

This Opinion is Not a
Precedent of the TTAB

Mailed: July 12, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Yolas All Natural Inc

Serial No. 90131028
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Francis John Ciaramella of Francis John Ciaramella PLLC
for Yolas All Natural Inc.

Nora Buchanan Will, Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

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Before Wellington, Dunn and Lebow,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Yolas All Natural Inc (“Applicant”) seeks registration on the Principal Register of the standard-character mark **YOLA’S ALL NATURAL** (“All Natural” disclaimed) for “cosmetics; anti-aging moisturizer; beauty serums; body scrub; body scrubs; facial moisturizers; facial scrubs; foot scrubs; hand scrubs; non-medicated anti-aging serum; non-medicated skin serums; skin moisturizer” in International Class 3.¹

¹ Application Serial No. 90131028; filed August 23, 2020, based on an allegation of first use the mark anywhere on June 1, 2017 and in commerce on December 26, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the following mark:

YOLA
BEAUTY

(“Beauty” disclaimed), for “on-line wholesale and retail store services featuring skincare products” in International Class 35.²

Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration. The appeal is briefed. We affirm the refusal to register.

I. Likelihood of Confusion

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 likelihood of confusion. *In re E. I. DuPont 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. Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark*

² Registration Nos. 56001473 issued on March 3, 2020.

Brands Inc. v. GFA Brands, Inc., 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods and/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 [or services] 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 [or services].’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We discuss these factors and the other relevant *DuPont* factors below.

A. Similarity or Dissimilarity of the Marks

We first consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *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), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The issue 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 such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *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.”). Nevertheless, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See Stone Lion*, 110 USPQ2d at 1161 (finding that the Board did not err in reasoning that the term LION was dominant in both applicant’s mark STONE LION CAPITAL and opposer’s marks LION CAPITAL

and LION); *Coach Servs.*, 101 USPQ2d at 1721; *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007).

In comparing the two marks, we find them to be very similar in appearance, sound and commercial impression. This is so because the primary and dominant source-identifying element of each mark is the literal term, or name, YOLA (or YOLA'S). See *Hess's of Allentown, Inc. v. Nat'l Bellas Hess, Inc.*, 169 USPQ 673, 677 (TTAB 1971) (“It is apparent that no distinction for legal or practical purposes can be made between a name and the possessive form thereof, ... It is our opinion therefore that "HESS" and "HESS'S" are and would be recognized as one and the same designation...”).

The secondary wording in Applicant's and Registrant's marks, ALL NATURAL and BEAUTY, respectively, are points of difference, but make little difference in terms of distinguishing the marks. Each term is highly descriptive for Applicant's goods and Registrant's services, each has little source-identifying value, and each thus been appropriately disclaimed in the application and registration. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (finding the descriptive and disclaimed portions of applicant's mark “unlikely to change the overall commercial impression engendered by the marks.”) (citing *Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-4 (Fed. Cir. 1997)); see also *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark's commercial impression”). Consumers encountering Applicant's and Registrant's marks will perceive these terms as

describing “all natural” or “beauty” products being sold under or in connection with the marks. Put differently, these are the types of terms that can be used to describe other companies’ products and services. Thus, consumers encountering the marks are likely to focus on the more unique, and non-descriptive terms: YOLA and YOLA’S.

Applicant contends that the design portion of the registered mark “can be said” to be more dominant than the literal wording because it “is stylized in its appearance and selection of font”; “prominently features a stylized semi-circular design”; and words “are not necessarily the more dominant and more significant feature of a mark.”³ However, “[i]n marks ‘consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the [services].’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *31 (TTAB 2021) (citing *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018)). We find that to be true in this case as well.

Applicant also argues that the marks may be distinguished because “[a]s is clear from the record of the Application, the mark YOLA’S ALL NATURAL identifies IOLANDA SOUZA CRYAN, whose consent was made of record.”⁴ While YOLA’S, as used in Applicant’s mark, may be a reference to a particular person affiliated with Applicant, there is no certainty that consumers will always be aware of this connection. Even consumers who are aware of Ms. Cryan’s role with Applicant and

³ 9 TTABVUE 5.

⁴ *Id.* at 9.

that her name is YOLA may also mistakenly believe that Ms. Cryan, or “Yola,” has a connection with Registrant’s services, especially given the relatedness of the goods and services (as explained further herein). *See Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (“Purchasers of opposer’s GOTT and JOEL GOTT wines are likely to assume that applicant’s goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer”).

