

This Opinion is not a  
Precedent of the TTAB

Mailed: May 8, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Limin Jiang*

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Serial Nos. 88921750 & 88921790

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Bobby W. Braxton, Esq., of Braxton Perrone, PLLC,  
for Limin Jiang.

Kelley Wells, Trademark Examining Attorney, Law Office 118,  
Michael Baird, Managing Attorney.

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Before Heasley, Coggins, and Casagrande,  
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:<sup>1</sup>

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<sup>1</sup> As part of an internal Board pilot program exploring the possibility of broadening acceptable forms of legal citations in Board cases, the citations in this opinion vary from the citation forms recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (June 2023). There will be no citations to the United States Patents Quarterly (USPQ). This opinion cites precedential decisions of the Court of Appeals for the Federal Circuit and the Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). This opinion cites decisions of the Board and the Director only to WESTLAW (WL). To facilitate broader research, cited Board decisions also list the serial or proceeding number. Decisions issued before 2008, however, may not be electronically available in the Board's TTABVUE docket system. Unless otherwise noted, only precedential Board decisions are cited. *See id.* Practitioners should continue to adhere to TBMP § 101.03 until further notice from the Board.

Limin Jiang (“Applicant”) seeks registration on the Principal Register of two marks: FURY TIRES (in standard characters, with “TIRES” disclaimed)<sup>2</sup> and FURY OFF-ROAD (in standard characters, with “OFF-ROAD” disclaimed),<sup>3</sup> both for “Tires for off road use; off road tires,” in International Class 12. The applications were assigned to the same trademark examining attorney and proceeded in parallel.

The Trademark Examining Attorney initially refused registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), due to likelihood of confusion in view of two registrations, owned by the same Registrant:

Registration No. 2566645 for GOLDEN FURY, in standard characters, for “tires,” in International Class 12;<sup>4</sup> and

Registration No. 6024669 for ELDORADO SPORT FURY AT 4S (“SPORT” disclaimed), for “tires,” in International Class 12.<sup>5</sup>

The initial Office action also notified Applicant that there was a prior-filed application for the mark FURY, in standard characters, for “wheels,” in International Class 12,<sup>6</sup> and, were it to register, Applicant’s mark would be refused on the basis of likelihood of confusion with this mark as well.<sup>7</sup>

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<sup>2</sup> Application Serial No. 88921750 was filed on May 18, 2020, based on Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>3</sup> Application Serial No. 88921790 also was filed on May 18, 2020, based on Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>4</sup> Registered on May 7, 2002, to TBC Trademarks, LLC.

<sup>5</sup> Registered on March 31, 2020, to TBC Trademarks, LLC.

<sup>6</sup> Filed on Jan. 07, 2019, by The Carlstar Group LLC.

<sup>7</sup> See Aug. 25, 2020, Nonfinal Office Actions in each respective file. Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status and Document Retrieval (TSDR) database of the United States

During prosecution, the application for FURY was abandoned and the Examining Attorney, in the Final Office Action, notified Applicant that it was no longer a potential bar to registration.<sup>8</sup> The Final Office Action maintained the Section 2(d) refusals based on the GOLDEN FURY and ELDORADO SPORT FURY AT 4S marks.<sup>9</sup>

In both cases, Applicant appealed<sup>10</sup> and simultaneously requested reconsideration.<sup>11</sup> The Board suspended the appeals and remanded to allow the Examining Attorney to consider the requests for reconsideration.<sup>12</sup> While the Examining Attorney was considering the requests, the registration for GOLDEN FURY was cancelled for failure to file a Section 8 renewal declaration, so the Examining Attorney withdrew the refusal based on that registration.<sup>13</sup> The Examining Attorney later denied reconsideration, maintaining the final refusal based

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Patent and Trademark Office (USPTO). The page numbers, if any are given, correspond to the page numbers in the downloaded .pdf-format version of the documents. Hereinafter, citations to documents in TTABVUE and TSDR will refer only to the case involving Application Ser. No. 88921750, unless otherwise noted.

