

**This Opinion Is Not a
Precedent Of The TTAB**

Mailed: June 3, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

—————
Trademark Trial and Appeal Board

—————
In re Watson

—————
Serial No. 85775921

Matthew H. Swyers of The Trademark Company, for Edward Kenneth Watson.

Nicholas Altree, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

—————
Before Kuhlke, Ritchie and Adlin, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Edward Kenneth Watson (“Applicant”) filed an Application to register the mark ORGASMIC,¹ in standard character form, for goods identified as “books in the field of sexual education,” in International Class 16. The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the prior registered mark ORGAZMIK,² in typed drawing format,³ for “prerecorded DVDs, CD-

¹ Application Serial No. 85775921, filed on November 9, 2012, pursuant to Section 1(b) of the Trademark Act, alleging a bona fide intent to use.

² Registration No. 2689986, issued February 25, 2003. Sections 8 and 15 accepted and acknowledged. Renewed.

Roms, video tapes, audio tapes and motion picture films all containing adult entertainment,” in International Class 9, and “retail store services and computerized retail online services available via the Internet in the field of adult entertainment programs and items,” in International Class 35, that when used on or in connection with Applicant’s identified goods, it is likely to cause confusion or mistake or to deceive.

Upon final refusal of registration, Applicant filed a timely appeal. Both Applicant and the Examining Attorney filed briefs.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a 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 similarities between the goods 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.”).

While all the *du Pont* factors must be considered when they are of record, the various factors “may play more or less weighty roles in any particular determination.” *In re E.I. du Pont*, 177 USPQ at 567. “Indeed, any one of the factors may control a

³ “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. The mark on a typed drawing was required to be typed entirely in capital letters. A typed mark is the legal equivalent of a standard character mark.” TMEP § 807.03(i) (April 2014).

particular case.” *In re Dixie Restaurants Inc.*, 41 USPQ2d at 1533 citing *du Pont*, 177 USPQ at 567. *See also Giersch v. Scripps*, 90 USPQ2d 1020, 1025 (TTAB 2009).

Marks and Strength

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “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). The mark in the cited Registration is ORGAZMIK, whereas Applicant’s mark is ORGASMIC. As Applicant concedes, these terms are phonetic equivalents, and they are visually quite similar as well.

Because the mark in the cited Registration is not an actual word, but would be construed to be a misspelling of “ORGASMIC,” which is Applicant’s mark, they provide the same commercial impression of extreme sexual pleasure.⁴

⁴ We take judicial notice of the definition of “orgasm” as “intense or paroxysmal excitement; especially: an explosive discharge of neuromuscular tensions at the height of sexual arousal that is usually accompanied by the ejaculation of semen in the male and by vaginal contractions in the female.” Merriam-Webster’s Online Dictionary, 11th Ed. (2008). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff’d* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In view thereof, as to the first *du Pont* factor, we find that the similarity of the marks and their commercial impressions weigh in favor of finding likelihood of confusion.

Applicant urges us to consider the weakness of the term “ORGASMIC,” and to that end has included in the record evidence of 10 third-party registrations that include the term “ORGASMIC,” or “ORGASM,” for goods or services similar or related to those at issue in this proceeding, including ORGASMIC BIRTH, ORGASMIC MEDITATION, MOTORIZED ORGASMIC RELEASE, FLABBERGASMIC, HAPPY ENDINGS ORGASMICALLY ORGANIC, ORGASM, and design, ORGASM ARTS, REAL ORGASMS, SCREAMING ORGASM, and I FEMALE ORGASM, and design. We note that several of these registrations include a disclaimer of the term “orgasm.” Although third-party registrations are not evidence of use, they may be evidence in the manner of dictionary definitions to show that a term is highly suggestive. *See* TBMP § 704.03(b)(1)(B), and cases cited therein. Accordingly, we agree with Applicant that the term “ORGASMIC” is highly suggestive of the goods and services at issue in this proceeding. Nevertheless, the marks at issue herein are more similar to each other than to any of the 10 submitted by Applicant, and Applicant did not submit any evidence of actual use of the term, much less evidence of extensive use of the term by third parties.

While the evidence is therefore not sufficient to make a finding as to the “number and nature of similar marks in use on similar goods” under the sixth *du Pont* factor, we find that the conceptual weakness of the marks limits the scope of protection to be accorded the marks.

Goods and Services and Channels of Trade

The Application identifies “books in the field of sexual education” whereas the cited Registration identifies “prerecorded DVDs, CD-Roms, video tapes, audio tapes and motion picture films all containing adult entertainment,” and “retail store services and computerized retail online services available via the Internet in the field of adult entertainment programs and items.” The Examining Attorney has attempted to demonstrate the relatedness of these goods and services by submitting third-party registrations, which, if they include goods and services identified in both the Application and the cited Registration, may serve to suggest that they are of a type which may emanate from a single source under a single mark. *See In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). However, of the many registrations submitted, we find that not more than one or two show books in the field of sexual education, as identified by Applicant, included in the same registration as video or other recordings featuring adult entertainment as identified in the cited Registration.

Furthermore, Applicant has submitted an affidavit attesting that there is no overlap in the goods and services. (Watson decl., para. 3). Applicant also attested that there is no overlap in the channels of trade. *Id.* at para. 7. In sum, we find that the Examining Attorney did not sustain his burden.

Accordingly, we find that the goods and services are unrelated and travel in different channels of trade, and these *du Pont* factors weigh against finding a likelihood of confusion.

Consumer Sophistication

Applicant urges us to consider consumer sophistication as a factor. To this end, Applicant's affidavit expresses that his clients "exercise a very high level of sophistication." (Watson decl., para. 9). The affidavit further states that prices for Applicant's books begin at \$9.99 for e-books, while prices for Registrant's retail services begin at \$.30/minute.⁵ These are not price points at which consumers would exercise an extreme degree of care. Furthermore, as our precedent dictates, with highly similar marks, even sophisticated buyers are not immune from source confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Nevertheless, consumers may exercise some degree of care in choosing between these types of goods and services that are of a personal nature, which would tend to negate a likelihood of confusion. Accordingly, we find this *du Pont* factor to be neutral.

Balancing the Factors

In summary, we have carefully considered all of the evidence and arguments of record relevant to the pertinent *du Pont* likelihood of confusion factors. We conclude that while the marks are similar and would likely have the same commercial impression, they are also highly suggestive, and the goods and services have not been shown to be related. Accordingly, we find there is no likelihood of confusion between Applicant's mark ORGASMIC for "books in the field of sexual education," and the cited Registered mark ORGAZMIK for "prerecorded DVDs, CD-Roms, video tapes, audio

⁵ This evidence supports our finding that applicant's goods and at least Registrant's retail services are unrelated – readers do not pay by the minute.

Serial No. 85775921

tapes and motion picture films all containing adult entertainment,” and “retail store services and computerized retail online services available via the Internet in the field of adult entertainment programs and items.”

Decision: The refusal to register is reversed.