

This Opinion is Not a
Precedent of the TTAB

Mailed: September 18, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Luna Cycles

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Serial No. 87132160

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Ruth Khalsa of LegalForce RAPC Worldwide PC,
for Luna Cycles.

Alicia Collins Edwards, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Bergsman, Lykos and Goodman,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Luna Cycles (“Applicant”) seeks to register on the Principal Register the mark LUNACYCLE in standard characters for goods ultimately identified as “Bicycle frames for electric bicycles; Electric bicycles; Electric bicycle parts, namely, brake sensors, electric bicycle motors, electric bicycle mid-drives, bicycle sprockets” in International Class 12.¹

¹ Application Serial No. 87132160, filed August 9, 2016, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging September 1, 2012 as the date of first use anywhere and in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark pursuant to 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 registered mark



for “Women’s bicycle clothing and accessories, namely, shorts, short-sleeve jerseys, long-sleeve jerseys, sleeveless jerseys, wind jackets, insulated warm-up jackets, sweatshirts, winter hats; women’s athletic clothing, namely, tops, socks in International Class 25,² that, when used on or in connection with Applicant’s identified goods in each class, it is likely to cause confusion or mistake or to deceive. The registration includes the following translation statement: “The English translation of ‘LUNA’ in the mark is ‘MOON.’” The registration includes the following description of the mark:

Color is not claimed as a feature of the mark. The drawing is amended to appear as follows: stylized word “LUNA” inside a rectangular design. With a design element composed of a crescent moon inside the letter “A”.

² Registration No. 3842162, issued August 31, 2010, on the Principal Register. Concurrent with the filing on August 30, 2016 of a partial “Combined Declaration of Use and Incontestability under Sections 8 & 15,” removing some of the goods listed in the original registration, Registrant also filed a request under Trademark Act Section 7 to amend the registered mark to “[rearrange] the placement of the crescent moon to a different position within the letter ‘A’; and, [replace] the oval outline with a rectangle.” The amendment was accepted, and the registration certificate was updated on December 13, 2016.

When the refusal was made final, Applicant appealed. The appeal is now briefed and has been presented to us for a decision on the merits.

I. Section 2(d) Refusal

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) (“*du Pont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and others are discussed below. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

A. The Marks

We commence with an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imps., 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) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Rather, we are obliged to consider the marks in their entirety. *Id.* See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

The marks at issue are LUNACYCLE in standard characters and



. Applicant argues that the Examining Attorney improperly focuses on the wording in the cited mark without giving due consideration to the design and appearance. In Applicant’s view, the carrier, stylized lettering, and crescent moon design provide meaningful distinctions with Applicant’s word mark. Applicant also criticizes the Examining Attorney for purportedly dissecting the marks and placing a disproportionate emphasis on the shared literal portion LUNA. As Applicant asserts, its mark is “a portmanteau of the word ‘LUNACY’ and ‘CYCLE’ and that Applicant’s marketing strategy plays off this highly specific concept ... ” Brief, p. 15; 4 TTABVUE 16. With LUNACY as the dominant portion of the applied-for mark, Applicant asserts that it engenders a different connotation and commercial

impression from the cited mark comprised of the term LUNA, a synonym for “moon.” Continuing, Applicant contends that the cited mark “evokes feminine beauty and elegance” whereas its mark alludes to the craziness or lunacy of its non-traditional electric bicycles and associated products. In view of these differences, Applicant takes the position that the marks are audibly and visually distinct and project dissimilar connotations and commercial impressions.

