

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 8, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re BeBella Inc.

Serial No. 97887864

Amanda V. Dwight of Burkhalter Kessler Clement & George LLP,
for BeBella Inc.

Sharif Farrag, Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

Before Pologeorgis, Cohen, and O'Connor,
Administrative Trademark Judges.

By the Board:

NOTICE OF CORRECTION

On March 31, 2025, the Board issued a final decision in connection with the above-noted ex parte appeal. The posted decision has a typographical error that must be corrected. The error is the issuance date of the decision. The issuance date should read March 31, 2025 and not August 24, 2024.

A corrected copy of the Board's final decision is attached.

Serial No. 97887864

Applicant's time for filing an appeal or commencing a civil action regarding the Board's decision continues to run from the mailing date of the March 31, 2025 decision. *See* Trademark Rule 2.145(d)(1), 37 C.F.R. §2.145(d)(1).

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In re BeBella Inc.

Serial No. 97887864

Amanda V. Dwight of Burkhalter Kessler Clement & George LLP,
for BeBella Inc.

Sherif Farrag,¹ Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

Before Pologeorgis, Cohen, and O'Connor,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

BeBella Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark GLITTERALLY PERFECT for goods ultimately identified as “Eye-shadow; Eye liner” in International Class 3.²

¹ Trademark Examining Attorney Doritt Carroll issued the office actions during the prosecution of the involved application. However, Trademark Examining Attorney Sherif Farrag was re-assigned the application after the Applicant filed its appeal brief. In this decision, we refer to Ms. Carroll and Mr. Farrag as the “Trademark Examining Attorney” or the “Examining Attorney.”

² Application Serial No. 90777742, filed on June 16, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intention to use

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the standard character mark GLITTERALLY OBSESSED, registered on the Principal Register, for "Glitter for cosmetic purposes; Body glitter; Body glitters; Face glitter; Face and body glitter; Hair glitter; Nail glitter; Nail grooming products, namely, tips, glue, lacquer and glitter" in International Class 3.³

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed.⁴ Applicant and the Examining Attorney filed briefs. For the reasons explained below, we affirm the Section 2(d) refusal to register.⁵

the mark in commerce. On March 19, 2024, Applicant filed an Amendment to Allege Use, and amended the Section 1(b) filing basis to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of first use anywhere and in commerce since at least as early as November 2023. The Examining Attorney accepted the Amendment to Allege Use on August 12, 2024.

³ Registration No. 6494367, issued September 21, 2021. The cited registration also lists goods in International Class 21. The Class 21 goods, however, do not form the basis of the Examining Attorney's Section 2(d) refusal and, therefore, we have given them no consideration in our analysis.

⁴ After the appeal was resumed, the Examining Attorney requested remand of the involved application to submit additional evidence to supplement the evidence of record in support of the likelihood of confusion refusal. 8 TTABVUE. The Board granted the remand request. 9 TTABVUE. On remand, the Examining Attorney issued a subsequent final office action refusing registration. 10 TTABVUE. Thereafter, the Board resumed the appeal and allowed Applicant time to submit a supplemental brief based on the subsequent final refusal. 11 TTABVUE. Applicant chose not to submit a supplemental brief.

⁵ The TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents. Additionally, as part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL

I. Likelihood of Confusion

Our determination under 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, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1314-15 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-79 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *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.”). Notwithstanding, “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) (internal citations removed).

A. Relatedness of the Goods

We first turn to the comparison of the goods, the second *DuPont* factor. In making our determination, we must look to the goods as identified in Applicant’s application and the relevant goods listed in the cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc.*

BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For opinions of the Board, this opinion uses citations to the Westlaw legal database and cites only precedential decisions, unless otherwise noted.

v. Hous. Comput. Servs. Inc., 918 F.2d 937, 942 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *see also In re Giovanni Food Co.*, (Serial No. 77796257) 2011 WL 810217, at *2 (TTAB 2011).

