

This Opinion is Not a
Precedent of the TTAB

Mailed: January 17, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Glory Yau-Huai Tsai
v.
BJK Glory House Catering Co., LLC
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Opposition No. 91212540
—

Glory Yau-Huai Tsai, *pro se*.

Lisa R. Hemphill, Gardere Wynne Sewell L.L.P., for BJK Glory House Catering Co., LLC.

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Before Zervas, Taylor, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

BJK Glory House Catering Co., LLC (“Applicant”) seeks registration of the mark GLORY HOUSE in standard characters (“HOUSE” disclaimed) for restaurant and catering services, in International Class 43.¹ Glory Yau-Huai Tsai (“Opposer”), appearing *pro se*, has opposed registration on the basis of a claim of priority and

¹ Application Serial No. 85789420 was filed on November 28, 2012 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting first use and first use in commerce on January 1, 2000.

likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).
The case has been briefed.² We dismiss the opposition.

I. Procedural History, Evidentiary Record, and Evidentiary Objections

We discuss below in some detail much of the procedural history of this case because it bears directly upon the evidentiary record at trial and upon our disposition of the case at final hearing.

Pleadings

On September 12, 2013, Opposer filed a 70-page Notice of Opposition that contained numerous allegations and claims and was accompanied by 11 exhibits comprising 49 pages. 1 TTABVUE. On October 28, 2013, Applicant filed a combined Answer and Motion to Strike under Rule 12 (f) of the Federal Rules of Civil Procedure, 4 TTABVUE, and the Board suspended the case pending disposition of the motion. 6 TTABVUE. While the motion was pending, the Board Interlocutory Attorney assigned to the case participated in the parties' discovery conference.

On January 30, 2014, the Board issued an order granting the motion to strike in part and denying it in part, and granting Opposer leave to file an amended pleading. 7 TTABVUE 8. The order also addressed matters that were discussed at the discovery conference. The Board advised Opposer that if he wished to rely on the voluminous exhibits attached to his original notice of opposition, he would be required to properly

² As discussed below, Opposer failed to timely file his main brief on the case, and the Board denied him leave to file it late. 45 TTABVUE. As a result, the briefing consists only of Applicant's brief, 46 TTABVUE, and Opposer's reply brief, 47 TTABVUE.

introduce them into evidence at trial. 7 TTABVUE 4. The order also stated that Opposer had indicated that he did not plan to hire an attorney and that the Board had advised him that it generally recommended that *pro se* parties retain counsel to represent them. 7 TTABVUE 7-8. The order admonished Opposer that he would be expected to comply with all applicable Board rules and practices and that he needed to familiarize himself with them. 7 TTABVUE 11-12.

On February 20, 2014, Opposer filed an Amended Notice of Opposition, 9 TTABVUE, which is the operative complaint in the case. As subsequently construed by the Board, the Amended Notice asserts claims of priority of use and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based upon Opposer's claimed ownership of Registration No. 1879695 of the mark shown below:³



for “printed matter; namely, childrens [sic] books, religious books, music books, newspapers for the oriental community, leaflets, business cards, menus, greeting cards, Christmas cards, letterheads and envelopes,” as well as Opposer's claimed use of the mark and trade name Glory House without a design element.⁴ 30 TTABVUE

³ Registration No. 1879695 issued on February 21, 1995 and was renewed on January 20, 2015.

⁴ The Amended Notice includes allegations regarding possible trademark infringement and unfair competition claims, and possible non-trademark tort claims. The Board's jurisdiction is limited to questions of trademark registration and therefore the Board has no jurisdiction to consider these possible claims. *See, e.g., FirstHealth of the Carolinas Inc. v. CareFirst of*

2, n.3. Applicant filed an Answer to Opposer's Amended Complaint on March 27, 2014, 12 TTABVUE, which is the operative answer in the case.⁵

Applicant's Motion for Summary Judgment and Related Motions

On November 12, 2014, Applicant filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, 18 TTABVUE, on the grounds that Opposer's goods and Applicant's services were unrelated and that Opposer had "judicially admitted" that there was no likelihood of confusion by failing to respond to Applicant's first sets of requests for admission and requests for production of documents and things. 18 TTABVUE 7. In a December 16, 2014 order, the Board addressed the filing of the summary judgment motion and Opposer's earlier filing of a document entitled "Short Discovery" and his Pretrial Disclosures. 19 TTABVUE.⁶ The Board issued a suspension and a briefing schedule on the summary judgment motion, and noted that if Opposer had failed to timely respond to any properly served requests for admission, the requests were deemed admitted unless he could show that his failure to respond was the result of excusable neglect, or unless he succeeded on a motion to withdraw or amend the admissions. 19 TTABVUE 2, n.1.

Maryland Inc., 479 F.3d 825, 81 USPQ2d 1919, 1921 (Fed. Cir. 2007). Any such claims are dismissed without prejudice to bringing such claims in another tribunal.

