for closely related goods.” *Id.* at 5 (citations omitted).

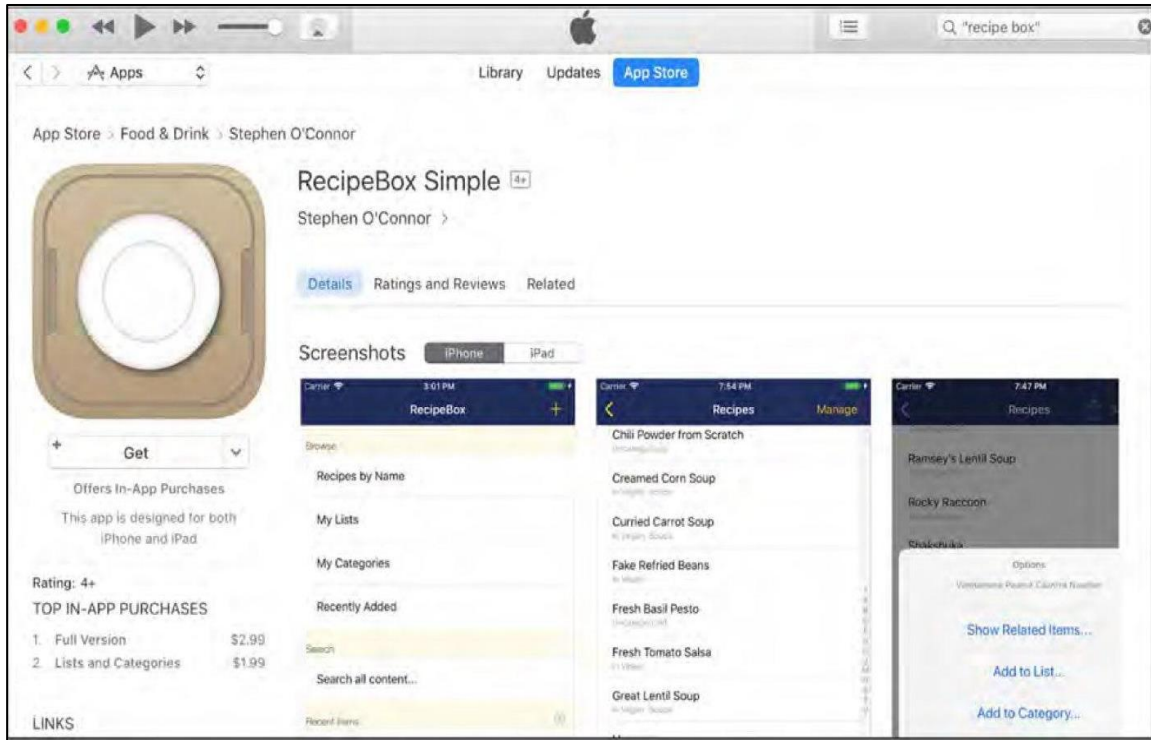
The third-party uses of the phrase RECIPE BOX in the record take various forms. One form is use in connection with mobile software applications which, like Applicant’s, are available through the Apple App Store. These mobile applications are offered under the marks Whiskware Recipe Box, RecipeBox Simple, Indian Recipe Box, and Recipe Box alone. We depict them below:



