

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 28, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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*In re Natures Generator, Inc.*

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Serial No. 97519777  
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Francis J. Ciaramella of Rick Ruz, PLLC,  
for Natures Generator, Inc.

Justine Parker, Trademark Examining Attorney, Law Office 101,  
Zachary Sparer, Managing Attorney.

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Before English, Lavache, and Brock,  
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

Applicant Natures Generator, Inc. seeks registration on the Principal Register of the composite mark below for “Solar-powered electricity generators; Wind-powered electricity generators,” in International Class 7.<sup>1</sup>

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<sup>1</sup> Application Serial No. 97519777, filed July 26, 2022, based on an allegation of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application includes the following mark description and color claim:

The mark consists of the wording “POWER HOUSE” in a stylized font. The word “POWER” in gray appears above the word “HOUSE” in green. Above the wording “POWER HOUSE” appears a green and gray leaf comprised of a green sun and gray water drop design. Across the design are three wavy white lines outlined in



The Trademark Examining Attorney refused registration of Applicant’s mark on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), citing the standard character mark POWERHOUSE, which is registered on the Principal Register for “Portable electric generators,” in International Class 7.<sup>2</sup>

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which the Examining Attorney denied. The appeal then resumed, and both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we **affirm** the refusal.

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

Trademark Act Section 2(d), in relevant part, prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion.” 15 U.S.C. § 1052(d). To determine whether confusion is likely, we analyze

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green with the lower most line terminating in a white and green-outlined electrical plug design. The entire leaf and water drop design is contained inside a design of a green house. The remaining white background is for shading and is not a part of the mark as shown.

The colors green, gray, and white are claimed as a feature of the mark.

<sup>2</sup> Registration No. 3327098, issued on October 20, 2007; renewed.

all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and respective goods, 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, 1103 (CCPA 1976). Here, we have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1205 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Ultimately, however, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

#### **A. Comparison of the Goods**

We begin our analysis with the second *DuPont* factor, which concerns the similarity or dissimilarity and nature of the respective goods, i.e., the relatedness of the goods. *DuPont*, 476 F.2d at 1361. In assessing relatedness, we must consider the goods as they are identified in Applicant’s application and the cited registration. See *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014)

(quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)).

Here, Applicant's goods are identified as "Solar-powered electricity generators; Wind-powered electricity generators," in International Class 7, and Registrant's goods are identified as "Portable electric generators," in International Class 7.

The Examining Attorney argues that Applicant's goods and Registrant's goods are legally identical.<sup>3</sup> We agree. The wording used to identify Registrant's goods, "portable electric generators," is very broad and the only limitation as to the nature of the electric generators is that they are portable. As to Applicant's identified electricity generators, the only limitation is as to their method of power generation, i.e., "solar-powered" and "wind-powered." Thus, we agree with the Examining Attorney that Applicant's goods, as identified, could include portable versions of "solar-powered electricity generators" and "wind-powered electricity generators,"<sup>4</sup> and that these goods are encompassed by Registrant's identified goods. *In re Solid State Design Inc.*, No. 87269041, 2018 TTAB LEXIS 1, at \*16 (noting that, where the goods in an application or registration are broadly described, they are deemed to

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<sup>3</sup> See Examining Attorney's Brief, 8 TTABVUE 10.

The TTABVUE citations in this opinion refer to the Board's docket system. The number preceding the "TTABVUE" designation is the docket entry number and any numbers following indicate the page numbers within the docket entry. The Trademark Status and Document Retrieval (TSDR) citations in this opinion refer to the electronic file database for the involved application.

<sup>4</sup> The Examining Attorney provided third-party website evidence showing that solar- and wind-powered electricity generators can be portable. See May 18, 2023 Nonfinal Office Action at TSDR 10-57; August 28, 2025 Denial of Request for Reconsideration at TSDR 5-24.

encompass all the goods of the nature and type described therein); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, No. 94002242, 2015 TTAB LEXIS 176, at \*60-61 (same).

