

This Opinion is not a
Precedent of the TTAB

Mailed: January 4, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Sunset Songs, LLC
—

Serial No. 90114652
—

Timothy Cart Matson of Fox Rothschild LLP,
for Sunset Songs, LLC.

Janet H. Lee, Trademark Examining Attorney, Law Office 124,
Lydia Belzer, Managing Attorney.

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

Opinion by Kuczma, Administrative Trademark Judge:

Sunset Songs, LLC (“Applicant”) seeks registration on the Principal Register of
the mark SUNSET SONGS (in standard characters) for:

Advertising and promotion services in the field of music;
Preparing audio visual presentations for use in
advertising; Online retail store services featuring musical
sound recordings and video recordings featuring music, in
International Class 35.¹

¹ Application Serial No. 90114652 was filed on August 14, 2020, based upon Applicant’s assertion 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). “SONGS” is disclaimed. On April 8, 2021, Applicant filed a Request to Divide Application Serial No. 90114652. Accordingly, Applicant’s goods and

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), citing Registration Nos. 5584121 and 5635872, owned by Sunset Creative LLC, for the marks



*Sunset Creative*² and SUNSET CREATIVE (in standard characters),³

respectfully, both for:

Marketing consulting, namely, digital marketing and social media marketing; On-line advertising and marketing services; Promoting, advertising and marketing of the brands, products, services and online websites of individuals, businesses and nonprofit organizations;

services in Classes 9, 38 and 41 were divided out into Application Serial No. 90975231, and are not involved in this appeal.

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVue docket system.

² Registration No. 5584121 issued on October 16, 2018. "CREATIVE" is disclaimed. The color(s) dark orange, orange, light orange, yellow, dark brown, brown, light brown, white, light blue and blue are claimed as a feature of the mark. The mark is described as follows:

The mark consists of the literal element "Sunset Creative" colored in dark brown that fades into brown and then orange with a white outline. In the background behind the literary element is blue water that has white at the bottom and then fades to light blue and then blue. Above the water are three palm trees that are light brown. Above the three trees are two light brown birds in flight. Behind the birds and trees is a large sun setting into the water, the sun having dark orange at the bottom then fades to orange then light orange and then yellow at the top of the sun. There are 5 thin white clouds throughout the image.

This registration also recites services in Class 42 which are not relevant to the refusal.

³ Registration No. 5635872 issued on December 25, 2018. "CREATIVE" is disclaimed. This registration also recites services in Class 42 which are not relevant to the refusal.

providing marketing consulting in the field of social media
in International Class 35,

as bars to registration.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney have submitted briefs. For the reasons set forth below, we affirm the refusal to register.


I. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion enunciated in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Ft. 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 have considered each *DuPont* factor for which there is evidence and argument of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed.

Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered); *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (“[T]he factors have differing weights.”); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

For purposes of our *DuPont* analysis, we focus on cited Registration No. 5635872 for the word mark SUNSET CREATIVE which we find to be the most relevant of the cited registrations in terms of the marks themselves. Accordingly, if we find a likelihood of confusion as to this cited registration, we need not find it as to Registration No. 5584121 for the mark . On the other hand, if we do not reach that conclusion, neither would we find it as to Registration No. 5584121. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Similarity of the Services

We first turn to the *DuPont* factors involving the similarity or dissimilarity and nature of Applicant’s and Registrant’s services, and their channels of trade and classes of customers. *DuPont*, 177 USPQ at 567. The compared services need not be identical or competitive to find a likelihood of confusion. It is sufficient that the services are related in some manner, or that the circumstances surrounding their

marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective services. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *In re Opus One Inc.*, 60 USPQ2d 1812, 1814-15 (TTAB 2001); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicant argues that “the products and services [it] sells are related audio-only and audio-visual recordings of musicians for sale via download, streaming and distribution of physical products.”⁴ While that may be how Applicant is actually using its mark, the application recites additional services relevant to the refusal that Applicant leaves out of this argument. The similarity of the services set forth in Applicant’s application and the cited Registration must be determined based on the respective identifications set forth in each. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic*, 123 USPQ2d at 1749); *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). The pertinent services identified in Applicant’s application are:

Advertising and promotion services in the field of music; ...
in International Class 35,

⁴ Applicant’s Brief p. 10 (4 TTABVUE 15).

while the pertinent services identified in Registrant's registration are:

... Promoting, advertising and marketing of the brands, products, services and online websites of individuals, businesses and nonprofit organizations; ... in International Class 35.