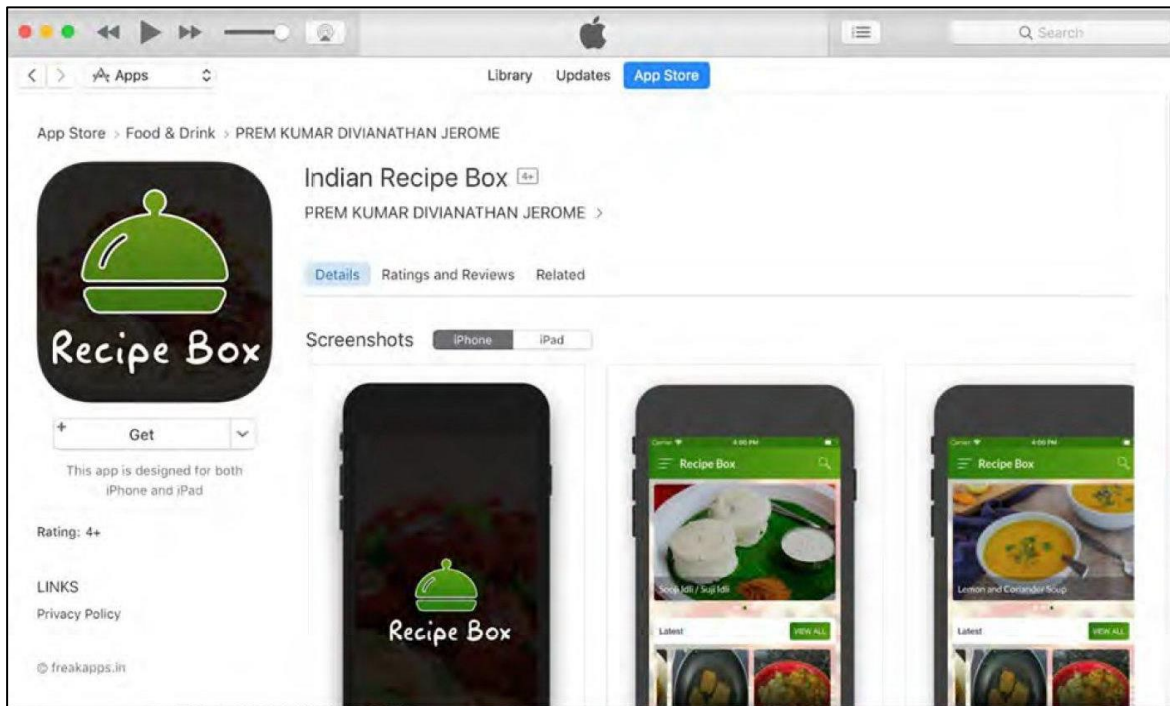
15

nationwide use of the registered mark under Trademark Act Section 7(b),” and that “[t]herefore, the geographical extent of applicant’s and registrant’s activities is not relevant to a likelihood of confusion determination.” 8 TTABVUE 6. We are mystified by this argument because Applicant never discussed the “geographical extent” of its activities or those of the registrant.

¹⁵ Everhart Decl. ¶ 4; Ex. C (TSDR 244).



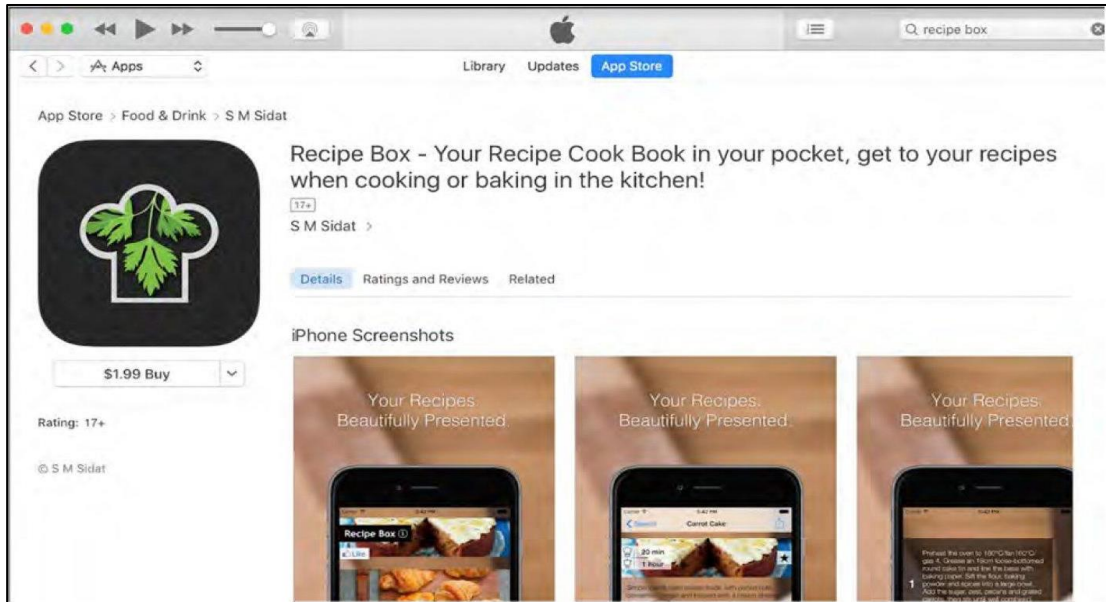
16



17

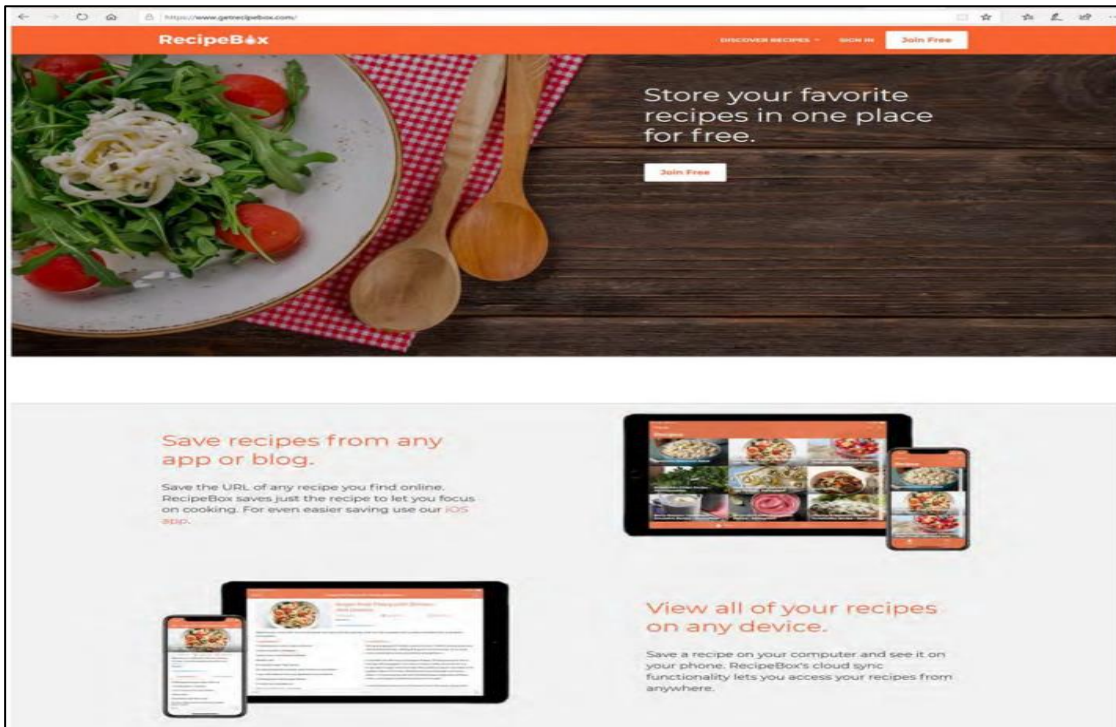
¹⁶ Everhart Decl. ¶ 4; Ex. C (TSDR 245).

