

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: December 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Blue Dragon Fly, Inc.*

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Serial No. 90825428

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Thomas L. Peterson, for Blue Dragon Fly, Inc.

Allyson Willis, Trademark Examining Attorney, Law Office 113,  
Myriah Habeeb, Managing Attorney.

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Before Cataldo, Coggins, and English,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Blue Dragon Fly, Inc. (“Applicant”) seeks registration on the Principal Register of

  
the mark **BLUEDRAGONFLY** for  
Walk More Live More

Bath cream; Body cream; Body lotion; Hair lotion; Hand  
cream; Hand lotions; Skin cream; Skin lotion, in  
International Class 3; and

Shirts; T-shirts; Tee shirts, International Class 25.<sup>1</sup>

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the standard-character mark BLUE DRAGONFLY ACRES for "Body butter; Bath soaps in liquid, solid or gel form," in International Class 3,<sup>2</sup> on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive. After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### I. 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, mistake, or deception. 15 U.S.C. § 1052(d). *See also, In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023).<sup>3</sup>

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<sup>1</sup> Application Serial No. 90825428 was filed on July 13, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce. According to the application, "[t]he mark consist of a silhouette of a dragon fly with the words BLUE DRAGONFLY below and the words Walk More Live More below that."

<sup>2</sup> Registration No. 6715002, issued May 3, 2022. The registration also identifies "candles" in Class 4 which are not at issue in this appeal. While Applicant states that "it does not appear that the registered mark is valid and a cancellation petition is in the process of being prepared" (8 TTABVue 7), no petition was filed and the registration is presumptively valid. Trademark Act § 7(b), 15 U.S.C. § 1057(b). A collateral attack on the validity of a cited registration will not be heard in an ex parte proceeding. *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1408 (Fed. Cir. 1997).

<sup>3</sup> This opinion cites decisions in conjunction with an internal Board pilot program to broaden acceptable forms of legal citation in Board cases. 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 to the Lexis legal database and are all precedents. Practitioners should adhere to the practice set

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 any likelihood of confusion analysis, different *DuPont* factors may play a dominant role and some factors may not be relevant. *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1116 (Fed. Cir. 2024) (quoting *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022)). In addition, varying weight may be assigned to each factor depending on the evidence presented, and “any one of the factors may control a particular case.” *Id.*; see also *Charger Ventures*, 64 F.4th at 1381. While we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019), two key considerations are the similarities between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)). These two factors, and one other (i.e., the third factor, considering the channels of trade), are discussed below.

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forth in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 101.03 *et seq.* (2024).

A. The Goods, Trade Channels, and Classes of Consumers

We begin with the second and third *DuPont* factors, which respectively consider the similarity and nature of the goods as described in the application and cited registration, and the similarity of established, likely-to-continue trade channels. *DuPont*, 476 F.2d at 1361; *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”); *Naterra Int’l*, 92 F.4th at 1117-18; *In re Detroit Athletic Co.*, 903 F.3d 1297, 1300 (Fed. Cir. 2018).

The Examining Attorney argues that the “same entity commonly manufactures the relevant goods,” “markets the goods under the same mark . . . through the same trade channels,” and the goods are “used by the same classes of consumers in the same fields of use . . . .”<sup>4</sup> Applicant does not address relatedness of the goods, channels of trade, or classes of consumers in its brief, apparently conceding these points. *See In re Morinaga Nyugyo K.K.*, 2016 TTAB LEXIS 448, at \*3 (TTAB 2016) (viewing the applicant’s failure to address the second and third *DuPont* factors in its appeal brief as an apparent concession on those factors). In view thereof, we offer only a short explanation of our analysis.

As the Examining Attorney has demonstrated with ample third-party Internet screenshots and third-party registrations, Applicant’s various cosmetic creams, cosmetic lotions, and shirts, are commercially related to Registrant’s body butter and

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<sup>4</sup> Examining Attorney’s Brief at unnumbered p. 7. 10 TTABVUE 7. Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution record refer to the .pdf version of the TSDR system.

bath soaps.<sup>5</sup> *See, e.g., In re Ox Paperboard, LLC*, 2020 TTAB LEXIS 266, \*15 (TTAB 2020) (evidence of relatedness may include Internet excerpts showing the goods advertised and sold by the same manufacturer or dealer, and prior use-based registrations covering both parties' goods). Moreover, we find on the face of the identifications that Applicant's body cream is virtually identical to Registrant's body butter. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (the identification of goods in an application and registration may in itself constitute evidence of relatedness of the goods).

The same third-party website evidence showing that Applicant's and Registrant's goods are related demonstrates both Applicant's and Registrant's goods may be encountered by the same classes of consumers under the same marks in common trade channels, namely, retail stores and websites providing Registrant's body butter or bath soaps on the one hand, and Applicant's cosmetic creams, cosmetic lotions, and/or shirts on the other hand. *See, e.g., Charger Ventures*, 64 F.4th at 1382. (evidence of third parties offering both relevant services at issue under the same mark and, often, on the same website supported Board's finding of relatedness under the second *DuPont* factor and "some overlap" under the third *DuPont* factor).

We find that the *DuPont* factors of the relatedness of the goods, channels of trade, and target consumers weigh in favor of a finding of likelihood of confusion.


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<sup>5</sup> *See* 10 TTABVUE 6-8 (mentioning at least 17 websites) and 8-18 (table of 20 third-party registrations) citing specific examples, listing the goods, and providing citation to the record.

B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 2018 TTAB LEXIS 170, at \*13 (quoting *In re Davia*, 2014 TTAB LEXIS 214, \*4 (TTAB 2014)).



