

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 29, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Kiss My Face, LLC

v.

PYR Less Group, LLC

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Opposition No. 91209825

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Carrie A. Johnson of Fraser Clemens Martin & Miller LLC for Kiss My Face, LLC.

Christian D. Stewart of Burdett Morgan Williamson & Boykin LLP for PYR Less Group, LLC.

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Before Zervas, Shaw and Hightower, Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

PYR Less Group, LLC (“Applicant”) has filed an application to register the mark TOUCH MY FACE, in standard character format, for “facial masks; non-medicated serums for use on skin” in International Class 3.¹ Kiss My Face, LLC (“Opposer”) opposed registration, alleging a likelihood of confusion in view of Opposer’s registrations and prior use of the mark KISS MY FACE, and variations thereof, for

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¹ Application Serial No. 85663155, filed June 27, 2012, based on Section 1(a) of the Trademark Act, with a claim of first use anywhere and use in commerce since at least as early as August 12, 2002.

body care products. Applicant denied the salient allegations of the notice of opposition.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the opposed application. In addition, the parties introduced the following items into evidence, either by stipulation or by notice of reliance:

A. Opposer's Evidence

1. Dictionary definitions for the words "kiss" and "touch" from www.merriam-webster.com.²
2. Copies of documents produced by Opposer during discovery comprising advertising material, sales and marketing materials, and Facebook pages displaying a variety of Opposer's KISS MY FACE facial care products as well as other personal care products.³
3. Printouts from the Trademark Status & Document Retrieval system ("TSDR") for Opposer's U.S. Registrations.⁴
4. Excerpts of the transcripts of the discovery deposition of Applicant, via its owner, Dr. Roby Mitchell and Applicant's employee, Ms. Jodi Bytheway.⁵
5. Copies of Applicant's Responses to Interrogatories, Document Requests, and Requests for Admission.⁶
6. Copies of documents produced by Opposer during discovery in this proceeding showing Opposer's enforcement efforts.⁷

² 19 TTABVUE 4-14.

³ *Id.* at 15-91.

⁴ *Id.* at 92-238.

⁵ *Id.* at 239-261.

⁶ *Id.* at 262-284.

⁷ *Id.* at 285-325; 20 TTABVUE 2-58.

7. Copies of documents produced by Applicant during discovery showing the price of Applicant's TOUCH MY FACE products and sales of these products from 2008 to 2013.⁸
8. Testimony deposition of Opposer's Chief Marketing Officer, Ms. Jean Fufidio with accompanying Exhibits.⁹

B. Applicant's Evidence

1. Dictionary definitions for the words "kiss" and "touch" from www.merriam-webster.com.¹⁰
2. Excerpts of the transcripts of the Fed. R. Civ. P. 30(b)(6) discovery depositions of Applicant, via its owner, Dr. Roby Mitchell and Applicant's employee, Ms. Jodi Bytheway.¹¹
3. Copies of documents produced by Applicant during discovery showing Applicant's TOUCH MY FACE products.¹²
4. Copies of documents produced by Applicant during discovery showing Applicant's Facebook page, website and marketing materials.¹³
5. Copies of the Applicant's and Opposer's Responses to Interrogatories, Document Requests, and Requests for Admission.¹⁴
6. Printouts from TSDR of Opposer's U.S. Registrations.¹⁵
7. A printout from TSDR of the specimen submitted with Opposer's trademark application for U.S. Registration No. 4636349, ONE KISS IS ALL IT TAKES.¹⁶

⁸ 20 TTABVUE 59-65; 21 TTABVUE.

⁹ 23 TTABVUE and 24 TTABVUE.

¹⁰ 25 TTABVUE 8-17.

¹¹ *Id.* at 18-54.

¹² *Id.* at 55-61.

¹³ *Id.* at 62-72.

¹⁴ *Id.* at 73-118.

¹⁵ *Id.* at 119-257.

¹⁶ *Id.* at 258-259.

