

This Opinion is Not a
Precedent of the TTAB

Mailed: October 23, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Beavertail Products, LLC
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Serial No. 88197106
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Paul Kempf of Dicke Billig & Czaja PLLC,
for Applicant, Beavertail Products, LLC.

Laura Golden, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

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Before Thurmon, Deputy Chief Administrative Trademark Judge,
Kuczma and Heasley, Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Beavertail Products, LLC (Applicant) seeks registration on the Principal Register

of  for “wild game hunting decoys,” in International Class 28.¹

¹ Application Serial No. 88197106 was filed on November 16, 2018, based upon Applicant’s declared first use and first use in commerce at least as early as February 1, 2012, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The mark consists of a shield with the words DOA DECOYS inside the shield with a star above DOA. The shield is surrounded with stylized feathers with two waterfowl at the left and right of the shield. Color is not claimed as a feature of the mark. “DECOYS” is disclaimed.

Registration of Applicant's mark was refused under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), due to a likelihood of confusion with the mark D.O.A. (typed drawing) in Registration No. 1851581 owned by D.O.A., Inc. (Registrant), registered for fishing lures, in International Class 28.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney submitted briefs and Applicant filed a reply brief. For the reasons set forth below, the refusal to register is affirmed.

I. Evidentiary Objection

Before proceeding to the merits of the refusal, we address an evidentiary matter. The Examining Attorney objects to the evidence Applicant submitted with its appeal brief, namely, "the specimens submitted in the Cited Registration" (Exhibit A) and Applicant's specimen filed with its application (Exhibit B) and requests that the Board disregard the specimens on the ground that they were untimely submitted.³ See *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A*, 109 USPQ2d 1593, 1596 (TTAB 2014).

² Registration No. 1851581 issued August 30, 1994 and has been renewed. Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A typed mark is the legal equivalent of a standard character mark. 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....").

³ Examining Attorney's Appeal Brief, 8 TTABVUE 11-12.

The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§1203.02(e), 1207.01 (2020); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §710.01(c) (Oct. 2018). This evidence has been available to Applicant during prosecution of the application, and there is no justification for the delay in making this evidence of record. If an applicant wishes to rely on matter in the file wrapper of a cited registration, it must timely make it of record during the prosecution of its application. The parts of the file wrapper of a cited registration are not made of record by virtue of the examining attorney attaching to an office action a printout detailing the particulars of the cited registration. *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011) (documents from file of cited registration submitted with applicant's appeal brief are late-filed and not considered; examining attorney's objection sustained); TBMP §§ 1203.02(e) and 1207.01.

Evidence should not be filed with the Board after the filing of a notice of appeal. If the applicant or the examining attorney desires to introduce additional evidence after an appeal is filed, they should submit a request to the Board to suspend the appeal and to remand the application for further examination. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Inasmuch as Registrant's specimen was not timely made of record, and Applicant's specimen is already part of the record, the Exhibits attached to Applicant's Brief have not been considered.

II. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion enunciated in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), 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 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 i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Ft. 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.”).


We have considered all of the evidence as it pertains to the relevant *DuPont* factors, as well as Applicant’s arguments (including any evidence and arguments not specifically discussed in this opinion). *DuPont*, 177 USPQ at 567-68; see also *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered).

A. Similarity of the Goods, Channels of Trade and Classes of Consumers

We first consider the *DuPont* factors involving the similarity of Applicant's and Registrant's goods, and their channels of trade and classes of customers. As pointed out by the Examining Attorney, the compared goods need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. 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)); TMEP § 1207.01(a)(i). See e.g., *On-line Careline v. America Online*, 56 USPQ2d 1471 (holding ON-LINE TODAY for Internet connection services and ONLINE TODAY for an electronic publication likely to cause confusion); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (holding MARTIN'S for wheat bran and honey bread, and MARTIN'S for cheese, likely to cause confusion); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (holding GOTT LIGHT for various water beverages likely to cause confusion with GOTT and JOEL GOTT for wine); *Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, 100 USPQ2d 1584, 1597 (TTAB 2011) (holding composite marks containing the word TOTAL for yogurt and other products likely to cause confusion with the mark TOTAL for ready-to-eat breakfast cereal); *In re*

Toshiba Med. Sys. Corp., 91 USPQ2d 1266 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion).

