

**This Opinion is Not a
Precedent of the TTAB**

Mailed: January 25, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Lawrence Charles
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Serial No. 87297780
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Troy M. Schmelzer of Baker & Hostetler LLP,
for Lawrence Charles.

Leslie L. Richards, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

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Before Wellington, Shaw and Greenbaum,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Lawrence Charles (“Applicant”) seeks registration on the Principal Register of the
mark TEABLY (in standard characters) for

Tea-based beverages in International Class 30.¹

¹ Application Serial No. 87297780 was filed on January 11, 2017, based upon Applicant’s claim of first use anywhere at least as early as October 2014, and use in commerce since at least as early as May 2015.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark TEABLEE (in standard characters) for

Houseware and glass products, namely, items used in the preparation or presentation of tea namely, coffee cups, tea cups, and mugs, drip mats for tea, tea infusers, infusers not of precious metal, tea strainers, tea balls, tea balls not of precious metal, tea caddies, tea canisters, tea sets; utensils used in the preparation of tea; Household utensils, namely; swizzle sticks, slotted spoons, mixing spoons; drinking vessels; drinking straws of non-precious metal; drinking straws of wood in International Class 21.²

After the refusal was made final, Applicant requested reconsideration and appealed to this Board. Reconsideration was denied, proceedings resumed, and the appeal is fully briefed. We affirm the refusal to register.

I. Applicable Law

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *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.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

² Registration No. 4951265 issued on May 3, 2016.

differences in the marks.”). We discuss below these and other relevant factors. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered); *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.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity of the marks

Under this factor, we compare Applicant’s mark TEABLY and the cited mark TEABLEE “in their entirety as to appearance, sound, connotation and commercial impression.” *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *du Pont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The test is not whether the marks can be distinguished in a side-by-side comparison, but instead whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted). Further, marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper

focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See St. Helena Hosp.*, 113 USPQ2d at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971). Here, the average customer includes members of the general public who drink, prepare or serve tea and tea-based beverages.

Although there is no “correct” pronunciation of a mark, *Viterra*, 101 USPQ2d at 1912, we find, and Applicant does not dispute, that consumers are most likely to view and verbalize Applicant’s mark TEABLY as the phonetic equivalent of the cited mark TEABLEE. *See Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985) (“the word portion of applicant’s mark ‘SEYCOS’, is virtually the phonetic equivalent of opposer’s ‘SEIKO’ mark and is, in fact, the phonetic equivalent of the plural of opposer’s mark”).

In certain circumstances, similarity in sound alone may be sufficient to find the marks confusingly similar. *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Here, the marks TEABLY and TEABLEE also are nearly identical in appearance, differing only by the final letter Y in Applicant’s mark in place of the letters EE in the cited mark. Applicant argues consumers will focus on this difference because the “overlapping portion-TEA-of applicant’s mark and the cited mark is descriptive.”³ This argument is not persuasive because the marks share the five-letter string T-E-A-B-L, not just the first three letters T-E-A. We find the different final letters (Y and EE) a minor

³ Applicant’s Brief, 10 TTABVUE 8.

distinction that does not obviate the striking visual similarities and aural identity of the marks. *See, e.g., Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Assn*, 811 F.2d 1490, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH confusingly similar); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 495 (TTAB 1985) (CAYNA is similar to CANA).

As for meaning or significance of the marks, there is no evidence that TEABLY or TEABLEE has any meaning or that they are anything other than coined terms, as Applicant has recognized (“both marks are strong and fanciful terms.”).⁴ Nonetheless, Applicant argues that the marks create different commercial impressions because “[t]he ‘ABLY’ ending of applicant’s mark is intended to evoke the concept of ability, that is, the state of doing something ably or capably. When ABLY is appended to TEA, the resulting mark TEABLY is intended to bring to mind the health benefits of tea along with the overall impression of being able or capable,” while the cited mark TEABLEE “combines ‘TEA’ with ‘BLEE,’ which has no meaning that applicant could determine and does not evoke the concept of ability.”⁵

There are several problems with this argument. First, Applicant’s mark TEABLY does not look or sound like the word “ability,” so we find it unlikely that the mark would convey the commercial impression of “ability.” Second, regardless of Applicant’s stated intentions about his mark, because the marks TEABLY and TEABLEE look and sound alike, and they both are coined terms with no meaning,

⁴ April 30, 2018 Response to Office Action, TSDR 5. Citations to the TSDR database are to the downloadable .pdf format.

