

This Opinion is Not a
Precedent of the TTAB

Mailed: August 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Oozotech Co., Ltd.
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Serial No. 79329157
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Michael T. Smith of Birch, Stewart, Kolasch & Birch, LLP, for Oozotech Co., Ltd.

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Brett Golden, Managing Attorney.

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Before Larkin, Johnson, and Lebow,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Oozotech Co., Ltd. (“Applicant”) seeks registration on the Principal Register of the standard character mark DOCSOLE¹ (“Applicant’s Mark”), for goods identified as “Insoles for shoes” (“Applicant’s Goods”) in International Class (“Class”) 25.

The Examining Attorney refused registration of Applicant’s Mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s Mark

¹ Application Serial No. 79329157 was filed on October 25, 2021 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on a request for extension of protection of International Registration Number 1634584, which registered on October 25, 2021.

is likely to be confused with the standard character mark, DOCTORINSOLE,² registered on the Principal Register for “Orthotic inserts for footwear” in Class 10.

When the refusal was made final, Applicant appealed. The appeal has been briefed. For the reasons discussed below, we affirm the refusal to register.

I. Likelihood of Confusion

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the *DuPont* factors. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”).³ We consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-79 (Fed. Cir. 2019), but “[n]ot all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020). “Each case must be decided on its own facts and the differences

² Registration No. 4579899 (“Cited Registration”) issued on August 5, 2014. A combined declaration under Trademark Act Sections 8 and 15, 15 U.S.C. §§ 1058 and 1065, has been accepted and acknowledged.

Citations to the appeal record are from the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 2014 TTAB LEXIS 17, at *6 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable. Applicant’s Appeal Brief is located at 4 TTABVUE and the Examining Attorney’s Appeal Brief is located at 6 TTABVUE.

All citations to prosecution history documents contained in the Trademark Status and Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

³ 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 Lexis database unless noted otherwise. Practitioners should also adhere to the guidance set forth in TBMP § 101.03.

are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973). Two key considerations are the similarities between the marks and the relatedness of the goods. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002).

A. The Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entireties, taking into account their appearance, sound, connotation, and commercial impression. *DuPont*, 476 F.2d at 1361. Similarity as to any one of these elements may be sufficient to support a finding that the marks are similar for likelihood of confusion purposes. *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *see also In re Inn at St. John’s, LLC*, 2018 TTAB LEXIS 170, at *13 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). We may give more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra*, 671 F.3d 1358, 1362 (Fed. Cir. 2012). “The proper focus is on the recollection of the average customer, who normally retains a general rather than specific impression of the marks.” *In re Mr. Recipe, LLC*, 2016 TTAB LEXIS 80, at *18 (TTAB 2016) (citations omitted). Because the goods at issue are “insoles for shoes” and “orthotic inserts for footwear,” the average purchaser is the ordinary consumer who purchases shoes, or footwear, and implements or accessories for those goods.

Applicant contends that the marks are distinct in appearance, sound, connotation, and commercial impression because its mark, DOCSOLE, is a “coined term” that creates a “unique commercial impression” from the Cited Registration, DOCTORINSOLE. (4 TTABVUE 4). Specifically, Applicant contends that the “DOC” in DOCSOLE “does not refer to ‘doctor,’ and there is no evidence of record that it would be understood as doing so.” (*Id.*). Applicant posits that the “DOC” in its mark refers to “dockside” shoes, also known as “boat shoes.”⁴ (*Id.*). The Examining Attorney argues that the marks are highly similar in commercial impression, inasmuch as “DOC” is shorthand for “doctor,” and the terms “sole” and “insole” are used in the context of shoes, or footwear. (6 TTABVUE 4).

We find that the marks are similar in appearance, meaning, and overall commercial impression. A “sole” is “the part of an item of footwear on which the sole rests and upon which the wearer treads,”⁵ and an “insole” is defined as “an inside sole of a shoe.”⁶ In the context of the goods offered under the marks, “DOC” is “short for doctor.”⁷ Contrary to its argument that DOCSOLE refers to “dockside,” or boat shoes,

⁴ See Response to Office Action dated Mar. 28, 2023 at 7. Applicant attached what appears to be the same webpage, cropped, to its Appeal Brief at Exhibit A. See 4 TTABVUE 9. We only consider the evidence as it appears in the prosecution record, because “[t]he record should be complete prior to the filing of an appeal.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).

⁵ MERRIAM-WEBSTER DICTIONARY (2024)(<https://www.merriam-webster.com/dictionary/sole>) (last visited Aug. 8, 2024). The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries which exist in printed format or have fixed regular editions. *In re Cordua Rests. LP*, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594 (Fed. Cir. 2016).

⁶ MERRIAM-WEBSTER DICTIONARY (2024) (<https://www.merriam-webster.com/dictionary/insole>) (last visited Aug. 8, 2024). We take judicial notice of this definition.

⁷ Nonfinal Office Action dated Aug. 8, 2022 at 7 (definition of “doc” from the AMERICAN HERITAGE DICTIONARY); see also Final Office Action dated May 19, 2023 at 74-81.

Applicant's own website displays its medical advisory board and information about designated hospitals for orthopedic surgery in South Korea, as well as provides a link for customers to download an app for insole customization.⁸ This suggests that Applicant's goods may be something recommended by doctors.

The first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

B. The Similarity or Dissimilarity and Nature of the Goods, and the Similarity or Dissimilarity of Established, Likely-To-Continue Trade Channels.

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." *DuPont*, 476 F.2d at 1361. When analyzing the second *DuPont* factor, we look to the identification of goods in the application and cited registration. *Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). The goods do not have to be identical or even competitive in order to find that there is a likelihood of confusion. *In re Iolo Techs., LLC*, 2010 TTAB LEXIS 223, at *6 (TTAB 2010). The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000).

