

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: August 24, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Dr. Fresh, LLC*  
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Serial No. 86010644  
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Ketan S. Vakil of Snell & Wilmer L.L.P.,  
for Dr. Fresh, LLC.

Mary E. Crawford, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

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Before Bergsman, Kuczma and Adlin,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Dr. Fresh, LLC (“Applicant”) seeks registration on the Principal Register of the mark COMPLETE CARE (in standard characters) for “dental floss,” in International Class 21.<sup>1</sup>

The Trademark Examining Attorney has 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 previously registered mark ARM &

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<sup>1</sup> Application Serial No. 86010644 was filed on July 15, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

HAMMER COMPLETE CARE and design, shown below, for “tooth paste, tooth gel,” in Class 3, as to be likely to cause confusion.



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

Our determination under Section 2(d) is based on an analysis of all of the 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 Co., 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. *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.”). These factors, and any other relevant du Pont factors in the proceeding now before us, will be considered in this decision.

*A. The similarity or dissimilarity and nature of the goods.*

To prove that the Applicant's and Registrant's respective goods (tooth paste, tooth gel vs. dental floss) are related, the Trademark Examining Attorney submitted (i) websites showing different entities using the same mark to identify tooth paste, tooth gel and dental floss, (ii) third-party registrations for marks identifying dental floss and tooth paste and/or tooth gel, and (iii) articles posted on the Internet explaining that dental floss and tooth paste were essential products for good oral hygiene.

The Trademark Examining Attorney submitted the following websites showing the sale of dental floss and tooth paste and/or tooth gel under the same marks:<sup>2</sup>

1. The Tom's of Maine website (tomsofmainestore.com) advertises the sale of Tom's brand toothpaste and dental floss;<sup>3</sup>

2. The P&G website (pg.com) advertises CREST toothpaste and dental floss;<sup>4</sup> and

3. The VITIS website (dentaaid.com) advertises its "range of toothbrushes, toothpastes, mouthwashes and dental floss and tape" as "[a]n oral hygiene brand that offers specific and personalized care for everyone."<sup>5</sup>

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<sup>2</sup> The Trademark Examining Attorney also submitted two websites, including Applicant's website (drfresh.com and pattersondental.com), that showed the sale of toothpaste but not dental floss, and one website (reach.com) that advertised the sale of dental floss but not toothpaste or tooth gel. Since these websites advertised the sale of only one of the products at issue, they have no probative value.

<sup>3</sup> October 28, 2013 Office Action.

<sup>4</sup> *Id.*

<sup>5</sup> May 21, 2014 Office Action.

The Trademark Examining Attorney also submitted copies of use-based, third-party registrations for goods listed in both the application and registration. Third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The registrations are listed in the table below.<sup>6</sup>

MARK	REG. NO.	GOODS
DR. SHARP	3768777	Toothpaste, tooth whitening gels, dental floss
DII DENTAL IMPLANT INSTITUTE	3797144	Toothpaste, dental floss
BEYOND	3898646	Toothpaste, dental floss
SUPERSMILE	3014779	Toothpaste, tooth gel, non-medicated dental floss
BIOFILM THERAPY	2811702	Toothpaste, dental floss
LET'S GET SOME GOODNESS GOING ON!	3893989	Toothpaste, dental floss
LIFE OPENS UP WHEN YOU DO	4109632	Toothpaste, dental floss
SPRY	4212609	Tooth gels, tooth paste, dental floss
AUTOMAGIC DELIVERY	4369852	Toothpaste, teeth gels, dental floss

<sup>6</sup> October 28, 2013 Office Action. Only the goods that appear in both Applicant's application and Registrant's registration are listed in the table.

