

This Opinion is not a  
Precedent of the TTAB

Mailed: January 25, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Jarral, Inc.*  
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Serial No. 86728679  
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Scott R. Brown of Hovey Williams LLP,  
for Jarral, Inc.

Nicholas A. Coleman, Trademark Examining Attorney, Law Office 107,  
J. Leslie Bishop, Managing Attorney.

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Before Zervas, Ritchie and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Jarral, Inc. (“Applicant”) seeks registration on the Principal Register of the mark WHIFF WIZARD (in standard characters) for “preparations for neutralizing odors in the air” in International Class 5.<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

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<sup>1</sup> Application Serial No. 86728679 was filed on August 18, 2015, based upon 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).

likelihood of confusion with the mark WHIFF (in typed drawing format)<sup>2</sup> registered on the Principal Register for “air freshener and room deodorizer” in International Class 5.<sup>3</sup>

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.

### **Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between 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.”).

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<sup>2</sup> Before November 2, 2003, standard character marks were known as typed drawings. A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure (“TMEP”) § 807.03(i) (January 2017).

<sup>3</sup> Registration No. 1635245, registered on February 19, 1991. Section 8 (10-Year) affidavit accepted on March 17, 2011.

**A. Comparison of the Goods, Trade Channels and Consumers**

We first compare Applicant's and Registrant's goods. In making our determination under this second *du Pont* factor, we look to the goods as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("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."). *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

In this case, Applicant's goods are identified as "preparations for neutralizing odors in the air" and Registrant's goods are identified as "air freshener and room deodorizer."

Inasmuch as the goods identified in Applicant's application are broadly defined to include air fresheners and room deodorizers, we find that these goods encompass Registrant's more narrowly identified goods. As a result, Registrant's goods are legally identical in part to Applicant's goods.

Because the goods at issue are legally identical in part, we must presume that the goods of Applicant and Registrant move in the same channels of trade and are offered to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d

1905, 1908 (Fed. Cir. 2012). Notwithstanding, since the identification of goods for Applicant's mark and the cited mark do not include any limitation as to the trade channels or class of purchasers for the listed services, it is presumed that the goods move in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods."); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Given the relatedness of Applicant's goods and Registrant's goods and the lack of any restrictions in their identifications as to trade channels or purchasers, these factors weigh in favor of a finding of likelihood of confusion.

### **B. Comparison of the Marks**

We next address the *du Pont* likelihood of confusion factor focusing on "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). "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) (quotation omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *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 a consideration of the marks in their entireties. *In re Nat'l Data*, 224 USPQ at 751.

In comparing the marks, we are mindful that where, as here, the goods are legally identical in part, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Applicant's mark is WHIFF WIZARD, and the cited mark is WHIFF. The sole difference between the marks is the inclusion of the term WIZARD in Applicant's mark.

While “[t]here is no explicit rule that likelihood of confusion automatically applies where a junior user’s mark contains in part the whole of another mark,” the fact that the cited registered mark is subsumed by Applicant’s mark increases the similarity between the two, particularly when the goods at issue are legally identical in part. *See, e.g., In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant’s mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant’s mark MACHO COMBOS for food items confusingly similar to MACHO for restaurant entrees); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (RICHARD PETTY’S ACCU TUNE for automotive service centers confusingly similar to ACCU-TUNE for automotive testing equipment).

Moreover, while the additional term “WIZARD” cannot be ignored, the shared term WHIFF appears first in Applicant’s mark. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc.*, 73 USPQ2d at 1692 (Fed. Cir. 2005) (“VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”). Further, even if consumers recognize the additional term “WIZARD” in Applicant’s mark and attribute significance to it, they could still

reasonably assume, due to the overall similarities between the respective marks and the relatedness of the goods, that Applicant's goods sold under the "WHIFF WIZARD" mark constitute a new or additional product line from the same source as the goods sold under Registrant's "WHIFF" mark with which they are acquainted or familiar, and that the "WHIFF WIZARD" mark is merely a variation of the Registrant's "WHIFF" mark. *See, e.g., SMS, Inc. v. Byn-Mar Inc.* 228 USPQ 219, 220 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing.").

In view of the foregoing, we find that the marks are sufficiently similar for likelihood of confusion purposes. The first *du Pont* factor thus supports a finding that confusion is likely.

**C. Strength of the Registrant's Mark and Nature of Similar Marks in Use on Similar Goods**

Applicant argues that the term WHIFF is suggestive and/or descriptive of the parties' respective goods. Applicant has not submitted any evidence to support this contention. Even if we were to assume that the term WHIFF is suggestive of air freshening or odor deodorizing products, marks deemed suggestive are nonetheless still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods. *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010); *In re Chica Inc.*, 84 USPQ2d 1845, 1850 (TTAB 2007); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982).

