

This Opinion is Not a
Precedent of the TTAB

Mailed: December 16, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Gymeni Fitness Technology LLC
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Serial No. 97428010
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William R. Borchers of Jackson Walker LLP,
for Gymeni Fitness Technology LLC.

Curtis French, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.
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Before Lynch, English and Allard,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Gymeni Fitness Technology LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark GYMENI for “caps, t-shirts, sweatshirts, athletic shorts” in International Class 25.¹

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion

¹ Application Serial No. 97428010 was filed on May 25, 2022 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intent to use the mark.

with the standard-character mark GYMINI registered on the Principal Register for the following goods in International Class 25:

Baseball shoes; baseball uniforms; beachwear; belts for clothing; bras; collar liners for protecting clothing collars; collar protector strips for application to clothing collars; ear muffs; foundation garments; hats; infant wear; insoles; insoles for footwear; pants; pullovers; scarfs; short sets; shorts; sleep masks; sports bra; suits; swim suits; swimming caps; swimming trunks; tee-shirts; tee shirts; thong beachwear; under garments; underpants; underwear; underwear, namely, boy shorts; yoga tops; baselayer [sic] bottoms; boxer shorts; camouflage jackets; cloche hats; clothing, namely, maternity bands; cycling shorts; detachable collars; down suits; flight suits; fur jackets; garter belts; head scarves; hiking jackets; ladies' underwear; maternity bras; nursing bras; rugby shorts; shoulder scarves; small hats; snow suits; sports caps and hats; stretch pants; suspender belts; suspender belts for men; turtleneck pullovers; walking shorts; woven bottoms; yoga pants.²

When the refusal was made final, Applicant requested reconsideration and appealed. The request for reconsideration was denied and the appeal proceeded. Applicant and the Examining Attorney filed appeal briefs.³ We affirm the refusal to register under Section 2(d) of the Trademark Act.

² Registration No. 6301197 was issued on March 23, 2021 (the “Cited Mark” or “Cited Registration”). The registration specifies that “[t]he wording ‘gymini’ has no meaning in a foreign language” and the name “shown in the mark does not identify a particular living individual.”

³ Applicant attached to its brief third-party registrations that it introduced with its request for reconsideration. Attaching previously-filed evidence to a brief is neither a courtesy nor a convenience to the Board. *In re Michalko*, Ser. No. 85584271, 2014 WL 2531202, at *1 (TTAB 2014). The proper way to cite evidence is to identify the document by date, name, and the page(s) where the evidence appears in the Office’s Trademark Status & Document Retrieval (TSDR) database. Trademark Rule 2.142(b)(3), 37 C.F.R. § 2.142(b)(3); *In re Virtual Independent Paralegals, LLC*, Ser. No. 86947786, 2019 WL 1453034, at *1 (TTAB 2019). Applicant and its counsel are cautioned against attaching evidence to future appeal briefs.

I. Analysis

“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 [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on 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 Ind., Inc.*, 575 U.S. 138, 144 (2015); *see also In re Charger Ventures*, 64 F.4th at 1381.

We consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 1381 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, Opp. No. 91194974, 2015 WL 1646447, at *8 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “The weight given to each factor depends on the circumstances of each case.” *In re Charger Ventures*, 64 F.4th at 1381; *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Moreover, “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, 1199 (CCPA 1973).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 1341-42 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002)). We address these two factors and other relevant *DuPont* factors below.

A. Similarity or Dissimilarity of the Goods, Trade Channels and Consumers

Under the second *DuPont* factor, we consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration” and under the third *DuPont* factor we consider “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. We must base our comparisons under the second and third *DuPont* factors on the goods identified in the Cited Registration and the involved application.⁴ *See, e.g., In re*

⁴ Applicant “disagrees” that the similarity of the goods “favor[s] a finding of likelihood of confusion,” 6 TTABVUE 6, but did not offer specific reasons for this assertion nor did it contest that Applicant’s and Registrant’s goods overlap. Applicant did not address the similarity or dissimilarity of trade channels or consumers.