The evidence relied upon by the Examining Attorney shows that the same entity commonly provides the relevant goods and markets them under the same mark:

- Eleven third-party registrations showing marks registered for goods including both hunting decoys and fishing lures, namely, Registration Nos.⁴:
 - 4793587 for NATO (animal hunting decoys, lures for hunting or fishing, fishing lures) owned by International Watchman Inc.;
 - 4827522 for  (waterfowl hunting decoys, [fishing] lures) owned by American Sports Licensing, LLC;
 - 5368833 for GAME HOG DECOYS LLC and Design (animal hunting decoys, fishing lures, wild game hunting decoys) owned by Game Hog Decoys LLC;
 - 5418051 for ASSASSIN HUNTING (animal hunting decoys, decoys for hunting or fishing, lures for hunting, scent lures for hunting or fishing) owned by Randall R. Kane and Aunica L. Kane;
 - 5454087 for RUT-FIN (fishing lures, waterfowl hunting decoys) owned by Rut-Fin LLC;
 - 5486547 for HALLOLURE and Design (decoys for hunting or fishing, scent lures for hunting or fishing) owned by Hong Kong Yi Hui Limited;
 - 5602602 for RUDDER (fishing lures, decoys for hunting or fishing, lures for hunting or fishing, scent

⁴ See September 20, 2019 Final Office Action at TSDR 19-51.

lures for hunting or fishing) owned by Lures Pro LLC;

- 5619204 for WideEye (fishing lures, decoys for hunting or fishing, lures for hunting or fishing, scent lures for hunting or fishing) owned by Eposeidon Outdoor Adventure Inc.;
- 5724598 for GORDY & SONS OUTFITTERS (fishing lures, waterfowl hunting decoys) owned by Houston Outfitters & Sportsmen Gallery, LLC;
- 5826193 for FINEST SPEAR LURES ON EARTH TEMPT-LURE LYKKE TIL FISKE (decoys for hunting or fishing; lures for fishing; artificial fishing lures; fishing lures; scent lures for hunting or fishing) owned by Tyler P. Templer and Shannon M. Templer;
- 5860256 for TWINSTAR DRAG (fishing lures, decoys for hunting or fishing, lures for hunting or fishing, Scent lures for hunting or fishing) owned by Accurate Grinding and Mfg. Corp.

Notably, nine of these eleven registrations are limited to goods for fishing and hunting.

Although the third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent they serve to suggest that the identified goods are of a kind which are produced or marketed by a single source under a single mark. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Thus, we find that the third-party, use-based registrations support the conclusion that the goods are related.

Additionally, the Examining Attorney's evidence supports that the relevant goods are sold or travel through the same trade channels and for use by the same classes of customers in the same fields of use:

- Hunting and fishing gear is sold at the same specialty stores, including Field & Stream, Green Top, Joe's Sporting Goods, Lake Charles Tackle, Rogers Sporting Goods, Fleet Farm, Farm & Home Supply, Gordy and Sons, and Presley Outdoors.⁵
- Applicant's and Registrant's goods are sold as sporting collectibles in a niche market, as shown in the evidence made of record of Red's Show, a sporting collectibles show, and the niche businesses Stein Decoys and White Deer Trading Post.⁶

Applicant contends there is no per se rule that all goods in a particular industry are related, citing *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) (BOTTOMS UP for ladies' and children's underwear held not likely to be confused with BOTTOMS UP for men's suits, coats and trousers, even though the marks were identical and covered apparel goods that may have been found in the same store). Even where both goods are clothing items, the Board found that any potential confusion was outweighed by the "distinct differences between women's underwear and men's suits and coats" and the fact that such goods would be sold in different departments of the same store. *Id.* Applicant argues that the same is true in this case,

⁵ See February 27, 2019 Office Action at TSDR 7-9, 10-12, 13-15, 16-18, 19-21; September 20, 2019 Final Office Action at TSDR 6-7, 8-9, 10, 11-12, 13-14.

