

This Opinion is not a
Precedent of the TTAB

Mailed: February 20, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Wella Operations US, LLC

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Serial No. 97401927

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Victoria Friedman and Shawn Duckworth of Dennemeyer & Associates LLC,
for Wella Operations US, LLC.

Elina Rojas, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

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Before Zervas, Greenbaum and Coggins,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Wella Operations US, LLC (“Applicant”) applied to register the standard-character mark TRI-FLEX TECHNOLOGY on the Principal Register for “nail care preparations, nail strengtheners, non-medicated nail treatment preparations for

cosmetic purposes, nail polish, nail color gels, nail lacquers, none of the foregoing containing collagen” in International Class 3.¹

The Examining Attorney issued a final refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), finding Applicant’s mark is likely to cause



confusion with the composite mark for “dietary supplements for humans containing Types I, II, and III Collagen” in International Class 5.²

After the Examining Attorney issued the final refusal, Applicant appealed to the Board. Applicant and the Examining Attorney then filed briefs. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357,

¹ Application Serial No. 97401927 was filed on May 9, 2022, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging Applicant’s bona fide intent to use the mark in commerce. Applicant has disclaimed the term TECHNOLOGY.

References to the briefs on appeal refer to the Board’s TTABVUE docket system. Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents in the USPTO TSDR Case Viewer. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

² Registration No. 6035483, registered on April 14, 2020. The mark is described as consisting of the words “Collagen Tri-Flex’ in stylized font. A stylized star burst appears above the word ‘Collagen’. ‘Tri-Flex’ has a hyphen between ‘Tri’ and ‘Flex’ and appears on the line beneath ‘Collagen’.” Color is not claimed as a feature of the mark.

177 USPQ 563 (CCPA 1973) (“*DuPont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We consider each *DuPont* factor that is relevant or for which there is argument and evidence of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Not all of the [*DuPont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

A. Similarity of Marks

The *DuPont* factor regarding the similarity or dissimilarity of the marks requires a determination of the marks in terms of appearance, sound, connotation, and overall commercial impression. *Palm Bay Imps.*, 73 USPQ2d at 1691. The test under this *DuPont* factor is not whether the marks can be distinguished when subjected to a

side-by-side comparison,³ but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721.

The respective 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) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). Therefore, the focus is on the recollection of the average purchaser, here, a member of the general purchasing public who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, 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 part of the marks. *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

³ Applicant in its brief displays the marks side-by-side and states, “[a] consumer viewing the marks for the first time would not simply see ‘TRI-FLEX’ in isolation, but will immediately notice the many differences between the marks as a whole” (4 TTABVUE 18). A side-by-side comparison is not the proper way to evaluate two marks.

determining likelihood of confusion.”). Further, “[n]o 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.*, 929 F.2d 645, 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. *Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

With the foregoing in mind, we examine Applicant’s and Registrant’s marks, beginning with Applicant’s mark.

Applicant’s mark is a combination of the term TRI-FLEX and TECHNOLOGY. As noted above, Applicant disclaimed the term TECHNOLOGY. “Technology” is defined as “the practical application of knowledge especially in a particular area.”⁴ The term merely describes a characteristic of Applicant’s goods. Disclaimed matter and wording that is descriptive of or generic for a party’s goods is typically less significant or less dominant when comparing marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *41 (TTAB 2022). The primary source indicator – and hence the dominant element – in Applicant’s mark is the term TRI-FLEX.

⁴ June 17, 2022 Office Action, TSDR 9.

TRI-FLEX is also the dominant term in Registrant's mark. As noted above, the mark includes a design which Registrant describes as a "stylized star burst." As the Examining Attorney points out, when evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). "The verbal portion of a word and design mark 'likely will appear alone when used in text and will be spoken when requested by consumers.'" *Id.* (quoting *Viterra*, 101 USPQ2d at 1911). Applicant apparently believes this as well, stating "[t]aken as a whole, TRI-FLEX TECHNOLOGY sounds distinctly different from COLLAGEN TRI-FLEX" when discussing the similarities of the marks in terms of sound.⁵

The design's stylization is considerable, so much that it is barely recognizable as a star burst. It is unlikely that the design would be pronounced by consumers in articulating the mark, or even be remembered because of its stylization. Instead, with its three sections of curved, flexible arms, the design reinforces the commercial impression of the term TRI-FLEX. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) ("puzzle design does not convey any distinct or separate impression apart from the word portion of the mark ... it serves only to strengthen the impact of the word portion in creating an association