Applicant also argues that neither Registrant's identification of services, nor the record, indicate that Registrant provides its services to recording artists in the music industry, and there is no indication in Applicant's identification of services or in the record that Applicant provides branding and advertising services for companies, which is irrelevant.⁵ The identification of Registrant's services is unrestricted, i.e., "promoting, advertising and marketing of the brands, products, services and online websites of individuals, businesses and nonprofit organizations." It therefore encompasses Applicant's more narrowly identified "advertising and promotion services in the field of music." *See Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738, 741 (TTAB 1978) ("since the goods in applicant's application are not restricted in any way, it must be presumed that such goods encompass disposable examination gowns of all types and descriptions").

In determining the similarity of Applicant's and Registrant's services, if confusion is likely as to one of Applicant's identified services, we need not consider the remaining identified services. It is sufficient for a finding of likelihood of confusion if identity or relatedness is established for any service encompassed by the identification of services within a particular class in an application. *See In re Wacker*

⁵ Applicant's Brief p. 8 (4 TTABVUE 13).

Neuson SE, 97 USPQ2d 1408, 1409 (TTAB 2010) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). Inasmuch as Registrant's advertising and promotion services are not limited to a specific market, they are unlimited, and include all markets such as the "field of music" identified in Applicant's services. Therefore, Registrant's and Applicant's services are in-part legally identical.

Further, because Applicant's services are legally identical in-part to the services in Registrant's registration, we presume that they travel through the same channels of trade to the same classes of purchasers. *See Cai v. Diamond Hong*, 127 USPQ2d at 1801 ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....") (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); *Harry Winston, Inc. and Harry Winston S.A. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1437 (TTAB 2014) ("Because the parties' goods are in part identical, as identified in the application and relevant registrations, we must presume that the channels of trade and classes of customers are the same."); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

Accordingly, the *DuPont* factors regarding the similarity of the services, as well as the trade channels and customers, favor a finding of likelihood of confusion.

B. Third-party Registrations

Applicant contends that its evidence of third-party registrations shows that others in particular areas of commerce have adopted and registered marks incorporating “SUNSET,” thus suggesting that customers are not confused by that common term since the remaining portions of the respective marks are sufficient to distinguish the marks as a whole from one another.⁶ Applicant cites twelve third-party registrations, including the following ten live registrations,⁷ for marks containing the wording “SUNSET” for services in Class 35 to support its argument that this word is weak, diluted, or so widely used that it should not be afforded a broad scope of protection:

- OFF SUNSET for personal and talent management services (Reg. No. 3370370);
- SUNSET PEOPLE for retail store services in the field of clothing (Reg. No. 5790202);
- ALLSAINTS SUNSET RIOT for advertising services (Reg. No. 5923359);

⁶ Applicant’s Brief p. 10 (4 TTABVUE 15).

⁷ See Applicant’s February 11, 2021 Response to Office Action, TSDR at 15-35. The services listed above are the most pertinent services identified in each cited registration.

Additionally, the registrations for two of the marks cited by Applicant have since been cancelled and are of no probative value and not considered, namely, SC SUNSET CASE & Design for wholesale, retail, mail order and on-line services (Reg. No. 4516843) (TSDR at 17-18); SUNSET BLVD NEWS for retail apparel stores; retail convenience stores; retail store services featuring a wide variety of consumer goods of others (Reg. No. 4629250) (TSDR 24-25). Cancelled registrations are only evidence that the registrations issued, and are not evidence of use of the registered marks at any time. *See, e.g., Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“a canceled registration does not provide constructive notice of anything”); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011) (“‘dead’ or cancelled registrations have no probative previous value at all”).



- **Sunset Trading** for distributorship in the field of furniture (Reg. No. 4009224, “Trading” disclaimed);



- **SUNSET FOODS** for retail grocery stores services (Reg. No. 4095646, “Foods” disclaimed);

- **SUNSET BLVD** (Reg. No. 5699509, registered on the Supplemental



Register) and (Reg. Nos. 5849342, “Sunset Blvd” disclaimed) for marketing, promotion and advertising services in the field of entertainment;





- **SUNSET ROOM** for providing facilities for trade exhibitions and providing facilities for business meetings (Reg. No. 6059953, “Room” disclaimed);
- **SUNSET PEAK TRADING CO.** for on-line retail store services featuring a wide variety of consumer goods (Reg. No. 5695903, “Trading Co.” disclaimed); and
- **SUMMER ON SUNSET** for advertising, public relations and marketing services, namely, promoting and marketing the goods and services of others through all public communication means (Reg. No. 6192841).

The Examining Attorney argues that most of the registrations set forth above are for services that are predominantly different from or unrelated to those identified in Registrant’s registration since they do not include advertising, marketing or promotional related services. We agree. Indeed, seven of the 12 third-party registrations relied on by Applicant are for services far removed from any involved here and therefore are not evidence that SUNSET is a weak or diluted term when used in connection with the services at issue in this case. *In re Dayco Products-*

Eaglemotive Inc., 9 USPQ2d 1910, 1911 (TTAB 1988) (third-party registrations can be useful “to demonstrate the sense in which a term is used in ordinary parlance and they can show that a particular term has been adopted by those engaged in a certain field or industry and that said term has less than arbitrary significance with respect to certain goods or services”).