⁵ The Answer purports to incorporate by reference the affirmative defenses in Applicant's Answer to Opposer's original Notice of Opposition. 12 TTABVUE 9. Those defenses were all mere amplifications of Applicant's denials of likelihood of confusion, and we have not considered them separately in our decision. See Trademark Trial and Appeal Board Manual of Procedure ("TBMP") Section 311.02(d) (2016).

⁶ The "Short Discovery" filing was a pleading-like document that set forth various allegations and was accompanied by two exhibits. 16 TTABVUE. The Board's order stated that this filing and Opposer's Pretrial Disclosures would be given no consideration in the case. 19 TTABVUE 1.

On January 14, 2015, Opposer responded to the summary judgment motion by submitting a declaration with various exhibits and by requesting an extension of time to respond to Applicant's discovery requests. 21 TTABVUE. In a January 26, 2015 order, the Board stated that it would give no further consideration to the extension request because the deadline for serving responses to Applicant's requests for admission had passed and could not be extended retroactively because Opposer had not attempted to show excusable neglect, but construed the request as a request to withdraw or amend his admissions. 22 TTABVUE 1. Applicant was given 20 days to respond to Opposer's motion to withdraw or amend his admissions. After responding to Opposer's motion, 26 TTABVUE,⁷ Applicant filed a reply brief in support of its summary judgment motion on February 23, 2015, which included a motion to strike the evidence submitted by Opposer in his opposition to the motion. 25 TTABVUE.

In a June 24, 2015 order, the Board denied Applicant's summary judgment motion on the ground that there were genuine disputes of material fact regarding the similarities between the parties' marks and trade channels. 30 TTABVUE 7-8. The order reset the parties' testimony periods and contained the following admonition: "The parties should note that the evidence submitted in connection with Applicant's motion for summary judgment is of record only for consideration of that motion. To

⁷ In a May 6, 2015 order, the Board allowed Opposer to serve and file his responses to the specific requests for admission referenced in Applicant's summary judgment motion. 27 TTABVUE. Opposer filed his responses, 28 TTABVUE-29 TTABVUE, and the Board found them to be sufficient to deem the specific requests denied. 30 TTABVUE 3-4.

be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period.” 30 TTABVUE 8, n.10.

Trial

On August 3, 2015, the last day of Opposer’s testimony period, Opposer filed a document entitled “Testimony and Deposition Executed by Plaintiff Glory Yau-Huai Tsai,” which contained a declaration and Exhibits 11-22 thereto. 31 TTABVUE 2-43. This was the only document filed by Opposer during his testimony period. The document stated that Opposer was submitting “his testimony together with the exhibits which Plaintiff is expecting to offer in the deposition process.” 31 TTABVUE 2. Applicant did not submit any evidence during its testimony period.

On November 16, 2015, the last day of Opposer’s rebuttal period, Opposer filed a document entitled “Testimony and Deposition Executed by Plaintiff Glory Yau-Huai Tsai,” 33 TTABVUE, which contained another declaration and an Exhibit 23 thereto.

Briefing at Final Hearing and Related Motions

In the portion of the Board’s June 24, 2015 order resetting the parties’ testimony periods, the Board stated that “[b]riefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).” 30 TTABVUE 9. Opposer’s main brief was thus due on January 15, 2016, 60 days after the close of Opposer’s rebuttal testimony period. Opposer did not file a brief by that deadline.

On April 7, 2016, the Board issued an order noting Opposer’s failure to file a brief and ordering him to show cause within 30 days why the Board should not treat his failure to file a brief as a concession of the case. 36 TTABVUE 1. On April 13, 2016,

Opposer filed a document entitled “Opposer’s Motion to Reopen Time for Opposer to File a Reply Brief in Support of Opposer’s Notice of Opposition; New Facts and Evidences, and Declaration of Glory Yau-Huai Tsai.” 37 TTABVUE. In this filing, Opposer referenced his previous August 3, 2015 and November 16, 2015 submissions, and claimed that he had mistakenly believed that those filings “were part of and similar to opposer’s ‘BRIEF,’” that the case was still in discovery, and that more evidence would be developed. 37 TTABVUE 3 (emphasis omitted). The filing contained another declaration by Opposer that set forth new facts and allegations, attached new Exhibits No. 24-26 thereto, and discussed the exhibits previously submitted, and a separate document entitled “Opposer Glory Yau-Huai Tsai’s Reply Brief in Support of Opposer’s Notice of Opposition.” 37 TTABVUE 5-36.

On May 17, 2016, Applicant filed a response to Opposer’s motion to reopen his time to file a brief, 39 TTABVUE, arguing that Opposer had failed to show excusable neglect for his failure to file a brief and had failed properly to submit any evidence during his testimony period. 39 TTABVUE 4-7. On May 17, 2016, Opposer filed a reply on his motion. 40 TTABVUE 3-7.

