

This Opinion is not a
Precedent of the TTAB

Mailed: January 27, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Nature Redefined, LLC

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Serial No. 86841672

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Mark Borghese of Borghese Legal Ltd.,
for Nature Redefined, LLC.

Jacob Vigil, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

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Before Kuhlke, Shaw and Adlin,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Nature Redefined, LLC (“Applicant”) seeks registration on the Principal Register of the mark THE FIXMD TRIAD in standard characters for “Beauty serums; Eye cream; Skin cleansers; Skin creams; Skin emollients; Skin masks; Skin moisturizer; Skin toners; Sun block; Sun screen; Non-medicated anti-aging serum,” in International Class 3.¹

¹ Application Serial No. 86841672 was filed on December 7, 2015, under Section 1(b) of the Trademark Act, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

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 goods, so resembles the mark TRIAD PADS in standard characters registered on the Principal Register for "Cosmetic pads; Cosmetics; Face creams for cosmetic use; Facial cleansers; Skin toners; Toners" in International Class 3,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and briefs were filed. We affirm the refusal to register.

Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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 (CCPA 1976). These factors and others are discussed below. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944 (Fed. Cir. 2006) (even within the *du Pont* list, only factors that are "relevant and of record" need be considered).

² Registration No. 3757649, issued on March 9, 2010, Sections 8 & 15 combined declaration accepted and acknowledged.

Similarity of the Goods/Channels of Trade/Consumers

With regard to the goods, channels of trade and classes of consumers, we must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (quoting *Hewlett Packard*, 62 USPQ2d at 1004).

Based on the dictionary definition for “cosmetics” as “a preparation, such as a powder or a skin cream, designed to beautify the body by direct application,”³ the Examining Attorney argues that Registrant’s broadly identified “cosmetics” encompasses all of the goods in Applicant’s “more narrow identification.” Ex. Att. br., 4 TTABVUE 8. Applicant did not present argument on these factors.

We agree with the Examining Attorney. Furthermore, Applicant’s “skin toners” are identical to Registrant’s “skin toners” and are encompassed by Registrant’s

³ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2016) (ahdictionary.com), July 22, 2016 Office Action at 2.

“toners.” *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981) (it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004). In addition, Applicant’s “skin cleansers” encompass Registrant’s “facial cleansers” and Applicant’s “skin creams” encompass Registrant’s “face creams for cosmetic use”; as such, these goods are legally identical.

Further, because the goods are identical and otherwise legally identical, and because there are no limitations as to channels of trade or classes of purchasers, we must presume that Applicant’s and Registrant’s goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

In view thereof, these *du Pont* factors strongly favor a finding of likelihood of confusion.

Similarity/Dissimilarity of the Marks

We consider Applicant’s mark THE FIXMD TRIAD and Registrant’s mark TRIAD PADS and compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)

(quoting *du Pont*, 177 USPQ at 567). The marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). “[S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003)). Finally, when the goods are identical or virtually identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. See *Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Viterra Inc.*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

The Examining Attorney contends that TRIAD is the dominant portion of Registrant’s mark and that FIXMD is Applicant’s house mark. He asserts that because Applicant’s mark incorporates the dominant element of Registrant’s mark and because Applicant’s house mark FIXMD does not serve to distinguish them, the marks are confusingly similar. Applicant responds that the Examining Attorney

erred in his analysis because he “focused his attention on only a portion of Applicant’s Mark.” App. Br., 4 TTABVUE 7.

While the marks must be viewed in their entirety “in articulating reasons for reaching a conclusion on the issue of confusion, 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 entirety.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161. Although there is no mechanical test to select a “dominant” element of a compound word mark, consumers are generally more likely to perceive a fanciful or arbitrary term, rather than a descriptive or generic term, as the source-indicating feature of the mark. *See, e.g., In re Dixie Rests., Inc.*, 41 USPQ2d at 1533-34 (affirming TTAB’s finding that “DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (finding that “BINION’S,” not the disclaimed descriptive wording “ROADHOUSE,” is the dominant portion of the mark BINION’S ROADHOUSE). The Examining Attorney argues that TRIAD is the dominant part of Registrant’s mark TRIAD PADS inasmuch as PADS is a generic term for Applicant’s “cosmetic pads” and is disclaimed. We find this conclusion sound.

The Examining Attorney further contends that the other elements in Applicant’s mark “THE FIXMD” do not serve to distinguish the marks because that is Applicant’s house mark and “[a]dding a house mark to an otherwise confusingly similar mark

will not obviate a likelihood of confusion under Section 2(d).” Ex. Att. br., 6 TTABVUE 5. The Examining Attorney points to Applicant’s “companion applications for the marks “FIXMD, FIXMDSKIN, and FIXMDSKINCARE” as evidence “that applicant uses the wording ‘FIXMD’ as a house mark.” *Id.* Applicant responds that two of these applications have been abandoned and “[c]urrently, Applicant has two intent to use applications with a common term (the mark which is the subject of this Appeal and one other application)” and this “is not evidence that the term is a ‘house mark.’” App. Reply br., 7 TTABVUE 3.

We agree with Applicant that this record does not establish FIXMD as a house mark which serves to “identify the manufacturer or seller over a wide variety of goods, with such goods often themselves identified by a ‘product mark.’” TMEP § 1402.03(b) (Jan. 2017).

