

This Opinion is Not a
Precedent of the TTAB

Mailed: March 28, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re LeNid USA Inc.

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Serial No. 90747917

Melvin K. Silverman of Melvin K. Silverman & Assocs., LLC,
for LeNid USA Inc.

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Before Wellington, Lykos and Goodman,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

LeNid USA Inc. (“Applicant”) seeks to register on the Principal Register the standard character mark CRÈMILY for goods ultimately identified as “Frozen-yogurt” International Class 30.¹

¹ Application Serial No. 90747917, filed June 1, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging February 19, 2021 as the date of first use anywhere and in commerce. As originally filed, the application included “food preparation services” in International Class 43. Applicant obviated a specimen refusal by deleting these services in its July 7, 2023 Request for Reconsideration. The mark appears on the drawing page as “Crèmily” but retains a claim as to standard characters and not special form. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (setting forth requirements for standard character mark); *see also In re Calphalon Corp.*, 122 USPQ2d 1153, 1158-61 (TTAB 2017) (applicant's

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the standard character mark CREMILLY on the Principal Register for "bakery products; chocolate glaze, chocolate ganache" in International Class 30 that it is likely to cause confusion or mistake or to deceive.²

Following issuance of the final refusal, Applicant timely filed a request for reconsideration which was denied. Applicant appealed. Applicant and the Examining Attorney filed briefs.³ We affirm the refusal to register.

I. Evidentiary Objections

Before discussing the substantive refusal we address evidentiary objections raised by the Examining Attorney.

The Examining Attorney objects to Applicant's submission with its appeal brief of the following new evidence: Registrant's Declaration of Use under Trademark Act

amendment of mark from SHARPIN to SharpIn did not transform mark from standard character to special form).

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system. Citations to the record throughout the decision include references to TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

² Registration No. 4784529, issued on August 4, 2015; Trademark Act Section 8 affidavit accepted on June 30, 2022. The original basis for the refusal was a likelihood of confusion of confusion with "ice cream" in the cited registration. *See* May 9, 2022 First Office Action. Following submission of Registrant's Section 8 affidavit deleting "ice cream" from the identification of goods, the Examining Attorney cited different goods to support the Section 2(d) refusal. *See* May 21, 2023 Final Office Action.

³ Applicant not only attached portions of the prosecution record to its brief, it also reprinted the text of Office actions within its brief. This was unnecessary and superfluous.

Section 8; the WIKIPEDIA entry for “ganache;” images of the packaging for Registrant’s goods; and the printout of another registration from the USPTO’s TESS database⁴ owned by Registrant and its prosecution history.

The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Insofar as the Examining Attorney has timely interposed an objection to Applicant’s late-filed evidence, the objection is sustained, and this evidence has been given no consideration. *See In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019); *In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).⁵ Nor have we considered any of Applicant’s arguments related to the late-filed evidence.

II. Trademark Act Section 2(d) Refusal

Section 2(d) of the Trademark 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*

⁴ The USPTO retired the TESS database on November 30, 2023.

⁵ The correct procedure would have been for Applicant, prior to filing its appeal brief, to have filed a separately captioned request for remand with a showing of good cause explaining why the evidence was not previously available. *See* Trademark Rule 2.142(d)(1), 37 C.F.R. § 2.142(d)(1) and TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 1207.02 (2023).

de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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, 129 USPQ2d 1160, 1162-63 (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, 26 USPQ2d 1687, 1690 (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, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Shell Oil*, 26 USPQ2d at 1688 (“the 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, 177 USPQ 386, 387 (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, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); see also *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.”). These factors are discussed below.

A. The Marks

We commence with the first *DuPont* factor which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (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.”) (citation omitted).