In the May 21, 2014 Office Action, the Trademark Examining Attorney submitted copies of articles posted on websites discussing oral hygiene and how both brushing (with toothpaste) and flossing (with dental floss) were essential elements of good oral hygiene. The articles are listed below:

1. “Maintaining Good Dental Care Habits,” by Clare Kittredge, posted on the Everyday Health website (everydayhealth.com), states that basic principles for good dental health include brushing your teeth two times a day and flossing at least once a day;

2. “Oral health: Brush up on dental care basics,” by the Mayo Clinic Staff, posted on the Mayo Clinic website (mayoclinic.org), reports that “[y]our smile depends on simple dental care habits, such as brushing and flossing.”;

3. The 1-800-DENTIST website (1800dentist.com) has a “find a dentist now” webpage. It features instructions for oral hygiene, including the proper techniques for brushing and flossing;

4. “Daily Tips for Good Oral Hygiene,” posted on KnowYourTeeth.com (May 21, 2014) includes instructions for proper brushing and flossing;

5. “Oral Hygiene 101,” the American Institute of Preventative Medicine, posted on HowStuffWorks.com, provides instructions on good oral hygiene, “specifically, brushing your teeth, flossing, whitening teeth, eating an anticavity diet, and visiting the dentist.”; and

6. “Dental Habits: Best Practices,” posted on Humanonedental.com, identifies topics such as the benefits of using dental floss and how to pick a toothpaste.

In view of the foregoing, the complementary nature of Applicant's dental floss and Registrant's toothpaste and tooth gel cannot be overlooked.<sup>7</sup> *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). We find, therefore, that the goods are closely related.

*B. The similarity or dissimilarity of established, likely-to-continue channels of trade.*

The Trademark Examining Attorney submitted excerpts from the two websites listed below that show the sale of different brands of toothpaste and dental floss at the same location.

1. Oral-B website (oralb.com) advertises the sale of Oral-B brand dental floss and CREST brand toothpaste;<sup>8</sup> and
2. The Dentist.net website advertises the sale of toothpastes and dental flosses manufactured by different entities.<sup>9</sup>

In any event, it is common knowledge that tooth paste and dental floss are sold in the "oral hygiene" section of drug stores, supermarkets, and convenience stores. Further, since these products are ordinary consumer products, they are sold to all classes of consumers.

We find that dental floss and toothpaste and tooth gel move in the same channels of trade.<sup>10</sup>

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<sup>7</sup> Applicant, in its Brief, did not argue that the goods were not related.

<sup>8</sup> October 28, 2013 Office Action.

<sup>9</sup> May 21, 2014 Office Action.

<sup>10</sup> Applicant, in its Brief, did not argue that the goods moved in different channels of trade or were sold to different classes of consumers.

*C. The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).*

Applicant argues that out of the 138 products displayed on Registrant’s website, only one product did not bear the ARM & HAMMER logo as part of a composite mark and, therefore, “Applicant’s dental floss would not be seen by consumers as an extension of Registrant’s product line without ARM & HAMMER as part of its mark.”<sup>11</sup>

One of the factors the *du Pont* court listed as relevant is “[t]he variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark).” 177 USPQ at 567. If a registrant is found to own a house mark for a range of goods, that is an *additional* factor—beyond the similarities between Applicant’s mark and goods, and any *one* of Registrant’s marks and goods—weighing in favor of a likelihood of confusion. *See McDonald’s Corp. v. McSweet, LLC*, 112 USPQ2d 1268, 1275 (TTAB 2014); *Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187, 1195 (TTAB 2007) (“The fact that opposer applies its marks to a variety of sports products makes it more likely that purchasers, aware of opposer’s use of the mark on a variety of sports products, when seeing a similar mark used in connection with backpacks, duffel bags and other sports bags, are likely to believe that these products are also being produced or sponsored by opposer.”); *Uncle Ben’s Inc. v.*

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<sup>11</sup> Applicant’s Brief, p. 7; 7 TTABVUE 12. Applicant submitted an extensive excerpt from Registrant’s website in its November 21, 2014 Request for Reconsideration (4 TTABVUE 30 – 48). For example, Registrant sells ARM & HAMMER TRULY RADIANT, ARM & HAMMER MENTADENT, and ARM & HAMMER PEROXICARE toothpaste, as well as ARM & HAMMER COMPLETE CARE toothpaste. 4 TTABVUE 39.

