

This Opinion is Not a
Precedent of the TTAB

Mailed: November 15, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Endurelite Supplements, LLC
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Serial No. 90708132
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Joseph P. Schilleci, Jr., of Schilleci & Tortorici, P.C.
for Endurelite Supplements, LLC.

Kevin Flebbe, Trademark Examining Attorney, Law Office 110,
Chris Pedersen, Managing Attorney.

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Before Wellington, Goodman, and Dunn,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Endurelite Supplements, LLC (“Applicant”) seeks to register the mark
ENDURELITE, in standard character format, on the Principal Register for:¹

¹ Application Serial No. 90708132, filed May 13, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging November 1, 2017 as the date of first use anywhere and in commerce.

The mark appears on the application’s drawing page as EndurElite. However, the presentation of the mark on the drawing page does not change the nature of the mark from a standard character mark to a special form mark. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (setting forth requirements for standard character mark). Our references to Applicant’s mark in this opinion in all uppercase letters reflects the fact that a term registered as a mark in standard character format is not limited to any particular font style, size, or color. *See In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009)

Dietary supplement drink mixes; Dietary supplements; Dietary supplements for human consumption; Dietary and nutritional supplements; Herbal supplements; Nutraceuticals for use as a dietary supplement; Nutritional supplements; Powdered nutritional supplement drink mix; Vitamin supplements; Vitamin and mineral supplements, in International Class 5.

Registration was refused under Section 2(d) of the Trademark Act (“the Act”), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered standard character mark ENDUROLETE for “dietary and nutritional supplements” in International Class 5.²

Applicant timely filed a notice of appeal, and a request for reconsideration which was denied. The appeal is fully briefed. For the reasons explained below, we affirm the refusal to register.

I. Preliminary Evidentiary Matter: Applicant’s Prior Registrations

In its Request for Reconsideration and its appeal brief, Applicant claims ownership of five registrations, including one for the mark ENDURELITE FUELING

(“rights associated with a word mark in standard character (or typed) form reside in the wording and not in any particular display of the word.”).

Citations to the record throughout the decision include references to TTABVUE, the Board’s online docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

This opinion contains citations to decisions in conjunction with a pilot program. Decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals are cited as they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Board decisions are cited by reference to the United States Patents Quarterly (“USPQ”). *See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024).*

² Reg. No. 6381598 issued on June 8, 2021.

FAST (Reg. No. 5488007), that Applicant purportedly uses “in connection with the marketing and distribution of its dietary supplement products.”³

Applicant merely listed the registrations and thus did not make them properly of record by submitting copies prior to filing the appeal. *See In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012) (mere listing of third-party registrations in brief insufficient to make them of record); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372 (TTAB 2006) (to make a third-party registration of record, either a copy of the paper USPTO record of the registration, or a copy taken from the electronic records of the Office, should be submitted); *see also* TBMP § 1208.02. It is also the Board’s well-established practice is not to take judicial notice of third-party registrations, including registrations owned by the applicant. *In re Olin Corp.*, 124 USPQ2d 1327, 1335 n.22 (TTAB 2017) (Board declined to take judicial notice of registrations owned by applicant).

However, the Examining Attorney did not advise Applicant that the mere listing was insufficient to make the registrations of record. Rather, in the appeal brief, the Examining Attorney discusses the registrations, without raising any objection to them not being of record.⁴

³ 7 TTABVUE 10-11. Applicant also claimed ownership of registrations for the following marks: PERFORMELITE (Reg. No. 5525905); RECOVERELITE (Reg. No. 5612816) and SUSTAINELITE (Reg. No. 5525970).

⁴ *See, e.g.*, 9 TTABVUE 5 (discussion of the registered marks); and 9 TTABVUE 6-7 (discussion of Applicant’s registration for mark ENDURELITE FUELING FAST in the context of the decision *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012)).

Under these circumstances, and despite the listed registrations not being properly introduced by Applicant, the Board treats them as stipulated into the record. *See Olin*, 124 USPQ2d 1335 n.22 (although the Board does not take judicial notice of registrations, because the examining attorney addressed applicant's two registrations in appeal brief, Board treated registrations as though they are of record); *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 n.6 (TTAB 1999) (examining attorney did not object to listing of third-party registrations, rather he treated the registrations as if they were of record); *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998). *See also* TBMP § 1208.02.

Accordingly, we have considered Applicant's registrations as being of record in this appeal.

II. Likelihood of Confusion under Section 2(d)

Section 2(d) of the Act prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

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. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311 (Fed. Cir. 2003). In making our determination, the Board has considered each *DuPont* factor for which there is evidence and argument.

See In re Guild Mortg. Co., 912 F.3d 1376, 1379 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207-1208 (Fed. Cir. 1993).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *Shell Oil*, 992 F.2d at 1206 (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). “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, 1199 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017); *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156 (Fed. Cir. 2002); *see also In re Chatam Int’l Inc.*, 380 F.3d 1340 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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 factors, and the others, are discussed below.

