

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Oral Hearing: July 13, 2021

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cuup, Inc.

Serial No. 88326435

Jeffrey L. Snow of Pryor Cashman LLP,
for CUUP, Inc.

Laura Taraban, Trademark Examining Attorney Law Office 127,
Mark Pilaro, Managing Attorney.

Before Wolfson, Kuczma, and Hudis,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

CUUP, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark CUUP BODY TALK for:


“Providing a website featuring non-downloadable articles in the fields of women’s apparel, undergarments, fitness, nutrition and wellness” in International Class 41, and

“Computer services, namely, creating an on-line community for registered and unregistered users to participate in discussions, get feedback from their peers, form virtual communities, upload photographs, and engage in social networking services in the fields of women’s

apparel, fitness, nutrition and wellness” in International Class 42.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the goods identified in the application, so resembles the marks BODYTALK (in



standard characters) and , both marks registered for, inter alia, “Providing healing services, namely, holistic and alternative healing therapies; providing information through an electronic communications network in the fields of holistic and alternative healing techniques” in International Class 44, as to be likely to cause confusion, to cause mistake, or to deceive prospective consumers.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

¹ Application Serial No. 88326435 was filed on March 5, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s bona fide intent to use the mark in commerce.

² Reg. No. 4729765, for the standard character mark, issued May 5, 2015; combined Trademark Act Sections 8 & 15 Declaration accepted and acknowledged.

Reg. No. 4702032, for the composite mark, issued March 17, 2015; combined Trademark Act Sections 8 & 15 Declaration accepted and acknowledged.

I. Evidentiary Objection

For the first time with its Reply Brief, Applicant submitted a copy of its CUUP registration (Reg. No. 6180524) and “evidence of third-party uses of BODY and TALK.” 13 TTABVUE 4-5.

Trademark Rule 2.142(d) provides, in pertinent part:

(d) The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.

This is especially true with respect to evidence submitted for the first time with a reply brief, to which the examining attorney has no opportunity to respond. *In re City of Houston*, 101 USPQ2d 1534, 1536-1537 (TTAB 2012); *In re Zanova Inc.*, 59 USPQ2d 1300, 1302 (TTAB 2001) (“By attempting to introduce evidence with its reply brief, applicant has effectively shielded this material from review and response by the Examining Attorney.”).

At the oral hearing, the Examining Attorney objected to the admission of the evidence attached to Applicant’s Reply Brief. However, the fact that the Board held an oral hearing in this case did not thereby provide the requisite opportunity for the Examining Attorney to object, the failure of which would have allowed for the admissibility of the evidence. In any event, the Examining Attorney did object to the evidence at the oral hearing and the objection is sustained. Moreover, the Examining Attorney’s objection was not waived by her answering questions about the evidence that were posed to her by the panel during the oral hearing.

If Applicant had wished to submit additional evidence after filing its appeal, it should have requested a remand for that purpose, which -- if granted -- would have given the Examining Attorney an opportunity to examine the new evidence and respond to it appropriately. Trademark Rule 2.142(d). Because Applicant failed to do so, we find the evidence submitted with Applicant's reply brief "manifestly untimely," and we have not considered it. *City of Houston*, 101 USPQ2d at 1537 (citing *In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1334 (TTAB 2009)).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020) ("Not all *DuPont* factors are relevant in each case . . ."). Two key considerations are the similarities between the marks and the relatedness of the goods and services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340,

71 USPQ2d 1944, 1945 (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.”).

We focus our analysis on the registered standard character mark BODYTALK identified in Registration No. 4729765, because if likelihood of confusion is found as to this registration, it is unnecessary to consider the other cited registration for



. Conversely, if likelihood of confusion is not found as to the standard character mark, we would not find likelihood of confusion as to the composite mark. *See, e.g., In re St. Julian Wine Co.*, 2020 USPQ2d 10595 (TTAB 2020); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1734 (TTAB 2018); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Similarity of the Marks

Under the first *DuPont* factor, we compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (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, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess 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. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). The emphasis “is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks or service marks.” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, *18 (TTAB 2020); see also *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *6 (TTAB 2019).

