

This Opinion Is Not a  
Precedent of the TTAB

Mailed: February 24, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Ubican Global Licensing, LLC*

Application Serial No. 88731594

Gene Bolmarcich of the Law Office of Gene Bolmarcich  
for Ubican Global Licensing, LLC.

Elaine Xu, Trademark Examining Attorney, Law Office 128,  
Travis Wheatley, Managing Attorney.

Before Bergsman, Larkin and Lebow, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Ubican Global Licensing, LLC (Applicant) seeks registration on the Principal Register of the mark HEALIX, in standard character form, for “herbs for smoking, none of the hemp derived ingredients of which contain a delta-9 tetrahydrocannabinol (THC) concentration of more than 0.3 percent on a dry weight basis,” in International Class 34.<sup>1</sup>

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<sup>1</sup> Serial No. 88731594 filed December 18, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s claim of a bona fide intent to use the mark in commerce.

The Examining Attorney refused to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that HEALIX, in standard character form, for herbs for smoking so resembles the registered mark HELIX and design, reproduced below, for "smoking pipes," in International Class 34, as to be likely to cause confusion.<sup>2</sup>



The description of the mark reads as follows:

Color is not claimed as a feature of the mark. The mark consists of the word "HELIX" and the image of a double helix, arranged horizontally, to the right of the word.

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("DuPont"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "In discharging this duty, the thirteen *DuPont* factors 'must be considered' 'when [they] are of record.'" *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*,

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<sup>2</sup> Registration No. 5797036 registered July 9, 2019.

177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (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.”). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

### **I. The similarity or dissimilarity of the marks.**

We turn first to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*,

126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling 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.”) (citation omitted).

“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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Because the goods at issue are herbs for smoking and smoking pipes, the average customer is a consumer who smokes herbs or smokes a pipe.

With respect to the registered mark consisting of the word “helix” and the helix design, the word “helix” is the dominant element of that mark. In the case of marks consisting of words and a design, we normally accord the words greater weight because the words are likely to make an impression upon purchasers, purchasers will

remember the words, and purchasers will use the words to request the goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)); *Herbko Int’l*, 64 USPQ2d at 1380 (“Because the impact of the design in the overall commercial impression is minor when compared with the words, a consumer viewing Herbko’s mark would attach greater significance to the words CROSSWORD COMPANION than to the crossword puzzle design.”). There is nothing improper in stating that, for rational reasons, we have given 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 entirety. *Viterra*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The Merriam-Webster Dictionary ([merriam-Webster.com](http://merriam-Webster.com)) defines the word “helix” as

- 1: something spiral in form: such as
  - a: an ornamental volute
  - b: a coil formed by winding wire around a uniform tube
- 2: the incurved rim of the external ear
- 3: a curve traced on a cylinder or cone by the rotation of a point crossing its right sections at a constant oblique angle.<sup>3</sup>

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<sup>3</sup> August 5, 2020 Response to an Office Action (TSDR 11).

Citations to the examination record refer to the USPTO Trademark Status and Document Retrieval system (TSDR) by page number in the downloadable .pdf format.

Accordingly, the word “helix” is an arbitrary mark, entitled to a broad scope of protection, when used in connection with smoking pipes. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong). *See also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks).

In addition, Applicant’s drawing of its mark is in standard character form. Marks presented in standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording, and not in any particular display. Thus, Applicant seeks registration of a mark that Applicant might depict in any font style, size, or color. At any time in the future, Applicant might display its mark in a manner employing the font and size of the literal portion of Registrant’s mark. *Viterra*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186-87 (TTAB 2018).

The marks HEALIX and HELIX and design are similar in appearance and sound. HEALIX and HELIX differ only by the letter “A” in the term “Healix.” Consumers will pronounce the English-language word “helix” in the registered mark HELIX and design as “hē likes.”<sup>4</sup> Keeping in mind that there is no correct pronunciation for a mark that is not a word in English, based on normal English pronunciation, consumers are likely to pronounce Applicant’s mark HEALIX as “heal” iks” or “hē likes.”<sup>5</sup> Thus, the marks are either identical or very similar in sound.

Applicant contends that the marks have different meanings when used in connection with the goods at issue.

In the context of Applicant’s herbs for smoking, “HEALIX” conveys the meaning of “**healing** herbs”. [Citing Allie Beckett, “Healing Herbs You Can Smoke (Other Than Cannabis)” (August 15, 2017)]. On the other hand, “HELIX” is defined as “something spiral in form”. [Citing Merriam-Webster.com]. This meaning is made clear to a consumer by the very nature of the Cited Mark wherein a design with a helix (which is well known as the shape of DNA) is a prominent part of the mark.<sup>6</sup>

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<sup>4</sup> Merriam-Webster.com attached to the August 5, 2020 Response to an Office Action (TSDR 11).