<sup>8</sup> See July 29, 2022, Final Office Action, at p.1.

<sup>9</sup> See *id.* at pp. 2-4.

<sup>10</sup> See 1 TTABVUE. References to the briefs and other filings in the appeals cite TTABVUE. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specific page(s), if any, to which we refer.

<sup>11</sup> See Jan. 30, 2023, Request for Reconsideration.

<sup>12</sup> See 2 TTABVUE.

<sup>13</sup> See July 26, 2023, Public Note.

on the one remaining registration (ELDORADO SPORT FURY AT 4S).<sup>14</sup> The appeals resumed<sup>15</sup> and are now fully briefed and ready for decision.<sup>16</sup>

The issues raised by the two appeals are nearly identical, as are the briefs. The evidentiary records appear identical as well. Accordingly, although the appeals have not been formally consolidated, we address both appeals in a single opinion. *See, e.g., In re Consumer Protection Firm*, Ser. No. 87445801, 2021 WL 825503, at \*1-2 (TTAB 2021) (“[E]ach proceeding retains its separate character and will result in the entry of a separate judgment for each appealed application; a copy of this decision shall be placed in each proceeding file.”); *see also* TBMP § 1214 (2024).

For the reasons explained below, we reverse the refusals to register.

#### I. Section 2(d) refusals generally

Section 2(d) of the Trademark Act prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”) (providing a nonexclusive list of 13 factors potentially

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<sup>14</sup> *See* 4 TTABVUE.

<sup>15</sup> *See* 5 TTABVUE.

<sup>16</sup> *See* 6 TTABVUE (Applicant’s brief), 8 TTABVUE (Examining Attorney’s brief), and 9 TTABVUE (Applicant’s reply brief).

relevant to likelihood of confusion). *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). We then weigh together the findings we have made on the relevant likelihood-of-confusion factors to determine if, on balance, they indicate that confusion is likely. *See, e.g., id.* at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.” *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993); *see also Charger Ventures*, 64 F.4th at 1381 (“In any given case, different ... factors may play a dominant role and some factors may not be relevant to the analysis.”) (citation omitted). In some cases, the dissimilarities in the marks can outweigh all the other factors. *See, e.g., QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1037 (Fed. Cir. 2021); *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1381-82 (Fed. Cir. 2016); *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998).

## II. Analysis

### A. Comparison of the Marks

The first *DuPont* factor concerns “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” 476 F.2d at 1361. “Marks are compared along the axes of their ‘appearance, sound, connotation and commercial impression.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017). This does not entail a side-by-side

comparison of the marks, but instead considers “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.” *i.am.symbolic*, 866 F.3d at 1323 (citations and internal quotation marks omitted).

Provided that our ultimate conclusion on the likelihood of confusion rests on a consideration of the marks in their entireties, “[i]t 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 . . . .” *QuikTrip W.*, 984 F.3d at 1035 (cleaned up; citation omitted). The Federal Circuit has often considered the first term in a multi-term mark as the dominant element, i.e., the element that most contributes to the commercial impression that consumers perceive. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”) (citations omitted).

Applicant’s marks are FURY TIRES and FURY OFF-ROAD. The only nondisclaimed term in each mark is the first term, FURY. We therefore find that FURY is the dominant aspect of Applicant’s two marks, as it contributes the most to the overall commercial impressions of the marks. *See id.*

The registered mark is ELDORADO SPORT FURY AT 4S, with “SPORT” disclaimed. Applicant argues that “[c]onsumers will focus on ‘Fury’ for Applicant’s mark but will be more focused on ‘EL DORADO’ [sic] in the Cited Registration. Given that consumers focus on the first part of the trademark, this weighs against a finding

of confusion.”<sup>17</sup> The Examining Attorney does not entirely disagree with Applicant as concerns the important effect of ELDORADO in forming the commercial impression of the registered mark, but rather suggests that ELDORADO, together with FURY, forms “a dominant portion” of the mark in the cited registration.<sup>18</sup> The Examining Attorney discounts SPORT because it is disclaimed due to its descriptive nature and therefore “is not considered to be dominant wording in the mark.”<sup>19</sup> The Examining Attorney also discounts the remaining terms “AT 4S” as both being descriptive in the cited registration, arguing that “AT” stands for “all-terrain” and “4S” stands for “four season.”<sup>20</sup>

