

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
Feb. 26, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tsuyoku Co., Ltd.

Serial No. 76651637

Tsuyoku Co., Ltd., pro se.

Shaunia P. Wallace Carlyle, Trademark Examining Attorney,  
Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Walters, Grendel and Zervas, Administrative  
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Tsuyoku Co., Ltd., applicant herein, seeks  
registration on the Principal Register of the mark depicted  
below

The logo consists of the text "H2Ogym" written in a stylized, handwritten font. The "H" is large and bold, with a textured, charcoal-like appearance. The "2" is smaller and positioned between the "H" and the "O". The "O" is also large and bold, with a similar textured appearance. The "gym" is written in a cursive, lowercase font, appearing to be written with a marker or thick pen. The overall style is informal and artistic.

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for "exercise equipment, namely, underwater treadmills, underwater step machines, underwater stationary cycles, underwater weight lifting machines and underwater body twist exercisers."<sup>1</sup>

The Trademark Examining Attorney has issued a final refusal to register applicant's mark, on the ground that the mark, as applied to the goods identified in the application, so resembles the mark depicted below,



previously registered on the Principal Register for goods identified in the registration as "manually operated exercise equipment for use in water,"<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive.

Trademark Act Section 2(d), 15 U.S.C. §1052(d).

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<sup>1</sup> Serial No. 76651637, filed on December 7, 2005. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b). The application states that "[t]he stippling in the drawing is for shading purposes only and is not a feature of the mark."

<sup>2</sup> Reg. No. 2440908, issued April 3, 2001. Section 8 affidavit accepted.

Applicant has appealed the final refusal. After careful consideration of the evidence of record,<sup>3</sup> we affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We begin with the second *du Pont* factor, which requires us to determine the similarity or dissimilarity of the goods as identified in the application and in the cited registration. We find that the underwater exercise equipment identified in applicant's application is highly similar to, and indeed legally identical to, the underwater exercise equipment identified in the cited registration.

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<sup>3</sup> The evidence submitted by applicant for the first time with its appeal brief is untimely and shall be given no consideration. Trademark Rule 2.142(d), 37 C.F.R. §2.142(d). We add that our decision would not be altered even if such evidence had been considered.

Applicant's specific underwater exercise machines are legally encompassed by registrant's more broadly-identified "manually operated exercise equipment for use in water." The second *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.

Given the legally identical nature of the goods, we further find that the trade channels and classes of purchasers for the respective goods also are legally identical. The third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

We turn next to the first *du Pont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entirety in terms of appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc., supra*. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB

1975). Finally, in cases such as this, where the applicant's goods are identical to the goods identified in the cited registration, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In terms of appearance, we find that applicant's mark is similar to the cited registered mark to the extent that both marks prominently include the component word "gym." The marks look dissimilar to the extent that "H<sub>2</sub>O" and "water" look dissimilar, and to the extent that the stylizations of the respective marks are different. On balance, the marks look somewhat dissimilar.

In terms of sound, we find that the marks are similar to the extent that both end with "gym." The marks are dissimilar to the extent that "H<sub>2</sub>O" and "water" sound different. On balance, the marks sound somewhat dissimilar.

However, we find that the marks are highly similar if not identical in terms of connotation. We note that "water" is defined as "a clear, colorless, nearly odorless and tasteless liquid, H<sub>2</sub>O, the most widely used of all

solvents and essential for most plant and animal life.”  
Webster’s II New Riverside University Dictionary (1988) at  
1303.<sup>4</sup> H<sub>2</sub>O” is widely known to be the chemical symbol for  
“water,” and the two designations can be and are used  
interchangeably. We find that purchasers would understand  
“H<sub>2</sub>O” and “water” to mean the same thing in both marks.  
The “gym” component of both marks likewise means the same  
thing in both marks. Thus, both marks would be perceived  
as combining the word “gym” with “water” or its equivalent,  
“H<sub>2</sub>O”. In short, the marks mean the same thing.

Likewise, we find that the marks create the same  
commercial impression as applied to the respective goods,  
i.e., that the goods allow performance of gym-like  
exercises that are done in the water.

Viewed in their entirety, we find that the marks are  
similar. The high degree of similarity between the marks  
in terms of connotation and commercial impression  
significantly outweighs any dissimilarities between the  
marks in terms of appearance and sound. The first *du Pont*  
factor weighs in favor of a finding of likelihood of  
confusion.

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<sup>4</sup> The Board may take judicial notice of dictionary definitions.  
*See University of Notre Dame du Lac v. J.C. Gourmet Food Imports*  
*Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505  
(Fed. Cir. 1983).

Considering all of the relevant *du Pont* factors, we conclude that confusion is likely to result from use of these highly similar marks on identical goods. To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.