

**This Opinion is Not a
Precedent of the TTAB**

Mailed: March 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Biobu SARL

Serial No. 90730546
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Michael Baird, Managing Attorney, Law Office 118.

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Before Greenbaum, Dunn and Cohen,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Biobu SARL (“Applicant”) seeks registration on the Principal Register of the standard character mark EKOBO for

Dishes, plates and bowls; cups; serving dishes and serving trays; and serving spoons and serving tongs; bathroom accessories, namely, soap boxes, soap dishes, tooth brush holders, bath sponges, soap dispensers, bathroom trays, in International Class 21.¹

The Trademark Examining Attorney finally refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

¹ Application Serial No. 90730546 was filed on May 24, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and is based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as March 1, 2014.

Applicant's mark, when used on or in connection with the identified goods, so resembles the mark ECOBOO (in standard characters), registered on the Principal Register, for

Bath brushes; Bottle cleaning brushes; Cleaning cloth; Cleaning cloths; Cloths for cleaning; Dish cloths; Loofahs for household purposes; Sponges for household purposes; Abrasive sponges for scrubbing the skin; Bath products, namely, body sponges; Bath products, namely, loofah sponges; Cleaning sponges; Fabric clean room wipes; Facial cleansing sponges; Kitchen sponges; Massage sponges; Scouring sponges, in International Class 21,

as to be likely to cause confusion, mistake or deception.²

When the refusal was made final, Applicant requested reconsideration and appealed to this Board. Reconsideration was denied, proceedings were resumed, and the appeal is fully briefed. We affirm.

I. Likelihood of Confusion

“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] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *2 (Fed. Cir. 2023) (cleaned up).

Our determination under Trademark Act Section 2(d) involves 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) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In*

² Reg. No. 6362031 issued on May 25, 2021.

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 Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Charger Ventures*, 2023 USPQ2d 451, at *4 (“In any given case, different *DuPont* factors may play a dominant role and some factors may not relevant to the analysis.”). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between 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 and differences in the marks.”).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect registrants from damage caused by registration of similar marks likely to cause such confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Goods and Channels of Trade

Under these *DuPont* factors, we compare the goods as they are identified in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Dixie Rests.*, 41 USPQ2d at 1534; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (Board must “give full sweep” to an identification of goods or services regardless of registrant’s actual business); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Here, the “bath sponges” identified in the application are broadly worded and encompass the more specific “abrasive sponges for scrubbing the skin,” “bath products, namely, body sponges,” and “bath products, namely, loofah sponges” identified in the cited registration. *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.’”). Therefore, the goods are in-part legally identical.

Because the goods in the application and cited registration include legally identical goods, we need not further consider their relatedness. 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 in the application. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 123 USPQ2d 1744 (Fed. Cir. 2017) (“Likelihood of confusion must be found if there is likely to be confusion with respect to any item in a class that comes within the identification of goods in the application and cited registration.”); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

Moreover, given the in-part legal identity of the identified goods, and the lack of restrictions or limitations in the application or cited registration as to their nature, channels of trade, or classes of customers, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Applicant's arguments as to these *DuPont* factors rely largely on purported "real world" distinctions between the goods and channels of trade based on the goods Applicant and Registrant actually advertise and sell, App. Br., 6 TTABVUE 8-9, and search engine optimization that separates or filters consumers of Applicant's and Registrant's goods sold online through keyword campaigns and metadata embedded in each website. *Id.* at 11-12. The arguments are unavailing. Applicant is reminded that we must focus on the identifications of goods set forth in the application and cited registration, rather than on alleged actual differences. In other words, Applicant may not restrict the scope of the goods covered in its application or the cited registration by argument or by extrinsic evidence. *Stone Lion*, 110 USPQ2d at 1162 ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions ..."); *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.").

These *DuPont* factors weigh heavily in favor of likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

Under this factor, we compare Applicant's mark EKOBO and Registrant's mark ECOBOO, both in standard characters, "in their entirety as to appearance, sound, connotation and commercial impression." *Detroit Ath. Co.*, 128 USPQ2d at 1048. *See*

also *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée 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*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 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, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018). “Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). We also bear in mind that because the identified goods are in-part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”). *See also Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) (“When the goods are identical, the appearance of a mark

of similar sound, appearance, or connotation is more likely to cause confusion than if the goods are significantly different.”).

Further, the marks “must be considered ... in light of the fallibility of memory” *Id.* at 1085 (quotation omitted). We focus on the recollection of the average consumer, who normally retains a general rather than a specific impression of trademarks. *See id.* at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F2d 1005, 169 USPQ 39, 40 (CCPA 1971). Because the identified goods are common kitchen and bathroom products, the average consumer is an ordinary member of the general public.

