

This Opinion is Not a
Precedent of the TTAB

Mailed: December 6, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Azam
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Serial No. 85863664
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Philip Thomas Norton, Esq. for Farhad A. Azam.

Wendy B. Goodman, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Taylor, Bergsman and Gorowitz,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Farhad A. Azam (“Applicant”) seeks registration on the Principal Register of the
mark CROME (in standard characters) for the goods listed below:

Conditioners; Hair care products, namely, heat protection
sprays; Hair color; Hair conditioners; Hair gel and hair
mousse; Hair gels; Hair glaze; Hair masks; Hair mousses;
Hair pomades; Hair shampoos and conditioners; Hair
sprays; Hair sprays and hair gels; Hair styling gel; Lotions
for face and body care; Non-medicated hair serums;

Pomades; Styling clay for hair; Styling gels; Styling paste for hair, in International Class 3.¹

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 that Applicant's mark so resembles the registered mark CHROME GIRL (standard characters) for the goods listed below as to be likely to cause confusion:

Beauty creams, excluding face creams; beauty lotions, excluding face lotions; blush; body cream; body lotion; cosmetics, excluding fragrances and perfumes; compacts containing make-up; cosmetic creams for hand and foot; cosmetic preparations, namely, firming lotions; cosmetic soaps; cosmetic suntan lotions; cosmetics and make-up, excluding fragrances and perfumes; cosmetics in general, excluding fragrances and perfumes; eye make-up; eye pencils; eye shadow; body creams for body care; face and body glitter; body lotions for body care; face glitter; facial make-up; foundation make-up; foundations; hair balsam; hair care lotions; hair color; hair dye; hair gel and hair mousse; hair removing cream; hair shampoos and conditioners; hair sprays and hair gels; hand soaps; lip balm; lip gloss; lip liner; lipstick; lotions for body care; make-up; make-up foundations; make-up pencils; make-up powder; mascara, nail polish; nail polish remover; nail stencils; skin lotion, excluding face lotion; sun tan lotion; sun-block lotions, in Class 3.²

Registrant disclaimed the exclusive right to use the word "Girl."

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

¹ Application Serial No. 85863664 was filed on February 28, 2013, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant's claim of first use anywhere on January 6, 1997 and first use in commerce since at least as early as June 1, 1997.

² Registration No. 4743904, registered May 26, 2015.

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 the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (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.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (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, 123 USPQ2d 1744, 1747 (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.*, 303 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

- A. The similarity or dissimilarity and nature of the goods and established, likely-to-continue channels of trade.

The description of goods in the application and the cited registration are in part identical because they both include body lotion, hair gel and mousse, hair shampoos and conditioners, and hair sprays. Under this *du Pont* factor, the Trademark Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“it is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

Because the goods described in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp.*,

Inc. v. Tseng, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

B. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“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*, 101 USPQ2d at 1721 (quoting *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007); see also *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*,

23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods at issue are hair care products and body lotions, the average customer is an ordinary consumer.

Applicant's mark is CROME and the registered mark is CHROME GIRL. While the marks are not identical, they are similar because they share the phonetically equivalent words "Crome" and "Chrome." The word "Chrome" is defined as "chromium-plated or other bright metallic trim, as on an automobile" or "*Photography*. a positive color transparency; kodachrome."³ Applicant did not provide, and we could not find, any definition of the word "Crome." Accordingly, we find that CROME is an intentional misspelling of the word "Chrome."

Applicant contends that its CROME mark "creates a connotation of goods that make any consumer's appearance shine and glow," and that the CHROME GIRL mark "creates the connotation of goods that will make a girl shine."⁴ Likewise,

³ *Dictionary.com* based on the **Random House Dictionary** (2017). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

⁴ Applicant's Brief, pp. 11-12 (4 TTABVUE 12-13).

Applicant asserts that its CROME mark “creates a commercial impression of goods that make anyone shine and glow, similar to chrome when it is hit with the sun,” while the registered mark CHROME GIRL “creates a commercial impression of a female who is either made of chrome, a female who endorses chrome, or a shiny girl.”⁵ We find very little difference in these purported meanings and commercial impressions. In essence, Applicant argues that its mark means and engenders the commercial impression of goods that will make you shine and glow and that Registrant’s mark means and engenders the commercial impression of a shiny girl. While the word “Girl” in the mark CHROME GIRL may not be ignored, we find that it does not create any significant difference in the meaning or commercial impression of the marks.⁶

Accordingly, we find that CROME is similar to CHROME GIRL in terms of appearance, sound, connotation and commercial impression.

C. The nature and extent of any actual confusion.

Applicant asserts that there has been no reported instances of any actual confusion even though the marks have been used simultaneously since 2014 in presumptively the same channels of trade.⁷

⁵ Applicant’s Brief, p. 9 (4 TTABVUE 10).

⁶ The Examining Attorney asserts that because the word “Girl” has been disclaimed as being merely descriptive, it is entitled to less weight than the word “Chrome.” Examining Attorney’s Brief (6 TTABVUE 5). However, there is no evidence in the record as to why Registrant disclaimed the exclusive right to use the word “Girl” and we will not speculate as to why it was disclaimed. *See* Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a) (“An Applicant may voluntarily disclaim a component of a mark sought to be registered.”).

⁷ Applicant’s Brief, pp. 12-13 (4 TTABVUE 13-14).

The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an *ex parte* proceeding:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an *ex parte* context.

Majestic Distilling, 65 USPQ2d at 1205.

While examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

In any event, this record is devoid of any probative evidence relating to the extent of use of Applicant's and Registrant's marks and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

D. Analyzing the factors.

Because the marks are similar, the goods are in part identical, and there is a presumption that the goods move in the same channels of trade to the same classes of purchasers, we find that Applicant's mark CROME for a wide variety of hair care products and body lotions is likely to cause confusion with the registered mark CHROME GIRL for the same products.

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