

This Opinion is Not a
Precedent of the TTAB

Mailed: February 25, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Paul S. Doran
v.
Wet Holdings (Global) Ltd.

Opposition No. 91239701

Wet Holdings (Global) Ltd.
v.
Paul S. Doran and Alykhan Tharani

Cancellation No. 92069595

Paul S. Doran, pro se and Alykhan Tharani, pro se.

Edwin D. Schindler, Esq. for Wet Holdings (Global) Ltd.

Before Wolfson, Heasley and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Evidentiary Record

This consolidated proceeding¹ consists of:

- (1) an opposition based on priority and likelihood of confusion, filed by Paul S. Doran (“Doran”) to the application of Wet Holdings (Global) Ltd. (“Wet



Holdings”) to register the mark **WATER ENHANCING TECHNOLOGIES**,² with a disclaimer of WATER ENHANCING TECHNOLOGIES, for “Apparatus for the cleansing, purification and pH enhancement of water; water conditioning apparatus for producing coherent water; apparatus for cleansing grey water; apparatus for the recovery of water waste; water treatment apparatus, namely, water conditioning units for changing the structure and resonance of water

¹ The Board consolidated these proceedings on November 16, 2018, and designated Opposition No. 91239701 as the parent case. 13 TTABVUE 2. TTABVUE citations in this decision are to the record in the parent case unless otherwise indicated. “TTABVUE” refers to the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

² Application Serial No. 87582805 was filed on August 24, 2017, based on Wet Holdings’ alleged bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the following Description of the Mark: “The mark consists of a blue drop of water with the stylized word ‘WET’ spelled in the drop of water and with the gray stylized wording ‘WATER ENHANCING TECHNOLOGIES’ appearing underneath the drop of water. The color white appears as background only and is not a claimed feature of the mark.” The colors blue and gray are claimed as features of the mark.

molecules for the enhancement of residential, commercial, and industrial water supplies” in International Class 11.

(2) a cancellation based on priority and likelihood of confusion, filed by Wet Holdings against the pleaded registration owned by Doran and Alykhan



Tharani (“Tharani”) (jointly, “Registrants”) for the mark ³, with a disclaimer of WATER ENHANCEMENT TECHNOLOGY, for “Water treatment apparatus, namely, water conditioning units for changing the structure and resonance of water molecules for the enhancement of residential, commercial, and industrial water supplies” in International Class 11.

The parties agree that a likelihood of confusion exists between their respective marks, and their dispute centers on priority.⁴ The consolidated proceeding is fully briefed.⁵

³ Registration No. 5392693 issued January 30, 2018 from an underlying application filed November 14, 2016, for which a statement of use was filed claiming first use and use in commerce on November 21, 2017. The registration includes the following Description of the Mark: “The mark consists of the letters ‘WET’ above the words ‘Water Enhancement Technology.’” Color is not claimed as a feature of the mark.

⁴ 4 TTABVUE 3 (Wet Holdings’ statement that it “admits that the respective trademarks of the parties are confusingly similar and that a likelihood of confusion exists....”); Cancel. No. 92069595, 1 TTABVUE 5 (Wet Holdings’ Petition, stating “[a] likelihood of confusion exists between the respective trademarks of Wet Holdings and Respondents....”); 4 TTABVUE 3 (Opposers’ Answer, stating “Respondents do agree that a likelihood of confusion exists between the respective trademarks ... as said trademarks are used for the same, similar or related and/or competing goods....”).

⁵ In a December 2, 2020 Order, 21 TTABVUE, the Board granted Opposer’s motion to reopen their time to file an opening brief, and accepted Wet Holdings’ July 10, 2020 opening brief and Opposers’ August 5, 2020 rebuttal brief. The Board allowed Wet Holdings until December

The parties had the benefit of a discovery conference conducted with Board participation. The post-conference order reflects that they discussed the procedures for properly taking and submitting testimony, and that the parties were directed to TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 700 on trial procedure and how to introduce evidence. 15 TTABVUE 10.⁶ The order also stated, “No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules.” *Id.*

None of the parties timely submitted any evidence. *See* 37 C.F.R. § 2.121(a) & (b). Opposer Doran also did not submit a trial brief by the deadline, so the Board issued an order allowing Doran time to show cause why the Board should not treat his failure to file a brief as a concession of the case. 16 TTABVUE. Doran responded that he had not lost interest in the case, and Tharani joined in the response, indicating that the two pro se litigants also retained an interest in the cancellation proceeding. 17 TTABVUE at 3.