Because the respective goods are legally identical,<sup>5</sup> the second *DuPont* factor weighs strongly in favor of finding a likelihood of confusion.

### **B. Trade Channels and Classes of Consumers**

Next, we consider established, likely-to-continue channels of trade, the third *DuPont* factor. *DuPont*, 476 F.2d at 1361. Because Applicant's goods are legally identical to Registrant's goods and there are no relevant restrictions as to the goods, we presume that the relevant trade channels and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding Board entitled to presume that trade channels and classes of purchasers were the same where the respective goods were identical); *In re Am. Cruise Lines, Inc.*, No. 87940022, 2018 TTAB LEXIS 363, at \*5; *In re Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at \*6, *aff'd*, 777 Fed. Appx. 516 (Fed. Cir. 2019).

We therefore find that the third *DuPont* factor also weighs in favor of a conclusion that confusion is likely.

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<sup>5</sup> The Examining Attorney also provided third-party website evidence showing that third parties offer both portable electricity generators, and solar-powered generators, under the same mark, as well as ten active, use-based, third-party registrations showing instances of a single mark being registered for the same or similar goods as those of both Applicant and Registrant. *See* April 10, 2025 Final Office Action at TSDR 8-91. This evidence indicates that the listed goods are of a type that may commonly emanate from a single source and thus may be perceived as related. *In re Albert Trostel & Sons Co.*, No. 74186695, 1993 TTAB LEXIS 36, at \*7. While we appreciate the Examining Attorney's thoroughness in providing this evidence, we need not further consider it, given our finding that, based on the respective identifications of goods alone, Applicant's goods and Registrant's goods are legally identical.

### **C. Strength of the Cited Mark**

Before we compare the marks at issue, we consider Applicant’s arguments that the cited mark POWERHOUSE is conceptually weak.<sup>6</sup> We do so because a determination of the strength or weakness of the mark helps inform us as to its scope of protection. *See In re Morinaga Nyugyo K.K.*, No. 86338392, 2016 TTAB LEXIS 448, at \*17-18 (“[T]he strength of the cited mark is—as always—relevant to assessing the likelihood of confusion under the *du Pont* framework.”).

When evaluating the strength or weakness of a mark, we look at the mark’s inherent conceptual strength based on the nature of the term itself and its commercial strength in the marketplace. *See Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (“There are two prongs of analysis for a mark’s strength under the sixth factor: conceptual strength and commercial strength.”); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 TTAB LEXIS 228, at \*24.

#### **1. Conceptual Strength of the Cited Mark**

Conceptual strength is a measure of a mark’s distinctiveness and may be placed “in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Because the cited mark issued on the Principal Register without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive

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<sup>6</sup> *See* Applicant’s Brief, 6 TTABVUE 11.

as to the goods listed in the cited registration.<sup>7</sup> 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, No. 9118587, 2006 TTAB LEXIS 330, at \*62 (“A mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.”).

However, the Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the mark or common element has some conceptual weakness as an indicator of a single source. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ . . . that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that segment is relatively weak.”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)).

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<sup>7</sup> Applicant asserts that POWERHOUSE (or POWER HOUSE) is “suggestive” and “conceptually weak as the wording merely serves an informational purpose (i.e., to tell the consumer . . . that the products offered . . . are used to **power** a **home**).” *Id.* at 9. Even if the term is suggestive, however, it would still be considered inherently distinctive and thus entitled to protection from confusingly similar marks. *Two Pesos*, 505 U.S. at 768 (noting that “because their intrinsic nature serves to identify a particular source of a product,” suggestive marks “are deemed inherently distinctive and are entitled to protection”).