It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, (Opposition No. 91117739), 2007 WL 1431084, at *10 (TTAB 2007)). The issue here is not whether consumers would confuse Applicant’s goods with Registrant’s Class 3 goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, (Opposition No. 91184456), 2012 WL 1267956, at *6 (TTAB 2012); *In re Rexel Inc.*, (Serial No. 241423), 1984 WL 63591, at *1 (TTAB 1984). Moreover, registration must be refused if Applicant’s mark for any of its identified goods is likely to cause confusion with Registrant’s mark for any of its listed Class 3 goods. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of

likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336-37 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

To reiterate, Applicant's goods are "Eye-shadow; Eye liner" and Registrant's Class 3 goods are "Glitter for cosmetic purposes; Body glitter; Body glitters; Face glitter; Face and body glitter; Hair glitter; Nail glitter; Nail grooming products, namely, tips, glue, lacquer and glitter."

In support of the Section 2(d) refusal, the Examining Attorney submitted 15 third-party registrations that identify both Applicant's goods and Registrant's Class 3 goods under the same mark.⁶ Although third-party registrations are not evidence that the registered marks are in use or that the public is familiar with them, they nonetheless have some probative value to the extent they serve to suggest that the goods or services listed in the registrations are of a kind that may emanate from a single source. *See, e.g., In re I-Coat Co.*, (Ser. No. 86802467), 2018 WL 2753196, at *10 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, (Ser. No. 75689077), 2001 WL 951738, at *4 (TTAB 2001)); *In re Aquamar*, (Ser. No. 85861533), 2015 WL 4269973, at *4 n.5 (TTAB 2015); *In re Albert Trostel & Sons Co.*, (Ser. No. 74186695), 1993 WL 596274, at *3 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, (Ser. No. 73603019), 1988 WL 252484, at *2 (TTAB 1988). Thus, this third-party registration evidence indicates that Applicant's and Registrant's Class 3 goods are the type that may

⁶ August 19, 2024 Subsequent Final Action, TSDR pp. 181-208.

emanate from the same source.

The Examining Attorney also submitted screenshots from the following websites of online retailers of cosmetic products that sell both Applicant's goods and Registrant's Class 3 goods under the same mark:

UrbanDecay.com,

ProfusionCosmetics.com

Moirabeauty.com

MyPoshMellow.com

LamelCosmetics.com,

MakeUpForever.com,

NYXCosmetics.com, and

MedusasMakeup.com.⁷

We find that the Examining Attorney's third-party marketplace use evidence clearly establishes that it is not uncommon for a single entity to offer under a single mark both "eye shadow" or "eye liner," on the one hand, and various facial and body glitter on the other. Therefore, this evidence supports a finding that Applicant's goods and the Class 3 goods listed in the cited registration are related. *See, e.g., In re Detroit Athletic*, 903 F.3d at 1306-07 (crediting relatedness evidence showing that third parties use the same mark for the goods and services); *Hewlett-Packard v. Packard Press*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis");

⁷ *Id.*, TSDR pp. 8-180.

Made in Nature v. Pharmavite, (Opposition No. 91223352), 2022 WL 2188890, at *25 (TTAB 2022) (third-party websites promoting sale of both parties' goods showed relatedness); *L'Oreal v. Marcon*, (Opposition No. 91184456), 2012 WL 1267956, at *8 (TTAB 2012) (evidence that "companies have marketed cosmetics and beverages under the same mark" supported finding goods related).

Applicant argues that its goods are different from Registrant's Class 3 goods because "glitter is not normally used on the eyes for obvious reasons."⁸ Applicant further maintains that it has "integrated glitter into its eye shadow and liner to ensure a simple and safe method to achieve a dazzling shimmer."⁹ In view thereof, Applicant concludes that the products are different and are utilized for different purposes.¹⁰

We disagree. The evidence of record demonstrates that certain eye shadows and eye liners contain glitter.¹¹ Moreover, Applicant has conceded that its own "eye shadow" and "eye liner" are integrated with glitter. We therefore find that Registrant's "glitter for cosmetic purposes" and "face glitter" and Applicant's goods are highly related because the goods provide the same purpose or function, i.e., applying glitter to the face for cosmetic purposes.