⁵ Applicant’s Brief, 10 TTABVUE 8-9.

they create the same overall commercial impression. Third, Applicant has set up a false comparison by dividing his mark TEABLY into the components “tea” and “ably” but dividing the cited mark TEABLEE into the components “tea” and “blee.” A true comparison would divide the marks the same way—either “tea” and “ably” vs. “tea” and “ablee,” or “tea” and “bly” vs. “tea” and “blee”—which would vitiate Applicant’s argument.

When viewed in their entireties, we find the marks to be highly similar in appearance and identical in sound, connotation and commercial impression. This *du Pont* factor supports a finding of a likelihood of confusion.

B. Relatedness of the Goods and Channels of Trade

With regard to the goods and channels of trade, we must make our determinations under these factors based on the goods as they are identified in the application and the cited registration. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

1. Similarity of Goods

The second *du Pont* factor “considers whether the consuming public may perceive [the respective [goods or] services of the parties] as related enough to cause confusion about the source or origin of the ... [goods or] services.” *St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett-Packard*, 62 USPQ2d at 1004). The goods identified in the

application are “tea-based beverages,” while the goods identified in the registration include tea-specific goods, such as tea cups and mugs, and accessories used to prepare or present tea, such as tea infusers, tea strainers, tea caddies, and tea sets.

Although the goods identified in the application are not identical to the goods identified in the registration, identity is not required to support a finding of likelihood of confusion. *Coach Servs.*, 101 USPQ2d at 1722 (“[I]t is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.”) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (the services [or goods] need not be identical or even competitive to find a likelihood of confusion). Rather, “likelihood of confusion can be found ‘if the respective products are related in some manner and/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.’” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven*, 83 USPQ2d at 1724). The issue is whether there is a likelihood of confusion as to the source of the goods, not whether purchasers would confuse the goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). In addition, under this *du Pont* factor, the Examining Attorney need not prove, and we need not find, similarity between Applicant’s identified goods and each product listed in the identification of goods in the registration. 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 registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

The Examining Attorney submitted a number of printouts from third-party commercial websites demonstrating that a single entity is likely to provide or feature tea and tea-based beverages, as well as one or more of the tea ware or tea accessories identified in the registration, all under the same mark. For example, Teavana offers tea, including bottled tea, and tea ware and accessories for the preparation and presentation of tea under the mark TEAVANA,⁶ Republic of Tea offers bottled, ready to drink tea brewed from real tea leaves, bottled iced tea, and tea bags, tea accessories and tea ware under the mark REPUBLIC OF TEA,⁷ Harney offers bottled tea, and tea bags, tea accessories and tea ware under the mark HARNEY & SONS,⁸ Celestial Seasonings offers tea and tea accessories such as mugs and tins under the mark CELESTIAL SEASONINGS,⁹ and Capital Teas offers teas and tea wares such as infusers under the mark CAPITAL TEA.¹⁰ *See, e.g., In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

⁶ October 31, 2017 Final Office Action, TSDR 8-13 and May 21, 2018 Denial of Request for Reconsideration, TSDR 9-10.

⁷ October 31, 2018 Final Office Action, TSDR 59-65 and May 21, 2018 Denial of Request for Reconsideration, TSDR 16-29, 57-62.

⁸ May 21, 2018 Denial of Request for Reconsideration, TSDR 11-15.

⁹ May 21, 2018 Denial of Request for Reconsideration, TSDR 30-43.

¹⁰ May 21, 2018 Denial of Request for Reconsideration, TSDR 76-78.