8. A printout from TSDR of a number of third-party U.S. Registrations for marks comprising the term “kiss,” “face,” or “touch.”¹⁷
9. Screen shots of search results from the Trademark Electronic Search System (“TESS”) for the terms “kiss,” “face,” or “touch,” in International Class 3.¹⁸
10. Copies of documents produced by Opposer during discovery comprising advertising material, sales and marketing materials, and Facebook pages displaying a variety of Opposer’s KISS MY FACE products.¹⁹
11. A screen shot of Opposer’s Facebook page promoting Opposer’s “Kiss Across America” contest and describing the contest.²⁰
12. Copies of confidential documents produced by Opposer during discovery showing Opposer’s enforcement efforts regarding third-party marks.²¹

II. Evidentiary Objections

Opposer moves to strike Applicant’s exhibits 13, 14, and 15 (which are referenced in item no. 9 above) consisting of screen shots of search results from TESS for the terms “kiss,” “face,” or “touch,” in International Class 3. The TESS search results were not subject to the Stipulation of the Parties.²² The exhibits list both live and dead registrations and applications but provide no information regarding goods or services, register, basis, or other relevant information. Opposer argues that filing a printout of TESS search results “is not sufficient to make third

¹⁷ *Id.* at 260-352.

¹⁸ *Id.* at 353-422.

¹⁹ *Id.* at 423-431; 26 TTABVUE 1-26.

²⁰ 26 TTABVUE 27-30.

²¹ 19 TTABVUE 285-325; 20 TTABVUE 2-58.

²² 18 TTABVUE.

party registrations listed therein of record in an inter parties proceeding.”²³ Applicant, in its brief, did not respond to Opposer’s objection.

We decline to strike the lists inasmuch as they are properly of record under a notice of reliance as official records. TBMP § 704.07 (2015). However, “a party may not make a third-party registration of record simply by introducing a list of third-party registrations that includes it . . . or by referring to the registration in its brief or pleading.” TBMP § 704.03(b)(1)(B); *Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 14894 (TTAB 2007) (“Submitting lists of third-party registrations . . . is not an acceptable way to make such registrations . . . of record.”). Moreover, a mere list of marks, including both live and dead registrations and applications with no other registration information, is of no probative value. *See Nat’l Fidelity Life Ins. v. Nat’l Ins. Trust*, 199 USPQ 691, 694 n.5 (TTAB 1978) (list of registrations without goods and services and other relevant information “has no probative value.”). Thus, we deny Opposer’s motion to strike, but we nevertheless have given the exhibits no consideration.

III. Opposer’s Standing and Priority

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Opposer’s standing to oppose registration of Applicant’s mark is established by its pleaded registrations, which the record shows to be valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222

²³ Opposer’s Br. at 7.

F.3d 943, 55 USPQ2d 1842, 1848, 1844 (Fed. Cir. 2000). In addition, because Opposer’s pleaded registrations are of record, priority is not an issue with respect to the goods and services covered by Opposer’s pleaded registrations. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services, the first two *du Pont* factors. *See 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.”).

Opposer made of record the following eleven registrations for KISS MY FACE formative marks:

	Reg. No.	Date Issued	Mark	Goods and Services
1	1513297	11/22/1988	KISS MY FACE	Personal care products--namely, shampoos, soaps, creme rinses, skin toners and skin lotions (Class 3)
2	1991868	08/06/1996	KISS MY FACE	Retail shops featuring clothing, and personal care products, namely shampoos, soaps, creme rinses, powders, skin toners and skin lotions (Class 42)

