

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 4, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ionic Blu LLC

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Serial No. 88311876

Reine Rooney of Reine Rooney LLC,
for Ionic Blu LLC.

Max Faucette, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Wellington, Kuczma and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Ionic Blu LLC, applied to register the mark BLU, in standard characters, on the Principal Register for “Wireless electronic tooth brushes for use in connection to an application on a mobile device for assisting the user with brushing their teeth,” in International Class 21.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the

¹ Application Serial No. 88311876 was filed on February 22, 2019, based on Applicant’s alleged intent to use the mark under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Trademark Act, 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 **RedoBlu** for numerous goods in several international classes, including in relevant part, “toothbrushes” and “toothbrushes, electric” in International Class 21, as to be likely to cause confusion:²

When the refusal was made final, Applicant appealed and filed a request for reconsideration, which was denied. The appeal is fully briefed.

We affirm the refusal.

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 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. du Pont 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

² Registration No. 2634356, registered July 23, 2002; renewed.

determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *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.”).

A. Similarity of the Goods, Trade Channels, and the Conditions of Sale

The second *DuPont* factor considers the “similarity or dissimilarity and nature of the goods or services as described in an application or registration”; the third *DuPont* factor considers the “similarity or dissimilarity of established, likely-to-continue trade channels”; and the fourth *DuPont* factor considers the “conditions under which, and buyers to whom, sales are made.” *DuPont*, 177 USPQ at 567. We must make our determinations for these factors based on the goods as they are identified in the application and cited registrations. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

The Examining Attorney asserts that “Registrant’s identification of goods (i.e., toothbrushes) is broad enough to encompass the goods of Applicant (i.e., wireless electric tooth brushes for use in connection to an application on a mobile device for assisting the user with brushing their teeth). Accordingly, the goods in question are

legally identical.”³ We agree that Registrant’s and Applicant’s goods are in part legally identical because Registrant’s broad identification of “toothbrushes” encompasses all toothbrushes, including Applicant’s more narrowly defined “wireless electronic tooth brushes for use in connection to an application on a mobile device for assisting the user with brushing their teeth.”

Applicant does not dispute that its goods are encompassed by Registrant’s “toothbrushes.” Instead, Applicant contends that Registrant does not actually provide toothbrushes. Referring to a bathroom fixture installation guide obtained from Registrant’s website and submitted for the first time with Applicant’s brief, Applicant argues that “[Registrant] does not offer toothbrushes for sale. Rather, they [sic] only offer bathroom fixtures.”⁴

We decline to consider Applicant’s late-filed evidence,⁵ which in any event does not show that Registrant does not provide toothbrushes.⁶ Even if there was such evidence in the record, it would be irrelevant because likelihood of confusion is determined based on the description of goods in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion*, 110 USPQ2d at 1162; *In re Dixie Rests.* 41 USPQ2d at 1534; *In re Fisher Sci. Co.*, 440 F.2d 434, 169 USPQ

³ 6 TTABVUE 5 (Examining Attorney’s Brief).

⁴ 4 TTABVUE 12 (Applicant’s Brief).

⁵ “The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also In re Inn at St. John’s*, 126 USPQ2d 1742, 1744 (TTAB 2018) (“The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution ... is untimely and will not be considered.”).

⁶ Evidence that Registrant provides an installation guide for a bathroom fixture does not show that Registrant does not provide other goods.

436, 437 (CCPA 1971).

Because Registrant's and Applicant's goods are in part legally identical, we presume that those goods travel through the same channels of trade to the same or overlapping classes of purchasers. *In re Information Builders Inc.*, 2020 USPQ2d 10444, 3 (TTAB 2020) (citing *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968)). There is no controversy on this point. However, quoting from *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2006), Applicant argues that "[t]he mere fact that two products may move in the same channels of trade to the same class of purchasers does not, *ipso facto*, prove that there is a definite relationship between the two types of goods."⁷ Applicant's argument is misplaced. As noted, the respective goods not only have a definite relationship, they are partially identical.

With respect to conditions of sale, we consider whether the goods are likely to be purchased on impulse or after careful consideration, as well as the degree, if any, of consumer sophistication. "Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchasers of inexpensive items may tend to have the opposite effect." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691, 1695 (Fed. Cir. 2005).

Applicant, again citing to evidence submitted for the first time with its brief, argues that its goods "are not marketed to people who are interested in proactive dental hygiene, especially for helping ensure children are brushing their teeth. The Applicant's goods are offered together with a [sic] app, to help provide an interactive toothbrushing

⁷ 4 TTABVUE 16 (Applicant's Brief).

experience.”⁸ Applicant further argues that consumers of both Applicant’s and Registrant’s goods are “sophisticated and knowledgeable about their respective interests.”⁹ In particular, “[Applicant’s] toothbrushes are electric and may be used in conjunction with an app. Consumers will be careful and deliberate when reviewing their options for toothbrushes, as they will want a high-quality product to use on their teeth. They will not wish to use a low-quality product that will not clean their teeth effectively or that will fail early.”¹⁰

Applicant’s unsupported arguments are unavailing. Because we are bound by the identifications of goods in the application and cited registration, and because neither identification is restricted as to price, quality, use or style, we must presume that Applicant’s and Registrant’s goods are marketed to all ordinary consumers of toothbrushes, including the general public, and in all price points, qualities, uses or styles. Furthermore, our decision must be based on the least sophisticated potential purchasers. *Stone Lion*, 110 U.SPQ2d at 1163. It is commonly known that toothbrushes are relatively inexpensive items that are frequently replaced, used by virtually all consumers, and likely to be purchased without a great deal of care. That Applicant’s goods are for use “in connection to an application on a mobile device for assisting the user with brushing their teeth” does not mean that all consumers are or must be sophisticated. Smart phones and mobile tablet devices are as ubiquitous these days as televisions;

⁸ *Id.* at 17. Even if Applicant’s purported evidence was properly of record, it does not support Applicant’s argument that its goods are marketed to any particular consumers. It is simply a webpage listing Applicant’s goods and their cost on its website.