¹⁷ Everhart Decl. ¶ 4; Ex. C (TSDR 246).



18

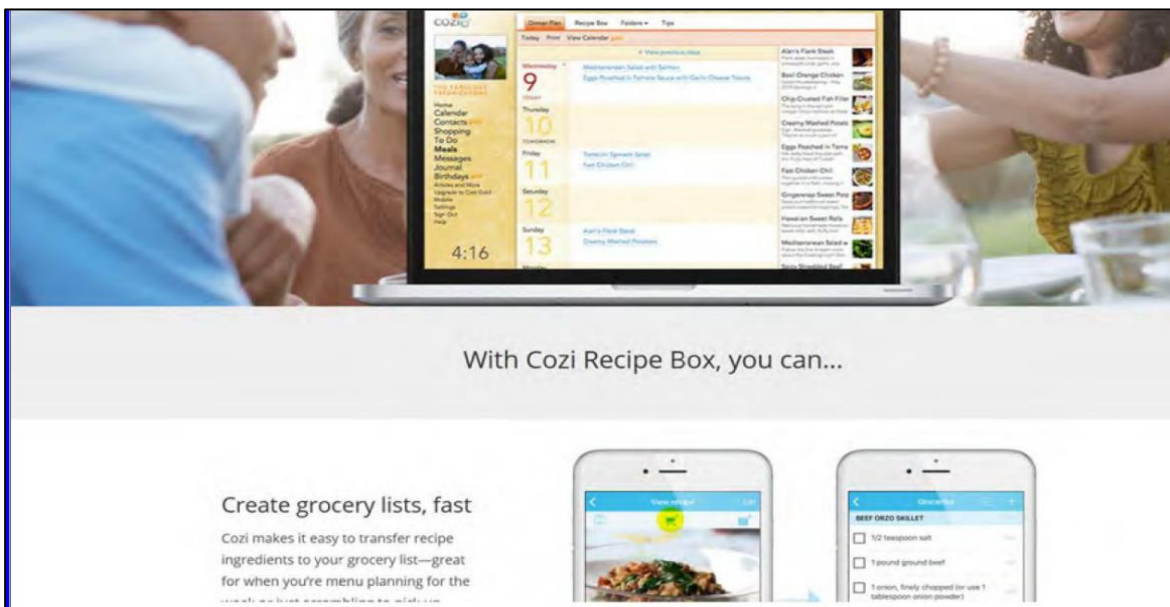
The record also contains third-party uses of RECIPE BOX in connection with other software applications, including online applications, which we depict below:



19

¹⁸ Everhart Decl. ¶ 4; Ex. C (TSDR 247).

¹⁹ Everhart Decl. ¶ 4; Ex. C (TSDR 80).



²⁰ Everhart Decl. ¶ 4; Ex. C (TSDR 92).

Ready to shop?

[Specs & Pricing: HP Touchsmart PCs >](#)

[Find a retailer >](#)

[Visit the HP Consumer Support Forums >](#)

Recipe Box



Say good-bye to old cookbooks and recipe cards. With the Recipe Box app on the HP TouchSmart PC you can easily organize all your favorite dishes.

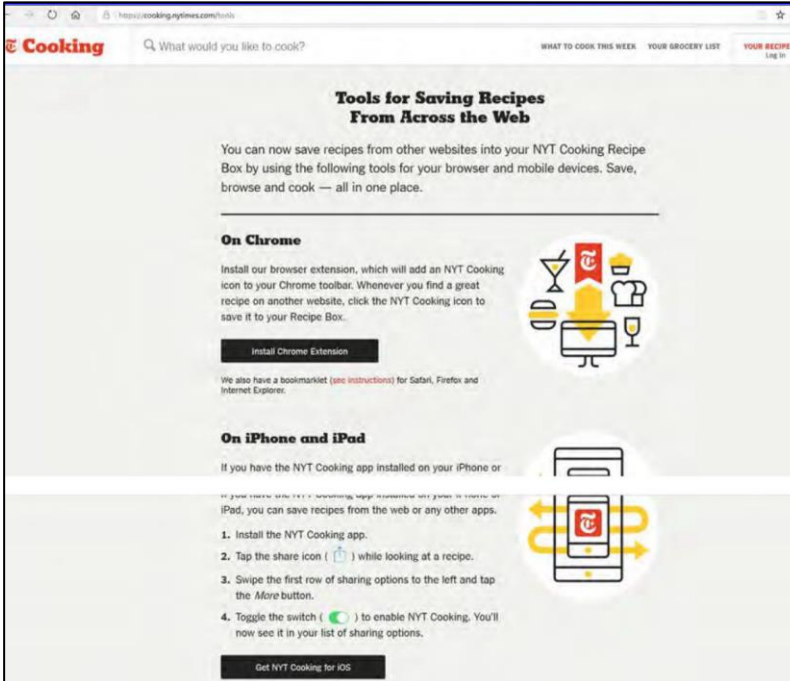
- Browse new recipes online¹ and save them with just one touch.
- Organize your recipes by category (appetizers, beverages, desserts and entrees) or create your own categories.
- Add your own recipes.
- Edit recipe ingredients and directions to satisfy your taste and family size.

