

This Opinion is not a  
Precedent of the TTAB

Mailed: October 24, 2017

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*The reThink Group, Inc.*

*v.*

*Ann Peterson*

Opposition No. 91227798

Craig Gipson and Brian D. Flagler of Flagler Law Group LLC,  
for The reThink Group Inc.

Ann Peterson, *pro se.*

Before Taylor, Heasley and Coggins,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Ann Peterson (“Applicant”), doing business as RealOrange International Ministries, Inc., seeks registration on the Principal Register of the word-and-design



composite mark for “Christian ministry services” in International Class

45.<sup>1</sup>

The reThink Group Inc. (“Opposer”) opposed registration<sup>2</sup> on the ground that Applicant’s mark, when used in connection with her identified services, is likely to cause confusion with Opposer’s previously used and registered word-and-design



composite mark

for:

Electronic downloadable publications and prerecorded media, namely, DVDs and CDs, all related to youth, family, or church ministry and marketed to churches and featuring religious curriculum for children, dramatic and non-dramatic musical sound recordings, and video recordings, all in the fields of spiritual formation for children and youth, family ministry leadership, and parenting in International Class 9;

Printed materials, all related to youth, family, or church ministry and marketed to churches, namely, series of non-fiction books, curriculum in the nature of printed instructional, educational and teaching materials, study guides, and workbooks, all in the fields of spiritual formation for children and youth, family ministry leadership, and parenting in International Class 16; and

Educational and entertainment services, all related to youth, family, or church ministry and marketed to churches, namely, arranging and conducting church leadership conferences and workshops and developing and disseminating educational materials of others, all in the fields of family ministry leadership, spiritual formation for children and youth, and

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<sup>1</sup> Application Serial No. 86738933 was filed on August 27, 2015, based upon Applicant’s claim of first use anywhere since July 1, 2009 and use in commerce since at least as early as August 1, 2014. According to the Application, color is not claimed as a feature of the mark. The description of the mark reads: “The mark consists of a flower above the wording ‘REAL ORANGE.’”

<sup>2</sup> 1 TTABVue, Notice of Opposition. Trademark Act Sections 2(d), 3, and 13, 15 U.S.C. §§ 1052(d), 1053, and 1063.

parenting; Providing religious instruction information via a global computer network related to youth, family, or church ministry in the fields of family ministry leadership, spiritual formation for children and youth, and parenting in International Class 41.<sup>3</sup>

In her Amended Answer, Applicant denied the salient allegations of likelihood of confusion.<sup>4</sup> The Amended Answer also contains a number of affirmative allegations amplifying upon her denial of a likelihood of confusion. *See* Amended Answer ¶¶ 8-14 (7 TTABVUE 4-6); *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 311.02(d) (June 2017) (amplifying denials).

The parties stipulated to Accelerated Case Resolution (“ACR”). *See* TBMP §§ 528.05(a)(2), 702.04. Their stipulation, which the Board approved, provides in pertinent part that the sole matter at issue is Opposer’s claim of priority and likelihood of confusion; that the parties stipulate to certain facts; that the parties may file briefs similar in form to cross-motions for summary judgment, with affidavits and exhibits attached as evidence; and that the Board, on consideration of the parties’ respective summary judgment briefs, can resolve any genuine issues of material fact necessary to the Board’s resolution of the case.<sup>5</sup> The case is fully briefed and ready for decision.

## **I. The Record**

The record includes:

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<sup>3</sup> Registration No. 4432533, issued on the Principal Register on Nov. 12, 2013. According to the registration, color is not claimed as a feature of the mark. The registration includes the following description: “The mark consists of concentric circles with the word “orange” in lower case letters underneath.”

<sup>4</sup> 7 TTABVUE.

<sup>5</sup> 8 TTABVUE.

- The pleadings.
- Applicant’s application file. *See* Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).
- The parties’ stipulation of facts.<sup>6</sup>
- Opposer’s evidence submitted with its summary judgment brief:<sup>7</sup>
  - Affidavit of Kevin Benson, Opposer’s Director of Sales and Marketing, attesting to Opposer’s provision of goods and services under its registered mark and authenticating:
    - The registration certificate and USPTO Trademark Electronic Search System (“TESS”) printout for Opposer’s pleaded Registration No. 4432533;
    - Opposer’s marketing materials relating to its Christian youth ministry conferences;
    - Copies of Opposer’s curricula marketing materials for use in its preschool, children’s, and high school ministry;
    - Copies of web pages from Opposer’s online store offering books on youth, parenting, and Christian ministry topics; and
    - Copies of web pages from Opposer’s online store offering sound recordings.
  - Opposer’s First Notice of Reliance, containing the affidavits of counsel Craig Gipson authenticating:

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<sup>6</sup> 8 TTABVUE 3-4.

