

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 26, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Joe Lo Enterprises, Inc.
—

Serial No. 90372116
—

Michael B. Chesal and Michael A. Shafer of Peretz Chesal & Herrmann, PL,
for Joe Lo Enterprises, Inc.

Dominic Ferraiuolo, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

—
Before Adlin, Johnson, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Joe Lo Enterprises, Inc. (“Applicant”) seeks registration on the Principal Register of the mark LIVE ANABOLIC (in standard characters, “ANABOLIC” disclaimed) for “Dietary supplements used for supporting healthy testosterone levels and men’s health in general with their workouts and everyday life; the foregoing products not

being marketed and sold through direct network marketing,” in International Class 5.¹

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the mark

The word "Live" is written in a stylized, cursive font. The letters are connected and have a fluid, handwritten appearance. The 'L' is particularly large and prominent, with a long tail that loops under the 'i'. The 'v' and 'e' also have a cursive, flowing quality.

registered on the Principal Register for “Enzyme dietary supplements; Nutritional supplements; Nutritional supplements, namely, probiotic compositions; all of the foregoing products marketed and sold through direct network marketing and not in other channels of trade,” in International Class 5,² as to be likely to cause confusion, to cause mistake or to deceive.

After the refusal was made final, Applicant requested reconsideration and filed a notice of appeal. After the request was denied, the appeal resumed. The appeal is fully briefed. For the reasons explained below, we reverse the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based 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) (“*DuPont*”). See

¹ Application Serial No. 90372116 was filed on December 10, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and use in commerce since at least as early as January 1, 2020.

² Registration No. 4978716 was issued on June 14, 2016; combined Sections 8 and 15 Declaration accepted and acknowledged. The mark is described as “a stylized version of the word ‘LIVE’.” Color is not claimed as a feature of the mark.

also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We 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 (Fed. Cir. 2019).

“Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020). Two key considerations are the similarities between the marks and the similarities between the goods or services. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“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.’”).

A. Strength or Weakness of LIVE

Because the strength or weakness of the cited mark informs our comparison of the marks, we address Applicant’s argument that “[c]onsumers are inundated with LIVE-formative marks when they seek these products, accustoming them to differentiating between LIVE-formative marks by focusing on even minor differences.”³



In determining the strength of a cited mark, we consider its strength based on the nature of the mark itself. *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596,

³ Applicant’s brief at 1 (10 TTABVUE 2).

*10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011). In tandem, if there is evidence in the record, we consider whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567 (The sixth *DuPont* factor considers “[t]he number and nature of similar marks in use on similar goods.”); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (“[Third-party] use evidence may reflect commercial weakness[.]”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016) (We may consider whether an inherently distinctive mark is “weak as a source indicator” in the course of a *DuPont* analysis.). If sufficient evidence of third-party use is provided, it can “show that customers ... ‘have been educated to distinguish between different ... marks on the basis of minute distinctions.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (quotations omitted).

Applicant argues that the cited mark is inherently weak because the term LIVE is the subject of the following third-party use-based registrations, all for use with dietary and nutritional supplements, and, commercially weak, arguing that each of these registered marks is currently in use in commerce:⁴

⁴ December 7, 2021 Response to Office Action at. 2-7, and Exhibits 1 and 2 attached to the Declaration of Ariel Rothschild at TSDR 11-16, 29-110.

No.	Mark	Disclaimer	Pertinent Goods and Services	Reg. No.
1	LIVE CONSCIOUS		Dietary and nutritional supplements	6421767
2	LIVE AGAIN		Dietary and nutritional supplements, none of the foregoing relating to pain alleviation or pain medication	6167450
3	LIVE WISE		Dietary and nutritional supplements	5967094
4	LIVE EARTH		Dietary supplements	6124783
5	LIVE 100PLUS		Herbal supplements	6065339
6	 LIVE LIGHTLY		Vitamin supplements	5993713
7	LIVEPERNATURE		Nutritional and dietary supplements	5910219
8	LIVE RELENTLESS NUTRITION	NUTRITION	Dietary and nutritional supplements	5846917
9	LIVE ULTIMATE		Dietary and nutritional supplements	5272628
10	LIVE EVOLVED		Dietary and nutritional supplements	6212673
11	LIVE WELL		Dietary and nutritional supplements	6399568
12	LIVE · GROW · TRANSFORM		Dietary and nutritional supplements	6327716
13	LIVE BEAUTIFULLY THROUGH NEURO-NUTRITION	NEURO-NUTRITION	Nutritional Supplements	6295965
14			Dietary and nutritional supplements for endurance sports	6218438

