

This Opinion is Not a
Precedent of the TTAB

Oral Hearing: December 5, 2017

Mailed: February 2, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Louis Vuitton Malletier

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Serial No. 79165769

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Rebecca Gan of Wenderoth LLP
for Louis Vuitton Malletier.

Janice L. McMorrow, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Lykos, Shaw and Lynch,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On February 6, 2015, Louis Vuitton Malletier's ("Applicant") predecessor in interest filed an application to register on the Principal Register the mark APOGÉE in standard characters for:

Perfumery products; perfumes; toilet water; eaux de parfum; eaux de Cologne; perfume bases; extracts of flowers; essential oils; air freshening products; potpourris [fragrances]; incense; cosmetic skin and lip care products; lotions for cosmetic use; cosmetic hand, face and body care products; hair care products; toiletries; soaps; shower gels; bath gels; bath oils; bath salts; foaming bath products; bath beads; cleansing milk for toilet purposes; deodorants; make-up products; lipstick; mascaras for eyelashes; blushers; make-up powder; eye shadows; make-up pencils; make-up removing products, make-up kits; nail care and nail

appearance improvement products; nail polish, nail protectors, nail lacquers, in International Class 3.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the following registered marks, both owned by KAB Brands, that when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive:

Registration No. 1144631 for the stylized mark on the Principal Register **ApHOGEE** for "Hair Conditioner for Professional Use Only" in International Class 3;² and

Registration No. 4866902 for the standard character mark on the Principal Register APHOGEE for "Hair care lotions; Hair conditioners; Hair creams; Hair mousse; Hair oils; Hair shampoo; Hair sprays; Hair styling preparations; Non-medicated hair treatment preparations for cosmetic purposes; Non-medicated preparations all for the care of skin, hair and scalp; Hair moisturizers" in International Class 3.³

When the refusal was made final, Applicant appealed and requested reconsideration which was denied. The appeal was resumed and was fully briefed based on the original identification of goods. Thereafter, multiple requests for remand were filed and granted to permit the introduction of new evidence and

¹ Application Serial No. 79165769, filed under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f ("Madrid Protocol"), requesting extension of protection for International Registration No. 1248536A. The application was originally filed by Pontet Allano Et Associes Selarl De Conseils En Propriete Industrielle but during the pendency of this appeal, was assigned to Louis Vuitton Malletier. See April 20, 2017 Trademark Document and Status Retrieval (TSDR) database entries. The application contains the following translation statement: "The English translation of 'APOGÉE' in the mark is 'HEIGHT.'"

² Registered December 30, 1980; renewed.

³ Registered December 8, 2015.

amend the identification of goods. Ultimately, Applicant's identification of goods was limited to the following:

Perfumery; Perfumery products, namely, oils for perfumes and scents, perfumes; toilet water; eaux de parfum; eaux de Cologne; all of the foregoing for non-professional use and sold only within Louis Vuitton Malletier stores, on Louis Vuitton Malletier's website and within Louis Vuitton Malletier's store-within-store partnerships with high-end retail stores within Louis Vuitton Malletier's exclusive distributor network.

The Examining Attorney accepted the amendment but adhered to the refusal to register. Supplemental briefing then took place focusing on the amended identification, and the appeal is now ready for decision.

I. Section 2(d) Refusal

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis two key considerations are the similarities between the marks and the similarities between the goods. See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). In addition, other relevant factors in this case are the established, likely-to-continue channels of trade as well as the purchasing conditions.

We will focus on Registration No. 4866902 because when that registered standard character mark is considered vis-à-vis the applied-for mark and identified goods, it is that mark that is most likely to support a finding of likelihood of

confusion. In other words, if confusion is likely between these marks, there is no need for us to consider the likelihood of confusion with the other cited registration. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Marks

We commence with the first *du Pont* likelihood of confusion factor which involves an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOH Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

With these principles in mind, we compare the applied-for mark APOGÉE to the cited mark APHOGEE. Applicant argues that because ordinary U.S. consumers familiar with French would translate Applicant’s mark APOGÉE to “height,” it projects a different meaning and commercial impression than Registrant’s mark APHOGEE which is a coined term. When translated, Applicant maintains that its

applied-for mark suggests that its products reflect the “height’ of continental chic.”⁴ In the alternative that consumers do not translate Applicant’s mark, Applicant postulates that by virtue of the presence of an accent mark, consumers are likely to ascribe a French look and pronunciation to its mark with a hard letter sound “P” and soft letter sound “G” (A-PO-ZHAY). By contrast, as Applicant asserts, the diagraph “PH” in the cited mark and absence of the accent mark results not only in a different appearance and sounds — the hard letters “F” and “G” (A-FO-JEE) — but also connotation. Applicant points to marketing materials touting Registrant’s hair products as “pH optimized” and including a “proprietary ProPhytamin complex.”⁵ In Applicant’s view, these differences suffice to distinguish the marks.