In sum, we find that Applicant's goods and Registrant's Class 3 goods are highly related for likelihood of confusion purposes. Accordingly, the second *DuPont* factor

⁸ Applicant's Appeal Brief, p. 6, 6 TTABVue 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ August 19, 2024 Subsequent Final Action, TSDR pp. 211-236.

strongly favors a finding of likelihood of confusion.

B. Similarity of Trade Channels

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because the identification of Applicant's goods and the Class 3 goods listed in the cited registration have no trade channel or consumer class limitations, they are presumed to move in all channels of trade usual for such goods and are available to all potential classes of ordinary consumers. *In re i.am.symbolic*, 866 F.3d 1315, 1327 (Fed. Cir. 2017) (quoting *In re Viterro Inc.*, 671 F.3d at 1362 and *Hewlett-Packard*, 281 F.3d at 1268). *See also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"). The relatedness evidence discussed above establishes that "eye shadow," "eye liner," and glitter for the face for cosmetic purposes move in the same retail trade channels, i.e., brick and mortar cosmetics and beauty care stores and online retailers for cosmetic and beauty care products, to the same consumers, who are ordinary members of the public.

Accordingly, the third *DuPont* factor also weighs in favor of a finding of likelihood of confusion.

C. Strength of the Cited GLITTERALLY OBSESSED Mark

Before we make our comparison of the marks, we consider the strength, as well as any weakness, of the cited GLITTERALLY OBSESSED mark as used in connection with the relevant goods listed in the cited registration. We do so because a determination of the strength or weakness of this mark helps inform us as to its

scope of protection. *See In re Morinaga Nyugyo K.K.*, (Serial No. 86338392), 2016 WL 5219811, at *6 (TTAB 2016) (“[T]he strength of the cited mark is — as always — relevant to assessing the likelihood of confusion under the *du Pont* framework.”).

When evaluating the strength or weakness of a mark, we look at the mark’s inherent strength based on the nature of the term itself, and its commercial strength in the marketplace. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *see also Made in Nature, LLC v. Pharmavite LLC*, (Opposition Nos. 91223352 (parent), 91223683 and 91227387), 2022 WL 2188890, at *11-12 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361); *New Era Cap Co. v. Pro Era LLC*, (Opposition No. 91216455), 2020 WL 285382, at 12 (TTAB 2020) (“ [T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.”) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003)).

With regard to commercial strength, “[t]he proper standard is the mark’s ‘renown within a specific product market,’ ... and ‘is determined from the viewpoint of consumers of like products,’ ..., and not from the viewpoint of the general public.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017).

1. Conceptual Strength of the Cited GLITTERALLY OBSESSED Mark

Conceptual strength is a measure of a mark’s distinctiveness and may be placed “in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505

U.S. 763, 768 (1992).

Because the cited mark GLITTERALLY OBSESSED issued on the Principal Register, without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive for the goods listed in the cited registration. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, (Opposition No. 91118587), 2006 WL 2460188, at *21 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).

The Federal Circuit has held, however, that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the mark or common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that segment is relatively weak’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)).

Here, Applicant submitted copies of the following third-party registrations for marks purportedly identical or similar to the cited mark GLITTERALLY OBSESSED

for identical or similar goods to show the weakness of the cited mark:¹²

Registration No.	Mark	Goods
7177097	GLITTERATI (standard character)	Alcoholic beverages, except beer.
5571974	GLITTER FIX (GLITTER disclaimed) (standard character)	Lip gloss.
5734849	GLITTER LOVE (GLITTER disclaimed)	Cosmetics in general, including perfume.

¹² Applicant's March 18, 2024 Request for Reconsideration, TSDR pp. 12-25.

In its appeal brief, Applicant discusses third-party registrations that it did not submit when prosecuting its application. *See* Applicant's Appeal Brief, p. 4, 6 TTABVUE 5 ("Numerous trademark and business owners have received registrations for "glitter" formative marks in connection with class 3 goods; including over 60 "Glitter" live registrations for cosmetic and skincare goods."). Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that the record should be complete prior to the filing of an appeal. After an appeal is filed, if an applicant desires to introduce additional evidence, the applicant may request the Board to suspend the appeal and to remand the application for further examination. Trademark Rule 2.142(d)(1), 37 C.F.R. § 2.142(d)(1). We therefore give no consideration to the registrations mentioned in Applicant's appeal brief that were not properly and timely made of record. *See In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1120 (TTAB 2012) (the applicant's discussion in its brief of third-party registrations not considered because the registrations were not properly introduced during the examination process).