Third-party registration evidence bears on conceptual weakness. *Tao Licensing*, 125 USPQ2d at 1057 (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (third-party registrations “may be given some weight

to show the meaning of a mark in the same way that dictionaries are used”). We find that the first eleven LIVE-formative third-party registered marks listed above,⁵ combined with either distinctive or descriptive wording and that cover nutritional or dietary supplements, are probative to show that marks containing the term LIVE in connection with such supplements can be distinguished by additional matter. *See In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012) (Seven registrations incorporating Grand Hotel showed that the Patent Trademark Office viewed the marks “as being sufficiently different from the cited registrant’s mark, and from each other, such as not to cause confusion. We presume that the owner of the cited registration did not have a problem with the registration of these third-party marks, as they all issued after the registration of the cited registrant’s registration without challenge by the registrant.”); *Plus Prods. v. Nat. Organics, Inc.*, 204 USPQ 773, 779 (TTAB 1979) (Numerous PLUS marks on the trademark register for vitamins reflect the Office’s belief, the trademark owners’ belief, and plaintiff’s belief that PLUS marks can be registered side by side for vitamins without confusion provided there are minimal differences between the marks.); *Jerrold Elecs. Corp. v. Magnavox Co.*, 199 USPQ 751, 758 (TTAB 1978) (“These [third-party] registrations reflect a belief, at least by the registrants, who would be most concerned about avoiding confusion and mistake, that various ‘STAR’ marks can coexist provided that

⁵ However, we find that the remaining marks LIVE●GROW●TRANSFORM, LIVE BEAUTIFULLY THROUGH NEURO-NUTRITION and 13 LIVES (Stylized) create sufficiently different commercial impressions that evidence of their registration is not probative.

there is a difference.”). As a result, we find that this registration evidence of LIVE-formative marks for dietary and nutritional supplements shows that the term LIVE is conceptually weak when used with such supplements. *In re Embiid*, 2021 USPQ2d 577, at *34 (TTAB 2021).

Evidence of third-party use of the LIVE element for the same or similar goods is also probative, and shows the commercial weakness of the cited mark. *i.am.symbolic*, 123 USPQ2d at 1751; *Tao Licensing*, 125 USPQ2d at 1057. The evidence shows that the first nine above-listed marks are in use with supplements. We find that this evidence is probative of the commercial weakness of the cited mark.⁶ With regard to the LIVE EVOLVED mark, number ten in the chart above, the evidence shows that the mark is used with online retail supplement sales,⁷ which we find to be quite closely related to supplements. *See e.g., In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source”).

⁶ As to the remaining four marks, appearing as numbers eleven through fourteen in the chart, we do not find them to be probative. First, there is no evidence that the mark LIVE WELL is used by itself; rather, the term LIVE appears as part of a slogan: LIVE WELL. TRAIN WELL. DIET WELL, which makes a sufficiently different commercial impression that it is not probative. December 7, 2021 Response to Office Action at TSDR 80-83. Second, the mark LIVE●GROW●TRANSFORM is not in use, and although the term LIVE appears by itself in text, it does not function as a mark. *Id.* at TSDR 85-86. Third, the marks LIVE BEAUTIFULLY THROUGH NEURO-NUTRITION and 13 LIVES (Stylized) make sufficiently different commercial impressions, so they are not probative. *Id.* at 87, 90.

⁷ *Id.* at TSDR 92.

We find that the third-party use evidence discussed above is highly probative to demonstrate commercial weakness of the cited mark in the supplements industry. *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, at *17 (TTAB 2020) (where plaintiff's and defendant's goods are beer, six local Brooklyn-formative named establishments' use of the term 'Brooklyn' in connection with beer sales have significant probative value as to commercial weakness), *aff'd in relevant part, vacated in part, and remanded*, 17 F.4th 129, 2021 USPQ2d 1069 (Fed. Cir. 2021). This third-party use evidence shows LIVE, when combined with other wording, is commonly used in the supplements field, and because of its common use, it is commercially weak.

In sum, we find that the term LIVE is both conceptually and commercially weak when used in connection with dietary and nutritional supplements, resulting in consumers being educated to look for minute distinctions in LIVE-formative marks in the marketplace. As such, this factor weighs against a finding of a likelihood of confusion.

B. Comparison of the Marks

We now turn to the first *DuPont* factor, which requires us to determine the similarity or dissimilarity of the marks in terms of appearance, sound, connotation, and overall commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “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 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The test under the first *DuPont* factor 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 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).