<sup>7</sup> 10 TTABVUE 27-518.

- Applicant's responses to Opposer's first set of interrogatories;
  - Applicant's responses to Opposer's first Request for Admissions;
  - and
  - Applicant's involved application.
- Opposer's Second Notice of Reliance, containing the affidavit of counsel Craig Gipson authenticating the registration certificate for the mark IF : GATHERING, Reg. No. 4849749, issued to a third party.
  - Opposer's Third Notice of Reliance, containing the affidavits of counsel Craig Gipson authenticating:
    - the registration certificate for the mark @ THE ROCK MATTHEW 16:18-19, Reg. No. 4677765, issued to a different third party; and
    - Applicant's responses to Opposer's Second Set of Interrogatories.
  - Opposer's Fourth Notice of Reliance, containing the affidavits of counsel Craig Gipson authenticating:
    - Dictionary definition of "real";
    - Documents produced by Applicant in response to Opposer's First Request for Production of Documents; and
    - Affidavit of John Estes, Opposer's Director of Information Technology Project Management Office, regarding Internet users' traffic to Opposer's home page.
  - Opposer's Fifth Notice of Reliance, containing the affidavit of counsel Craig Gipson authenticating the registration certificate for the mark

ORANGE COUNTY REGISTER COMMUNICATIONS, Registration No.  
3962118.

- Opposer’s Reply brief cites dictionary definitions of “Christian”, “religious”, and “spiritual”.<sup>8</sup>
- Applicant’s summary judgment brief cites definitions of the words “spiritual”, “religion”, and “church”.<sup>9</sup>

## II. Standing and Priority

Any person who believes that he will be damaged by registration of a mark upon the Principal Register has standing to file an opposition. Trademark Act Section 13, 15 U.S.C. § 1063; *Executive Coach Builders, Inc. v. SPV Coach Co., Inc.*, 123 USPQ2d 1175, 1179 (TTAB 2017). The plaintiff in every *inter partes* case must not only plead but prove standing by showing a real interest—i.e., a direct and personal stake—in the proceeding and a reasonable basis for his belief of damage. *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); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999).

Here, Opposer’s standing to oppose registration of Applicant’s mark is supported by its pleaded registration, which the record shows is valid, subsisting and owned by Opposer.<sup>10</sup> *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842,

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<sup>8</sup> 13 TTABVUE 6.

<sup>9</sup> 12 TTABVUE.

<sup>10</sup> The parties stipulate that “Opposer is the current owner of the valid and subsisting federal trademark registration U.S. Reg. No. 4,432,533 for ORANGE & Design.” Stipulation

1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Its standing is further supported by its affidavit testimony that it is a Christian ministry organization providing educational and entertainment goods and services—all related to youth, family, or church ministry and marketed to churches—under its registered mark.<sup>11</sup> As such, Opposer has established that it has a direct and personal stake in this proceeding and a reasonable basis for its belief of damage stemming from registration of a confusingly similar mark for Christian ministry services. *See Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1480-81 (TTAB 2017).

Because Opposer's pleaded registration is of record, priority is not at issue with respect to the goods and services covered by that registration. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). Moreover, the record establishes Opposer's use of its mark in connection with its identified goods and services prior to Applicant's dates of first use or filing date. The parties stipulate that "Opposer first used the term ORANGE & Design as a source identifier for those goods and services provided in the Opposer's registration as early as the dates set out in the registration for Opposer's mark ORANGE & Design."<sup>12</sup> Those dates are February 1, 2007 for Opposer's Class 41 services, April 27, 2008 for

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¶ 4, 8 TTABVUE 3; *see also* Benson affidavit ¶ 6, exhibit A, registration certificate and TESS printout for Reg. No. 4432533, 10 TTABVUE 33, 35-37.

<sup>11</sup> Benson affidavit ¶¶ 4-19, 10 TTABVUE 32-34.

<sup>12</sup> Stipulation ¶ 5, 8 TTABVUE 4.

Opposer's Class 9 goods, and April 28, 2009 for Opposer's Class 16 goods. Applicant admits that she did not use her applied-for mark before July 1, 2009, and did not use it in commerce before August 1, 2014.<sup>13</sup> She accordingly admits that "Opposer first used Opposer's Mark before Applicant first used the Challenged Mark."<sup>14</sup> Opposer has therefore established its priority.

### III. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), 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 & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. \_\_\_, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

We have considered each relevant *DuPont* factor for which there is evidence or argument, and have treated the other factors as neutral. See *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant."). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group*

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<sup>13</sup> Applicant's responses to Opposer's first set of Requests for Admission nos. 13, 14, 10 TTABVUE 315, 327.

