

This Opinion Is Not a
Precedent of the TTAB

Hearing: October 20, 2020

Mailed: October 21, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Carolyn Anderson Beautiful, LLC
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Application Serial No. 87851445
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David L. Bieck of DeWitt LLP for Carolyn Anderson Beautiful, LLC.

Grace Duffin, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney
—————

Before Bergsman, Goodman and Coggins, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Applicant Carolyn Anderson Beautiful, LLC seeks registration on the Principal Register of the stylized mark BEAUTIFUL, reproduced below, for “hair care products, namely, shampoos; hair conditioners; hair sprays; styling gels; hair fiber protectants in the form of lotions and creams; styling foams for hair; root lifters in the nature of hair creams, foams, gels, and spray liquids; volumizers in the nature of hair creams,

foams, gels, and sprays; hair lotions, gels, pomades, and waxes in the nature of hair taffies; and hair waxes,” in International Class 3.¹



The description of the mark in the application reads as follows:

The mark consists of the word “Beautiful” represented in script font with a stylized, horizontally-disposed S curve extending from the “L” in “Beautiful” and across the top of the word “Beautiful”.

Color is not claimed as a feature of the mark.

The Examining Attorney refused to register Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark for hair care products listed in the identification of goods so resembles the registered mark BEAUTIFUL, in typed drawing form, for “perfume, cologne, body creme, body lotion, body powder, perfumed soap,” in International Class 3, as to be likely to cause confusion.²

I. Preliminary Issue

Applicant attached to its brief the evidence listed below without having previously submitted the evidence during the prosecution of its application:

¹ Serial No. 87851445 filed March 27, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming August 15, 2017 as its date of first use anywhere and first use in commerce.

² Registration No. 1762297 registered April 6, 1993; second renewal.

- Exhibit A – photograph of products bearing Applicant’s mark;
- Exhibit B – photograph of Applicant’s product;
- Exhibit C – an excerpt from Applicant’s website;
- Exhibit D – photograph of Registrant’s product;
- Exhibit E – an excerpt from Registrant’s website;
- Exhibit F – the definition of the word “beautiful” derived from Webster’s Ninth

New College Dictionary (1987);

- Exhibit G – printout of the results of search of the USPTO’s Trademark Electronic Search System (TESS) for the word “beautiful” in International Class 3;

- Exhibit H – printout of the results of a TESS search for the word “beautiful” for shampoo; and

- Exhibit I – printout of the results of a TESS search for the word “beautiful” for shampoo limited to live applications and registrations.

The Examining Attorney, in her brief, objects to the evidence attached to Applicant’s brief on the ground that Applicant did not timely submit the evidence.

Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

At the oral hearing, Applicant pointed out that in its January 21, 2019 Response to Office Action and its August 21, 2019 Request for Reconsideration, it proffered that

there are 813 applications for registrations for trademarks containing the word ‘beautiful’ covered by Class 3.”³ The Examining Attorney, in her denial of the Request for Reconsideration, pointed out Applicant did not submit a copy of the purported search and explained “[to] make third-party registrations part of the record, an applicant must submit copies of the registrations, or the complete equivalent from the USPTO’s automated systems, prior to appeal,” citing *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2064 (TTAB 2013), TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.03 (2018), and TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 (2020).⁴ Applicant did not file a request to the Board to suspend the appeal and to remand the application for further examination.

The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examining attorney after the appeal is filed.⁵ See *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB

³ January 21, 2019 Response to Office Action (TSDR 2 and 5); August 21, 2019 Request for Reconsideration (TSDR 2 and 5).

In her February 21, 2019 Office Action, the Examining Attorney incorrectly stated that Applicant’s argument that Registrant’s trademark is inherently weak is a collateral attack on the validity of the registration and, therefore, she did not expressly address Applicant’s proffer regarding the contents of the USPTO database. February 21, 2019 Office Action (TSDR 3-4).

Citations to the prosecution record are to the USPTO’s Trademark Status and Document Retrieval system (TSDR) in the downloadable .pdf format.

⁴ September 23, 2019 Request for Reconsideration Denial. (TSDR 4).