Here, Applicant argues that the coexistence of third-party registrations for marks including the term POWERHOUSE, covering goods in International Class 7, supports the conclusion that the term is conceptually weak.<sup>8</sup> While Applicant characterizes these third-party registrations as “numerous,” the record contains only the following six:<sup>9</sup>

- POWERHOUSE (Reg. No. 1953266) for “catalytic converters for treating exhaust gases”;
- POWERHOUSE (Reg. No. 3834936) for “Power machines for cutting and splitting logs for firewood”;
- POWERHOUSE (Reg. No. 4782409) for “Parts of power-operated horizontal directional drills used in underground construction, namely, housings, back reamer housings, beacon housings, and drill bits used during horizontal directional drilling operations”;
- THE POWERHOUSE (Reg. No. 5497554) for “Power staplers”;
- POWERHOUSE (Reg. No. 5539350) for “Machine parts, namely, pulleys, timing pulleys; power transmission components namely belts, for machines, motors and engines in industrial applications”; and
- POWERHOUSE OF ULTRASONIC TECHNOLOGY (Reg. No. 6689683) for various ultrasonic machines and tools, including “ultrasonic cleaning machines and systems comprising ultrasonic generators, immersion box, tube resonator, material handling system and controller, and ultrasonic cutting and sealing equipment in the form of sieving generator, converter, ring resonator and connecting cable for laboratory use,” a well as various goods in International Class 9.

The Examining Attorney points out that only five of these registrations are based on use,<sup>10</sup> as the last listed, Registration No. 6689683, was registered under

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<sup>8</sup> Applicant’s Brief, 6 TTABVUE 11.

<sup>9</sup> See August 22, 2024 Request for Reconsideration at TSDR 49-55, 57-72.

<sup>10</sup> Examining Attorney’s Brief, 8 TTABVUE 8.

Trademark Act Section 44(e), 15 U.S.C. § 1126(e) and no declaration of use under Trademark Section 8, 15 U.S.C. § 1058, has been filed. *See In re Info. Builders Inc.*, No. 87753964, 2020 TTAB LEXIS 20, at \*19 n.19 (giving no consideration to a non-use-based registration “because it does not demonstrate exposure of the mark prior to registration through use in commerce and, therefore, has no probative value”). And none of the five use-based registrations cover goods that are the same as, or even proven similar to, those listed in the cited registration. Thus, Applicant’s evidence falls far short of establishing that POWERHOUSE has a normally understood and well-recognized descriptive or highly suggestive meaning in connection with portable electric generators, such that the term could be considered conceptually weak. *Cf. Jack Wolfskin*, 797 F.3d at 1373-74 (involving “extensive evidence of third-party registrations”); *Juice Generation*, 794 F.3d at 1339 (same).

## **2. Commercial Strength of the Cited Mark**

To assess commercial strength of the cited mark, we consider the number and nature of similar marks in use on similar goods. *DuPont*, 476 F.2d at 1361; *see Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, No. 91217095, 2016 TTAB LEXIS 604, at \*11. If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005).

Here, Applicant has not submitted any evidence of third-party marketplace uses of marks identical or similar to the cited POWERHOUSE mark. And the third-party

registrations discussed above do not establish that the relevant consuming public has been exposed to widespread use of similar marks in connection with portable electric generators. *In re Morinaga*, 2016 TTAB LEXIS 448, at \*22-23 (“[T]hird-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.”).

### **3. Conclusion as to the Strength of the Cited Mark**

In short, the evidence of record does not establish that the cited mark is either conceptually or commercially weak. Thus, we deem the cited mark to have the normal scope of protection afforded an inherently distinctive mark. *See In re Thomas*, No. 78334625, 2006 TTAB LEXIS 135, at \*18.

