

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

Mailed: April 21, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Brilliant Massage Therapy dba Brilliant Massage & Skin

Serial No. 88903456

Jolita Sakmanaite, pro se,
for Brilliant Massage Therapy dba Brilliant Massage & Skin.

Kyle Ingram, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.

Before Cataldo, Greenbaum and Hudis,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Brilliant Massage Therapy dba Brilliant Massage & Skin (“Applicant”) seeks registration on the Principal Register of the mark BRILLIANT MASSAGE & SKIN (in standard characters, MASSAGE & SKIN disclaimed) for

Massage; Skin care salons; Health spa services, namely,
cosmetic body care services, in International Class 44.¹

¹ Application Serial No. 88903456 was filed on May 6, 2020, based upon Applicant’s claim of first use anywhere and in commerce since at least as early as July 24, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Trademark Examining Attorney 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 services, so resembles the registered mark BRILLIANT AGING (in standard characters, AGING disclaimed) for "Wellness and health-related consulting services" in International Class 44 as to be likely to cause confusion, mistake or deception.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.

I. Applicable Law

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. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all [du Pont] factors for which there is record evidence but 'may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.'") (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*,

² Registration No. 86918061 issued on October 11, 2016.

308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *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 or Dissimilarity of the Marks

Under this factor, we compare Applicant’s mark BRILLIANT MASSAGE & SKIN and Registrant’s mark BRILLIANT AGING, both in standard characters, “in their entirety as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 122 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a

connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018).

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *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.”). On the other hand, “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.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, as the U.S. Court of Appeals for the Federal Circuit has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark....” *Id.* at 751.

Further, the marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). We focus on the recollection of the average consumer, who normally retains a general rather than a specific impression of trademarks. *Id.* at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Applicant argues that the Examining Attorney dissected the marks and that when the marks are compared in their entireties, the marks look different (6 TTABVUE 9) and convey different commercial impressions: the “combination of the words in Applicant’s mark clearly implies that Brilliant Massage Therapy offers massage and skin care services. The mark Brilliant Aging implies that the owner of the mark provides services for older adults.”³ 6 TTABVUE 7. As corollaries, Applicant argues that the word “Massage” is the dominant portion of Applicant’s mark (6 TTABVUE 4), and that the shared term “Brilliant’ is highly suggestive as applied to the mentioned services and the addition of ‘Massage & Skin’ is sufficient to distinguish the marks.” 6 TTABVUE 9.

The Examining Attorney focuses on the visual and aural similarities between the marks due to the shared term BRILLIANT, which he contends is the most distinctive portion, and therefore the strongest source identifying element, of each of the marks, combined with a term that is descriptive or generic of the identified services. 8 TTABVUE 5-7. We agree with the Examining Attorney’s assessment of the similarity of the marks.

When considered in their entireties, we find Applicant’s mark BRILLIANT MASSAGE & SKIN and Registrant’s mark BRILLIANT AGING to be very similar overall due to the shared term BRILLIANT, which appears in the initial position in

³ Citations to the prosecution record are to the Trademark Status & Document Retrieval (“TSDR”) system by page number in the non-downloadable versions of the documents. All other citations are to TTABVUE, the Board’s online docketing system.

each mark, followed by wording which would be perceived simply as indicating the general category of services provided in association with the mark.

There is no evidence that BRILLIANT has any meaning or significance when applied to the massage, skin care or cosmetic body care services identified in the application, or to the wellness and health-related consulting services identified in the registration, and there is no evidence of use by third parties of similar marks in association with similar services that might dilute the source-identifying capacity of BRILLIANT for those services. On the other hand, the trailing terms “MASSAGE & SKIN” and “AGING” are generic or highly descriptive of the services identified in the application and registration, respectively, and the terms appropriately have been disclaimed in the application as well as in the cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

Descriptive matter typically is less significant or less dominant when comparing marks. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846 (quoting *Nat'l Data*, 224 USPQ at 752 (the “descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion”)). We find that to be the case here, where consumers likely will view the terms MASSAGE & SKIN in Applicant’s mark and the term AGING in Registrant’s mark in their generic or highly descriptive sense, respectively, rather than as a source-distinguishing element for either mark.