⁵ The Board’s well-established practice is not to take judicial notice of third-party registrations when an applicant or examining attorney requests that such notice be taken during the course of an appeal. See TBMP § 1208.02. See also *In re Olin Corp.*, 124 USPQ2d 1327, 1335 n.22 (TTAB 2017) (Board declined to take judicial notice of registrations owned by applicant). To make a third-party registration of record, a copy of the registration (from

2018), *aff'd mem.*, 777 Fed. App'x 516 (Fed. Cir. 2019). We sustain the objection and we will not consider the evidence attached to Applicant's brief with the exception of the dictionary definition.⁶

II. Likelihood of confusion

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "In discharging this duty, the thirteen *DuPont* factors 'must be considered' 'when [they] are of record.'" *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019), *quoting In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567. "Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018), *quoting In re Mighty Leaf*

either the electronic records of the Office or the paper USPTO record) must be submitted. *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012) (mere listing of third-party registrations in brief insufficient to make them of record); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372 (TTAB 2006); *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1456 n.2 (TTAB 1998); *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). *See also In re Fiat Group Marketing & Corporate Communications S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014) (examining attorney's objection to applicant's submission of third-party registration with appeal brief sustained).

⁶ The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

Tea, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). *See also 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.”).

“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, 177 USPQ 386, 387 (CCPA 1973). 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.3d 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.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002).

A. The similarity or dissimilarity of the marks.

We turn first to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*,

126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014),); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he 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.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

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); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *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 “perfume, cologne, body creme, body lotion, body powder, perfumed soap,” the average customer is an ordinary consumer.

Applicant is seeking to register the stylized mark BEAUTIFUL, reproduced below, and the registered mark is BEAUTIFUL in typed drawing form.



A typed drawing is the equivalent to a drawing in standard character form. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks.”). Marks presented in standard characters (formerly typed drawing form) are not limited to any particular depiction. The rights associated with a mark in standard characters or typed drawing format reside in the wording, and not in any particular display. Thus, Registrant may depict the registered mark in any manner, regardless of the font style, size, or color. Registrant, at any time in the future, might display its mark in a manner similar to Applicant’s mark. *Viterra*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original)). Thus, Applicant’s argument that Registrant uses its mark in block lettering is unavailing.⁷

⁷ Applicant’s Brief, p. 5 (12 TTABVUE 6).

Applicant also argues that Applicant distinguishes its mark from Registrant's mark by displaying its trade name Carolyn Anderson Beautiful on the product bottles and displaying the name Carolyn Anderson in front of the stylized BEAUTIFUL trademark.⁸ However, "[i]n determining the applicant's right to registration, only the mark as set forth in the application may be considered." *Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959). *See also i.am.symbolic*, 123 USPQ2d at 1729 ("To the extent that Symbolic is advocating that we consider another mark, will.i.am, that is not part of the applied-for mark in analyzing the similarity of the marks, we decline to do so. The correct inquiry requires comparison of the applied-for mark, which only includes the words 'I AM,' to the registrants' marks."); *Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 253 F.2d 431, 117 USPQ 213, 214 (CCPA 1958) ("The fact that each of the parties applies an additional name or trademark to its product is not sufficient to remove the likelihood of confusion. The right to register a trademark must be determined on the basis of what is set forth in the application rather than the manner in which the mark may be actually used."); *Blue Cross and Blue Shield Ass'n v. Harvard Cmty. Health Plan Inc.*, 17 USPQ2d 1075, 1077 (TTAB 1990).

Applicant asserts "the consumer will be unaware of the scope of [Registrant's] Registration, and will only be familiar with [Registrant's] products sold in stores and appearing on its website" which is purportedly different from how Applicant uses its

⁸ *Id.*

mark.⁹ There are several problems with this argument. First, because Applicant failed to introduce supporting evidence in a timely manner, Applicant's argument is uncorroborated. Second, as noted above, in this appeal we are concerned with the registration of Applicant's mark, not its use. Finally, in evaluating the similarity of the marks, we may take into account whether the trade dress of packages or labels used by Applicant or Registrant demonstrate that the trademark projects a similar commercial impression. *Am. Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793, 797 (TTAB 1986). However, Applicant may not use Registrant's trade dress or actual use of its mark as evidence that the marks are not similar because trade dress may change.

[A] distinction in trade dress cannot weigh against likelihood of confusion with respect to the registration of a simple word mark like DOUGHIES. The reason is that such dress might well be changed at any time; only the word mark itself is to be registered.

Kimberly Clark Corp. v. H. Douglas Enters., Ltd., 774 F.2d 1144, 227 USPQ 541, 543 (Fed. Cir. 1985). *See also Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992).

Finally, Applicant contends that the meaning and commercial impression engendered by Applicant's use of its stylized BEAUTIFUL mark and Registrant's use of BEAUTIFUL are different because Registrant's use of BEAUTIFUL captures the sense of smell and Applicant's use of BEAUTIFUL refers to vision.