We additionally note that Applicant, in its November 30, 2023 response to Office action, included a table of 61 GLITTER-formative third-party registered marks for goods in Class 3 purportedly to demonstrate the weakness of the cited mark. *See* Applicant's November 30, 2023 Response to Office Action, TSDR pp. 8-10. Even though the Examining Attorney did not object to this list, we note a mere list of third-party registrations, without the underlying registrations themselves, does not suffice to make them of record and are essentially irrelevant, especially where, as here, the registration basis or the exact attendant goods for each third-party registration listed is not identified in the list. *See In re Peace Love World Live, LLC*, Ser. No. 86705287, 2018 WL 3570240 at *6 n.17 (TTAB 2018) ("[T]he list does not include enough information to be probative. The list includes only the serial number, registration number, mark, and status (live or dead) of the ... registrations. Because the goods are not listed, we do not know whether the listed registrations are relevant."); *In re Broadway Chicken Inc.*, (Ser. No. 74326626), 1996 WL 253841, at *1 n.6 (TTAB 1996) ("In order to make third-party registrations properly of record in a proceeding such as this, applicant should submit copies of the registrations themselves, or the electronic equivalent thereof, namely, printouts from the electronic records of the [USPTO]"). Accordingly, we have given no consideration to the list of third-party registrations identified in Applicant's November 30, 2023 response to Office action.

Registration No.	Mark	Goods
	(standard character)	
5950193	GLITTERHOLIC (standard character)	Cosmetics and makeup preparations.
5796074	GLITTERVERSE (standard character)	Adhesives for cosmetic purposes; Adhesives for cosmetic use; Glitter for cosmetic purposes; Body glitter; Body glitters; Face glitter; Face and body glitter; Face paint; Face painting kits; Face paints.
5711629	GLITTERING	Hair care preparations; hair spray; hair styling spray.

We initially note that the registered mark GLITTERATTI is for goods unrelated to the goods at issue in this appeal, namely, “Alcoholic beverages, except beer.” Thus, this third-party registration has no probative value regarding the strength of the cited mark. *Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at *51 (TTAB 2017) (third-party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case”); *In re Thor Tech, Inc.*, Ser. No. 78634024, 2009 TTAB LEXIS 253, at *19 (TTAB 2009) (“third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from [the parties’] trailers and recreational vehicles”).

The remaining five third-party registrations do demonstrate that the term “glitter,” by itself, is, at a minimum, highly descriptive and therefore weak when used in connection with products that contain glitter. However, we note that some of the third-party registrations are for marks that creatively and uniquely combine the term “glitter” with another word, i.e., GLITTERHOLIC and GLITTERVERSE. These particular unique combinations are not found in the cited mark nor is the term “glitter” used as a standalone term in the cited mark. Instead, the cited mark plays on the word “literally” which is not present in any of the third-party registrations. We further note that Applicant did not submit any third-party registration evidence concerning the “OBSESSED” portion of the cited mark. That being said, we nonetheless find that the third-party registration evidence does support a finding that the cited GLITTERALLY OBSESSED mark is suggestive of goods containing glitter and therefore slightly weakened conceptually.