The Examining Attorney also made of record a number of use-based, third-party registrations from the USPTO's electronic database to show that it is common for a single entity to register the same mark for tea and tea accessories or tea ware that are the same as, or very similar to, those at issue.¹¹ For example, Reg. No. 3956023 for PURE RELEAF identifies teas, tea cups and mugs, tea pots and tea services, Reg. No. 4305771 for BARNIE'S COFFEEKITCHEN identifies tea, tea cup and mugs. Reg. No. 4297879 for ORGANICALLY YOURS, MISSTEAM identifies teas and beverages made of tea as well as tea balls, tea caddies, tea canisters, tea infusers and tea sets, and Reg. No. 5156327 for DAVIDSTEAM identifies teas and tea beverages as well as empty tea storage tins, tea canisters, and accessories for the preparation and service of tea including tea pots, tea bowls, tea strainers, tea balls, tea infusers, tea sets, cups, mugs, saucers, tea kettles and tea trivets.¹²

While third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, such registrations that individually cover a number of different items and are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed services are of a type which may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *see also In re Anderson*, 101 USPQ2d 1912,

¹¹ April 10, 2017 Office Action, TSDR 7-124.

¹² *Id.* at TSDR 7-11, 18-23.

1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant contends that the identified goods are not related because he uses his mark on bottled, low-calorie, tea-based beverage that are marketed as a “healthier alternative to other bottled ice tea drinks in the consumer beverage market,” while “Registrant’s website at www.teablee.com indicates that Registrant uses the TEABLEE mark in connection with a small metal basket that serves as a tea infuser, steeper, and strainer for brewing single cups or pots of loose leaf tea.”¹³ Arguments concerning the actual or intended use of the marks are not relevant to our analysis of the relatedness of the goods. As stated above, we must assess this *du Pont* factor according to the identifications of the respective goods in the application and cited registration, not on extrinsic evidence of actual use. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ at 1787; *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Based upon the identifications of goods in the application and registration, and the ample evidence of record, we find that consumers would believe that the goods identified in the application are closely related to the goods identified in the registration, and that they may emanate from a common source.

¹³ Applicant’s Brief, 10 TTABVUE 6, 10.

2. Channels of Trade

Considering the channels of trade and classes of purchasers, because there are no limitations or restrictions as to trade channels or classes of purchasers in the identification of goods in the application or cited registration, we presume that the identified goods are or would be marketed in all normal trade channels for such goods and to all normal classes of purchasers of such goods. *Stone Lion*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels ... for the relevant goods.”). The trade channels for the goods identified in application and registration are the same, and would include tea shops and kitchenware stores. The relevant classes of consumers for the identified goods also are the same, and would include those who drink, prepare or serve tea. *See 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”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In addition to the relatedness evidence from commercial websites discussed above, the Examining Attorney submitted screenshots from the online retail websites for Bed Bath and Beyond,¹⁴ World Market,¹⁵ Williams-Sonoma¹⁶ and The Spice & Tea

¹⁴ October 31, 2017 Final Office Action, TSDR 12-16.

¹⁵ *Id.*, TSDR 17-19.

¹⁶ *Id.*, TSDR 39-47.

Exchange¹⁷ which show that these entities sell tea and tea accessories together in the same sections of their websites. This evidence confirms that tea and tea accessories travel in the same channels of trade and are offered to the same classes of consumers. *See Anderson*, 101 USPQ2d at 1920.

Applicant contends that “Applicant’s goods appeal to on-the-go consumers looking for quick, ready-made and easily consumable beverages, whereas registrant’s goods appeal to a different class of consumers seeking to make beverages in their own homes using specialized equipment.”¹⁸ Applicant further argues that the identified goods move in different channels of trade because “registrant’s goods are specialty goods that will likely be purchased after a focused search from applicant’s or a third party website, [while] applicant’s goods will likely be purchased off the shelf in a physical store for immediate consumption.”¹⁹ In light of the above-discussed legal presumptions and confirming evidence that the channels of trade and classes of consumers for the goods identified in the application and registration are the same, these arguments are not persuasive.

The similarities of the goods and their channels of trade weigh heavily in favor of a finding of likelihood of confusion.

¹⁷ May 21, 2018 Denial of Request for Reconsideration, TSDR 77-78

¹⁸ Applicant’s Brief, 10 TTABVUE 11-12.

¹⁹ *Id.* at 12.

II. Conclusion

Having considered all the evidence and arguments bearing on the relevant *du Pont* factors, we conclude that the marks are highly similar, and the identified goods are closely related and move through the same channels of trade to the same classes of purchasers. We therefore find that Applicant's mark is likely to cause confusion with the cited mark when used on or in connection with the goods identified in the application.

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