Accordingly, we find that the sixth *DuPont* factor is neutral in our analysis.<sup>11</sup>

### **D. Comparison of the Marks**

We turn now to the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation,

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<sup>11</sup> Applicant’s brief also invokes the fifth *DuPont* factor, which concerns the “fame of the prior mark.” *DuPont*, 476 F.2d at 1361. Specifically, Applicant argues that there is no evidence that the cited Prior Mark is famous or has acquired secondary meaning within the marketplace or that consumers associate the term POWER HOUSE with the Prior Owner.” Applicant’s Brief, 6 TTABVUE 10. “Secondary meaning” is not required for a mark that is inherently distinctive, like the cited mark. Further, in an ex parte appeal such as this one, the owner of the cited registration is not a party to the proceeding and thus cannot introduce evidence regarding its use of the cited registered mark or any resulting fame. *In re Integrated Embedded*, No. 86140341, 2016 TTAB LEXIS 470, at \*26. The Examining Attorney also “is under no obligation to demonstrate the fame of a cited mark.” *Id.* Thus, we deem the fifth *DuPont* factor neutral.

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and commercial impression. *See Palm Bay Imps.*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *Inn at St. John’s*, 2018 TTAB LEXIS 170, at \*13.

Here, Applicant’s mark is:



And the cited mark is POWERHOUSE (in standard characters).

While the respective marks appear together above, this placement does not reflect the actual conditions under which consumers are likely to encounter the marks in the marketplace. Thus, when assessing these 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.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017) (quoting *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). “The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.” *In re Box Sols. Corp.*, No. 76267086, 2006 TTAB LEXIS 176, at \*14.

All elements of the respective marks must be considered. *See Viterra*, 671 F.3d at 1362 (“[M]arks must be viewed ‘in their entirety,’ and it is improper to dissect a mark . . . , including when a mark contains both words and a design.”); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) (stating that “marks must be compared in their entirety”). That said, “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.” *Nat’l Data*, 753 F.2d at 1058.

Further, where the goods are legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992).

In this case, we agree with the Examining Attorney that the wording POWER HOUSE is the dominant element in Applicant’s mark, because it is the sole literal element in the mark. We assign less weight to the design element in Applicant’s mark because, in view of its nature, it is unlikely to be verbalized and thus consumers are less likely to use it to recall the mark or request the goods. *See Viterra*, 671 F.3d at 1362 (“In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’”) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983)); *L.C. Licensing, Inc. v. Berman*, No. 91162330, 2008 TTAB LEXIS 756, at \*9 (“[I]t is well settled that if a mark comprises both a word and a design, then the word is

normally accorded greater weight because it would be used by purchasers to request the goods.”). Also, while the design element is prominent in Applicant’s mark, we find it essentially reinforces the literal element, as it contains, inter alia, components that would likely be perceived as representing power (i.e., wind power represented by wavy lines that terminate in an electrical plug, solar power represented by depiction of the sun) and a house (i.e., represented by the outline of a house).

Thus, we find the dominant element of Applicant’s mark is POWER HOUSE, which is nearly identical to the entirety of the cited mark (POWERHOUSE), as the display of POWER and HOUSE on different lines is an inconsequential difference in terms of appearance and does not change the pronunciation of the term as a whole. *See, e.g., In re Cox Enters.*, No. 76591278, 2007 TTAB LEXIS 6, at \*10 (“Without the space, THEATL is equivalent in sound, meaning and impression to THE ATL . . . .”); *In re Planalytics Inc.*, No. 76322156, 2004 TTAB LEXIS 198, at \*7 (finding the absence of the space in GASBUYER does not create a different perception of the term); *Seaguard Corp. v. Seaward Int’l, Inc.*, No. 92013589, 1984 TTAB LEXIS 75, at \*10 (treating SEA GUARD and SEAGUARD as “essentially identical”). We therefore find that the marks are highly similar in appearance and sound. *See, e.g., In re i.am.symbolic, llc*, No. 85916778, 2018 TTAB LEXIS 281, at \*25 (finding marks more similar than dissimilar where the marks shared the same dominant element, which was identical in sound and meaning); *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 TTAB LEXIS 108, at \*5 (“The marks at issue are similar in sight and sound, since they share the term LAROQUE.”).

