

This Opinion is not a
Precedent of the TTAB

Mailed: February 22, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Dileep Essentials Pvt. Ltd.

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Serial No. 90542201

Stephen P. McNamara and Samantha M. Gerold of St.Onge Steward
Johnston & Reens LLC for Dileep Essentials Pvt. Ltd.

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Before Goodman, Coggins and Thurmon,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Dileep Essentials Pvt. Ltd. (“Applicant”) seeks registration on the Principal Register of the mark ELLEMENTRY (in standard characters) for “Candles” in International Class 4.¹

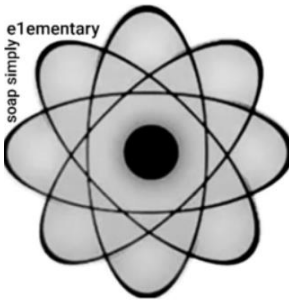
¹ Application Serial No. 90542201 was filed on February 23, 2021, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application included goods and services in several other International Classes, but those were transferred to a separate application (Serial No. 90978154) after Applicant filed a Request to Divide.

Citations to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. Citations to the briefs on appeal refer to the

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because Applicant’s mark is likely to be confused with the following Principal Register marks, owned by

elementrē

different Registrants: elementrē for the following goods: “Non-medicated skin cleansing and exfoliating preparations; pads for cleaning impregnated with cosmetics; Nonmedicated soaps; perfumes; essential oils; cosmetics; make-up; make-up removing preparations; lipstick; beauty masks” in International Class 3;² and



(SOAP disclaimed) for “body cream soap” in International

Class 3.³

Board’s TTABVUE docket system. Applicant’s brief is at 4 TTABVUE. The Examining Attorney’s brief is at 6 TTABVUE.

² Registration No. 6635162 issued February 8, 2022. The description of the mark states: “The mark consists of the wording ‘ELEMENTRE’ with two lines above and below the wording and an accent line over the letter ‘E.’”

³ Registration No. 6556579 issued November 9, 2021. The description of the mark states: “The mark consists of a design of a nucleus with a shaded circle located exactly in the middle of the nucleus. The word ‘E1EMENTARY,’ written in lowercase letters, is spelled with the number one instead of the letter ‘L.’ It is found on the top-left corner and written horizontally. The word ‘SOAP SIMPLY’ is in all lowercase letters, and is written vertically alongside top-left corner of the nucleus.”

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.

We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. The Examining Attorney has objected to Exhibit B (comprising printouts of third-party registrations from TSDR) attached to Applicant's brief that was not previously made of record by Applicant during examination.⁴

Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that the record in an application should be complete prior to the appeal. Exhibits attached to a brief and not made of record during examination are untimely, and generally will not be considered. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002). Therefore, Applicant's Exhibit B is untimely, and we have not considered it.

Both Applicant and the Examining Attorney submitted dictionary definitions with their briefs and we take judicial notice of them.⁵

⁴ Applicant also attached to its brief as "Exhibit A" material that it submitted during examination. This exhibit was unnecessary. *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *2 n.4 (TTAB 2020) (attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board).

⁵ 4 TTABVUE 79 ("Exhibit C," definition of "elementary"); 6 TTABVUE 19 (definition of "macron"). The Board may take judicial notice of dictionary definitions in print and online format. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). *See also In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1780 n.9 (TTAB 2017) (judicial notice taken of definition attached to an applicant's appeal brief).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *See 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, e.g., In re Guild Mtg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *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.”). These are the focus of Applicant’s and the Examining Attorney’s arguments in this appeal; the Examining Attorney also addresses the similarity or dissimilarity of the trade channels.

(citation omitted). A consumer relies on the recollection of the various marks that he or she has previously seen in the marketplace; given the fallibility of memory, recollection is based on an overall general impression and not minute details or specific characteristics of the marks.

Applicant's mark is ELLEMENTRY (in standard characters) and Registrant's

mark is the composite word and design mark:  .

Applicant argues that its mark and Registrant's mark are visually distinct because Applicant's mark is a "word mark" while Registrant's mark is "stylized." 4 TTABVUE 8. Applicant submits that the cited mark is "distinguished by the use of a lower case logo and macron on the terminal 'ē.'" 4 TTABVUE 11.