The response included a motion to reopen the testimony period, *id.*, which the Board denied. 21 TTABVUE. The Board’s order stated in relevant part that “Doran and Tharani did not submit any evidence until they filed it in connection with their August 5, 2020 rebuttal brief. While the delay in submitting an opening brief was not substantial, there was a lengthy delay in Doran and Tharani’s filing of evidence,” and

19, 2020 to file its rebuttal brief in the cancellation proceeding, and Wet Holdings did so prior to the deadline. 21 TTABVUE 7.

⁶ The order noted the Registrants’ pro se status, the Board having strongly advised them to obtain legal counsel, and that if the Registrants chose to proceed without counsel, they would be required to familiarize themselves with Board procedures and rules. 15 TTABVUE 2.

“evidence must be made properly of record pursuant to the relevant Trademark Rules, and not merely attached to a brief.” *Id.* at 5 & n.3 (citing *Swiss Watch Int’l Inc. v. Federation of the Swiss Watch Ind.*, 101 USPQ2d 1731, 1734-35 (TTAB 2012) (declaration and exhibits submitted with brief not an acceptable way to make evidence of record)).

Despite clear guidance from the Board regarding the schedule for and manner of submitting evidence, none of the parties introduced evidence during their respective testimony periods. Rather, the parties attached exhibits to their briefs in this case, which fails to satisfy the Board’s rules and the scheduling order regarding the timing of and procedure for introducing evidence. Accordingly, these proffered exhibits are not part of the record and receive no consideration. *See Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1846 n.8 (TTAB 2004) (materials submitted outside of applicant’s assigned testimony period and which failed to comply with the Board’s evidentiary rules given no consideration); TBMP § 706 (“Evidence not obtained and filed in compliance with the rules of practice governing inter partes proceedings before the Board will not be considered by the Board.”).

As a result, the record in this consolidated proceeding consists only of the file of Wet Holdings’ opposed application and the file of Registrants’ challenged registration, which form part of the record without any action by the parties under Trademark Rule 2.122(b), 37 C.F.R. § 2.22(b).

II. Entitlement to a Statutory Cause of Action⁷

Entitlement to a statutory cause of action must be established in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark or petition to cancel a registration when he or she demonstrates an interest falling within the zone of interests protected by the statute, 15 U.S.C. §§ 1063 & 1064, and a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020).

Doran’s pleaded registration (which he co-owns with Tharani) establishes his statutory entitlement to the opposition based on alleged likelihood of confusion between the registered mark and Wet Holdings’ mark. *See Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Wet Holdings’ statutory entitlement to petition to cancel the pleaded registration is inherent in its position as defendant in the opposition. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1428 (TTAB 2014)

⁷ Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Despite the change in nomenclature, the substance of our analysis of this issue in our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

(“Applicant has standing based on opposers’ assertion of their marks and registrations against applicant in their notice of opposition”); *Anthony’s Pizza & Pasta Intl. Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1274 (TTAB 2009) (“Defendant has standing to cancel plaintiff’s pleaded registration by virtue of being the defendant in the consolidated proceeding, and the fact that plaintiff has asserted its registration against defendant.”), *aff’d*, 415 Fed. Appx. 222 (Fed. Cir. 2010). Thus, in both the opposition and the cancellation, the party in the position of plaintiff has demonstrated an interest falling within the zone of interests protected by the respective provisions of the statute, and a reasonable basis for inferring proximate causation of damage.

III. Priority

Priority is an issue in both the opposition and the cancellation proceeding because, although Registrants’ registration is of record, Wet Holdings has petitioned to cancel it. *See Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 181 USPQ 272, 275 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”). Thus, the parties in this case bear the burden of establishing priority in connection with their respective claims of likelihood of confusion. To establish priority on a likelihood of confusion claim under Section 2(d) of the Trademark Act, the party must prove by a preponderance of the evidence that, vis-à-vis the adverse party, it owns proprietary rights in “a mark or trade name previously used in the United States . . . and not abandoned” *Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031,

1036-37 (TTAB 2010) (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44 (CCPA 1981)).

Because the only evidence of record consists of the files of the opposed application and pleaded registration, their filing dates determine priority.⁸ “The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence.” Trademark Rule 2.122(b)(2); 37 C.F.R. § 2.122(b)(2). Particularly relevant in this case, “competent evidence’ ... includes either party’s application or registration for the relevant mark, for when an application or registration is of record, the party may rely on the filing date of the application for registration, i.e., its constructive use date. The result is that either party in this case may rely on the filing date of its various applications -- without further proof -- to establish priority.” *Central Garden & Pet Co. v. Doskocil Mfg. Co., Inc.*, 108 USPQ2d 1134, 1139-40 (TTAB 2013) (citing *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009); *Brewski Beer Co. v. Brewski Bros. Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998) (“petitioner or respondent may rely on its registration for the limited purpose of proving that its mark was in use as of the application filing date”)).