In support of the Office's relatedness argument, the Examining Attorney submitted copies of 23 use-based third-party registrations for use in connection with the same goods offered by Applicant and Registrant, suggesting that Applicant's

⁸ Final Office Action dated May 19, 2023 at 82-88 (translated webpages from <https://www.docsole.co.kr/main/main.php?>).

Goods and Registrant's Goods are of a type that may originate from the same source and are offered under the same mark.⁹ See *In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at *8 (TTAB 2019) ("As a general proposition, third-party registrations that cover goods ... from both the cited registration and an Applicant's application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark.") (citing *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267-68 (Fed. Cir. 2002); and other opinions). The Examining Attorney also submitted printed pages from drscholls.com, powerstep.com, and pedagusa.com,¹⁰ all of which display insoles and orthotic¹¹ inserts being offered at each website.

Applicant nonetheless posits that the goods are unrelated and flow through distinct channels of trade because its insoles are over-the-counter products, whereas Registrant's orthotics are, allegedly, custom made and require a prescription. (4 TTABVUE 5). Applicant's argument implicates the third *DuPont* factor, "the similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. Absent "meaningful limitations" in either the application or the

⁹ See Final Office Action dated May 19, 2023 at 9-20 (Reg. Nos. 5974777, 5533411, 5846317, 5611372, 5687538, 5788726), 23-56 (Reg. Nos. 5898214, 6200870, 5924118, 5678957, 5963036, 6137156, 5807055, 6133817, 6134970, 6937082, 6184664, 6281184, 6184899, 6889211, 6479741, 5898215, 6282808).

¹⁰ Nonfinal Office Action dated Aug. 8, 2022 at 9-28 (printed pages from drscholls.com and powerstep.com); Final Action dated May 19, 2023 at 59-73 (printed pages from powerstep.com and pedagusa.com).

¹¹ "Orthotics," or "orthotic inserts," are also referred to as "orthotic insoles." See Final Office Action dated May 19, 2023 at 59-64, 70-71; Nonfinal Office Action dated Aug. 8, 2022 at 17-28.

Cited Registration, we presume that the identified goods move through all normal and usual channels of trade for such goods, and that they are available to all normal potential purchasers of such goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1327 (Fed. Cir. 2017); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042-43 (Fed. Cir. 1983).

In support of its position, Applicant submitted one WebMD article that describes orthotics as “prescription medical devices that you wear inside your shoes to correct biomechanical foot issues such as problems with how you walk, stand, or run.”¹² But the identification for Registrant’s goods is without limitation, and as discussed above, the Examining Attorney submitted evidence from three different websites that offer insoles as well as non-prescription orthotics to the general public.

We find all of the Examining Attorney’s evidence to be probative of, and to establish, relatedness. *See, e.g., In re Detroit Athletic*, 903 F.3d at 1306 (third-party registration evidence showed “consumers are accustomed to seeing a single mark associated with a source that sells both”); *In re Anderson*, 2012 TTAB LEXIS 42, at *28-29 (TTAB 2012) (relatedness found where third-party websites showed tires and automobiles emanating from a common source). In addition, based on the evidence of record, we find that Applicant’s and Registrant’s goods are offered to the same consumers in the same channels of trade. Overall, the second and third *DuPont* factors weigh in favor of a finding of likelihood of confusion.

¹² Response to Office Action dated Mar. 28, 2023 at 9 (Jodi Helmer, *Do I Need Shoe Orthotics?*, WEBMD (2021), <https://www.webmd.com/pain-management/what-are-shoe-orthotics>).

C. Degree of Consumer Care

Finally, we address Applicant's argument that purchasers of Applicant's and Registrant's goods will exercise a heightened degree of care in making their purchasing decisions, and as a result, they are less likely to be confused by any similarities of the marks. (4 TTABVUE 6).

Under the fourth *DuPont* factor, "the conditions under which and buyers to whom sales are made," *DuPont*, 476 F.2d at 1361, we note that when encountering marks, purchaser sophistication or degree of care may tend to minimize likelihood of confusion. However, impulse purchases of inexpensive items where consumers pay little attention to the source of the products may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1376 (Fed. Cir. 2005).

The identifications in the application and Registration here are not limited to a specific type of purchaser, so we must presume that members of the ordinary public are among the purchasers, and that the standard of care for purchasing the goods or services is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 2018 TTAB LEXIS 116, at *29 (TTAB 2018) (citing *Stone Lion*, 746 F.3d at 1325). Even if purchasers of Applicant's and Registrant's goods were sophisticated or knowledgeable about insoles and orthotics, that would not necessarily mean that those same purchasers would be sophisticated or knowledgeable about trademarks, or immune from source confusion. *Stone Lion*, 874 F.3d at 1325. In any event, there is no evidence of record to support Applicant's argument, and "[a]ttorney argument

is no substitute for evidence.” *Enzo Biochem Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). As a result, the fourth *DuPont* factor weighs in favor of a finding of likelihood of confusion.

II. Conclusion

We find that confusion is likely between Applicant’s Mark, DOCSOLE, and Registrant’s Mark, DOCTORINSOLE, given the similarity of the marks in appearance, meaning, and overall commercial impression; the relatedness of the goods; the same consumers being offered the respective goods through the same trade channels; and the standard of purchasing care of the least sophisticated potential purchaser.

Decision: We affirm the refusal to register Applicant’s Mark, DOCSOLE, Serial Number 79329157, under Section 2(d) of the Trademark Act.