

This Opinion is Not a
Precedent of the TTAB

Mailed: September 15, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Heartland Climbers, LLC

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Serial No. 90885309

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R. Bennett Ford, Jr. of Roy Kiesel Ford Doody & North APLC,
for Heartland Climbers, LLC.

Kara Jagdeo, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

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Before Bergsman, Lykos and English,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Heartland Climbers, LLC (“Applicant”) seeks to register on the Principal Register the standard character mark DEATH FROM ABOVE for “Hunting stands,” in International Class 28.¹

¹ Application Serial No. 90885309, filed August 16, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. 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”

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 registered mark HUNT FROM ABOVE for, in relevant part, "hunting stands for use in trees; seats especially adapted for hunting stands for use in trees," in International Class 28,² that it is likely to cause confusion or mistake or to deceive.

Following issuance of the final refusal, Applicant timely filed a notice of appeal. The appeal is fully briefed. For the reasons explained below, we affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), 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, 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

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. 4668538, registered on January 6, 2015 on the Principal Register; Trademark Act Sections 8 and 15 combined declaration has been accepted and acknowledged.

(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 (“[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, 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, and the others, are discussed below.

A. The Goods and Established, Likely-to-Continue Channels of Trade and Classes of Consumers

We commence by comparing 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); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *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). See also *B & B Hardware*, 113 USPQ2d 2045, 2049 (recognizing that an “applicant’s right to register must be made on the basis of the goods described in the application”).

“It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); see also *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

As noted above, Applicant’s goods are broadly identified as “hunting stands” and unrestricted as to type. We must therefore assume that the identification encompasses all kinds of “hunting stands,” including Registrant’s more specialized “hunting stands for use in trees.” See, e.g., *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.’”); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992)

(where registrant's goods are broadly identified as "computer programs recorded on magnetic disks," without any limitation as to the kind of programs or the field of use, it must be assumed that registrant's goods encompass all such computer programs, including applicant's more specialized computer programs for data integration and transfer). As such, the goods are in-part legally identical.³

This brings us to the third *DuPont* factor, the established, likely-to-continue channels of trade and classes of consumers. Because the goods are legally identical in part and unrestricted as to trade channels and classes of consumers, we must presume that those particular goods travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers seeking hunting stands. *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); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

In view of the foregoing, the second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion.

³ The Examining Attorney also focused on whether Applicant's goods are related to Registrant's goods in International Class 9, and submitted third-party website evidence in support thereof. However, based on the identification of goods as written, we need not reach the question as to whether Applicant's and Registrant's goods are related to Registrant's International Class 9 items.

B. The Marks

We now consider 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. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). “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, 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).

“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) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)). We keep in mind that where, as here, the goods are identical, less similarity between the marks is needed for us to find a likelihood of confusion. *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *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.”).

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.*, 113 USPQ2d at 1085 (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). Here, the average purchasers are hunting enthusiasts.

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just a portion. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913

F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)). Nonetheless, 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 a consideration of the marks in their entireties. *See Stone Lion*, 110 USPQ2d at 1164.

Applicant argues that because consumers are more likely to focus on the distinctions between the words DEATH and HUNT, the respective first portions of Applicant's and Registrant's marks, the marks are dissimilar. In Applicant's view, DEATH and HUNT are the dominant elements of each respective mark with their own unique meaning. Elaborating on its position, Applicant explains:⁴

HUNT is descriptive of the registrant's goods, "hunting stands for use in trees." DEATH is suggestive of applicants goods - also "hunting stands." One use of a hunting stand is to allow a hunter to sit or stand while he awaits the game. When the hunt is successful, the stand may facilitate a kill. There is a connection between DEATH and hunting stands, but that connection is attenuated. Like NOBURST for liquid antifreeze hot-water-heating systems, DEATH suggests a desired result of using the product rather than immediately informing the purchasing public of a characteristic, feature, function, or attribute of applicant's product. *In re Noble Co.*, 225 USPQ 749 (TTAB 1985). Thus, DEATH is suggestive.

...

DEATH FROM ABOVE creates a very different commercial impression than HUNT FROM ABOVE. As noted above, the registrant's goods include "fall protection equipment for fall restraint and fall arrest." The commercial impression created by HUNT FROM ABOVE when used with fall protection equipment is with this

⁴ Applicant's Brief, p. 3 and 5; 6 TTABVUE 4 and 6.

product, you can hunt from a tree without falling out and breaking your neck. The commercial impression is one of safety. DEATH FROM ABOVE does not create or convey the same commercial impression. DEATH FROM ABOVE focuses on the killing aspect of hunting. It conveys no safety message - quite the opposite, actually. The different commercial impressions created by DEATH FROM ABOVE and HUNT FROM ABOVE serve to avoid confusion.