Applicant’s mark is CUUP BODY TALK. The cited registered mark is BODYTALK. Although Registrant’s mark combines the two words “body” and “talk” while Applicant displays the phrase as two words, the distinction is immaterial. When a compound term comprises two ordinary English words, consumers generally recognize them as such, rather than considering the combination to be a fanciful or arbitrary term with no meaning at all. As a result, whether such a mark appears as one word or two often has little or no effect on consumers’ impression of it. See *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD “essentially identical”). Consumers who encounter Registrant’s mark would readily recognize its constituent terms, “body” and “talk.”

But for the immaterial distinction of the spacing between the words in Applicant’s mark, its CUUP BODY TALK mark completely appropriates the cited registered

mark BODYTALK. “Marks have frequently been found to be similar where one mark incorporates the entirety of another mark, as is the case here.” *Tivo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1115 (TTAB 2018); *see also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1322 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (affirming Board’s finding that the mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, that the noun LION was the dominant part of both parties’ marks, and that confusion was likely).

Applicant argues that “the dominant portion of Applicant’s Mark is necessarily CUUP,” and that the term CUUP in the mark “is sufficient to dispel any likelihood of confusion between the marks.” Applicant’s Brief, 10 TTABVUE 10. The Examining Attorney disagrees: “Adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion under Section 2(d).” Examining Attorney’s Brief, 12 TTABVUE 6. Applicant does not dispute that CUUP “is a house mark of Applicant,” Reply Brief, 13 TTABVUE 2, but contends that it is “itself a strong mark and the primary focus of the consumer’s attention.” *Id.*

While we must consider the marks in their entireties, as purchasers or prospective purchasers would see them, *Cai v. Diamond Hong*, 127 USPQ2d at 1801, one feature of a mark may make a greater impression on these purchasers than another part, and it is appropriate to give more weight to the dominant feature in determining the commercial impression made by the mark. *TiVo Brands*, 129 USPQ2d at 1116 (“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 consideration of the marks in their entireties.”) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Whether the addition of the term CUUP in Applicant's mark distinguishes it from Registrant's mark depends on the strength of the other terms and the overall commercial impression of the mark as a whole. “It has long been held that the addition of a trade name or house mark to a registered mark does not generally avoid confusion.” *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1364 (TTAB 2007) (“Indeed, a consumer who has been told about the advantages of registrant's MVP casino services is likely to believe that [applicant's] CLUB PALMS MVP casino services is simply the now identified source of the previously anonymous MVP casino services.”); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant's VANTAGE TITAN mark for MRI diagnostic apparatus, and registrant's TITAN mark for medical ultrasound device, likely to cause confusion); *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (“such addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the marks so as to avoid source confusion;” LE CACHET DE DIOR confusingly similar to the registered mark CACHET).

On the other hand, “where there are some recognizable differences in the asserted conflicting product [or service] marks or the product [or service] marks in question are highly suggestive or merely descriptive or play upon commonly used or registered terms, the addition of a housemark and/or other material to the assertedly conflicting

product [or service] mark has been determined sufficient to render the marks as a whole sufficiently distinguishable.” *Christian Dior*, 225 USPQ at 534; *see also Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1174 (TTAB 2011) (finding “addition of the distinctive house mark ZIG ZAG to the highly suggestive phrase [CLASSIC] is sufficient in this case to outweigh the similarities” between CLASSIC CANADIAN and ZIG ZAG CLASSIC AMERICAN BLEND; both marks for smoking tobacco).

In this case, the common term in Applicant’s and Registrant’s marks, BODY TALK, (with or without a space between the words) is not “so highly suggestive that the inclusion of [Applicant’s] house mark would create significant differences in the marks’ appearance, pronunciation, meaning, and commercial impression,” such that the inclusion of Applicant’s house mark CUUP sufficiently distinguishes the marks. *Fiesta Palms*, 85 USPQ2d at 1366. As in *Fiesta Palms*, we find that purchasers familiar with the cited registered mark BODYTALK are likely to assume that CUUP simply identifies what had previously been an anonymous source of information provided over the Internet in the fields of holistic and alternative healing techniques, and that Registrant likely would be extending its services to include non-downloadable articles in the fields of women’s fitness, nutrition and wellness, as well as creating an on-line community in the fields of women’s fitness, nutrition and wellness.