⁶ See September 20, 2019 Final Office Action at TSDR 15, 16, 17-18.

where fishing lures are sold in different departments than are waterfowl decoys.⁷

However, the Board in *In re Sydel* went on to note:

But more important, and especially in this case is the nature of the marks and the commercial impression that they project in connection with the respective goods. Thus, if “BOTTOMS UP” can be deemed to have any suggestive connotation as applied to men’s suits, coats and trousers, it will be in association with the drinking phrase, “drink up!” [See: The Random House College Dictionary]. This is hardly the connotation that “BOTTOMS UP” would generate as applied to applicant’s ladies’ and children’s underwear.

Id. at 630. Applicant offers no similar distinction in the commercial impressions imparted by its mark for use on wild game hunting decoys versus Registrant’s mark registered for fishing lures. Thus, there are important distinctions between *Sydel* and the facts involved in this appeal.

Applicant next cites *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984), where the applicant sought registration of the mark PLAYERS for men’s underwear which was refused registration based on a registration for PLAYERS for shoes. Applicant argues that the Board in *British Bulldog* observed that the goods in question were distinctly different and even if sold in the same stores, they would ordinarily be displayed in different retail floor sections, and that those goods were not complementary or companion items as are coats and boots or athletic shoes and athletic clothing.⁸ However, after noting that “men’s underwear is in the nature of a self-service, ‘off the shelf’ item, whereas shoes are purchased with care, usually with

⁷ Applicant’s Brief pp. 8-9 (6 TTABVUE 13-14).

⁸ Applicant’s Brief p. 9 (6 TTABVUE 14).

the assistance of a salesman,” the Board explained that “the mark ‘PLAYERS’ has somewhat different connotations when applied to” the different goods, namely:

“PLAYERS” for shoes implies a fit, style, color, and durability adapted to outdoor activities. “PLAYERS” for men’s underwear implies something else, primarily indoors in nature.

Id. at 856. As in *Sydel Lingerie*, the mark in *British Bulldog* was found to have different connotations when applied to the applicant’s and registrant’s goods. Here, there is no evidence supporting different connotations of Applicant’s and Registrant’s marks when used in connection with their goods.

Lastly, Applicant cites *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (CROSSOVER for bras held not likely to be confused with CROSSOVER for ladies’ sportswear), in support of its argument “that [in that case] there were sufficient competitive differences between the goods since they were different types of clothing items, had different uses, and were normally sold in different sections of the department store. Furthermore, the mere fact that the goods of an application and the goods of a registration may be sold in the same retail establishment does not by itself establish that the goods are related.”⁹ However, the Board’s decision in *Sears* was based on two factors, a consent agreement and marks that, while identical in appearance, projected different meanings as applied to the respective goods, which led to its conclusion of no likelihood of confusion. Here, there is no consent agreement and Applicant’s mark and Registrant’s mark project the same or similar meanings.

⁹ Applicant’s Brief p. 10 (6 TTABVUE 15).

The three cases Applicant cites recognize the significance of different meanings or commercial impressions of identical marks as applying to the goods at issue in those cases. Applicant has not shown that such circumstances are present in this case. Moreover, as addressed below, the “DOA” in Applicant’s and Registrant’s marks, have the same commercial impression with respect to Applicant’s wild game hunting decoys, and Registrant’s fishing lures. The fact that Applicant’s goods can be used to lure water fowl¹⁰ and Registrant’s goods can be used to catch fish in the same lakes and rivers supports the relatedness of the goods. While hunting and fishing are separate sporting activities, as shown in the evidence of record, such goods are offered for sale carried by the same types of vendors. Indeed, the Board has previously found hunting and fishing goods to be “closely related” goods for the purposes of assessing likelihood of confusion. *See In re Buck Stop Lure Co.*, 226 USPQ 190, 191-92 (TTAB 1985) (training scents for hunting dogs related to fishing rods); *In re New Archery Prods. Corp.*, 218 USPQ 670, 672 (TTAB 1983) (arrowheads related to fishing lures). The evidence of record in this case supports a finding of relatedness between Applicant’s hunting decoys and Registrant’s fishing lures.


