

This Opinion is Not a  
Precedent of the TTAB

Mailed: July 21, 2022

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Denise Wiggins*

Serial No. 88925216

Michelle J. Miller of M. J. Miller Law Firm, LLC for Denise Wiggins.

Eric Sable, Trademark Examining Attorney, Law Office 117,  
(Cynthia Tripi, Managing Attorney).

Before Cataldo, Kuczma and Larkin,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Denise Wiggins, filed an application to register on the Principal



Register the mark identifying the following goods:

Face powder; Glitter for cosmetic purposes; Lip gloss; Lip gloss and wands therefor sold as a unit; Lip glosses; Lipstick; Lipstick cases; Lipstick holders; Lipsticks; Body glitter; Face and body glitter; Loose

face powder; Make-up powder; Pressed face powder in International Class 3.<sup>1</sup>

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 of likelihood of confusion with the cited registered standard-character mark EINNAF, identifying the following goods:

Aromatherapy fragrance candles; Backfire torches containing diesel oil or kerosene and a wick for use in starting backfires to control fires and for controlled burns; Candles; Candles being of wax or liquid, for the illumination of carved pumpkins, mini-pumpkins, gourds, and other fruits and vegetables; Candles and wicks for candles for lighting; Candles for night lights; Christmas tree candles; Colored fire torches; Dust-binding compositions; Dust absorbing compositions; Dust binding compositions for sweeping; Petroleum based dust absorbing compositions for use in road building, sweeping, dustlaying; Scented candles; Scented wax for use in candle warmers; Wicks for candles; Wicks for candles for lighting in International Class 4.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.<sup>3</sup> We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 88295216 was filed on May 20, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting May 15, 2020 as a date of first use of the mark anywhere and in commerce. Applicant disclaimed "COSMETICS" apart from the mark as shown and submitted the following description of the mark and color statement: The mark consists of the stylized wording "EINNAF COSMETICS" where the term "EINNAF" appears in white and red lips appear in place of the dot in the letter "I" and the terms [sic] "COSMETICS" appear in red. All of the foregoing appears on a black background. The color(s) black, red, and white is/are claimed as a feature of the mark.

<sup>2</sup> Registration No. 5966598 issued on the Principal Register on January 21, 2020. Registrant submitted the following translation statement: The wording "Einnaf" has no meaning in a foreign language.

<sup>3</sup> All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are

## I. Evidentiary Matter

Applicant included with her appeal brief hyperlinks to internet articles that were not introduced into the record during prosecution of her involved application.<sup>4</sup> In his appeal brief, the Examining Attorney objected to this evidence as untimely and not sufficient to make the assertedly hyperlinked webpages of record.<sup>5</sup>

We have made clear that providing hyperlinks to internet materials is insufficient to make such materials of record. *See In re Olin*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017) (citing *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013)); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (stating that “a reference to a website’s internet address is not sufficient to make the content of that website or any pages from that website of record”); *Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (noting that because of the transitory nature of internet postings, websites referenced only by links may later be modified or deleted). The procedure for making printouts of internet evidence of record is addressed in 37 C.F.R. § 2.53(c); Trademark Manual of Examining Procedure (TMEP) § 710.01(b) (July 2022) and authorities cited therein.

With regard to the timeliness of this evidence, Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with

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the page references, if applicable. *See also, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, \*2 n.1 (TTAB 2020).

<sup>4</sup> 17 TTABVUE 11, 16 n. 1-3 (Applicant’s brief).

<sup>5</sup> 19 TTABVUE 4-5 (Examining Attorney’s brief).

the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

The website screenshots assertedly available at the hyperlinks were not submitted during prosecution of the involved application, and are not timely. Consequently, they will be given no consideration.<sup>6</sup> In addition, any unsupported arguments based upon this excluded evidence will not be considered. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

We now turn to the merits of this appeal.

## **II. Likelihood of Confusion**

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*,

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<sup>6</sup> As noted above, the proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (Jun. 2022) and authorities cited therein.

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575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor that is relevant. *See Cai*, 127 USPQ2d at 1800 (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the relatedness of the goods. *See 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

### A. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of




Applicant's mark and the registered EINNAF mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (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*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.").

"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." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted); *see also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In*

*re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988), *aff'd mem.*, 864 F.2d 149 (Fed. Cir. 1988).



Applicant's  mark adopts the wording of the registered mark EINNAF in its entirety, adding the generic and disclaimed term "cosmetics" as a following noun that is modified by EINNAF in Applicant's mark. The term EINNAF is identical in appearance and sound in both marks. There is no evidence regarding the relative strength or weakness of the EINNAF mark. *Cf., e.g., Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (the extent of third-party use or registrations may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason)); *see also In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1735 (TTAB 2018) (third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning). The term does not appear to have any meaning in relation to the identified goods or otherwise. Nonetheless, there is nothing in the record to indicate that EINNAF would possess a different meaning in relation to Applicant's goods than as applied to the goods identified in the cited registration. *See generally In re Embiid*, 2021 USPQ2d 577, at \*21 (TTAB 2021).

A likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”); *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY’S PIZZA for restaurant services specializing in pizza and PERRY’S for restaurant and bar services); *In re South Bend Toy Mfg. Co.*, 218 USPQ 479, 480 (TTAB 1983) (LIL’ LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

It further is settled that a standard character mark, such as Registrant’s, “could be used in any typeface, color, or size, including the same stylization actually used . . . by the other party, or one that minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup*, 98 USPQ2d at 1258-59). In other words, Registrant could adopt a stylized all lowercase font identical to that of the word “einnaf” in Applicant’s word and design mark.

The stylized lip design, dotting the “i” in “einnaf,” emphasizes the wording and suggests the nature of Applicant’s goods, including various lipsticks and lip glosses. Similarly, the rectangular black carrier merely acts as a background for the mark. As a result, we find the wording “einnaf” is the most distinctive element in Applicant’s word and design mark. It is well settled that one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more



weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161 (finding that the Board did not err in reasoning that the term LION was dominant in both applicant's mark STONE LION CAPITAL and opposer's marks LION CAPITAL and LION); *In re Chatam Int'l Inc.*, 71 USPQ2d at 1946.

Where, as here, a mark is composed of both words and a design, the words are normally accorded greater weight, in part because consumers are likely to remember and use the word(s) to request the goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”). We do not discount the design elements in Applicant's word and design mark. Nonetheless, we find the presence of the design is insufficient to create a commercial impression that is significantly different from Registrant's EINNAF mark.

Applicant argues:

In the Applicant's Second Response, the Applicant provided internet evidence that demonstrate[s] the difference between how the consumers encounter the Applicant's Mark and the Registered Marks and the commercial impression is sufficient enough to overcome a likelihood of confusion because the marks are different. The Applicant would also like to note that EINNAF COSMETICS is not just a cosmetics brand, it is a

women empowerment company. The Applicant's Mark, unlike the Registered Mark, empowers women through make-up and marketplace opportunities for women in business.<sup>7</sup>

First, in our determination of the similarity or dissimilarity of the marks, we must compare them as they appear in the drawing of the application and in the registration. We do not consider the manner in which Applicant and Registrant actually use their marks in the marketplace. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

Second, we find Applicant's evidence insufficient to support her contention that consumers will perceive the asserted differences in commercial impression between the marks. Applicant's claimed intention to empower women, while laudable, is not apparent on the face of her mark. Neither is an absence of women's empowerment conveyed by the registered mark. Simply put, Applicant's contentions regarding the differences between the marks' commercial impressions are not supported by the evidence of record.

Even if we were to accept Applicant's contention that the marks convey different commercial impressions, similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or

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<sup>7</sup> 17 TTABVUE 11 (internal citations omitted); February 12, 2021 Response to Office Action at 10-12; September 5, 2021 Request for Reconsideration at 10-16.

meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted)). Therefore, even if the marks had somewhat different commercial impressions, the similarity in appearance, sound and connotation would still strongly support a finding of a likelihood of confusion.

We are not persuaded by Applicant’s citation to other decisions in which this tribunal or a reviewing court found no likelihood of confusion. “It has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted). The registrability of unrelated marks not at issue in this proceeding does not compel a different result in this case.

Where, as here, the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding some differences. *See, e.g., Stone Lion*, 110 USPQ2d at 1161 (affirming TTAB’s finding of confusion where applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties’ marks); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that, even though applicant’s mark PACKARD TECHNOLOGIES, with “TECHNOLOGIES” disclaimed, does not incorporate every feature of opposer’s HEWLETT PACKARD marks, a similar overall commercial impression is created).

We recognize the difference between the marks. Nonetheless, viewing the marks as a whole, we find purchasers may reasonably assume that Applicant’s goods offered

under her mark emanate from the same source as the goods in the cited registration of EINNAF. As a result, consumers encountering these marks could mistakenly believe the two are a variation of each other, but nonetheless identify goods emanating from a common source.

For these reasons, we find that the marks are far more similar than dissimilar. The first *DuPont* factor thus weighs in favor of finding a likelihood of confusion.

### **B. The Goods and Channels of Trade**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Stone Lion*, 110 USPQ2d at 1159; *Hewlett-Packard*, 62 USPQ2d at 1004; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Additionally, we may find that there is a likelihood of confusion when only one item in a class of goods is commercially similar to the other party’s goods. “Likelihood of confusion must be found as to the entire class [of goods or services identified] ... if there is likely to be confusion with respect to any [good or] service that comes within the recitation of [goods or] services in that class.” *Primrose Retirement Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)) (It is sufficient for a finding of likelihood of confusion if the relatedness is established for any item encompassed by the identification of goods within a particular class in the application); *see also Research in Motion Limited v. Defining Presence Marketing Group, Inc. et al*, 102 USPQ2d 1187 (TTAB 2012) (“Likelihood of

confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application.”); *Hewlett-Packard Development Company, L.P. v. Vudu, Inc.*, 92 USPQ2d 1630, 1633 n.4 (TTAB 2009) (“it is sufficient if likelihood of confusion is found with respect to use of the mark on any item that comes within the description of goods in the application or registration”) (internal citations omitted).

