

This Opinion Is Not A
Precedent Of The TTAB

Mailed: July 17, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Airbnb, Inc.
v.
Seth Bolt and Victoria Bolt
—

Opposition No. 91273632
—

Christopher T. Varas and Sara K. Stadler of Kilpatrick Townsend & Stockton LLP
for Airbnb, Inc.

John D. Griffin of Griffin Law PC
for Seth Bolt and Victoria Bolt
—

Before Kuhlke, Adlin and Elgin,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicants, Seth and Victoria Bolt, seek registration of the mark shown below for “Hotel services; Restaurant services; Arranging temporary housing accommodations; Booking of temporary accommodation; Providing information in the field of temporary lodging and accommodations; Providing temporary accommodation” in International Class 43.¹

¹ Serial No. 90444946 was filed on January 1, 2021, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C.



Opposer, Airbnb, Inc., has opposed registration of Applicants’ mark on the ground that, as used in connection with Applicants’ services, the mark so resembles Opposer’s various common law and registered AIRBNB marks, for a variety of services, including “Arranging temporary housing accommodations; Providing online reservation services for temporary lodging; Providing temporary lodging information via the Internet,” as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).² By its answer, Applicants admit, inter alia, the following allegations:

2. The fanciful term AIRBNB has no ordinary English language meaning.
3. Airbnb is the owner of numerous U.S. registrations and pending applications for AIRBNB, including, but not limited to the registrations shown in the table below [opposer’s pleaded registrations].
4. Airbnb’s Marks are inherently distinctive as applied to Opposer’s Services, which comprise an online marketplace as described throughout this Notice.

§ 1051(b). The application includes the following description of the mark: “The mark consists of the stylized wording ‘TREEBNB’ with a stylized mountain range directly above.”

² Not. of Opp., 1 TTABVUE. Opposer also pleaded dilution by blurring; however, this claim was not addressed in the brief and is forfeited. *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, Cancellation No. 92050879, 2013 WL 5407315, at *2, *aff’d*, 565 F. App’x 900 (Fed. Cir. 2014) (mem.).

Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020).

15. Airbnb's Marks predate and are senior to the Application date.

16. Airbnb's Marks are first in time, and there are no issues as to priority or seniority.

Applicants otherwise generally deny the allegations.³

I. RECORD

On February 15, 2024,⁴ the Board approved the parties' stipulation filed on August 28, 2023 (Stip.).⁵ The parties stipulated to the authenticity and admissibility of Applicants' listings on Opposer's websites attached to the stipulation. The record also includes the pleadings and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file of the application subject to the notice of opposition. In addition the record includes:

- Opposer's Testimony Declarations of Eugene Krasnopolsky, Opposer's Director of Global Brand Marketing, with exhibits (Krasnopolsky Decl.);⁶ and Hal Poret, Opposer's outside survey researcher and consultant, with exhibits (Poret Decl.);⁷
- Opposer's notices of reliance on 1) certified copies and TSDR printouts of Opposer's pleaded registrations showing current status and title;⁸

³ The answer also includes several "affirmative defenses" which are simply amplifications of the denials.

⁴ 20 TTABVUE.

⁵ 15 TTABVUE.

⁶ 17 TTABVUE.

⁷ 16 TTABVUE.

⁸ 18 TTABVUE. TSDR printouts for these registrations were also attached to Opposer's Notice of Opposition. 1 TTABVUE.

2) printouts of records from the Board's online database TTABVUE showing various proceedings involving Opposer;⁹ printouts from various third-party websites and dictionary definitions;¹⁰ and various discovery requests and responses.¹¹

Applicants did not take any testimony, file a notice of reliance or a brief.

II. THE PARTIES

Opposer provides a “community marketplace in which people can list, view, and book unique accommodations and experiences around the world on its website [and] mobile app.” Krasnopolsky Decl. ¶ 2, 17 TTABVUE 2. Opposer was founded in 2008 and began use of the mark AIRBNB in 2009. *Id.* ¶¶ 2-3, 17 TTABVUE 2. Opposer's listings include treehouses. *Id.* Exh. A-1, 17 TTABVUE 7. Opposer's pleaded registrations are summarized below:¹²

Registration No. 3890025 for the standard character mark AIRBNB for “providing online business directories featuring temporary lodging,” in International Class 35;

Registration No. 3890027 for the standard character mark AIRBNB for “Arranging temporary housing accommodations; Providing online reservation services for temporary lodging; Travel agency services, namely, [making reservations and bookings for transportation] and lodging; Providing temporary lodging information via the Internet,” in International Class 43;

Registration No. 3971784 for the standard character mark AIRBNB for “computer services in the nature of customized

⁹ 12 TTABVUE.