⁵ 4 TTABVUE 20.

with crossword puzzles”); *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, *34 (TTAB 2023) (blue rectangle in the mark suggests an ice cube and reinforces the term ICE); *In re Swatch Grp. Mgmt. Servs. AG*, 110 USPQ2d 1751, 1762 (TTAB 2014) (“combination of the design [of a tourbillon] with the word TOURBILLON reinforces the singular impression conveyed by the mark as a whole, which is nothing more than the significance of ‘tourbillon’”), *aff’d mem.*, 599 F. App’x 959 (Fed. Cir. 2015).

We disagree with Applicant’s statement that this case is similar to *Ferro Corp. v. Ronco Labs., Inc.*, 356 F.2d 122, 148 USPQ 497, 498-99 (CCPA 1966), *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014), and *Steve’s Ice Cream v. Steve’s Famous Hot Dogs*, 3 USPQ2d 1477, 1478-79 (TTAB 1987), where “the design elements differentiated the design marks from their standard character equivalents.”⁶ In this case, the design in Registrant’s mark is not as unusual and eye-catching as the designs in the cases relied on by Applicant.

Registrant’s mark also includes the term COLLAGEN, and Registrant’s identification of goods indicates that the goods contain collagen. We therefore find that this term is generic in the context of the goods, and that it plays a much lesser role than TRI-FLEX in the mark’s commercial impression. *See In re Detroit Athletic*, 128 USPQ2d at 1050. In so finding, we disagree with Applicant that “[t]he Cited Mark immediately amplifies the word ‘collagen,’” and that “the Examining Attorney has given too much weight to one literal element”⁷

⁶ 4 TTABVUE 19.

⁷ 4 TTABVUE 18.

In view of the foregoing, and because there is no evidence that TRI-FLEX has any meaning or significance when used with Applicant's or Registrant's identified goods, and there is no evidence of third-party use or registration of similar marks on the same or similar goods, we find TRI-FLEX is the most significant and dominant element in both marks, and accord it more weight than the other elements of each mark. We therefore find Applicant's and Registrant's marks are similar in sound, meaning, appearance and commercial impression.

The *DuPont* factor regarding the similarity of the marks favors a finding of likelihood of confusion.

B. Similarity of the Goods, Channels of Trade and Classes of Purchasers

The next *DuPont* factors we consider are “[t]he similarity or dissimilarity and nature of the goods ... as described in an application or registration,” and the similarity or dissimilarity of the trade channels in which, and the classes of purchasers to whom, the parties' respective services are marketed. *DuPont*, 177 USPQ at 567; *see also Stone Lion Cap. Partners v. Lion Cap.*, 110 USPQ2d at 1161-63.

Under the first of these *DuPont* factors, Applicant's and Registrant's 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). “Instead, likelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they

could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., v. Triumph Learning*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).⁸

It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any identified goods within that class in the application or cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). We therefore focus on the broadest item in Applicant’s identification, “nail care preparations” without collagen.

Applicant excluded collagen in its identification of goods and argues as follows:

... Applicant’s Goods do not contain any collagen. This eliminates any opportunity for connection between the Applicant’s nail building product and a dietary supplement that is ingested to help improve or maintain overall health. Collagen has no relevance whatsoever to Applicant’s Goods, which further evidences the degree of dissimilarity between the goods in question.⁹

The problem with Applicant’s argument is that the refusal is not premised on collagen as an ingredient of Applicant’s goods, but that Applicant’s mark for nail care preparations (not containing collagen) is likely to be confused with Registrant’s mark for the identified supplements. In other words, collagen need not be in Applicant’s identified goods for source confusion to exist.

⁸ For this reason, Applicant’s arguments at pp. 4-5 of its brief (4 TTABVUE 10-11) regarding differences in the goods (one is ingested and the other is applied to nails with a brush, and is never ingested) are not relevant. 4 TTABVUE 10-11. The issue is not whether purchasers would confuse the identified goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

⁹ 4 TTABVUE 11-12.