We acknowledge the specific differences in sight and sound pointed out by Applicant. However, we disagree with Applicant’s contention that the Examining Attorney has improperly dissected the marks and that they are overall different in meaning and commercial impression. In reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161 (citing *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

There is no correct pronunciation of a trademark that, like Applicant’s applied-for mark LUNACYCLE, is not a word, but a coined term. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1409 (TTAB 2010). Applicant urges us to find that because prospective consumers will focus on the first six letters of Applicant’s mark which spell the word “lunacy,” the mark projects a different connotation and meaning. Under Applicant’s logic then, consumers would be more likely to understand and

pronounce Applicant's mark as "lunacy cle." While in theory this is possible, it is highly unlikely. Rather, considering the goods for which registration is sought, it is more likely that consumers will understand the mark to represent a "telescoped form" of the two separate words "LUNA CYCLE" focusing on the first arbitrary portion "luna" as the dominant feature and according less significance to the generic term "cycle." Because Applicant has applied to register its mark in standard character format, if registered, Applicant would be entitled to display its mark in any stylization, including with the letter "L" and initial letter "C" in upper case and the remaining letters in lower case.³ *See In re Viterra Inc.*, 101 USPQ2d at 1909 (the rights reside in the wording or other literal element and not in any particular display or rendition); *see also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) ("Registrations with typed drawings are not limited to any particular rendition of the mark and, in particular, are not limited to the mark as it is used in commerce."). Used in this manner, consumers are more likely to read Applicant's mark as two separate words, "luna cycle" instead of focusing on the play on word "lunacy." The display of the mark on Applicant's own specimen, reproduced below, of use with each of these letters in a relatively larger sized font supports this finding:

³ Under Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a), applicants for standard character marks make no claim to any particular font style, size, or color.

The screenshot displays the LunaCycle website interface. At the top, the LunaCycle logo is prominent, along with a search bar and navigation links for 'HOT & NEW', 'BATTERIES', 'MOTORS AND KITS', 'SCORERS/UPGRADERS', 'BOTS', 'PARTS', 'E-TRIKE', 'GARAGE', 'VIDEOS', 'BLOG', and 'SUPPORT'. The main product page features a large image of the Bafang BBS02 750w Mid Drive motor and controller. To the right of the image, the product title 'Bafang BBS02 750w Mid Drive (Motor and controller only)' is displayed, followed by a price of \$399.95. Below the product image, there is a 'Choose Your Options' section with dropdown menus for 'Shipping' and 'Add a Spare and Mounting Kit'. A 'Quantity' field and an 'ADD TO CART' button are also visible. The bottom of the page includes a footer with the LunaCycle logo, contact information (support@lunacycle.com), and a subscription form for a 'New Battery and Kit Notification List'.

Turning our analysis now to the registered composite mark



LUNA as the sole literal element, centrally positioned in relatively large sized lettering, is the dominant element. *See In re Viterra Inc.*, 101 USPQ2d at 1911 (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999) (“In the case of marks

which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods.”). The rectangular carrier is rather ordinary and therefore is subordinate to this literal element. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1138 (TTAB 2015) (design feature of mark that merely serves as carrier does not distinguish applicant’s mark from cited mark). The stylized letter “A” incorporating a crescent moon serves to reinforce the dominance of the literal element LUNA. Thus, the graphics in the registered mark fail to mitigate the similarities in sound and appearance.

Insofar as the involved marks each incorporate LUNA as either the sole literal or dominant element, the marks engender a similar sound, appearance, connotation and commercial impression, when viewed in their entireties despite any differences in wording and appearance. In other words, we find the similarities outweigh the dissimilarities. This *du Pont* factor also weighs in favor of finding a likelihood of confusion.

B. The Goods

The next step in our analysis here is a comparison of the goods, the second *du Pont* factor. We consider the goods as identified in Applicant’s application vis-à-vis the goods identified in the cited registration. *Stone Lion*, 110 USPQ2d at 1161. The respective goods need not be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis, but need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate

from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave sweetener related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

As noted above, Applicant’s goods are identified as,

Bicycle frames for electric bicycles; Electric bicycles;
Electric bicycle parts, namely, brake sensors, electric
bicycle motors, electric bicycle mid-drives, bicycle sprocket.

The current goods in the cited registration are

Women’s bicycle clothing and accessories, namely, shorts
short-sleeve jerseys, long-sleeve jerseys, sleeveless jerseys,
wind jackets, insulated warm-up jackets, sweatshirts,
winter hats; women’s athletic clothing, namely, tops, socks.