Even if we were to consider the terms “AT” and “4S” descriptive—and we hasten to note that we don’t think the evidence cited by the Examining Attorney quite rises to that level—the mark we are considering is made up of five terms: ELDORADO SPORT FURY AT 4S. To conclude, as the Examining Attorney does, that consumers will focus selectively on the first and third terms, but not the second, fourth, and fifth, strikes us not only as a legally improper dissection of the mark, but also as an inaccurate reflection of how consumers would perceive the registered mark. To our eyes, ELDORADO, as the first term, is dominant, but each of the remaining four terms contribute, to varying but significant degrees, to the overall commercial

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<sup>17</sup> See 6 TTABVUE 7; *see also* 9 TTABVUE 4.

<sup>18</sup> See 8 TTABVUE 6 (emphasis added).

<sup>19</sup> See *id.* at 5.

<sup>20</sup> See *id.* at 6.

impression. And the term FURY, surrounded as it is by two terms on each side, does not stand out.

While we find that Applicant's marks and the registered mark have a small degree of similarity because FURY is a term in each, they are dissimilar in that, overall, they look and sound quite different. *See, e.g., Am. Grease Stick Co. v. Chemplast, Inc.*, 341 F.2d 942, 944 (CCPA 1965) ("the dissimilarities of the competing marks [FLUORO GLIDE vs. RU GLYDE and SIL-GLYDE] heavily outweigh the similarities, especially in sound and appearance"). We find that, considering the marks in their entirety, the multiple dissimilarities between Applicant's marks and the registered mark overshadow the one similarity. As a result, this factor weighs against a conclusion that confusion is likely.

#### B. Comparison of the Good and Trade Channels

The second likelihood-of-confusion factor assesses "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." *DuPont*, 476 F.2d at 1361. We consider "the applicant's goods as set forth in its application, and the [registrant's] goods as set forth in its registration." *i.am.symbolic*, 866 F.3d at 1325 (citation omitted). The Examining Attorney correctly points out that the broad identification of "tires" in the cited registration encompasses the narrower subset ("Tires for off-road use; off road tires") identified in the applications. For purposes of determining whether confusion is likely, this means we treat the goods as legally identical. *See, e.g., San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 684 (CCPA 1977); *Int'l Paper Co. v. Valley*



*Paper Co.*, 468 F.2d 937, 938 (CCPA 1972). Applicant does not contest this factor. This factor thus weighs in favor of a conclusion that confusion is likely.

The third *DuPont* factor considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” 476 F.2d at 1361. This factor, like the comparison of the goods, looks to what is disclosed in the application and registrations. *See, e.g., Detroit Athletic*, 903 F.3d at 1307. Here, neither the applications nor the registration contains any limitation on trade channels. This lack of restrictions, coupled with the legal identity of the goods, means, as the Examining Attorney points out,<sup>21</sup> that we presume that the goods in the application and both registrations travel in the same trade channels. *See, e.g., Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012). Applicant does not address this factor. We agree with the Examining Attorney that this factor favors a conclusion that confusion is likely.

C. Who are the buyers and under what conditions do they buy?

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” 476 F.2d at 1361. Applicant argues that its off-road tire customers purchase tires for a different use than customers of the tires under the registered mark.<sup>22</sup> This argument gets no traction. As noted above, the lack of any restrictions in the applications and registration and the undisputed fact that Applicant identifies a sub-type (off-road

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<sup>21</sup> *See* 8 TTABVUE 13.

<sup>22</sup> *See* 6 TTABVUE 9; 9 TTABVUE 7.

tires) of the goods identified in the registration (tires) means that we must presume the classes of customers are the same. *See, e.g., Stone Lion*, 746 F.3d at 1323; *Viterra*, 671 F.3d at 1362. Thus, the off-road tires in the applications are sold to a subset of the classes of customers to whom goods under the registered mark are directed. This favors a conclusion that confusion is likely.