¹⁰ 13 TTABVUE.

¹¹ 14 TTABVUE.

¹² Bracketed information contains services that have been deleted in post-registration filings.

web pages featuring user-defined information, personal profiles and information,” in International Class 42;

Registration No. 4289397 for the standard character mark AIRBNB for “Providing an online interactive website featuring the listing and rental of temporary lodging; Providing online computer database and online searchable databases featuring information, listings and announcements about housing, apartments, condominiums, townhouses, real estate, [commercial real estate]and rental and leasing advertisements for the foregoing; Real estate listing, rental and leasing services for residential housing, apartments, rooms in homes, sublets, vacation homes, cabins and villas [and office space in commercial properties] on a global computer network; Providing reviews and feedback about listers and renters of real estate,” in International Class 36, “Computer services, namely, creating an on-line community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in social networking featuring the rental and listing of real estate,” in International Class 42, “On-line social networking services,” in International Class 45;

Registration No. 4329542 for the standard character mark AIRBNB for “Online trip and travel recommendations and reservation services; Providing travel information over global computer networks, namely, providing search services for travel listings, travel information and related topics and for making reservations and bookings for transportation; Providing reviews and recommendations of local attractions via a global computer network,” in International Class 39, “Providing travel information over global computer networks, namely, providing search services for travel listings, travel information and related topics and for making reservations and bookings for lodging,” in International Class 43;

Registration No. 4385613 for the standard character mark AIRBNB for “Providing an online interactive website obtaining users comments concerning business organizations, service providers, and travel and social activities; Providing information, namely, compilations, rankings, ratings, reviews, referrals and recommendations relating to business organizations, service providers, and

travel and social activities using a global computer network; Advertising and promotion services and related consulting; dissemination of advertising for others via a global communications network; online advertising services for others, namely, providing advertising space on internet web sites; Providing a searchable online advertising guide featuring the goods and services of online vendors; providing a searchable online evaluation database for buyers and sellers; promoting the goods and services of others; advertising and advertisement services; advertising and information distribution services, namely, providing classified advertising space via the global computer network; providing consumer product and service information via the Internet; providing an online business information directory on the Internet; providing on-line computer databases and on-line searchable databases featuring classified listings; computer services, namely, providing on-line computer databases and on-line searchable databases featuring consumer information on a wide variety of topics of general interest to the consuming public,” in International Class 35;

Registration No. 4884815 for the standard character mark AIRBNB for “Vacation real estate listing services and providing such services via a global computer network; Real estate listing services, namely, providing an interactive website and online database of rental properties, rental information, rental property descriptions and images, rental locations and amenities, availability and rates for vacation rental homes, condominiums, cabins, villa, apartments, and time-shares; Real estate services, namely, arranging of rental agreements for real estate for others by through a website where users can post and receive requests to rent short-term houses, condos, * and * apartments [, and time-shares],” in International Class 36, “Providing a website for the arrangement and booking of travel tours and excursions; Providing a website featuring travel information and commentary; Providing an online searchable computer database featuring information on travel; Providing reviews of travel service providers; Travel guide and travel information services; Travel agency services, namely, making reservations and bookings for transportation, excursions, travel tours and travel [; Providing links to the web sites of others featuring transportation, excursions, travel tours and travel],” in

International Class 39, “Providing online reservation, booking and search services for temporary lodging, temporary accommodations and temporary vacation rentals; Providing an online interactive website featuring temporary lodging, temporary accommodations, temporary vacation rentals and temporary rental listings; Providing a website featuring information in the field of temporary lodging, temporary accommodations and temporary vacation rentals; Travel agency services, namely, making reservations and bookings for temporary lodging, temporary accommodations and temporary vacation rentals; Providing rental information for temporary lodging, temporary accommodations and temporary vacation rentals, namely, property descriptions and images, reviews, locations and amenities, availability and rates for temporary lodging, temporary accommodations and temporary vacation rentals,” in International Class 43.

Applicants “provide short-term rentals in treehouses, mirror cabins and domes at their Whitwell, Tennessee and Walhalla, South Carolina properties, along with chef, massage and yoga personal services for overnight guests in Tennessee.” Notice of Reliance Exh. B, 14 TTABVUE 17 (Applicants’ response to Interrogatory No. 8). Applicants have listed their treehouse rentals on Opposer’s website since 2015. Notice of Reliance Exh. B, 14 TTABVUE 17, 20 (Applicants’ responses to Interrogatory Nos. 9, 16).

