

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Local Holdings

Serial No. 88515551

Ashley D. Johnson of Dogwood Patent and Trademark Law,
for Local Holdings.

Alexandra El-Bayeh, Trademark Examining Attorney, Law Office 130,
John Lincoski, Managing Attorney.

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

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Evidentiary Matters

Local Holdings (“Applicant”) seeks registration on the Principal Register of the
mark MANSBRAND in standard characters for:

Pharmaceutical preparations for treating erectile
dysfunction, nutritional deficiencies, and low muscle mass;
dietary supplements; erectile dysfunction supplements;
male enhancement supplements; herbal supplements;

health supplements; health booster supplements; muscle building supplements; and nutraceuticals for use as a dietary supplement, in International Class 5.¹

The Examining Attorney refused registration for most of the identified goods under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the prior registered mark MANBRAND SKINCARE, with SKINCARE disclaimed, for “Non-medicated skincare products for men, namely, face wash, face lotion, eye cream, body wash, shampoo,” in International Class 3.² The partial refusal does not apply to Applicant’s pharmaceutical preparations.

After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and appealed. The Examining Attorney denied the request for reconsideration, maintaining the likelihood of confusion refusal. The appeal then proceeded, and Applicant and the Examining Attorney filed briefs. As explained below, we affirm the partial refusal to register.

Before proceeding to the merits, we address an objection by the Examining Attorney to new evidence Applicant embedded in and submitted with its Appeal Brief. Applicant’s Brief includes a table of pairs of what Applicant characterizes as “similar or identical marks coexisting in Classes 003 [and] 005.”³ In addition, Applicant’s Brief includes numerous evidentiary attachments, some of which are the third-party

¹ Application Serial No. 88515551 was filed July 15, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 5687307 issued February 26, 2019.

³ 7 TTABVUE 19-25.

registration records, and some of which are duplicative of other evidence introduced during prosecution.

As required by Trademark Rule 2.142(d), the record must be complete before an appeal is filed. 37 C.F.R. § 2.142(d). We therefore cannot consider Applicant's new evidence, which should have been submitted during prosecution. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE §§ 1203.02(e), 1207.01 (2021); TRADEMARK MANUAL OF EXAMINING PROCEDURE § 710.01(c) (2021). "[T]o the extent that any of the evidence attached to the appeal brief was not previously submitted, it is not timely and we give it no consideration." *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). We sustain the Examining Attorney's objection to the untimely third-party registration evidence that is not part of the record.

As to the remaining exhibits to Applicant's Brief, while Applicant may be "under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither." *Id.* Attachments of material already in the record "requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application, requiring more time and effort than would have been necessary if citations directly to the prosecution history were provided." *Id.* at 1951.

II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours*

& Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); 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). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Communs. Inc.*, 955 F.3d 994, 2020 USPQ2d 10341 **3 (Fed. Cir. 2020). Two key considerations are the similarities between the marks and the relatedness of the goods. 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.”).

A. Similarity of the Marks

We first compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d at 1691 (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 Fed. Appx. 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 similar enough that confusion as to the source of the services offered under the respective marks is likely to result. *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).

We compare Applicant's mark, MANSBRAND, to the cited mark, MANBRAND SKINCARE, and find them similar in appearance, sound, connotation and commercial impression. The only term in Applicant's mark is nearly identical to the first and only distinctive term in the cited mark. "It is not improper for the Board to determine that, for rational reasons, it should give more or less weight to a particular feature of the mark provided that its ultimate conclusion regarding the likelihood of confusion rests on a consideration of the marks in their entireties." *QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35 at **5-6 (Fed. Cir. 2021) (cleaned up).

Applicant's MANSBRAND and the MANBRAND component of the cited mark are compounds consisting of the identical component BRAND preceded by MAN(S), which likely would be perceived as variations of the same word, MAN. While Applicant emphasizes the distinction between MANBRAND and MANSBRAND, we find that the one-letter difference in the middle of the term does not create a significant difference in appearance or sound.

The placement of MANBRAND at the beginning of the cited mark makes it prominent. *In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "[t]he identity of the marks' two initial words is particularly significant

because consumers typically notice those words first”); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered.”). MANBRAND also dominates the cited mark because the other word in the mark, SKINCARE, is generic for the “skincare products” in the cited registration, and has been disclaimed. This reduces its significance in the likelihood of confusion analysis because consumers would view it merely as referring to the goods, and would not rely on the wording to indicate source. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). So while the additional generic word in the cited mark creates some difference from Applicant’s mark in appearance and sound, we find the marks overall much more similar than dissimilar, particularly because we must consider the marks “in light of the fallibility of memory.” *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)).

In terms of connotation and commercial impression, MANSBRAND and MANBRAND SKINCARE are highly similar. Applicant has argued that its MANSBRAND mark contains a “plural” of MAN, although we note that the plural of “man” is “men,” rather than “mans.”⁴ Even assuming it is a slang plural, the difference does not meaningfully change the connotation or commercial impression. *See Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evident

⁴ TSDR October 22, 2019 Response to Office Action at 20 (dictionary.com entry for “man” indicating that the plural is “men”).

that there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark”); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (singular and plural of SWISS GRILL deemed “virtually identical”); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (singular and plural forms of SHAPE considered essentially the same mark).