The November 14, 2016 filing date of the underlying application that resulted in Registrants’ pleaded registration establishes their constructive use date for purposes

⁸ We do not consider or address the parties’ priority arguments that rely on the exhibits to the briefs, which are not part of the record.

of priority. This priority date precedes the August 24, 2017 filing date of Wet Holdings' application. Accordingly, Doran has priority in the opposition, satisfying this element of his likelihood of confusion claim. By contrast, Wet Holdings lacks priority, and therefore its likelihood of confusion claim in the cancellation proceeding fails.

IV. Opposer Doran's Likelihood of Confusion Claim

As noted above, the parties agree that a likelihood of confusion exists between their respective marks.⁹ We concur.

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. du Pont 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). A likelihood of confusion analysis often focuses on 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

⁹ 18 TTABVUE 10 (Registrants' Brief, stating that "Opposer/Respondent contend there is overwhelming likelihood of confusion"); 19 TTABVUE 11 (Wet Holdings' Brief, stating that "Doran and Wet Holdings agree that their respective marks are confusingly similar, thereby rendering the outcome of Doran's Opposition and Wet Holdings' related Petition for Cancellation a "priority of use" contest"); Cancel. No. 92069595, 1 TTABVUE 5 (Wet Holdings' Petition, stating "[a] likelihood of confusion exists between the respective trademarks of Wet Holdings and Respondents...."); 4 TTABVUE 3 (Opposers' Answer, stating "Respondents do agree that a likelihood of confusion exists between the respective trademarks ... as said trademarks are used for the same, similar or related and/or competing goods....").

the goods and differences in the marks.”). Indeed, given that the entire record in this case consists only of the subject application file and pleaded registration file, these are the only *DuPont* factors for which we have evidence. The parties do not argue any other factors.

If likelihood of confusion exists with respect to any of Wet Holdings’ identified goods in its single-class application, the opposition must be sustained. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

A. The Goods, Trade Channels and Classes of Consumers

The identifications of goods in both the application and registration at issue include “water treatment apparatus, namely, water conditioning units for changing the structure and resonance of water molecules for the enhancement of residential, commercial, and industrial water supplies.” Thus, the goods are identical in part, and the second *DuPont* factor weighs heavily in favor of a likelihood of confusion.

Under the third *DuPont* factor, because the goods overlap, we presume as a matter of law that the trade channels also overlap, at least in part. *See Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, “the marketing channels of trade and targeted classes of consumers and donors are the same”); *see also In re Viterro 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). Thus, the third *DuPont* factor also weighs heavily in favor of likely confusion.

B. Similarity of the Marks



With respect to the marks, we must compare “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison such as shown above, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721; *see also Edom Labs. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). Similarity in any one of the elements of appearance, sound, meaning, or commercial impression suffices to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola 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”); *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). We also bear in mind that, at least with respect to the identical goods, when turning to the marks, “the degree of similarity necessary to support a conclusion of likely confusion

declines.” *Century 21 Real Estate v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *see also Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018).

The marks share very similar wording – WET WATER ENHANCING TECHNOLOGIES, on the one hand, and WET WATER ENHANCEMENT TECHNOLOGY on the other hand. The first two words of each mark, WET WATER, are identical, and the first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. Also, both marks share in common the presentation of the first word WET in a much larger font than the remaining wording. The third words in the marks are variations of the same root – ENHANCING and ENHANCEMENT. The fourth words in the mark are the plural and singular version of the same word. We find that despite these minor word variations, the closeness of the wording contributes to the visual similarity of the marks, but even more so, to their similarity in sound and overall connotations, particularly because “the average customer ... retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).

Although Wet Holdings’ “blue drop of water” design adds a visual difference between the marks, the design element merely depicts and reinforces the words WET and WATER in Wet Holdings’ mark, and consumers therefore are unlikely to rely on the design for source indication to distinguish Wet Holdings’ mark from the registered

mark. The block-letter fonts used in both marks are relatively unremarkable, and do not distinguish the marks. Overall, we find that the marks look similar and sound almost the same.

As for connotation and commercial impression, the literal portion of Wet Holdings' mark is very close to that in the registered mark, and neither the minor variations in wording between the marks nor the design element in Wet Holdings' mark change the meaning or impression of either mark. The marks overall have the same connotation, and the commercial impressions are quite similar.

Given the nearly identical sound, the similarity in appearance, and the strong similarities in connotation and commercial impression of the marks at issue, the first *DuPont* factor weighs in favor of a finding of likely confusion.

V. Conclusion

Based on the similarity between the marks for identical goods presumed to travel in the same channels of trade to the same classes of purchasers, we conclude that a likelihood of confusion exists. 15 U.S.C. § 1052(d).

Decision: The opposition is sustained. The petition to cancel is denied.