Hands-free help



Let HP TouchSmart help by reading the recipe to you.

21



Tools for Saving Recipes From Across the Web

You can now save recipes from other websites into your NYT Cooking Recipe Box by using the following tools for your browser and mobile devices. Save, browse and cook — all in one place.

On Chrome



Install our browser extension, which will add an NYT Cooking icon to your Chrome toolbar. Whenever you find a great recipe on another website, click the NYT Cooking icon to save it to your Recipe Box.

[Install Chrome Extension](#)

We also have a bookmarklet ([see instructions](#)) for Safari, Firefox and Internet Explorer.

On iPhone and iPad

If you have the NYT Cooking app installed on your iPhone or iPad, you can save recipes from the web or any other apps.

1. Install the NYT Cooking app.
2. Tap the share icon () while looking at a recipe.
3. Swipe the first row of sharing options to the left and tap the **More** button.
4. Toggle the switch () to enable NYT Cooking. You'll now see it in your list of sharing options.

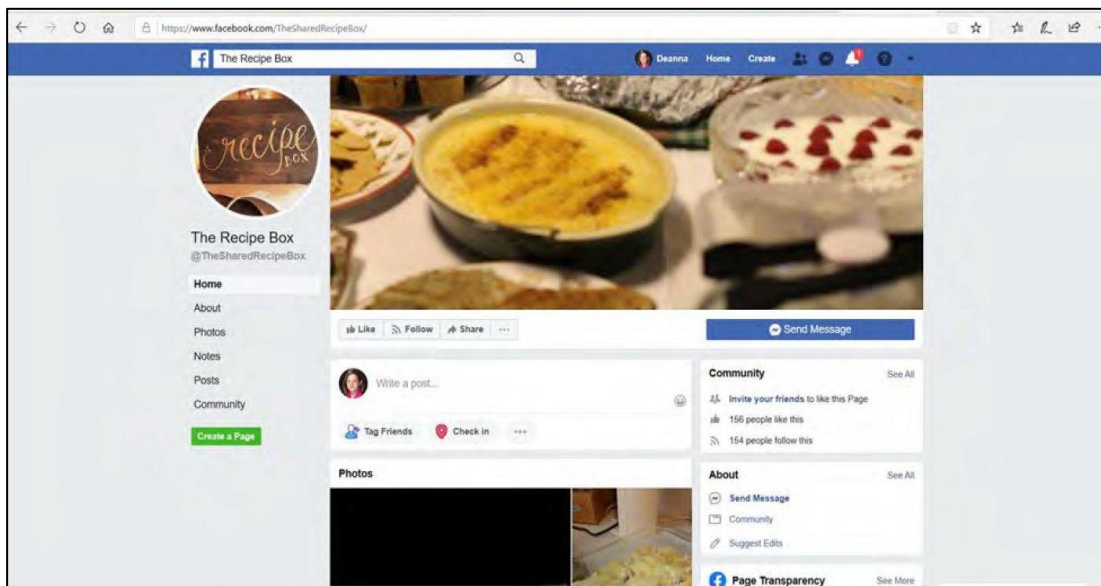
[Get NYT Cooking for iOS](#)

22

²¹ Everhart Decl. ¶ 4; Ex. C (TSDR 96).

²² Everhart Decl. ¶ 4; Ex. C (TSDR 103).

The record also reflects more than a dozen uses of THE RECIPE BOX, and additional uses of phrases containing RECIPE BOX, in connection with Facebook pages on which recipes are collected and shared.²³ We depict portions of a few below:



24

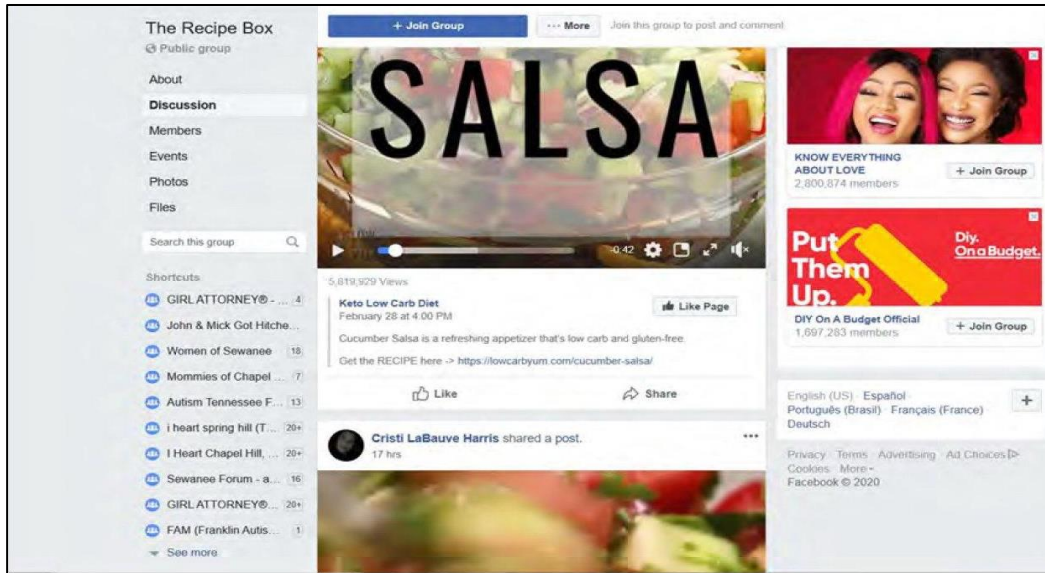


25

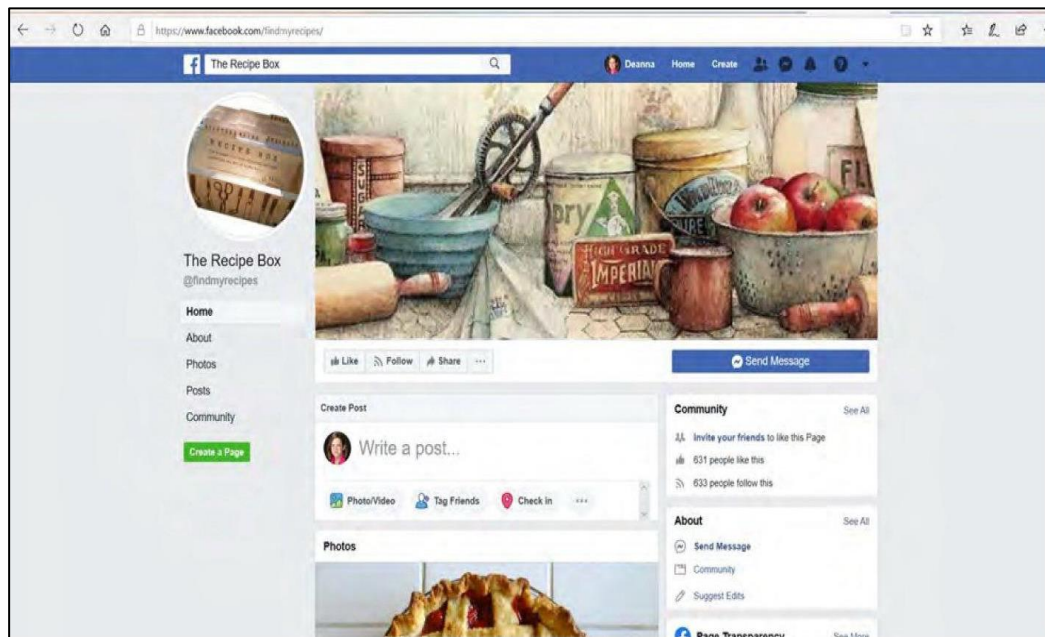
²³ Everhart Decl. ¶ 4; Ex. C (TSDR 106-33, 142-45, 151-74, 188-94, 212-14, 226-35).

²⁴ Everhart Decl. ¶ 4; Ex. C (TSDR 106).

²⁵ Everhart Decl. ¶ 4; Ex. C (TSDR 108).



