

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Hi-Tech Pharmaceuticals, Inc.
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Serial No. 97092374
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Jessica H. Leach, of The Law Office of Arthur W. Leach,
for Hi-Tech Pharmaceuticals, Inc.

Leslee Friedman, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Rogers, Chief Administrative Trademark Judge, and
Coggins and English, Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Hi-Tech Pharmaceuticals, Inc. (“Applicant”) seeks registration on the Principal Register of the standard-character mark EQUIPOISE for “dietary supplements,” in International Class 5.¹

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

¹ Application Serial No. 97092374 was filed October 26, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

to the goods identified in the application, so resembles the standard-character mark **AQUIPOISE** for “health food supplements; vitamins; dietary and nutritional supplements; vitamin and mineral supplements,” in International Class 5,² 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). Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*,” setting forth factors to be considered and referred to as “*DuPont* factors”), *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, 1204 (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, 2024 USPQ2d 293, at *2 (Fed. Cir. 2024) (quoting *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513, at *17 (Fed. Cir. 2022)).

² Registration No. 6958056, issued January 17, 2023.

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 In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023). While we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (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, 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)). These two factors, and one other, are discussed below.

A. Relatedness of the Goods; Channels of Trade 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*, 177 USPQ at 567; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018). Apparently conceding these issues, Applicant did not address these *DuPont* factors in its brief so we offer only a short explanation of our analysis. *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

Applicant’s goods are “dietary supplements.” Opposer’s goods include “dietary . . . supplements.” We accordingly find the parties’ goods are in-part identical. This is sufficient to support a finding of likelihood of confusion, as relatedness need only be

established between Applicant's dietary supplements and any item in Registrant's identification of goods. *See, e.g., In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (collecting cases).

We must presume that the identical goods are sold or will be offered for sale in the same channels of trade to the same consumers. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (presumption that identical goods move in the same channels of trade and are available to the same classes of customers for such goods); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board entitled to rely on this legal presumption). We accordingly find the channels of trade and the classes of consumers are in part the same.

In view of the in-part identity of the goods, trade channels, and consumers, the second and third *DuPont* factors weigh heavily in favor of a likelihood of confusion. *See, e.g., Aquamar*, 115 USPQ2d at 1126.

B. Similarity or Dissimilarity of the Marks

The first *DuPont* factor considers the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *see also Detroit Athletic*, 128 USPQ2d at 1048. 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) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019)).

The marks must be considered in light of the fallibility of memory and not on the basis of a side-by-side comparison. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (cleaned up). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018). Here, the average purchasers are members of the general public seeking dietary supplements. Because the goods are identical in part, “the degree of similarity between the marks necessary to support a determination that confusion is likely declines.” *Id.*; *see also Aquamar*, 115 USPQ2d at 1126.

Applicant contends that Applicant’s mark EQUIPOISE and Registrant’s mark AQUIPOISE have “markedly different” appearances and do “not sound similar” – even though they differ only by the first letter.³ However, the marks are highly similar in sound and appearance to the extent that each begins with a single vowel followed by the identical letter pattern Q-U-I-P-O-I-S-E. Additionally, because both marks are in standard characters, we must assume they could be displayed in the same or similar font style, size, or color, thus further increasing the similarity in appearance. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a); *see also Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).

³ 6 TTABVUE 8. 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. *See, e.g., In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *1 n.1 (TTAB 2023).

Applicant argues that we must consider the pronunciation of the vowels “E” and “A,” and contends that the difference in these vowel sounds, as shown by comparison of the words “bed” and “bad,” are divergent and that the EQUIPOISE and AQUIPOISE marks at issue likewise lack aural similarity.⁴ However, as to phonetic similarity, there is no indication that AQUIPOISE is a known word, and “there is no correct pronunciation of a trademark that is not a recognized word.” *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014) (citation omitted). Therefore, AQUIPOISE may be pronounced in any manner, with its opening vowel quite similar to that in EQUIPOISE. Moreover, we find that because EQUIPOISE is a recognized word, and the marks share the same [E/A]-Q-U-I-P-O-I-S-E structure, it is highly likely that consumers will pronounce AQUIPOISE similarly to EQUIPOISE. Even if the marks differ in their opening vowel sounds as posited by Applicant, there is only a slight difference in sound. In addition, the dictionary entry of record for EQUIPOISE reveals that the opening vowel in that word may itself have different pronunciations,⁵ and “no trademark owner can guarantee that the public will pronounce its mark perfectly.” *In re Energy Telecomms. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983). To the extent one mark

⁴ 6 TTABVUE 8.