We turn our attention to those five third-party registrations which have similar or somewhat related services to the services in Registrant’s registration:

- ALLSAINTS SUNSET RIOT for advertising services (Reg. No. 5923359);
- SUNSET BLVD (Reg. No. 5699509 registered on the Supplemental Register); and  (Reg. No. 5849342, “Sunset Blvd” disclaimed) both for marketing, promotion and advertising services in the field of entertainment;
- SUMMER ON SUNSET for advertising, public relations and marketing services, namely, promoting and marketing the goods and services of others through all public communication means (Reg. No. 6192841); and
-  for providing facilities for trade exhibitions and providing facilities for business meetings (Reg. No. 6059953).

The term “SUNSET” in Registration No. 5923359 for the mark ALLSAINTS SUNSET RIOT for “advertising services” is located in the middle of that mark following the distinctive term “ALLSAINTS” and forms a different commercial impression than “SUNSET” followed by the descriptive term “CREATIVE” shown in Registrant’s mark.

The term “SUNSET BLVD” used in the registrations for the marks SUNSET




BLVD (Registration No. 5699509 on the Supplemental Register) and (Registration No. 5849342) refer to the famous street in West Hollywood, California, known as “Sunset Boulevard.” In recognition of the geographical descriptiveness of “SUNSET BLVD,” the registrant disclaimed that term in order to register its mark (i.e., the mark in Registration No. 5849342) on the Principal Register.

Similarly, Registration No. 6192841 for the mark SUMMER ON SUNSET was registered by West Hollywood Travel and Tourism Board, and the language used on the specimen filed in connection with the SUMMER ON SUNSET application contains numerous references to “Sunset Boulevard” and “Sunset Strip,” for example: “A Music & Event Series on the World-Famous Sunset Strip.” “From coveted reservations at the places to see and be seen . . . it’s all on the world-famous Sunset Boulevard.”⁸ Accordingly, the terms “SUNSET BLVD” and “SUNSET” as used in the marks in Registration Nos. 5699509, 5849342 and 6192841 because of their association with the geographically descriptive Sunset Boulevard, create a different commercial impression from Registrant’s mark SUNSET CREATIVE which does not assert an association with Sunset Boulevard.

⁸ See Application Serial No. 88629710, June 30, 2020 Response to Office Action at TSDR 11 and June 30, 2020 Specimen at TSDR 3.



Registration No. 6059953 for the mark  for providing facilities for trade exhibitions and providing facilities for business meetings is registered for services which are different from the advertising, marketing and promotional services in Registrant's registration, and Applicant has not provided any evidence that such services are commercially related. Even assuming that such services were related to Registrant's services, this is the only registration of record for an arguably similar mark.

Although evidence of the extensive registration and use of a term by others has been treated as "powerful" evidence of its weakness (*see In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1746 n. 8 (TTAB 2016), citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) and *Jack Wolfskin Ausrustung Fur Drausses GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015)), Applicant's list of five registrations, none of which involve services shown to be similar to Registrant's services, falls far short of showing that the term "SUNSET" is weak when used for the involved services. By comparison, in *Juice Generation*, there were at least 26 relevant third party uses or registrations of record, *see* 115 USPQ2d at 1672 n. 1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n. 2. Moreover, as the Board explained in *In re Morinaga*, a list of registrations has limited probative value because it is not evidence that the marks have actually been used in commerce or that the public is even aware of them. *In re Morinaga*, 120 USPQ2d at 1745 (" . . . Applicant's citation of third-party registrations as evidence of

market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”). *See also In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) (one third-party registration has little probative value, especially in the absence of evidence that the mark is in use on a commercial scale or that the public has become familiar with it).

Therefore, this factor is neutral.

C. Similarity of the Marks

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, meaning and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); *In re Viterra*, 101 USPQ2d at 1908. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Chutter, Inc. v. Great Management Group, LLC*, 2021 USPQ2d 1001, at *35 (TTAB 2021) (citing *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019)). Where the services of an applicant and registrant are identical, or identical in-part as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *In*

re Viterra, 101 USPQ2d at 1908; *Coach v. Triumph Learning*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Because the similarity or dissimilarity of the marks is determined by considering the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *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.”). However, while we must consider the marks in their entirety, it is appropriate to accord greater importance to the more distinctive elements in the marks in determining whether the marks are similar. *In re Nat'l Data*, 224 USPQ at 751 (“[T]here 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.”).