Despite the visual differences between the marks, overall they are similar. Each mark is comprised of a single word containing three syllables, commencing with the letter string “A-P” and ending with the letters “O-G-E-E.” But for the addition of the accent mark in Applicant’s mark and letter “H” in Registrant’s mark, the marks are identical. With the cited mark in standard characters, we cannot credit Applicant’s suggestion that the inclusion of “pH” refers to the abbreviation for the measure of hydrogen and therefore results in a different meaning and commercial impression when compared to Applicant’s mark APOGÉE. This is because the letter combination “PH” can be used in any format, including all upper case, which is not consistent with the chemical abbreviation. *See In re Calphalon Corp.*, 122 USPQ2d

⁴ November 7, 2016 Brief, p. 9; 10 TTABVUE 15.

⁵ *Id.* at 9; 10 TTABVUE 16. *See* Applicant’s July 7, 2016 Response to Office Action, TSDR at 2-20.

1153, 1161 (TTAB 2017) (rejecting Applicant’s argument that some letters of its standard-character mark would be presented in lowercase, the Board stated, “[h]aving elected to seek registration of its proposed mark as a standard character mark,” Applicant’s mark must be “assessed without limitation to any particular depiction of that term”); *see also Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011) (“If the registrant ... obtains a standard character mark without claim to any particular font style, size or color, the registrant is entitled to depictions of the standard character mark regardless of font style, size, or color”). As a result, the marks are only slightly different in appearance. *See, e.g., In re Lamson Oil Co.*, 6 USPQ2d 1041 (TTAB 1987) (finding TRUCOOL and TURCOOL similar in appearance); *In re Pix of Am., Inc.*, 225 USPQ 691 (TTAB 1985) (finding NEWPORTS and NEWPORT to be essentially identical in appearance); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (finding MILTRON and MILLTRONICS (stylized) to be highly similar in appearance); *In re BASF AG*, 189 USPQ 424 (TTAB 1975) (finding difference between marks LUTEX and LUTEXAL insufficient to avoid source confusion).

Moreover, because the cited mark APHOGEE is not a recognized word, it may be pronounced in a similar manner as the mark APOGÉE. *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014) (“There is no correct pronunciation of a trademark that is not a recognized word.”); *see also In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (“[T]here is no correct pronunciation of a trademark, and consumers may pronounce a mark

differently than intended by the brand owner.”); *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227, 227 (CCPA 1969) (“We think that one is very likely to pronounce ‘Collegienne’ as if it were spelled ‘Colleejen’ or ‘Colleejun.’”). Hence, even if consumers were to perceive Applicant’s mark APOGÉE as the French word for “height,” because the marks are so alike in appearance and could be pronounced similarly, it is likely that consumers would perceive the cited mark as having the same meaning and commercial impression. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007) (whether or not ASPIRINA is viewed by the public as a Spanish term, consumers would have the same perception of the term as the equivalent of “aspirin”).

Thus, when considered as a whole, both Applicant’s and Registrant’s marks are similar in appearance, sound, connotation and commercial impression. The first *du Pont* factor therefore weighs in favor of finding a likelihood of confusion.

