

This Opinion is not a  
Precedent of the TTAB

Mailed: March 26, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Coscentra B.V.*

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Serial No. 79196465

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John Alunit of Alunit IP  
for Coscentra B.V.

Tina L. Snapp, Trademark Examining Attorney, Law Office 116,  
Christine Cooper, Managing Attorney.

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Before Ritchie, Shaw, and Coggins,  
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Coscentra B.V. (“Applicant”) seeks registration on the Principal Register of the product configuration mark shown below for goods ultimately identified as “Perfumery, essential oils, articles for body- and beauty-care, namely, perfumes,” in International Class 3<sup>1</sup>:

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<sup>1</sup> Serial No. 79196465, filed on August 26, 2016, under Section 66(a) of the Trademark Act, based on International Registration No. 1319601, registered August 26, 2016.

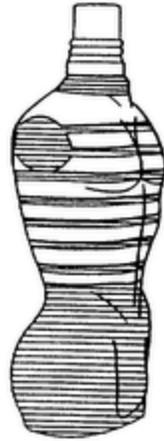


Applicant's registration contains the following description of the mark: The mark consists of a three-dimensional configuration of the packaging for the goods in the shape of a male torso. The broken lines depicting the spray nozzle indicate placement of the mark on the goods and are not part of the mark. Color is not claimed as a feature of the mark.

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a prior registration of the configuration mark shown below, also for "perfumes," in International Class 3<sup>2</sup>:

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<sup>2</sup> Registration No. 2141962, registered March 10, 1998. The application was filed under Section 44(e) of the Trademark Act, based on French Registration No. 95587225, registered September 7, 1995. The cited registration contained other goods, which were deleted post-registration. Sections 8 and 15 affidavits accepted and acknowledged. Renewed twice.



The cited registration contains the following description of the mark: The mark consists of the three-dimensional shape of the container for the goods. The drawing is lined for the color blue.

After the Examining Attorney made the refusal final, Applicant filed an appeal.<sup>3</sup> Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

#### I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re*

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<sup>3</sup> After the initial appeal, the Examining Attorney requested remand for consideration of a drawing requirement. The remand was granted, the requirement was made, and upon Applicant's submission of an amended drawing and description, the requirement was deemed to be satisfied. The Section 2(d) refusal was maintained, and the appeal was resumed. Applicant submitted a Supplemental Appeal Brief, which as Applicant states, "replaces the original Appeal Brief." 10 TTABVue 2. Therefore, all references in this decision are to the Supplemental Appeal Brief.

*Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); see also *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

A. The Goods, Trade Channels and Purchasers

We consider first the similarities or dissimilarities between the respective goods as identified in the application and the cited registration. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (goods as identified in involved application and cited registration compared). Both the application and the cited registration identify, “perfumes.” Thus the goods are identical.

As for the channels of trade, when as here, the respective identifications of goods are identical, without restrictions as to nature, type, channels of trade, or classes of purchasers, the identified goods are presumed to travel in the same channels of trade to the same class of purchasers. *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); (“[A]bsent restrictions in the application and registration,

goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”). Thus, we must presume the trade channels and classes of purchasers are the same for both Applicant’s and registrant’s perfumes.

We find that these factors weigh heavily in favor of finding a likelihood of confusion.

#### B. The Marks

We next compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps.*, 73 USPQ2d at 1692. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. V. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be analyzed to determine whether the marks are similar. *Joel Gott Wines LLC v.*

*Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013) (citing *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955)). In fact, 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 a consideration of the marks in their entireties. *In re Nat'l Data Corp.*, 224 USPQ at 751. Moreover, where, as in the present case, the marks appear on goods that are identical, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).



Both Applicant's mark and the mark in the cited registration

are product configuration marks comprising bottles for perfume. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Here, the average purchaser includes any consumer of perfume.

The Examining Attorney argues that Applicant's mark is "similar in appearance, connotation, and overall common commercial impression" to the registered mark because "both marks consist of a three-dimensional configuration of the packaging for the goods in the shape of a male torso."<sup>4</sup> Applicant admits that both marks are product configuration marks in the shape of a "male torso."<sup>5</sup> Applicant argues, however, that the shapes of the torsos are sufficiently different that consumers will not expect them to emanate from a single source.

In particular, Applicant refers to evidence from Encyclopedia Britannica that describes different body types or "somatotypes," which include "endomorph, or round fat type; mesomorph, or muscular type; and ectomorph, or slim, linear type."<sup>6</sup> In this regard, Applicant argues that the torsos in the marks are different since "[w]hen viewing the two marks in their entireties, prospective consumers can see that the registered mark consists of a male torso with a slender physique and no penis, while applicant's mark consists of a muscular physique and penis."<sup>7</sup> Applicant further argues that confusion is avoided because:

1. Consumers are accustomed to seeing the male form in all forms of media and can see that not all men have the same physique;
2. Applicant's mark comprises more musculature and definition, with a well proportioned torso, while the registrant's mark shows a slender upper body and a disproportionately larger buttocks;

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<sup>4</sup> 12 TTABVUE 7. Although the Examining Attorney refers to both marks as being a "design mark," there is no dispute that both are product configuration marks.

<sup>5</sup> 10 TTABVUE 6.

<sup>6</sup> Attached to April 9, 2017 Response to Office Action, at 5.

<sup>7</sup> 10 TTABVUE 6.

3. A penis is not commonly shown in consumer products and applicant's mark comprises a penis, which prospective consumers are likely to notice; and
4. The arms are cut shorter in the registrant's mark, but cut longer in applicant's mark, therefore highlighting broader shoulders.<sup>8</sup>

While we agree that there are differences in certain aspects of the marks, we must consider the appearance, connotation, and commercial impression of the marks as a whole. *See In re Homeland Vinyl Prods. Inc.*, 81 USPQ2d 1378, 1382 (TTAB 2006) (in likelihood of confusion case involving product configurations, "it is the overall commercial impression of the marks derived from viewing the marks in their entirety that is controlling rather than an analysis of the specific details."). In this regard, while the mark in the cited registration is "lined for the color blue," Applicant's mark is not limited to any particular color. Furthermore, the mark in the cited registration is clearly a male torso, and is more anatomically correct than Applicant acknowledges.

The Examining Attorney submitted into the record dozens of images of perfume bottles.<sup>9</sup> While two or three of the images depict human figures in some form, none of the third-party images depict a perfume packaged in the form of a male torso. The cited registration is registered on the Principal Register without any disclaimer or claim of acquired distinctiveness. We find that there is no evidence that the cited mark is commercially or conceptually weak. Rather, when viewed as a whole,

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

<sup>9</sup> Images attached to December 16, 2016 Office Action, at 5-13; February 23, 2018 Office Action, at 3-15.

Applicant's mark and the cited mark are similar in sight, connotation, and commercial impression. Both may be called for by consumers as a perfume container in the shape of a male torso.

This *du Pont* factor also weighs in favor of finding a likelihood of confusion.

## II. Conclusion

After considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the goods are identical, and presume that they would travel through the same channels of trade to some of the same general consumers. We further find that the marks as a whole are similar in sight, connotation, and commercial impression, and will likely be called for by consumers in a similar manner as a perfume container in the shape of a male torso. Accordingly, we find a likelihood of confusion between Applicant's product configuration mark



and the product configuration mark in the cited registration



both for perfumes.

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