However, Applicant's mark is in standard characters, which means that the mark can be depicted in any font style, size, or color. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). Applicant's mark could therefore be displayed in lower case and in a font style similar to Registrant's word and design mark. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) ("[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.") (citation omitted).

As Applicant points out, the straight bar above the ending letter "e" in Registrant's mark is a macron, which is a pronunciation symbol indicating a long vowel sound;⁶ it

⁶ See Webster-dictionary.org/definition/macron, 6 TTABVUE 19, "n. 1. (Pron.). A short, straight, horizontal mark [-], placed over vowels to denote that they are to be

is a minor distinction easily overlooked by consumers. *Cf. Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n. 1 (TTAB 1978) (Fast-Finder with hyphen is in legal contemplation substantially identical to Fastfinder without hyphen). The design element in Registrant's mark consists of horizontal lines running over the top and bottom of the mark. The horizontal lines in Registrant's mark simply serve to frame the mark and reinforce the wording; they are not distinctive features. *See In re Hughes Furniture Indus.*, 114 USPQ2d 1134, 1138 (TTAB 2015) (“[C]ommon design elements (consisting of a rectangle enclosing the literal elements and two horizontal lines) . . . merely serve as carriers for the wording and do not include a distinctive element with strong source-identifying characteristics.”). This design element also does little to distinguish the marks.

The marks are very similar in appearance as to the letter portions “ELLEMENTR” and “ELEMENTR” and differ by the additional letter “l” in Applicant's mark along with the ending letters “y” and “e,” respectively, in each mark. The strong visual similarity between the marks is not diminished by these slight distinctions. *See Mag Instr. Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (slight differences in marks do not normally distinguish them; difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR). We find the marks are similar in appearance.

pronounced with a long sound; as, ā, in dāme; ē, in sēam, etc.” WEBSTERS DICTIONARY, websters-dictionary.org.

As to similarity in sound, Applicant argues the marks are not phonetically identical and that they are distinct. 4 TTABVUE 11. Applicant submits that the macron on the terminal ‘ē’ in Registrant’s mark is a “long sound” that would be pronounced “elemen-tray” while Applicant’s mark is pronounced “elementree.” 4 TTABVUE 11. The Examining Attorney, relying on the pronunciation in the dictionary definition for a long vowel with a macron, *see* n.6, argues that Applicant’s and Registrant’s marks both would be pronounced as “elementree.” 6 TTABVUE 7.

While there is no correct pronunciation of a trademark, *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227, 227 (CCPA 1969), and it is not possible for a trademark owner to control how purchasers will vocalize its mark, *Centraz Indus., Inc. v. Spartan Chem. Co., Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006), the dictionary evidence of record supports the Examining Attorney’s position on pronunciation. Given that the marks are very similar (ELEMENTRĒ and ELLEMENTRY) with only slight differences, the marks could be pronounced the same or similarly. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (XCEED and X-SEED similar).

As to connotation and commercial impression, the Examining Attorney argues that both Applicant’s and Registrant’s marks are the phonetic equivalent of “elementary.” 6 TTABVUE 8. Applicant argues otherwise and asserts that “elementrē” “suggests a French skin care product,” while “Applicant’s mark ELLEMENTRY does not have [that] meaning[.]” 4 TTABVUE 12. Applicant did

provide the definition for “elementary”: “of, relating to, or dealing with the simplest elements or principles of something.”⁷

Viewed in their entirety, the marks are highly similar, based on the visual and phonetic similarities discussed above. Additionally, many consumers are likely to perceive both marks to be variations on and the phonetic equivalent of “elementary.” We find the overall commercial impressions of the marks to be very similar, in view of the similarities in appearance, sound, and likely similar connotation for many consumers. *See e.g., Boliden AB v. Bolidt Maatschappij tot Exploitatie van Kunststoffen en Bouwwerken B.V.*, 208 USPQ 448, 450 (TTAB 1980) (BOLIDT and BOLIDTAN are similar in sound and appearance to opposer’s mark BOLIDEN and create substantially the same commercial impressions).