III. ENTITLEMENT TO A STATUTORY CAUSE OF ACTION

Entitlement to a statutory cause of action is a requirement that must be proven by the plaintiff in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1372 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark where doing so is within the zone of interests protected by the statute, and the party has a reasonable belief in

damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-05 (Fed. Cir. 2020).

As listed above, the record includes status and title copies of Petitioner's pleaded registrations that support a plausible likelihood of confusion claim. In view thereof, Petitioner's entitlement to a statutory cause of action to oppose registration of Applicants' mark is established. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000) (pleaded registrations "suffice to establish ... direct commercial interest"; a belief in likely damage can be shown by establishing a direct commercial interest).

IV. SECTION 2(d) CLAIM

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 its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that Applicants' use of their mark in connection with the services identified in their application is likely to cause confusion, mistake, or deception as to the source or sponsorship of those goods. *Cunningham*, 222 F.3d at 946.

A. PRIORITY

In view of the pleaded registrations and Applicants' admissions in their answer, priority is not in issue with respect to the marks and services in the registrations. *See*

Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024 (CCPA 1982); and *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400 (CCPA 1974).

B. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (*DuPont*); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019) (Board considers each relevant *DuPont* factor for which there is evidence and argument). We turn to consider the likelihood of confusion factors for which we have evidence and argument.

1. Relatedness of Services, Channels of Trade, Conditions of Purchase

Opposer pleaded ownership of several registrations and common law rights. However, we focus our analysis on Opposer's registered standard character mark AIRBNB for "Arranging temporary housing accommodations; Providing online reservation services for temporary lodging; Providing temporary lodging information via the Internet," in International Class 43 (Registration No. 3890027). If we do not find a likelihood of confusion with respect to this mark and these services, then there would be no likelihood of confusion with the marks and services in Opposer's other

registrations and in which Opposer claims common law rights. *See In re Max Cap. Grp. Ltd.*, Serial No. 77186166, 2010 WL 22358 at *2 (TTAB 2010).¹³

Opposer’s “arranging temporary housing accommodations” are identical to Applicants’ “arranging temporary housing accommodations.” Opposer’s “providing online reservation services for temporary lodging” and “providing temporary lodging information via the Internet” and Applicants’ “booking of temporary accommodation” and “providing information in the field of temporary lodging and accommodations” are legally identical because Opposer’s services are encompassed by Applicants’ broadly worded services.

Further, where, as here, the services in the asserted registration and subject application are identical or legally identical and there are no limitations as to channels of trade or classes of purchasers in either the application or Opposer’s registrations, we must presume that Applicants’ and Opposer’s services will be offered in the same channels of trade and will be bought by the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1268 (Fed. Cir. 2002). In addition, the record reveals that Applicants have used Opposer’s marketplace to promote their

¹³ As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, the citation form in this opinion is in a form provided in the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the **Westlaw (WL)** database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

treehouse rentals since 2015. Notice of Reliance Exh. B at 6, 14 TTABVUE 19; Stip. Exh. A, 15 TTABVUE 5-26 (copies of Applicants' listings on Opposer's platform).

We consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 476 F.2d at 1361, also based on the identifications of services in the pleaded Registration and subject Application, as that determines the scope of the registration. *Stone Lion Cap. v. Lion Cap.*, 746 F.3d 1317, 1324 (Fed. Cir. 2014). The identifications of services in the application and registration include all services of the type identified, without limitation as to their nature or price. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013). Nonetheless, by their very nature, consumers would apply at least some care to their purchase, to ensure their accommodations will be in an acceptable location and meet their other needs.

The factors regarding the relatedness of the services and channels of trade weigh strongly in favor of a likelihood of confusion, but the conditions of sale factor weighs slightly against it.

2. Strength of Opposer's Mark AIRBNB

Before we compare the marks, we consider the strength, including any fame, of Opposer's AIRBNB mark. We do so because a determination of the strength of this mark helps inform us as to its scope of protection. In doing so, we consider the fifth *DuPont* factor which enables Opposer to expand the scope of protection that should be given to its mark through evidence showing “[t]he fame of the prior mark (sales, advertising, length of use).” *DuPont*, 476 F.2d at 1361.

When evaluating the strength, we look at the mark's inherent strength based on the nature of the term itself and its commercial strength in the marketplace, *Spireon Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023), citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength), as well as “[t]he number and nature of similar marks in use on similar goods.” See *Made in Nature, LLC v. Pharmavite LLC*, Opposition No. 91223352, 2022 WL 2188890, at *11 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003). See also *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017).

a. Conceptual Strength

Because Opposer's Registration is on the Principal Register, without a claim of acquired distinctiveness, the mark AIRBNB is presumed to be at worst inherently distinctive for those services. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, Opposition No. 91118587, 2006 WL 2460188, at *21 (TTAB 2006) (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”). Opposer's founders coined the term AIRBNB as an homage to the time the founders rented out a room with airbeds in their apartment adding free breakfast as a perk. Krasnopolsky Decl. ¶ 3, 17 TTABVUE 2.