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, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). Further, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a

specific impression of trademarks. *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991)), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992); *see also In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). “Similarity is not a binary factor but is a matter of degree.” *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant’s and Registrant’s coined marks CRÈMILY and CREMILLY are almost identical in appearance. The only distinctions are the presence of the French accent grave mark above the letter “E” in Applicant’s mark and the additional letter “L” in Registrant’s mark.⁶ Despite these minor differences in spelling and diacritics, the marks may also be pronounced in the same manner. Consumers could pronounce the marks with either the long or short vowel sounds for the letters “E” and “I” or some combination thereof. Because “there is no correct pronunciation of a mark” and because “it is impossible to predict how the public will pronounce a particular mark,” we must assume that the marks could be pronounced in the same manner by consumers. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1835 (TTAB 2013) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012)); *In re The Belgrade Shoe Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (CCPA 1969). *See, e.g., Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461 (TTAB 1985) (holding SEYCOS and design for watches, and SEIKO for watches and clocks, likely to cause confusion); *In re Great Lakes Canning, Inc.*, 227 USPQ 483

⁶ There is no evidence in the record that Applicant’s mark is a foreign word.

(TTAB 1985) (holding CAYNA (stylized) for soft drinks, and CANA for, inter alia, canned and frozen fruit and vegetable juices, likely to cause confusion. Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *See e.g., In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Thus, when comparing the marks overall, they are identical in sound and almost identical in appearance. The similarity of the marks weighs in favor of finding a likelihood of confusion.

B. The Goods

Next we compare the goods as they are identified in the involved application and cited registration, the second *DuPont* factor. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised

together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant's goods (or similar goods) and the goods listed in the cited registration (or similar goods). *See, e.g., Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

The Examining Attorney made of record the following eleven (11) use-based, third-party registrations showing that the same entities have registered single marks identifying both "baked goods"⁷ and "frozen yogurt" or the equivalent thereof:⁸

Registration No. 6014346 for "Cakes" and "Frozen yogurt";

Registration No. 5456800 for "Bakery goods, namely, pastries, bakery desserts, breads, cakes, fruit cobblers, cookies, pies, ..." and "frozen yogurt";

Registration No. 6192385 for "bakery goods and "non-dairy frozen yogurt";

Registration No. 5719975 for "bakery products" and "frozen yogurt";

Registration No. 5616232 for "bakery goods" and "Frozen yogurt";

Registration No. 6014346 for "Cakes" and "Frozen yogurt";

⁷ We consider the full scope of the goods recited in the application and cited registration. *See Country Oven*, 2019 USPQ2d 443903, at *9 (TTAB 2019) ("a registration that describes goods broadly is presumed to encompass all goods or services of the type described."). Accordingly, "baked goods" in the cited registration is broad enough to encompass, for example, "cakes" in the third-party registrations. Likewise, "frozen yogurt" includes all types of frozen yogurt such as "non-dairy frozen yogurt."

⁸ *See* May 21, 2023 Final Office Action at TSDR 105-126 (.pdf format).

Registration No. 6062806 for “Baked goods, namely, cookies, cakes, bread, brownies and desserts” and “Frozen yogurt”;

Registration No. 6660785 for “cakes” and “frozen yogurt;”

Registration No. 6706502 for “bakery products” and “frozen yogurt”;

Registration No. 6621412 for “Bakery goods” and “Frozen yogurt”; and

Registration No. 6915731 for “bakery products” and “frozen yogurts.”

Third-party registrations that cover goods from both a cited registration and an applicant’s application are relevant to show that the goods are of a type that may emanate from a single source under one mark. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1051; *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). As a result, we find Applicant’s “frozen yogurt” related to Registrant’s “bakery products” meaning this *DuPont* factor also favors a likelihood of confusion.

C. Weighing of the *DuPont* Factors

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. Weighing the *DuPont* factors for which there has been evidence and argument, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023), the similarities of the marks in sight and sound coupled with the related nature of the goods lead us to the conclusion that prospective consumers are likely to confuse the involved marks and goods as originating from,

associated with, or sponsored by the same entity. Accordingly, we find that confusion is likely between Applicant's applied-for mark and the mark in the cited registration for the identified goods.

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