When comparing Applicant’s composite word-and-design mark  to Registrant’s standard-character mark BLUE DRAGONFLY ACRES, 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)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of trademark marks. *In re St. Julian Wine Co.*, 2020 TTAB LEXIS 196, \*13 (TTAB 2020). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof

over time. *In re Mucky Duck Mustard*, 1988 TTAB LEXIS 11, \*3 (TTAB 1988). Because the goods are shirts and various cosmetic butters, creams, lotions, and soaps, the average customer is an ordinary consumer. *See In re Embiid*, 2021 TTAB LEXIS 168, \*12 (TTAB 2021); *L’Oreal S.A. v. Macron*, 2012 TTAB LEXIS 77, \*16 and \*26 (TTAB 2012).

“[S]imilarity 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)). The marks must be considered in their entirety, *St. Julian Wine Co.*, 2020 TTAB LEXIS 196, \*13, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *Detroit Athletic Co.*, 903 F.3d at 1305 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985)), and 1306 (it was not error for the Board to focus on dominant portions of the marks); *see also, e.g., Charger Ventures*, 64 F.4th at 1382 (permissible for the Board “to focus on dominant portions of a mark”).

We find the wording BLUE DRAGONFLY to be the dominant element of Applicant’s mark because this wording is the first and largest literal portion, presented in all capitals, and the leading word BLUE is emphasized with bolding. *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 1988 TTAB LEXIS 60, \*8 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered[.]”); *see also Palm Bay Imps.*, 396 F.3d at 1372-73.

While Applicant's mark comprises both words and a design, "the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1371 (Fed. Cir. 2015), citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983). If a mark comprises both wording and a design, greater weight is often given to the wording, because it is the wording that purchasers would use to refer to or request the goods. *See, e.g., In re Viterra, Inc.*, 671 F.3d 1358, 1366 (Fed. Cir. 2012). Moreover, the design is a silhouette of a dragonfly, which serves to reference and reinforce the BLUE DRAGONFLY wording. Accordingly, we are not persuaded by Applicant's argument that the silhouette design of a dragonfly is the dominant element of its mark. We acknowledge Applicant's additional wording ("Walk More Live More") which is at the bottom of the mark in a smaller font. This wording is less prominent than BLUE DRAGONFLY, and does not detract from the dominant literal BLUE DRAGONFLY portion of the mark.

BLUE DRAGONFLY is the leading wording in Registrant's mark, and this initial, arbitrary wording is identical to Applicant's BLUE DRAGONFLY wording. As to appearance and stylization, Registrant's mark is a standard-character mark and may be displayed in any font style, color, and size, including the identical stylization of the literal elements of Applicant's mark. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). *See also Viterra*, 671 F.3d at 1363. The marks are thus similar in appearance to the extent they both contain the leading words BLUE DRAGONFLY.



As to sound, the marks are similar because of the shared identical wording BLUE DRAGONFLY. Applicant's dragonfly design would not be verbalized except, perhaps, to the extent it reinforces the words BLUE DRAGONFLY which will be verbalized. *Viterra*, 671 F.3d at 1366; *Palm Bay Imps.*, 396 F.3d at 1372-73. And while the respective marks contain additional wording, we must consider the average customer who retains a general impression of the marks, *St. Julian Wine Co.*, 2020 TTAB LEXIS 196, at \*13, and who will shorten the marks – here, to the identical leading BLUE DRAGONFLY wording. See *In re Bay State Brewing Co., Inc.*, 2016 TTAB LEXIS 46, \*9 (TTAB 2016) (“we also keep in mind the penchant of consumers to shorten marks”); *Big M., Inc. v. U.S. Shoe Corp.*, 1985 TTAB LEXIS 8, \*11 (TTAB 1985) (“we cannot ignore the propensity of consumers to often shorten trademarks”).

We find that both marks present similar connotations and commercial impressions due to the shared, dominant, and apparently arbitrary BLUE DRAGONFLY element. The trailing word ACRES in Registrant's mark gives an impression of an indefinite geographic area, and one on which blue dragonflies may be found. As mentioned earlier, the dragonfly silhouette in Applicant's mark references and serves to reinforce the BLUE DRAGONFLY wording of that mark. The “Walk More Live More” wording is a point of difference between the marks, but as a smaller, secondary tagline in Applicant's mark it does not diminish the overall BLUE DRAGONFLY commercial impression of the mark. Finally, there is no argument or evidence here, or other reason to find, that the wording BLUE DRAGONFLY would have one meaning when used with Registrant's cosmetic goods,

and a second and different meaning when used with Applicant’s cosmetic goods and shirts. *See, e.g., Embiid*, 2021 TTAB LEXIS 168, at \*28.

In sum, we find the similarities between the marks in their entirety in appearance, sound, connotation, and commercial impression are more significant than the differences. *See Charger Ventures*, 64 F.4th at 1382 (recognizing that “an additional word or component may technically differentiate a mark but do little to alleviate confusion”); *St. Helena Hosp.*, 774 F.3d at 751 (“[M]arks must be considered ... in light of the fallibility of memory.”) (internal quotation marks omitted). The first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

### C. Summary; Weighing the Factors

The first, second, and third *DuPont* factors weigh in favor of a likelihood of confusion. The marks are more similar than dissimilar, conveying the same overall connotation and commercial impression. The goods are related and are sold through the same channels of trade to the same consumers. When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *Charger Ventures*,

65 F.4th at 1384, we find confusion is likely between Applicant’s mark and the cited mark BLUE DRAGONFLY ACRES.



## II. Decision

The Section 2(d) refusal to register Applicant’s mark is affirmed.