<sup>14</sup> Applicant's response to Opposer's second set of Requests for Admission no. 25, 10 TTABVUE 97, 295.

*Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (factors “may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002)) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”); *Primrose Ret. Communities, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

#### **A. Similarity of the Goods and Services**

Under the second *DuPont* factor, we consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration....” *DuPont*, 177 USPQ at 567. In making this comparison, we must consider the goods and services as they are described in the application and registration. *Octocom Systems, Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Integrated Embedded*, 120 USPQ2d 1504, 1514 (TTAB 2016). The issue is not whether purchasers would confuse the parties’ goods and/or services, but rather whether there is a likelihood of confusion as to their source. *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012).

Applicant takes the position that the goods and services offered under Opposer's registered mark are not similar in form or function to those offered under her applied-for mark because they are classified in different International Classes: Class 45 in Applicant's case and Classes 9, 16, and 41 in Opposer's case.<sup>15</sup>

As Opposer rightly points out, though, the system for classification of goods and services was created for the convenience of the Office, and has no bearing on the issue of likelihood of confusion.<sup>16</sup> Trademark Act Section 30 provides in pertinent part that "The Director may establish a classification of goods and services, for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant's or registrant's rights." 15 U.S.C. § 1112. The Court of Appeals for the Federal Circuit has stated that "classification is wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification. *Cf.* 15 U.S.C. § 1112...." *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993); *see also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) ("[T]he fact that goods are found in different classes has no bearing on the question of likelihood of confusion. The separation of goods into the various classes of the classification schedule is merely a convenience for the Office and is not intended as a commentary on their relationship to one another in the marketplace."); *Nat'l Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1216 n.5 (TTAB 1990) ("The classification system was established for the convenience of the Office rather than to

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<sup>15</sup> Applicant's brief pp. 2-4, 12 TTABVUE 3-5.

<sup>16</sup> Opposer's reply brief p. 3, 13 TTABVUE 4.

indicate that goods in the same class are necessarily related or that classification in different classes indicates that they are not related.”); *see generally* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 19:56 (5th ed. Sept. 2017).

In its three International Classes, Opposer’s registration identifies, in pertinent part, “electronic downloadable publications and prerecorded media” (Class 9), “printed materials” (Class 16), and “educational and entertainment services” (Class 41). In each of the three International Classes, the goods or services are described as “all related to youth, family, or church ministry and marketed to churches”...“all in the fields of spiritual formation for children and youth, family ministry leadership, and parenting.”<sup>17</sup>

Applicant insists that her “*Christian* ministry services” are dissimilar because Opposer’s identification of goods and services make “no mention of the word *Christian*.”<sup>18</sup> Instead, she argues, Opposer’s identification relates to “religious,” “spiritual,” and “church” ministry. Addressing each of these adjectives in turn, Applicant contends that:

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<sup>17</sup> In International Class 41, the identification of services is phrased slightly differently at its conclusion: “in the fields of family ministry leadership, spiritual formation for children and youth, and parenting.” Its meaning, though, is the same as for the other Classes.

<sup>18</sup> Applicant’s brief p. 4, 12 TTABVUE 5.

- “Religious” is defined as “relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity.”<sup>19</sup> And the Supreme Court has not defined the term.<sup>20</sup>
- “Spiritual” is variously defined as:
  - Of, relating to, consisting of, or affecting the spirit
  - Of or relating to sacred matters;
  - Ecclesiastical rather than lay or temporal;
  - Concerned with religious values;
  - Related or joined in spirit;
  - Of or relating to supernatural beings or phenomena;
  - Of, relating to, or involving spiritualism.<sup>21</sup>
- “Church” is defined as “A charitable association of persons organized for the advancement of religion and for the conduct of religious worship, services, or rites, and that is permanently established.”<sup>22</sup>

Applicant concludes that the adjectives modifying Opposer’s “ministry”—“religious,” “spiritual,” and “church”—imply differing views, meanings, and opinions, but do not represent or imply “*Christian*.”<sup>23</sup> Since that is the distinguishing feature

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<sup>19</sup> Applicant provided a hyperlink to the Merriam-Webster.com definition of “religious” in her brief. *Id.* Providing hyperlinks to Internet materials is insufficient to make such materials of record. See *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012); TBMP § 704.08(b). We will, however, take judicial notice of this definition *sua sponte*. (Merriam-Webster.com/dictionary/religious 10/18/2017.) The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions. *E.g.*, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); TBMP § 1208.04. The Board also may notice dictionary definitions *sua sponte*. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We take judicial notice *sua sponte* of the parties’ other proffered dictionary definitions, as well.