Applicant also argues that the term WHIFF is weak in relation to deodorizing or odor eliminating products. In support of its argument, Applicant has submitted the following third-party registrations:

<b>REGISTRATION NUBMER</b>	<b>MARK</b>	<b>IDENTIFIED GOODS</b>
Reg. No. 3461335	WHIFF	Grooming products for animals, namely, pet conditioners and fragrance sprays for pets; and pet fragrances, namely, odor control fragrance collars
Reg. No. 3586834	TAKE A WHIFF!	Deodorant for personal use
Reg. No. 4950969	WHIFF OUT	Deodorizers for ash trays and ash and cigarette receptacles.

Additionally, Applicant contends that because Registrant’s WHIFF mark was not cited as a bar to registration with the marks subject to the now canceled registration and abandoned application identified below, the Office has purportedly made a determination that the term WHIFF is weak when used in relation to air freshening and/or odor neutralizing products:

Registration No. 3053144 (canceled)	WHIFF WHACKER	Liquid Odor removers for eliminating pet odors and household odors
Application Serial No. 77146037 (abandoned)	WHIFF IT	Air deodorizer, air freshener sprays; air fresheners; deodorizers for automobiles; shoe deodorizers; house deodorizers

Evidence of extensive registration and use by others of a term on the same or very similar goods can be “powerful” evidence of weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363,

116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

Here, Applicant has not submitted any evidence of actual third-party marketplace use of the term “WHIFF” used in connection with air freshening or odor neutralizing products. Instead, Applicant has submitted only three live third-party registrations. Third-party registrations such as those offered by Applicant are not evidence of *use* of the marks, *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992), but they can be used to show that a mark or portion thereof is weak. *See Juice Generation*, 115 USPQ2d at 1675 (weakness of PEACE, LOVE); *Jack Wolfskin*, 116 USPQ2d at 1136; *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). An applicant may come closer to a weak mark without causing a likelihood of confusion. *Juice Generation*, 115 USPQ2d at 1674.

With regard to the registered TAKE A WHIFF! mark, we find that the goods identified in this registration, i.e., deodorant for personal use, are hygiene products used by humans and are therefore unrelated to the goods at issue. Accordingly, this registration is insufficient to establish that term WHIFF is weak when used connection with products used to freshen the air or to remove odors from the air. *See Kay Chems., Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 1042, 175 USPQ 99, 101 (C.C.P.A. 1972); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (third-party registrations found to be of limited value because goods identified in the

registrations appeared to be in fields which were far removed from the involved products).

That leaves the two remaining registrations for the marks WHIFF for various pet grooming products including odor control fragrance collars and WHIFF OUT used in connection with deodorizers for ash trays and cigarette receptacles. While we recognize the goods identified in these two registrations perform an identical function as the goods identified in the cited registration, i.e., eliminating odors, we nonetheless find that these two registrations, standing alone and without any evidence of actual use of the marks, is insufficient evidence under our reviewing court's decisions in *Juice Generation* and *Jack Wolfskin* to establish that the term WHIFF is weak when used in connection with air freshening and/or odor neutralizing products.<sup>4</sup>

We further find unpersuasive Applicant's argument that because the Office did not cite Registrant's WHIFF mark as a bar to the registration of the marks WHIFF WHACKER and WHIFF IT, both used in connection with various air freshening and/or odor neutralizing products, the Office has determined that the term WHIFF is weak when used in association with such products and therefore by not allowing Applicant's mark to proceed to registration would create an inconsistent treatment of WHIFF formative marks.

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<sup>4</sup> We note that in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, see 115 USPQ2d at 1672 n. 1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n. 2.

A canceled registration is generally evidence only of the fact that that registration issued and therefore is not evidence of the weakness of a mark. *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006). Furthermore, an application only serves as proof that an application was filed. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Thus we accord the canceled registration and the abandoned application submitted by Applicant no probative value.

In any event, prior decisions and actions of other trademark examining attorneys in registering other marks or approving marks for registration have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. *See In re Cordua Rest. Inc.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Design’s application, the PTO’s allowance of such registrations does not bind the Board or this court.”)). Each case is decided on its own facts, and each mark stands on its own merits. *See In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Accordingly, Applicant has not demonstrated that the term “WHIFF” is weak or diluted for any of the goods in the cited registration. This factor favors a finding of likelihood of confusion.

**Conclusion**

Based on all evidence and arguments bearing on the *du Pont* factors, including the evidence and arguments that we have not specifically discussed herein, we conclude that Applicant's mark, as used in connection with the goods identified in the application, so resembles the cited mark as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

***Decision:*** The refusal to register Applicant's WHIFF WIZARD mark is affirmed.