Generally, use of name or term in the possessive with an apostrophe, versus without, is of little significance. *See Pinocchio’s Pizza Inc. v. Sandra Inc.*, 11 USPQ2d 1227, 1228 (TTAB 1989) (“[T]he marks [PINOCCHIOS and PINOCCHIO’S] are virtually identical, the only difference being the insignificant inclusion of an apostrophe”). Possessive use with names is not uncommon and can exacerbate the likelihood of confusion. *Cf. In re Luis Caballero, S.A.*, 223 USPQ 355, 357 (TTAB 1984) (“Businesses frequently use a possessive form of their names or marks without an apostrophe.”); *In re Directional Marketing Corporation*, 204 USPQ 675, 677 (TTAB 1979) (“purchasers may well regard ‘DRUMMONDS’ simply as a possessive form of ‘DRUMMOND.’”). We also point out that there is a void of evidence showing YOLA or YOLA’S used by others on or in connection with sale of cosmetics and personal body products.⁵

⁵ In its brief, Applicant argues that “other marks incorporate similar terms for use in International Class 003. See, e.g., Application No. 90098251 for YOLANDA’S NATURALLY ORGANIC HAIR & BODY OILS and Registration No. 3404212 for YOLANDA AGUILAR.” 9 TTABVUE 12. However, those registrations are not of record in this appeal because Applicant did not submit them during prosecution. To make third-party registrations of record, an applicant must submit a copies thereof (from either the electronic records of the Office or the

We are cognizant of the anti-dissection rule and note Applicant’s argument that “[h]ere it is highly inappropriate to compare Applicant’s mark to the Prior Mark merely upon the shared synonymous use of the term YOLA/YOLA’S. The anti-dissection rule requires that the respective marks be considered in their entirety.”⁶ We have indeed considered the marks in their entirety. However, for the well-founded reasons provided above, we have also appropriately accorded weight to the fact that the marks share essentially the same name or term, YOLA and YOLA’S, and this features strongly in determining the overall very commercial impressions created by the marks. *See Stone Lion*, 110 USPQ2d at 1161.

Overall, we find that the marks in their entirety are very similar in appearance, sound, connotation and commercial impression. The first *DuPont* factor therefore weighs in favor of finding a likelihood of confusion.

B. Relatedness of the Goods and Services; Trade Channels

Under the second and third *DuPont* factors, we consider, respectively, “[t]he similarity or dissimilarity and nature of the goods [and services]” and the “established, likely-to-continue channels of trade” for these goods and services. *DuPont*, 177 USPQ at 567. *See also Detroit Athletic*, 128 USPQ2d at 1051. For both

paper USPTO record) showing their current status and title. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 (2022). Applicant did take such steps. Even though the listing of the registrations was not objected to by the Examining Attorney, the Board cannot consider more information regarding the list other than that provided by the Applicant. *Id.* Consequently, the two listed putative third-party registrations have no real probative value, and fail to prove Applicant’s contention that YOLA and YOLA’S are common names or terms.

⁶ *Id.* at 7.

factors, we must base our analyses on the identifications in Applicant's application and the cited registration. *See Stone Lion*, 110 USPQ2d at 1162; *In re Dixie Rests.*, 41 USPQ2d at 1534; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The goods need not be identical for there to be a likelihood of confusion; there need only be a relationship in some manner, or the conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods and services come from a common source. *Coach Servs. Inc.*, 101 USPQ2d 1721; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.*, 223 USPQ 830, 831 (TTAB 1984).

Here, Applicant's goods, which include skincare products, are very closely related to Registrant's "on-line retail store services featuring skincare products." That is, Applicant's goods—including, "cosmetics, anti-aging moisturizer, beauty serums, body scrubs, facial moisturizers, non-medicated skin serums, and skin moisturizers—are precisely the types of goods that Registrant is selling. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (confusion likely because "the Detroit Athletic Club's clothing goods are 'very general' in nature and cover 'all types of clothing,' including the clothing sold through DACo's sports apparel retail services."); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *5-6 (TTAB 2019) ("Thus, we must consider Applicant's [retail bakery shop] services to encompass a broad

spectrum of bakery products that quite obviously includes goods of the type identified in the cited registration, i.e., ‘bread buns.’”);