Despite Applicant's arguments to the contrary,<sup>12</sup> the addition of the design element in Applicant's mark does little to mitigate confusion, because, again, the components of the design merely reinforce the impression created by the term POWER HOUSE (or POWERHOUSE). *See, e.g., In re Charger Ventures*, 64 F.4th 1375, 1382 (Fed. Cir. 2023) (“[A]n additional . . . component may technically differentiate a mark but do little to alleviate confusion.”); *In re Max Capital Grp. Ltd.*, 2010 TTAB LEXIS 1, at \*17 (finding that the addition of a design element to a word that is identical to another mark did not reduce likelihood of confusion, especially where the respective services were legally identical). Simply put, any connotation or commercial impression that the relevant consumers are likely to attribute to the cited mark could also be attributed to Applicant's mark.

Indeed, in view of the marks' shared wording, consumers could reasonably assume that Applicant's goods sold under its mark are from the same source as the goods sold under the cited mark with which they are acquainted or familiar, and that Applicant's mark is merely a variation of, or derivative of, the cited mark, or vice versa. *See, e.g., In re Comexa Ltda.*, No. 75396043, 2001 TTAB LEXIS 274 (applicant's use of term AMAZON and parrot design for chili sauce and pepper sauce is likely to cause confusion with registrant's AMAZON mark for restaurant services); *SMS, Inc. v. Byn-Mar Inc.*, No. 91068062, 1985 TTAB LEXIS 32, at \*4 (finding applicant's marks ALSO ANDREA and ANDREA SPORT were “likely to evoke an association by consumers

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<sup>12</sup> Applicant's Brief, 6 TTABVUE 7-8.

with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing").

This is especially so because the cited mark is registered in standard character form and thus the mark may be presented in any font style, size, or color, including the same font style, size, and color of the literal portion of Applicant's mark. *See Aquitaine Wine*, 2018 TTAB LEXIS 108, at \*13 ("[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color."). For that reason, and because we may not consider extrinsic evidence of actual use of the marks in our analysis, we reject Applicant's argument that the marks, as actually used in commerce, create different commercial impressions.<sup>13</sup> *See id.* at \*11 ("[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.").

Accordingly, we find Applicant's mark is highly similar to the cited mark in terms of sound, appearance, connotation, and overall commercial impression. The first *DuPont* factor therefore weighs in favor of a conclusion that confusion as to source is likely.

#### **E. Purchasing Conditions and Sophistication of Purchasers**

Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing."

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<sup>13</sup> *Id.* at 8.

*DuPont*, 476 F.2d at 1361. Applicant argues that the relevant purchasers of both Applicant’s and Registrant’s goods are “sophisticated,” “well educated, and not likely to make . . . purchases on impulse.”<sup>14</sup> Applicant adds that “the respective goods . . . can be extremely expensive,” as “[g]enerators may cost hundreds if not thousands of dollars.”<sup>15</sup>

Based on the evidence of record, the goods at issue here can, in fact, range in price from just under \$200 to nearly \$9,000.<sup>16</sup> Based on this evidence, at least a portion of the relevant purchasers—those in the market for more expensive types of generators—are likely to exercise more discernment in their purchasing decisions and less likely to buy on impulse. Yet the goods, as identified, are not limited to particular classes or types of purchasers, or specific trade channels. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”). And the evidence of record indicates that the goods are available to members of the general public, who may exercise less caution when making purchases, especially on the lower end of the price spectrum. Because the relevant purchasers here could include the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *See Stone Lion*, 746 F.3d at 1325 (citations

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<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.*, April 10, 2025 Final Office Action at TSDR 27, 41-43, 54, 63-65, 69, 74, 77; *see also* July 10 Request for Reconsideration at TSDR 14, 16 (showing, respectively, Applicant’s generator being offered for \$3,599.99, and Registrant’s generator being offered for \$499.99).

omitted). In this case, the record does not contain any evidence that would lead us to believe that the least sophisticated purchasers of Applicant's goods would exercise anything more than ordinary care. *See In re Samsung Display Co.*, No. 90502617, 2024 TTAB LEXIS 258, at \*25-25.