Accordingly, the *DuPont* factors regarding the similarity of the goods, as well as the trade channels and customers, favor a finding of likelihood of confusion.

¹⁰ See Applicant’s Brief p. (6 TTABVUE 16) and Applicant’s specimen filed with its application showing use of its mark in connection with floater pack duck decoys.

B. Similarity of the Marks

It is well settled that marks are compared in their entirety for similarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); *In re Viterra*, 101 USPQ2d at 1908.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Nat'l Data*, 224 USPQ at 751.

Looking at the marks in their entirety, Applicant’s mark , and the cited registered mark D.O.A.¹¹, are similar in appearance and sound. Applicant’s mark

¹¹ Both marks begin with the identical letters “DOA.” Although Registrant’s mark includes periods, i.e., “D.O.A.,” the periods most likely are not pronounced when the mark is spoken. Thus, the periods are an insignificant difference that is unlikely to be noticed or remembered



is comprised of the term “DOA” with the word “DECOYS” located underneath “DOA” in a smaller font. Although there is a slight difference in the sound of the marks stemming from the inclusion of the word “DECOYS” in Applicant’s mark, it does not differentiate the meaning of the marks. This is supported by Applicant’s disclaimer of the descriptive term “DECOYS,” resulting in an insignificant difference that is not likely to be noticed or remembered by customers when they encounter these marks at separate times. Purchasers in general are inclined to focus on the first word or portion of a trademark, especially where it is followed by a highly descriptive or generic term (as is the case with “DECOYS”). *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered”).

The addition of the word “DECOYS” in Applicant’s mark does not alter the meaning or commercial impression of its mark, or otherwise diminish its similarity with Registrant’s mark. Applicant’s identification of goods shows that the word “DECOYS” is generic for its “wild game hunting decoys.” Adding such a nondistinctive term to the mark does not suffice to differentiate the marks.

Applicant contends that its mark “is a stylized design mark that has a distinct commercial impression prominently featuring a shield between large stylized feathers and wings as well as two large waterfowl heads. The letters DOA are found on an upper portion of the shield and represent only a minority portion of the overall

by purchasers when encountering the marks. *See* TMEP § 807.14(c) (“Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.”).


mark.” “The most prominent portions of the mark,” according to Applicant, “focus on the waterfowl, the two heads and the rather large wings extending from the center shield,” which is “also is a very prominent portion of the mark.” Applicant maintains that the stylistic images of its mark are the most eye-catching aspects of the mark. And that “[n]one of this has anything in common with the Cited Registration” which “has no design features at all.”¹²

Applicant cites cases where the distinct design feature is the dominant portion of the mark, in support of its contention that the stylized design portion of its mark is eye-catching and serves to distinguish Applicant’s mark from Registrant’s word mark. However, in composite marks involving letters and designs, the letters, like words, are more likely to be recalled than designs and to be used in verbalizing composite marks in the course of referring to the mark owner or requesting its goods or services. Given the central location and visual prominence of the letters “DOA,” together with the word “DECOYS” presented in smaller font, and the fact that the background design portion of Applicant’s mark is a “carrier” for the letters and word portion of the mark, the letters “DOA” are the dominant portion of Applicant’s mark. *See Joel Gott Wines v. Rehoboth Von Gott*, 107 USPQ2d at 1430.

The cases Applicant relies on involve marks that are exceptions to these general principles, so we take a closer look at the cases to see whether they support Applicant’s position. *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014) found that the

¹² Applicant’s Brief p. 5 (6 TTABVUE 10).




design aspect of the mark, , with the large R letters was distinct enough to distinguish REDNECK RACEGIRL & Design from the registered word mark RACEGIRL for identical goods. The Board acknowledged that while it is often true that words in a composite word and design mark are considered to be dominant, that is not always the case, finding the applicant's word and design mark registrable over the cited mark. In looking at each mark, the Board noted crucial differences between the applicant's mark and the cited mark. The fact that applicant's mark contained the two large prominently displayed letters RR, where the letter strings "edneck" and "acegirl" were displayed in "relatively tiny typeface and subsequent letters are displayed in increasing thickness, drawing attention to the RR letters apart from the wording making the lettering difficult to notice." *Id.* at 1168. Contrary to Applicant's contention that *Covalinski* found the design of the mark to be the more distinctive aspect of the mark,¹³ the Board's holding focused on the prominence of the letters RR in the mark, not on some design-only portion of that mark.¹⁴

In *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009), the Board found no likelihood of confusion between applicant's standard character mark


¹³ Applicant's Brief p. 5 (6 TTABVUE 10).