On September 1, 2016, the Board issued an order on Opposer’s motion to reopen. 45 TTABVUE.⁸ The Board discharged the order to show cause because it found that Opposer had not lost interest in the case, but found that Opposer had failed to show excusable neglect to justify the reopening of his testimony and briefing periods. 45

⁸ The Board construed the motion as also seeking to reopen Opposer’s testimony period to add the three exhibits filed in response to the Board’s order to show cause. 45 TTABVUE 4.

TTABVUE 6-8. In doing so, the Board reiterated that it had previously “advised Opposer to obtain counsel and cautioned Opposer that if he did not obtain representation, he would be required to strictly comply with all applicable rules.” 45 TTABVUE 7-8. The Board also stated that it would give no consideration to Opposer’s proposed brief or the new evidence that he had attached to his response to the order to show cause and to his motion to reopen. 45 TTABVUE 8.

The Board’s order also considered whether any evidence that Opposer purported to submit during his testimony period or otherwise was properly of record and could be considered at final hearing. The Board first held that the exhibits attached to Opposer’s Amended Notice of Opposition were not properly of record because they did not consist of material that could be made of record by attachment to a pleading. The Board also found that Opposer’s testimony declaration was not properly of record because the parties had not stipulated to take testimony by declaration. 45 TTABVUE 9.

The Board then noted that each exhibit to Opposer’s testimony declaration (31 TTABVUE) had been accompanied by a cover sheet and, after construing each cover sheet to be a notice of reliance, the Board proceeded to consider whether each exhibit was properly made of record under notice of reliance. 45 TTABVUE 9. The Board found that only Exhibits 11 and 21 were properly made of record under notice of reliance because Exhibit 11, a Seller’s Permit issued by the California State Board of Equalization, was an official record, and because Exhibit 21, an Internet printout, met the procedural requirements for submission of Internet materials under notice

of reliance set forth in *Safer Inc. v. OMS Invests. Inc.*, 94 USPQ2d 1031 (TTAB 2010). 45 TTABVUE 10, n.6. The Board found that the other exhibits were not properly made of record under notice of reliance. 45 TTABVUE 10. Exhibits 10, 12-14, and 22 (an email, a membership roster, concert programs and discovery requests served by Opposer), 31 TTABVUE 4-9 and 24-32, were found not to be the type of evidence admissible under notice of reliance, and Exhibits 15-20 (various webpages), 31 TTABVUE 10-21, were found not to meet the procedural requirements set forth in *Safer*.

Finally, the Board's order found that the declaration and exhibit that Opposer had submitted during his rebuttal period, 33 TTABVUE, were not properly of record because Applicant had not introduced any evidence during its testimony period that was subject to rebuttal by Opposer, and because the evidence was procedurally improper. 45 TTABVUE 10-11.

The Board's order allowed Applicant 30 days to file a main brief if it wished to do so, and stated that if "Opposer files a reply brief, the brief must be confined to rebutting Applicant's main brief." 45 TTABVUE 11. Applicant filed a brief on October 3, 2016, 46 TTABVUE,⁹ and Opposer filed a reply brief on October 13, 2016. 47 TTABVUE.¹⁰

⁹ Opposer claims in his reply brief that Applicant's brief was untimely because it was filed on October 3, 2016, more than 30 days after the September 1, 2016 date of the Board's order. 47 TTABVUE 2. The 30th day after September 1, 2016 fell on a Saturday, which meant that under Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 6(a)(1)(C), Applicant's brief could be filed on the next business day. Applicant's brief was timely filed on the next business day, Monday, October 3, 2016.

¹⁰ Opposer's reply brief is nearly three times as long as Applicant's brief. The reply brief contains or refers to exhibits and evidence that the Board previously excluded from the

The Record and Evidentiary Objections

Because Applicant did not submit any evidence during its testimony period and because of the Board's prior evidentiary rulings in response to Opposer's multiple improper filings, the trial record is very small. It consists of the operative pleadings as described above (without exhibits thereto),¹¹ the file of the involved application, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), Opposer's Exhibits 11 and 21, which the Board previously ruled to be of record under notice of reliance, and Opposer's registration.¹²

The Board's September 1, 2016 order permitted Applicant to object to the admissibility of Exhibits 11 and 21 if Applicant filed a brief, 45 TTABVUE 11, and stated that the Board "will address any such objections and determine the probative weight to accord Exhibits 11 and 21 at final decision." In its brief, "Applicant objects to these exhibits as they provide no relevance to the issues before the Board in this

record, 47 TTABVUE 8-18, 23-30, and thus goes far beyond merely "rebutting Applicant's main brief," in violation of the Board's September 1, 2016 order. We have given no consideration to any evidence that the Board previously excluded, and have considered only those portions of the reply brief that can fairly be read to address arguments made in Applicant's brief.