In any event, even sophisticated purchasers are not immune from source confusion, especially where, as here, the relevant goods are legally identical and are being, or will be, offered under highly similar marks. *See Shell Oil Co.*, 992 F.2d at 1208 (citing *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1548 (Fed. Cir. 1990) (affirming the Board's reasoning that even sophisticated purchasers may be confused by similar marks)).

Therefore, we are not persuaded that consumer sophistication or purchasing conditions would play a role in avoiding or minimizing source confusion here. Accordingly, we deem the fourth *DuPont* factor neutral in our analysis.

#### **F. Actual Confusion**

The seventh and eighth *DuPont* factors relate, respectively, to the nature and extent of any actual confusion and the extent of the opportunity for actual confusion. *See DuPont*, 476 F.2d at 1361. These "factors are interrelated; the absence of evidence of actual confusion, under the seventh *DuPont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *DuPont* factor, that there has been a significant opportunity for actual confusion to have occurred." *Keystone Consol. Indus. v. Franklin Inv. Corp.*, No. 92066927, 2024 TTAB LEXIS 290, at \*75-76 (citing *In re Cont'l Graphics Corp.*, No.

75033628, 1999 TTAB LEXIS 500, at \*9; *Gillette Can. Inc. v. Ranir Corp.*, No. 91082769, 1992 TTAB LEXIS 24, at \*19).

Applicant argues that “[t]here has been no documented evidence that shows that any consumers have confused the respective marks in commerce.”<sup>17</sup> But we have no evidence that the respective marks have coexisted in the marketplace under conditions that would create a significant opportunity for actual confusion to have occurred. And, as a general matter “the relevant test is **likelihood** of confusion, not actual confusion.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1309 (Fed. Cir. 2018). As the Board has previously stated,

[t]he fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.

*In re Opus One, Inc.*, No. 75722593, 2001 TTAB LEXIS 707, at \*19-20.

We therefore treat the seventh and eighth *DuPont* factors as neutral. *See In re Davey Prods. Pty*, No. 77029776, 2009 TTAB LEXIS 524, at \*22-25.

### **G. Extent of Potential Confusion**

Applicant also invokes the twelfth *DuPont* factor, concerning “the extent of any potential confusion, i.e., whether de minimis or substantial.” *DuPont*, 476 F.2d 1361. Specifically, Applicant argues that “even if there were to be evidence of actual

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<sup>17</sup> Applicant’s Brief, 6 TTABVUE 10.

confusion in the future, such instances can be dismissed as inconsequential or de minimis.”<sup>18</sup>

This argument is speculative and otherwise unavailing. The marks here are highly similar, and Applicant’s and Registrant’s goods are legally identical and thus presumably travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. And the record contains no evidence that the goods at issue are marketed to or purchased by a small or otherwise limited number of consumers. Thus, the extent of potential confusion cannot reasonably be deemed to be de minimis. *See, e.g., Davey Prods.*, 2009 TTAB LEXIS 524, at \*26 (rejecting applicant’s argument that the potential for confusion was de minimis where the goods at issue “would be marketed to and purchased by significant numbers of purchasers”).

Accordingly, this factor is neutral.

## **II. Conclusion**

Having considered all of the arguments and evidence of record pertaining to the relevant *DuPont* factors, we find that the marks are highly similar in appearance, sound, connotation, and overall commercial impression; that, as identified, Applicant’s goods and Registrant’s goods are legally identical; and that the respective goods travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. These *DuPont* factors all weigh heavily in favor of a conclusion that confusion is likely, while the remaining relevant factors are neutral. Accordingly, we conclude that consumer confusion is likely.

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<sup>18</sup> *Id.* at 11.

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