<sup>20</sup> Applicant’s brief pp. 4-6, 12 TTABVUE 5-7.

<sup>21</sup> Applicant’s brief p. 6, 12 TTABVUE 7, Merriam-Webster.com/dictionary/spiritual 10/18/2017.

<sup>22</sup> Applicant’s brief p. 8, 12 TTABVUE 9, Duhaime.org/LegalDictionary/Category/ChurchLawDictionary.aspx 10/18/2017.

<sup>23</sup> Applicant’s brief p. 9, 12 TTABVUE 10.

of Applicant’s “Christian ministry services,” she reasons, Opposer’s goods and services are dissimilar to hers.

The parties’ identifications, however, are not mutually exclusive. Both employ the term “ministry,” which means “[t]he act of serving: ministrations.”<sup>24</sup> We agree with Opposer that the broader terms used to describe its ministry—“religious,” “spiritual,” and “church”—encompass Applicant’s narrower term, “Christian.”<sup>25</sup> The term “Christian” is defined as “[o]f, pertaining to, or professing belief in Christianity,”<sup>26</sup> which is defined, in turn, as “conformity to the Christian religion.”<sup>27</sup> “Religious” is essentially synonymous with “spiritual,” which is defined as “[o]f or relating to religion or religious matters; ecclesiastical or sacred.”<sup>28</sup> And “church” is defined as “a body or organization of religious believers: [e.g.]: the whole body of Christians.”<sup>29</sup> Hence, the term “Christian” in Applicant’s identification is a subset encompassed by Opposer’s more broadly-worded identification. *See In re Integrated Embedded*, 120 USPQ2d at 1514.

To demonstrate the overlap between its “religious” and “spiritual” goods and services on the one hand and “Christian ministry services” on the other, Opposer has introduced two use-based, third-party registrations:

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<sup>24</sup> Webster’s II New Riverside Dictionary Revised Edition (1996).

<sup>25</sup> Opposer’s reply brief p. 2, 13 TTABVUE 3.

<sup>26</sup> Webster’s II New Riverside Dictionary Revised Edition (1996) quoted in Opposer’s reply brief p. 5, 13 TTABVUE 6. As with Applicant’s proffered definitions, we take judicial notice of Opposer’s dictionary definitions.

<sup>27</sup> Merriam-Webster’s Collegiate Dictionary (11th ed. 2008).

<sup>28</sup> Webster’s II New Riverside Dictionary Revised Edition (1996).

<sup>29</sup> Merriam-Webster’s Collegiate Dictionary (11th ed. 2008).

Mark	Reg. No.	Pertinent Services
	4677765	<b>Christian ministry services</b> , namely, <b>religious</b> worship services for youth and adults and providing gatherings and retreats to develop and enhance the <b>spiritual</b> lives of youth and adults; consulting services for organizing religious worship services for youth and adults and providing gatherings and retreats to develop and enhance the <b>spiritual</b> lives of youth and adults.
IF : GATHERING	4849749	<b>Christian ministry services</b> , namely, providing live and recorded <b>religious</b> events that feature public speaking, motivational speaking, and music.

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Although these third-party registrations are not significant in number, they nonetheless have probative value to the extent that they serve to suggest that the services listed therein are of a kind that may emanate from a single source under a single mark. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1091-92 (TTAB 2016) (citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)).

More importantly, these third-party registrations serve to demonstrate how Opposer's identified goods and services may be offered under the rubric "Christian ministry services." Just as the **IF : GATHERING** registration's "Christian ministry services" included "live and recorded religious events," "public speaking,"

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<sup>30</sup> Opposer's brief, 10 TTABVUE 333, 335.

“motivational speaking,” and “music,” and just as the @ **THE ROCK & Design** registration included “religious worship services for youth and adults” and “providing gatherings and retreats,” Opposer’s identified goods and services can also relate to Christian ministry.

According to Opposer’s Director of Sales and Marketing:

Opposer is a Georgia non-profit corporation and Christian ministry organization.<sup>31</sup>

Opposer operates and produces a Christian youth ministry conference under Opposer’s Mark called the Orange Conference and regional Christian youth ministry conferences called the Orange Tour....<sup>32</sup>

The Orange Conference and Orange Tour feature public speaking, often by guest speakers, offering education and instruction on topics related to Christianity and youth ministry.<sup>33</sup>

The Orange Conference and Orange Tour feature music.<sup>34</sup>

Opposer produces and creates electronic downloadable publications and prerecorded media, such as DVDs and CDs related to Christian church ministry and featuring, among other things, dramatic and non-dramatic musical sound recordings....<sup>35</sup>

One of the purposes of Opposer’s curriculum ... and Opposer’s events, such as the Orange Conference and Orange Tour, is to encourage discipleship of students participating in Christian youth ministries and evangelism to non-Christian students.<sup>36</sup>

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<sup>31</sup> Affidavit of Kevin Benson, Opposer’s Director of Sales and Marketing ¶ 4, 10 TTABVUE 32.