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Charger Ventures, 64 F.4th at 1383 (“The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration.”) (emphasis omitted); *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 WL 6072822, at *8 (TTAB 2021) (“[A]s with the relatedness of the goods, the similarity or dissimilarity of the channels of trade must be determined based on the identifications of goods in the parties’ registrations[.]”).

It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed in the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981); *In re Aquamar, Inc.*, Ser. No. 85861533, 2015 WL 4269973, at *4 n.5 (TTAB 2015). The Cited Registration and involved application cover the following identical and legally identical goods:

Cited Registration	Involved Application
Tee-shirts; tee shirts	T-shirts
Shorts; cycling shorts; rugby shorts; walking shorts	Athletic shorts
Hats; sports caps and hats	Caps

Because there are no trade channel restrictions in the Cited Registration or the involved application, we must presume that the foregoing identical and legally identical goods travel through the same channels of trade to the same purchasers. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the

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, 1362 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers).

B. Strength of the Cited Mark

We turn next to the sixth *DuPont* factor under which we consider the conceptual and commercial strength of the Cited Mark. *See, e.g., Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (noting the “two prongs of analysis for a mark’s strength under the sixth factor”); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

Applicant argues that the GYM prefix common to both marks is conceptually and commercially weak, and in support of this position: (1) points to “sample” use-based registrations for marks with the prefix GYM identifying clothing;⁵ (2) argues that the prefix GYM is “highly descriptive” because it “is associated with exercising ... and

⁵ Applicant references “over 300 active applications/registrations in International Class 025 having the term ‘GYM,’” 6 TTABVUE 7, but the only evidence of record Applicant introduced to support this assertion is seven third-party registrations. March 29, 2024 Request for Reconsideration, TSDR 11-24. Accordingly, we consider only the third-party registrations with two exceptions. We do not consider: (1) Reg. No. 6989817 for the mark GYMFOX because this registration issued based on a United Kingdom registration for the mark and no maintenance documents have been filed evidencing use of the mark in commerce, *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 WL 2188890, at *14 (TTAB 2022) (explaining that registrations issued under Sections 44(e) and 66(a) of the Trademark Act, 15 U.S.C. §§ 1126(e) and 1141f(a) “lack probative value” because they are not based on use in commerce); and (2) Reg. No. 7162156 for the mark GYMBAT because the registration has been cancelled. *Id.* at 14-15 (“A cancelled or expired registration has no probative value other than to show that it once issued and it is not entitled to any of the statutory presumptions of Trademark Act Section 7(b).”).

people typically have workout/gym clothes”;⁶ and (3) asserts that “in light of the plethora [of] uses of ‘GYM’ in the clothing marketplace” consumers “regularly distinguish between the ‘GYM’ marks” for clothing and “pay little regard to the term.”⁷

Applicant introduced five currently active third-party use-based registrations for GYM-formative marks for athletic clothing, but did not introduce evidence showing the extent of use of these marks in the marketplace. Thus, we cannot conclude, as Applicant asserts, that consumers “regularly distinguish” between GYM-formative marks in the marketplace such that the Cited Mark is commercially weak. *In re Morinaga Nyugyo Kabushiki Kaisha*, Ser. No. 86338392, 2016 WL 5219811, at *8 (TTAB 2016) (Third-party registrations “standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”); *see also Sock It To Me, Inc. v. Fan*, Opp. No. 91230554, 2020 WL 3027605, at *12 (TTAB 2020) (“[T]hird-party registrations, with no evidence of the extent of their use in commerce, [do] not diminish the commercial strength of [a mark]. ... The existence of [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with [the marks].”) (internal quotation marks omitted); *Tony Lama Co. v. Di Stefano*, Opp. No. 92011422, 1980 WL 30120, at *10 (TTAB 1980) (third-party

⁶ Appeal Brief, 6 TTABVUE 7.