¹⁴ Indeed, the Board's finding in *Covalinski* is consistent with our finding that the word DECOYS in Applicant's mark is unlikely to have much impact on consumer perception of the mark.



VOLTA for caffeine-infused vodka and the cited mark , which also incorporated VOLTA, for wines. According to Applicant, the Board found no likelihood of confusion between the applicant's mark and the cited mark which both contained the term VOLTA, due to the prominent design in the registered mark. However, noting that the marks differed in sound because the literal portion of the registered mark began with the term TERZA, the Board reversed the refusal to register applicant's mark VOLTA based on its finding that "confusion is unlikely because the marks are too dissimilar and the goods have not been shown to be related." *Id.* at 1285. Here, unlike *White Rock Distilleries*, Applicant's and Registrant's marks begin with the same three-letter term.

Applicant also cites *In re Ferro Corp. v. Ronco Labs., Inc.* 356 F.2d 122, 148 USPQ 497, 498-99 (CCPA 1966), which found no likelihood of confusion between applicant's

mark  and opposer's "FERRO" marks due to the dominance of the design elements of applicant's mark and the relatively small typeface in which "FERRO" appeared, noting that opposer's ownership of various "FERRO" marks did not entitle it to sole possession of the descriptive term "ferro." *Id.* at 499.¹⁵

In *Parfums de Coeur Ltd. v. Lazarus*, 83 USPQ2d 1012, 1016 (TTAB 2007) (opposition brought by opposer, owner of registrations for BOD MAN mark for men's


¹⁵ Applicant's Brief pp. 6-7 (6 TTABVUE 11-12).



fragrances, versus applicant's mark **BODYMAN** for a television series) the displayed design in applicant's mark was considered to be the dominant element of the mark because it is prominently displayed and engages the viewer before the viewer looks at the word "Bodyman." However, the Board further explained:


If the difference in pronunciation were the only differences between the marks, there would obviously be a much stronger case for the similarity of the marks. However, it must be remembered that applicant's mark includes a prominent design element, and it is intended to be used for an animated television series. Because television is a visual medium, the "consumers" of applicant's show, i.e., the viewers, will see the mark, and see the prominent design element.

83 USPQ2d at 1016-17. The Board found that the similarity in the sound of the marks was not a dispositive factor plus, the Board recognized differences in the connotations of the marks. Thus, when comparing the marks in their entireties, the marks were found to be different. *Id.* at 1016-1018. That is unlike the situation in the present case, where Applicant's and Registrant's marks contain the exact same first term.

Applicant argues that like in the *Parfums de Coeur v. Lazarus* case, the design elements in its mark catch the eye and engage the viewer before they ever look at the letters "DOA." However, unlike the location of the word **BODYMAN** in the applicant's mark in *Parfums de Coeur v. Lazarus*, the terms "DOA" and the word "DECOYS" in Applicant's mark  are centered in the top third of the mark, resulting in an impression that is different from the applicant's mark in *Parfums de Coeur v. Lazarus*. The letters DOA are readily recognizable in Applicant's mark. While the

stylistic portions of Applicant's mark are eye-catching, they are not how purchasers seeing the mark will use the mark to communicate about Applicant's goods.

Lastly, Applicant cites *Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, 1478-79 (TTAB 1987), where no likelihood of confusion was found between

STEVE'S for ice cream and the STEVE'S and Design mark, , for restaurant services. The Board noted that there were obvious differences in the marks:


The design portion of applicant's mark is extremely suggestive of the fact that applicant's restaurants feature hot dogs. The highly stylized depiction of humanized frankfurters, prancing arm in arm to musical notes, creates a distinctive commercial impression. Even with the word "STEVE'S" appearing above the hot dog figures, applicant's mark is distinguishable from the registered mark of opposer, which is simply the word "STEVE'S" in block letter form.