The overall similarity of the marks weighs in favor of a finding of likelihood of confusion.

B. Strength or Weakness of ELEMENT or ELEMENTARY

In connection with evaluating the cited mark’s conceptual strength, active 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 a particular industry that the public will look to other elements to distinguish the source of the goods.⁸ *See Juice*

⁷ MERRIAM-WEBSTER DICTIONARY, merriam-webster.com. 4 TTABVUE 79.

⁸ There is no evidence regarding the cited mark’s commercial or marketplace strength. In an ex parte appeal, 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. *See, e.g., In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame is not normally a factor in ex parte proceedings).

Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334 , 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015). 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) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.”); *In re Guild Mtg. Co.*, 2020 USPQ2d 10279 *3 (TTAB 2020) (same); *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”).

Applicant argues that ELEMENTARY marks are weak, in view of third-party registrations containing “the base component ELEMENT, or similar variations,” in Class 3 for cosmetics/soaps and in Class 4 for candles, referencing the third-party registrations attached to its brief. 4 TTABVUE 9-10. Applicant submits that in view of this weakness, Applicant’s and Registrant’s marks are distinguishable. 4 TTABVUE 9, 10-11, 14.

However, the Board does not take judicial notice of registrations, and, as indicated, the third-party registrations to which Applicant refers are not of record. *In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998). Because these referenced third-party registrations are not of record, we cannot determine that the “base component” ELEMENT in each mark has any particular significance for the goods at issue, rendering it weak. *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 USPQ2d 1073, 1081 n.6 (TTAB 2007).

Applicant also argues that the term ELEMENTARY is weak for soaps, referencing the co-existence of the cited registrations as well as one additional third-party registration, ITS ELEMENTARY, for “bubble bath; soap for personal use,” that it submitted during examination. December 13, 2022 Response to Office action at TSDR 6-7; 4 TTABVUE 9.

However, we are not privy to the facts surrounding the examination or registration of the marks in the cited registrations or the third-party registration. As such, we do not know whether, for instance, the owners of these registrations entered into an agreement allowing for their coexistence, or any other circumstances that led to the registration of both marks. It is well settled, however, that the USPTO is not bound by the decision of a trademark examining attorney. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement ... even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”).

We find the strength or weakness of Registrant’s mark neutral in the analysis.

C. Similarity or Dissimilarity of the Goods

We turn next to the second *DuPont* factor, where we assess the similarity or dissimilarity of Applicant’s and Registrant’s goods. *DuPont*, 177 USPQ 567. In determining the similarity or relatedness of Applicant’s and Registrant’s goods, we must focus on the goods as they are identified in the involved application and cited registration. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed.

Cir. 2017); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335 , 209 USPQ 986 (CCPA 1981).

Applicant's goods are "Candles." Registrant's goods are "Non-medicated skin cleansing and exfoliating preparations; pads for cleaning impregnated with cosmetics; Nonmedicated soaps; perfumes; essential oils; cosmetics; make-up; make-up removing preparations; lipstick; beauty masks."

Applicant argues that "Candles nowadays provide light and a room fragrance. Soaps and skin care products do neither. Candles are not related goods to skin care products or cosmetics." 4 TTABVUE 13. Applicant argues "that there is no material evidence that shows that there is any relationship between the Registrant's skin care products/cosmetics and Appellant's candles" and "there is no basis for asserting that these goods are related." 4 TTABVUE 13.

As to relatedness, the Examining Attorney focuses on soaps in Registrant's identification of goods, providing webpages from Sephora, Aveda, L'Occitane, Anthropologie, and Urban Outfitters. June 15, 2022 Office action at TSDR 2-20; February 21, 2023 Office action at TSDR 2-25. These webpages establish the

relatedness of the goods as it shows the sale of soaps and candles under the same mark.⁹ 6 TTABVUE 15.