First, we disagree with Applicant's contention that consumers are likely to focus on the words "Death" and "Hunt" as the first part of the respective marks at issue. There is no mechanical test to select the dominant element of a mark. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017). While the first term in a mark generally is considered to be the feature which will be called for, and so remembered, by consumers, this is not invariably the case. *See Stone Lion*, 110 USPQ2d at 1161 ("the Board did not err in finding that 'STONE LION CAPITAL' is 'similar in sight, sound, meaning, and overall commercial impression' to 'LION CAPITAL' and 'LION.'"); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.").

DEATH FROM ABOVE and HUNT FROM ABOVE are both unitary marks because the words "Death" and "Hunt" do not create a commercial impression separate and apart from the marks as a whole; that is, "Death" and "Hunt" are so integrated into the marks that they cannot be regarded as separable. *See In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981); *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983). Both DEATH FROM ABOVE and HUNT FROM ABOVE are

unitary phrases that are more than the sum of their parts. *Dena Corp. v. Belvedere Int'l, Inc.*, 950 F.2d 1555, 1561, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) (finding EUROPEAN FORMULA and design for cosmetic products not unitary since the “elements are not so merged together that they cannot be regarded as separate” and the proximity of the words to the design feature “does not endow the whole with a single, integrated, and distinct commercial impression.”).

Second, with the exception of these initial words, Applicant’s and Registrant’s marks are the same and they engender the same commercial impression (i.e., above the action). Consumers do not focus on minutia but rather overall impressions. *See, e.g., In re John Scarne Games, Inc.*, 120 USPQ 315, 315-16 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”).

Finally, even when the wording is slightly different, if the marks convey the same idea, meaning or commercial impression, they are confusingly similar. *See, e.g., Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on cleaning products); *In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (holding CITY WOMAN for ladies’ blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods). Such is the case here where consumers are likely to recognize both phrases as referring to goods that facilitate hunting from an elevated

vantage point.⁵ As a result, both Applicant's mark and the cited mark share the same connotation and commercial impression.⁶

Given the similarities between the marks and identity of the goods, consumers familiar with the mark HUNT FROM ABOVE are likely to perceive Applicant's mark DEATH FROM ABOVE as a variant mark denoting a product line extension into a specific type of hunting stand. *See, e.g., Double Coin Holdings, Ltd. v. Tru Dev.*, 2019 USPQ2d 3373409 at *7 (TTAB 2019) ("Here, ROAD WARRIOR [for tires] looks, sounds, and conveys the impression of being a line extension of WARRIOR."); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN "more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices"); *Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.").

In sum, we acknowledge the fundamental rule that the marks must be considered in their entireties, *see Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir.

⁵ *See* July 20, 2022 Final Office Action at TSDR 74 (entry for "tree stand" from WIKIPEDIA describing "tree stands" as "used by hunters" in order to "elevate the hunter and give them a better vantage point.")

⁶ *See* December 17, 2021 Office Action at TSDR 9-28 (entries from the online version of THE MERRIAM-WEBSTER DICTIONARY for "death," "from above" and "hunting" and entry for "hunting" from the online version of the encyclopedia BRITANNICA, all accessed on December 17, 2021.

2015), and the differences in sound and appearance. These differences, however, are outweighed by the similarities of the marks in sound, appearance, connotation and commercial impression. The primary connotation and commercial impression of both Applicant's and Registrant's standard character marks DEATH FROM ABOVE and HUNT FROM ABOVE calls to mind hunting from an elevated position to enhance visibility and sight lines from multiple angles. Consumers "may have but dim recollections from having previously seen or heard one or the other of the involved marks." *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969). Thus, when comparing the marks overall, they are similar, if not identical, in connotation and commercial impression. This *DuPont factor* weighs in favor of finding a likelihood of confusion.

II. Conclusion — Summary of the *DuPont* Factors

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. *See In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023).

Where the goods are in-part identical, as is the case here, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *See Cai*, 127 USPQ2d at 1801. Here, the marks project the same connotation and commercial impression. This factor, coupled with the identical nature of the goods presumably marketed in overlapping trade channels to the same classes of consumers, lead us to the conclusion that prospective consumers are likely to confuse the involved goods as originating from or associated with or sponsored by the same

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entity.

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