The Examining Attorney argues that the goods have a complementary purpose (i.e., to improve the strength, appearance, and overall health of nails), citing *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290-91 (Fed. Cir. 1984) (bread and cheese related because they are often used in combination and “[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion”); *In re Decombe*, 9 USPQ2d 1812, 1815 (TTAB 1988) (fresh produce is complementary to biscuits, cookies wafers and candy insofar as they are served and eaten together); *In re Hester Indus., Inc.*, 231 USPQ 881, 882-83 (TTAB 1986) (bread and frozen chicken parts are complementary goods, and thus related, because they are appropriate for use together in sandwiches and may otherwise be sold to the same purchasers for use in a single meal); and *In re Vienna Sausage Mfg. Co.*, 230 USPQ 799, 799-80 (TTAB 1986) (sausage and cheese are complementary goods, and thus related, because they may be used together in recipes, sandwiches, and hors d’oeuvres). For support, the Examining Attorney points to the following evidence:¹⁰

- Nutra, stating, “Daily supplementation with collagen peptides may boost the growth of fingernails by 12%, and reduce the frequency of broken nails by 42%.” (June 17, 2022 Office Action, TSDR 85);
- LonoLife, stating, “Collagen peptide powder may be a good supplement to take for your nails because it’s high in the amino acid, arginine. Collagen peptides contain 18 of the 20 amino acids. Arginine. Although there are five amino acids in collagen peptides that have more mg per serving than arginine, it’s this amino acid that shines (no

¹⁰ 6 TTABVUE 6.

pun intended) for nail growth.” (June 17, 2022 Office Action, TSDR 90-96);

- Posh Beauty Blog, stating, “The most numerous collagen type in the body is the collagen type 1, and if you are thinking of preserving the beauty of your skin hair or nails, look for the collagen 1 type. Collagen 1 is prevalent in connective tissues, and a decrease of it can cause sagging skin, fine lines, brittle nails, and thinning hair.” (June 17, 2022 Office Action, TSDR 96-102);

- Byrdie, stating that the best rated nail polish for strengthening and decreasing nail breakage by 35% in one week is ESSIE Treat Love & Color that contains collagen as an active ingredient (June 17, 2022 Office Action, TSDR 130-131); and

- Harper’s Bazaar, observing how nail care products can be infused with a variety of proteins, vitamins, minerals, antioxidants, and other skin care ingredients to improve the appearance and health of nails (June 17, 2022 Office Action, TSDR 146-157).

This evidence demonstrates that collagen is an important contributor to nail strength; that supplements, including collagen supplements, are taken to improve nail strength; that the best rated nail polish for strengthening and decreasing nail breakage contains collagen as an active ingredient; and that many nail strengtheners do not contain collagen, suggesting that collagen is not a critical ingredient in a nail strengthener (*see, e.g.*, June 17, 2022 Office Action, TTABVUE 119-141, “The Best Nail Strengtheners to Say Goodbye to Flimsy Nails”). We thus find that Applicant’s and Registrant’s identified goods serve at least one overlapping purpose – strengthening fingernails. Even though the collagen supplements in Registrant’s identification of goods are ingested and Applicant’s nail treatments are applied topically, the above evidence establishes that consumers will consider both

Applicant's and Registrant's goods when wanting to strengthen fingernails. We therefore find that there is an inherent relationship between the identified goods. *See L'Oreal v. Marcon*, 102 USPQ2d at 1440 ("Additional evidence that the parties' goods are related is the common use of aloe vera as an ingredient in cosmetics and personal care products[,]” noting testimony that “consumers are aware that aloe or aloe vera is often prominently listed as a beneficial ingredient in moisturizers and other skin care products” and that “Opposer itself uses aloe vera and other botanicals in a number of its products.”).

The Examining Attorney also relies on third-party websites to show the same entity provides nail care products and treatments and collagen supplements and markets these goods under the same mark. Internet evidence showing use of the same mark with the same goods has been found probative of the relatedness of such goods. *In re Embiid*, 2021 USPQ2d 577, at *28 (TTAB 2021) (webpages from three clothing companies that offer shoes, shirts, or sweat shirts under the same mark “is evidence that consumers are accustomed to seeing shoes and clothes sold under the same mark.”). The following are probative:¹¹

- Beauty Pie, offering Beauty Pie brand nail care products and Beauty Pie collagen nutritional supplements (February 10, 2023 Office Action, TSDR 100-104);
- FlexiNail, offering nail care products and collagen nutritional supplements – including nail conditioner and collagen supplements sold together as a “great starter