The prominence of the term BRILLIANT is further enhanced by its placement as the initial literal element in each mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *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 most likely to be impressed in the mind of a purchaser and remembered”); *see also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Accordingly, we find that BRILLIANT is the dominant element in each mark, and we give that term more weight than the other elements of the marks in our likelihood of confusion analysis. In making this finding, we do not ignore the presence of the additional wording in either mark. However, for the reasons discussed above, we believe consumers are more likely to remember the term BRILLIANT than the other terms in either mark. *Nat’l Data*, 224 USPQ at 751.

In sum, we find the sound, appearance, meaning and overall commercial impression of the marks BRILLIANT MASSAGE & SKIN and BRILLIANT AGING to be very similar when the marks are viewed in their entireties.

The *DuPont* factor of the similarity of the marks favors a finding of a likelihood of confusion.

B. Similarity or Dissimilarity of the Services

Next, we compare the services as they are identified in the application and cited registration. *See Detroit Athletic Co.*, 128 USPQ2d at 1052; *Dixie Rests.*, 41 USPQ2d at 1534; *Stone Lion*, 110 USPQ2d at 1161; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Hewlett-Packard Co. v.*

Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Applicant argues that confusion is unlikely because the services identified in the application and registration are different. However, the services do not have to be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009). The respective services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted). See also *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). The issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

The Examining Attorney made of record approximately ten use-based, third-party registrations of marks identifying massage and/or cosmetic body care services, and health/wellness consulting services (e.g., Reg. No. 3638755 for ENVITA, Reg. No. 4137207 for CAMPUS SPA, and Reg. No. 4711320 for SUNDALA).⁴ While third-party

⁴ September 21, 2020 Final Office Action, TSDR 2-10. For the other third-party registrations, see *id.*, TSDR 11-29, 31-38. The Examining Attorney also submitted six third-party Internet websites that offer health and wellness “counseling” (not “consulting”) services and massage. August 5, 2020 Office Action, TSDR 4-7; November 12, 2020 Request for Reconsideration

registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, such registrations that individually cover a number of different items and are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed services are of a type which may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *see also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). This evidence supports a finding that the services identified in the application and registration are related for purposes of our likelihood of confusion analysis.

Applicant points to Applicant's and Registrant's websites as support for its assertion that the services are not related because (1) Registrant does not provide massage therapy or other services similar to those identified in the application, and (2) Registrant and Applicant offer their services in geographically distinct areas. 6 TTABVUE 7-9. These arguments are unconvincing.

First, we remind Applicant that our determination under this *DuPont* factor is based on the description of the services in the application and cited registration, not on extrinsic evidence of actual use. *i.am.symbolic*, 123 USPQ2d at 1749; *Stone Lion*, 110 USPQ2d at 1162. In other words, an applicant may not restrict the scope of the

Denied, TSDR 2-6. And in his brief, the Examining Attorney erroneously referred to those websites as using the word "consulting" in their names or on their webpages. 8 TTABVUE 9-10. The website evidence is not probative of whether the massage services identified in the application and the "Wellness and health-related consulting services" identified in the registration are related or move through the same channels of trade.

services covered in its application or the cited registration by argument or extrinsic evidence. *Octocom*, 16 USPQ2d at 1787 (“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 the sales of goods are directed.”). As we just discussed, the record supports a finding that the services identified in the application and registration are related.

Second, because Applicant seeks a geographically unrestricted registration, and Registrant owns a nationwide registration which gives Registrant presumptive exclusive rights to nationwide use of its mark in connection with the identified services under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), it is not relevant that Applicant and Registrant offer their services in different states. *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983) (“Applicant seeks a geographically unrestricted registration under which it might expand throughout the United States. Under these facts, it is not proper, as the TTAB found, to limit our consideration to the likelihood of confusion in the areas presently occupied by the parties. Section 7(b) of the Trademark Act of 1946, 15 U.S.C. § 1057(b), creates a presumption that the registrant has the exclusive right to use its mark throughout the United States. Therefore, the geographical distance between the present locations of the respective businesses of the two parties has little relevance in this case.”).

The second *DuPont* factor also favors a finding of likelihood of confusion.

C. Conclusion

In view of the very similar marks and the relatedness of the services identified in the application and cited registration, we find confusion is likely between Applicant's mark BRILLIANT MASSAGE & SKIN and Registrant's mark BRILLIANT AGING for the respective services recited therein.

Decision: The refusal to register Applicant's mark BRILLIANT MASSAGE & SKIN on the ground of likelihood of confusion under Trademark Act Section 2(d) is affirmed.