Applicant argues the differences in the marks in appearance and sound suffice to distinguish them, and the marks create different commercial impressions. In particular, Applicant argues Registrant’s mark ECOBOO conveys ecologically-minded products made of bamboo because the mark “contains ‘Eco’ (short for ‘Ecology’), and ‘Boo’ (short for ‘Bamboo’)” (Reply Br., 9 TTABVUE 4), while Applicant’s mark EKOBO

is a combination of two terms into one mark. The element “Eko” is an abbreviation for the wording “ecology” and is a representation of the sustainable principles behind Applicant’s products, well-documented in its nearly 20-year history in developing diningware. The “-bo” component of Applicant’s mark is short for “beau”, which is French for “beauty”, a reference to the Applicant’s founding principles to develop aesthetically pleasing products. The French root for the “bo” component also results in a particular sound, “-beau”, which is different from “boo” such that it is not obvious to any consumer that “-bo” has any connection to “bamboo”.

App. Br., 6 TTABVUE 5.

The Examining Attorney focuses on the visual and aural similarities between the marks, and argues both marks “convey the strong impression of goods manufactured from eco-friendly bamboo.” Ex. Atty. Br., 8 TTABVUE 7.

The marks EKOBO and ECOBOO are visually similar because they both consist of one-word, three-syllable terms that are similar in cadence and structure, beginning with the vowel “E,” followed by a consonant and the letter string “OBO,” and ending with the vowel “O.” Applicant’s substitution of the letter “K” for the letter “C” as the second character in its mark, and Applicant’s use of a single rather than double letter “O” at the end of its mark, are minor differences that, if even noticed, do little to distinguish the marks’ appearance.

As to connotation, Applicant concedes the lead components of the marks, “EKO” and “ECO,” both signify “ecology.” App. Br., 6 TTABVUE 5 (“The element ‘Eko’ is an abbreviation for the wording ‘ecology’”), Reply Br., 9 TTABVUE 4 (“‘Eco’ (short for ‘Ecology’)”).³ As for the components “BO” and “BOO,” even if Applicant intends “BO” to refer to the French word “beau,” and then, by extension, the English word “beauty,” App. Br., 6 TTABVUE 4-5, “we must look to the likely consumer perception of the mark in connection with the identified goods, rather than applicant’s intended connotation.” *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1886 (TTAB 2011).

³ We also take judicial notice from Dictionary.com Unabridged, based on THE RANDOM HOUSE DICTIONARY (2024), accessed March 26, 2024, that “eco” is defined as “ecology.” The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

There is no evidence that potential consumers who encounter Applicant's mark EKOBO on or in connection with the identified goods will perceive "BO" as evoking the French word "beau," or that they will make any connection with the English word "beautiful." Indeed, Applicant's specimen, which is the only evidence of Applicant's use of EKOBO with its identified goods, uses no French terms, and the displayed goods are not recognizable as being of French design or origin. May 24, 2021 Specimen, TSDR 1-10.

On the other hand, the specimen shows bamboo salad tongs, *id.* at TSDR 1-5, and a soap dispenser "made with bamboo fiber," *id.* at TSDR 6-10, and it touts the goods as eco-friendly: "EKOBO is a home living brand specialized in the design and manufacture of premium, eco-friendly tableware & home accessories." *Id.* at 4, 9. Thus, at minimum, Applicant's point-of-sale materials suggest a connection between the mark EKOBO and eco-friendly bamboo products.

We agree with both Applicant and the Examining Attorney that Registrant's mark ECOBOO also evokes bamboo-sourced materials. Reply Br., 9 TTABVUE 4 ("Eco' (short for 'Ecology'), and 'Boo' (short for 'Bamboo')"); Ex. Atty Br., 8 TTABVUE 6 ("As Registrant's goods are also fiber-based, it is reasonable to assume that consumers would draw the same inference from Registrant's mark: That the goods are of eco-friendly bamboo."). Five use-based third-party registrations of marks with BOO suffixes for various bamboo products, submitted by Applicant, provide further support for this finding, although they are not determinative. June 11, 2023 Request

for Reconsideration, TSDR 20-34 (CABOO, CHABAMBOO, COCOBOO, KOUBOO and NATBOO).⁴

Regarding the sound of the marks, both of which are coined terms, it has long been held that “[t]here is no correct pronunciation of a trademark that is not a recognized word.” *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014) (citing *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969)). Consumers therefore could pronounce a mark differently than the mark owner intends. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (“[T]here is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.”); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n.3 (TTAB 1987) (“Obviously, correct pronunciation as desired by the applicant cannot be relied upon to avoid a likelihood of confusion. There is no ‘correct’ pronunciation for a trademark.”). We also agree with the Examining Attorney that

the context in which a mark is used make[s] certain pronunciations **more likely**, as such extrinsic factors necessarily inform how a mark is interpreted. In this case, where the goods of both parties appear to be derived from ECO-friendly bamBOO, a consumer is highly likely to take