B. The Goods

Next we discuss the second *du Pont* factor, a comparison of the goods, bearing in mind that Applicant’s and Registrant’s respective goods must be compared as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The respective goods need not be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis, but 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 [the goods] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave sweetener related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). Likelihood of confusion must be found as to the entire class if there is likely to be confusion with respect to any good that comes within the identification of goods in that class. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

Applicant’s goods consist of “Perfumery; Perfumery products, namely, oils for perfumes and scents, perfumes; toilet water; eaux de parfum; eaux de Cologne ... for non-professional use ...”; Registrant’s goods are identified as “Hair care lotions; Hair conditioners; Hair creams; Hair mousse; Hair oils; Hair shampoo; Hair sprays; Hair styling preparations; Non-medicated hair treatment preparations for cosmetic purposes; Non-medicated preparations all for the care of skin, hair and scalp; Hair moisturizers.” Based on the identifications themselves, the involved goods fall under

the general category of beauty and personal care products. This, standing alone, does not suffice to show relatedness since there is no per se rule in this regard. However, the record includes evidence that it is not uncommon for perfumery and hair care products to be sold under the same trademark:

- Calvin Klein Eternity trademark used in connection with perfume, eau de toilette, hair/body wash;⁶
- Salvatore Ferragamo Acqua trademark used in connection with perfume, eau de toilette, and shampoo/shower gel;⁷
- Clinique trademark used in connection with hairspray, perfume, body cream;⁸
- Jack Black trademark used in connection with perfume and shampoo;⁹
- Amazing Grace trademark used in connection with eau de toilette, shampoo, perfume.¹⁰

From this evidence we can glean that Applicant's and Registrant's perfumery and hair products are related, complementary items intended to be used together as part of one's beauty care regime. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (“[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.”).

⁶ Excerpts from Macy's website www.macys.com submitted with March 13, 2017 Final Office Action March 13, 2017 at TSDR 2-5.

⁷ *Id.* at 10-12.

⁸ Excerpts from Clinique website www.clinique.com submitted with March 13, 2017 Final Office Action at TSDR 59 and 62.

⁹ Excerpts from www.getjackblack.com submitted with March 13, 2017 Final Office Action at TSDR 64-67.

¹⁰ Excerpts from www.philosophy.com submitted with March 13, 2017 Final Office Action at TSDR 74-79, 104, 108.

This evidence also shows that consumers may not only expect to encounter such products under the same trademark but may also look for perfumery and hair care products sharing the same scent. We acknowledge that some of the aforementioned evidence may involve house marks, but this is no surprise given the nature of the goods. The evidence still remains probative to the extent that it demonstrates that the involved goods may emanate from the same source and are designed to be used together.

Applicant argues that it does not manufacture hair products and that “Registrant has no nexus to the alchemic ambit of luxury French perfume.”¹¹ In addition, Applicant contends that Registrant’s products are limited to professional grade products. Applicant’s arguments are unavailing, as we must rely on the identifications of goods in the application and registration at issue, not on extrinsic evidence of actual use. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ2d at 1787. The fact that Applicant has limited its perfumery products to “non-professional use” cannot serve as a distinguishing factor; this is because unlike Registration No. 1144631, the hair care products listed in Registration No. 4866902 are not restricted to “professional use.” As such, we must assume that Registrant’s goods encompass both professional and non-professional use meaning that they are available for sale to the general public and not just hair care professionals. Also, as noted above, it is well established that the involved goods need not be identical. The issue is not whether the goods will be confused with each other, but rather whether

¹¹ July 21, 2017 Supplemental Brief, p. 4; 32 TTABVUE 9.

the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). *See also, Capri Cosmetics, Inc. v. Nina Ricci S.A.R.L.*, 142 USPQ 361 (TTAB 1964) (cosmetics and beauty preparations and perfumes are closely related goods).

Accordingly, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

C. Established, likely-to-continue channels of trade

We direct our attention to the established, likely-to-continue channels of trade, the third *du Pont* factor. A pivotal issue in this appeal is whether the trade channel restrictions set forth in the application of “sold only within Louis Vuitton Malletier stores, on Louis Vuitton Malletier’s website and within Louis Vuitton Malletier’s store-within-store partnerships with high-end retail stores within Louis Vuitton Malletier’s exclusive distributor network” obviate any likelihood of confusion. Applicant contends that these trade channel limitations ensure that “there is simply no universe in which the average reasonable consumer would conclude that Applicant’s, premium luxury fragrance goods would emanate from a common source with Registrant’s specialty, professional-grade hair conditioner.”¹²

As noted above, the cited registration upon which we rely is not limited to hair conditioners; nor is it limited to professional use or, for that matter, to any particular channel of trade. Because the identification in cited Registration No. 4866902 has no trade channel restrictions, we must presume that Registrant’s hair care products

¹² July 21, 2017 Supplemental Brief, p. 2; 32 TTABVUE 7.