3	2301324	12/21/1999	KISS MY FACE	Non-medicated lip balms, cosmetics, namely, lipsticks, foundations, conditioners, bath and body gels, facial creams, hand lotions, deodorants, soaps, shaving creams, skin lotions, skin toners and facial and body lotions (Class 3)
4	2706187	04/15/2003	KISS MY FACE	Clothing, namely, t-shirts (Class 25)
5	3120784	07/25/2006	KISS MY FACE WHITENING	Personal Care Products, Namely, Toothpastes (Class 3)
6	3590613	03/17/2009	KISS MY FACE MOISTURE SOAP	Personal care products, namely, soaps (Class 3)
7	4200053	08/28/2012	KISS MY FACE SHIMMER	Non-medicated tinted lip balms (Class 3)
8	4229593	10/23/2012	KISS MY FACE	Personal care products, namely, all purpose liquid, hand, bar and cosmetic soaps, non-medicated alpha-hydroxy acid lotions, bar soaps, bath and shower gels, body lotions, body creams, body balms, body wash, cosmetics, deodorants for personal use, exfoliating cleansers, facial cleansers, facial lotions, facial creams, and facial gels, facial masks, foaming soaps, non-medicated foot creams and foot scrubs, shampoos, hair conditioners, hair detanglers, hair styling gels, hand lotions and hand creams, liquid soaps, moisturizing shower gel, mouthwash, non-medicated lip balms, shaving creams, skin toners, non-medicated sun care products, and toothpaste and toothpaste gel (Class 3)
9	4268625	01/01/2013		All purpose soaps, bar soaps, bath and shower gels, body lotions, body washes, cosmetics, foaming soaps, hand lotions, body creams and body balms, liquid soaps, non-medicated lip balms, personal care products, namely, facial creams, foot creams, hand creams, deodorants for personal use, hair conditioners, hair detanglers, hair styling gels, mouthwashes, breath fresheners, shampoos, shaving creams, toothpastes, non-medicated sun care preparations and non-medicated sunscreen preparations (Class 3)

10	4450641	12/17/2013		<p>Personal care products, namely, all purpose soaps, moisturizing soaps, alpha-hydroxy acid face and body lotions, bar soaps, bath and shower gels, body lotions, body creams, body balms, body wash, cosmetics, tinted lip gloss, lip tint, tinted moisturizers, deodorants for personal use, exfoliating cleansers, facial cleansers, facial lotions, facial creams, facial gels, facial masks, foaming soaps, non-medicated foot creams, foot scrubs, shampoos, hair conditioners, hair detanglers, hair styling gels, hand lotions, hand creams, liquid soaps, moisturizing shower gel, mouthwash, non-medicated lip balms, shaving creams, moisturizing shaving creams, skin toners, non-medicated sun care preparations, sun tanning preparations, toothpaste, and toothpaste gels (Class 3)</p>
11	4450642	12/17/2013		<p>Personal care products, namely, all purpose soaps, moisturizing soaps, alpha-hydroxy acid face and body lotions, bar soaps, bath and shower gels, body lotions, body creams, body balms, body wash, cosmetics, tinted lip gloss, lip tint, tinted moisturizers, deodorants for personal use, exfoliating cleansers, facial cleansers, facial lotions, facial creams, facial gels, facial masks, foaming soaps, non-medicated foot creams, foot scrubs, shampoos, hair conditioners, hair detanglers, hair styling gels, hand lotions, hand creams, liquid soaps, moisturizing shower gel, mouthwash, non-medicated lip balms, shaving creams, moisturizing shaving creams, skin toners, non-medicated sun care preparations, sun tanning preparations, toothpaste, and toothpaste gels (Class 3)</p>

We focus our analysis on Registration No. 4229593 for the mark KISS MY FACE in standard characters for a variety of personal care products, including facial masks, because the mark and the goods in this registration are the closest to Applicant's mark and goods. If we do not find a likelihood of confusion with this

registered mark and its associated goods, then there would be no likelihood of confusion with the marks in the other pleaded registrations. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Fame of the KISS MY FACE mark

We begin with the *du Pont* factor that requires us to consider the fame of Opposer's mark. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

We also note that fame is not an all-or-nothing proposition. "Fame for purposes of likelihood of confusion is a matter of degree that 'varies along a spectrum from very strong to very weak.'" *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012) (quoting *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1375 (Fed. Cir. 2005)).

Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods and services identified by the marks at issue, "the length of time those indicia of commercial awareness have been evident," widespread critical assessments, and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and

services. *Bose*, 63 USPQ2d at 1305-1306 and 1309. Although raw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, raw numbers alone may be misleading. Some context in which to place raw statistics may be necessary (e.g., the substantiality of the sales or advertising figures for comparable types of products or services). *Bose*, 63 USPQ2d at 1309.

Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer introduced the evidence below to demonstrate the fame of its marks. Much of Opposer's evidence regarding its income, advertising and sales was designated as confidential and filed under seal and, therefore, we refer to such evidence only in general terms.

1. Opposer has used its KISS MY FACE mark in commerce for personal care products since at least as early as 1981.²⁴ Opposer owns eleven U.S. registrations for KISS MY FACE marks dating back to 1988.²⁵

2. For at least the past five years Opposer's gross sales of KISS MY FACE personal care products in the U.S. have been substantial, and they have been growing steadily each year.²⁶

²⁴ Fufidio Dep., 23 TTABVUE 7.

²⁵ 19 TTABVUE 92-238.

²⁶ Fufidio Dep., 23 TTABVUE 12-14; 24 TTABVUE 2-3.

3. Opposer's KISS MY FACE products are sold nationally in well-known retail outlets, including Whole Foods, Kroger, Walgreen's, and Target.²⁷

4. Opposer's advertising budget for its KISS MY FACE marks is significant and encompasses a variety of advertising media, such as print and electronic media, including social media.²⁸

5. Opposer's KISS MY FACE goods have received favorable critical assessments from a number of national magazines, including, Vogue, Women's Health, Redbook, The Oprah Magazine, and Prevention.²⁹

6. Opposer maintains an Internet web site located at www.kissmyface.com which offers its goods for sale and which features extensive information about Opposer's KISS MY FACE products. Opposer's goods also are sold online at Amazon.com and Drugstore.com.³⁰

7. Opposer maintains a Facebook page, which prominently features the KISS MY FACE products and has nearly 100,000 followers. Opposer also maintains a mailing list of approximately 95,000 email subscribers, who receive email and letters from Opposer several times a month about KISS MY FACE products.³¹

8. In a brand-awareness survey of female consumers in the natural health and beauty aids category, approximately fifty-seven percent of participants indicated an awareness of KISS MY FACE products. Opposer's products compared favorably in

²⁷ *Id.* at 24 TTABVUE 9.

²⁸ *Id.* at 23 TTABVUE 20-22.

²⁹ *Id.*, 23 TTABVUE 22-28.

³⁰ 19 TTABVUE 25-79; Fufidio Dep., 23 TTABVUE 11.

³¹ Fufidio Dep., 23 TTABVUE 28.

brand recognition to other “natural” brands such as BURT’S BEES, AVEENO, and TOM’S OF MAINE.³² Applicant has not objected to the survey, and we find it to be credible.

Based on the foregoing evidence, we find that KISS MY FACE is a strong mark. Accordingly, the strength of the KISS MY FACE mark for personal care products “casts a long shadow which competitors must avoid.” See *Kenner Parker Toys*, 22 USPQ2d at 1456-57 (“A strong mark . . . casts a long shadow which competitors must avoid.”). This *du Pont* factor favors a finding of likelihood of confusion.

B. Similarity of the goods, channels of trade, and classes of purchasers

We turn next to the *du Pont* factors involving the relatedness of the goods, channels of trade, and classes of purchasers. We base our evaluation on the goods as they are identified in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Both Applicant’s and Opposer’s identifications of goods include “facial masks.” The goods therefore are in part identical, and Applicant does not dispute this. In analyzing the similarity of the goods, it is sufficient for a refusal based on likelihood of confusion that relatedness is established for any single item encompassed by the description of goods in the application. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

³² 24 TTABVUE 13.

Applicant does not dispute the attendant presumption that the channels of trade and classes of purchasers are the same. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (absent restrictions in an application and/or registration, identical goods are “presumed to travel in the same channels of trade to the same class of purchasers”) (quoting *Hewlett-Packard*, 62 USPQ2d at 1001); *see also Stone Lion*, 110 USPQ2d at 1161; *In re Linkvest*, 24 USPQ2d 1716, 1716 (TTAB 1992).