<sup>32</sup> Benson Affidavit ¶ 8, 10 TTABVUE 33.

<sup>33</sup> Benson Affidavit ¶ 9, 10 TTABVUE 33.

<sup>34</sup> Benson Affidavit ¶ 10, 10 TTABVUE 33.

<sup>35</sup> Benson Affidavit ¶ 19, 10 TTABVUE 34.

<sup>36</sup> Benson Affidavit ¶ 15, 10 TTABVUE 34.

Applicant admits that her identified services are broadly described, stating, “It is hard to describe all ‘services’ that might be deemed ‘Christian Ministry Services.’”<sup>37</sup> Given the breadth and vagueness of her identification, it is appropriate to consider extrinsic evidence of use to clarify its meaning. *Cf. Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *In re Trackmobile*, 15 USPQ2d 1152, 1154 (TTAB 1990). Applicant admits in the course of discovery that she offers her Christian ministry services by various means:

**INTERROGATORY NO. 14:** Describe the methods by which you offer or provide goods or services under or in connection with the Challenged Mark to any person(s).

**ANSWER:** Method:

- a. [www.realorange.org](http://www.realorange.org)
- b. RealOrange evangelism cards
- c. RealOrange business cards
- d. Social media
- e. Mentioned in, “Real God.”<sup>38</sup> [a downloadable book]

These goods and services, offered as part of Applicant’s Christian ministry services, are similar in kind to Opposer’s identified goods and services. Applicant offers her

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<sup>37</sup> Applicant’s Answer to Interrogatory no. 6, Opposer’s First set of Interrogatories; Applicant’s Answer to Interrogatory no. 3, Opposer’s Second set of Interrogatories. 10 TTABVUE 302, 307, 340, 343.

<sup>38</sup> Applicant’s Answer to Interrogatory no. 14, Opposer’s First set of Interrogatories, 10 TTABVUE 303, 308.

services to persons who are members of or attend Christian churches.<sup>39</sup> She offers electronic downloadable publications, such as her books *Preparing the Bride*,<sup>40</sup> and *Real God*,<sup>41</sup> like Opposer's electronic downloadable publications in International Class 9.<sup>42</sup> She offers printed evangelism cards and brochures,<sup>43</sup> such as:



and

like Opposer's printed materials in International Class 16.<sup>44</sup>

And she offers her Christian ministry services via guest public speaking and a radio show,<sup>45</sup>

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<sup>39</sup> Applicant's response to First set of Requests for Admission, no. 16, 10 TTABVUE 315, 327.

<sup>40</sup> 10 TTABVUE 359-511 (Applicant's mark appearing at the end); Applicant's response to Opposer's Second set of Requests for Admission, no. 27 (denying that the book has been made available in printed form); Applicant's response to Opposer's Second set of Requests for Admission, no. 31 (admitting that the book has been made available in electronic downloadable format), 10 TTABVUE 97-98, 295-296.

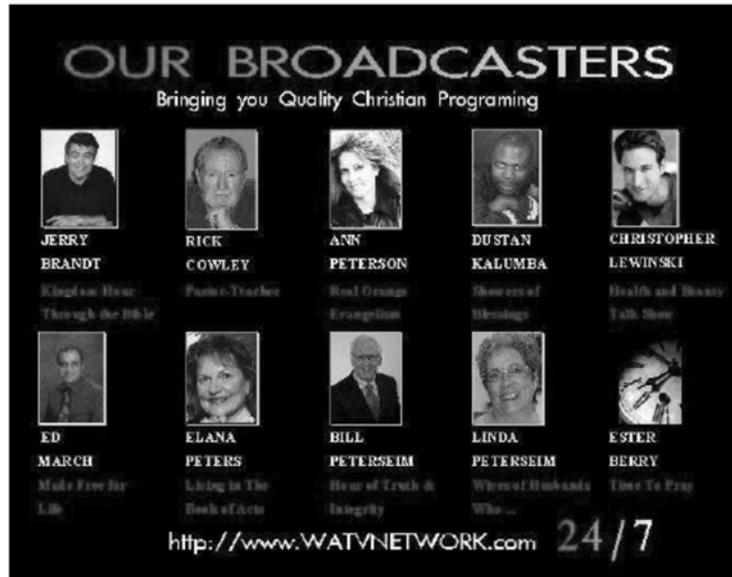
<sup>41</sup> 10 TTABVUE 104-263 (Applicant's mark appearing at 10 TTABVUE 234); Agreement to publish electronically via Kindle, 10 TTABVUE 265-272; Applicant's response to Opposer's Second set of Requests for Admission, no. 3.; Applicant's Answer to Opposer's First set of Interrogatories, nos. 12, 16; 10 TTABVUE 95, 294, 303, 308.