B. The Goods; Trade Channels and Classes of Consumers

We initially consider the second *DuPont* factor, involving “whether the consuming public may perceive the respective goods [] of the parties as related enough to cause

confusion about the source or origin of the goods [].” *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (citation omitted)). We compare the goods as they are identified in the application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1300 (Fed. Cir. 2018); *Stone Lion Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1323; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937 (Fed. Cir. 1990); *see also B&B Hardware*, 575 U.S. at 143 (recognizing that an “applicant’s right to register must be made on the basis of the goods described in the application”).

The same goods listed in the cited registration, “dietary and nutritional supplements,” are identified in the application. The involved goods are thus identical in part and the second *DuPont* factor therefore weighs heavily in favor of a likelihood of confusion.

The third *DuPont* factor assesses “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. Where, as here, the goods are legally identical in-part, we presume the channels of trade and classes of purchasers are the same. *Stone Lion*, 746 F3d at 1323. This factor also weighs heavily in favor of likelihood of confusion.

B. The Marks

We turn now to *DuPont* factor involving an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371 (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 per curiam*, 777 F. App’x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). We are mindful that where, as here, Applicant’s and Registrant’s goods are identical, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Est. Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992). *See also In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010).

In evaluating the similarity between Applicant’s mark, ENDURELITE, and the Registrant’s mark, ENDUROLETE, we initially note that each mark comprises 10 letters forming four syllables in the following format ENDUR_L_TE (with different vowels in the spaces). This similarity brings the marks closer together both visually and phonetically. That is, to the eye, the marks are extremely similar, particularly given the sole difference being vowels embedded within the third and fourth syllables of the marks. In terms of sound, although there is no true correct pronunciation of a coined mark and consumers may pronounce a mark differently than intended by the mark owner, *see In re Viterra Inc.*, 671 F.3d 1358, 1367 (Fed. Cir. 2012) (citation

omitted), the two marks are likely to be pronounced in an extremely similar fashion given the identical placement of the same consonants throughout the two marks. Even should consumers attempt to separate the elements of Applicant's mark and pronounce it as ENDUR ELITE, this remains aurally very similar to any reasonable pronunciation of the registered mark, ENDUROLETE.

Despite the strong visual and aural similarities between the marks, Applicant argues the marks have different commercial impressions because "ELITE is a house mark" and Applicant uses ELITE as a suffix in other marks for its dietary and nutritional supplements.⁵ Applicant argues that "consumers encountering Applicant's dietary supplements containing the ENDURELITE mark will perceive and understand that such products originate from Applicant [because] ... the inclusion of the ELITE house mark and the Applicant's pervasive use of the ELITE house mark in connection with the Applicant's dietary supplement product line."⁶ Applicant further contends that the "ELITE house mark is the distinctive portion of the Applicant's ENDURELITE mark and the key component for any analysis to determine the commercial impression among consumers between the ENDURELITE mark and the Registrant's ENDUROLETE mark."⁷

Applicant's argument regarding its putative house mark use of ELITE, as part of its mark, does not persuade us that the marks are not similar. This is so because "[i]n

⁵ 7 TTABVUE 10.

⁶ 7 TTABVUE 11.

⁷ 7 TTABVUE 11.

determining the applicant's right to registration, only the mark as set forth in the application may be considered; whether or not the mark is used with an associated house mark is not controlling." *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017 (citation omitted)). *See also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) ("[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application."). Moreover, there is no evidence demonstrating that consumers have come to recognize ELITE as a house mark for Applicant's goods.

Applicant also argues that the prefix ENDUR element, common to both marks, should play less of a role in finding the marks similar because it "is highly suggestive of the nature of the parties' dietary supplement products."⁸ We agree that the shared prefix likely suggests an "endurance" improvement attribute by taking the dietary and nutritional supplements. Thus, contrary to Applicant's argument, because both marks are likely to suggest an "endurance" improvement quality to their goods, the connotations conveyed by the marks are also similar.

We further point out that, other than both marks being suggestive of an "endurance" quality in connection with the goods, there is no evidence that this prefix is otherwise commercially or conceptually weak. In contrast, in the decision cited by Applicant, *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005), the record included dictionary evidence and twenty-three third-party

⁸ 7 TTABVUE 12.

registrations which established that ESSENTIALS was so highly suggestive as applied to clothing that it was conceptually weak.

In sum, we find the marks, ENDURELITE and ENDUROLETE, are extremely similar in terms of appearance, sound and connotation. Again, the differences between the marks are minimal and the proper test regarding similarity “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, 1373 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). Here, we find the overall commercial impressions by the marks are nearly the same.

The first *DuPont* factor weighs in favor of likelihood of confusion.