26



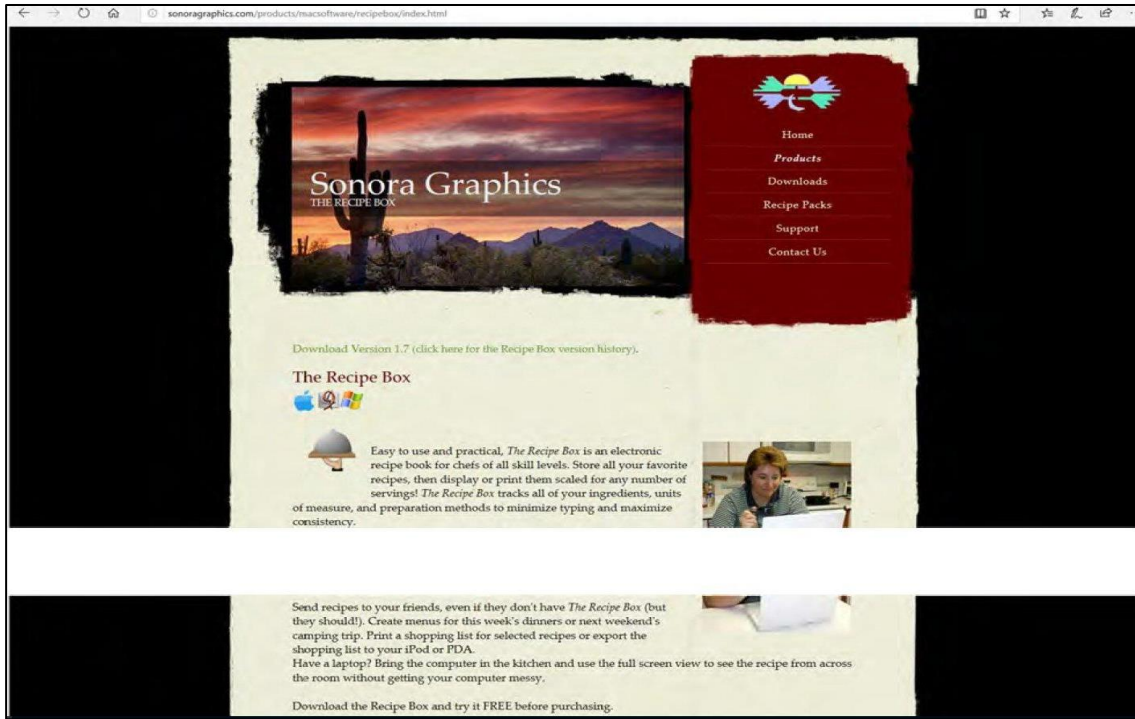
27

The record also contains various online databases, recipe collections and books, and a YouTube channel, displaying the words THE RECIPE BOX or RECIPE BOX.

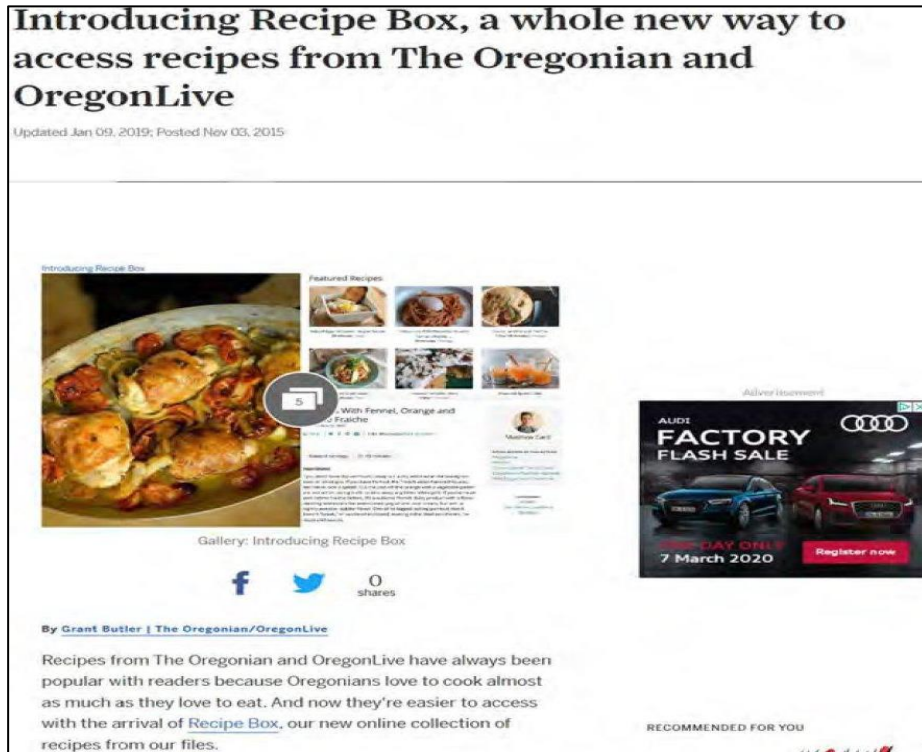
We depict portions of several below:

²⁶ Everhart Decl. ¶ 4; Ex. C (TSDR 113).

²⁷ Everhart Decl. ¶ 4; Ex. C (TSDR 119).