<sup>42</sup> Benson Affidavit ¶ 19, exhibit D, 10 TTABVUE 34, 47-48.

<sup>43</sup> Applicant's Responses to Opposer's Second Request for Admissions no. 13, exhibit A, 10 TTABVUE 281; Applicant's Answer to Opposer's First set of Interrogatories, no. 14, 10 TTABVUE 303, 308.

<sup>44</sup> Benson Affidavit ¶¶ 13, 18, 10 TTABVUE 33-34.

<sup>45</sup> Applicant's Answer to Interrogatory no. 7, Opposer's First Set of Interrogatories; Applicant's Answer to Interrogatory nos. 4, 6, Opposer's Second Set of Interrogatories; Applicant's



much like Opposer’s educational and entertainment services in International Class 41.<sup>46</sup>

In sum, Applicant’s “Christian ministry services” are identical in part to Opposer’s services, *see Nazon v. Ghiorse*, 119 USPQ2d 1178, 1187 (TTAB 2016) (broadly-worded identification encompasses more narrowly-worded identification), and are offered via the sorts of goods that Opposer offers under its registered mark.

Hence, under the second *DuPont* factor, the significant similarities between the parties’ goods and/or services weigh in favor of finding a likelihood of confusion.

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

The third *DuPont* factor is the similarity or dissimilarity of established, likely-to-

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Response no. 15 to Opposer’s Second Request for Admissions, 10 TTABVUE 96, 288, 295, 302, 307, 340, 343-344.

<sup>46</sup> Benson Affidavit ¶¶ 7-10, 10 TTABVUE 33, 38-42.

continue trade channels. *DuPont*, 177 USPQ at 567. The parties stipulate that their respective identifications of goods and/or services place no limitations on the types of consumers or channels of commerce in which they may use their marks.<sup>47</sup> Absent such limitations, their legally identical services must be presumed to travel in the same channels of trade to the same classes of consumers. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160-61 (Fed. Cir. 2014); *In re Viterra*, 101 USPQ2d at 1908; *Nazon v. Ghiorse*, 119 USPQ2d at 1187.

This presumption is further supported by the evidence. Opposer's goods and services are all related to youth, family, or church ministry and marketed to churches.<sup>48</sup> Its youth ministry is directed to teenage students in high schools, "to encourage discipleship of students participating in Christian youth ministries and evangelism to non-Christian students."<sup>49</sup> Applicant's Christian ministry services are disseminated via the same or similar means (as set forth above), to persons who are members of or attend Christian churches,<sup>50</sup> ranging in age from teenager to senior citizen.<sup>51</sup> There is, in consequence, a decided overlap in the parties' means of communication of their messages, as well as their intended recipients.

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<sup>47</sup> Stipulation ¶¶ 2, 4, 10 TTABVUE 30-31.

<sup>48</sup> Stipulation ¶ 7, 10 TTABVUE 31; Benson Affidavit ¶ 7, 10 TTABVUE 33.

<sup>49</sup> Benson Affidavit ¶¶ 8, 13, 15-16, 10 TTABVUE 33-34.

<sup>50</sup> Applicant's response to Opposer's First set of Requests for Admission, no. 16, 10 TTABVUE 315, 327.

<sup>51</sup> Applicant's answer to Opposer's Interrogatory no. 13, First set of Interrogatories, 10 TTABVUE 303, 308; Applicant's response to Opposer's Request for Admission no. 6, Opposer's Second set of Requests for Admission 10 TTABVUE 95, 294.

Thus, under the third *DuPont* factor, the similarity of established, likely-to-continue trade channels also weighs in favor of finding a likelihood of confusion.

**C. Similarity of the Marks**

Under the first *DuPont* factor, we consider the similarity or dissimilarity of Applicant’s and Opposer’s marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The parties’ marks, once again, are:

**Applicant’s Mark**



**Opposer’s Mark**



Applicant asserts that “The marks are not similar in fashion or form” and that “The marks [are] not the same in name.”<sup>52</sup> In the course of discovery, however, Applicant admitted that there were numerous similarities between the marks:

<b>Admissions Regarding Applicant’s Mark</b>	<b>Admissions Regarding Opposer’s Mark</b>
Applicant’s Mark contains the word “orange.” [Applicant’s Response to 1st set of Requests for Admission no. 3]	Opposer’s Mark contains the word “orange.” [Applicant’s Response to 2nd set of Requests for Admission, no. 18]

<sup>52</sup> Applicant’s brief p. 1, 12 TTABVUE 2.

