

This Opinion is not a
Precedent of the TTAB

Mailed: August 11, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Danielle Doyle Sheeb

Serial No. 85953038

Veronica Montemayor of McCathern, PLLC,
for Danielle Doyle Sheeb.

Catherine L. Tarcu, Trademark Examining Attorney, Law Office 105,
Susan Hayash, Managing Attorney.

Before Bucher, Kuhlke and Cataldo,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Danielle Doyle Sheeb (“Applicant”) seeks registration on the Principal Register
of the mark **THE PERFECT FACE** (*in standard character format*) for

body and beauty care cosmetics; cleansing creams;
concealers; cosmetic creams; cosmetic creams for skin
care; cosmetic pads; cosmetic pencils; cosmetic
preparations; cosmetic preparations for skin care;
cosmetic white face powder; cosmetics; cosmetics and
cosmetic preparations; cosmetics and make-up; cosmetics,
namely, compacts; cosmetics, namely, lip primer; cotton
for cosmetic purposes; eyebrow cosmetics; face creams for
cosmetic use; lip stains; lotions for cosmetic purposes;

make-up kits comprised of blush, eye shadow, highlighters and contours” in International Class 3.¹

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 identified goods, so resembles the mark **Parfait Visage**, registered on the Principal Register for “pharmaceutical preparations in the form of topical ointments, namely, skin moisturizers and skin cleansers; skin cell growth stimulators; antivirals; antibacterial, and antifungal agents, namely, pharmaceuticals, natural oils, vitamins, minerals and hand washes” in International Class 5,² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant requested reconsideration. After the Trademark Examining Attorney denied the request for reconsideration, this appeal was filed. We reverse the refusal to register.

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

¹ Application Serial No. 85953038 was filed on June 6, 2013, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 21, 2001.

² Registration No. 3084748 issued on April 25, 2006; renewed. The English translation of “Parfait Visage” is “Perfect Face.”

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.

I. Relatedness of the goods

We turn first to the second *du Pont* factor focusing on the relatedness of the goods. It is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). We must look to the goods as identified in the involved application and cited registration, not extrinsic evidence of actual use. *See, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (stating that “[i]t was proper ... for the Board to focus on the application and registrations rather than on real-world conditions”); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of

the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”).

Applicant's goods are “body and beauty care cosmetics; cleansing creams; concealers; cosmetic creams; cosmetic creams for skin care; cosmetic pads; cosmetic pencils; cosmetic preparations; cosmetic preparations for skin care; cosmetic white face powder; cosmetics; cosmetics and cosmetic preparations; cosmetics and make-up; cosmetics, namely, compacts; cosmetics, namely, lip primer; cotton for cosmetic purposes; eyebrow cosmetics; face creams for cosmetic use; lip stains; lotions for cosmetic purposes; make-up kits comprised of blush, eye shadow, highlighters and contours” in International Class 3. Registrant's goods are “pharmaceutical preparations in the form of topical ointments, namely, skin moisturizers and skin cleansers; skin cell growth stimulators; antivirals; antibacterial, and antifungal agents, namely, pharmaceuticals, natural oils, vitamins, minerals and hand washes” in International Class 5.







Applicant argues that

pharmaceutical products are typically targeted at a different market of consumers than that for makeup and cosmetic products[, n]amely, those looking to use medicine to change a feature, rather than merely changing appearance with makeup.

Applicant's brief at 14. By contrast, the Trademark Examining Attorney contends that Applicant's cosmetic goods by definition encompass Registrant's pharmaceutical goods. She argues that to the extent the term “cosmetics” means “any

preparation applied to the body, esp. the face, with the intention of beautifying it,”³ Applicant’s “cosmetic creams for skin care” are broad enough to include skin moisturizers and skin cleansers of the type listed by Registrant. We disagree with this analysis. By the very terms of the Nice Classification system, cosmetics in the nature of non-pharmaceutical skin moisturizers and skin cleansers classified in International Class 3 cannot encompass pharmaceutical preparations in International Class 5 even if these topical ointments are further identified as “skin moisturizers and skin cleansers.”

The Trademark Examining Attorney has provided evidence from the Internet showing national merchants that market a range of cosmetics as well as pharmaceutical preparations or antibacterial hand washes arguably similar to Registrant’s goods:

	Cosmetics	Pharmaceuticals
SEPHORA		
ULTA BEAUTY		
drugstore.com™ the uncommon drugstore		



³ See dictionary entry attached to Office Action of September 19, 2013.