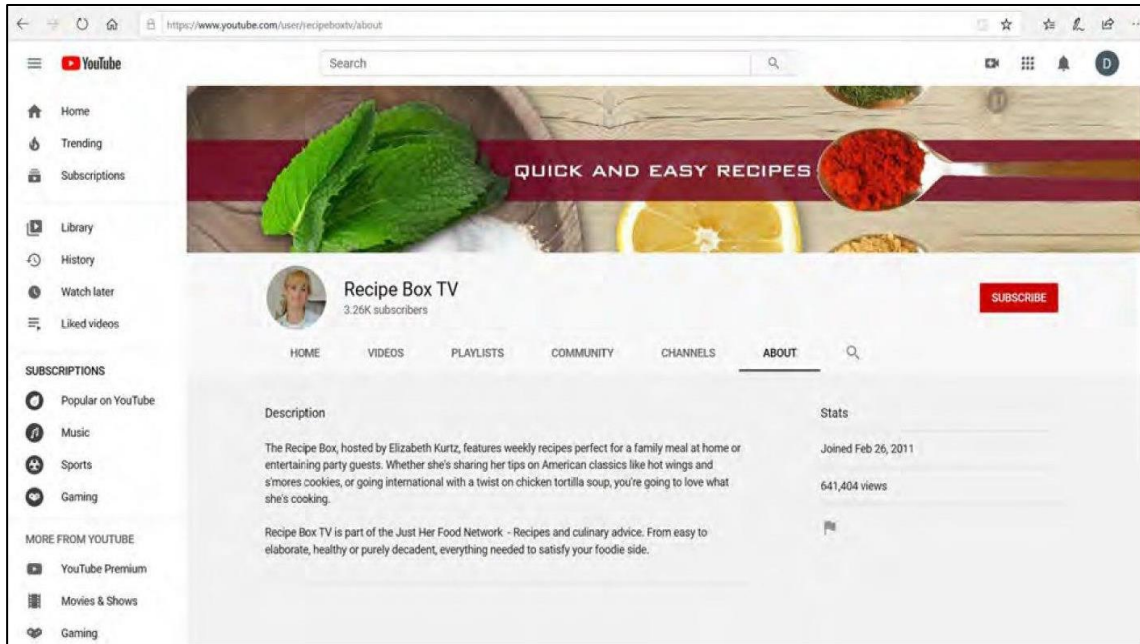
28



29

28 Everhart Decl. ¶ 4; Ex. C (TSDR 97-102).

29 Everhart Decl. ¶ 4; Ex. C (TSDR 181-82).



30

Finally, the record contains an article on the website of Brit & Co entitled “The Five Best Digital Recipe Boxes,” which discusses the author’s search for “a good place on the web to both discover new recipes, and to save some of my own.”³¹

The record as a whole shows that the phrase RECIPE BOX has some degree of weakness when it is used in connection with the subject goods. As noted above, the word RECIPE has been disclaimed in both Applicant’s mark and the cited mark because the fields of use of the subject mobile phone application software involve recipes. The meaning of the phrase RECIPE BOX in both the brick-and-mortar world and the digital world as a physical or virtual place to collect, organize, and work with recipes makes it a very short step from acknowledging the weakness of the disclaimed word RECIPE to concluding that the term RECIPE BOX “has some degree of

³⁰ Everhart Decl. ¶ 4; Ex. C (TSDR 191).

³¹ Everhart Decl. ¶ 3; Ex. B (TSDR 47).

conceptual weakness in connection with [mobile application software] and is at best highly suggestive when used in connection with such goods.” *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1673 (TTAB 2018) (reversing refusal to register I’M SMOKING HOT for cosmetics over a registration of SMOKIN’ HOT SHOW TIME for identical goods in light of the demonstrated weakness of the common term “smokin(g) hot”).

The third-party uses shown and discussed above also “tend to show consumer exposure to third-party use of the term [RECIPE BOX] on similar goods” to those identified in the application and cited registration. *Id.* at 1675. The record here is roughly comparable in nature to that in *FabFitFun*, where the applicant “made of record a total of ten third-party uses of SMOKIN’ HOT formatives as marks for cosmetics in general and, in particular, eye makeup of various colors and shades,” as well as “four other examples of SMOKIN’ HOT used either as marks in the United Kingdom, or as descriptive terms applied to makeup” *Id.* at 1674. Here, as in *FabFitFun*, the record “reflects a more modest amount of evidence than that found in *Jack Wolfskin* and *Juice Generation* wherein ‘a considerable number of third parties’ use [of] similar marks was shown,” *id.*,³² but as in *FabFitFun*, the record here is sufficient to suggest that consumers of mobile phone application software “will look not just to the [RECIPE BOX] component of marks containing the phrase to identify and distinguish source, but also to the other parts of the marks.” *Id.* at 1675. We find

³² “[I]n *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record . . . and in *Jack Wolfskin*, there were at least fourteen” *Morinaga Nyugyo K.K.*, 120 USPQ2d at 1746 n.8 (citations omitted).

that “the relative weakness of the component term [RECIPE BOX] common to both marks weighs somewhat in favor of a finding of no likelihood of confusion.” *Id.*

C. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *Davia*, 110 USPQ2d at 1812), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted). Because the goods identified in the application include “Downloadable computer application software for mobile phones” with a field-of-use specification that users can “discover, access, share, bookmark, annotate, index, and store information about, and media content concerning, goods, services, experiences, recipes, cooking, and food, and . . . interact

online with information and media content that other users share concerning goods, services, experiences, recipes, cooking, and food,” the average customer here is a mobile phone owner who is interested in recipes and cooking.

The marks must be considered in their entirety, but “in articulating reasons for reaching a conclusion on the issue of confusion, 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 entirety.” *Detroit Athletic Co.*, 128 USPQ2d at 1050 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). Applicant argues in its appeal brief that PINCH IT! is the dominant portion of its mark. 6 TTABVUE 6. The Examining Attorney responds that “the common significant wording RECIPE BOX is the significant portion of the proposed mark as the phrase PINCH IT! is the lead-in phrase to the heart of the mark.” 8 TTABVUE 5. Applicant replies that “where the phrase RECIPE BOX is demonstrably commonplace and weak by evidence of its definition and traditional and current usage, it is difficult to see how RECIPE BOX could be the ‘heart’ of the mark.” 9 TTABVUE 3. Given their arguments, we will begin our analysis under the first *DuPont* factor by determining which portion of Applicant’s mark should be given greater weight in that analysis.

