

This Opinion Is Not a
Precedent of the TTAB

Hearing: June 9, 2020

Mailed: July 6, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re The Half Baked Bus, LLC
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Serial No. 88099422
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David P. Gordon of Gordon & Jacobson PC,
for The Half Baked Bus, LLC

Jessica Hilliard, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Mermelstein, Goodman and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, The Half Baked Bus, LLC, seeks registration on the Principal Register of the mark shown below for use in connection with “Cosmetic preparations for skin care other than tanning accelerators; Cosmetics and cosmetic preparations other than tanning accelerators; Skin cream other than tanning accelerators; Skin moisturizer other than tanning accelerators, in International Class 3:¹

¹ Application Serial No. 88099422 was filed on August 30, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark anywhere and in commerce as of August 30, 2018.



The description of the mark reads as follows:

The mark consists of the words “HALF BAKED BUS” in upper case letters in a whimsical font over a fanciful drawing of the front of a bus.

Color is not claimed as a feature of the mark.

Applicant appeals from the Examining Attorney’s final refusal to register pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with the identified goods, so resembles the registered mark HALF BAKED, in standard characters, for “Cosmetics, namely, sun tan accelerator lotion,” in International Class 3,² as to be likely to cause confusion.

The appeal is fully briefed, and an oral hearing was held on June 9, 2020.

We reverse the refusal to register.

I. Applicable Law

The fundamental purpose of Trademark Act § 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ

² Registration No. 2893830, issued October 12, 2004; renewed.

327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc.*, 192 USPQ at 29 (“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.”). These factors and the other *DuPont* factors argued by the Examining Attorney and Applicant are discussed below.

A. Similarity or Dissimilarity of the Goods and Trade Channels

We begin our analysis with the second and third *DuPont* factors. The second *DuPont* factor considers the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 128 USPQ2d at 1047 (quoting *DuPont*, 476 F.2d at 1361), and the third *DuPont* factor

considers the “similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052. It is “not necessary that the goods be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). “[L]ikelihood of confusion can be found ‘if the respective goods 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.’” *Id.*

The Examining Attorney argues that a single entity will commonly provide tanning accelerators (as in the registration) and skin care cosmetics (as in the application) under the same mark.³ In support, she provided Internet evidence from fifteen specialty companies, including cosmetic and tanning companies, which offer both types of goods under the same mark.⁴ For example, Australian Gold provides men’s moisturizers and tanning accelerator lotions;⁵ L’Oréal Paris provides dry skin moisturizers and tanning lotions;⁶ and Lancôme provides skin creams and tanning lotions;⁷ all under the same mark.⁸

³ 7 TTABVUE 6.

⁴ December 19, 2018 Office Action, TSDR 8-21; May 27, 2019 Final Office Action, TSDR 12-65; Reconsideration Letter, TSDR 4-57. Trademark Status & Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

⁵ August 23, 2019 Reconsideration Letter, TSDR 4-17.

⁶ December 19, 2018 Office Action, TSDR 11-19.

⁷ May 27, 2019 Final Office Action, TSDR 34-40.

⁸ We take judicial notice of the definition of “accelerator” in Merriam-Webster’s online dictionary as “a substance that speeds a chemical reaction.” (<https://www.merriam->

Additionally, the Examining Attorney made of record twenty-six use-based third-party registrations for marks covering both skin tanning preparations, including accelerators, and other skin care cosmetics.⁹ Third-party use-based registrations that cover different goods may serve to suggest such goods are of a type that may emanate from a single source. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB), *aff'd per curiam*, 864 F.2d 149 (Fed. Cir. 1988). For example, Registration Nos. 4649697 (INKED GIRLS); 4731388 (NEVER MISS A SPOT); and 5598648 (DCNSTRCTD), all cover tanning accelerators along with the kinds of cosmetics identified in the application.

Because there are no limitations or restrictions in either Applicant's or the Registrant's identification of goods, we must presume that they move in all normal channels of trade for goods of the type identified. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). The Internet evidence shows that both parties' goods, in actuality, travel in the same trade channels.

Apart from emphasizing that its identification specifically covers cosmetics, skin

webster.com/dictionary/accelerator, accessed on July 1, 2020). Therefore, a tanning accelerator is anything that speeds up the tanning process.

