

**This Opinion is Not a
Precedent of the TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Cosmo Spa Lounge & Supply, Inc.
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Serial No. 88434221
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Boyana Bounkova of Sutter Law, P.C. for Cosmo Spa Lounge & Supply, Inc.,
for Applicant.

Sahar Nasserghodsi, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Taylor, Adlin, and Dunn, Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Applicant, Cosmo Spa Lounge & Supply, Inc., seeks registration on the Principal Register of the mark GEL-LYS (in standard characters) for “artificial eyelash tweezers; tweezers” in International Class 8 and “battery-powered applicators for applying cosmetics to eyelashes; motorized applicators for applying cosmetics to eyelashes” in International Class 21.¹

¹ Application Serial No. 88434221 was filed on May 16, 2019, 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.

References to the application are to the downloadable .pdf version of documents available from the TSDR (Trademark Status and Document Retrieval) database. The TTABVUE

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the 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 mark GEL'ISS (in standard characters), registered on the Principal Register for "cosmetics and cosmetic preparations," in International Class 3,² as to be likely to cause confusion, mistake or deception.

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.

I. Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co. (DuPont)*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

citations refer to the Board's electronic docket, with the first number referring to the docket entry and the second number, if applicable, referring to the page within the entry.

² Registration No. 4728364 issued April 28, 2015.

A. Comparison of the Marks

We consider Applicant's mark GEL-LYS and the registered mark GEL'ISS, both in standard characters, and compare them "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The marks "must be considered ... in light of the fallibility of memory." *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

1. Strength of the Registered Mark

Before comparing Applicant's mark to the registered mark, we address the conceptual strength of the registered mark. See *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) ("the strength of the cited mark is -- as always -- relevant to assessing the likelihood of confusion under the *DuPont* framework"). "In order to determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014). In assessing the conceptual strength of a mark, we may consider dictionary definitions "to determine the ordinary significance and meanings

of words.” *Hancock v. Am. Steel & Wire Co. of N. J.*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953). Third-party registrations may be probative of a mark’s strength because they “show the sense in which a mark is used in ordinary parlance.” *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016) quoting *Juice Generation Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (citations omitted).

With respect to the strength of the registered mark cited against Applicant, the mark combines the term GEL, an apostrophe, and the letters ISS to form the word GEL’ISS. The record includes definitions of the noun “gel” as “a thick, clear, liquid substance, especially one used on the hair or body” and “a semirigid colloidal dispersion of a solid with a liquid or gas, as jelly, glue, etc.”³ The record also includes seventeen third party registrations for marks incorporating the term GEL for related goods.⁴

Based on this evidence, we agree with Applicant that the term GEL is conceptually weak as applied to cosmetics and cosmetic preparations which may have the form of a gel. However, the registered mark GEL’ISS includes other matter that also contributes to its overall commercial impression. More specifically, we also find that the term GEL’ISS is the phonetic equivalent of the word “jealous,” a term which is arbitrary as applied to Applicant’s cosmetics. We further find that the registered mark GEL’ISS has a double connotation, referring to both the GEL characteristics of

³ August 13, 2020 response TSDR 15-16 (citing Cambridge Dictionary and Dictionary.com).

⁴ August 13, 2020 Response TSDR 18-33.

the goods and the phonetically equivalent word “jealous.” Indeed, Applicant agrees that the registered mark is “a sound-alike of jealous.”⁵ Based on these findings, the registered mark GEL’ISS is stronger than marks which merely are a variant of the term GEL, and less strong than an arbitrary mark.