Inclusion of Applicant’s house mark is a difference between the marks, but we find that it does not result in marks that are sufficiently dissimilar for likelihood of

confusion purposes. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (presence of an additional term in a mark “does not necessarily eliminate the likelihood of confusion if some terms are identical.”) (*citing China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123 (Fed. Cir. 2007)).

Applicant further argues that the term BODY TALK (as one word or two) in each mark projects a different connotation, thereby eliminating a likelihood of confusion. Applicant alleges that the meaning of the cited registered mark is “about a body’s inner-talk and conveys the notion that the Registrant’s services consist of medicinal practices using the inner connection between one’s body parts as a means of healing,” 10 TTABVUE 8, whereas “the idea conveyed by Applicant’s use of BODY TALK, namely external and honest conversations among women about their bodies, is entirely inapposite to the medicinal notion of the ‘talk’ or interaction between a organs as a means of detecting and treating disease.” 10 TTABVUE 10. We reject Applicant’s argument as improperly based on extrinsic evidence, in this case portions of Registrant’s website:³

³ Submitted with Applicant’s November 18, 2019 Office Action at TSDR 18.

About BodyTalk

The BodyTalk techniques provide insights to the areas of your body that need attention. What might seem like an obvious problem to you is not necessarily the one your body wants to address first.

This is the beauty of BodyTalk. It respects the body's own needs and determines your body's priorities for healing. Then with the use of a variety of non-invasive techniques, BodyTalkers refocus your body's natural healing response to establish better communication within the body.



It is well-established that registrability is based on the marks and the services as recited in an applicant's application and the cited registration. *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (“Evidence of actual marketplace usages that seeks to limit or alter the usages encompassed by the marks, goods and services, or usages listed in the application and registration are not considered in assessing likelihood-of-confusion in the registration context.”); *see also In re Midwest Gaming & Ent. LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008) (“it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods”).

The scope of protection to which each mark is, or would be, entitled is determined by the registration thereof, pursuant to Trademark Act Section 7(b) (federal trademark registration on the Principal Register “shall be prima facie evidence ... of the owner's exclusive right to use the registered mark in commerce on or in connection

with the goods or services specified in the certificate...”). 15 U.S.C. §1057(b). Because the scope of the recitation in a registration determines the scope of the post-grant benefit, we do not consider extrinsic evidence of how the mark is used, which may change at any time. This is not a case where the recitation of services in either Applicant’s application or Registrant’s registration is technical or vague and requires clarification. *See, e.g., Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) (citing *In re Trackmobile*, 15 USPQ2d 1152, 1154 (TTAB 1990)) (extrinsic evidence of use may be considered to determine the meaning of the identification).

Because the marks BODYTALK and CUUP BODY TALK are similar in sight, sound, meaning and overall commercial impression, the first *DuPont* factor favors a finding of likelihood of confusion.

B. Relatedness of the Services

The second *DuPont* factor “considers “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir 2018) (quoting *DuPont*, 177 USPQ at 567). The goods and services need not be identical, but “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.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant's recited services are directed to providing a website, and an on-line community, in the fields of, inter alia, women's fitness, nutrition and wellness. The cited registration includes the services of providing a website in the fields of holistic and alternative healing techniques. The Examining Attorney argues that Applicant's services are broad enough to cover Registrant's services: "[Applicant] uses broad wording to describe its services as providing online communities and a website featuring articles in the fields of nutrition and wellness, which presumably encompass all services of the type described, including Registrant's narrower services...." Examining Attorney's Brief, 12 TTABVUE 11-12. Applicant, responds that the services are "highly distinguishable by their nature," inasmuch as its primary business is "selling custom-sized bras and undergarments," and that while its e-commerce website provides a forum "with information about women's bodies and image issues," Registrant's services are "designed to optimize the body's internal communications." Applicant's Brief, 10 TTABVUE 12-13. Applicant points to Registrant's advertising, which states: "Each system, cell, and atom of the body is in constant communication with each other." 10 TTABVUE 13.