The Board may take judicial notice of definitions from dictionaries, 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).

⁹ May 27, 2019 Final Office Action, TSDR 66-141.

creams, and moisturizers *other than* tanning accelerators,¹⁰ Applicant does not dispute that its goods are related to Registrant's goods, or that they move in the same trade channels.

Based on the foregoing, we find that the second and third *DuPont* factors weigh in favor of likelihood of confusion.

B. Purchasing Conditions

The fourth DuPont factor, considers “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567.

On the one hand, circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion between similar marks. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). On the other hand, the fact that purchasers are sophisticated or knowledgeable in a particular field does not mean they are immune to source confusion. *See In re Shell Oil Co.*, 26 USPQ2d at 1690 (“even sophisticated purchasers can be confused by very similar marks”). Board precedent requires our decision to be based “on the least sophisticated potential purchasers.” *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (quoting *Gen. Mills, Inc. v. Fage Dairy*

¹⁰ 5 TTABVUE 6.

Proc. Indus. S.A., 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014).

Applicant argues that “consumers to whom the [cosmetics] of the Appellant are being sold should be considered sophisticated,” and that “sophisticated consumers would not be confused,”¹¹ but provides no evidence to support this contention. Instead, Applicant cites an unpublished decision from the Southern District of New York for the proposition that “[c]ourts have generally held that purchasers of cosmetics, perfumes and other beauty products are likely to examine with care the products they purchase.”¹² In that case, *Juicy Couture, Inc. v. L’Oreal USA, Inc.*, 2006 WL 1012939 (S.D.N.Y. Apr. 19, 2006), the district court stated that “consumers of cosmetics and in particular purchasers of lipstick, are likely to examine with care the products they apply to their skin and lips.” *Id.* at *29.¹³ The court provided no factual basis for its conclusory statement, which was made in the context of a factual finding that the plaintiff’s customers were “fashion conscious and, therefore, likely to be “relatively sophisticated shoppers.” Moreover, we will not adopt the factual findings of another court that is based on a different record.

¹¹ 5 TTABVUE 23-24.

¹² 5 TTABVUE 25.

¹³ Applicant also cited two SDNY district court cases that do not support Applicant’s contention regarding the general sophistication of cosmetics consumers. The court in *In Origins Natural Res., Inc. v. Kotler*, 20015 WL 2492429 (S.D.N.Y. 2001) found sophistication because the involved cosmetics were upscale and expensive, sold in upscale stores, and therefore likely to be purchased by sophisticated consumers. The court in *Nina Ricci, S.A.R.L. v. Gemcraft, Ltd.*, 612 F. Supp. 1520 (S.D.N.Y. 1985), stated that [w]omen who use expensive perfumes are discriminating and sophisticated consumers,” whereas “[m]en who purchase expensive perfumes as a gift are somewhat less discriminating ... an impulse purchaser.” *Id.* at 1530.

As the Examining Attorney correctly notes, “the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion,” and “where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser.”¹⁴ (Citations omitted). As discussed, Applicant provided no evidence supporting its allegation that its consumers are sophisticated. Because the cosmetics described in the application have no limitations as to their type or price point, and may be relatively inexpensive and purchased by the public at large, we must assume the purchasers include casual consumers purchasing relatively inexpensive items. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986). Applicant’s counsel acknowledged in the oral hearing that our decision must be based on “the least sophisticated potential purchasers,” who may not exercise a heightened degree of care. *Stone Lion*, 110 USPQ2d at 1163.

Even if Applicant had provided evidence of consumer sophistication, it would not necessarily prevent a likelihood of confusion because “[h]uman memories even of discriminating purchasers ... are not infallible.” *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 1406, 168 USPQ 110, 112 (CCPA 1970). “That 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.” *In re Research & Trading Corp.*, 230 USPQ 49, 50 (Fed. Cir. 1986).

¹⁴ 7 TTABVUE 12-13.

Based on the foregoing, the fourth *DuPont* factor weighs in favor of a likelihood of confusion.