¹¹ In its June 24, 2015 order, the Board found that "Opposer alleges that Applicant's applied-for mark is likely to cause confusion with both of Opposer's prior used and registered marks" and that "Applicant denies the salient allegations in the notice of opposition." 30 TTABVUE 2. As noted above, the Board also held that the exhibits attached to Opposer's Amended Notice of Opposition were not properly of record.

¹² The registration is of record despite Opposer's failure to make it of record through any of the means specified in Trademark Rule 2.122(d). Applicant admitted that the registration issued in 1995, and that Opposer owned it, in Applicant's Answer to Opposer's Amended Notice of Opposition, 12 TTABVUE 3, and Applicant treated the registration as if it were of record in Applicant's brief, in which Applicant framed the issue at final hearing as "Whether Applicant's GLORY HOUSE word mark is confusingly similar to Opposer's registered mark." 46 TTABVUE 6, 8. *See, e.g., Tiffany & Co. v. Columbia Indus., Inc.*, 455 F.2d 582, 173 USPQ 6, 8 (CCPA 1972); *Floralife, Inc. v. Floraline Int'l Inc.*, 225 USPQ 683, 684, n.6 (TTAB 1985).

proceeding, i.e., a likelihood of confusion between Opposer's design mark and Applicant's mark." 46 TTABVUE 9. We will address these objections before turning to the merits of the case.

Exhibit 11

Applicant objects to Exhibit 11, a copy of Applicant's August 1975 California State Board of Equalization Seller's Permit, on the ground of relevance, claiming that it shows only that Opposer was authorized to engage in a business at the address shown therein and that it "is of no probative value as to the issues in this proceeding." 46 TTABVUE 9. Opposer did not address this objection in his reply brief. We overrule this objection and will consider the Permit for whatever probative value it may have.

The Board previously ruled that Exhibit 11 is an official record. 45 TTABVUE 10, n.6. As such, it is "self-authenticating in nature (and hence require[s] no extrinsic evidence of authenticity as a condition precedent to admissibility) . . ." *The Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579, 580, n.5 (TTAB 1979). Because the Permit is self-authenticating and is more than 20 years old, the statements on the face of the Permit fall within the exception to the rule against hearsay for ancient documents, Fed. R. Evid. 803(16), and can be considered as substantive evidence.

Exhibit 21

Applicant also objects to Exhibit 21, the pages from Dun & Bradstreet regarding the entity called "Glory House Productions," on the ground that "it also provides no probative value to the consideration of the issue of whether there is a likelihood of

confusion between Opposer's GLORY HOUSE and Chinese character and design mark for printed materials, *et al.*, and Applicant's GLORY HOUSE mark for restaurant and catering services [because] there has been no nexus provided as to how Exhibit 21 relates to Applicant, Opposer, or how it relates to this opposition or supports Opposer's claim of a likelihood of confusion." 46 TTABVUE 9-10. Opposer did not respond to this objection in his reply brief. We sustain this objection.

With respect to Internet materials offered under notice of reliance, "the propounding party must indicate in the notice of reliance 'generally the relevance of the material being offered.'" TBMP Section 704.08(b). Opposer offers Exhibit 21 not as evidence of his own use of the mark and name Glory House, but instead to show that "Dun & Bradstreet Credibility Corp. continuously posts false information on their www.dandb.com website claiming that opposer Glory Yau-Huai Tsai's trademark GLORY HOUSE's publishing and printing business is a business that produces videos and motion pictures, and is an Urban Films Distributor." 31 TTABVUE 22. But even if the website page were Opposer's own and not that of a third party, it would not be competent evidence of Opposer's use of his mark. *See* TBMP §704.08(b) ("Internet printouts that are otherwise properly authenticated are acceptable to show that the statements contained therein were made or that information was reported, but not to prove the truth of the statements contained therein."). We give this webpage no further consideration.

II. Standing

A threshold issue in every *inter partes* case is the plaintiff's standing to challenge registration. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). The plaintiff must show that it possesses a real interest in the proceeding beyond that of a mere intermeddler, and that it has a reasonable basis for its belief of damage resulting from registration of the subject mark. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

As discussed above, Opposer's registration, which also contains the term GLORY, is of record because Applicant has admitted that the registration is existing and owned by Opposer. Because this registration is in the record, the record establishes Opposer's real interest in the proceeding and reasonable belief in damage by registration of Applicant's mark. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Opposer thus has standing to oppose.

III. Opposer's Section 2(d) Claims

Section 2(d) of the Trademark Act prohibits the registration of a mark that "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d). To prevail on his Section 2(d) claim, Opposer must prove by a preponderance of the evidence that he has priority of use of his mark and name, and

that use of Applicant's mark GLORY HOUSE for restaurant and catering services is likely to cause confusion, mistake, or deception as to the source or sponsorship of those services. *Cunningham*, 55 USPQ2d at 1848.

