

This Opinion is not a
Precedent of the TTAB

Mailed: March 6, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ayablu Inc.

Serial No. 97904206

Mary Grieco Lee of Olshan Frome Wolosky LLP
for Ayablu Inc.

Bridget Watson, Trademark Examining Attorney, Law Office 128,
Colleen Cassidy, Managing Attorney.

Before Goodman, Heasley, and O'Connor,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Ayablu Inc., seeks registration on the Principal Register of the mark HONEYBEE REWARDS PROGRAM (in standard characters, with “REWARDS PROGRAM” disclaimed) for “Administration of a customer loyalty program which provides discounts for the company’s goods and loyalty points to be used toward purchase of the company’s goods; Arranging and conducting incentive reward programs to promote the sale of infant and children’s apparel and related accessories”

in International Class 35.¹

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with these services, so resembles the registered mark HONEY BEE (in standard characters) for "Women's clothing, namely, tops, pants, skirts, dresses, blouses, swimwear and cover ups," in International Class 25, as to be likely to cause confusion, to cause mistake, or to deceive.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

I. Likelihood of Confusion

Trademarks exist "to prevent consumers from being confused about which company is providing a product or service." *Dewberry Grp., Inc. v. Dewberry Eng'rs Inc.*, 604 U.S. ___, 2025 WL 608108, *2 (2025).³ The Trademark Act accordingly bars

¹ Application Serial No. 97904206 was filed on April 24, 2023, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board's TTABVue online docket system.

² Registration No. 4445852, issued on the Principal Register on Dec. 10, 2013, renewed.

³ As part of an ongoing pilot, 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 decisions of the Board, this opinion cites to the Westlaw (WL) legal database and cites only precedential decisions, unless otherwise noted. Practitioners should also adhere to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 101.03(a) (2024).

the registration of “a mark which so resembles [another’s] mark ... as to be likely ... to cause confusion, or to cause mistake, or to deceive. § 1052(d).” *Vidal v. Elster*, 602 U.S. 286, 299 (2024) (internal punctuation omitted).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the “*DuPont* factors”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018).

“Not all the *DuPont* factors are necessarily ‘relevant or of equal weight in a given case, and any one of the factors may control a particular case.’ *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003) (internal quotation marks omitted).” *Bureau Nat’l. Interprofessionnel du Cognac v. Cologne & Cognac Entm’t.*, 110 F.4th 1356, 1365 (Fed. Cir. 2024). Two key considerations are the similarity of the marks and relatedness of the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002)).

A. Similarity of the Marks

Under the first *DuPont* factor, we compare Applicant’s HONEYBEE REWARDS PROGRAM mark and Registrant’s HONEY BEE mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at 1361; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée*

En 1772, 396 F.3d 1369, 1371 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 2018 WL 2734893, *5 (TTAB 2018), *aff’d*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 2014 WL 2531200, *2 (TTAB 2014)), *accord Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co., Ltd.*, 2024 WL 3739358, *8 (TTAB 2024).

Applicant argues that the public will view its HONEYBEE REWARDS PROGRAM mark differently from the cited HONEY BEE mark. “The Cited Mark does not include the words ‘REWARDS’ or ‘PROGRAM,’” Applicant contends. “Although REWARDS PROGRAM is disclaimed from Applicant’s Mark, consumers will still refer to Applicant’s Mark as HONEYBEE REWARDS PROGRAM and therefore the overall commercial impression is different than that of the Cited Mark.”⁴ “Further,” Applicant submits, “although both Applicant’s Mark and the Cited Mark share a common element, that being ‘HONEY BEE’ or ‘HONEYBEE,’ ... [t]here are several points of difference between Applicant’s Mark and the Cited Mark. Applicant’s Mark is three words and uses ‘HONEYBEE’ as one wor[d], whereas the Cited Mark is two words and separates ‘HONEY’ and ‘BEE’ into two words.”

We agree with the Examining Attorney, however, that the marks, taken in their entirety, are quite similar. Both contain or consist of the key term “HONEY[]BEE.” The presence or absence of a space between HONEY and BEE does not meaningfully distinguish them, as they are practically identical in sight, sound and meaning. *See*,

⁴ Applicant’s brief, 6 TTABVUE 10.

e.g., *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 2016 WL 3915987, *5 (TTAB 2016) (holding that the absence of a space does not meaningfully distinguish MINI MELTS from MINIMELTS); *In re Iolo Techs., LLC*, 2010 WL 2513865, *2 (TTAB 2010) (finding ACTIVECARE and ACTIVE CARE confusingly similar); *Seaguard Corp. v. Seaward Int'l, Inc.*, 1984 WL 62803, *3 (TTAB 1984) (“‘SEAGUARD’ and ‘SEAGUARD’ are, in contemplation of law, identical.”) (internal citation omitted); *In re Best W. Family Steak House, Inc.*, 1984 WL 63066, *1 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical.”); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 1983 WL 51866, *2 (TTAB 1983), *aff'd*, 737 F.2d 1576 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”).