Regarding the BNB portion of AIRBNB, in their answer Applicants admit AIRBNB is distinctive “but not as to whether BNB by itself is fanciful [or] distinctive.” Ans. ¶1, 5 TTABVUE 3; however, there is no evidence in the record to support a finding that BNB is not distinctive. On the contrary, the dictionary definitions list B&B (not BNB) as a common abbreviation of “bed and breakfast.” Notice of Reliance Exhs. M-U, 13 TTABVUE 217, 224, 231, 237, 245, 250, 253, 257, 263.

b. Commercial Strength

Commercial strength is “based on marketplace recognition of the mark [],” *Made in Nature*, 2022 WL 2188890, at *12, and “may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the [services] traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018) (quoting *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) (internal citations omitted)). Commercial strength may also be measured by “widespread critical assessments; notice by independent sources of the products identified by the marks; and the general reputation of the products and services.” *Monster Energy Co. v. Lo*, Opposition No. 91225050, 2023 WL 417620, at *11 (TTAB 2023) (quotation marks and quotations omitted).

“Fame for confusion purposes arises as long as a significant portion of the relevant consuming public recognizes the mark as a source indicator.” *Id.* (citing *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1375

(Fed. Cir. 2005)). Here, the “relevant consuming public” consists of purchasers of the temporary lodging services.

“[W]e must determine where to place Opposer’s mark on the ‘spectrum’ of marks, which ranges from ‘very strong to very weak.’” *Id.* (citing *Joseph Phelps Vineyards*, 857 F.3d at 1325). “Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use,” *id.* (citing *Bose*, 293 F.3d at 1371), and, as a result, it is incumbent on Opposer to clearly prove that its AIRBNB mark is famous. *Made in Nature*, 2022 WL 2188890, at *16 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1367 (Fed. Cir. 2012)).

To prove the commercial strength of its AIRBNB mark, Opposer relies on: the Poret survey; media references in press, travel and lifestyle publications; long standing use of the mark; and enforcement activity.

Poret Survey

The survey was designed to measure “the extent to which the AIRBNB mark is famous, if at all, in connection with rental property reservation services.” Poret Decl. ¶ 2, Exh. A at 3 (expert report), 16 TTABVUE 2, 8. Based on the survey results, 32.7% of all 300 respondents named AIRBNB when asked, unaided, to list all companies, websites, or mobile apps they are aware of that offer finding, listing, and reserving rental properties. The next most frequently identified brands were ZILLOW at 12% and VRBO at 11%. Mr. Poret finds that the unaided result for AIRBNB is very high as it was top of mind for a substantial percentage of the general public, and the most-

named mark. When shown the AIRBNB word mark, 90.3% of respondents answered that they had seen or heard of AIRBNB. The next most frequently recognized mark was VRBO at 40%. Based on the survey results, Opposer's survey expert concludes that "the AIRBNB word mark is famous." Poret Decl., 16 TTABVUE 32. The survey and Mr. Poret's findings stand unrebutted.

Media References

The record includes many references to and reviews of accommodations available through AIRBNB specifically pertaining to treehouses. A few examples are summarized below:

"The 17 Coolest Treehouses on Airbnb You Can Book Right Now," Thrillist (Nov. 16, 2022), Notice of Reliance Exh. A, 13 TTABVUE 8-23;

"The 11 Best Airbnb Treehouses in the U.S.," TimeOut (July 17, 2023) Notice of Reliance Exh. F, 13 TTABVUE 106-19;

"7 Amazing Tree Houses You Can Rent on Airbnb," Business Insider (Feb. 9, 2016) Notice of Reliance Exh. H, 13 TTABVUE 143-58; and

"Missouri Treehouse on Airbnb Called 'Rental of Our Dreams,'" Fox2Now (Jan. 12, 2023) Notice of Reliance Exh. L, 13 TTABVUE 209-12.

Length of Time

Opposer has offered its services under the mark AIRBNB since 2009 and has offered treehouse rentals since 2015. Krasnopolsky Decl. ¶¶ 2-3, 17 TTABVUE 2; Notice of Reliance Exh. B, 14 TTABVUE 19 (Applicants' response to Interrogatory No. 16).