Priority

Priority may arise from "a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights." *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002). Opposer's registration gives him priority on his claim under Section 2(d) based upon his registration, *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974), but on his claim under § 2(d) based upon his alleged common law mark and trade name, he must prove the existence of proprietary rights in his alleged mark and name that predate Applicant's first use of its mark, here deemed to be the November 28, 2012 filing date of Applicant's application.¹³ *Herbko*, 64 USPQ2d at 1378.

The only admissible evidence regarding Opposer's possible prior use of Glory House at common law is the California State Board of Equalization Seller's Permit (Exhibit 11). The statements on the face of the Permit only show, however, that it

¹³ Applicant claims in its brief that it "has been using the mark GLORY HOUSE in connection with restaurant and catering services since at least as early as January 1, 2000," 46 TTABVUE 7, Applicant's claimed date of first use in its application. Trademark Rule 2.122(b)(2) provides that the "allegation in an application for registration . . . of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence." 37 C.F.R. § 2.122(b)(2). Applicant offered no evidence during its testimony period, but for priority purposes it may rely on its filing date. *See, e.g., Central Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1139 (TTAB 2013).

was issued in August 1975 by the California State Board of Equalization to holders named Glory House and/or Glory Yau Tsai at an address at 750 E. Garvey Avenue, Suite E, Monterey Park, California 91754 under the tax account number SR AP 13-675766. While the Permit states that its holder “Is Hereby Authorized Pursuant to Sales and Use Tax Law to Engage in the Business of Selling Tangible Personal Property at the Above Location,” the Permit *per se* does not prove any actual use of the name Glory House in any business, or the acquisition by Opposer of any proprietary rights in the alleged common law trademark and trade name. Because Opposer has failed to establish priority of use of his common law trademark or trade name, Opposer’s common law claim is dismissed.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion under Section 2(d) is based upon an analysis of all probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We consider each *du Pont* factor for which there is record evidence. In every likelihood of confusion analysis, of course, two key factors are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Because we have found Exhibit 11 to be incompetent evidence of Opposer’s use of his mark, the only evidence in the record on Opposer’s Section 2(d) claim is his

registration.¹⁴ We turn first to the first *du Pont* factor regarding the similarity of the marks.

A. Similarity of the Marks.

We compare the parties' marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

For ease of reference in our analysis on this factor, Opposer's registered mark is reproduced again below:



The mark is described as consisting "of the words 'GLORY HOUSE' enclosed within [sic] and a pair of wall torch holders and under a cross inside a crown." The five

¹⁴ That is sufficient to allow Opposer to proceed because an "opposition can be predicated solely on a prior registration, and neither testimony need be taken nor further evidence introduced since under § 7 of the Lanham Act, 15 U.S.C. 1057(b), a certificate of registration is 'prima facie evidence of the validity of the registration, registrant's ownership of the mark, and registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate . . .'" *Tiffany & Co.*, 173 USPQ at 7.

Chinese characters in the mark are translated into English in the registration as “righteous beauty book printing shop.” Opposer has disclaimed the exclusive right to use the Chinese characters that mean “book printing shop.” Applicant’s mark GLORY HOUSE “is a standard character mark without a claim to a particular font.” 46 TTABVUE 13.¹⁵

Applicant’s basic argument regarding the similarity of the marks is that Opposer’s “mark has a very distinct commercial impression and will not be confused with Applicant’s mark.” 46 TTABVUE 13. Opposer’s basic argument regarding similarity is that the words “GLORY HOUSE and GLORY HOUSE **both look exactly the same, sound the same, have the same meaning and have the exact same spelling,**” and that the “**literal portion of the marks are [sic] exactly the same, the predominant portion of the trademark name is exactly the same, namely the exact same words ‘GLORY HOUSE,’**” 47 TTABVUE 18 (emphasis in original), and that “**Applicant’s mark contains the exact same words, the exact same terms as Opposer Glory Yau-Huai Tsai’s registered mark. The marks are not only confusingly similar but also confusingly 100 percent identical.**” 47 TTABVUE 38 (emphasis in original).

¹⁵ As such, we must assume that Applicant’s mark could be used in any typeface, color, or size, including the font in which the words GLORY HOUSE appear in Opposer’s registration. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). We are not required, however, to assume use of the mark in that font combined with any of the other words and design elements shown in the registration. *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014).

