

This Opinion Is Not a
Precedent of the TTAB

Mailed: July 15, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Nachman
—

Serial No. 88123747
—

Lynn Lehnert of Goldberg Segalla,
for Kiera Nachman.

Ronald L. Fairbanks, Trademark Examining Attorney, Law Office 119,
J. Brett Golden, Managing Attorney.

—
Before Kuhlke, Adlin and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Kiera Nachman, seeks registration on the Principal Register of the mark NĀO AYURVEDA and design (shown below), for use in connection with “Non-medicated preparations, namely, skin care creams, lotions, cleansers and sprays; preparations, namely, skin care creams, lotions, cleansers and sprays; face serums; body oils; non-medicated cleansers for the skin and intimate personal hygiene purposes; hair oils; shampoos; eye creams; lip balms; facial oils; skin toners; bath salts; perfume oils; facial oils,” in International Class 3:



Applicant has disclaimed the exclusive right to use “Ayurveda” apart from the mark as shown.

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 NAOS,² in standard characters, for “Skin soaps, Cosmetics, Hair Lotions,” in International Class 3, as to be likely to cause confusion.

The appeal is fully briefed. We reverse the refusal to register.

I. Evidentiary Issue

Applicant attached several exhibits to her brief including, for the first time, an excerpt from a webpage purportedly obtained from an Internet website located at

¹ Application Serial No. 88123747 was filed on September 19, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. The description of the mark, which does not claim color, reads as follows: “The phrase ‘NAO AYURVEDA’ appears underneath an image of hands curved around flowers with an eye appearing inside a lotus flower, enclosed by a circular design.” The application also includes goods in International Class 30 which are not at issue in this appeal.

² Registration No. 5415760, issued on March 6, 2018 under Section 44(e) of the Trademark Act, based on French Registration No. 3101484.

naos.com. It is well-settled that the record in an ex parte proceeding must be complete prior to appeal. Trademark Rule 2.142(d); 37 CFR § 2.142(d). The evidence attached to Applicant's brief is untimely and, to the extent such evidence was not already of record at the time of appeal, we do not consider it nor any of Applicant's arguments based thereon. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); see also TBMP §§ 1203.02(e) and 1207.01 (January 2017).³

II. 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 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

³ The internet evidence would have been inadmissible even if it had been timely submitted because no access date was provided. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TMEP) § 12008.03; *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018); *See also In re Planalytics Inc.*, 70 USPQ2d 1453, 1458 (TTAB 2004) (dates accessed is important because “information on websites is transitory and subject to change at any time at the owner's discretion.”).

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 *DuPont* factors, along with the *DuPont* factor regarding the similarities of established trade channels, 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.

The identification of goods in the cited registration includes “cosmetics,” and the identification of goods in the application includes particular cosmetics, such as “face serums,” “lip balms” and “skin toners,” thus making them legally identical in part.⁴

⁴ A “cosmetic” (noun) is “[a] preparation, such as powder or a skin cream, designed to beautify the body by direct application,” or “[s]omething superficial that is used to cover a deficiency or defect” (<https://www.ahdictionary.com/word/search.html?q=cosmetic>). The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet*

The cited registration also includes “skin soaps,” which are encompassed within Applicant’s “skin cleansers.” “Likelihood of confusion must be found if there is likelihood of confusion involving any item that comes within the identification of goods in the involved application.” *In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)); *see also In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“[I]n view of our findings with respect to Applicant's fresh processed fish and frozen fish and Registrant's non-live fish and frozen fish, we need not make a determination as to Applicant's remaining goods as 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.”).⁵

Applicant argues that although her goods are similar to Registrant’s goods, there is no likelihood of confusion because

Applicant’s Mark target[s] different consumers, in that they focus on all-natural, organic, and ayurvedic skin care. These goods will not be found at every day drug stores such

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 Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

⁵ The Examining Attorney also made of record excerpts of pages from the Internet websites of beauty care retailers, Ulta and Aveda, showing both companies provide general cosmetic and beauty care products along with natural and organic-based cosmetic and skincare/haircare products, June 10, 2019 Final Office Action, TSDR 6-22, which he argues “established that the same entity commonly manufactures, produces, or provides the relevant goods and are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use.”

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.

as Target, Wal-Mart, etc., but at a specialized location. Unlike the goods covered by the Cited Mark, which appear to be sold at pharmacies and drug stores, the goods covered by Applicant's Mark will be sold at a boutique store.

Applicant's argument is unavailing. As the Examining Attorney observes, there are no limitations or restrictions in either Applicant's or Registrant's identification of goods. Because there is substantial overlap between Applicant's specific cosmetics and Registrant's broadly identified "cosmetics," we find that they are legally identical in part. "Likelihood of confusion must be found if there is likelihood of confusion involving any item that comes within the identification of goods in the involved application." *In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)); *see also In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) ("[I]n view of our findings with respect to Applicant's fresh processed fish and frozen fish and Registrant's non-live fish and frozen fish, we need not make a determination as to Applicant's remaining goods as 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.").

Furthermore, where, as here, Applicant's and Registrant's goods are in-part identical, we must presume that the channels of trade and classes of purchasers for those services are also the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 56 C.C.P.A. 769, 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); *American*

Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute, 101 USPQ2d 1022, 1028 (TTAB 2011).

The second and third *DuPont* factors strongly support a finding of a likelihood of confusion.