travel in all trade channels appropriate for such goods. *See Octocom*, 16 USPQ2d at 1787. These trade channels include, as reflected in the record, traditional brick-and-mortar and online department stores (e.g. Macy's and Macys.com) as well as direct business-to-consumer (B2C) websites offering for sale to the general public hair care products and perfumes (Clinique.com, JackBlack.com, AmazingGrace.com). We agree with Applicant that Louis Vuitton Malletier stores and the Louis Vuitton Malletier's B2C website are specialized trade channels that do not overlap with the ordinary channels of trade for Registrant's products. However, we find otherwise with regard to "Louis Vuitton Malletier's store-within-store partnerships with high-end retail stores within Louis Vuitton Malletier's exclusive distributor network." Given that high-end retail stores often sell the types of goods at issue, we consider this a trade channel appropriate for the goods, and therefore one in which we presume Registrant's goods may travel. Indeed, there is no evidence to suggest that the trade channels are mutually exclusive. We cannot conclude that there would be no overlapping channels of trade between Applicant's and Registrant's goods. *See also Revlon, Inc. v. La Maur, Inc.*, 157 USPQ 602, 605 (TTAB 1968) ("[A]pplicant's hair conditioner and opposer's perfume, toilet water, talc, etc. are closely related cosmetic and toiletry products that are, as the record shows, generally sold through the same outlets to the same classes of purchasers and, moreover, are products which are found in a line of cosmetics and toiletries marketed by several perfume or cosmetic houses."); *Mary Kay Cosmetics, Inc. v. Dorian Fragrances, Ltd.*, 180 USPQ 406, 407 (TTAB 1973) (perfumes are available to the general public in stores which

cater to those of expensive tastes and in drug stores which cater to persons of all tastes). Hence, on the record before us, the third *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

D. Conditions of Sale

Lastly we consider the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

According to the record, Applicant's products sold under the APOGÉE mark, retail for \$240 for a 100 ml bottle and \$350 for 200 ml sold separately.¹³ As Applicant contends, its goods are "high-end, hard to come by and hotly anticipated."¹⁴ By contrast, Registrant's products are sold in beauty supply shops for approximately \$11 for a 16 ounce bottle.¹⁵ In addition, Applicant maintains that perfume by its very nature is highly personal, meaning that prospective consumers are likely to exercise a high degree of care when comparing various perfumes and making purchasing decisions. Applicant likewise postulates that professional-grade hair products are not casual purchases either.

¹³ March 16, 2017 Request for Remand; 24 TTABVUE 28, 42 and 45.

¹⁴ July 21, 2017 Supplemental Brief, p. 4; 32 TTABVUE 9.

¹⁵ July 7, 2016 Office Action Response at TSDR 20-21

Both Applicant's and Registrant's products are offered for sale to the general public. In addition, the registration is unrestricted with regard to purchasers or price point. In other words, both Applicant's mark and the Registrant's could be sold to unsophisticated consumers, suggesting that purchases may be made with no greater than ordinary care or consideration.

Nonetheless, even if we accept Applicant's assertion that its involved goods may be the subject of sophisticated and discriminating purchases, careful purchasers are likely to be confused by highly similar marks used in connection with related goods. "[T]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)). Therefore, even if purchasers of the identified goods may exercise care before purchasing these goods, it does not mean there can be no likelihood of confusion. In the present case, the similarity between the marks and related nature of the goods as identified outweigh any sophisticated or careful purchasing decision. *See HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). As such, this *du Pont* factor is, at best, neutral.

II. Conclusion

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, each of the *du Pont* factors discussed above either favors a finding of likelihood of confusion or is neutral. To summarize, despite slight differences, the marks overall are similar in appearance and may be pronounced in an identical or similar manner, meaning that they project virtually the same connotation and commercial impression. This, coupled with the related and complementary nature of the goods which are marketed in at least one overlapping trade channel to the general public leads us to the conclusion that confusion as to source is likely. On balance, we are not persuaded that because of the price and personal nature of Applicant's products that prospective consumers encountering Applicant's and Registrant's marks in the marketplace are unlikely to be confused, given the similarities of the marks and relatedness of the goods.

Decision: The Section 2(d) refusal to register is affirmed with regard to cited Registration No. 4866902; accordingly, we need not consider the refusal with regard to Registration No. 1144631.