As we have stated, our determination regarding the similarity of the services is based on the services as they are identified in the application and registration. *In re Detroit Athletic*, 128 USPQ2d at 1052 (citing *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017); *Stone Lion*, 110 USPQ2d at 1162. Applicant may not rely on portions of Registrant's website to impermissibly narrow the scope of the services in the cited registration. *In re Midwest Gaming*, 106 USPQ2d at 1165; *In*

re La Peregrina, 86 USPQ2d at 1646; *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764 (TTAB 1986). Any specific differences between the actual nature of the services are irrelevant in our analysis.

We agree with the Examining Attorney that Applicant's services as recited encompass Registrant's services and are thus legally identical. That Applicant's services are directed to women's apparel, undergarments, fitness, nutrition and wellness does not avoid the overlap, inasmuch as Registrant's services are marketed and available to all consumers regardless of age, gender, or other attributes. *See, e.g., Octocom Sys., Inc. v. Houst. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed."); *Recot, Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1895, 1898 (Fed. Cir. 2000) ("Even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.").

The second *DuPont* factor regarding the similarity or dissimilarity of Applicant's and Registrant's services favors a finding of likelihood of confusion.

C. Trade Channels and Classes of Consumers

The third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *see also Stone Lion*, 110 USPQ2d at 1161-63.

Because there are no limitations as to channels of trade or classes of purchasers in the descriptions of Applicant’s or Registrant’s services, and the services identified in the application and cited registration are legally identical, we find the channels of trade and classes of purchasers to be the same. *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra Inc.*, 101 USPQ2d at 1908 (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *13 (TTAB 2020) (applying presumption to identical and closely related goods) (citing *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

The third *DuPont* factor favors a finding of likelihood of confusion.

D. Consumer Sophistication

“The fourth *DuPont* factor considers ‘[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.’” *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant argues that “because of the highly invasive and personal nature of medicine and treating one’s body from disease, consumers of Registrant’s services are highly likely to scrutinize the qualifications and characteristics as to the origin and provider of the services.” 10

TTABVUE 14. Likewise, “Applicant’s consumers, too, may conduct careful research as to the source of CUUP products and its tangential services to address concerns about fabric, fit, sustainability etc.,” *Id.*

As there is no evidence supporting these arguments, we find them not well-taken. *See Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)). Further, consumers for bras and undergarments include sophisticated as well as unsophisticated buyers who would not necessarily exercise heightened care, and Board precedent requires our decision to be based “on the least sophisticated potential purchasers.” *Stone Lion*, 110 USPQ2d at 1163. Moreover, even careful purchasers can be confused as to source where similar marks are used on legally identical goods. *See In re Rsch. Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (*citing Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)) (“Human memories even of discriminating purchasers ... are not infallible.”).

The fourth *DuPont* factor is neutral in our analysis of whether confusion is likely.

III. Summary

We find there is a likelihood of confusion as to the source of Applicant’s services bearing the mark CUUP BODY TALK when encountered by relevant purchasers familiar with Registrant’s BODYTALK services. The marks are similar in sight, sound, meaning and overall commercial impression. The services are legally identical and are presumed to travel through similar trade channels to the same classes of

prospective purchasers. Consumers familiar with the registered mark BODYTALK for “Providing healing services, namely, holistic and alternative healing therapies; providing information through an electronic communications network in the fields of holistic and alternative healing techniques” who subsequently encounter Applicant’s CUUP BODY TALK mark for “providing a website featuring non-downloadable articles” and “creating an on-line community” in the fields of women’s fitness, nutrition and wellness could easily believe, mistakenly, that Applicant’s services are affiliated with Registrant’s services.

Decision: The refusal to register Applicant’s mark CUUP BODY TALK under Trademark Act Section 2(d) is affirmed.