If MANSBRAND instead were perceived as the possessive form, “man’s”, albeit without the apostrophe, there also is little difference between the marks. One mark would be perceived as a reference to a “man’s brand” while the dominant part of the other would be perceived as a “brand” for a “man.” The connotation is the same. We are not persuaded by Applicant’s contention that in its mark, “[t]he plural form of MAN (Mans or man’s) is important, creating the commercial impression of products that can be useful for manly men,”⁵ because nothing about the plural or possessive form produces that impression. Rather, in this case “with non-dominant features [of the cited mark] appropriately discounted,” where the dominant portions consist of a term, on the one hand, and the possessive form of the same term on the other hand, we find these terms “nearly identical,” and the marks “convey a similar appearance, sound, connotation, and commercial impression.” *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946-47 (Fed. Cir. 2004); *see also Hunt Foods & Indus., Inc. v. Gerson Stewart Corp.*, 367 F.2d 431, 151 USPQ 350 (CCPA 1966) (likelihood of

⁵ 6 TTABVUE 16 (Applicant’s Brief).

confusion found between HUNT and HUNT'S); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (finding BINION and BINION'S "virtually identical").

While the cited mark's additional word SKINCARE names the type of goods, this generic word does not substantively distinguish the marks. It does not change the meaning or impression of MANBRAND; it merely refers to the product. Therefore, the meaning and impression of the cited mark rests mostly on MANBRAND. The marks as a whole remain similar in connotation and commercial impression.

Given their overall resemblance in appearance, sound, connotation and commercial impression, we find Applicant's mark and the cited mark similar. Thus, the first *DuPont* factor favors a finding of likelihood of confusion.

B. The Goods, Trade Channels and Classes of Consumers

The second and third *DuPont* factors address the relatedness of the goods and the trade channels in which they travel.

Under the second factor, "likelihood of confusion can be found 'if the respective goods are 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 (internal citations omitted). In analyzing the relatedness of the goods, we look to the identifications in the application and cited registration. *See Detroit Ath. Co.*, 128 USPQ2d at 1051; *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for this partial refusal

based on likelihood of confusion that relatedness is established for any of the goods for which registration was refused. *See Tuxedo Monopoly, Inc. v. General Mills Fun Grp*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 866 F.3d 1315, 116 USPQ2d 1406, 1409 (TTAB 2015).

Pursuant to the partial refusal, we compare the cited registration's various "non-medicated skincare products for men" to Applicant's "dietary supplements; erectile dysfunction supplements; male enhancement supplements; herbal supplements; health supplements; health booster supplements; muscle building supplements; and nutraceuticals for use as a dietary supplement." The Examining Attorney submitted a variety of evidence demonstrating the relatedness of these goods.

Third-party retailers offering both types of goods include:

The Public Goods website promotes men's daily supplements and men's shampoo and body wash, all under the PUBLIC GOODS mark.⁶

The Hammer Nutrition website promotes various types of supplements, along with skincare products such as creams and balms, all under the HAMMER mark.⁷

The Now website promotes supplements, "Beauty & Health" skincare products such as cleansers, facial oil and facial mist under the same NOW mark.⁸

The Perricone MD website offers skincare products such as creams as well as various supplements, all under the PERRICONE MD mark.⁹

⁶ TSDR November 12, 2019 Office Action at 5 (publicgoods.com).

⁷ TSDR December 28, 2020 Office Action at 2-3 (hammernutrition.com).

⁸ TSDR December 28, 2020 Office Action at 6-7 (nowfoods.com).

⁹ TSDR December 28, 2020 Office Action at 8-9 (perriconemd.com).

The GOA website promotes a skin-booster supplement as well as a line of skincare products including eye cream under the GOA mark.¹⁰

The MenScience website uses the tagline “Men’s Skincare, Grooming and Nutrition Products” and features a line of skincare products including shampoo and body wash and a line of supplements, all under the MENSCEINCE mark.¹¹

The Hims website promotes “products designed for your skin needs” such as face creams, along with supplements, all under the HIMS mark.¹²

This evidence supports the relatedness of the goods in the application and cited registration by showing that consumers are accustomed to encountering such goods offered under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). The evidence shows that these products are promoted together as part of a wellness regime that includes skincare and dietary, health, or muscle-building supplements.

The Examining Attorney further supported the relatedness of the goods by introducing seven use-based, third-party registrations showing that the same entity

¹⁰ TSDR May 19, 2021 Denial of Reconsideration at 17-18 (goaskincare.com).

¹¹ TSDR May 19, 2021 Denial of Reconsideration at 19-21 (menscience.com).

¹² TSDR May 19, 2021 Denial of Reconsideration at 22-23 (forhims.com).

has registered a single mark identifying both skincare products, and supplements. Such registrations are relevant to show that the respective goods are of a type that may emanate from a single source under one mark.¹³ *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1140 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd* (unpublished) No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988).