Id. at 1479. The Board also noted numerous third-party uses which demonstrated that the purchasing public had "become conditioned to recognize that many businesses in the restaurant and food store fields use the term, or something closely related to it, and that this purchasing public is able to distinguish between these businesses based on small distinctions among the marks." *Id.* In this case, there is no evidence of third-party uses of similar marks.

These prior decisions, while pertinent to the extent that they may set standards to be applied generally in proceedings such as this, are of little value in determining likelihood of confusion. It is well settled that each case must be decided on its own facts and the Board is not bound by prior decisions involving different records. *In re Boulevard Entm't Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003) ("the

PTO must decide each application on its own merits, and decisions regarding other registrations do not bind either the agency or this court,” citing *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)); *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014).

When comparing the marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (citing *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Bay State Brewing*, 117 USPQ2d at 1960 (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) (citing *Joel Gott Wines v. Rehoboth Von Gott*, 107 USPQ2d at 1430).

“Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of products.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985). Therefore, the marks  and D.O.A. are similar in appearance, sound, connotation, and commercial impression such that the inclusion

of the word “DECOYS” and the design elements in Applicant’s mark does not avoid the likelihood of confusion between the marks. This factor supports a finding of likelihood of confusion.

C. Number and Nature of Similar Marks in Use on Similar Goods

Under the sixth *DuPont* factor, we assess the extent to which the cited mark’s strength may be attenuated by “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567; *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”). For likelihood of confusion purposes, a mark’s strength “varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

Evidence of extensive registration and use of a term by others for similar goods can be powerful evidence of the term’s weakness. *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) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps. v. Veuve Clicquot*, 73 USPQ2d at 1693. However, Applicant points to no evidence of third-party actual use, and instead relies only on one third-party registration. Third-party registration

evidence goes not to the commercial strength of Registrant's mark, but rather its conceptual strength. That is, "[u]se evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)). *See also In re Guild Mortg. Co.*, 2020 USPQ2d 10279 *3 (TTAB 2020) ("[E]vidence of third-party registrations is relevant to 'show the sense in which . . . a mark is used in ordinary parlance.'").


Applicant submits one third-party registered mark, Registration No. 4542323, for the mark DOA for "firearm attachments, namely, mounts for attaching gun sights to a firearm; firearm sights; gunsights for firearms; non-telescopic gun sights for firearms; sights, namely, open sights for use on firearms." Applicant argues that its mark is entitled to registration since Registrant's D.O.A. mark for fishing lures has coexisted on the Principal Register with the registered DOA mark for firearm attachments "presumably without any confusion."¹⁶ This single third-party registration does not affect the meaning of the cited mark, nor does it support a finding that the cited mark is weak or otherwise entitled to a narrow scope of protection. Moreover, prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Board. Each case is decided on its own facts, and each mark

¹⁶ Applicant's Brief p. (6 TTABVUE 16-17).

stands on its own merits. *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (quoting *In re Boulevard Entm't*, 67 USPQ2d at 1480).

Under the sixth *DuPont* factor, the minimal third-party registration evidence does not support a finding that the cited mark is so weak or otherwise entitled to such a narrow scope of protection that Applicant's mark is not likely to cause confusion with Registrant's mark.

D. Conclusion

Applicant's word and design mark , and Registrant's mark D.O.A., are highly similar with respect to sound, meaning and commercial impression. The addition of the descriptive word "DECOYS" in Applicant's mark does not serve to distinguish Applicant's mark from Registrant's mark. Given that Applicant's and Registrant's goods are used for fishing and hunting for wild game, including water fowl, the term "DOA" used in each mark yields a similar overall commercial impression. Therefore, we find a likelihood of confusion between Applicant's mark and the cited mark for the identified goods.

Decision: The refusal to register Applicant's mark  under § 2(d) of the Trademark Act is affirmed.