Opposer's mark and Applicant's mark have the words "GLORY HOUSE" in common, but "likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark." *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). "On the other hand, 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 entireties. Indeed, this type of analysis appears to be unavoidable." *Id.*

For the reasons discussed below, we find that the English-language words "GLORY HOUSE" are the dominant portion of Opposer's mark. "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.'" *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). "[T]he literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers." *Id.* at 1911. The English-language words "Glory House" are the largest verbal element of the mark and they appear in the center of the mark surrounded by all of the other elements in the mark, including the mark's Chinese characters.¹⁶ For English speakers, the words GLORY HOUSE are

¹⁶ We can infer from the presence of the Chinese characters in the mark, and from the presence of "newspapers for the oriental community" in the identification of goods, that some of Opposer's consumers read Chinese, although the record contains no evidence as to the size of that portion. For consumers who are bilingual in English and Chinese, the verbal element of the mark is "Glory House Righteous Beauty Book Printing Shop," but we believe that the words "Glory House" would be the dominant portion of the mark for those consumers as well

the only part of the mark that would be articulated and used orally to refer to the goods.

We turn now to the required consideration of the marks in their entirety for similarity or dissimilarity in appearance, sound, connotation and commercial impression. Even though the words GLORY HOUSE comprise the entirety of Applicant's mark and dominate Opposer's mark, in comparing the marks in their entirety, we must take into account the words other than GLORY HOUSE and the visual elements that appear in Opposer's mark.

Chinese characters in the mark appear beneath the words GLORY HOUSE. We find that for consumers who cannot read the characters, they are a design element that gives the mark as a whole an East Asian connotation. We find that for consumers who can read the characters, they are not a design element, but rather the words "Righteous Beauty Book Printing Shop," which communicate the basic nature of the GLORY HOUSE business.

Applicant's mark shares the words GLORY HOUSE with Opposer's mark, but it does not have any design or other elements, or any Asian or business-defining connotations. We find nevertheless that when Opposer's mark and Applicant's mark are considered in their entirety, they are similar in sound, appearance, connotation, and commercial impressions, particularly to non-Chinese speakers, and that this *du*

because they are the largest and most central words in the mark, and the first words to be vocalized, and the other words are of an informative or explanatory nature.

Pont factor supports a finding of likelihood of confusion. We turn next to the similarity or dissimilarity of the parties' goods and services.

B. Similarity of the Goods and Services

This second *du Pont* factor assesses the similarity or dissimilarity of the parties' goods and services. The parties' goods and services do not have to be identical or competitive for confusion to be likely.¹⁷ “[L]ikelihood of confusion can be found ‘if the respective goods [and services] are 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.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Our determination of the similarity of the goods and services is based upon the identification of goods in Opposer's registration and the identification of services in Applicant's application. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The identification of goods in Opposer's registration is “printed matter; namely, childrens [sic] books, religious books, music books, newspapers for the oriental community, leaflets, business cards, menus, greeting cards, Christmas cards, letterheads and

¹⁷ Opposer recites this rule in his reply brief, 47 TTABVUE 7, 37, citing *Safety-Kleen Corp. v. Dresser Indus.*, 518 F.2d 1399, 186 USPQ 476 (CCPA 1975), *In Re Iolo Techs., LLC*, 95 USPQ2d 1498 (TTAB 2010), *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984), and Section 1207.01(a)(1) of the Trademark Manual of Examining Procedure (“TMEP”), but does not apply it to the goods and services here. In any event, none of the cited cases, and none of the cases listed in the cited TMEP section, involved the goods and services here, so they do not provide any support for a claim of relatedness.

envelopes,” while the identification of services in the application covers “restaurant and catering services.”¹⁸ The identifications of Opposer’s goods other than “newspapers for the oriental community” have no restrictions or limitations as to their nature so we must presume that those printed goods encompass all such goods. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *Stone Lion*, 110 USPQ2d at 1162-63. Applicant’s “restaurant and catering services” similarly have no restrictions or limitations, and “thus must be construed to encompass all types of restaurant services . . .,” *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009), including restaurants providing Asian cuisine, and all types of catering services, including individual and corporate caterers.

We agree with Applicant that “Opposer has not pled or provided any evidence that the goods and services are in direct competition,” 46 TTABVUE 15, and Opposer made of record no evidence that the goods and services are related. Indeed, Opposer admits that the goods in his registration and the services in Applicant’s application are unrelated. Despite this admission, Opposer argues that “[e]ven though defendants’ business services and goods are unrelated to opposer Glory Yau-Tsai’s business services and goods, **likelihood of confusion can occur at anytime and anywhere about who the owner of the business GLORY HOUSE is.**” 47 TTABVUE 6, 37 (emphasis in original). As discussed in footnote 14, Opposer may rely solely upon the evidentiary presumptions flowing from his registration, so we

¹⁸ Likelihood of confusion may be found if it exists with respect to any item in the parties’ identifications of goods or services. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

must compare the goods identified in his registration and the services identified in the application to see whether they are inherently similar or related, solely on the face of those identifications. *See Stone Lion*, 110 USPQ2d at 1159-63; *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014) (on *ex parte* appeal under Section 2(d), Board must determine from the identifications and the record whether relatedness of the goods and services is “evident, well-known or generally recognized.”).