2. Commercial Strength of the Cited GLITTERALLY OBSESSED Mark¹³

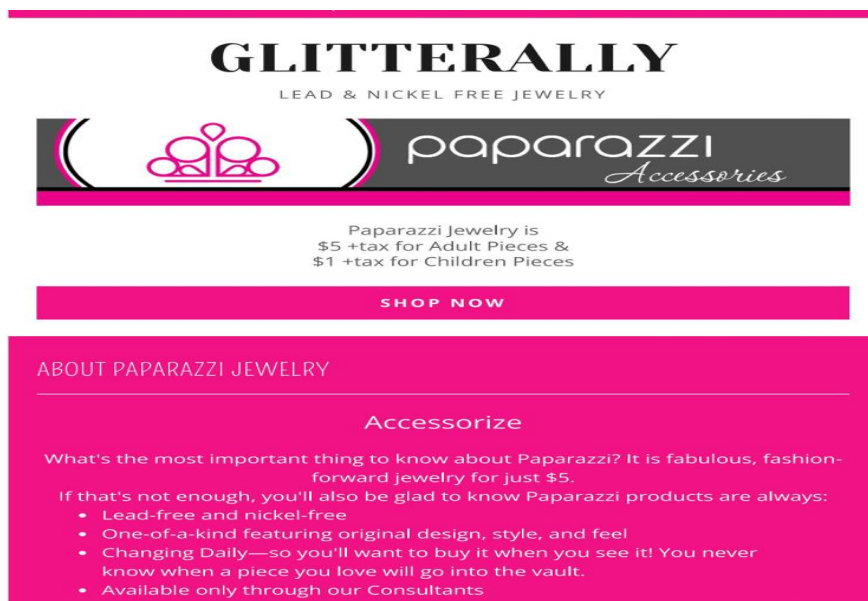
We next address the sixth *DuPont* factor, the number and nature of similar marks in use on similar goods. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living*,

¹³ The fifth *DuPont* factor examines the extent to which the public perceives the prior mark as indicating a single source of origin, i.e., its fame or commercial strength. *DuPont*, 476 F.2d at 1361. However, as is typical in an ex parte proceeding, the record in this case provides no basis for a finding that the cited mark is commercially strong when used in association with Registrant’s Class 3 goods. In an ex parte appeal the ‘fame of the mark’ factor is normally treated as neutral because the record generally includes no evidence as to fame, particularly since the owner of the cited registration is not a party to this proceeding and thus cannot introduce evidence regarding its use of the cited registered mark. *See In re Thomas*, (Serial No. 78334625), 2006 WL 1258862, at *6 n.11 (TTAB 2006). Thus, the fifth *DuPont* factor is neutral.

LLC, (Opposition No. 91217095), 2016 WL 7655551, at *4-5 (TTAB 2016). The Federal Circuit has held that evidence of extensive registration and use of a term by others for similar goods or services can be “powerful” evidence of the term’s weakness. *Jack Wolfskin*, 797 F.3d at 1373-74; *Juice Generation*, 794 F.3d at 1339. If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods or services, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005).

Here, Applicant submitted the following purported third-party marketplace uses of the term GLITTERALLY to demonstrate that the cited GLITTERALLY OBSESSED mark is commercially weak:¹⁴