Applicant argues that the goods are “readily and immediately distinguishable on their face.” Brief, p. 18; 4 TTABVUE 19. While that may be true, as noted above, the issue is not whether purchasers would confuse the goods, but rather whether there is

a likelihood of confusion as to the source of these goods. Based on the identifications themselves, both goods are related, complementary products.

“Electric bicycles” are “human powered bicycles with integrated electric motors to provide a cyclist with additional power and speed. The latest generation of electric bikes feature lightweight, removable rechargeable batteries making them easy, practical and fun to use in a variety of settings.”⁴ These products are marketed towards the “The Daily Commuter”, “The Recreational, Fun-Loving Cyclist,” “Environmentally Conscious-Cyclist”, “Adult Cyclist” and “Physically-Limited Cyclist.”⁵ The record shows that electric bicycles are offered for sale in the same trade channels as traditional bicycles which also offer women’s bicycle apparel.

The Examining Attorney submitted evidence from brick-and-mortar/online retail bicycle specialty stores offering for sale electric bicycles as well as the type of women’s bicycle apparel products identified in the involved application under the same brand name or trademark. The best illustration is Spokes etc. (<https://spokesetc.com/>) which promotes itself as the “Largest Trek & Specialized Dealer in the Mid-Atlantic,” offering free shipping or in-store pick-up for orders placed online. Its business-to-consumer (B2C) website shows that it offers for sale under the Trek trademark “Trek Ride+Lift+” electric bicycle as well as women’s bicycle apparel such as “Trek UCI World Cup Waterloo Women’s T-shirt,” “Bontrager Trek Segafredo Travel Polo,”

⁴ Final Office Action, p. 20 (excerpt from <https://spokesetc.com> website). Citations to the prosecution history in the USPTO’s TSDR database are to the downloadable .pdf version. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

⁵ *Id.* at 20-21.

“Sportful Trek – Segafredo Republica Womens’ Jersey,” “Sportful Trek –Segafredo Pro Race Sock.” Under the Electra trademark, Spokes etc. offers for sale the “Electra Townie Commute Go!” electric bicycle and the “Electra Waffle Beanie,” “Electra 5” sock,” “Electra No Cuff Sock” and “Electra Townie Ladies Hoodie.”⁶ Although we acknowledge that the Trek and Electra marks may be viewed as house marks, the evidence still demonstrates that the same consumers may encounter the involved goods in the same context.

The record also shows that bicycle specialty stores offer for sale electric bicycles as well as women’s bicycle apparel under different trademarks but as complementary products. For example, Bike Attack offers a variety of brands of electric bicycles as well as women’s bicycle clothing apparel.⁷ This evidence is not from “big box” retail stores selling a wide variety of goods but rather from specialty retailers marketing to electric bicycle enthusiasts, which would of course include women. This targeted type of retailing is narrower in scope, and supports a finding that consumers would be likely to encounter one product while purchasing the other.

In view of the evidence of record, we find that the goods identified in the application and cited registration are related and complementary in nature. *Cf. In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that “[s]uch complementary use has long been recognized as

⁶ Final Office Action pp. 45-58 (excerpts from <http://www.bikeattack.com>).

⁷ Final Office Action pp. 28-35 (excerpts from <http://www.bikeattack.com>).

a relevant consideration in determining a likelihood of confusion”). As such, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

C. Trade Channels

Directing our attention to the established, likely-to-continue channels of trade, Applicant argues that because the cited registration covers promotional clothing items offered in connection with nutrition bars, it cannot overlap with Applicant’s identified goods. Applicant’s argument is misplaced; the cited registration contains no such limitations. Because the identifications in the application and cited registration have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods. *See Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). These trade channels include, as reflected in the record, online and brick-and-mortar specialty bicycle shops. As such, the third *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

D. The Number and Nature of Similar Marks in Use on Similar Goods

“The purpose of [an applicant’s] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694; *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS*

Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation*, 115 USPQ2d at 1675-76 (internal citations omitted). “The weaker [the Registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). *See also Palm Bay*, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”). As emphasized by the U.S. Court of Appeals for the Federal Circuit, evidence of the extensive registration and use of a term by others can be “powerful” evidence of weakness. *Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1676.

