

This Opinion is Not a
Precedent of the TTAB

Mailed: January 27, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Now Yoga, LLC

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Serial No. 85677969

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Matthew H. Swyers of The Trademark Company PLLC,
for Now Yoga, LLC.

Zachary B. Cromer, Trademark Examining Attorney, Law Office 104,
Chris Doninger, Managing Attorney.

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Before Bucher, Kuhlke and Lykos,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Now Yoga, LLC (“Applicant”) seeks registration on the Principal Register of the mark **NOW YOGA AND FITNESS** (*in standard character format*) for “yoga instruction” in International Class 41.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used with the

¹ Application Serial No. 85677969 was filed on July 16, 2012, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

recited services, so resembles the mark **NOWYOGA**, also registered on the Principal Register for “yoga instruction” in International Class 5, as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Likelihood of Confusion Analysis

Our determination under Section 2(d) is based upon an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We discuss each of the *du Pont* factors concerning which Applicant or the Trademark Examining Attorney submitted argument or evidence.

As to the *du Pont* factors focusing on the similarity of the respective services, their channels of trade and conditions of sale, Applicant concedes that the services are recited identically without any limitations, and therefore we must presume the trade channels and marketing conditions are also identical.

Nonetheless, Applicant continues to point to obvious differences of which the informed consumers of Registrant's and of Applicant's respective services would be cognizant immediately:

Applicant's yoga instruction, massage, acupuncture, and other holistic services, bearing the **NOW YOGA AND FITNESS** mark are used to attract a very specific consumer, namely, adults seeking yoga instruction and other body work and healing services as well as related accessories. In contrast, it can only be assumed that the [Registrant's] mark was used to attract those seeking Buddhism based yoga and QiGong classes.

Applicant's brief at 10.

Of course, an applicant may not restrict the scope of the services covered in its application or in the cited registration by argument or extrinsic evidence. *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013), *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008), *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764 (TTAB 1986). Thus, any specific differences between the *actual* forms or traditions of the respective services are irrelevant in our analysis. As noted above, neither of the recitations of services includes any of the limitations in trade channels or classes of purchasers highlighted by Applicant's declarant. As a result, we find that the services herein are legally identical and we must presume that the channels of trade and conditions of sale will also be identical.

As to whether consumers of yoga instruction are sophisticated and knowledgeable, Applicant's counsel argues that "the average purchaser" of these services "would also exercise a high level of sophistication," thereby "minimizing any likelihood of confusion." Applicant's brief at 10. However, we find no evidence in

this record supporting a conclusion that persons taking yoga instruction, as a class, are sophisticated consumers. Accordingly, we find this to be, at best for Applicant, a neutral *du Pont* factor.

We turn then to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of “the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). We also keep in mind that when, as here, marks would be used in connection with identical services, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

Applicant points out that in contrast to Applicant’s mark, which “consists of the term ‘NOW’ followed by the terms ‘YOGA AND FITNESS’,” the cited mark “telescopes the terms NOW and YOGA to form one unitary and distinct mark: NOWYOGA. ... As such, from the onset it is clear that the marks cannot be said to be identical.” Applicant’s brief at 9.

In response, the Trademark Examining Attorney counters that these two marks are highly similar as to sound, appearance and connotation. Certainly, Applicant's insertion of a space between the words "Now" and "Yoga" does not alter the commercial impression of its mark or obviate a likelihood of confusion. *See Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) ("[T]he marks **SEAGUARD** and **SEA GUARD** are, in contemplation of law, identical"). Likewise, Applicant's adding the words "And Fitness" does not obviate the refusal herein. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Disclaimed matter that is descriptive of or generic for an applicant's services is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). Here, the trailing words "And Fitness" are at least highly descriptive of Applicant's services, have been properly disclaimed by Applicant, and hence do little to distinguish these marks. Given that the dominant portion of both marks is "Now Yoga / NowYoga," we find the marks are highly similar as to overall commercial impression.

As to the *du Pont* factor focusing on the number and nature of similar marks in use on yoga instruction services, Applicant made of record three marks registered in connection with yoga instruction:



As noted by the Trademark Examining Attorney, purported evidence of the weakness of a cited mark consisting solely of third-party registrations is generally entitled to little weight in determining the strength or weakness of a mark, because such registrations alone do not establish that the registered marks identified therein are in *actual use* in the marketplace or that consumers are accustomed to seeing them. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). As a result, we do not find these registrations to be probative. Moreover, the third-party marks submitted by Applicant call to mind “now and then,” “Happy New Year,” and calmness or tranquility – each mark containing the word “now” and registered in connection with yoga instruction services, but creating substantially different commercial impressions than Applicant’s and Registrant’s marks. Accordingly, even if these particular marks were shown to be widely used in the marketplace, they would not be especially relevant to this *du Pont* factor.

In conclusion, with identical services that are presumed to travel through the same trade channels to the same classes of ordinary consumers, and where the respective marks are quite similar as to overall commercial impressions, we find a likelihood of confusion should Applicant’s applied-for mark be used in connection with Applicant’s services.

Decision: The refusal to register Applicant’s mark **NOW YOGA AND FITNESS** under Section 2(d) of the Lanham Act is hereby affirmed.