Absent a meaningful distinction between these key terms, it is apparent that Applicant’s HONEYBEE REWARDS PROGRAM subsumes and incorporates Registrant’s HONEY BEE mark in its entirety. “When one mark incorporates the entirety of another mark, it has been found to be similar.” *Bureau Nat’l Interprofessionnel du Cognac v. Cologne & Cognac Entm’t.*, 110 F.4th at 1370 (citing *Coca-Cola Bottling Co. of Memphis, Inc. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556 (CCPA 1975); *TiVo Brands LLC v. Tivoli, LLC*, 2018 WL 6921323, *18 (TTAB 2018)).

Applicant also places HONEYBEE at the forefront of its mark, where consumers are most likely to notice and remember it. *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1119 (Fed. Cir. 2024) (citing *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303-04

(Fed. Cir. 2018) (“the Board found that the marks’ lead words are their dominant portion and are likely to make the greatest impression on consumers”) (internal punctuation omitted)). We give due consideration to the trailing terms REWARDS PROGRAM, but note that “from both a visual and auditory perspective, because they are last, they are less likely to be impressed upon a purchaser’s memory and to be used in calling for the goods.” *In re Int’l Fruit Genetics, LLC*, 2022 WL 17222664, *15 (TTAB 2022).

These trailing terms are, moreover, disclaimed as descriptive or generic, and are thus of little assistance to consumers in distinguishing one purveyor’s goods or services from another’s. *In re Charger Ventures LLC*, 64 F.4th 1375, 1382 (Fed. Cir. 2023) (“while the Board must consider the disclaimed term, an additional word or component may technically differentiate a mark but do little to alleviate confusion”). As the Board has noted, “if a junior user takes the entire mark of another and adds a generic, descriptive or highly suggestive term, it is generally not sufficient to avoid confusion.” *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 WL 4877349, *9 (TTAB 2019). “Thus, if the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 1985 WL 72008, *1 (TTAB 1985).

Applicant argues that it “operates the Burt’s Bees Baby website where it sells children’s clothing and other related products (<https://www.burtsbeesbaby.com/>). HONEYBEE REWARDS PROGRAM is used in connection with Applicant’s customer

rewards program. Consumers are likely to draw the connection between Applicant’s primary brand, BURT’S BEES BABY, and the rewards program.”⁵

We emphasize, however, that we determine registrability based on the marks in the Application and Registration, not on other marks Applicant may use in the marketplace. *In re Shell Oil Co.*, 992 F.2d 1204, 1207 n.4 (Fed. Cir. 1993) (“Although Shell argues that its use of RIGHT–A–WAY would be in association with other Shell trademarks, the proposed registration is not so limited. Registrability is determined based on the description in the application, and restrictions on how the mark is used will not be inferred.”). “Regardless, we do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.” *In re Aquitaine Wine USA, LLC*, 2018 WL 1620989, *4 (TTAB 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d at 1324).⁶

“[T]he ‘similarity or dissimilarity of the marks in their entirety’ is a predominant inquiry.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002) (citing *DuPont*, 476 F.2d at 1361).” *Heil Co. v. Tripleye GmbH*, 2024 WL 4925901, *29 (TTAB 2024). For the foregoing reasons, we find that the marks are

⁵ Applicant’s brief, 6 TTABVUE 10.

⁶ The Examining Attorney also objects that Applicant (i) only provided the hyperlink, which is not sufficient to introduce the underlying webpages into the record, *see In re Weiss*, 2024 WL 3617597, *2 (TTAB 2024); and (ii) submitted this new evidence for the first time in its brief, rendering it untimely. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), *cited in In re Taverna Izakaya LLC*, 2021 WL 5411210, *1 (TTAB 2021). We sustain the Examining Attorney’s objection on both grounds, and give the hyperlink evidence no consideration.

very similar, and that the first *DuPont* factor weighs strongly in favor of finding a likelihood of confusion.