[Registrant's] perfume, cologne, and Body Scented Products are all defined by a distinctive scent that is pleasurable to a person's olfactory sense. Contrast this with Applicant's Hair Care Products that are designed to

⁹ *Id.*

clean a person's hair and improve its visual appearance. Thus, a typical consumer familiar with the Estee Lauder Fragrance and Body Scented Products would be unlikely to associate them with Applicant's Hair Care Products that are not characterized by a dominant scent despite the fact that both products display the word "Beautiful" on their packaging.¹⁰

Assuming Registrant's products are designed for smell and Applicant's products are designed for appearance, the meaning and commercial impression engendered by their respective use of "Beautiful" is the same: an aesthetically pleasing smell and an aesthetically pleasing appearance.¹¹

We find that Applicant's mark is legally identical to the registered mark in its entirety in terms of appearance, sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the goods.

As noted above Applicant is seeking to register its stylized BEAUTIFUL mark for hair care products and the description of goods in the cited registration is "perfume, cologne, body creme, body lotion, body powder, perfumed soap." To prove that the products are related, the Examining Attorney submitted excerpts from 16 third-party websites showing the use of the same marks to identify various hair care products and "perfume, cologne, body creme, body lotion, body powder, [or] perfumed soap." The websites listed below are illustrative:

¹⁰ Applicant's Brief, p. 6 (12 TTABVUE 7).

¹¹ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1987) defines the word "beautiful" as "1. having qualities of beauty: exciting aesthetic pleasure. 2. generally pleasing." (12 TTABVUE 44).

- Lush website (lushusa.com) showing the mark DIRTY to identify perfume¹² and styling cream for hair.¹³
- The Body Shop website (thebodyshop.com) showing the mark THE BODY SHOP used to identify personal fragrances, body butters, perfumed soaps, hair shampoos, and hair conditioners.¹⁴
- Kiehl's website (kiehls.com) showing the mark KIEHL'S used to identify fragrances, body moisturizers, creams, perfumed soaps, and lotions¹⁵ and hair care products such as shampoos, conditioners, and styling gels.¹⁶
- BeautyCounter website (beautycounter.com) showing the use of the stylized letter "B" and BEAUTYCOUNTER, reproduced below, for hair shampoos, conditioners,¹⁷ and body lotions.¹⁸



¹² January 20, 2018 Office Action (TSDR 9).

Citations to the prosecution record are to the USPTO's Trademark Status and Document Retrieval system (TSDR) in the downloadable .pdf format.

¹³ *Id.* at TSDR 20.

¹⁴ *Id.* at TSDR 28-39 and 57-59.

¹⁵ *Id.* at TSDR 40-42 and 51-56.

¹⁶ *Id.* at TSDR 43-50.

¹⁷ February 21, 2019 Office Action (TSDR 32-35).

¹⁸ *Id.* at TSDR 36.

- The Honest Co. website (honest.com) showing the use of the mark HONEST for body lotions¹⁹ and hair shampoos and conditioners.²⁰

- Philosophy website (philosophy.com) showing the use of the mark PHILOSOPHY on hair care products²¹ and body lotions, body creams, and hand creams.²²

- Origins website (origins.com) showing the use of the mark ORIGINS for perfume and body moisturizers, creams, lotions, and oils,²³ and shampoo.²⁴

The evidence shows that third parties manufacture and sell both sets of products and use the same mark to identify both sets of products.²⁵ Applicant did not submit any evidence to rebut the Examining Attorney's evidence; rather, Applicant argues that the above-noted evidence is neither probative, nor persuasive, for the reasons discussed below.

Applicant asserts that consumers do not consider the goods related because they are not complementary.²⁶ There is no requirement that related products must be complementary. "Goods may nonetheless be related even if they are not identical,

¹⁹ *Id.* at TSDR 37.

²⁰ *Id.* at TSDR 38-41.

²¹ *Id.* at TSDR 42-46.

²² *Id.* at TSDR 47-50.

²³ September 23, 2019 Denial of Request for Reconsideration (TSDR 8-18 and 24-32).

²⁴ *Id.* at TSDR 19.

²⁵ We agree with Applicant that the Internet excerpt for Aveda products displays only hair care products. February 21, 2019 Office Action (TSDR 6-31). Otherwise, we find that the other websites display the same entities using the same marks for both sets of products.

²⁶ Applicant's Brief, pp. 6-7 (12 TTABVUE 7-8).

competitive, or combinable.” *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009). “[G]oods that are neither used together nor related to one another in kind may still ‘be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.” *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)).