¹¹ Some of the Examining Attorney's evidence is not probative because it does not refer to collagen. *See, e.g., Pacifica*, (June 17, 2022 Office Action, TSDR 158-171); and *Dr. Remedy*, (February 10, 2023 Office Action, TSDR 251-262).

package” (February 10, 2023 Office Action, TSDR 106-109);
and

- Byrdie, offering ESSIE, a nail polish with collagen as an active ingredient. (June 17, 2022 Office Action, TSDR 130-131)

This evidence, in conjunction with the evidence regarding an inherent relationship between the goods, persuades us that Applicant’s and Registrant’s identified goods are related.

With regard to the trade channels and classes of purchasers, neither Applicant nor Registrant limit their trade channels or classes of purchasers in their respective identifications. In the absence of such limitations, we presume that Applicant’s and Registrant’s goods move in all trade channels normal for such goods and are available to all potential classes of ordinary consumers of such goods. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

The evidence regarding trade channels is not extensive. Most of the Examining Attorney’s evidence shows search results on particular websites for “nail polish” and then for “supplements” or “collagen supplements.” Although these results are on the same general websites, they are not on the same webpages. We do find persuasive, however, the FlexiNail webpage offering the involved goods as part of a single package on one webpage, and the Beauty Pie website offering such goods on the same website under the same Beauty Pie brand.

From the identifications and from the Examining Attorney's website evidence, we find that purchasers of Applicant's and Registrant's identified goods, *i.e.*, members of the general consuming public who desire stronger nails, overlap.

In view of the foregoing, we resolve the *DuPont* factors regarding the similarity of the goods, trade channels and purchasers in favor of finding a likelihood of confusion.

C. Purchaser Care

Applicant argues:

The relevant consumers are sophisticated and discerning and include professional buyers representing business establishments, licensed professionals, and individuals. Such buyers typically seek out the products they want and are highly educated in product buying or are even professional buyers. Consumers who would purchase Applicant's Goods are very particular about the products and would even pay attention to such minor differences as whether a product produces a matte or a glossy finish when applied to the nail or whether it dries naturally or is cured. Therefore, such consumers would exercise a high degree of care in selecting a nail product.¹²

We are not persuaded by Applicant's argument. First, Applicant relies on precedent which is not binding on the Board. Second, Applicant does not cite to any evidence to support its argument. "Attorney argument is no substitute for evidence." *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005); *see also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018). Third, "Board precedent requires the decision to be based 'on the least sophisticated potential purchasers.'" *Stone Lion Cap. Partners v. Lion Cap.*,

¹² 4 TTABVUE 14-15.


110 USPQ2d at 1163 (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1584 (TTAB 2014)). Fourth, Applicant's identification of goods is not restricted as to price and, therefore, we must presume that Applicant's nail care preparations include ones that are inexpensive. Indeed, the evidence demonstrates that nail polish costs as little as \$2.13 per bottle. At that price point, Applicant's argument makes little sense.¹³

We thus find the *DuPont* factor regarding purchasing conditions is neutral in the likelihood of confusion analysis.

II. Conclusion

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*, 64 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023). Applicant's and Registrant's marks are similar, and their identified goods are related. The trade channels and purchasers overlap. We therefore conclude that Applicant's mark TRI-FLEX TECHNOLOGY for "nail care preparations, nail strengtheners, non-medicated nail treatment preparations for cosmetic purposes, nail polish, nail color gels, nail lacquers, none of the foregoing containing collagen" is likely to be confused with the cited composite mark

¹³ *See* June 17, 2022 Office Action, TSDR 63 (Ultra Gel Shine Nail Lacquer sells for \$2.13 - \$8.50). *See also, e.g., id.* at 47 (Sephora Collection Color Hit Mini Nail Polish for \$5.00), 59 (China Glaze Nail Lacquer with Hardeners for \$3.75 - \$ 7.50), 61 (Nailtopia chip-free nail lacquer for \$2.50; Sally Hansen Limited Edition xPEEPS collection for \$3.00); February 10, 2023 Office Action, TSDR 98 (Barry M Gelly Hi Shine Nail Paint for \$4.79).


COLLAGEN
TRI-FLEX for “dietary supplements for humans containing Types I, II, and
III Collagen.”

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