In addition to the facially obvious relationship between the goods and services, the Examining Attorney submitted ample evidence corroborating this connection. The record includes printouts from the websites of third-party retailers featuring skincare products for sale, including many of the same goods listed in Applicant’s identification of goods, all under the same mark.⁷ For example, printouts show marks, like SEPHORA, ULTA, KIEHL’S, ORIGINS, and L’OCCITANE and Sephora being used on goods like Applicant’s and to identify retail store services like Registrant’s. *See Detroit Athletic Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (finding two third-party webpages showing applicant’s and registrant’s goods “can be manufactured and sold by a single source” supported relatedness); *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1640 (TTAB 2007) (evidence of three companies using single mark for clothing and fragrances supported finding of relatedness). This evidence shows that the respective goods and services are not only closely-related but also that they can be found in some of the same trade channels and offered to the same class of consumers.

⁷ Attached to March 2, 2021 Office Action at TSDR pp. 2-17; December 7, 2021 Office Action denying Request for Reconsideration at TSDR pp. 2-38.

In sum, Applicant's goods and Registrant's services are closely related and may be offered in the same channels of trade. Accordingly, the second and third *DuPont* factors weigh in favor of finding a likelihood of confusion.

C. Other Factors

The fourth *DuPont* factor concerns the conditions under which and buyers to whom sales are made, i.e. "impulse" versus careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567. Applicant argues that both Registrant and Applicant "deal in respective goods and services that can be extremely expensive. Cosmetics products can cost many hundreds of dollars. If the goods or services are relatively expensive, more care is taken and buyers are less likely to be confused as to source or affiliation."⁸ As explained, *supra*, we must base our analysis on the goods and services as they are described in the application and registration. *See Stone Lion*, 110 USPQ2d at 1161; *Octocom*, 16 USPQ2d at 1787 ("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 the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

⁸ 9 TTABVUE 12.

Here, neither Applicant's identified goods nor Registrant's recited services are limited to a higher price point or marketing to any particular class of clientele. Moreover, the record demonstrates what may be common knowledge—cosmetics and skincare products may be purchased from online retail stores, like Registrant's, at very low prices, e.g., \$4 for "face mask" or \$5 for "lip balm & scrub."⁹ Indeed, these are the price points where one can anticipate that consumers may exercise less care and be susceptible to impulse purchasing. Accordingly, the fourth *DuPont* factor remains neutral in our analysis or, to the extent the relevant goods and services may lead to impulse purchasing, the factor weighs in favor of finding confusion likely.

Applicant further argues "there is no evidence that the cited [registered] Mark is famous or has acquired secondary meaning within the marketplace or that consumers associate the term YOLA/YOLA'S with the [Registrant]."¹⁰ This argument is unpersuasive because, in an *ex parte* appeal such as this, the owner of the cited registration is not a party and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (July 2022). Because of the nature of the evidence required to establish the fame of a registered mark, which generally resides with the mark owner, there is little opportunity for such evidence

⁹ Printouts from www.sephora.com (Sephora Collection) March 2, 2021 Office Action, at pp. 5-6.

¹⁰ 9 TTABVUE 12.

to be provided, and the “fame of the mark” *DuPont* factor is normally treated as neutral. *See In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006).

Applicant also contends that “[t]here has been no documented evidence that shows that any consumers have confused the respective marks in commerce ... [or] demonstrated events of confusion by consumers between the respective marks.”¹¹ Again, in *ex parte* cases, the owner of the cited registration is not a party and there is generally no way to know whether the registration owner is likewise unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. *See, e.g., In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). We also keep in mind that “the relevant test is **likelihood** of confusion, not **actual** confusion.” *In re Detroit Athletic Co.*, 128 USPQ2d 1047, 1053 (Fed. Cir. 2018) (emphasis in original).

Accordingly, the seventh and eighth *DuPont* factors, involving lack of instances of actual confusion and the fame of the prior mark, respectively, are neutral.

D. Balancing the *DuPont* Factors - Conclusion

Applicant’s goods and Registrant’s services are closely related and may be marketed through the same trade channels to some of the same classes of consumers. The marks in their entirety are very similar in overall appearance, sound, connotation and commercial impression. For these reasons, we find that Applicant’s mark YOLA’S ALL NATURAL on various skincare and personal body products is

¹¹ 9 TTABVUE 13.



likely to cause confusion with the registered mark for online retail store services featuring skincare products.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is affirmed.