C. Similarity or Dissimilarity of the Marks

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 128 USPQ2d at 1047 (quoting *DuPont*, 476 F.2d at 1361). “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 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods and services offered under the respective marks is likely to result. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs. v. Triumph Learning LLC*, 101 USPQ2d at 1721. Our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”).

According to the Examining Attorney: (1) because the definition of “half-baked” is “insufficiently thought out; ill-conceived” or “[e]xhibiting a lack of good judgment or common sense;”¹⁵ (2) because the wording “HALF BAKED BUS” in Applicant’s mark is dominant over the design and, therefore, more likely to be remembered and used by consumers;¹⁶ and (3) because Applicant’s mark and Registrant’s mark share the wording, “HALF BAKED; the marks have a “highly similar commercial impression[s]”¹⁷ and are, thus, similar.¹⁸

Applicant disputes the Examining Attorney’s contention that its mark invokes a meaning based on something that is ill-conceived, stating that “there is nothing in the record that establishes that the term HALF-BAKED in HALF BAKED BUS has anything to do with the definition of ‘half-baked’ cited by the Examining Attorney” or that “Applicant’s goods include a bus that is ill-conceived and insufficiently thought out.¹⁹ According to Applicant, it would be “illogical” to “attempt to create an impression of the goods as being ill-conceived and insufficiently thought out” for skin care products, since consumers would not use products “that might cause harm or be ineffective.”²⁰

Instead, Applicant argues, its mark is “arbitrary and incongruous when the goods

¹⁵ 7 TTABVUE 15 (referencing May 27, 2019 Final Office Action, TSDR 10, definition from The American Heritage Dictionary).

¹⁶ 7 TTABVUE 18.

¹⁷ 7 TTABVUE 14-15.

¹⁸ 7 TTABVUE 13.

¹⁹ 5 TTABVUE 15.

²⁰ *Id.*

(which are not a bus) are considered.” Because “the words ‘HALF BAKED’ are adjectives for the word BUS; i.e., it is the BUS that is half baked.”²¹ And since “BUS” is totally arbitrary for the goods being sold (as are the graphics) and by adding it/them to the words “HALF BAKED,” a strong incongruous mark is generated when the mark is considered its totality.”²² Applicant argues that, in contradistinction to the “arbitrary, distinctive and incongruous” nature of the wording “HALF BAKED BUS” in Applicant’s mark as it relates to cosmetics other than tanning accelerators, Registrant’s mark HALF BAKED, “when applied to tanning accelerators is “somewhat descriptive”:

[A] person using a sun tan accelerator lotion figuratively (and even moderately, literally) ‘bakes’ in the sun ... if they don’t completely ‘bake’, they ‘half bake in the sun. And, if they don’t completely “bake”, they “half bake” in the sun, as the purpose of the accelerator is to reduce the time required to obtain a tan. However, even if this more appropriate descriptive definition of registrant’s use of the term HALF BAKED applies, it would not apply to Appellant’s mark since Appellant’s goods are not buses that are half or partially sunbaked.²³

Applicant highlights another definition of “half baked” in the dictionary evidence provided by the Examining Attorney,²⁴ not argued in her brief, defining that term as “only partly baked,” to illustrate this point.²⁵

Applicant also disputes that the wording HALF BAKED BUS is dominant in its

²¹ 5 TTABVUE 11.

²² *Id.* at 12.

²³ *Id.* at 14.

²⁴ May 27, 2019 Office Action, TSDR 10.

²⁵ 5 TTABVUE 15. That definition is listed as the first definition. The “ill-conceived” definition is listed second, as an informal use.



mark. According to Applicant, its mark “is most decidedly directed to a funky bus and is dominated by the graphics where the words become part of the graphics being formed from smoke emanating from the bus.”²⁶ Thus, Applicant concludes, “the overall commercial impression of the mark relates to a *bus*.”²⁷

We agree with the Examining Attorney that the marks have some similarities in sound and appearance because Applicant’s three-word mark begins with and comprises the entirety of Registrant’s two-word mark HALF BAKED. Nonetheless, we do not agree with the Examining Attorney that the entire wording HALF BAKED BUS is dominant in Applicant’s mark. Clearly, the term “HALF BAKED” is used in as an adjective in Applicant’s mark to modify the noun “BUS,” which is arbitrary in relation to Applicant’s cosmetics “other than tanning accelerators,” making “BUS” dominant in Applicant’s mark. The inclusion of a so-called “funky” bus design in Applicant’s mark, which comprises around 80 percent of the mark as a whole, with a plume of smoke coming out of a window in the bus that connects to the letter “S” in the word “BUS,” serves to reinforce that understanding.