The *du Pont* factors relating to similarity and nature of the goods and similarity of established, likely to continue channels of trade favor a finding of likelihood of confusion.

C. Conditions under which and to whom sales are made, i.e. “impulse” vs. careful, considered purchases

Next we consider the degree of care under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration. Purchaser sophistication or a high degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items or a low degree of care may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

Opposer argues that the parties’ goods are relatively low-priced and subject to impulse buying by “general consumers who, with little care or prior knowledge might purchase such products.”³³ Applicant argues that the conditions of sales of the parties’ goods disfavors a likelihood of confusion because its goods are “marketed as high-end natural beauty products to sophisticated consumers

³³ Opposer’s Br., p. 35.

concerned with their personal beauty products and such consumers carefully consider and research natural beauty products.”³⁴

The record shows that the Applicant’s TOUCH MY FACE products sell for between \$21.75 and \$43.45, with the facial mask selling for \$40.00 for a two ounce container.³⁵ Opposer’s goods generally sell for between \$5.99 and \$21.99 with its facial mask selling for approximately \$15.00, also for a two ounce container.³⁶ Although most of Applicant’s products cost more than Opposer’s we do not find the difference to be particularly significant, especially as the respective identifications of goods are not restricted as to price.

Applicant’s contention that purchasers of Opposer’s products are “sophisticated consumers” is not supported by any evidence.³⁷ Both Applicant’s and Opposer’s goods are sold online, in pharmacies, and in health food or “natural stores” to what must be presumed are ordinary consumers.³⁸ *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1441 (TTAB 2012) (Cosmetics and personal care products tend to be relatively inexpensive and may be subject to impulse purchase.). Given the relatively low cost and the nature of the goods, the parties’ facial masks may be subject to impulse purchase and frequent replacement. *See Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1640-41 (TTAB 2007). “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers

³⁴ Applicant’s Br., pp. 35-36.

³⁵ 25 TTABVUE 62-72.

³⁶ 23 TTABVUE 30; 19 TTABVUE 25.

³⁷ Applicant’s Br., p. 35.

³⁸ *Bytheway Dep.*, 25 TTABVUE 45-46; *Fufidio Dep.*, 23 TTABVUE 10-11.

of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 54 USPQ2d at 1899.

The factors relating to conditions of sale weigh in Opposer’s favor.

D. Number and nature of similar marks in use on similar goods

This du Pont factor focuses on the usage by third-parties of similar marks in connection with related goods or services in the marketplace. Such evidence demonstrates that customers have become conditioned by a plethora of similar marks to distinguish between different marks on the basis of minute distinctions. *Palm Bay*, 73 USPQ2d at 1694.

Applicant made of record a number of third-party marks for cosmetics or facial care products containing the terms “kiss,” “touch,” or “face” including, *inter alia*:³⁹

KISS	KISS-A-LICIOUS
LOVE & KISSES	KISS ME IN THE GARDEN
KISS ME	KISS IN THE CITY
SHINY KISS	NATURAL KISS
BEST KISS	SECRET KISSES
KISS OF HOPE	ISLAND KISS
HEALTHY KISS	TROPICAL KISS
KISS & TELL	KISS-A-PEEL
KISS THE EARTH NATURALS	KISS THE EARTH MINERALS
KISS NEW YORK and Design	DR. KISS
KISS OF FIRE	THE KISS
TREASURED KISS	LOVE MY FACE
MYFACE	MYFACE.COSMETICS
TOUCH MY SKIN FOR EXTERNAL USE ONLY and Design	

Applicant argues that “existence of numerous third-party registrations and third-party marks incorporating the word KISS used in relation to personal

³⁹ 25 TTABVUE 260-352.

cosmetic goods shows that Opposer's KISS MY FACE marks are weak, or at least that Opposer's KISS MY FACE marks are neither particularly strong nor entitled to broad protection."⁴⁰ We find that this evidence is unpersuasive.