B. Applicant’s Prior Existing Registration and *Strategic Partners*

Applicant and the Examining Attorney argue the applicability of the Board’s decision in *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012), in connection with Applicant’s ownership of Reg. No. 5488007 for the following mark:



for “nutritional supplements, namely, pre-workout powders, protein powders, vitamins, minerals, meal replacement bars and weight loss supplements,” in Class 5.⁹

Under the thirteenth *DuPont* factor, the Board considers “[a]ny other established fact probative of the effect of use,” *DuPont*, 476 F.2d at 1361. It is a “catchall” factor that “accommodates the need for flexibility in assessing each unique set of facts ...” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *15 (TTAB 2019) (quoting *Strategic Partners.*, 102 USPQ2d at 1399). “This includes a variety of circumstances, such as the coexistence of an applicant’s prior-registered mark with the cited registration. Where an applicant owns a prior registration and the mark is ‘substantially the same’ as in the applied-for application, this can weigh against finding that there is a likelihood of confusion.” *Id.* (citing *Inn at St. John’s*, 126 USPQ2d at 1748 (internal citation omitted)).

In determining whether the coexistence of an applicant’s prior registration with a cited registration weighs against finding confusion between the marks, we may consider: (1) whether the applicant’s prior registered mark is the same as applicant’s mark or is otherwise not meaningfully different; (2) whether the identifications of goods or services in the application and prior registration are identical in relevant part; and (3) the length of time the applicant’s prior registration has coexisted with

⁹ Issued on June 5, 2018. As discussed above, this registration has been deemed stipulated into the record.

the registration being considered as the basis for the Section 2(d) refusal. *Strategic Partners*, 102 USPQ2d at 1399-1400.

The Examining Attorney argues that *Strategic Partners* is inapplicable in this appeal because “the numerous additional elements to [the mark in] applicant’s prior registration mean that applicant’s prior regist[ered mark] is not for a substantially similar mark” and “the marks have not co-existed for at least five years with the cited registration.”¹⁰

Applicant, on the other hand, argues that *Strategic Partners* does support a finding of no likelihood of confusion because:¹¹

As noted by the Examining Attorney in his brief, the Applicant also owns a registered trademark for ENDURELITE FUELING FAST [], which has been registered since June 5, 2018 and has been acknowledged by the USPTO as incontestable under Section 15. This registration contains the very same ENDURELITE mark as at issue in the case at bar for the same type goods (i.e., dietary supplements for endurance athletes). Therefore, like the situation in *In re Strategic Partners*, the instant case is, in fact, a ‘unique situation’ that requires the reversal of the Examining Attorney’s refusal to register the ’132 Application for ENDURELITE by this Board.

Both Applicant and the Examining Attorney are correct in their observations regarding Applicant’s prior registration. As with the applicant’s prior registration in *Strategic Partners*, Applicant’s prior registration (Reg. No. 5488007) issued over five years ago, and thus “is not subject to attack by the owner of the cited registration on a claim of priority and likelihood of confusion.” *Strategic Partners*, 102 USPQ2d at

¹⁰ 9 TTABVUE 7.

¹¹ 12 TTABVUE 5. We note that Applicant did not argue the applicability of *Strategic Partners* in its main brief, but responded in its reply brief to the issue raised by the Examining Attorney.

1399.¹² In addition, the prior registration contains the same literal term ENDURELITE that Applicant now seeks to register, and the registration is for some, but not all, of the goods identified in the present application.

On the other hand, the circumstances of this appeal differ from those in *Strategic Partners*. Here, Applicant seeks registration of the standard character mark ENDURELITE, while its prior registration is for a composite mark (shown above)—in addition to the stylized term ENDURELITE, the mark contains a design and the additional wording, FUELING FAST. In *Strategic Partners*, the Board determined that the applicant’s existing registered mark, ANYWEARS, in standard characters, is “substantially similar” to the applicant’s applied-for mark, a “slightly stylized” ANYWEAR. *Id.* Here, Applicant’s existing registered mark is not substantially similar to the mark it now seeks to register.

Another important contrast in circumstances is that, Applicant is seeking to the register the mark ENDURELITE for goods, that pertinently include “dietary and nutritional supplements,” and this is a significant expansion upon the more specifically-described nutritional supplements listed in Applicant’s existing prior registration. In *Strategic Partners*, the goods covered by the applicant’s existing prior registration and in its application were identical, i.e., footwear.

In view of the above, we find the existence of Applicant’s prior registration only weighs slightly in favor of finding confusion unlikely. We hasten to add, however, that

¹² Section 14(3) of the Act, 15 U.S.C. § 1064(3), bars certain claims for cancellation of registrations that issued more than five years prior to the filing of the claim. This includes a claim under Section 2(d), likelihood of confusion.

there are significant differences between the circumstances present in this appeal with those in *Strategic Partners*, and we certainly do not find ourselves in the “unique position” where the thirteenth *DuPont* factor “outweighs the other [factors].” *Id.* at 1399.

C. Weighing the *DuPont* Factors

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. Because the marks ENDURELITE and ENDUROLETE are extremely similar and will be encountered by the same classes of consumers in the same trade channels on identical goods, i.e., nutritional and dietary supplements, there is a likelihood of confusion. We make this ultimate conclusion despite the existence of Applicant’s prior registration, under the thirteenth *DuPont* factor weighing slightly against our finding that confusion is likely.

Decision: The Section 2(d) refusal is affirmed.