2. Similarity/Dissimilarity of the Marks

Turning to compare Applicant’s mark GEL-LYS to the registered mark GEL’ISS, we find that the marks look and sound the same, and have the same connotation. More specifically, both marks are two syllable words of six letters joined by either a hyphen or an apostrophe. The first syllable (GEL) is identical. The second syllable (LYS and ISS), when combined with the first syllable, may have the same pronunciation. Like Registrant’s mark GEL’ISS, Applicant’s mark GEL-LYS is the phonetic equivalent to “jealous.” *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (“We find that the minor differences between I LOVE YOU and I LUV U in appearance due to the different spellings of the words “love” and “you” do not outweigh the identity of the entire marks in terms of sound, connotation, and commercial impression.”); *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1646 (TTAB 2009) (“CYNERGY and SYNERGIE are highly similar, if not identical, phonetic equivalents. We find applicant’s arguments to the contrary unpersuasive, including the argument that the first ‘Y’ in CYNERGY will be pronounced as a long ‘I.’”); *Hewlett-Packard Dev. Co., L.P. v. Vudu, Inc.*, 92 USPQ2d 1630, 1632 (TTAB 2009) (“In sum, there is no genuine issue that the marks [VUDU and VOODOO] are

⁵ 8 TTABVUE 10.

phonetic equivalents for the identical arbitrary term, are assumed to be presented in the same display or form of lettering, carry the same connotation, and convey very similar overall commercial impressions.”).

We are not persuaded by Applicant’s argument that its mark has a different connotation because its “mark GEL-LYS is a combination of two words – the word ‘GEL’ and the word ‘LYS,’ which means ‘light’ in languages such as Danish, Hebrew, Norwegian, Western Frisian, and Yiddish” and “the use of the word GEL in connection with Applicant’s goods is not descriptive, as it does not describe a quality or characteristic of the goods.”⁶ Applicant submitted no evidence in support of its definition of LYS in other languages and, more importantly, no evidence that its mark GEL-LYS would be understood by prospective American purchasers of Applicant’s goods to be a combination of an English word and a foreign word, rather than a phonetic equivalent to “jealous” (or a coined word similar to those in the third party GEL registrations). With respect to GEL not describing a quality or characteristic of Applicant’s goods, Applicant admitted during examination that “Gel-Lys is a patent-pending **gel-curing** device that bonds eyelash extensions instantly, the device features a Light Emitting Diode (LED).”⁷ (Emphasis added). For these reasons, we find the marks GEL’ISS and GEL-LYS share the same dual connotation of a GEL-related product and “jealous.”

⁶ 8 TTABVUE 10, 11.

⁷ August 13, 2020 Response TSDR 8.

Turning to the marks in their entireties, we find that GEL-LYS and GEL'ISS are similar in appearance, phonetically equivalent in sound, and share the same connotation, creating the same overall commercial impression. We find, as a result, that the differences between the marks are outweighed by their similarities and weigh the *DuPont* factor concerning the marks in favor of finding likelihood of confusion.

B. Relationship between the Goods, Channels of Trade and Classes of Purchasers

With regard to the relationship between Applicant's goods and the goods in the cited registration and their channels of trade and classes of purchasers, we must make our determination under these factors based on the goods as they are identified in the application and cited registration. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017). In assessing the similarity or dissimilarity and nature of the goods, the Board "considers whether 'the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven 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.").

As stated, Applicant seeks registration of its mark for “artificial eyelash tweezers; tweezers” and “battery-powered applicators for applying cosmetics to eyelashes; motorized applicators for applying cosmetics to eyelashes,” and the registered mark is used on “cosmetics and cosmetic preparations,” in International Class 3. The record includes a definition of the noun “cosmetic” as “a powder, lotion, lipstick, rouge, or other preparation for beautifying the face, skin, hair, nails, etc.”⁸ Because Applicant identifies its goods as applying cosmetics to eyelashes, and describes its goods, as set forth above, as including a “gel-curing device that bonds eyelash extensions,” we take judicial notice that the noun cosmetics also is broadly defined as “something that is cosmetic,” and, as to the adjective cosmetic, as “done or made for the sake of appearance: such as correcting defects, especially of the face,” and this definition of cosmetics includes artificial eyelashes.⁹

We find Applicant’s goods “for applying cosmetics to eyelashes” and “artificial eyelash tweezers” are related to the registered “cosmetics” on the face of the description of the goods. The application and registrations themselves may provide evidence of the relationship between the goods. *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d at 1005; *Merrit Foods v. Associated Citrus Packers, Inc.*, 222 USPQ 255 (TTAB 1984).