Third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used in ordinary parlance that the public will look to other elements to distinguish the source of the goods. *Juice Generation*, 115 USPQ2d at 1674-75. *See also Institut Nat’l des Appellations D’Origine v. Vintners Int’l Co. Inc.*, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (“third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.”) (internal citations omitted).

Applicant maintains that the LUNA portion in the cited mark is relatively weak and entitled to a narrow scope of protection in light of its common use as a trademark

in the apparel industry. In support thereof, Applicant argues that based on its search of the USPTO database, there are over 100 marks utilizing LUNA or a variation thereof in International Class 25. As examples, Applicant has made of record several third-party registrations incorporating the term LUNA in their mark which list clothing items in Class 25 and in some instances women's clothing items. *See* Reg. No. 4498401 (LUNA LA VIE); Reg. No. 2029008 (LUNACHIX); Reg. No. 2110031 (LUNAIRE); Reg. No. 1966953 (LUNA BLANCA); Reg. No. 4936552 (LUNA MOON);



Reg. No. 4923587 (LLUNAA); Reg. No. 4886436 (); Reg. No. 4989986 (LUNA COLLEZIONE); Reg. No. 4538357 (LUNAFINERY); Reg. No. 4803146 (MAR & LUNA); Reg. No. 3421154 (LUNA LUZ); Reg. No. 4305484 (LUNA C); Reg. No. 4736651 (LUNA BLUE); and Reg. No. 4842537 (SOL + LUNA).⁸

Bicycle clothing may indeed be a distinct product line from apparel. But even assuming that women's bicycle clothing falls within the ambit of apparel, the evidence of record falls short of establishing that LUNA is so weak in the apparel industry that consumers are capable of making minute distinctions. The record is devoid of examples of actual use of the mark LUNA or variations thereof in connection with Registrant's goods or goods related thereto. Thus, the evidence before us falls short of showing that the cited mark is weak for the relevant goods. *Compare Jack Wolfskin*, 116 USPQ2d at 1136 ("extensive" evidence not only of third-party registrations but also "of these marks being used in internet commerce" for the

⁸ *See* May 16, 2017 Response to Office Action.

relevant goods); *Juice Generation*, 115 USPQ2d at 1671 (uncontradicted testimony of “a considerable number” of third- party uses of similar marks, along with third-party registrations). We therefore deem this factor neutral.

E. Nature and Extent of any Actual Confusion

Applicant points to the absence of evidence of actual confusion even with concurrent use as weighing in its favor. A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the likelihood of confusion, not actual confusion. *Herbko Int’l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Further, any suggestion that there has been no actual confusion between the marks based on the coexistence of Applicant’s mark and the cited registration is entitled to little probative value in the context of an ex parte appeal. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205. *See also In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Therefore, this *du Pont* factor is neutral.

F. Extent of Potential Confusion

With regard to the extent of potential for confusion, i.e., whether de minimis or substantial, we cannot find, as Applicant urges that this factor leans towards a finding of no likelihood of confusion. At issue in this case are electric bicycles and women’s bicycle clothing items. These are the type of goods that would be marketed

to and purchased by members of the general public. The potential for confusion therefore cannot be deemed to be de minimis. See *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1205 (TTAB 2009). This *du Pont* factor therefore, at best, is neutral.

II. Conclusion

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, each of the *du Pont* factors discussed above either favors a finding of likelihood of confusion or is neutral. To summarize, despite slight differences in sound and appearance, overall the marks project virtually the same connotation and commercial impression. This, coupled with the related and complementary nature of the goods which are marketed in the same trade channels to the same consumers, female bicycle enthusiasts, supports a finding that there is a likelihood of confusion between Applicant's mark and the cited registration.

Decision: The Section 2(d) refusal is affirmed.