In support of the refusal of registration, the Examining Attorney introduced into the record<sup>8</sup> printouts from the following third-party websites showing use of the same marks, brand names and trade names to identify the source of various cosmetics, including makeup powder, lip blush, lip gloss, lipstick and face powder, as well as candles:

- TOM FORD;
- SEPHORA;
- BATH & BODY WORKS;
- AVEDA;
- AVON;
- BEAUTY PIE;
- NARS;
- ORIGINS;
- TRISH MCEVOY;

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<sup>8</sup> August 20, 2020 first Office Action at 5-14; March 5, 2021 final Office Action at 6-57; September 28, 2021 Denial of Request for Reconsideration at 5-86.

- AMY HEAD;
- BYREDO
- CHARLOTTE COOK;
- DKM;
- ELEVE;
- GUIDOTTI;
- MALICIOIUS WOMEN CO.;
- MARIE HUNTER;
- REVOLUTION BEAUTY LONDON; and
- VICTORIA'S SECRET.

This evidence establishes that these third parties offer various cosmetics identified in the application, and “candles” identified in the cited registration, under the same house marks or trademarks.

The Examining Attorney also introduced into the record<sup>9</sup> copies of approximately twenty-five use-based, third-party registrations for marks identifying, *inter alia*, both one or more of the cosmetics identified in the application, and candles. The following examples are illustrative:<sup>10</sup>

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<sup>9</sup> March 5, 2021 final Office Action at 66-138.

<sup>10</sup> All three marks appear in typed or standard characters.

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Reg. No. 3749852 for the mark THE NAKED BEE, identifying lip balm, lip gloss, lip polisher, scented candles;

Reg. No. 5187947 for the mark MAGIC IN THE AIR, identifying lip balms, lip creams, lip glosses, candles; and

Reg. No. 4932915 for the mark DIANA VREELAND, identifying lipstick, scented candles.

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent they serve to suggest that the goods and services are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect that cosmetics and candles bearing similar marks are likely to emanate from the same source.

We agree with Applicant that “None of the goods listed under the Applicant’s Mark and the Registered Marks are the same. In fact, none of the goods offered under the same mark can be used as a substitute for one another because the goods have different purposes.”<sup>11</sup> However, it is not necessary for us to find that the goods are “the same,” may be used for the same purposes or are even competitive to find a likelihood of confusion. *See, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d

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<sup>11</sup> 17 TTABVUE 12-13.

1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They 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 [the goods and/or services] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Applicant argues “All of the goods offered under the Registered Mark are in the candle industry. The candle industry does not include cosmetic products.”<sup>12</sup> Applicant goes on to argue “All of the goods offered by the Applicant are in the cosmetic industry as noted in the Applicant responses. The cosmetic industry does not include candles as a standard product even though there might be some retail companies, that are not beauty brands like the Applicant, that offer candles and numerous other products in addition to facial cosmetics.”<sup>13</sup> However, the Examining Attorney’s evidence shows that beauty brands such as Tom Ford, Sephora, Aveda, Avon and Victoria’s Secret offer cosmetics and candles under the same trademarks and trade names. While Applicant may be correct that cosmetics and candles may be produced by different industries, the internet and third-party registration evidence of record demonstrates that they are offered under the same brands and marks.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the goods are encountered, we must base our likelihood of confusion

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<sup>12</sup> 17 TTABVUE 16.

<sup>13</sup> 17 TTABVUE 16-17.



determination on the goods as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also 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”).

Neither Applicant’s goods nor the goods identified in the cited registration are limited to any particular trade channel and we cannot consider asserted marketplace realities not reflected in the identifications. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). In the absence of trade channel limitations in the identifications of goods in the involved application and cited registration, we must presume that these goods are offered in all customary trade channels therefor. *See Citigroup v. Capital City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Further, evidence of record demonstrates that both Applicant’s goods and the Registrant’s goods may be encountered by the same classes of consumers under the same marks in at least one common trade channel, i.e., websites of beauty and lifestyle retailers who offer both cosmetics and candles under the same trade names, brand names and trademarks.

We find that the *DuPont* factors of the relatedness of the goods, channels of trade and classes of consumers weigh in favor of finding a likelihood of confusion.

### **C. Conclusion**

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant's arguments relating thereto, including those arguments and evidence not specifically addressed herein, we conclude that consumers familiar with Registrant's goods offered under its mark would be likely to believe, upon encountering Applicant's mark, that the goods in the cited registration and Applicant's goods originated with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register Applicant's mark is affirmed under Section 2(d) of the Trademark Act.