The only goods identified in Opposer’s registration that have any intrinsic relationship to the services identified in Applicant’s application are menus, which are used by consumers of restaurant or catering services to select food and beverages. That fact alone, however, is not enough to show that menus, and restaurant and catering services, are related for purposes of this *du Pont* factor.

In *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004), the Federal Circuit reversed the Board’s finding that use of the identical mark RITZ for both cooking classes and kitchen textiles was likely to cause confusion. The Board had found that cooking classes and kitchen textiles were related because “the services of applicant clearly require the use of certain of opposer's goods.” *Id.* at 1355. The Federal Circuit found this to be in error because the fact that “two goods are used together . . . does not, in itself, justify a finding of relatedness. [T]he test is not that goods and services must be related if used together, but merely that that finding is part of the underlying factual inquiry as to whether the goods and services at issue . . . can be related in the mind of the consuming public as to the origin of the goods.”

Id. at 1355-56 (quoting *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1358 (Fed. Cir. 2000)). The Federal Circuit found that “aside from the fact that these goods are used together, there is no indication that the consuming public would perceive them as originating from the same source. As a result, the board's finding of relatedness is not supported by substantial evidence.” *Id.* at 1356. *See also St. Helena Hosp.*, 113 USPQ2d at 1086-87 (the fact that printed materials such as manuals, posters, stickers, activity cards and educational worksheets dealing with physical activity and physical fitness (identified in the cited registration) were used in connection with health services (identified in the subject application) was insufficient to show that those goods and services were related). There is no evidence here showing that menus, and restaurant and catering services, would be viewed as originating from the same source.

Unlike menus, the remaining goods identified in Opposer’s registration have no intrinsic use in the rendition of restaurant and catering services *per se*. The only other identified goods which conceivably could be related solely by virtue of their nature, i.e., leaflets,¹⁹ business cards, letterheads, and envelopes,²⁰ are, of course, used by

¹⁹ We may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed form or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We judicially notice the definition of “leaflet” from the *English Oxford Living Dictionaries* (oxforddictionaries.com) as a “printed sheet of paper containing information or advertising and usually distributed free.”

²⁰ Children’s books, religious books, and music books are specific types of books with specific contents, while “newspapers for the oriental community” are a specific type of publication defined by reference to ethnicity. The rendition of restaurant and catering services does not involve, much less require, the use of these goods, and there is no other basis in the record or otherwise upon which to conclude that these goods would be viewed as coming from the same source as restaurant or catering services.

virtually every company in every industry. Use of ubiquitous business stationery and materials is not enough, however, to show the relatedness of these goods to restaurant and catering services such that consumers would believe that both the goods and the services emanate from a common source. *Shen*, 73 USPQ2d at 1355-56; *St. Helena Hosp.*, 113 USPQ2d at 1086-87.²¹

Given Opposer's admission that his goods and Applicant's services are unrelated, the absence of any inherent relationship between most of Opposer's goods and Applicant's services, and the absence of any evidence or legal authority showing that any of Opposer's goods are related to Applicant's services, we find that the parties' goods and services are dissimilar. This *du Pont* factor weighs heavily against a finding of likelihood of conclusion.

C. Channels of Trade and Classes of Customers

The third *du Pont* factor considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels," *Stone Lion*, 110 USPQ2d at 1061, while the fourth *du Pont* factor considers the classes of customers to whom the goods and services are sold. *Coach*, 101 USPQ2d at 1722-23. There is no evidence in the record on these factors, but we may infer the general channels of trade and classes of customers from the identifications of goods and services in the registration and application. *Viterra*, 101 USPQ2d at 1908.

²¹ Greeting cards and Christmas cards may similarly be used by some companies, but that fact alone does not establish that cards, and restaurant and catering services, would be viewed as originating from a common source.

There is some overlap in the classes of customers for the services identified in Applicant's application and the goods identified in Opposer's registration simply because restaurant and catering services, and goods such as greeting cards, Christmas cards, letterheads and envelopes, are used by most members of the general public. But "the mere fact that both opposer and applicant are presumed to market to general consumers, including businesses and individuals, does not dictate a conclusion that confusion is likely to arise." *Sports Auth. Mich. Inc. v. PC Auth. Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2001).

In *Sports Authority*, the Board judicially noticed that purchasers of computer services (the applicant's services) and related goods would likely also be purchasers of footwear, apparel, and sporting goods and services (some of the opposer's goods), but found that there was nothing in the record "to establish the overlap in purchasing habits of consumers of computer goods and services and consumers of sporting goods, equipment, apparel and footwear" or "to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship." *Id.* See also *Coach*, 101 USPQ2d at 1723 ("there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source," citing *Sports Auth.*, 63 USPQ2d at 1794).