<p>The word “orange” is a prominent and important element of Applicant’s Mark. [Applicant’s Response to 1st set of Requests for Admission no. 8]</p>	<p>The word “orange” is a prominent and important element of Opposer’s Mark. [Applicant’s Response to 2nd set of Requests for Admission, no. 22]</p>
<p>In Applicant’s Mark, the word “orange” contains all lowercase letters. [Applicant’s Response to 1st set of Requests for Admission no. 5]</p>	<p>In Opposer’s Mark, the word “orange” contains all lowercase letters. [Applicant’s Response to 2nd set of Requests for Admission, no. 19]</p>
<p>In Applicant’s Mark, the words “real” and “orange” appear in a non-serif or sans-serif font. [Applicant’s Response to 1st set of Requests for Admission no. 6]</p>	<p>In Opposer’s Mark, the word “orange” appears in a non-serif or sans-serif font. [Applicant’s Response to 2nd set of Requests for Admission, no. 20]</p>
<p>In Applicant’s Mark, the lower portion of the letter “g” within the word “orange” in Applicant’s Mark hangs lower [than] the lower portion of any other letter within the word “orange” as contained in Applicant’s Mark. [Applicant’s Response to 1st set of Requests for Admission no. 7]</p>	<p>In Opposer’s Mark, the lower portion of the letter “g” within the word “orange” in Opposer’s Mark hangs lower [than] the lower portion of any other letter within the word “orange” as contained in Opposer’s Mark. [Applicant’s Response to 2nd set of Requests for Admission, no. 21]</p>
<p>Applicant’s Mark consists of a round or circular flower or flower-like design above the wording “real orange.” [Applicant’s Response to 1st set of Requests for Admission no. 10]</p>	<p>Opposer’s Mark consists of a round or circular shape containing concentric circles appearing above the word “orange.” [Applicant’s Response to 2nd set of Requests for Admission, no. 23]</p>
<p>In Applicant’s Mark, the flower design appears above the words “real” and “orange” within Applicant’s Mark. [Applicant’s Response to 1st set of Requests for Admission no. 12]</p>	<p>The round, circular design contained in Opposer’s Mark is located above the word “orange” in Opposer’s Mark. [Applicant’s Response to 2nd set of Requests for Admission, no. 24]</p>

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These admissions corroborate a fairly apparent similarity between the parties’ marks. The marks share the term ORANGE written in lowercase—Opposer’s sole

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<sup>53</sup> Opposer’s brief pp. 11-12, 10 TTABVUE 15-16; Opposer’s 1st set of Requests for Admission, 10 TTABVUE 312-318, Applicant’s responses 10 TTABVUE 326-329; Opposer’s 2nd set of Requests for Admission, 10 TTABVUE 93-101, Applicant’s responses, 10 TTABVUE 294-296.

literal and dominant component. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n 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.”) *cited in In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014).

Applicant adopts the literal portion of Opposer’s mark in its entirety, adding the word “REAL.” Applicant admits that the word “REAL” in her applied-for mark is an adjective modifying the word ORANGE.<sup>54</sup> She further admits that the word “real” means “not imaginary or pretended; actual; authentic or genuine.”<sup>55</sup> Taken as a whole, then, the wording in Applicant’s mark suggests that her REAL ORANGE ministry is the next generation in the ORANGE ministry—i.e., a new, better, more authentic offshoot of Opposer’s. “[C]areful purchasers who do notice the difference in the marks will not necessarily conclude that there are different sources for the goods, but will see the marks as variations of each other, pointing to a single source.” *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014). Consequently, the term REAL does not distinguish the two marks.

Applicant’s design element also does not suffice to distinguish her mark from Opposer’s. Opposer’s design element, consisting of concentric circles, tends to reinforce the impact of the word below it: ORANGE. *See In re Morinaga Nyugyo Kabushiki*

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<sup>54</sup> Applicant’s Response to 1st set of Requests for Admission no. 11, 10 TTABVUE 315, 327.

<sup>55</sup> Applicant’s Response to 1st set of Requests for Admission no. 9, 10 TTABVUE 315, 326; confirmed in Webster’s II New Riverside Dictionary (Rev. ed. 1996), 10 TTABVUE 349-350.