*Stubenberg International Inc.*, 47 USPQ2d 1310, 1313 (TTAB 1998) (“the fact that opposer applies its mark [UNCLE BEN’S] to a variety of products ... makes it more likely that purchasers, aware of opposer’s use of UNCLE BEN’S on a variety of food products, when seeing applicant’s mark [BEN’S BREAD] used in connection with a bread mix, are likely to believe that this product is also being produced or sponsored by opposer.”).

Thus, the fact that Registrant uses its ARM & HAMMER logo on a wide variety of goods weighs in favor of finding that there is a likelihood of confusion.

*D. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.*

We now turn 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. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, “two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) (emphasis in the original; citation omitted). *See also Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (*citing Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).



In comparing the marks, we are mindful that where, as here, the goods are closely related, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods/services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Also, “[t]he 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). *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d* mem., 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As indicated above, the average customer for toothpaste, tooth gel and dental floss is an ordinary consumer.

The marks are similar because they both include the term “Complete Care” and different because Registrant’s mark includes its famous ARM & HAMMER logo. In this regard, Registrant’s mark incorporates Applicant’s entire mark. In similar circumstances where the goods are closely related and a registrant’s mark includes an applicant’s entire mark, the Board has found that the marks, in their entirety, are similar. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant’s mark ML for personal care products and skin care preparations is similar to registrant’s mark ML MARK LEES for skin care products); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (THE LILLY as a mark for women's dresses is likely to be confused with LILLI ANN for women's apparel including dresses); *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660-61 (TTAB 2014) (applicant’s mark PRECISION for irrigation equipment and components is similar to registrant’s mark PRECISION DISTRIBUTION CONTROL for irrigation sprinklers); *In re United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE for women’s clothing stores and women’s clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women’s clothing). In *United States Shoe*, the Board observed that “Applicant’s mark would appear to prospective purchasers to be a shortened form of registrant’s mark.” 229 USPQ at 709. Likewise, in this case, Applicant’s mark COMPLETE CARE appears to be a shortened version of Registrant’s mark shown below:



We recognize that Registrant's ARM & HAMMER logo house mark appearing alongside the COMPLETE CARE product mark creates differences in appearance from Applicant's COMPLETE CARE mark.<sup>12</sup> However, the ARM & HAMMER logo house mark and the COMPLETE CARE product mark engender distinct commercial impressions. *See In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (VANTAGE TITAN for medical resonance diagnostic apparatus, is likely to cause confusion with TITAN for medical diagnostic apparatus - even though the words "Vantage" and "Titan" are not naturally associated, the term TITAN will retain its identity as a separately identifiable term in the mark.). *See also Squirtco v. Tomy Corp.*, 397 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[I]n SQUIRT SQUAD, SQUIRT retains its identity"). Thus, Registrant's mark is different than the marks in the cases cited by Applicant involving unitary composite marks where one feature was a dominant element. Here, Registrant's mark creates two distinct commercial impressions.<sup>13</sup>

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<sup>12</sup> See *Wikipedia* entry for "Arm & Hammer" ("The Arm & Hammer brand is one of the longest-running and most recognized U.S. trademarks.") (4 TTABVUE 10); "Baking Soda Maker Strikes Again," *The New York Times* (June 16, 1990) ("Nearly 150 years after the family-run business that became the Church & Dwight Company began making baking soda, a new and more aggressive management and the environmental movement are breathing new life into the company's famous Arm & Hammer trademark.") (4 TTABVUE 12).