The arbitrary command PINCH IT! appears at the beginning of Applicant’s mark, and the first part of a mark is often its dominant portion. *See, e.g., In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (the first part of a mark “is most likely to be

impressed upon the mind of a purchaser and remembered”)); *Palm Bay Imps.*, 73 USPQ2d at 1692). The first words PINCH IT are accompanied by an exclamation point, which draws attention to the words, and emphasizes and reinforces them, and they modify the phrase RECIPE BOX, in which RECIPE has been disclaimed because “it is merely descriptive of a purpose or feature of [A]pplicant’s software as it appears in the field or function of the identification of goods,”³³ and which has been shown above to be somewhat weak in the context of the subject goods. As between PINCH IT! and RECIPE BOX, the PINCH IT! portion is far more “likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (internal citation omitted)).³⁴ We thus find that the phrase PINCH IT! is the dominant portion of Applicant’s mark, and turn now to the required comparison of the marks in their entireties, giving greater weight in that comparison to PINCH IT! than to RECIPE BOX in Applicant’s mark.

³³ September 3, 2019 Office Action at TSDR 1.

³⁴ In identifying the dominant portion of Applicant’s mark, we may consider how it is used when it appears in text. *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 & n.5 (Fed. Cir. 1983). On the Best Buy website pages displaying Applicant’s “Pinch It! Recipe Box for Android,” the words “Recipe Box” are used generically in several places, the source of the product is identified in one place as “Pinch It!,” and consumers are encouraged to buy the product and “get Pinching.” March 21, 2020 Final Office Action at TSDR 2-3. These uses of the elements of Applicant’s mark by a seller of Applicant’s goods buttress our finding that consumers are likely to recall and use PINCH IT! rather than RECIPE BOX to refer to the goods.

The Examining Attorney's basic arguments for similarity are that "the marks are identical in part" because they both contain the phrase RECIPE BOX, and that "incorporating the entirety of one mark within another does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d)." 8 TTABVUE 5.³⁵ Applicant argues in its appeal brief that "the inclusion of the phrase 'PINCH IT!' in Applicant's Mark differentiates it to such extent that there will be no likelihood of confusion by consumers as to the source of the two marks." 6 TTABVUE 8. In its reply brief, Applicant argues that the Trademark Manual of Examining Procedure ("TMEP") instructs that

"[a]dditions or deletions to marks may be sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) ***the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.***"

9 TTABVUE 3 (quoting TMEP Section 1207.01(b)(iii)) (emphasis added by Applicant)).

"The only common element in the marks is the term [RECIPE BOX] and, as discussed above, this term is weak as a source identifier" in the field of software applications and online websites and databases pertaining to recipes. *FabFitFun*, 127 USPQ2d at 1676 (standard character marks I'M SMOKING HOT and SMOKIN' HOT SHOW TIME found not to be confusingly similar when used on identical goods because of their structure and the relative weakness of the common element

³⁵ With respect to the latter argument, we note that Applicant's mark does not incorporate the entirety of the cited mark, which is THE RECIPE BOX, not RECIPE BOX alone.

SMOKIN(G) HOT). The marks here are more dissimilar than similar in appearance, sound, and connotation and commercial impression when considered in their entireties notwithstanding their common element.

With respect to appearance and sound, the marks begin with different words, PINCH IT! and THE. A consumer seeing or hearing Applicant's mark would first see or hear the dominant portion PINCH IT!, which has no visual or aural counterpart in the cited mark. Although the definite article THE in the cited mark has little or no source-identifying significance per se, *see, e.g., Pierce-Arrow Soc'y v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, *5 (TTAB 2019), it does contribute to the appearance and sound of the cited mark, and thus to the differences between the marks in those means of comparison. *Cf. FabFitFun*, 127 USPQ2d at 1676 (the differences in structure between the marks I'M SMOKING HOT and SMOKIN' HOT SHOW TIME "render[ed] the marks only somewhat similar in appearance and sound."). We find that the marks are more dissimilar than similar in appearance and sound.

As to the meaning of the marks, the dominant portion of Applicant's mark implores consumers to PINCH IT! It is not clear exactly what they should "pinch," but the presence of the phrase in Applicant's mark gives the mark an unusual feel. The cited mark THE RECIPE BOX essentially identifies a non-descript thing, and because the definite article has little or no source-identifying significance, the cited mark connotes little more than something used to collect, organize, and store recipes.

In the cited mark, there is no source identifier comparable to the attention-grabbing phrase PINCH IT! in Applicant's mark.

“Taken in their entirety, the marks are more dissimilar than similar in appearance, sound and connotation and, overall, convey somewhat different commercial impressions. In view thereof, the *du Pont* factor of the similarity or dissimilarity of the marks favors a finding of no likelihood of confusion.” *Id.*

D. Balancing the *DuPont* Factors

The goods are either legally identical or closely related due to their nature as identified in the application and cited registration, but the marks PINCH IT! RECIPE BOX and THE RECIPE BOX are more dissimilar than similar and their common element RECIPE BOX “is relatively weak in connection with the goods at issue.” *Id.* “Because of the overall differences between the marks and the weakness of the term shared by them, we find that confusion is not likely” between Applicant's mark PINCH IT! RECIPE BOX and the registered mark THE RECIPE BOX. *Id.*

Decision: The refusal to register is reversed.