

This Opinion is Not a
Precedent of the TTAB

Mailed: May 29, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Primelife Research, LLC

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Serial No. 88216774

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David M. Tener of Caesar Rivise, PC
for Primelife Research, LLC

Jessica Hilliard, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Wolfson, Greenbaum, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Primelife Research, LLC (“Applicant”) seeks registration on the Principal Register of the mark PRIMELIFE RESEARCH and Design, displayed below



, with a disclaimer of “RESEARCH” for “Dietary supplements; Dietary supplements for human consumption; Dietary and nutritional supplements” in International Class 5.¹ The application claims the colors blue and silver as a feature of the mark, and contains the following description of the mark:

The mark consists of a blue square with a gradient that is dark blue at left, light blue in the middle, and dark blue on the right. A silver tree is positioned in the middle of the blue square with the silver stylized word “PRIMELIFE” underneath the tree and the silver stylized word “RESEARCH” underneath that in smaller font.

The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark COLOSTRUM PRIME LIFE in standard characters, with a disclaimer of COLOSTRUM, for “Dietary and nutritional supplements” in International Class 5.² After the Examining Attorney made the refusal final, Applicant appealed.

For the reasons set forth below, we affirm the refusal to register.

¹ Application Serial No. 88216774 was filed December 4, 2018 based on alleged use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

² Registration No. 3443915 issued on June 10, 2008, and has been renewed.

II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Two key considerations are the similarities between the marks and the relatedness of the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *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.”).

A. The Goods

“[L]ikelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citations omitted). In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir.

2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). A finding of likely confusion with respect to at least one item in the identification suffices to establish likely confusion for this single-class application. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

As identified, the goods are in-part identical, as both the application and cited registration include dietary and nutritional supplements. Applicant offers no argument regarding this factor.

The second *DuPont* factor thus weighs heavily in favor of likely confusion.

B. The Trade Channels and Classes of Consumers

Turning to the trade channels and consumers, because the goods in the cited registration are identical in part to Applicant's, we presume that they travel through the same channels of trade to the same classes of purchasers, considerations under the third *DuPont* factor. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, "the marketing channels of trade and targeted classes of consumers and donors are the same"); *see also In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion).

Thus, the third *DuPont* factor weighs in favor of likely confusion.

C. The Number and Nature of Similar Marks for Similar Goods

Before reaching the degree of similarity of the marks, we address Applicant's evidence and argument under the sixth *DuPont* factor, "[t]he number and nature of similar marks in use on similar goods," *DuPont*, 177 USPQ at 567, as this may impact the scope of protection accorded the cited registration. The Federal Circuit has held that evidence of the extensive registration and use of similar marks by others in the field can be powerful evidence of a mark's weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. 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, 1674 (Fed. Cir. 2015). The strength of a mark may be assessed based on its conceptual strength arising out of the nature of the mark itself and its commercial strength, derived from the marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010).

Unlike cases in which the Federal Circuit found weakness based on "a considerable number of third parties[] use [of] similar marks," *Juice Generation*, 115 USPQ2d at 1674, Applicant has presented no evidence of actual use and thus no commercial weakness evidence, and has submitted at most two registrations that could be relevant to conceptual weakness. This falls far short of the volume of evidence the Federal Circuit found convincing in *Jack Wolfskin* and *Juice Generation*. *See also In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1735 (TTAB 2018) (three third-party uses are "well short of the volume of evidence found convincing in *Jack Wolfskin* and *Juice Generation*."); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1745-46

(TTAB 2018) (two third-party registrations for related but not identical services and two registrations for identical services with a non-identical but similar mark were not sufficient to prove Registrant's mark was conceptually or inherently weak).


Almost all of the registrations relied on by Applicant are for goods or services quite distinct from the dietary and nutritional supplements at issue, such as insurance services, life insurance underwriting, credit card services, and prepared entrees.³ Such registrations have no bearing on the conceptual strength of the term for dietary and nutritional supplements. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”). Only two registrations (for PRIME LIFE in a stylized font) involve supplements, but narrowly identify them and restrict their trade channels as follows: “bovine and swine feed supplements sold direct to livestock producers by owner or through owner’s dealers who sell direct to livestock producers and not through any other consumer channel.”⁴ Given the small number and limited nature of these third-party registrations, we deem them insufficient to narrow the scope of protection for the cited registration, and find this *DuPont* factor neutral.

³ June 24, 2019 Response to Suspension Inquiry at 27-40.

⁴ *Id.* at 39-40.

D. Similarity of the Marks



We next compare the marks  and COLUSTRUM PRIME LIFE “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721). Where, as here, the goods are in part legally identical, the degree of similarity of the marks necessary to find likelihood of confusion lessens. *Cai*, 127 USPQ2d at 1801; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We find that the marks look and sound similar in large part because of the common wording PRIMELIFE/PRIME LIFE that dominates both marks. For rational reasons, we may give more or less weight to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration

of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908. In Applicant's mark with its tree design and wording, purchasers are more likely to remember and use the wording to request the goods. *See Jack Wolfskin*, 116 USPQ2d at 1134; *Viterra*, 101 USPQ2d at 1908 (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987). The PRIMELIFE wording in particular stands out because of its relatively large font and central location. The mark also contains the word RESEARCH, but it appears in much smaller font, and Applicant has disclaimed it as descriptive, reflecting its lesser significance in the likelihood of confusion analysis, as consumers are less likely to rely on descriptive wording to indicate source. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (in comparing THE DELTA CAFÉ to DELTA, the generic term CAFÉ lacks sufficient distinctiveness to create a different commercial impression). Although Applicant argues that consumers would not be aware of the disclaimer, so it would not affect their perception of the mark, it is not the disclaimer itself but the underlying reason for it that influences consumer perception. The descriptive or generic nature of a term renders it less important in the comparison of marks because consumers would be unlikely to focus on it to distinguish source. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). So, while we do not ignore RESEARCH in the analysis, "the non-source identifying nature of the word[] and the disclaimer[] thereof constitute rational reasons for giving those terms less weight in the analysis." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed.