*Kaisha*, 120 USPQ2d 1738, 1742 (TTAB 2016). Applicant’s design is more floral than fruitlike, but far from dispelling the similarity between the marks, it reinforces the connotation that Applicant’s services are but a variation or offshoot from Opposer’s. *Id.*; *In re Hitachi High-Technologies*, 109 USPQ2d at 1774. As Applicant admits, her mark’s design element, like Opposer’s, is round or circular, and centered above the literal portion.<sup>56</sup> Any consumers already familiar with Opposer’s mark would think upon seeing Applicant’s composite mark that this is just another variation on the display of Opposer’s mark. *Id.*

Comparing the marks in their entireties, then, we find that that the similarities in sound, appearance, meaning and commercial impression between Applicant’s mark and Opposer’s registered mark far outweigh any differences. For these reasons, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

#### **D. Strength of Opposer’s Mark**

The fifth *DuPont* factor is the fame or strength of the prior mark. *DuPont*, 177 USPQ at 567. The strength of a mark, as assessed under Section 2(d), is not a binary factor; it “varies along a spectrum from very strong to very weak.” *Palm Bay Imps.*, 73 USPQ2d at 1694, *quoted in Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017); *see also Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

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<sup>56</sup> *See* table corresponding to footnote 51.

Opposer claims that its mark is “one of the preeminent brands in Christian youth and church ministry resources and events.”<sup>57</sup> In support of this claim, its affiants attest that at least 8,622 churches subscribe to and receive its curriculum;<sup>58</sup> the combined attendance at its ORANGE (Christian youth ministry) conferences for the years 2014 through 2016 was 19,874; the combined attendance for the ORANGE Tour (regional Christian youth ministry conferences) for that same time period was 37,901;<sup>59</sup> and for the three years ending on January 1, 2017, Opposer’s primary Internet homepage received 2,700,644 sessions from 991,595 unique users viewing 5,143,017 pages.<sup>60</sup>

Beyond that, Opposer maintains, under the sixth *DuPont* factor, the strength of Opposer’s mark in the field of religious goods and services is undiminished by similar third-party marks.<sup>61</sup> *DuPont*, 177 USPQ at 567. With the exception of one California newspaper that uses the mark ORANGE COUNTY REGISTER COMMUNICATIONS in a geographically descriptive sense, covering “religion” as a topic in its newspapers, Opposer maintains that it owns the only active federal trademark registration containing the word ORANGE, used in connection with goods or services identifying “religion,” “religious,” “Christian,” or “ministry.”<sup>62</sup> Applicant has offered no evidence to

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<sup>57</sup> Opposer’s brief p. 19, 10 TTABVUE 23.

<sup>58</sup> Benson affidavit ¶ 14, 10 TTABVUE 34.

<sup>59</sup> Benson affidavit ¶¶ 11-12, 10 TTABVUE 33.

<sup>60</sup> Affidavit of John Estes, Opposer’s Director of Information Technology Project Management Office, ¶ 5, 10 TTABVUE 513.

<sup>61</sup> Opposer’s brief pp. 19-20, 10 TTABVUE 23-24.

<sup>62</sup> *Id. citing* Reg. no. 3962118, 10 TTABVUE 517.

the contrary. Thus, Opposer has shown that its mark's conceptual strength is, by and large, undiminished by third party marks. *See Juice Generation*, 115 USPQ2d at 1674; *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016) (“...evidence of one third-party user of a mark that is similar to Opposer’s mark is not sufficient to establish that Opposer’s mark is a weak mark entitled to only a narrow scope of protection or exclusivity of use especially when Applicant has not introduced any evidence regarding the extent to which that mark has been used.”).

But Opposer has not demonstrated that its mark has sufficient commercial strength to be considered famous. A strong or famous mark, at the high end of the spectrum, is one “with extensive public recognition and renown,” *Bridgestone Americas Tire Ops. LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1063 (Fed. Cir. 2012), where a significant portion of the relevant consuming public recognizes the mark as a source indicator. *Palm Bay Imps.*, 73 USPQ2d at 1694. “When the numbers [evidencing public exposure of a mark] are large, they may suffice to prove fame for likelihood of confusion purposes, assuming relevant contextual indicators support that conclusion.” *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1245 (TTAB 2015). Opposer has generated significant subscription and attendance numbers, but it has provided no context indicating that its numbers are particularly large compared with comparable evangelical ministries. It has shown, at best, moderate to average commercial strength.

For these reasons, the fifth and sixth *DuPont* factors weigh somewhat in favor of finding a likelihood of confusion.

#### IV. Conclusion

On consideration of all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *DuPont* factors, we find that the marks at issue are similar, that Applicant's identified services are related to Opposer's identified goods and legally identical, in part, to Opposer's identified services, that they move through the same channels of trade to the same class of consumers, and that Opposer's mark is of moderate to average strength. For these reasons, we



conclude that Applicant's mark  so resembles Opposer's registered mark



as to be likely to cause confusion or mistake, or to deceive.

**Decision:** The opposition is sustained, and registration to Applicant is refused.