Neither Applicant nor the Examining Attorney has discussed the significance of the word THE in Applicant’s mark. In this case, it does not appear to have source identifying significance and merely serves to limit the noun “triad” to the type specified by the accompanying adjective “fixmd,” meaning not just any “triad” it is the “fxmd triad.” *In re The Computer Store, Inc.*, 211 USPQ 72, 75 (TTAB 1981). *See also In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE to be confusingly similar, stating “[t]he addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance. ‘The’ is a definite article. When used before a noun, it denotes a particular person or thing.”); *In re Narwood Productions, Inc.*, 223 USPQ 1034 (TTAB 1984).

Applicant argues that the marks are so different that this one *du Pont* factor outweighs the others. See *Kellogg Co. v. Pack'Em Enters., Inc.*, 14 USPQ2d 1545, 1550 (TTAB 1990), *aff'd*, 951 F.2d 330, 333, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991). However, Applicant relies on case law in which the common element in the marks was inherently weak as highly suggestive and in some cases the goods were not identical. See, e.g., *Lever Brothers Company v. The Barcolene Company*, 174 USPQ 392 (CCPA 1972) (ALL CLEAR for household cleaner not likely to cause confusion with ALL for same goods); *Colgate-Palmolive Company v. Carter Wallace Inc.*, 167 USPQ 529, 530 (CCPA 1970) (PEAK PERIOD for personal deodorants not confusingly similar to PEAK for dentifrice); *H.D. Lee Co. v. Maidenform, Inc.*, 87 USPQ2d 1715 (TTAB 2008) (ONE FAB FIT held not likely to cause confusion with ONE TRUE FIT for similar goods); *Tricia Guild Assocs. Ltd. v. Crystal Clear Indus. Inc.*, 38 USPQ2d 1313, 1316 (TTAB 1994) (DESIGNERS GUILD for upholstery and furnishing fabrics and for textile wall coverings and wall paper held not confusingly similar to THE DESIGN GUILD for wholesale distributorship services in the field of decorative lighting and giftware); *Cumberland Packing Corp. v. McMahan Prods., Inc.*, 189 USPQ 428, 430 (TTAB 1975) (SWEET 'N LEGAL for dietary frozen desserts and SWEET 'N LOW for low calorie sugar substitute). In another example the mark was a unitary phrase, unlike Applicant's mark where TRIAD stands as a separate word. See *In re Lar Mor Int'l, Inc.*, 221 USPQ 180 (TTAB 1983) (no confusion found between TRES JOLIE and BIEN JOLIE, both for women's clothing).⁴

⁴ The Board further notes Applicant's inaccurate representation of the law. Citing TMEP §1207.(b)(i), Applicant asserts that "[s]imilarity in one respect – sight, sound, or meaning –

The marks are similar in appearance and sound by virtue of the identical element TRIAD. In addition, the common element TRIAD has the same meaning, “a group of three,”⁵ and commercial impression in both marks. The addition of THE FIXMD to Applicant’s mark and PADS to Registrant’s mark present differences in sound and appearance, and add other meanings to each mark, but do not create a difference in the meaning of TRIAD in both marks.

While we do not find that FIXMD is a house mark, because Applicant’s mark incorporates the dominant element of Registrant’s mark and the goods are identical and otherwise legally identical, consumers could view Registrant’s mark as a shortened or modified version of Applicant’s mark. In addition, because Applicant’s and Registrant’s marks are in standard characters they are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); TMEP § 1207.01(c)(iii) (Jan. 2017). We must consider Applicant’s and Registrant’s mark “regardless of font style, size, or color,” *Citigroup Inc. v. Capital*

does not support a finding of likelihood of confusion, even where the goods or services are identical or closely related.” App. Br., 4 TTABVUE 6 (emphasis added). The excerpt from that Section reads as follows (emphasis added):

Similarity of the marks in one respect – sight, sound, or meaning – **will not automatically** result in a determination that confusion is likely even if the goods are identical or closely related; rather, taking into account all of the relevant facts of a particular case, similarity as to one factor alone **may be** sufficient to support a holding that the marks are confusingly similar.

⁵ THE AMERICAN HERITAGE DICTIONARY (www.ahdictionary.com), March 12, 2016 Office Action at 4.

City Bank Group Inc., 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011), including iterations highlighting the common element TRIAD.

The addition of other distinctive matter does not necessarily avoid likely confusion where the dominant portion is the same. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 1322 110 USPQ2d at 1161 (affirming TTAB's finding that 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). Here, TRIAD is the dominant portion of Registrant's mark. While TRIAD is not predominant over THE FIXMD in Applicant's mark, as noted above, Registrant's mark could be perceived as a shortened version of Applicant's mark. *In re Mighty Leaf Tea*, 94 USPQ2d at 1260-61 (affirming TTAB's finding that applicant's mark, ML, is likely to be perceived as a shortened version of registrant's mark, ML MARK LEES (stylized), when used on the same or closely related skin-care products); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (holding CAREER IMAGE (stylized) for clothing and retail women's clothing store services, and CREST CAREER IMAGES (stylized) for uniforms, likely to cause confusion, noting that CAREER IMAGE would be perceived by consumers as a shortened form of CREST CAREER IMAGES).

Overall, and in view of the identical goods, we find that the similarities outweigh the dissimilarities and this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

Balancing of Factors

In conclusion, because the marks are more similar than dissimilar, the goods are identical and otherwise legally identical, and the channels of trade and consumers overlap, we find that confusion is likely between Applicant's mark THE FIXMD TRIAD and Registrant's mark TRIAD PADS.

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