In this regard, excerpts from websites showing the same mark used for both sets of goods are probative to demonstrate that the goods are related. *See e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (holding ON-LINE TODAY for Internet connection services and ONLINE TODAY for an electronic publication likely to cause confusion in part because Internet connection services and Internet content publications have been shown to be available from a single source); *In re Iolo Tech., LLC*, 95 USPQ2d 1498, 1500-01 (TTAB 2010) (“The examining attorney also submitted evidence from several websites to show that various types of optimization software such as identified by applicant and technical support services such as identified by the cited registration are advertised to consumers under the same mark.”); *G.B.I. Tile and Stone*, 92 USPQ2d at 1371 (holding the goods, while different and not interchangeable, are related because the evidence, including Internet excerpts showing third parties using the same marks for both sets of products, clearly demonstrates that there are entities that are the source of both sets of products).

Applicant also asserts, “[a] typical consumer is unlikely to mistakenly believe that perfume and shampoo must come from the same source.”²⁷ The test is not whether typical consumers mistakenly believe that the products “must” come from the same source, but whether they mistakenly believe that the products “may” come from the same source. It is not necessary that the goods be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that the goods are related in some manner or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs.*, 101 USPQ2d at 1722.

Applicant argues that consumers will not associate its inexpensive shampoos with Registrant’s expensive fragrant perfume products.²⁸ There are multiple problems with this argument. First, we must consider the goods as Applicant and Registrant describe them in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (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

²⁷ Applicant’s Brief, p. 7 (12 TTABVUE 8).

²⁸ Applicant’s Brief, pp. 7-8 (12 TTABVUE 8-9).

applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

Second, we do not read limitations into the identification of goods. *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 216 USPQ at 940 ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *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.").

Third, we cannot resort to extrinsic evidence to restrict the prices of an applicant's or registrant's goods. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration). Therefore, we must presume that Registrant's "perfume, cologne, body creme, body lotion, body powder, perfumed soap" includes all types of such products sold at all price points.

Applicant argues that it is highly speculative that because third parties sell both sets of products under similar marks, consumers also will believe that Registrant

sells both sets of products under its registered mark.²⁹ However, that is precisely what the third-party use evidence proves. Because third parties sell both sets of products under the same marks, consumers familiar with Registrant's "perfume, cologne, body creme, body lotion, body powder, perfumed soap" upon encountering hair care products under the identical mark, may mistakenly believe that those products emanate from a single source.

Applicant argues that Registrant is no longer using its BEAUTIFUL mark on all the products in the description of goods.

Even more pertinently, [Registrant] seems to have migrated beyond [Registrant's] Registration for the cologne and Scented Body Products that it sells. Instead, [Registrant's] website demonstrates that these cologne and Scented Body Products are commercialized under the ESTEE LAUDER or LAUDER trademarks rather than the BEAUTIFUL trademark. Thus, the sum total of [Registrant's] products sold under its BEAUTIFUL mark that could be possibly confused with Applicant's "Beautiful" Design mark is limited to a single eau de parfum spray, a single powder and a single lotion out of the hundreds of products that appear on the [Registrant's] website.³⁰

Applicant has again conflated use with registration. Even if Registrant has "migrated" from some of the products in the description of goods, Applicant conceded that Registrant is still using its BEAUTIFUL mark for perfume, powder and lotion. Under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. It is sufficient for

²⁹ Applicant's Brief, pp. 8-9 (12 TTABVUE 9-10).

³⁰ Applicant's Brief, p. 7 (12 TTABVUE 63).

a refusal based on likelihood of confusion that we find any item encompassed by the identification of goods in a particular class in the application and registration related. *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.”).

To the extent Applicant contends Registrant abandoned its BEAUTIFUL mark, we have no jurisdiction to examine, in an ex parte proceeding such as this, Applicant’s claim because that would amount to a collateral attack on the validity of the cited registration that is properly cognizable only by way of a cancellation proceeding. *In re Dixie Rests., Inc.*, 41 USPQ2d at 1534; *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992); *In re United Brokers, Inc.*, 222 USPQ 361, 363 (TTAB 1984). There is nothing to indicate that Applicant has sought to cancel the cited registration. Accordingly, we give no consideration to Applicant’s arguments in this regard.