⁷ *Id.* at 8.

registrations “per se, are incompetent” to show “that the marks are known in the marketplace and have made such an impact upon purchasers that they have become conditioned to distinguish between these marks by” their differences); *cf. Palm Bay Imps., Inc. v Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

We agree, however, that the prefix GYM is conceptually weak for Registrant’s clothing intended to be worn at the gym. This conclusion is supported by the five active third-party use-based registrations incorporating the prefix GYM for gym-related clothing: GYMIVY (Reg. No. 5519400), GYM SWAG (Supp. Reg. No. 5847174), GYMKUSH (Reg. No. 5911874), GYMIT (Reg. No. 6098686), and GYMONLY (Reg. No. 6133444).⁸ *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015) (third-party registration evidence may be probative of conceptual weakness showing that a mark or portion thereof “has a normally understood and well-recognized descriptive or suggestive meaning”); *In re Guild Mortg. Co.*, Ser. No. 86709944, 2020 WL 1639916, at *5 (TTAB 2020) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which ... a mark is used in ordinary parlance.’”); *Sock It To Me*, 2020 WL 3027605, at *12 (“[T]hird-party registrations may be probative of conceptual strength or weakness as they may be considered to demonstrate the meaning of a word which comprises the mark, or a portion thereof,

⁸ March 29, 2024 Request for Reconsideration, TSDR 11-20.

to show that there is a well-known and commonly understood meaning of that word and that the mark has been chosen to convey that meaning.”) (internal quotation marks omitted).

Notwithstanding that the prefix GYM is conceptually weak, the record does not support that the Cited Mark as a whole is conceptually weak. Moreover, the Cited Mark is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), so we must presume that it is an inherently distinctive mark. Trademark Act Section 7(b), 15 U.S.C. § 1057(b). We further note, as discussed in the next subsection, that the Cited Mark and Applicant’s mark share more than the conceptually weak prefix GYM.

C. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the “similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361; *see also Stone Lion Cap. Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1321 (Fed. Cir. 2014). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012). The focus is on the recollection of an ordinary consumer, who normally retains a general rather than specific impression of trademarks. *Geigy*

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Chem. Corp. v. Atlas Chem. Indus., Inc., 438 F.2d 1005, 1007 (CCPA 1971); *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 WL 1267956, at *5 (TTAB 2004); *Sealed Air Corp. v. Scott Paper Co.*, Opp. No. 91055167, 1975 WL 20752, at *3 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 746 F.3d at 1321; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (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.”).

We are mindful that where, as here, some of Applicant’s and Registrant’s goods are identical or legally identical, the degree of similarity necessary to find a likelihood of confusion need declines. *Coach Servs.*, 668 F.3d at 1369; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992).

Turning first to appearance, the marks differ by a single letter in the second syllable GYMENI v. GYMINI. In the normal marketing environment, purchasers typically do not have the luxury of examining marks in minute detail. *Nike, Inc. v. WNBA Enters. LLC*, Opp. No. 91160755, 2007 WL 763166, at *13 (TTAB 2007). In addition, the average purchaser retains a general, rather than specific recollection of trademarks. *Id.* For these reasons, most purchasers are unlikely to notice or remember the one-letter difference in the middle of the marks.

Applicant argues that the one-letter difference “become[s] substantial when the weaknesses of the similar term [GYM] is considered.”⁹ We disagree. Applicant’s mark

⁹ Appeal Brief, 6 TTABVUE 7.

shares more in common with the Cited Mark than the prefix GYM and is more similar to the Cited Mark than any of the third-party registered marks addressed above.

With respect to sound, “Applicant believes that ‘GYMINI’ is likely pronounced ji-min-ee, while ‘GYMENT’ is pronounced jem-uh-nahy. Thus, the two marks likely do not sound that much alike.”¹⁰ Applicant has not pointed to any evidence to support its belief about how consumers will pronounce the marks. Moreover, there is no correct way to pronounce a mark that is not an English-language word. *In re Viterra*, 671 F.3d at 1373 (“[T]here is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner”).