<sup>5</sup> Merriam-Webster.com accessed February 24, 2021. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

<sup>6</sup> Applicant’s Brief, pp. 1-2 (4 TTABVUE 3-4). The exhibits Applicant refers to are attached to its August 5, 2020 Response to an Office Action. The Allie Beckett article purportedly is posted on an unidentified website accessed on an unidentified date. To make Internet evidence part of the record, an applicant must both (1) provide complete information as to the date the evidence was published or accessed from the Internet, and its source (e.g., the complete URL address of the website), and (2) download and attach the evidence to the Office action. *See In re I-Coat Company, LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018) (“[W]e will no longer consider Internet evidence filed by an applicant in an ex parte proceeding to be properly of record unless the URL and access or print date has been identified, either directly

While HEALIX and HELIX are not identical, the slight difference between them, if consumers even notice it, does not create dissimilar marks. *See Pennwalt Corp. v. Center Labs., Inc.*, 524 F.2d 235, 187 USPQ 599, 601 (CCPA 1975) (ALLERSET for “allergenic extract prescription set used for injection for hyposensitization therapy in the field of allergy” is similar to ALLEREST for “medication for relief of sinus passage congestion, allergies and hay fever”); *Glenwood Labs., Inc. v. Am. Home Prods. Corp.*, 455 F.2d 1384, 173 USPQ 19 (CCPA 1972) (MYOCHOLINE for a medicinal preparation for treatment of dysphagia, abdominal distention, gastric retention, and urinary retention is similar to MYSOLINE for an anti-convulsant drug); *Mag Instr. Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR); *Alfacell v. Anticancer Inc.*, 71 USPQ2d 1301, 1305 (TTAB 2004) (ONCASE v. ONCONASE: “As seen and spoken, this middle portion may be missed by many of the relevant purchasers.”); *In re Total Quality Grp. Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999) (“Applicant’s mark STRATEGYN and registrant’s mark STRATEGEN are phonetic equivalents and differ by only one letter.”); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“Moreover, although there are certain differences between the [marks’ CAYNA and CANA] appearance, namely, the inclusion of the letter ‘Y’ and the design feature in applicant’s mark, there are also obvious similarities between them. Considering the similarities between the marks in sound

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on the webpage itself, or by providing this information in a response, except where the examining attorney does not object.”). Notwithstanding, because the Examining Attorney did not object to the webpage, we consider it for whatever probative value it might have.

and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions”).

In any event, even if we agree that HEALIX and HELIX and design do not have the same connotation or engender the same commercial impression, the visual and aural similarities of the marks are more significant than any possible differences in connotation or commercial impression. *See Clairol Inc. v. Roux Labs.*, 442 F.2d 980, 169 USPQ 589, 590 (CCPA 1971) (even though the words “Plus” and “Puff” “may have different meanings by themselves, this difference alone does not overcome the conclusion that when the marks are viewed in their entireties a likelihood of confusion exists.”). *See also Miles Labs., Inc. v. Whorton Pharmacal Co.*, 199 USPQ 758, 761 (TTAB 1978) (Marks ACNETONE and ACNE-DOME “scarcely distinguishable, especially in sound” and “any difference in connotation will not have any practical chance of avoiding error.”).

We find the marks in their entireties to be more similar than dissimilar.

## **II. The similarity or dissimilarity and nature of the goods.**

Applicant is seeking to register its mark HEALIX for herbs for smoking while the Registrant registered the cited mark for smoking pipes. Clearly, herbs for smoking and smoking pipes are complementary products because smokers may smoke herbs in pipes. In fact, the Allie Beckett article discussed above, “Healing Herbs You Can

Smoke (Other Than Cannabis), featured two photographs of pipes used in connection with herbs.<sup>7</sup> *See also*:

- Sacred Smoke Herbals website (sacredsmokeherbals.com) advertising the sale of an amethyst crystal pipe to “elevat[e] your smoke medicine experience!”;<sup>8</sup> and

- The Alchemist’s Kitchen website (thealchemistskitchen.com) advertising a “Black Small GeoPipe” that “delivers a powerfully smooth smoking experience.”<sup>9</sup>

*Cf. Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011) (tobacco and cigarette papers and pocket machines for rolling cigarettes are complementary products because consumers of opposer’s tobacco may use applicant’s products to roll or make their own cigarettes).

We find that the goods are related.

**III. Established, likely-to-continue channels of trade and classes of consumers.**

The Examining Attorney submitted four third-party websites showing companies selling both herbs for smoking and smoking pipes.

- Sacred Smoke Herbals website (sacredsmokeherbals.com);<sup>10</sup>
- The Alchemist’s Kitchen website (thealchemistskitchen.com);<sup>11</sup>
- Little Mary Jane website (shoplittlemaryandjane.com);<sup>12</sup> and

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<sup>7</sup> August 5, 2020 Response to Office Action (TSDR 10).

<sup>8</sup> July 16, 2020 Office Action (TSDR 7).

<sup>9</sup> *Id.* (TSDR 9).

<sup>10</sup> July 16, 2020 Office Action (TSDR 6-7).

<sup>11</sup> *Id.* (TSDR 8-9).

<sup>12</sup> *Id.* (TSDR 10-12).

- Toke House website (tokehouse.com).<sup>13</sup>

In addition, consumers who purchase herbs for smoking may also purchase and use smoking pipes to smoke their herbs.

We find that Applicant and Registrant offer their goods in the same channels of trade to some of the same classes of consumers.

#### **IV. Conclusion**

Because the marks are similar, and the goods are related and are offered in the same channels of trade to some of the same classes of consumers, we find that Applicant's mark HEALIX for "herbs for smoking, none of the hemp derived ingredients of which contain a delta-9 tetrahyrocannabinol (THC) concentration of more than 0.3 percent on a dry weight basis" is likely to cause confusion with the registered mark HELIX and design for "smoking pipes."

**Decision:** We affirm the refusal to register Applicant's mark HEALIX.

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<sup>13</sup> August 24, 2020 Office Action (TSDR 5-6).