B. Relatedness of the Goods and Services, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361.

Applicant argues that its mark “is used in connection with a rewards program relating to the BURT’S BEES BABY brand of children’s clothing and related items,” whereas “the Cited Mark is used in connection with women’s bathing suits.”⁷

Again, “[t]he relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration,” *In re Charger Ventures*, 64 F.4th at 1383, not on real-world conditions. *In re Detroit Athletic*, 903 F.3d at 1307 (“the relevant inquiry in an ex parte proceeding focuses on the goods and services **described in the application and registration**, and **not** on real-world conditions”) (emphasis in original in italics). The goods and services here are Registrant’s “women’s clothing, namely, tops, pants, skirts, dresses, blouses, swimwear and cover ups,” and Applicant’s “administration of a customer loyalty program which provides discounts for the company’s goods and loyalty points to be used toward purchase of the company’s goods; Arranging and conducting incentive reward programs to

⁷ Applicant’s brief, 6 TTABVUE 11.

promote the sale of infant and children’s apparel and related accessories.” We focus on these descriptions in making our determination, not on Applicant’s inadmissible extrinsic evidence of its claimed marketing practices. *In re Embiid*, 2021 WL 2285576, *14 n.38 (TTAB 2021).

The average customers here are ordinary consumers of clothing items, inasmuch as women’s and children’s clothing are standard household items. *Id.* at *15 (clothing items are “worn by virtually everyone”). The customers who shop for women’s clothing could also shop for infants’ and children’s apparel. As our reviewing Court’s predecessor noted, “Registrant contends it is common knowledge that women, as mothers, purchase their children’s clothes, including, of course, their undergarments. Therefore, as the matter stands before us, there is a reasonable likelihood that the same customers would purchase both the boots of registrant and the underwear of applicant. In our opinion, use of the identical trademark on the instant goods would be likely to lead purchasers to assume that they emanated from the same source.” *Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 624 (CCPA 1961) (women’s boots related to men’s and boys’ underwear). Thus, the subject goods and services might be encountered by the same purchasers. *Jeanne-Marc Inc. v. Cluett, Peabody & Co.*, 1984 WL 63081, *4 (TTAB 1984) (“[W]hile [the goods of the parties] might not be encountered in the same stores, both parties’ goods might be encountered by the same purchasers.”).

The relatedness of goods and services is determined from the perspective of the consuming public. “Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the

source or origin of the goods and services.” *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002). “Thus, the goods or services need only be ‘related in some manner 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.’” *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 WL 16646840, *22 (TTAB 2022) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012)).

Here, the Examining Attorney has adduced third-party evidence showing discounts and loyalty rewards programs commonly offered by women’s clothing retailers such as Old Navy,⁸ JCrew,⁹ Columbia Sportswear,¹⁰ Patagonia,¹¹ Zara,¹² Eddie Bauer,¹³ H&M,¹⁴ The Childrens Place,¹⁵ North Face,¹⁶ and Adidas.¹⁷

Evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis....” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d at 1267. This evidence, however, goes beyond that, showing that apparel retailers’ use of discount and loyalty reward programs is commonplace. “This

⁸ OldNavyGap.com, Nov. 29, 2023 Office Action at 6-17.

⁹ JCrew.com, *id.* at 18-39.

¹⁰ Columbia.com, *id.* at 40-51.

¹¹ PatagoniaBend.com, *id.* at 52-55.

¹² Zara.com, *id.* at 56-81.

¹³ EddieBauer.com, *id.* at 82-85.

¹⁴ HM.com, April 4, 2024 Office Action at 7-16.

¹⁵ ChildrensPlace.com, *id.* at 17-25.

¹⁶ TheNorthFace.com, *id.* at 27-49.

¹⁷ Adidas.com, *id.* at 52-58.

evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both.” *In re Detroit Athletic*, 903 F.3d at 1306. And these consumers would, in consequence, “perceive the respective goods and services of the parties as related enough to cause confusion about the source or origin of the goods and services.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (cleaned up) (citation omitted); *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th at 1117, *quoted in In re Samsung Display Co., Ltd.*, 2024 WL 3451873, *3 (TTAB 2024).

Applicant, citing *St. Helena*, contends that the Examining Attorney failed to meet the Federal Circuit’s heightened “something more” evidentiary requirement for situations where goods are compared to services.¹⁸ That standard, however, only applies where the relatedness of the goods and services is not evident, well-known or generally recognized. *In re Samsung Display Co., Ltd.*, 2024 WL 3451873, *7 (TTAB 2024). This case presents the very opposite situation: as the third-party evidence indicates, apparel retailers routinely offer discounts and loyalty reward programs to their customers, who have become accustomed to such incentives. *See In re Detroit Athletic*, 903 F.3d at 1306. The subject goods and services are thus likely to be related in the mind of the consuming public.