Our analysis cannot be predicated on dissecting the marks into their various components; the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *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.”). It is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight in the analysis. *Nat'l Data Corp.*, 224 USPQ at 751-52.

Applicant argues that on the whole, the marks are dissimilar because adding the word ANABOLIC to Applicant’s mark causes Applicant’s mark to look and sound

different, have a different meaning, and make a different commercial impression when compared to the cited mark.⁸

In considering Applicant's mark, the dominant portion is LIVE, notwithstanding that LIVE is conceptually weak. This is so because the word ANABOLIC has been disclaimed by Applicant, as this term is either merely descriptive or generic of dietary and nutritional supplements. By contrast, LIVE is inherently distinctive, even though it is also inherently weak. While the term ANABOLIC may therefore be given less weight than LIVE, it may not be ignored, and its significance in this case is enhanced by the inherent weakness of LIVE, the involved mark's only other element. *See M2 Software Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) ("When comparing the similarity of marks, a disclaimed term, here 'COMMUNICATIONS,' may be given little weight, but it may not be ignored.").

The Examining Attorney argues that Applicant's mark subsumes the cited mark, and that adding a term to a registered mark generally does not obviate the similarity between the compared marks.⁹ Furthermore, the Examining Attorney contends that the addition of the disclaimed term ANABOLIC to LIVE in Applicant's mark does not obviate the similarity between the two marks.¹⁰

While the Examining Attorney's approach is generally appropriate, in this case the weakness of the marks' shared term LIVE leads us to a different conclusion. In

⁸ Applicant's brief at 8-10 (10 TTABVUE 9-11).

⁹ Examining Attorney's brief (12 TTABVUE 3).

¹⁰ *Id.*

fact, the addition of a term to another's mark may avoid confusion if the matter shared by the two marks is highly suggestive, or commonly used or registered in the industry for similar goods or services. *See e.g., Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1315 (TTAB 2005) (The board held that "In terms of overall commercial impression, we find that although the word ESSENTIALS is the entirety of the commercial impression created by opposer's mark, in applicant's mark it contributes relatively less to the mark's commercial impression than does the house mark NORTON MCNAUGHTON. This is because ... we find that the word ESSENTIALS is highly suggestive as applied to the parties' clothing items and as it appears in both parties' marks, especially in applicant's mark."). Therefore, for terms commonly used in an industry, the addition of other matter to a mark may be enough to distinguish it from another mark. *Hartz Hotel*, 102 USPQ2d at 1154 (numerous third-party uses of GRAND HOTEL marks for hotel services show that consumers distinguish between these marks even though the only distinguishing element is a geographically descriptive term).

As we found above, the term LIVE is highly suggestive and in common use in the supplements industry, and therefore, the scope of protection to which the mark of the cited registration is entitled is quite limited, and the stylization of the cited mark does not change our analysis as it is insignificant and nondistinctive. We find the addition of the term ANABOLIC to the term LIVE is sufficient to distinguish Applicant's mark from the cited mark in sound, appearance, connotation and commercial impression.

The first *DuPont* factor also weighs against a finding of likelihood of confusion.

C. Comparison of the Goods

Next, we compare the goods as they are identified in the involved application and cited registration under the second *DuPont* factor. See *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Applicant did not address the second *DuPont* factor in its brief, thus “[a]pparently conceding the issue,” *In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1740 (TTAB 2016), “so we offer only a brief explanation of our conclusion.” *Id.*

The application identifies “[d]ietary supplements used for supporting healthy testosterone levels and men’s health in general with their workouts and everyday life.” The goods of the cited registration are identified in-part as “[n]utritional supplements.” We find that Applicant’s “dietary supplements used for supporting ... men’s health in general with ... everyday life” is encompassed by the cited registrant’s more broadly described “nutritional supplements.” Thus, we find that the goods are legally identical in-part. See *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Thus, this factor weighs in favor of a finding of likelihood of confusion.

D. The Channels of Trade, Classes of Consumers, and Purchasing Conditions

Under the third *DuPont* factor, we consider the “similarity or dissimilarity of established, likely-to-continue trade channels,” while the fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. We base our consideration of the channels of trade and classes of consumers on the identifications of goods recited in the involved application and cited registration. *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“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 sales of the goods are directed.”).