⁸ August 13, 2020 response TSDR 15 (citing Dictionary.com).

⁹ Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/cosmetic>. Accessed 3 Mar. 2021. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

Goods which are “used in combination” are complementary, and “complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.” *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (“We agree with the Board that the complementary nature of bread and cheese cannot be ignored”). Here, all of Applicant’s goods, its tweezers and artificial eyelash tweezers, as well as its applicators, may be used for “applying cosmetics,” and so are related to cosmetics. The identification of goods tell us so, and therefore the Examining Attorney has made a “showing that customers would seek out both types of goods for the same purpose.” *N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1232 (TTAB 2015). Because of the relationship shown by the description of Applicant’s cosmetic applicators and tweezers and Registrant’s cosmetics, we find that the goods are complementary. Indeed, the same purchaser may seek Applicant’s and Registrant’s goods for the same purpose of improving the appearance of their eyelashes.

With respect to the channels of trade and sales conditions for Applicant’s and Registrant’s goods, the record includes evidence from many third party websites (Revlon, KISS, MAC Cosmetics, Azeredo Cosmetics, Sephora, Lilly Lashes, Moxielash, House of Lashes, Anastasia Beverly Hills, Benefit Cosmetics, KBL Cosmetics, Lancome, Sally Hansen, Twinkle Apothecary, and Ulta) showing that a

single entity can be the source of both beauty tools, like Applicant's tweezers and applicators for applying cosmetics including false eyelashes, and cosmetics.¹⁰

To the extent that Applicant relies on its own and Registrant's websites to demonstrate different channels of trade and sales conditions, Applicant mistakes the relevant inquiry. Like our analysis of the similarity or dissimilarity of the goods, we assess similarities in the channels of trade and conditions of sale on the identifications of goods in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014). As a result, evidence of how Applicant and Registrant are actually offering their goods in the marketplace is not particularly relevant. *Id.*; *In re Detroit Athletic Co.*, 903 F3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018). Because there are no restrictions reflected in the identifications of goods, Applicant's contention that its goods are sold only to professionals and will not be found in overlapping channels of trade or under the same sales conditions as the registered goods can be given no consideration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1163 ("Parties that choose to recite services in their trademark application that exceed their actual services will be held to the broader scope of the application.").

Finally, Applicant counters the evidence that the goods are complementary and used for the same purpose, and travel in the same channels of trade under the same sales conditions, by contending that not all products within the same broad industry

¹⁰ August 2, 2019 Office Action TSDR 10-18; February 20, 2020 Office Action TSDR 6-11; August 29, 2020 TSDR 6-86.

of cosmetology are related. *Cf. Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) (“a finding that the goods are similar is not based on whether a general term or overarching relationship can be found to encompass them both.”) (*citing Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975)); *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007) (“to demonstrate that goods are related, it is not sufficient that a particular term may be found which may broadly describe the goods”). We agree with this point, but find it inapplicable here. The record shows that the goods involved here are not unrelated because, as identified, they work together. The record shows that beauty tools like Applicant’s applicators for cosmetics and tweezers, and cosmetics which can include artificial eyelashes, may be used together to improve eyelash appearance, and are available to the same end consumers, through some of the same channels of commerce, namely stores that offer cosmetics and beauty tools.

We find that the similarity of the respective goods, channels of trade and sales conditions weigh in favor of finding a likelihood of confusion.

C. Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. While we recognize the differences between the marks, we find that Applicant’s mark GEL-LYS is the phonetic equivalent of the registered mark GEL’ISS, and that the marks create the same commercial impressions so that when applied to the complementary goods, confusion is likely.

Decision: The refusal to register Applicant’s mark GEL-LYS is affirmed.