- www.shopglitterally.com

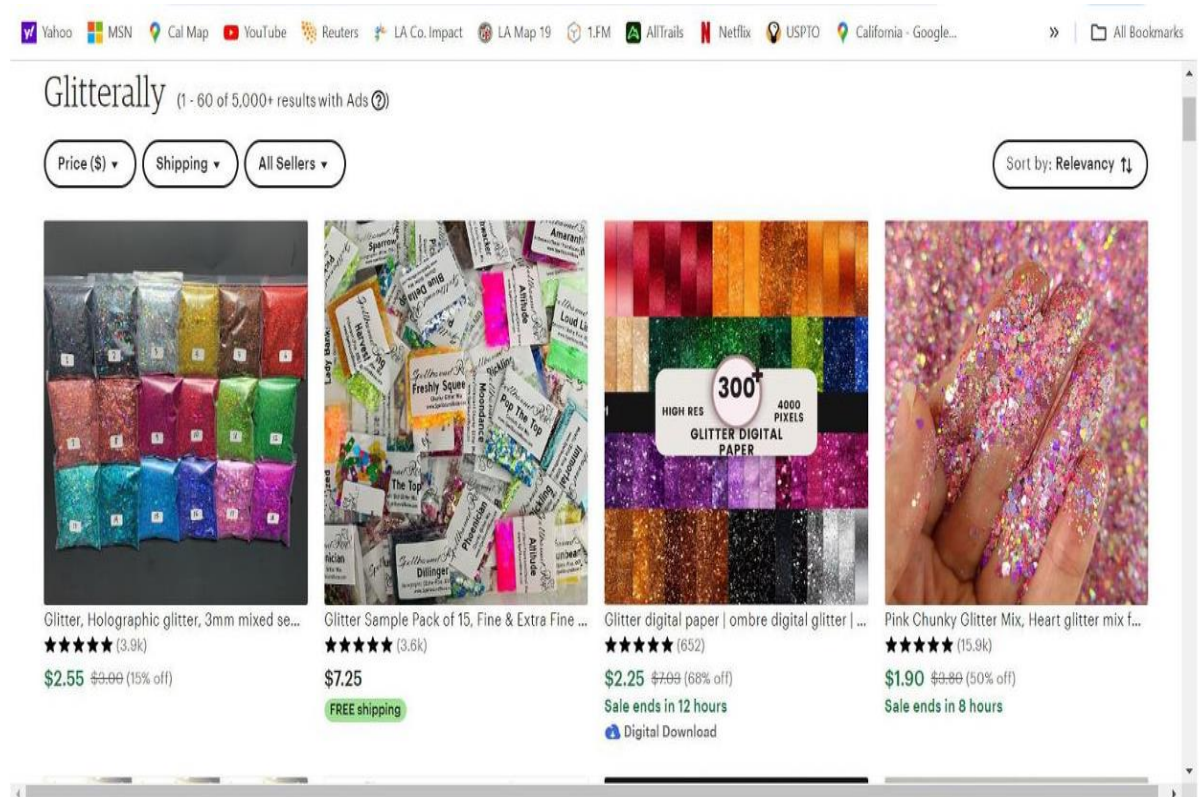


¹⁴ Applicant’s March 18, 2024 Request for Reconsideration, TSDR pp. 26-36.

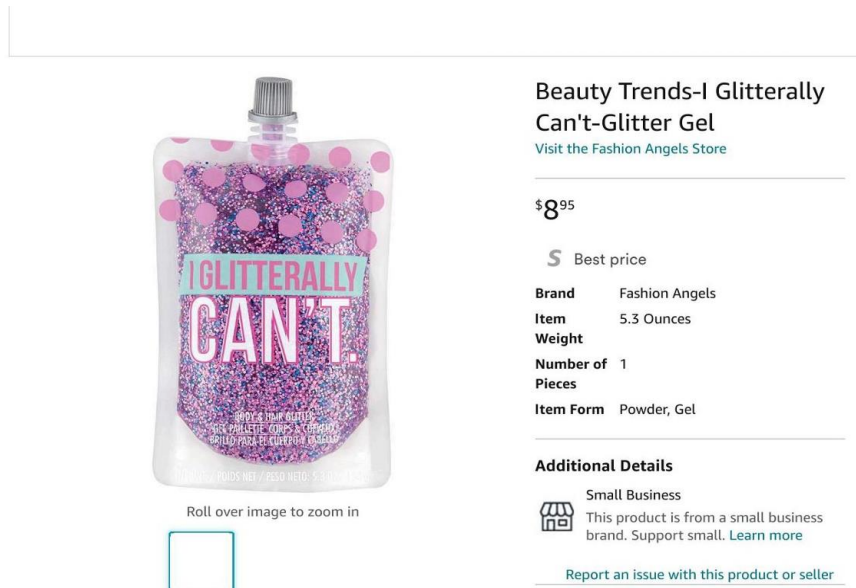
- www.shopgorgeousthings.com



- www.etsy.com



- www.amazon.com



Evidence comprising only a small number of third-party uses of similar marks is entitled to little weight in determining the strength of a mark. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1328-29 (Fed. Cir. 2017); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406 (CCPA 1973). Here, we have only two probative source-indicating third-party uses.¹⁵ This is a “far cry” from what is needed in order to make a sufficient showing of commercial weakness or to establish any diminished commercial strength of Registrant’s GLITTERALLY OBSESSED mark. *See, e.g., In re Inn at St. John’s, LLC*, (Ser. No. 87075988), 2018 WL 2734893, at *4 (TTAB 2018) (four third-party registrations and no third-party uses were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to