B. 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.”).

With respect to appearance, Applicant argues that her proposed mark NĀO AYURVEDA and Design is dissimilar to Registrant’s mark NAOS because it is a composite mark with an extensive design above the wording; contains an additional word AYURVEDA; and the word NĀO contains a diacritical mark.⁶ Given the size and visual prominence of the distinctive design (comprising of “an image of hands curved around flowers, with an eye appearing inside a lotus flower, enclosed by a circular design”), the design should have been accorded more weight in the analysis, she urges.⁷ However, she contends, the Examining Attorney “gave no weight at all to the extensive design above the words,” and therefore “failed to analyze the mark as a whole.”⁸ Moreover, she asserts, the word AYURVEDA in her mark “lend[s] further distinctions between the two marks” and, though disclaimed, it is still part of the mark and must be considered.⁹

With respect to sound, Applicant explains that she incorporated a diacritical mark above the letter “A” in the word NĀO in the full wording NĀO AYURVEDA so that it would be pronounced “now Ayurveda.”¹⁰ Because the registered mark NAOS “has no

⁶ 4 TTABVUE 6-9.

⁷ *Id.* at 7.

⁸ *Id.*

⁹ *Id.* at 8.

¹⁰ *Id.* at 9

such distinction,” she argues, they are “pronounced differently.”¹¹

Finally, Applicant argues that the marks have different commercial connotations. As distinguished from Registrant’s mark NAOS, she asserts, “which gives no indication of its commercial impression or even the type of goods covered,” Applicant’s mark includes the word AYURVEDA, which describes the traditional system of Hindu medicine,” which is linked to its design and, overall, “is distinctive of “earthy, organic products.”¹²

The Examining Attorney correctly notes that, when a mark is comprised of both words and a design, such as Applicant’s mark, the words are normally accorded greater weight because consumers are likely to remember and use the word(s) to request the goods or services. *See, e.g., In re Viterra, Inc.*, 101 USPQ2d at 1905. He also correctly asserts that with regard to the wording in a mark, disclaimed matter that is descriptive of or generic for the goods or services is often “less significant in creating the mark’s commercial impression” than other distinctive wording therein. *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). It is well settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ 1047 (Fed. Cir. 2018).

Nonetheless, we find that the wording NĀO AYURVEDA, coupled with the prominently displayed and unique design, presents a distinct commercial impression

¹¹ *Id.*

¹² *Id.*

not found in Registrant's NAOS mark:



Additionally, while “[t]he letters of the registrant’s four-letter mark [NAOS] comprises the entirety of the dominant portion of the applicant’s mark,” as the Examining Attorney notes, the use of a diacritical mark over the letter “a” in the mark does distinguish Applicant’s mark by making it appear to be in a foreign language. It is unclear whether Registrant’s mark is in English or a foreign language but in any event there is no evidence that consumers would perceive the marks as being in the same language, or perceive them as otherwise similar.

Further, though not mentioned in the parties’ briefs, the translation of record for NAOS in Registrant’s mark is “temple or part of a temple.”¹³ In English, “naos” is defined as “an ancient temple or shrine” or a “cella” (which is defined as “the frequently hidden inner part of a Greek or Roman temple that house the image of the deity”).¹⁴ “Naos” is the singular form of this noun; “naoi” is the plural form. Given that, and the lack of evidence that the first term in Applicant’s mark has any meaning

¹³ January 15, 2019 Office Action, TSDR 6-7.

¹⁴ <https://www.merriam-webster.com/dictionary/naos>.

at all, there is no reason to think that consumers would perceive the term NĀO in the applied-for mark as representing the singular form of Registrant's mark NAOS, as the Examining Attorney has suggested they might.¹⁵

NĀO in the applied-for mark is similar in appearance to “NÃO,” the Portuguese word for “no,”¹⁶ though Applicant uses a macron as a diacritical mark instead of a tilde. A “macron” is a mark – placed over a vowel to indicate that the vowel is long or placed over a syllable or used alone to indicate a stressed or long syllable in a metrical foot, whereas a “tilde” is “a mark ~ placed especially over the letter n (as in Spanish señor sir) to denote the sound \nʏ\ or over vowels (as in Portuguese irmã sister) to indicate nasality.”¹⁷ Regardless, NĀO does not have a known meaning in English, as NAOS does.

Moreover, while AYURVEDA in the applied-for mark, defined as—a “traditional Hindu system of medicine, which is based on the idea of balance in bodily systems and uses diet, herbal treatment, and yogic breathing”¹⁸—has been disclaimed and is therefore conceded by Applicant to be descriptive of the goods,¹⁹ it is still part of the applied-for mark and must be considered in our analysis. *In re Viterra, Inc.*, 101 USPQ2d at 1911; *see generally In re National Data Corp.*, 753 F.2d 1056, 224 USPQ

¹⁵ 6 TTABVue 9.

¹⁶ <https://dictionary.cambridge.org/us/dictionary/english-portuguese/no?q=NO>.

¹⁷ <https://www.merriam-webster.com/dictionary/macron>
<https://www.merriam-webster.com/dictionary/tilde>.

¹⁸ January 15, 2019 Office Action, TSDR 9 (citing a definition from the Oxford Dictionary).

¹⁹ Applicant entered a disclaimer in response to requirement of the Examining Attorney during prosecution of the application, which is a concession that the term is at best merely descriptive. *See In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 n.4 (TTAB 1988).

749, 751 (Fed. Cir. 1985) (a disclaimer has no legal effect on the issue of likelihood of confusion inasmuch as the purchasing public is unaware of what words have been disclaimed). AYURVEDA, added to NĀO, which already appears different from NAOS, coupled with a prominent design, creates an overall commercial impression that is distinct from the word NAOS in the registration.

Considering the proposed mark and Registrant's marks in their entireties, we find them more dissimilar than similar. This *Dupont* factor weighs strongly against a finding of likelihood of confusion.

III. Conclusion

In sum, we find that there is no likelihood of confusion between the proposed mark



NĀO AYURVEDA

and Registrant's mark NAOS. 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 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.'").

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