

This Opinion Is Not a
Precedent of the TTAB

Mailed: April 6, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Ric Flair, LLC
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Application Serial No. 87884420
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Alan S. Clarke of Taylor English Duma LLP for Ric Flair, LLC.

Amy Kergate, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.
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Before Bergsman, Adlin and Larkin, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Ric Flair, LLC (Applicant) seeks registration on the Principal Register of the mark
NATURE BOY, in standard character form, for the products listed below:

Cell phone cases, in International Class 9;

Beach towels, in International Class 24; and

T-shirts, tank-tops, and sweatshirts, in International Class
25.¹

¹ Serial No. 87884420, filed April 19, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and first use in commerce as of January 1, 1976 for the goods in all classes.

According to Applicant “[t]he name(s), portrait(s), and/or signature(s) shown in the mark identifies Richard Fliehr, whose consent(s) to register is made of record.”

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 the clothing products in Class 25 so resembles the registered mark NATURE BOYS for the clothing listed below as to be likely to cause confusion.

Clothing for fishing, namely, fishing vests, fishing waders, fishing caps, fishing hats, fishing jackets, fishing shirts, fishing suits, fishing sweaters and thermal underwear for fishing; coats; sweaters; shirts; gloves and mittens; neckties; bandanas; warmth-keeping supporters in the nature of arm warmers, hand warmers, knee warmers, leg warmers and body warmers, namely, insulated vests; mufflers; ear muffs; caps and hats; belts for clothing; athletic shoes; shoes for fishing; anoraks, in International Class 25.²

Registrant disclaims the exclusive right to use the word “Boys.”

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.*,

² Registration No. 4960478, registered May 17, 2016. The registration also includes goods in Class 28 that are not at issue in this appeal.

105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997), *quoting 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 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)).

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

The description of goods in the cited registration is repeated below:

Clothing for fishing, namely, fishing vests, fishing waders, fishing caps, fishing hats, fishing jackets, fishing shirts, fishing suits, fishing sweaters and thermal underwear for fishing; coats; sweaters; shirts; gloves and mittens; neckties; bandanas; warmth-keeping supporters in the nature of arm warmers, hand warmers, knee warmers, leg warmers and body warmers, namely, insulated vests; mufflers; ear muffs; caps and hats; belts for clothing; athletic shoes; shoes for fishing; anoraks.

“Under standard examination practice, a semicolon is used to separate distinct categories of goods or services.” *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (citing TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.01(a) (2018) (“commas should be used in the identification to separate items within a particular category of goods or services” and semicolons “should generally be used to separate distinct categories of goods or services within a single class.”).³ We find that here, the semicolons in Registrant’s identification that precede and follow the goods identified as “shirts” separate Registrant’s “shirts” into a discrete category of products which is not connected to nor dependent on “clothing for fishing” set out on the other side of the semicolon. We further find that Registrant’s

³ The TMEP gives the following example:

For example, “cleaners, namely, glass cleaners, oven cleaners, and carpet cleaners; deodorants for pets” is an acceptable identification in Class 3. In this example, the word “cleaners” names the category covering “glass cleaners, oven cleaners, and carpet cleaners.” The semicolon prior to “deodorants for pets” indicates that the deodorants are a separate category of goods from the cleaners.

“shirts,” as separately set out in the identification of goods by means of the semicolon, stand alone and independently as a basis for our likelihood of confusion findings under the second and third *DuPont* factors.

Thus, the description of goods in the cited registration includes “shirts” per se; it is not limited to fishing shirts. “Shirts” is broad enough to encompass the “t-shirts” and “tank-tops” in Applicant’s description of goods.⁴ See *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). See also *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (same). Therefore, the goods are in part legally identical.

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 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,

⁴ Merriam-Webster.com defines a tank top as “a sleeveless collarless shirt with usually wide shoulder straps and no front opening.” 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); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

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.”).

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

Because the goods described in the application and the cited registration are in part legally identical, we 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) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....”)); *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); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018), *aff’d mem.* (No. 18-2236) (Fed. Cir. September 13, 2019) (“Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are 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).

III. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties 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, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (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 where, as here, the goods are in part legally 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.” *Cai.*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721). See also *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *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 shirts, t-shirts, and tank tops without any restrictions or limitations as to channels of trade, classes of consumers, or price, the average customer is an ordinary consumer.

Applicant is seeking to register the mark NATURE BOY and the mark in the cited registration is NATURE BOYS. The only difference in the marks is Registrant's pluralization of the word "Boy." Because Applicant and Registrant use the marks on in part legally identical products (i.e., shirts, t-shirts, and tank tops), the difference between the marks, if even noticed by an ordinary consumer, fails to distinguish the marks. *See Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *Weidner Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (SHAPES is similar to SHAPE); *In re Pix of Am., Inc.*, 225 U.S.P.Q. 691, 692 (TTAB 1985) (noting that the pluralization of "Newport" is "almost totally insignificant in terms of the likelihood of

confusion of purchasers.”); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962) (finding no material difference between the singular and plural forms of RED DEVIL).