	Cosmetics	Pharmaceuticals

We accept the possibility that goods of the types identified by Applicant and by Registrant may occasionally be found on the same Internet sites. However, that alone does not show a relationship between the respective goods. For example, it is not clear that all of these advertisements even include pharmaceutical preparations

in International Class 5. Additionally, in some of the websites listed above, the goods involve different marks and distinctly different source identifiers for the cosmetic and pharmaceutical products. Hence, these screen prints do not support the position taken by the Trademark Examining Attorney.

The Trademark Examining Attorney also provided use-based, third-party registrations showing the same mark for both non-medicated cosmetics (lotions, creams, etc.), and medicated skin moisturizers and skin cleansers (in International Class 5) in order to support the conclusion that the goods are related:

XTRACARE	Kahuna Organics	NET-A-PORTER
CORIA	CORBAN LABORATORIES	
SIMPLY POWERFUL SKIN CARE	eBYE	
	CHATTEM	
	Bamboo Elements	

While these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they suggest that Applicant's goods and the goods identified in the cited registration are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Accordingly, we find that these respective products are sufficiently related that consumers seeing similar marks on these types of skin care products are likely to assume the products originate from the same source. Hence, this *du Pont* factor tends to support a likelihood of confusion herein.

II. Trade channels and conditions of sale

Applicant and the Trademark Examining Attorney have also disagreed on where, how, and to whom the parties' respective products are sold. Although Applicant argues that its involved products are sold exclusively through its own website or directly to customers after a makeup application session (Brief at 16), neither the application nor the registration contain any restrictions as to the trade channels of the goods. Nor can we find any probative evidence to support Applicant's claims that Applicant's types of goods are targeted to a "younger generation" while Registrant's types of goods are targeted to an "older generation."

On the other hand, as noted above, we have questioned how clearly the Trademark Examining Attorney's Internet evidence demonstrates that national retailers having a prominent presence on the Internet (e.g., Sephora, Ulta, Drugstore.com, Walgreens, etc.) present pharmaceutical preparations as complementary products to cosmetic creams for skin care. Similarly, presuming that Sephora, Ulta, Walgreens, The Body Shop, Bath and Body Works, and other national retailers sell both types of products in their bricks-and-mortar stores, we cannot be sure that they would be displayed within the same aisles or sections of large retail stores.

Without probative evidence on these *du Pont* factors, we find them to be neutral.

III. Confusing similarity of the marks

We turn then to the first *du Pont* factor, i.e., whether Applicant's mark and Registrant's mark are similar or dissimilar when compared in their entireties. *See*

Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We make this determination in accordance with the following principles.

The test, under this *du Pont* factor, 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. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Finally, “[u]nder the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine ... similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay* 73 USPQ2d at 1696.

The Trademark Examining Attorney has shown that an “appreciable segment of American consumers” speak French. See excerpt from www.census.gov as attached to Applicant’s Request for Reconsideration of November 7, 2014. The doctrine of foreign equivalents is applied when it is likely that “the ordinary American purchaser would ‘stop and translate’ [the term] into its English equivalent.” *Palm Bay*, 73 USPQ2d at 1696, quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976). See also *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006). “The ‘ordinary

American purchaser' in this context refers to the ordinary American purchaser who is knowledgeable in the foreign language." *Id* at 1024.

As noted above, the cited registration includes a translation of Registrant's mark, "Parfait Visage," as "Perfect Face." Applicant introduced into the record copies of a webpage showing Registrant's repeatedly touting its "Parfait Visage" product as the French term for "perfect face":



In addition, the Trademark Examining Attorney submitted several translations from Internet-based dictionaries for the separate words "parfait" and "visage":

parfait *adjective*
perfect
en parfait état in mint condition
presque parfait almost perfect, near perfect
un crime presque parfait an almost perfect crime, a near perfect crime ⁵

⁴ <http://www.globalhealingcenter.com/parfait-visage.html>, as attached to Applicant's Request for Reconsideration of November 7, 2014.