Applicant argues that tire consumers are getting more sophisticated and careful in buying tires.<sup>23</sup> To substantiate this argument, Applicant points to a document appended to its appeal brief. This is duplicate of an article Applicant submitted in prosecution.<sup>24</sup> The Board disapproves of the resubmission, in an appeal brief, of evidence already in the prosecution record. *See, e.g., In re Black Card LLC*, Ser. No. 90641690, 2023 WL 8110301, at \*2 (TTAB 2023) (evidence “made of record during prosecution ... should not have been refiled with the brief; the Board discourages the practice”) (citations omitted); *In re Info. Builders Inc.*, Ser. No. 87753964, 2020 WL 2094122, at \*2 n.4 (TTAB 2020) (“Exhibits to briefs that merely duplicate evidence already in the record are of little or no use in an ex parte proceeding. They are neither a convenience, nor a courtesy.”).

Getting to the evidence itself, it consists of a single publication issued by a company (Tireweb Marketing) that designs tire-seller websites. It highlights the importance of their services by stating that consumers spend more time on tire websites than they used to. As the document itself discloses:

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<sup>23</sup> *See* 6 TTABVUE 9; 9 TTABVUE7.

<sup>24</sup> *See* Jan. 30, 2023, Request for Reconsideration, at 21-22.

Tireweb Marketing employs developers and designers to create customised tire dealer websites. Doing this ensures each website is unique and supports the dealer's business. Tireweb Marketing websites incorporate video content, consumer reviews and use responsive web design to accommodate tire buyers using mobile devices.

This document simply lacks the persuasive value of an objective media report that tires buyers are sophisticated and careful purchasers.

The Examining Attorney points out that the “least sophisticated potential purchasers” interested in the relevant goods must be considered.<sup>25</sup> We agree. *See, e.g., Stone Lion*, 746 F.3d at 1325. A broad cross-section of the consuming public purchases tires, and, without any convincing evidence that they generally are careful or sophisticated in making those purchases, they will certainly include many buyers who are not particularly careful or sophisticated. On the other hand, there is no evidence that tires, which are not cheap, are impulse purchases. On balance, we find that the fourth factor either is neutral or, at most, tips slightly in favor of a conclusion that confusion is likely.

D. Weighing the findings on the relevant factors together.

Our final step is to assess these findings together to determine if, on balance, confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1383. Here, we have only one factor weighing in favor of a conclusion that confusion is unlikely against several factors suggesting the opposite. But this is not simply a mechanical tally of the number of factors on either side. *See, e.g., Citigroup Inc. v. Cap. City Bank Grp., Inc.*,

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<sup>25</sup> *See* 8 TTABVUE 4.

637 F.3d 1344, 1356 (Fed. Cir. 2011). Rather, “the various evidentiary factors may play more or less weighty roles in any particular determination.” *Shell Oil*, 992 F.2d at 1206.

We believe that this case presents a situation where the differences in the marks, taken in their entireties, outweigh the other factors. While not a common occurrence, cases like this arise from time to time. *See, e.g., Champagne Louis Roederer*, 148 F.3d at 1375 (differences between CRISTAL CHAMPAGNE and CRYSTAL CREEK outweighed other factors); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1387 (Fed. Cir. 1989) (affirming Board’s holding that “that the more important fact ... is the dissimilarity in commercial impression between the marks ‘PECAN SANDIES’ and ‘PECAN SHORTEES’” for cookies and that “these marks, in their entireties” do not convey similar commercial impressions); *Am. Grease Stick Co.*, 341 F.2d at 944.

While the respective marks have FURY in common, we think it cannot be said, in view of the totality of the circumstances here, that either of Applicant’s marks “so resembles” ELDORADO SPORT FURY AT 4S “as to be likely ... to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d) (emphasis added).

**Decision:** The refusals to register Applicant’s marks are reversed.