As an initial matter, it is well settled that third-party registrations alone are of limited probative value for demonstrating weakness of a mark because they are not evidence that the registered marks are in use. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1200 (TTAB 2007). Where the record includes no evidence about the extent of third-party uses, the probative value of such evidence is minimal. *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001).

Notwithstanding the lack of evidence of use, we do not find these third-party registrations to be especially relevant. The third-party registrations that include the term "KISS" create commercial impression that are quite different and distinguishable from Opposer's KISS MY FACE mark. Accordingly, the third-party "KISS" marks do not show that the mark KISS MY FACE as a whole is weak for personal care products. The three registrations for marks including the term "my face" are more on point but we cannot conclude that three such marks establishes a crowded field of "my face"-formative marks for similar personal care products. Nor do we find any of the third-party marks to be as similar to the pleaded mark KISS MY FACE as is Applicant's TOUCH MY FACE.

⁴⁰ Applicant's Br., p. 32.

In view of the foregoing, Applicant has not demonstrated that there are similar marks in use on similar goods.

E. Nature and extent of any actual confusion and length of time and conditions under which there has been concurrent use without evidence of actual confusion

A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *See J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the *likelihood* of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Given Applicant's relatively modest sales of its TOUCH MY FACE products in only Texas and California prior to selling the goods online in 2011,⁴¹ we cannot find that the absence of evidence of actual confusion supports Applicant's argument that confusion is not likely.

F. Similarity of the marks in their entirety as to appearance, sound, connotation and commercial impression

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In

⁴¹ 21 TTABVUE; 25 TTABVUE 45-46.

comparing the marks, we are mindful that where, as here, the 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. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Further, “[t]he 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.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980).

In terms of sound, TOUCH MY FACE and KISS MY FACE are similarly constructed, with the same number of words, syllables and cadence, and both end with the identical words “MY FACE.”

In terms of connotation or meaning, the first word of each mark comprises a verb, “TOUCH” or “KISS,” which suggests a command or instruction to kiss or touch someone’s face. According to a definition of record, the word “kiss” is defined as a type of touching:

Definition of KISS⁴²

transitive verb

1 : to touch with the lips especially as a mark of affection or greeting <*kissed* his wife good-bye>

⁴² Merriam-webster.com, 25 TTABVUE 9.

2 : to touch gently or lightly <wind gently *kissing* the trees>

This similarity in meaning between “touch” and “kiss” results in marks with similar connotations.

Applicant argues that the marks are dissimilar because the “dominant, distinct elements TOUCH and KISS differ in appearance, sound, connotation and commercial impressions in the eyes of consumers” and because the term MY FACE is a “weak, descriptive element.”⁴³ We disagree.

The issue is not whether “touch” and “kiss” are different words; the issue is whether TOUCH MY FACE and KISS MY FACE, are similar when considered in their entirety. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Clearly, “touch” and “kiss” are different words, but they are synonyms. When they are combined with MY FACE they create similar connotations and commercial impressions, i.e, physical contact with the face. Regarding the strength of MY FACE, we do not find this phrase to be as weak as Applicant argues. The term “face” may be weak for facial care products, but, as discussed above, we find that MY FACE, when combined with “touch” or “face,” creates a unitary suggestion or command to the consumer to kiss or otherwise touch someone’s face.

Accordingly, the overall similarity of the marks in sound, connotation and commercial impression is such that there is reasonable likelihood of purchasers attributing identical products sold thereunder to a single source. This *du Pont* factor favors a finding of a likelihood of confusion.

⁴³ Applicant’s Br., p. 22, 26.

G. Balancing the factors

Taking into account the strength of Opposer's mark, that the goods are in part identical and presumed to move in the same channels of trade and be sold to the same classes of consumers, and because the marks are similar, we find that Applicant's mark for "facial masks" and "non-medicated serums for use on skin" is likely to cause confusion with Opposer's mark for a variety of goods including "facial masks."

Decision: The opposition is sustained and registration to Applicant is refused.