Applicant’s mark SUNSET SONGS and Registrant’s mark SUNSET CREATIVE are similar in appearance and sound since both marks start off with the same distinctive first word which is the word most likely to be impressed upon the minds of customers. Although there is some difference in the overall sound and appearance of the marks stemming from the second word found in each mark, that does not

significantly differentiate the meaning of the marks. Purchasers are generally more inclined to focus on the first word, portion or syllable in any trademark or service mark. *See Palm Bay v. Veuve Clicquot*, 73 USPQ2d at 1692; *see also L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012) citing *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” when making purchasing decisions).

This is especially so where the first portion is followed by a highly descriptive or generic term as is the case with Applicant’s and Registrant’s marks here, where the second word in each mark i.e., “SONGS” and “CREATIVE,” respectively, are descriptive and have been disclaimed. Disclaimed, descriptive or generic matter is typically less significant or less dominant in relation to other wording in a mark. *See In re Detroit Athletic*, 128 USPQ2d at 1050 (*citing In re Dixie Rests.*, 41 USPQ2d at 1533-34; *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004); *In re Nat’l Data*, 224 USPQ at 752. Thus, the descriptive terms are less significant in affecting the overall commercial impressions of the marks and result in the word “SUNSET” being the common dominant portion of Applicant’s and Registrant’s marks. *In re Detroit Athletic*, 128 USPQ2d at 1049-50 (finding “[t]he identity of the marks’ two initial words is particularly significant because consumers typically notice those words first” and additional descriptive wording “do[es] little to alleviate the confusion that is likely to ensue”).

Applicant contends that its mark “is sufficiently different from” the cited SUNSET CREATIVE mark.⁹ Applicant attempts to distinguish its mark arguing that “[t]he dissimilarities in appearance, sound, connotation and commercial impression of ‘CREATIVE’ and ‘SONGS’ warrant removal of the Examining Attorney’s objection and passage of the mark SUNSET SONGS. Taken as a whole, the dissimilarities suggest that any confusion as to source of the goods and services at issue is highly unlikely.”¹⁰ However, Applicant offers no evidence or analysis of the dissimilarities in appearance, sound, connotation or commercial impression between its SUNSET SONGS mark and Registrant’s SUNSET CREATIVE mark. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)).

The addition of “SONGS” in Applicant’s mark in place of “CREATIVE” in Registrant’s mark does not obviate the similarity between Applicant’s and Registrant’s marks. The term “CREATIVE” in Registrant’s mark is defined as:

1 : one who is creative; 2 : creative activity or the material produced by it especially in advertising.¹¹

⁹ Applicant’s Brief pp. 6-7 (4 TTABVUE 11-12).

¹⁰ Applicant’s Brief p. 7 (4 TTABVUE 12).

¹¹ The Examining Attorney requested that we take judicial notice of the dictionary definition of “creative” citing to Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/creative>, © 2021 Merriam-Webster, Incorporated, 09/10/2021, and we do so. *See In re Inn at St. John’s*, 126 USPQ2d at 1747 n.15 (taking judicial notice of definition from Dictionary.com because it was from The Random House Unabridged Dictionary); *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (taking judicial notice of definitions from Merriam-Webster Online Dictionary at www.merriam-webster.com). In addition, we take judicial notice of the definitions of “song” (<https://www.merriam-webster.com/dictionary/song>) and “singing” (<https://www.merriam-webster.com/dictionary/singing>) Merriam-Webster Online Dictionary, © 2021 Merriam-Webster, Incorporated, 1/3/2022.

The term “SONG” in Applicant’s mark is defined as:

1 : the act or art of singing;

and “singing” is defined as:

1 a : to produce musical tones by means of the voice, b : to utter words in musical tones and with musical inflections and modulations.

As the above definitions support, the term “CREATIVE” in Registrant’s mark conveys creative activity which encompasses the composition of songs and singing. Although the addition or deletion of words to a mark may avoid a likelihood of confusion if the marks in their entirety convey different commercial impressions, there is no evidence suggesting that the overall commercial impressions of Applicant’s mark and the cited mark differ significantly as a result of “CREATIVE” and “SONGS” being used in each mark.

When comparing marks, “[t]he 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*, 127 USPQ2d at 1801 (quoting *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721).

Based on the overall similarity of Applicant’s SUNSET SONGS mark to the registered SUNSET CREATIVE mark in appearance, sound, meaning and commercial impression, it is likely that the average customer would retain a similar recollection for each mark, or think that they were associated, supporting a finding of likelihood of confusion.

II. Conclusion

Because the services are identical in-part, the channels of trade and classes of purchasers are presumed to be the same. Additionally, there is a strong similarity of the marks in sound, sight, meaning and commercial impression. Therefore, considering the relevant *DuPont* factors, we find that the Office has met its burden in showing a likelihood of confusion between Applicant's mark and the mark in the cited registration for Applicant's identified services.

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