¹⁵ The third-party marketplace use shown at www.shopgorgeousthings.com displaying a ball cap with the word GLITTERALLY and www.shopglitterally.com showing the term GLITTERALLY in connection with the sale of jewelry are of little to no probative value because the mark is used in connection with goods that are different from the goods at issue in this appeal. *See Tao Licensing, LLC*, Can. No. 92057132, 2017 TTAB LEXIS 437, at *51.

be significant” in the Federal Circuit’s decisions in *Jack Wolfskin*, 116 USPQ2d at 1136 and *Juice Generation*, 115 USPQ2d at 1674). Thus, the sixth *DuPont* factor is neutral.

3. Summary of the Strength of the Cited Mark

In sum, the evidence of record does demonstrate that the cited mark is slightly weakened conceptually but not commercially. We hasten to add, however, that even weak marks are entitled to protection. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401 (CCPA 1974) (Likelihood of confusion “is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and a ‘strong’ mark.”); *In re Colonial Stores, Inc.*, (Ser. No. 73209079), 1982 WL 52041, at *3 (TTAB 1982) (“[E]ven weak marks are entitled to protection against registration of confusingly similar mark.”).

D. Similarity of the Marks

We next consider the first *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imps.*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. See *Krim-Ko Corp. v. Coca-Cola 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.”); *In re Inn at St. John’s, LLC*, (Serial No. 87075988), 2018 WL 2734893, at *5 (TTAB 2018) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”) (quoting *In re Davia*, (Serial No. 85497617), 2014 WL 2531200, at *2 (TTAB 2014)).

“The 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.” *In re i.am.symbolic*, 866 F.3d at 1323 (quoting *Coach Servs. Inc.*, 668 F.3d at 1368) (internal quotation marks omitted). Furthermore, where the goods of an applicant and registrant are “similar in kind and/or closely related,” as is the case here, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods. *See Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242 (Fed. Cir. 2004); *In re J.M. Originals Inc.*, (Ser. No. 75530739), 1987 WL 124026, at *1 (TTAB 1987),

Applicant’s mark is GLITTERALLY PERFECT in standard characters. The cited mark is GLITTERALLY OBSESSED also in standard characters. When considered in their entirety, we find Applicant’s and Registrant’s marks to be similar in appearance, sound, connotation, and overall commercial impression because of the shared, initial term GLITTERALLY appearing in each mark. Indeed, since each of the marks leads with the identical term, consumers are more likely to recall that first term and remember it. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (“the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876 (Fed. Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because “consumers must first notice th[e] identical lead word”).

Applicant argues that, given the weakness of the terms glitter and glitterally, and because the words PERFECT and OBSESSED appearing in Applicant's and Registrant's marks, respectively, differ in appearance, sound, connotation and commercial impression, relevant consumers can differentiate the marks at issue so as to avoid any likely confusion.

In support of its arguments, Applicant relies on the Board's nonprecedential decisions in *In re Hibernia Distillers Ltd.*, (Ser. No. 86523391), 2018 WL 5819339 (TTAB 2018) and *In re Ruebens Brew LLC*, (Ser. No. 86066711), 2015 WL 9842516 (TTAB 2015). In the *Hibernia Distillers* decision, the Board, basing its holding solely on the first *DuPont* factor as being dispositive, found that the applicant's proposed



composite mark for "Whiskey; Irish whiskey; single malt whiskey; bourbon whiskey; whiskey cocktails" was sufficiently different than the cited standard character marks HYDE for "herbal flower liquer," HYDE PARK for "spirits; wines," and JAMES F.C. HYDE for "spirits and liquers," all registered on the Principal Register in International Class 33 and owned by different registrants, so as to avoid any likely confusion.

Similarly, in *Ruebens Brew*, the Board, relying predominantly on the first *DuPont*



factor, found that the applicant's proposed composite mark for

“beer” was sufficiently different than the cited mark



for “alcoholic beverages, namely, wine.”