The identification of the cited registration contains the following limitation: “all of the foregoing products marketed and sold through direct network marketing and not in other channels of trade.” In contrast, the involved application reads: “the foregoing products **not** being marketed and sold through direct network marketing” (emphasis added). “Network marketing” is defined as “a business model that depends on person-to-person sales by independent representatives, often working from home.”¹¹

¹¹ Exhibit A to Applicant’s brief (10 TTABVUE 14-19). Applicant requested that we take judicial notice of the definition. Applicant’s brief at 7 n.1 (10 TTABVUE 8). The Examining Attorney expressly did not object. Examining Attorney’s brief at 1 (12 TTABVUE 1). As the Board may take judicial notice of definitions of online industry specific encyclopedias, we grant the request. *See Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana*

Applicant argues that consumers are not likely to confuse the source of the goods sold under the subject marks because they will never encounter them in the same marketing contexts.¹² Applicant argues that its and registrant's channels of trade "are parallel tracks that will never meet."¹³

The Examining Attorney argues that while the identifications of goods specify limits as to channels of trade, they do not recite any limitations as to classes of purchasers,¹⁴ and, as such, Applicant's and registrant's goods will be available to all purchasers of supplements, who will likely use competing sales channels to hunt for bargains or other competitive edges for the same goods.¹⁵ Here, the Examining Attorney argues, the goods in issue are not different goods traveling in separate trade channels reaching different and distinct classes of purchasers, but legally identical goods with highly similar marks reaching the exact same classes of consumers.¹⁶

Applicant contends that consumers will not be confused "owing to the purchasing conditions of the parties' respective goods."¹⁷ Applicant argues further that courts have repeatedly found purchasers of supplements will exercise a great deal of care due to the purchaser's own health-conscious nature.¹⁸ However, as Applicant relies

Inc., 98 USPQ2d 1921, 1934 n.61 (TTAB 2011) (Board may take judicial notice of information from encyclopedias), *aff'd*, 2016 WL 3034150 (D.D.C. May 27, 2016).

¹² Applicant's brief at 6-7 (10 TTABVUE 7-8).

¹³ *Id.* at 6 (10 TTABVUE 7).

¹⁴ Examining Attorney's brief (12 TTABVUE 4).

¹⁵ *Id.*

¹⁶ *Id.* (12 TTABVUE 5).

¹⁷ Applicant's reply brief at 4 (13 TTABVUE 5).

¹⁸ *Id.* at 1, 5 (13 TTABVUE 2, 6).

on findings in other cases to support its argument,¹⁹ we find that there is no evidence in the record before us to support this contention. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”).

We acknowledge Applicant’s arguments that the channels of trade are distinct, but because of the many ways in which consumers are exposed to marks, it is difficult to fashion amendments to the recitation of goods that meaningfully restrict how the relevant public may encounter or perceive the mark, *In re i.am.symbolic*, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017), where “supplements ... for men’s health in general” and other “nutritional supplements,” are often marketed and sold together.²⁰

Here, consumers are members of the general public who purchase dietary and nutritional supplements. The record shows that supplements are available for less than \$30 a bottle.²¹ While the record shows that consumers are encouraged to consult with a healthcare provider before adding a supplement to their routine,²² there is no evidence in the record to support a finding that potential purchasers are sophisticated or will exercise care when purchasing such supplements.

In sum, we find that the third and fourth factors weigh in favor of a finding of likelihood of confusion.

¹⁹ *Id.* at 5 (13 TTABVUE 6).

²⁰ July 26, 2022 Denial of Request for Reconsideration at TSDR 5-61.

²¹ *Id.* at TSDR 32.

²² *Id.* at TSDR 25, 36.

II. Conclusion: Balancing the Factors

In this case, the term LIVE in the cited registration is conceptually and commercially weak for the identified goods and is entitled to only a very narrow scope of protection or exclusivity of use. Thus, notwithstanding that Applicant's and registrant's goods are identical in-part and may reach the same consumers despite limitations in the channels of trade, we find that the addition of the term ANABOLIC is sufficient to render Applicant's mark dissimilar from the mark of the cited registration and that, as a result, confusion is not likely. Here, the weakness of the term LIVE of the cited mark and the dissimilarity of Applicant's and registrant's marks are dispositive factors in our likelihood of confusion analysis. *Cf. Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[A] single *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.”); *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1461 (Fed. Cir. 1998) (“[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.”); *Hartz Hotel*, 102 USPQ2d at 1155 (finding the sixth *DuPont* factor dispositive) citing *Kellogg Co. v. Pack-Em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive”).

Decision

The refusal to register Applicant's mark, LIVE ANABOLIC, under Section 2(d) of the Trademark Act, is reversed.