<sup>13</sup> The marks in *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689 (Fed. Cir. 2005) (the word "veuve" is the dominant portion of Applicant's mark VUEVE ROYALE and Opposer's mark VUEVE CLIQUOT); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012) (the word "L'Oreal" is the dominant portion of Opposer's mark L'OREAL PARIS); and *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (the word "kid" is the first part of the marks KIDWIPES and KID STUFF) which Applicant cites for the proposition that first part of the mark is often the most dominant portion are unitary composite marks and, therefore, these cases are inapposite. Likewise, *In re Hearst Corp.*, 982 F.2d 493, 25

Applicant is seeking to register COMPLETE CARE on the Principal Register. Registrant did not disclaim the exclusive right to use the term “Complete Care.” Therefore, both Applicant and Registrant consider “Complete Care” to be suggestive, at minimum, when used in connection with their respective products. Where, as here, Registrant’s use of the term “Complete Care” as part of its registered mark engenders a separate and distinct commercial impression which is identical to Applicant’s mark COMPLETE CARE, it is well established that even the owner of a weak mark is entitled to be protected from damage due to a likelihood of confusion with another’s use of the same or similar mark. *Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521, 526 (TTAB 1982). “Neither trademarks nor the public are adequately protected unless decisions in cases of this kind are based on a realistic appraisal of the likelihood of purchasers or prospective purchasers being confused as to source regardless of theoretical ‘weakness’ of a mark.” *Matsushita Electric Industrial Co., Ltd. v. National Steel Construction Co.*, 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971). Accordingly, the presence of Registrant’s ARM & HAMMER logo is insufficient to distinguish the marks. In

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USPQ2d 1238 (Fed. Cir. 1992) (VARGAS is not similar to VARGA GIRL); *Playboy of Miami, Inc. v. John B. Stetson Co.*, 426 F.2d 394, 165 USPQ 686 (CCPA 1970) (PLAYBOY OF MIAMI is not similar to THE STETSON PLAYBOY); and *In re White Rock Distilleries Inc.* 92 USPQ2d 1282 (TTAB 2009) (VOLTA is not similar to TERZA VOLTA and design) are not applicable because the marks in those cases were unitary composite marks whereas Registrant’s mark engenders two distinct commercial impressions. For example, in *Hearst*, the court expressly found that “[t]he appearance, sound, sight, and commercial impression of VARGA GIRL derive significant contribution from the component ‘girl.’” 25 USPQ2d at 1239. As indicated above, the house mark ARM & HAMMER logo and the product mark COMPLETE CARE engender distinct commercial impressions and the meaning and commercial impression created by COMPLETE CARE is not impacted by the ARM & HAMMER logo.

comparing Applicant's mark and Registrant's mark, the commonality of the term "Complete Care" results in marks that are similar in appearance, sound, connotation and commercial impression.

Applicant vigorously argues that the addition of a house mark to a suggestive term like "Complete Care" is sufficient to distinguish two marks. However, we must consider each mark in its entirety and on a case-by-case basis. In this case, the presence of the ARM & HAMMER logo in Registrant's mark is not dispositive. IN this regard, we note that there is nothing in Applicant's mark COMPLETE CARE that indicates the source or origin of its dental floss. A purchaser could only speculate on who sponsored or produced the product and his/her speculation would necessarily be based on the term COMPLETE CARE. It is reasonable to assume that under such circumstances, a person familiar with Registrant's  *Complete Care* toothpaste or tooth gel would conclude that the term COMPLETE CARE in Applicant's mark refers to Registrant as the source or origin of the products. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983).<sup>14</sup>

We find that any differences between the marks in appearance, sound, connotation and commercial impression are outweighed by the similarities. In sum, when the marks are considered in their entireties, the marks are similar.

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<sup>14</sup> Accordingly, Applicant's citation to *In re Sears, Roebuck and Co.*, 2 U.S.P.Q.2d 1312 (TTAB 1987) (CROSS-OVER for bras versus CROSSOVER for ladies sportswear) offers little guidance because the marks at issue in that case are not remotely similar to the issue presented by the marks in this case.

*E. Balancing the factors.*

Because the marks are similar, and the goods are related, and move in the same channels of trade, we find that Applicant's mark COMPLETE CARE for "dental floss" is likely to cause confusion with Registrant's mark COMPLETE CARE and the ARM & HAMMER logo for "toothpaste, tooth gel."

**Decision:** The refusal to register Applicant's mark COMPLETE CARE is affirmed.