⁴ We do not include in this count third-party registrations for the marks BAMBOO, BOODLAH, and TABOO, *id.* at TSDR 8-13, 35-37, because they registered under Sections 66(a) or 44(e) of the Trademark Act, 15 U.S.C. §§ 1141f(a) and 1126(e), respectively, and therefore have very little, if any, probative value. *Cf. In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1983) (third-party registrations issued under Section 44(e), without any use in commerce basis, have very little persuasive value in suggesting that the identified goods or services are related). Nor do we include third-party registrations for the marks BOOKOO and BOOTNIKS, *id.* at TSDR 14-19, as the former connotes the word “beaucoup” and the latter connotes other words with the suffix “niks,” such as “neatniks” and “beatniks,” rather than “bamboo.”

these terms into account. In the present case, the compared marks could clearly be pronounced the same.

Ex. Atty. Br., 8 TTABVUE 6 (emphasis in original).

In certain circumstances, similarity in sound alone may be sufficient to find the marks confusingly similar. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). In this case, however, as discussed above, when we consider the marks in their entireties, we find they also look similar, and they convey the same connotation and commercial impression of eco-friendly bamboo products. *Palm Bay*, 73 USPQ2d at 1692. The substitution of the letter “K” for the letter “C” and the use of a single or double letter “O” at the end of the marks are minimal differences that do not dispel those similarities, particularly considering the lesser degree of similarity required for confusion to be likely between marks that are used in connection with in-part identical goods. *Century 21*, 23 USPQ2d at 1700.

This *DuPont* factor also favors a finding of likelihood of confusion.

C. Lack of Actual Confusion

Applicant argues under the eighth *DuPont* factor that Applicant and Registrant have both used their marks “in the U.S. for many years, and Applicant is aware of no instances of actual confusion between the marks” and, in somewhat contradictory language, that they have both used their marks “in commerce concurrently for a handful of years. Yet, there is no evidence of actual confusion among consumers.” App. Br., 6 TTABVUE 10-11. See *Guild Mortg.*, 2020 USPQ2d 10279, at *6 (“The eighth *du Pont* factor ... – [t]he length of time during and conditions under which

there has been concurrent use without evidence of actual confusion,’ *see du Pont*, 177 USPQ at 567 – requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.”).

Applicant’s “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *Majestic Distilling*, 65 USPQ2d at 1205. Moreover, “in this ex parte context, there has been no opportunity to hear from the owner of the cited registration (“Registrant”) about whether it is aware of any reported instances of confusion. We therefore are getting only half the story.” *Guild Mortg.*, 2020 USPQ2d 10279, at *23. Nor can we assess whether there has been any significant opportunity for actual confusion to have occurred, as we have little evidence as to the nature and extent of use by Applicant and Registrant. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *9 (TTAB 2019) (explaining that “for the absence of actual confusion to be probative, there must have been a substantial opportunity for confusion to have occurred”); *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends on there being a significant opportunity for actual confusion to have occurred).

In any event, “the relevant test is likelihood of confusion, not actual confusion.” *Detroit Ath. Co.*, 128 USPQ2d at 1053. And, as often stated, “a showing of actual confusion is not necessary to establish a likelihood of confusion.” *i.am.symbolic*, 123 USPQ2d at 1747 (quoting *Herbko*, 64 USPQ2d at 1380).

This *DuPont* factor is neutral.

D. Conclusion

The goods are in-part legally identical and must be presumed to move in the same channels of trade to the same classes of consumers. Accordingly, the second and third *DuPont* factors weigh heavily in favor of a likelihood of confusion. The marks look similar, they sound similar and could be pronounced identically, and they convey the same connotation and commercial impression of eco-friendly bamboo products. The first *DuPont* factor therefore also weighs in favor of a likelihood of confusion. The eighth *DuPont* factor is neutral, and no *DuPont* factor weighs against a finding of likelihood of confusion.

Having weighed and balanced the *DuPont* factors for which there is evidence and argument, we conclude confusion is likely between Applicant's mark EKOBO and the cited registered mark ECOBOO.

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