Enforcement Actions

Opposer actively enforces its trademark rights in AIRBNB. This includes taking action before the Board against registration of third-party applications for BNB-formative marks (SEABNB, MAILBNB, BAGBNB, VRBNB, SHAPRPBNB, GRADBNB, CAREBNB, and CARBNB) for related services. Opp. Notice of Reliance, Exhs. A-J, L, M, 12 TTABVUE 8-97, 105-16 (printouts of Board opposition proceedings).

Finally, there is no evidence in the record of the “number and nature of similar marks in use on similar goods” that might diminish the strength of Opposer’s AIRBNB mark.

Based on the entirety of the record, we find that AIRBNB is on the “very strong” end of the “spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 857 F.3d at 1325. Opposer’s AIRBNB is entitled to a broad scope of protection against confusingly similar marks, therefore increasing the likelihood of confusion with Applicants’ mark. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992); *see also Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992) (a strong mark “casts a long shadow which competitors must avoid”).

3. Similarity or Dissimilarity of the Marks

Considering the similarity or dissimilarity of the parties’ marks, we compare them in their entireties in terms of appearance, sound, connotation and commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018); *see also Palm Bay*, 396 F.3d at 1371. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, Serial No. 85497617,

2014 WL 2531200, at *2 (TTAB 2014)), *aff'd mem.*, 777 F.App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling 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.”) (citation omitted). In comparing the marks, we are mindful that where, as here, the services are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs.*, 668 F.3d at 1368; *Century 21 Real Estate Corp.*, 970 F.2d at 877. “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (quoting *Coach Servs.*, 668 F.3d at 1368); *see also Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053 (Fed. Cir. 2012).

The marks must be considered in their entirety, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *Detroit Athletic*, 903 F.3d at 1305 (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985)).

While Applicants' mark  includes a design element, we find the literal portion dominates and is the more memorable portion of the mark. Where a

mark comprises both wording and a design, greater weight is often given to the wording, because it is the wording that purchasers would use to refer to or request the services. *See, e.g., Viterra*, 671 F.3d at 1362. In addition, the stylization in Applicants' wording is minimal and does not provide a point of distinction. Moreover, because Opposer's mark is registered in standard characters, the rights associated with that mark reside in its wording, and not in any particular display and we must consider that Opposer's mark may be displayed in the same font, color and size that Applicants uses in their mark. *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(c)(iii) (May 2024).

In comparing the literal terms AIRBNB and TREEBNB, they have the same structure, one syllable word preceding the term BNB. The identical structure presents a similar commercial impression. We acknowledge the first words AIR and TREE are different, *Palm Bay*, at 1689 (Fed. Cir. 2005) (first word in mark a prominent feature). However, given the commercial strength of AIRBNB in this field and the offering of tree houses on the AIRBNB platform, consumers would view TREEBNB as a subset of AIRBNB's services or, as Opposer characterizes it, "consumers would believe Applicants' TREEBNB services are an expansion of Airbnb's existing use of [their] Airbnb brand in the treehouse space." Opposer's Brief, 19 TTABVue 8.


Moreover, as we have here, where the services are identical or legally identical, the degree of similarity between the marks necessary to support a determination that


confusion is likely declines. See *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337 (Fed. Cir. 2012); *Viterra*, 671 F.3d at 1367.

We find the similarities in the marks outweigh the dissimilarities and this factor also favors likelihood of confusion.

4. Potential for Confusion

Opposer acknowledges it is not possible to document instances of actual confusion because Applicants have not yet used their composite mark TREEBNB in commerce. However, Opposer provided a likelihood of confusion survey to demonstrate likely confusion. The survey follows the *Eveready* format. *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366 (7th Cir. 1976); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, Opposition No. 91194148, 2015 WL 5316485, at *15 (TTAB 2015). The survey revealed that 39.5% of the test group respondents expressed confusion between

AIRBNB and  as compared to 2% of the control group respondents shown

AIRBNB and . The resulting number of 37.5% (removing the control results from the test results) confusion is well within the range where likely confusion has been found. *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463-64 (Fed. Cir. 1991) (30%); *Anheuser-Busch*, 2015 WL 5316485 at *15 (24% or 17.5%). The survey stands un rebutted and we find it probative to support likely confusion.

5. Balancing the Factors

We have carefully considered all arguments and evidence properly of record, including any not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors.

We have found that the parties' services, customers, and channels of trade are identical or legally identical, that Opposer's mark AIRBNB is inherently distinctive and commercially very strong affording it a very broad scope of protection, and the marks are similar. Weighing the factors, the record establishes Applicants' mark



is likely to cause consumer confusion with Opposer's mark AIRBNB.

DECISION: The opposition is sustained.