⁵ *See* October 12, 2023 Response to Office Action at 22 (definition and pronunciation of “equipoise” from merriam-webster.com). *See also* MERRIAM-WEBSTER DICTIONARY, *Guide to Pronunciation* (merriam-webster.com/assets/mw/static/pdf/help/guide-to-pronunciation.pdf) (accessed October 1, 2024). The Board may take judicial notice of information from dictionaries. *Sterling Computs. Corp. v. Int’l Bus. Machs. Corp.*, 2023 USPQ2d 1050, at *6 n.20 (TTAB 2023) (citing *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”)).

may be pronounced with one initial vowel sound, while the other mark may be pronounced with a different opening vowel sound, such slight differences in marks normally do not create dissimilar marks. *See e.g., Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1741 (TTAB 2014) (AKEA is similar to IKEA); *Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (“Obviously, the marks LEGO and MEGO are extremely similar in that they differ simply by one letter.”); *Energy Telecomms.*, 222 USPQ at 351 (ENTELEC and INTELECT are similar, and “[s]light differences in the sound of similar marks do not avoid a likelihood of confusion.”); *U.S. Mineral Prods. Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) (AFCO and CAFCO differ only as to the letter ‘C’ and are “substantially similar in appearance and sound”). Consumers do not focus on minutia but rather overall impressions. *Cf. In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers . . . do not engage in trademark syllable counting--they are governed by general impressions made by appearance or sound, or both.”). We find the marks are highly similar in sound and appearance.

As to connotation and commercial impression, Applicant contends that the different prefixes EQUI- and AQUI- at the beginning of the marks have distinguishable meanings and create overall different commercial impressions when combined with POISE.⁶ In support of its argument, Applicant points to the dictionary definitions of record showing EQUI- means “equal” or “equally,” and AQUI- means

⁶ 6 TTABVUE 8-11.

“water.”⁷ Applicant also points to the definition of POISE, which, as Applicant acknowledges “is associated with ‘balance’.”⁸ Applicant argues that “[p]ut together, the registered mark ‘AQUIPOISE’ may suggest . . . a balance specifically related to water . . . [while] Applicant’s EQUIPOISE mark, by contrast, has no such connotation and/or relation to water.”⁹

The record reveals that the word EQUIPOISE means “a state of equilibrium” and “counterbalance.”¹⁰ It also reveals that one definition of POISE is “a stably balanced state : EQUILIBRIUM.”¹¹ In the context of dietary supplements, both EQUIPOISE and AQUIPOISE have similar connotations and commercial impressions involving equilibrium. By Applicant’s argument, the connotation of Registrant’s mark is a balance of water. Applicant’s unrestricted meaning of “equilibrium” is broad enough to encompass all equilibria, including one related to water.

Here, when comparing the marks overall, and in the context of the identical goods, we find EQUIPOISE and AQUIPOISE have a similar connotation and engender similar commercial impressions related to equilibrium. We remind Applicant that we must consider the marks in light of the fallibility of human memory and based on the recollection of the average purchaser, who normally retains a general impression of

⁷ October 12, 2023 Response to Office Action at 12 (equi-), 17 (aqui-) (merriam-webster.com).

⁸ 6 TTABVUE 11.

⁹ 6 TTABVUE 11.

¹⁰ October 12, 2023 Response to Office Action at 22 (definition of “equipoise” from merriam-webster.com).

¹¹ October 12, 2023 Response to Office Action at 29 (definition of “poise” from merriam-webster.com).

trademarks. *See St. Helena Hosp.*, 113 USPQ2d at 1085; *i.am.symbolic, llc*, 127 USPQ2d at 1630; *see also Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1977) (many consumers “may have but dim recollections from having previously seen or heard one of the other of the involved marks”).

Because the marks, which vary by a single letter, are highly similar in sound and appearance, have similar connotations, and engender similar commercial impressions, the first *DuPont* factor weighs in favor of a likelihood of confusion.

C. Summary, Balancing the *DuPont* Factors

We have carefully considered all of the evidence of record, and the arguments related thereto. *See Charger Ventures*, 2023 USPQ2d 451, at *7. The goods are in-part identical, which weighs heavily in favor of a likelihood of confusion and reduces the degree of similarity between the marks required for confusion to be likely. *Viterra*, 101 USPQ2d at 1912 (when goods at issue are identical, degree of similarity necessary to support a conclusion of likely confusion declines) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)). Because we must presume the trade channels and consumers are the same, this also weighs heavily in favor of a likelihood of confusion. The marks are highly similar in appearance and sound, and similar in connotation and commercial impression. This also weighs in favor of a likelihood of confusion. Weighing all of the relevant factors, we find confusion is likely.

II. Decision

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