We find the evidence of third-party use and registration of the same marks for goods such as Applicant's and goods such as Registrant's quite persuasive to establish their relatedness. While Applicant argues that the respective goods are not the same, do not compete with one another, are used in different ways, and serve different functions, they need not be "competitive or intrinsically related" to find a likelihood of confusion. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1737 (Fed. Cir. 2017). As noted above, this factor weighs in favor of likely confusion when the goods are sufficiently related or when their marketing could lead consumers to the mistaken notion that they come from the same source. *Coach Servs.*, 101 USPQ2d at 1722. This is what the record shows in this case.

Turning to the trade channels, the third-party retail website evidence discussed above establishes that goods such as Applicant's and Registrant's travel in some of the same channels of trade to the same classes of consumers, including male members of the general public. While the cited registration identifies skincare products

¹³ TSDR December 28, 2020 Office Action at 10-15, 20-23; TSDR May 19, 2021 Denial of Reconsideration at 2-16. We did not consider the third-party registration for skincare products and supplements for pets. TSDR December 28, 2020 Office Action at 16-19.

directed to men, some of Applicant's goods also are directed to men, in that they address male erectile dysfunction. The retail website evidence also shows numerous sites geared toward men which offer both skincare products and supplements.

While Applicant argues that "Registrant's skincare products ... appear to only be available online from the Registrant's website,"¹⁴ inferring such a limitation on trade channels is impermissible. Rather, "[t]he 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 [and any cited registration] regardless of what the record may reveal as to the particular nature of an applicant's [or registrant's] goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed." *Octocom Sys.*, 16 USPQ2d at 1787; *see also In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013) ("An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence") (quoting *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008)).

Thus, the second and third *DuPont* factors also weigh in favor of likely confusion.

C. Conditions under Which and Buyers to Whom Sales Are Made

The fourth *DuPont* factor involves "[t]he conditions under which and buyers to whom sales are made, i.e., impulse vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. In assessing this factor, the Board must consider all potential customers for the goods identified, including the least sophisticated ordinary

¹⁴ 6 TTABVUE 18 (Applicant's Brief).

consumers. *Stone Lion*, 110 USPQ2d at 1163. Customer care and sophistication tend to render confusion less likely. *See Palm Bay*, 73 USPQ2d at 1695.

Applicant argues under this factor that Registrant's goods are "high-end" and available on a monthly subscription that "starts at \$35.00, which is strong evidence that customers are not impulse buying the products."¹⁵ Again, however, we must reject Applicant's effort to read limitations into the goods in the cited registration, which are unrestricted as to price or manner of sale. The evidence in the record shows that skincare products are offered on general consumer retail websites at modest prices. Given that we must consider the least sophisticated potential consumer for the goods as identified, there is no basis to find that the skincare products in the cited registration necessarily involve sophisticated purchasing.

Similarly, while Applicant seeks to cast its own goods as involving "a solution to a male-oriented issue" that therefore would involve "discerning" customers, we note that some of Applicant's goods are unrestricted, such as "herbal supplements" and "dietary supplements," and Applicant offers no evidence that these goods involve "a male-oriented issue," much less careful, sophisticated purchasing. The retail website evidence in the record reflects that these types of products can be inexpensive and are sold through general consumer retail websites. Thus, we find that they do not necessarily involve elevated care in purchasing.

¹⁵ 6 TTABVUE 18 (Applicant's Brief).

D. Thirteenth Factor – Prior Coexisting Registrations in Classes 3 and 5

The thirteenth *DuPont* factor considers “any other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Applicant contends that its mark can coexist with the cited registration because other allegedly identical or similar pairs of marks coexist on the Register in Class 3 on the one hand, and Class 5 on the other hand. However, as noted above, Applicant’s submission of the third-party registration evidence on which it seeks to rely was untimely, and cannot be considered.

In the absence of evidentiary support for Applicant’s contentions about third-party marks, we find this *DuPont* factor to be neutral in the likelihood of confusion analysis.¹⁶

III. Conclusion

The similarity of the marks for related goods that move in some of the same channels of trade to the same classes of customers renders confusion likely.

Decision: The partial refusal to register Applicant’s mark based on likely confusion is affirmed. In due course, the application may proceed with the remaining

¹⁶ Even had we considered the third-party registration evidence, it would have been unconvincing. Unlike the typed word marks depicted in Applicant’s table of third-party registrations in its Brief, some of the registered marks actually include stylization and/or design elements. Most of Applicant’s proffered pairs of registrations are not analogous to the marks at issue in this case because they contain other and different distinguishing matter – additional wording or stylization and design elements – not found in the marks at issue here. In addition, Applicant’s USPTO database printouts of third-party registrations are incomplete, for example by collapsing from view the “Mark Information” that would show disclaimers and other matter that could impact the comparison of marks. Ultimately, each case must be decided on its own facts. *See In re Alabama Tourism Dep’t*, 2020 USPQ2d 10485 at **36 (TTAB 2020) (“We do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record before us.”).

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goods not subject to the partial refusal: “Pharmaceutical preparations for treating erectile dysfunction, nutritional deficiencies, and low muscle mass.”