“Absent evidence to the contrary, we must consider all reasonable possibilities” of pronunciation. *Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Can. No. 92079409, 2024 WL 3739358, at *10 (TTAB 2024). Given that the marks differ only by a single vowel (“e” v. “i”), no matter how the marks are pronounced, the difference in pronunciation would be slight. *In re Energy Telecomms. & Elec. Assoc.*, 1983 WL 51826, at *1 (TTAB 1983) (“[N]o trademark owner can guarantee that the public will pronounce its mark perfectly”). Any slight difference in pronunciation is unlikely to be noticed by consumers and is not sufficient to distinguish the marks. *Id.*; see also *In re Viterra Inc.*, 671 F.3d at 1367 (finding substantial evidence supported the Board’s determination “that any minor differences in the sound” of the marks X-SEED and XCEED “may go undetected by consumers and, therefore, would not be sufficient to distinguish the marks”).

¹⁰ *Id.* at 8.

Turning to connotation and commercial impression, Applicant argues:

In the middle of Applicant's mark, for example, is the term "men", and in the middle of the asserted mark is the term "min." These two terms have very different meanings – i.e., male humans versus little. In fact, the asserted mark reinforces this by actually ending in the term "mini." Thus, the asserted mark appears to have something to do with smallness and gyms while the applied-for mark has something to do with males and gyms, meaning that the marks will mean different things to consumers.¹¹

Some consumers visually encountering the Cited Mark GYMNI may recognize it as a telescoped mark comprised of the words "gym" and "mini," but others are likely to perceive it as a misspelling of or play on the word "Gemini," a zodiac constellation or astrology sign,¹² while others may perceive it as a coined term. Consumers seeing Applicant's mark GYMNI may recognize the GYM prefix for Applicant's gym-related clothing but may also, or alternatively, perceive Applicant's mark as a misspelling of or play on the word "Gemini" or as a coined word. Consumers encountering Applicant's mark in a typical marketing environment are unlikely to carefully examine it, dissect the term "men" from the middle of it, and perceive the mark as connoting "something to do with males[.]" And consumers who hear, but do not see, Applicant's mark are unlikely to notice or focus on the middle syllable as the word "men."

¹¹ *Id.*

¹² We take judicial notice of the MERRIAM-WEBSTER online dictionary definition for the word "Gemini" at <https://www.merriam-webster.com/dictionary/Gemini> (last visited December 13, 2024). The Board may take judicial notice of dictionary definitions. *See, e.g., Conopco, Inc. v. Transom Symphony OPCO, LLC*, Opp. No. 91256368, 2022 WL 874335, at *7 n.8 (TTAB 2022).

Given that the marks differ only by one letter in the middle syllable, we find that they are likely to convey similar connotations and commercial impressions related to a gym or exercise or the constellation and zodiac sign Gemini. To the extent there may be differences in connotation or commercial impression, we find they are outweighed by the similarities between the marks in appearance and sound. *Cf. Coach Serv.*, 668 F.3d at 1369 (“We agree with the Board that these distinct commercial impressions outweigh the similarities in sound and appearance, particularly since, as discussed below, the parties’ goods are unrelated.”); *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 WL 2734893, at *5 (TTAB 2018) (“Similarity in any one of these elements [appearance, sound, connotation and commercial impression] may be sufficient to find the marks confusingly similar.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, Ser. No. 85497617, 2014 WL 2531200, at *2 (TTAB 2014); *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

II. Conclusion

As a final step, we “weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing.” *In re Charger Ventures*, 64 F.4th at 1384 (emphasis omitted). The second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion as the goods are in part identical and legally identical and the trade channels and consumers for those goods are presumably the same. The first factor also favors a likelihood of confusion as the marks in their entireties are quite

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similar in appearance and sound and are likely to convey similar connotations and commercial impressions. Under the sixth *DuPont* factor, the prefix GYM is conceptually weak for clothing worn for gym use but the Cited Mark as a whole is inherently distinctive and does not appear to be conceptually weak. Nor does the record support a finding that the prefix GYM or the Cited Mark is commercially weak. We find that the sixth *DuPont* factor is neutral. We further note that Applicant's mark is more similar to the Cited Mark than any of the third-party registered marks.

Because all of the relevant *DuPont* factors favor a likelihood of confusion or are neutral, we find that Applicant's mark GYMENI for "caps, t-shirts, sweatshirts, athletic shorts" is likely to cause confusion with the Cited Mark GYMINI for goods, including tee shirts, shorts and sports caps and hats.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.