Internet evidence may be probative of relatedness. *Made in Nature, LLC v. Pharmavite, LLC*, 2022 USPQ2d 557, at *46 (TTAB 2022) (third-party websites promoting sale of both parties' goods showed relatedness); *In re Embiid*, 2021 USPQ2d 577, at *28-29 (TTAB 2021) (evidence of third-parties offering goods of both applicant and registrant pertinent to relatedness of the goods); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (relatedness found where internet evidence demonstrated goods commonly emanated from the same source under a single mark). While the webpages from Anthropologie, Aveda and L'Occitane do show candles and soap under the same mark, the Sephora pages show candles and soap offered under different marks. It is unclear whether Urban Outfitters offers soaps, although the webpage shows the offering of skin care products and candles under different marks. We find there is sufficient evidence in the record showing that candles and soap are offered under the same mark and by the same retailers. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir 2018) (crediting relatedness evidence that third parties use the same mark for the goods at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard*, 62 USPQ2d

⁹ The Examining Attorney also argues the goods are complementary, stating that “consumers frequently use these goods together as part of a self care or wellness regimen,” 8 TTABVUE 16, but we find there is not any evidence in the record to support this argument.

at 1004 (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Applicant also argues that the goods have different uses and purposes. While as Applicant points out, candles and soap are different products, with different uses, the issue regarding the similarity of the goods must be viewed in the context of whether relevant consumers would be confused as to source or sponsorship.

It is well settled that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. *See Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant submits that the Office “has not deemed candles to be related to soap/cosmetics for purposes of refusing the registration of similar marks” and that the classifications are different. 4 TTABVUE 13, 14. In particular, Applicant argues that there are numerous third-party registrations containing ELEMENT or ELEMENTARY or similar variations that co-exist for Class 3 and Class 4 goods, evidencing that the goods are distinguishable. 4 TTABVUE 14.

As already indicated, we have not considered the third-party registration evidence (Exhibit B attached to the brief) because it is not of record, and we do not take judicial notice of registrations. But in any event, the fact that goods are found in different classes has no bearing on the question of likelihood of confusion. The separation of goods into the various classes of the classification schedule is merely a convenience for the Office and is not intended as a commentary on their relationship to one another in the marketplace. *Nat'l Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1216 n.5 (TTAB 1990) (“The classification system was established for the convenience of the Office rather than to indicate that goods in the same class are necessarily related or that classification in different classes indicates that they are not related.”). *See also Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (stating that classification is for the convenience of the Office and is “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”).

Therefore, we find the second *DuPont* factor weighs in favor of likelihood of confusion.

D. Similarities or Dissimilarities of the Trade Channels

We now turn to the third *DuPont* factor which requires us to consider “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. The basis for our analysis of trade channels is the identification of goods set forth in the application and cited registration “regardless of what the record may reveal as to the particular nature of an applicant’s [or registrant’s] goods, [or]

the particular channels of trade or the class of purchasers to which sales of the goods are directed.” *Octocom Sys.*, 16 USPQ2d at 1787. Here, both Registrant’s and Applicant’s identifications are unrestricted as to trade channels. Moreover, in the absence of specific limitations in Applicant’s and Registrant’s respective identifications, we must assume that the products set forth in the identifications are sold in all normal channels of trade for goods of that type. *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *39-41 (TTAB 2020) (“[A]bsent an explicit restriction in the application, the identified goods in the application must be presumed to move in all channels of trade that would be normal for such goods and to all usual prospective purchasers for goods of that type.”).

For similarity of trade channels, the Examining Attorney relies on the websites of specialty retailers Sephora, Aveda, L’Occitane, Anthropologie, and Urban Outfitters. June 15, 2022 Office action at TSDR 2-20; February 21, 2023 Office action at TSDR 2-25. The websites show that these retailers sell soap and candles on their websites, although they are not sold on the same webpages.

We find this evidence supports a finding that these goods are offered in at least one common channel of trade, that is, the websites operated by the third-party specialty retailers.

The third *Dupont* factors weighs in favor of a finding of likelihood of confusion.

III. Conclusion

We find the first, second and third *DuPont* factors weigh in favor of a likelihood of confusion in that the marks are similar, the goods are related and the trade channels overlap. Given these similarities, a likelihood of confusion exists.

Decision: The Section 2(d) refusal to register Applicant's mark ELLEMENTRY is affirmed.