We are not persuaded by Applicant’s arguments. First, the Board does not encourage the citation to nonprecedential decisions because they are not binding on the Board, nor are they a substitute for evidence needed to support or traverse a refusal. *See In re tapio GmbH*, (Serial No. 87941532), 2020 WL 6938377, at *10 n.34 (TTAB 2020) (Board found unpersuasive nonprecedential decisions decided on different records); *In re Soc’y of Health and Physical Educators*, (Serial No. 87107590), 2018 WL 3994009, at *3 n.7 (TTAB 2018) (“Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold.”). In any event, we find that the factual circumstances in the *In re Hibernia Distillers Ltd.* and *In re Reubens Brew LLC* decisions are distinguishable from those in this ex parte appeal. Indeed, it has long been the law that “past decisions on confusing similarity are of little assistance in new fact situations wherein entirely different marks and products are involved.” *Medicated Prods. Co. v. Alice Jewelry Co.*, 255 F.2d 408, 408 (CCPA 1958).

Because average consumers retain a general rather than specific impression of trademarks, they are likely to assume a connection between Applicant’s mark and the cited mark based on the shared initial wording, GLITTERALLY. As previously noted, marks may be confusingly similar in appearance despite the addition, deletion, or substitution of letters or words. *See, e.g., Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546 (Fed. Cir. 1990) (finding TMM confusingly similar to TMS); *In re*

Pellerin Milnor Corp., (Serial No. 280084), 1983 WL 51846 (TTAB 1983) (finding MILTRON and MILTRONICS confusingly similar); *In re BASF A.G.*, (Serial No. unknown), 1975 WL 20946 (TTAB 1975) (finding difference between marks LUTEX and LUTEXAL insufficient to avoid source confusion).

Further, even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to their overall similarities, that Applicant's goods sold under the proposed mark constitute new or additional goods from the same source as the Class 3 goods provided under the cited registered mark with which they are acquainted or familiar, and that Applicant's mark is merely a variation of, or derivative of, Registrant's mark. *See, e.g., In re Comexa Ltda.*, (Serial No. 75396043), 2001 WL 717676 (TTAB 2001) (applicant's use of term "AMAZON" and parrot design for chili sauce and pepper sauce is likely to cause confusion with registrant's "AMAZON" mark for restaurant services); *SMS, Inc. v. Byn-Mar Inc.*, (Opposition No. 91068062), 1985 WL 71967 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing."); *In re Collegian Sportswear, Inc.*, (Serial No. 326,917), 1984 WL 63155 (TTAB 1984).

Finally and as previously noted, the third-party marketplace evidence of record is insufficient to weaken the cited GLITTERALLY OBSESSED mark commercially as a source-identifier for the relevant goods listed in the cited registration.

In sum, while there are some specific differences between Applicant's and Registrant's marks, i.e., the inclusion of the word PERFECT in Applicant's mark and the term OBSESSED in the cited mark, we nonetheless find that, in their entireties, the marks are more similar than dissimilar in appearance, sound, connotation, and overall commercial impression due to the common presence of the identical initial word "GLITTERALLY." The first *DuPont* factor thus favors a finding of likelihood of confusion.

II. Balancing of *DuPont* Factors

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We find that (1) the marks at issue are more similar than dissimilar, (2) Applicant's goods and Registrant's Class 3 goods are highly related, (3) the goods move, at a minimum, in overlapping trade channels and are offered to overlapping classes of purchasers. As such, we conclude that Applicant's GLITTERALLY PERFECT mark, as used in connection with the identified goods, so resembles the cited mark GLITTERALLY OBSESSED for the relevant listed goods in the cited registration as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

We make this ultimate conclusion despite our finding of some conceptual weakness of the cited mark when used in connection with the listed Class 3 goods. That is, in spite of any slight narrowing of the scope of protection for Registrant's mark, we find it is still entitled to protection against registration of Applicant's confusingly similar mark for goods that are highly related to Registrant's goods. *See In re i.am.symbolic*, (Ser. No. 85916778), 2018 WL 3993582, at *10 n.13 (TTAB 2018).

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