Finally, as best we understand Applicant’s argument, Applicant argues that some of the third-party websites are not probative because the relevant third-party marks are house marks, not product marks.³¹

Companies do not generally sell a variety of different products under the same trademark, adopting instead a

³¹ Applicant’s Reply Brief, p. 4 (15 TTABVUE 5).

variety of different trademarks tailored to those products and the marketing message that they mean to suggest or convey for each such product. If Applicant were attempting to sell her hair care products under [Registrant's] brand, then the Examining Attorney's use of third-party websites as evidence of consumer confusion would be more persuasive. Here, however, we are dealing with a product trademark that typical consumers are familiar with being applied in commerce to individual products or product lines.³²

There are two problems with this argument. First, there is no evidence supporting Applicant's contention that "[c]ompanies do not generally sell a variety of different products under the same trademark, adopting instead a variety of different trademarks tailored to those products" and that "typical consumers" are familiar with how product marks are used vis-à-vis house marks. "Attorney argument is no substitute for evidence." *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005).

Second, neither Applicant's description of goods nor Registrant's description of goods restricts the use of the mark to a house mark or a product mark. As noted above, we must consider the goods as Applicant and Registrant describe them in the application and registration, we may not read limitations into the identifications of goods, and we may not resort to extrinsic evidence to restrict or differentiate Applicant's or Registrant's description of goods. Accordingly, there is no legal basis on which Applicant may proffer this argument.

We find that the goods are related.

³² *Id.*

- C. Established, likely-to-continue channels of trade and classes of consumers.

The Examining Attorney argues that Applicant and Registrant offer their goods in the same channels of trade to the same class of consumers because “the record establishes that it is common for the identified goods of applicant and registrant to be provided together under the same mark and marketed together.” The third-party evidence regarding product relatedness, discussed above, also shows that entities that manufacture both sets of products also sell them through their websites. However, the probative value of that evidence is limited because of the ubiquity of Internet sales.

Applicant argues that Applicant and Registrant sell their goods through different channels of trade.

The channels of trade for Applicant’s Hair Care Products and Estee Lauder’s Fragrance and Body Scented Products are distinctly different. Perfumes, colognes, and Body Scented Products are generally sold in department stores and specialty stores. Meanwhile, Hair Care Products like shampoos and conditioners are generally sold in grocery stores, drug stores, and specialty hair salons. A customer will not generally see shampoos or conditioners sold in a department store just like a perfume or cologne will generally not be sold in a grocery store, drug store, or hair salon (except for a couple of inexpensive brands of perfume and cologne sold in some drug stores). This retail differentiation reinforces in a customer’s mind that Hair Care Products and Fragrance and Body Scented Products are very different products.³³

³³ Applicant’s Brief, p. 8 (12 TTABVUE 9).

First, Applicant did not submit any evidence regarding channels of trade or classes of consumers. “Attorney argument is no substitute for evidence.” *Cai*, 127 USPQ2d at 1799 (quoting *Enzo Biochem*, 76 USPQ2d at 1622). *See also Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) (“mere attorney arguments unsubstantiated by record evidence are suspect at best.”).

Second, as noted above, we consider the goods as Applicant and Registrant describe them in the application and registration and we do not read limitations into the descriptions of goods. Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in the application or cited registration, we must presume that Applicant’s hair care products and Registrant’s “perfume, cologne, body creme, body lotion, body powder, perfumed soap” move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 98 USPQ2d at 1261; *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods.*, 177 USPQ at 77.

We find this *DuPont* factor to be neutral.

D. The conditions under which and consumers to whom sales are made.

Applicant argues that Registrant’s customers are sophisticated consumers because Registrant’s products are personal, luxury products.³⁴ Notwithstanding Applicant’s argument regarding the conditions under which the respective products are bought, we may not limit, by resort to extrinsic evidence (or, in this case, attorney

³⁴ *Id.* at pp.7-8 (12 TTABVUE 8-9).

argument), the scope of goods as identified in the cited registration or the subject application and, thus, the conditions under which and persons to whom sales are made. *E.g.*, *Dixie Rests. Inc.*, 41 USPQ2d at 1534; *In re Fisher Scientific Co.*, 440 F.2d 43, 169 USPQ 436, 437 (CCPA 1971); *In re La Peregrina Ltd.*, 86 SPQ2d 1645, 1646 (TTAB 2008); *Bercut-Vandervoort & Co.*, 229 USPQ at 764 (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

We find this *DuPont* factor is neutral.

E. Conclusion

Because the marks are legally identical and the goods are related, we find that Applicant's stylized BEAUTIFUL mark for hair care products is likely to cause confusion with the registered mark BEAUTIFUL, in typed form, for "perfume, cologne, body creme, body lotion, body powder, perfumed soap."

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