Applicant argues that while the marks have similarities,⁵ they do not have the same meaning and do not engender the same commercial impression.⁶

Applicant’s Mark refers solely to Applicant himself, a singular “Nature Boy” who has used his Mark to refer specifically to himself as a celebrity for decades, while Registrant uses the cited Mark to describe its customers, males who enjoy specific activities in the outdoors (fishing) and seek specific gear to wear in these activities.⁷

The problem with Applicant’s argument is that we must determine the issue of likelihood of confusion based on the marks that appear on the drawing pages and in connection with the description of goods in the application and registration at issue. *See In re i.am.symbolic*, 123 USPQ2d at 1749 (Board did not err in holding that an express restriction in the description of goods associating the mark with Applicant’s principal does not change the meaning or commercial impression of the mark). As in *i.am.symbolic*, the marks here are virtually identical. *Id.* at 1748 (noting that the applicant “does not and cannot, dispute that the mark, I AM in standard character form, and the registrants’ marks, I AM in standard character, typed, or stylized form, are pronounced the same way and, at a minimum, [are] legally identical.”). In addition, unlike in *i.am.symbolic* where applicant added an explanation in the description of goods that the products are “all associated with William Adams,

⁵ Applicant’s Brief, p. 5 (4 TTABVUE 6).

⁶ *Id.* at p. 6 (4 TTABVUE 7).

⁷ *Id.* at pp. 6-7 (4 TTABVUE 7-8).

professionally known as ‘will.i.am.’” in this application, there is no restriction, limitation, or explanation in Applicant’s description of goods that it can point to that changes the meaning or commercial impression of its mark. In sum, because neither the mark, nor the description of goods, refers to any individual, there is no basis on which we can find that the meaning and commercial impression of Applicant’s mark NATURE BOY differs from that of the registered mark NATURE BOYS.

Applicant also contends that the renown that NATURE BOY has achieved as professional wrestler Ric Flair’s nickname engenders a different commercial impression than the mark NATURE BOYS in the cited registration.⁸ Again, the problem with this argument is that it requires us to go beyond the mark in the drawing page and description of goods in the application and to use extrinsic evidence to distinguish the marks. Notwithstanding Applicant’s argument and evidence regarding the actual scope of its own and the cited Registrant’s use of its mark, we may not limit, by resort to extrinsic evidence, the scope of goods as identified in the cited registration or in the subject application to change the commercial impression of the marks. *Compare Coach Servs.*, 101 USPQ2d at 1721 (although the marks [COACH] are identical in appearance and sound, they differ in connotation and commercial impression because applicant uses COACH to identify educational materials used to prepare students for standardized tests and opposer uses COACH

⁸ Applicant’s Brief, pp. 8-10 (4 TTABVUE 9-11). Applicant is not arguing that the USPTO should register NATURE BOY because it is a famous mark. Applicant argues that because consumers recognize NATURE BOY as wrestler Ric Flair’s nickname, the fame or renown of the mark changes the meaning and commercial impression engendered thereby.

to identify luxury products such as handbags, luggage, clothing, watches, eye glasses, and wallets). Here, unlike in *Coach Servs.*, the parties use virtually identical marks to identify in part legally identical products.

During the prosecution of the application, the Examining Attorney asserted that Ric Flair, aka The Nature Boy, is well known.

Widely regarded as the greatest professional wrestler of all time and the best American performer of the 1980s, Mr. Fliehr had a career that spanned 40 years and included tenures with the National Wrestling Alliance (NWA), World Championship Wrestling (WCW), the World Wrestling Federation (WWF, later WWE) and Total Nonstop Action Wrestling (TNA). For these reasons, he is the subject of frequent media attention and his name is often in the public view. Please see the attached sampling of items retrieved via an Internet search.

The name “NATURE BOY” in the applied-for mark clearly references Richard Fliehr (aka Ric Flair) and would be construed by the public as a reference to Mr. Fliehr. Accordingly, because Mr. Fliehr’s written consent is not of record, registration must be refused pursuant to Section 2(c) of the Trademark Act.⁹

Applicant contends that because of the renown of Ric Flair as The Nature Boy, consumers will perceive the association between the mark NATURE BOY and Applicant which changes the commercial impression of the mark.¹⁰ However, Applicant has not shown that in the context of t-shirts and tank tops, NATURE BOY has a specific meaning in connection with Ric Flair, the wrestler. For example, if the

⁹ August 11, 2018 Office Action (TSDR 5). *See also id.* at TSDR 10-67. References to the prosecution record are to the Trademark Status and Document Retrieval System (TSDR) in the downloadable .pdf format.

¹⁰ Applicant’s Brief, pp. 9-10 (4 TTABVue 10-11).

description of goods were wrestling t-shirts or wrestling tank tops, there might be an argument that the mark has a specific connotation referring to Ric Flair. Here, the record does not show that NATURE BOY when used in connection with the clothing identified in the application has any meaning associated with Ric Flair, aka The Nature Boy. *See Coach Servs., supra; In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1373 (Fed. Cir. 2004) (“The Board must, of course, determine the commercial impression of a mark in the proper context of the goods or services associated with that mark”) (citation omitted); *Embarcadero Tech. Inc. v. RStudio Inc.*, 105 USPQ2d 1825, 1834 (TTAB 2013) (“Our analysis concerning the similarity of the marks, however, does not end with their appearance and sound. Rather, we must also look at any commercial impressions or connotations created by the marks and, in doing so, we consider the marks in relation to the identified goods and services.”).

We find that the marks NATURE BOY and NATURE BOYS are similar in their entireties as to appearance, sound, meaning and commercial impression.

IV. Conclusion.

Because the marks are similar, the goods are in part legally identical and, therefore, we presume that the goods are offered in the same channels of trade to the same classes of consumers, we find that Applicant’s mark NATURE BOY for, inter alia, t-shirts and tank tops is likely to cause confusion with the registered mark NATURE BOYS for shirts.

Decision: The refusal to register Applicant’s mark NATURE BOY for the goods in International Class 25 is affirmed.

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The USPTO will publish Applicant's application for the goods in Classes 9 and 24 in due course.