Applicant attempts to liken this case to a nonprecedential Board decision, *In re Juice Generation, Inc.*, 2019 WL 1918974 (TTAB 2019), which it contends found that:

SUPA DUPA REWARDS for, inter alia, “arranging and conducting incentive reward programs to promote the sale of prepared food, smoothies, restaurant and cafe services,” “online ordering services in the field of restaurant take-out and delivery; retail store services featuring food and drink,” and “café and restaurant services; juice bar services” is not likely

¹⁸ Applicant’s brief, 6 TTABVUE 12.

to cause confusion with the registered mark SUPER DUPER for, inter alia, non-alcoholic beverages containing fruit juices, smoothies, vegetable-fruit juices, fruit-based beverages, and vegetable juices.¹⁹

Generally, the practice of citing non-precedential Board opinions is not encouraged. *In re tapio GmbH*, 2020 WL 6938377, *9 n.30 (TTAB 2020). “[T]hey are not binding upon the Board, nor are they a substitute for evidence needed to support or traverse a refusal.” TBMP § 1203.02(f). They often present distinguishable factual backgrounds and records, and this case is no exception. In the nonprecedential *Juice Generation* decision on which Applicant relies, the Board found that “because Registrant’s mark [SUPER DUPER] is highly suggestive and, thus, a weak mark, Applicant’s mark may come closer to Registrant’s mark without causing a likelihood of confusion.” *In re Juice Generation*, 2019 WL 1918974, at *3. Here, in contrast, HONEY BEE is arbitrary for Registrant’s identified goods, and is thus conceptually strong as a trademark. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way”; such marks are typically strong). The Board in *Juice Generation* also felt obliged to apply the “something more” requirement, because its subject goods and services were analogous to food and restaurant services. *In re Juice Generation*, 2019 WL 1918974, at *8 (citing *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003)). Here, however, as the third-party evidence demonstrates, the relatedness of the goods and services offered by apparel retailers is evident, well-

¹⁹ Applicant’s brief, 6 TTABVUE 12.

known and generally recognized. *In re Samsung Display*, 2024 WL 3451873, at *7. The third-party evidence also shows how the respective goods and services travel through common channels of trade, offered by the same entities. *In re Charger Ventures LLC*, 64 F.4th at 1382.

The second and third *DuPont* factors thus support a finding of likelihood of confusion.

C. Customer Sophistication

Under the fourth *DuPont* factor, which concerns the purchasing public's relative care and sophistication, Applicant argues that:

the consumers using Applicant's Honeybee Rewards Program are sophisticated in the sense that the program is attached to the Burt's Bees Baby brand, and consumers of Applicant's goods would use the HONEYBEE REWARDS PROGRAM. Thus, Applicant's consumers are clearly aware that Applicant is the source of the HONEYBEE REWARDS PROGRAM, and they would not believe that this program is associated with Honey Bee bathing suits.²⁰

This argument fails for several reasons. First, Applicant's allusion to the "Burt's Bees Baby brand" attempts to resurrect an argument that died aborning, supported by neither the evidence nor the subject Application. Second, as we have found, the average customers here are ordinary consumers of clothing items—i.e., members of the general public. And third, Registrant's identification of goods sets no price points, and are presumed to include women's clothing items that are relatively inexpensive. *Sock It To Me, Inc. v. Aiping Fan*, 2020 WL 3027605, *10 (TTAB 2020). Moreover, Applicant's services are directed to shoppers seeking discount prices. "Because the

²⁰ Applicant's brief, 6 TTABVUE 13.

buyers to whom sales are made are all general consumers, and the goods at issue are relatively low-priced and subject to impulse buying, we find that, the fourth *DuPont* factor weighs in favor of finding a likelihood of confusion.” *Id.* at *11 (TTAB 2020).

II. Conclusion

On careful consideration of the arguments and evidence, we find that the respective marks are similar, that the goods and services are related, and that they would travel through common channels of trade to the same classes of customers, who could not be expected to exercise more than average care and sophistication in making their purchases. We find therefore that there is a likelihood of confusion between the two marks. 15 U.S.C. § 1052(d).

Decision: The refusal to register Applicant’s mark is affirmed.