Cir. 2018). The tree design in Applicant's mark is another visual difference, but we do not find it sufficient to distinguish the marks for consumers. We are unconvinced by Applicant's argument that the gradient blue background emphasizes the importance of the tree, as it appears behind the wording too.

PRIME LIFE dominates the registered mark as well. Even though COLOSTRUM forms the first part of the mark, PRIME LIFE is more significant, as "the public can be said to rely more on the non-descriptive portion of [a] mark." *See Nat'l Data*, 224 USPQ at 752. In the registered mark, COLOSTRUM is disclaimed, presumably because the dietary and nutritional supplements feature colostrum, which is "a yellowish liquid, especially rich in immune factors, secreted by the mammary gland of female mammals a few days before and after the birth of their young."⁵

We reject Applicant's argument that consumers would not recognize COLOSTRUM as generic or descriptive because the word is used less often than PRIME and LIFE. To support the argument, first, Applicant submitted lists of TESS search results for each of these three words,⁶ positing that the relative frequency with which each appears in trademark applications or registrations shows that consumers would not know the meaning of COLOSTRUM, and would consider it arbitrary or

⁵ We take judicial notice of this definition, sourced from The Random House Dictionary, available at <https://www.dictionary.com/browse/colostrum?s=t>, accessed May 27, 2020. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions).

⁶ August 13, 2019 Response to Office Action at 7.

fanciful. Second, Applicant offered “ngram” viewer evidence from Google Books⁷ to support the same proposition.

Although Applicant has recast its argument in other terms, essentially it contends that its evidence shows that COLOSTRUM is a stronger component of the registered mark, while PRIME LIFE is weaker. Notably, as discussed above, COLOSTRUM has a generic or descriptive significance in relation to supplements, and mere TESS lists of applications and registrations, without additional context, lack probative value to show consumer understanding of the term in relation to these goods. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405, n.17 (TTAB 2018) (TESS list does not include enough information to be probative when it lacks goods or services); *see also Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (“We cannot determine from a mere [TESS] listing like this the nature of the goods or services for which these purported marks have been applied-for or registered...”). Thus, mere TESS listings of marks that consist of or include each of the terms are not probative of the dominance of any component of the registered mark. Similarly, Applicant provides no context or evidence even to suggest that the Google Books results reflect consumer understanding of or familiarity with the terms. The ngram results certainly do not support Applicant’s contention on their face. Thus, although we have considered Applicant’s evidence and arguments, as Applicant itself notes in its Brief,

⁷ *Id.* at 8-13 According to Applicant, the ngram graph for “colostrum” shows the term appears less often than “prime” or “life” in those “books analyzed by Google.” Applicant provided no more specific explanation of the relevance of the ngram evidence, and no context for it, to assist in our assessment of its probative value.

consumers often “select specific supplements to address specific health concerns,”⁸ such that consumers would recognize COLOSTRUM in the registered mark as a reference to the key ingredient in the identified supplements.

For the foregoing reasons, the marks’ connotations and commercial impressions are similar because of the common dominant wording. We find that consumers would attribute the same meaning to PRIMELIFE and PRIME LIFE. While the additional wording in each mark contributes to its overall meaning and connotation, as explained above, the respective additional words are descriptive or generic, and consumers would perceive them as references to features of the identified supplements. The tree design in Applicant’s mark appears decorative, and as Applicant acknowledges, reinforces the sense of “life”⁹ referred to in the wording of both marks, and consumers would not rely on it to distinguish the marks. We find that consumers encountering the marks likely would view the goods as different types of supplements offered from the same source.

Given their resemblance in sound, appearance, connotation and commercial impression, we find the marks to be similar. This factor weighs in favor of a likelihood of confusion.

E. Sophisticated Purchasing

Relying on the nature of the goods apparent from the identifications in the application and cited registration, Applicant contends that consumers of supplements

⁸ 4 TTABVUE 16.

⁹ 4 TTABVUE 12.

engage in careful purchasing decisions. “[W]e must be sensitive to the fact that patients [or consumers] from the general public will not exercise the degree of care exhibited by medical professionals.” *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). We consider ordinary members of the public as potential purchasers of the dietary and nutritional supplements, and “Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’” *See Stone Lion Capital Partners*, 110 USPQ2d at 1163. Even if these ordinary members of the public exercise some greater degree of care in selecting supplements based on their ingredients, as noted above, the consumers may still mistakenly believe that the supplements are different varieties coming from the same source.

III. Conclusion

The overall similarity of the marks for identical goods that move in the same channels of trade to the same classes of customers renders confusion likely.

Decision: The refusal to register Applicant’s mark is affirmed.