⁹ *Id.* at 18.

¹⁰ *Id.*

downloading an “app” is as simple as downloading a song.

The second, third, and fourth *DuPont* factors weigh in favor of finding likelihood of confusion.

B. Similarity of the Marks

We turn next to the first *DuPont* factor, which considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 903 F.3d 1296, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 Fed. App’x. 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 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., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). “[W]here, as here, the goods at issue are identical, ‘the degree of similarity necessary to support a conclusion of likely confusion declines.’” *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)). Our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of

trademarks. *See 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.”); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014).

The Examining Attorney argues that Applicant’s mark BLU and Registrant’s mark **RedoBlu** “are similar because they share identical wording, with Applicant merely omitting the term ‘RED’ from its mark. The omission of the term ‘RED’ does not alter the commercial impression of Applicant’s mark so much that likelihood of confusion is likely.”¹¹ The design elements in Registrant’s mark, he argues, “consist merely of a circle design with one half in red and the other in blue. Such a simple design ... does nothing to alter the impression engendered by the shared wording BLU.”¹² According to the Examining Attorney, “consumers familiar with registrant’s RED BLU mark are likely to see the mark BLU, for legally identical goods, as merely identifying a new product line or rendition of the mark and goods offered by the registrant.”¹³

Applicant argues that the marks differ in appearance “when ... viewed as a whole, taking into account the distinctive design elements of the registered mark....”¹⁴ According to Applicant, the shared literal elements in Registrant’s mark “consist of an insignificant portion of the mark in relation to the mark’s other literal and stylized

¹¹ 6 TTABVUE 8 (Examining Attorney’s Brief).

¹² *Id.* at 9-10.

¹³ *Id.* at 10.

¹⁴ 4 TTABVUE 11 (Applicant’s Brief).

elements.” In addition, Registrant’s mark **RedoBlu** “incorporates unique stylized elements in relation to its circle that is half red and half blue,” and adds the distinctive term RED, causing the mark “to be a highly distinctive design and provide a visual difference and commercial impression.”¹⁵ Moreover, “[t]he circle further emphasizes the two colors of the word mark—red and blue. This further helps to avoid any likelihood of confusion.”¹⁶ Applicant also asserts that the marks “differ phonetically” and are pronounced “in substantially different manners” due to Registrant’s addition of “red.”¹⁷ Finally, Applicant contends without further explanation that the marks have “significantly different connotation and commercial impressions” because of their “contextual differences.”¹⁸

We find Applicant’s arguments unpersuasive. Likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding or deleting other matter. If an important or significant portion of both marks is the same, as is the case here, then the marks may be confusingly similar notwithstanding some differences. *See, e.g., Toshiba Med. Sys. Corp.*, 91 at 1269 (finding TITAN and VANTAGE TITAN confusingly similar); *Hewlett-Packard v. Packard Press*, 62 USPQ2d at 1004 (PACKARD TECHNOLOGIES and HEWLETT PACKARD confusingly similar); *In re Pierre Fabre S.A.*, 188 USPQ 691, 692 (TTAB 1975) (PEDI-RELAX and RELAX confusingly similar).

¹⁵ *Id.* at 11-12.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 13-14.

¹⁸ *Id.* at 15.

While Registrant's mark includes a circle design with two halves, red and blue, it also reinforces the wording RED BLU. Consumers are likely to call for Registrant's goods using the wording RED BLU, thus making the mark's literal elements more important than the design. *In re Viterra*, 101 USPQ2d at 1911 ("the verbal portion of a word and design mark likely will be the dominant portion"); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) ("if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods").

Furthermore, we agree with the Examining Attorney that Applicant's mark will be perceived similarly by consumers, who are likely to consider Applicant's mark as representing another line of Registrant's toothbrushes, simply another iteration of Registrant's mark, or vice-versa. As mentioned earlier, the recollection of the average purchaser normally retains a general rather than a specific impression of trademarks, and "may have but dim recollections from having previously seen or heard one or the other of the involved marks." *Neutrogena*, 161 USPQ at 688. As the Examining Attorney notes, Applicant's mark is presented in standard characters and thus "may be displayed in any lettering style" and "could be presented in the same manner of display" as Registrant's mark.¹⁹ *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) ("[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.") (citing *Citigroup*, 98 USPQ2d at 1259).

¹⁹ 6 TTABVUE 10 (Examining Attorney's Brief).

Notwithstanding their differences, Applicant's standard character mark BLU and Registrant's mark **RedBlu** are similar in overall appearance, sound, connotation and commercial impression. Taking into account the lesser degree of confusing similarity needed between marks used in connection with identical goods, the first *DuPont* factor weighs in favor of finding likelihood of confusion. *Century 21 Real Estate Corp.* 23 USPQ2d at 1700; *In re Hitachi High-Technologies Corp.*, 109 USPQ2d at 1773.

II. Conclusion

In sum, we find that the first, second, third, and fourth *DuPont* factors weigh in favor of finding likelihood of confusion and are dispositive in this case, and there are no factors weighing against such a finding.

Decision: The refusal to register is affirmed.