⁵ COLLINS FRENCH-ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/french-english/>

parfait <i>adj</i> (sans défaut)	perfect <i>adj</i>	
Ce travail est parfait.		
parfait <i>adj</i> (modèle de)	perfect <i>adj</i>	6
visage <i>masculine noun</i>		
face		7
visage <i>nm</i> (face humaine)	face <i>n</i>	
Chacun de nous a un visage différent.		
Each of us has a different face.		
visage <i>nm</i> (expression des traits de la face)	face <i>n</i>	
Sous ses cheveux blancs et avec ses rides elle a un visage très doux.		
Beneath her white hair, even with her wrinkles, she has a very gentle face.		
visage <i>nm</i> <i>figuré</i> (personne) (<i>figurative</i>)	face <i>n</i>	
J'aime me promener dans la foule et voir de nouveaux visages.		
I like walking around town and seeing new faces.		
visage <i>nm</i> <i>littéraire</i> (aspect) (<i>figurative</i>)	face <i>n</i>	
	appearance <i>n</i>	
Après les inondations le village offrait un visage de désolation.		
After the floods, the face of the village was one of desolation.		8

While Applicant acknowledges that it is aware that the two words “parfait” and “visage” literally translate to “perfect” and “face,” the result of her Bing translator shows that the expression “the perfect face” would translate as “le visage parfait.” Given the usual presence in such a French language expression of the leading masculine article and the adjective following the noun, Applicant argues that “The Perfect Face” is not the correct, literal translation of the cited “Parfait Visage,” and thus would not cause confusion as to whether these goods are related among ordinary purchasers in the United States who are familiar with the French language. Certainly, several of the examples of usage in French language sentences

⁶ WORDREFERENCE ENGLISH-FRENCH DICTIONARY, <http://www.wordreference.com/fren/parfait>.

⁷ COLLINS FRENCH-ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/french-english/>

⁸ WORDREFERENCE ENGLISH-FRENCH DICTIONARY, <http://www.wordreference.com/fren/visage>.

shown above in the dictionary entries support Applicant's position that the noun ordinarily precedes the adjective modifier.

Despite the fact that Registrant clearly touts "parfait visage" as "perfect face," we find that the French words, "Parfait Visage," is not an exact translation of "Perfect Face." In addition to the transposition of the noun and modifying adjective, Applicant points out the absence of the French article "le" from Registrant's mark. Applicant also argues that this is a case where the mark would not be translated because of the inherent nature of the mark. *See In re Thomas*, 79 USPQ2d at 1024, citing, *In re Tia Maria, Inc.* 188 USPQ 524 (TTAB 1984). Specifically, Applicant argues that the doctrine of foreign equivalents does not apply here because the ordinary American purchaser would not stop and translate "Parfait Visage" into "Perfect Face" inasmuch as the ordinary purchaser in this country already has a well-established connotation for the term "parfait" in the English language, namely, a tart dessert.

Applicant is correct that the doctrine of foreign equivalents is not absolute, and "where the only similarity between the marks is in connotation, a much closer approximation is necessary ... to justify a refusal to register on that basis alone." *In re Sarkli*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983) (**REPECHAGE** not confusingly similar to "Second Chance"). *See also Palm Bay*, 73 USPQ2d at 1696 (no substantial evidence that the average American purchaser would stop and translate the word "Veuve" into "widow") and *In re Buckner Enterprises Corp.*, 6 USPQ2d

1316 (TTAB 1987) (**PALOMA**, meaning both “dove” and “pigeon,” is not confusingly similar to **DOVE**).

In view of the lack of equivalency based on the grammatically incorrect translation of Registrant’s mark and the English meaning of PARFAIT in Registrant’s mark, we find that “Parfait Visage” is not such a close approximation of “The Perfect Face” that the ordinary American purchaser would stop and translate “Parfait Visage” into “The Perfect Face.” In view of the differences in sound and appearance, without sufficient similarity in the connotations of the marks, we cannot find that these respective marks project similar overall commercial impressions. Hence, this critical *du Pont* factors favors a finding of no likelihood of confusion.

IV. No Evidence of Actual Confusion

Finally, Applicant argues there has been no actual confusion despite coexisting use for almost fifteen years. Applicant supports that statement by asserting that it has been using its mark since May 21, 2001, and the first use date claimed in the registration is June 30, 2001. While a showing of actual confusion would be highly probative, the lack thereof is not. “The lack of evidence of actual confusion carries little weight, especially in an *ex parte* context.” *Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 (internal citations omitted) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that testimony of applicant’s corporate president’s unawareness of instances of actual

confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). In any event, the record is devoid of probative evidence relating to whether there have been meaningful opportunities for actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Furthermore, Applicant's allegations of its actual use in a very specific trade channel support the possibility that there have not been meaningful opportunities for confusion to occur. Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

V. Conclusion

In view of our finding that the marks are not similar, we find no likelihood of confusion herein. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive").

Decision: The refusal to register Applicant's mark **THE PERFECT FACE** under Section 2(d) of the Lanham Act is hereby reversed.