²⁶ 5 TTABVUE 18.

²⁷ *Id.*

We also agree that HALF BAKED in Registrant's mark is dominant, since it is a mere adjective and seems to suggest Registrant's tanning accelerators, perhaps intentionally so. A person that is tanned, but not burned, would be "partly baked" by the sun. "Baked," on its own may, refer to one who "expose[s] (oneself) to the rays of the sun."²⁸ It follows, then, that one who bakes in the sun short of burning may only be half baked. This interpretation would not apply to Applicant's mark, which emphasizes the noun, "bus," and results in a connotation that cannot suggest the goods. As the Examining Attorney notes, it is not improper to assign more weight to a particular feature in mark when considered in its entirety, which we do here.

The Examining Attorney acknowledges that HALF BAKED has multiple meanings, but argues

[T]his does not mean that consumers will ascribe a particular meaning to the applied-for mark and another, different meaning to the registered mark, thereby avoiding confusion. As both marks contain the identical wording HALF BAKED, consumers could interpret both the registered mark and Applicant's mark as creating a commercial impression related to something that is insufficiently thought out, creating a likelihood of confusion. Similarly, due to the shared wording HALF BAKED, consumers could interpret both the registered mark and Applicant's mark as creating a commercial impression related to something that is only partly baked, also creating a likelihood of confusion.²⁹

We find the Examining Attorney's argument misplaced because meaning or connotation of a mark must be determined in relation to the named goods or services.

²⁸ Collins English Dictionary, <https://www.collinsdictionary.com/dictionary/english/bake> (accessed on July 3, 2020). 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.

²⁹ 7 TTABVUE 16.

See In re Sears, Roebuck & Co., 2 USPQ2d 1312 (TTAB 1987); *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(b)(v). Thus, when considering the commercial impression of Registrant's mark HALF BAKED, it is illogical to reject application of the meaning "partly baked" when that meaning is suggestive of tanning accelerators, while at the same time adopting the informal and arbitrary definition of that term.

It is also illogical to suggest that consumers might apply the definition of "partly baked" to both marks when that meaning is arbitrary in relation to Applicant's goods. Even marks that are identical in sound or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion. *In re Sears, Roebuck & Co.*, 2 USPQ2d at 1314 (CROSS-OVER for bras and CROSSOVER for ladies' sportswear not likely to cause confusion because "CROSS-OVER" was suggestive of applicant's bras, whereas "CROSSOVER," as applied to registrant's goods, was "likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which 'crosses over' the line between informal and more formal wear . . . or the line between two seasons").

In sum, we find that the marks have very different overall commercial impressions. *See e.g., Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (THE RITZ KIDS for clothing items, including gloves, not confusingly similar to RITZ for barbeque mitts; addition of "KIDS" serves to distinguish the marks); *In re Farm Fresh Catfish Co.*, 231 USPQ 495 (TTAB 1986)

(the marks, as applied to the respective goods and services create different commercial impressions). The first *DuPont* factor therefore weighs against finding likelihood of confusion.

D. Number and Nature of Similar Marks for Similar Goods

The sixth *DuPont* factor “considers ‘[t]he number and nature of similar marks in use on similar goods.’” *DuPont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). “The purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks Int’l Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps. Inc. v. Veuve Cliquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)) (internal quotation omitted).

1. Third-Party Registrations

Applicant argues that Registrant’s mark HALF BAKED “is not strong with respect to the area of cosmetics broadly because it is somewhat descriptive of the goods being claimed and because similar and identical names are used on cosmetics and in the related tanning salon industry.”³⁰ In support, Applicant submitted evidence of four third-party registrations including Registration No. 5634661 for the mark HALF CAKED; Registration No. 4151132 for the mark TOTALLY BAKED;

³⁰ 5 TTABVUE 20.