In this case, Opposer made of record no evidence to suggest that merely because members of the general public eat in restaurants or use caterers and also buy printed

goods such as envelopes and greeting cards, they would be likely to believe that those services and goods come from a common source.

The other goods identified in Opposer's registration, children's books, religious books, music books, newspapers for the oriental community, leaflets, business cards, and menus, are, by their very nature, consumed by narrower classes of customers, not by most members of the general public. Opposer made no evidence of record that consumers of restaurant and catering services who also consume these specific goods would be likely to believe that those services and these specific goods come from a common source. This *du Pont* factor weighs against a finding of likelihood of confusion. *Sports Auth.*, 63 USPQ2d at 1794.

With respect to the channels of trade, Applicant's restaurant and catering services are, by definition, provided primarily through food service outlets that prepare, serve, and/or deliver food and beverages. Opposer's printed matter would not ordinarily be sold through such food service channels of trade. Menus, the goods that have the most inherent relationship to restaurant and catering services, may be used in restaurants or when ordering through caterers, but logically they are sold directly to the restaurants and caterers themselves because by necessity they must be customized for each consumer.²² A restaurant patron or catering customers would also have no knowledge of where or by whom a restaurant or catering menu was printed.

²² Such customization would presumably include a display and description of the available food and beverage items and their prices, as well as a display of the restaurant's or caterer's own service mark and other information specific to the restaurant or caterer.

Greeting cards, Christmas cards, letterheads, and envelopes are not typically sold in restaurants or through caterers, but instead through channels of trade such as mass merchandisers, stationery stores, and printers.²³ Children's books, religious books, and music books are not typically sold in restaurants or through caterers, but instead to specific segments of the general public through channels of trade such as general and specialty bookstores, mass merchandisers, and music stores. "Newspapers for the oriental community" are not typically sold in restaurants or through caterers, but instead through channels in which newspapers directed to members of the East Asian community are sold. Leaflets and business cards are not typically sold in restaurants or through caterers, but instead are sold through channels of trade such as stationery stores, business supply stores, and printers to individuals and companies who need to advertise and to identify themselves for business purposes using those goods, which by their nature require customization for each customer.²⁴

Opposer made of record no evidence to show any overlap between the food service outlets through which restaurant and catering services are sold, and the channels of

²³ The goods identified in Opposer's registration as "letterheads" and "envelopes" must be construed to include blank stationery and blank envelopes, as well as stationery and envelopes customized for a particular business or individual through the imprinting on the goods of a specific name and specific contact information.

²⁴ Unlike letterhead and envelopes, which can be sold "in blank," we have difficulty envisioning "blank" leaflets and "blank" business cards as reasonably falling within the identification of those goods in Opposer's registration. In the case of business cards, customization would involve imprinting the goods with the name, title, and contact information of the person identified through the card, while in the case of leaflets, customization would involve imprinting the goods with the customer's advertising information and contact information.

trade through which Opposer's printed goods are sold. Opposer also made of record no evidence that restaurant or catering services would be offered through mass merchandisers, bookstores, stationery stores, business supply stores, printers, and other established channels of trade through which Opposer's goods other than menus are typically sold.²⁵ We find that this *du Pont* factor weighs against a finding of a likelihood of confusion. *Sports Auth.*, 63 USPQ2d at 1794.

D. Actual Confusion

Applicant argues that Opposer has submitted no evidence of actual confusion and that the parties' marks have coexisted for more than 15 years. 46 TTABVUE 7, 15. Proof of actual confusion is not necessary to show a likelihood of confusion, *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990), and evidence of actual confusion is difficult to obtain in any event. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1834 (TTAB 2012). The absence of actual confusion is not probative unless it is accompanied by evidence demonstrating that in light of the parties' actual business activities, confusion, if likely, would have occurred. *See Cunningham*, 55 USPQ2d at 1847. Neither party submitted any evidence regarding the extent and nature of the use of their marks, so we find that this factor is neutral to our analysis.

²⁵ It is possible that in some mass merchandisers or "big box" retailers, restaurant services could be sold together with greeting cards, envelopes, and some of the other goods identified in Opposer's registration. The mere availability of the same goods and services "under the same roof" has long been held not to be a sufficient basis for a finding that those goods or services are related. *See, e.g., Federated Foods*, 192 USPQ at 29.

IV. Conclusion

We find that Opposer failed to prove by a preponderance of the evidence that Applicant's use of its mark in connection with restaurant and catering services is likely to cause prospective consumers of those services to believe that they originate with or are sponsored or authorized by Opposer. In balancing the *du Pont* factors on the record here, we find that the goods, classes of customers, and channels of trade are dissimilar, and that these *du Pont* factors outweigh the similarity of the marks and establish that confusion is not likely.

Decision: The claims in the Amended Notice of Opposition under Section 2(d) of the Trademark Act are dismissed with prejudice.