Registration No. 2953835 for the mark BAKED COLLECTION; and Registration No. 2801528 for the mark BAKED BRONZER for cosmetics; all for cosmetics, but none specifically identifying or emphasizing tanning accelerators.³¹ According to Applicant, these registrations show “the term ‘BAKED’ being used with cosmetics and for goods similar to those identified in applicant’s application.”³²

The Examining Attorney responds that a mere four third-party registrations do not establish that Registrant’s mark is weak.³³ She further argues that because the marks in those registrations do not show the particular wording “HALF BAKED,” they are “insufficient to establish that the specific wording HALF BAKED is weak or diluted.”³⁴

As a preliminary matter, we note that third-party registrations are “not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). They can, however, be useful in showing how a mark is used in ordinary parlance, and to prove that some segment of the composite marks that contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the

³¹ 5 TTABVUE 9 (referring to third-party registrations submitted with May 6, 2019 Response to Office Action, TSDR 14-17; and August 1, 2019 Request for Reconsideration, TSDR 17-18).

³² 5 TTABVUE 19.

³³ 7 TTABVUE 19.

³⁴ *Id.*

conclusion that that segment is inherently weak. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

In this case, they do neither. The marks HALF CAKED, TOTALLY BAKED, BAKED COLLECTION, and BAKED BRONZER in the third-party registrations have different connotations and commercial impressions than Registrant's mark HALF BAKED, and are more dissimilar to Applicant's mark HALF BAKED BUS and Design than is Registrant's mark. Additionally, the registrations cover cosmetics, generally, and not specifically tanning accelerators. Though their coverage legally extends to tanning accelerating cosmetics, since those goods are not excluded, we are not persuaded that the terms in those marks are descriptive of tanning accelerators.

2. Third-Party Use

In a further effort to show Registrant's mark is "weak and/or descriptive," Applicant provided evidence consisting of ten third-party websites that use the term HALF BAKED in connection with tanning salon services,³⁵ and eleven third-party websites for tanning salons that sell tanning products, in addition to providing tanning services.³⁶ Although Registrant's mark covers tanning products, not services, Applicant attempts to bootstrap this evidence together to show that consumers would

³⁵ 5 TTABVUE 6-7.

³⁶ 5 TTABVUE 7-9.

consider the wording HALF BAKED weak for tanning products.³⁷

Applicant's argument is unavailing. Even if Applicant's internet evidence shows the wording HALF BAKED to be suggestive or descriptive of tanning salon services, it does not show HALF BAKED to be descriptive of all products sold by tanning salons. As the Examining Attorney observes, although Applicant's website evidence may show that tanning salons sell tanning products, it does not show that they sell those products under the same name or mark of the tanning salon.³⁸

Use of the term HALF-BAKED by tanning salons for tanning services may be suggestive of tanning services for the same reasons we discussed under the first *DuPont* factor and thus found the marks to have very different connotations and commercial impressions. But Applicant's Internet evidence does not show Registrant's mark to be weak for tanning accelerators. The sixth *DuPont* factor is therefore neutral in our analysis.

II. Conclusion

In sum, we find that there is no likelihood of confusion between Applicant's mark



and Registrant's mark HALF BAKED. Notwithstanding that the goods are related, and the channels of trade and purchasers overlap, we conclude that the marks are too dissimilar overall to warrant a finding of likelihood of confusion and that this *DuPont* factor, accordingly, is

³⁷ 5 TTABVUE 20-21.

³⁸ 7 TTABVUE 21-22.

dispositive in this case. *Kellogg Co. v. Pack'em Enters.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single du Pont factor may not be dispositive. ... ‘each [of the thirteen factors] may from case to case play a dominant role.’”). Specifically, because the commercial impression of Applicant’s mark would be perceived as having to do with a bus, and because Registrant’s mark would be perceived as suggesting a state of being partly tanned, the purpose of Registrant’s goods, we find that purchasers are not likely to assume that a source connection exists between Applicant’s cosmetic goods “other than tanning accelerators” and Registrant’s “tanning accelerator lotions.”

Decision: The refusal to register under Trademark Act § 2(d) is reversed.