



**IN THE MATTER OF THE APPLICATION OF E.I. DuPONT DeNEMOURS &
CO. (ASSIGNEE OF HORIZON INDUSTRIES CORPORATION)**

Patent Appeal No. 8866

United States Court of Customs and Patent Appeals

476 F.2d 1357; 1973 CCPA LEXIS 363; 177 U.S.P.Q. (BNA) 563

May 3, 1973

PRIOR HISTORY: [**1] Serial No. 307,711.

OPINION BY: MARKEY

OPINION

[*1359] MARKEY, Chief Judge.

This appeal is from the decision of the *Trademark Trial and Appeal Board*, 166 USPQ 351 (1970), affirming a refusal to register DuPont's mark RALLY for a combination polishing, glazing and cleaning agent for use on automobiles¹ on the basis of likelihood of confusion under section 2(d) of the Lanham Act with Horizon's registered mark RALLY for an all-purpose detergent.² We reverse.

1 Serial No. 307,711, filed September 19, 1968.

2 Reg. No. 675,713, issued March 17, 1959.

The application now before us was originally filed by Horizon. DuPont had earlier filed for registration of RALLY for a combination wax and cleaning agent for automobiles.³ That application was refused in view of Horizon's registration. DuPont appealed and the board affirmed.⁴

3 Serial No. 270,842, filed May 8, 1967.

4 Decision of Trademark Trial and Appeal Board, abstracted at 160 USPQ 830 (1968).

While its appeal was pending, DuPont purchased Horizon's mark for the automobile product, the present application and the good will of that business. Because Horizon retained RALLY for all-purpose detergent, [**2] an agreement designed to avoid conflict was entered into on the same day. Boundaries of use of the marks were established, permitting the sale of products "incidentally usable" in the other party's market but prohibiting any promotion as "especially suited for use in such market." DuPont's realm was the "automotive aftermarket." Horizon's encompassed the "commercial building or household market."

The examiner, aware of the assignment and agreement, nonetheless refused registration, citing Horizon's registration and describing the issue as "ruled upon" in the board's earlier decision. The board affirmed, holding:

It is our opinion that despite any agreement between the parties the public interest cannot be ignored, and when the goods of the parties are as [*1360] closely related as those here involved, their sale under the identical mark "RALLY" would be likely to result in confusion, mistake, or deception. cf. *In re Avedis Zildjian Co.*, 157 USPQ 517 (CCPA, 1968); and *In re Continental Baking Company*, 156 USPQ 514 (CCPA, 1968). * * * The mere fact that registrant may have precluded itself from selling an automobile cleaner under the mark "RALLY" does not overcome the likelihood [**3] of confusion as set forth in Section 2(d) of the

Trademark Statute.

OPINION

Our decision turns on the application of Sec. 2(d) to the facts before us. DuPont, having an unquestioned right to use, argues that the "right to register follows the right to use," particularly where the right on its goods is exclusive, Horizon having given up use of the mark in DuPont's market. The Patent Office solicitor denies such a broad relationship in the rights to use and register and emphasizes the duty of the Patent Office "to guard the public interest" against confusion.

Both parties have cited prior opinions of this court. We are thus presented with a welcomed opportunity to set forth a reliable guide for decision-making in cases involving Sec. 2(d). It need hardly be said that concepts expressed in our prior opinions and inconsistent with what we say here may be considered no longer viable in this court.

The Statute

We begin with interpretation of the Lanham Act (Chapter 22, Title 15) as it applies here. The legislative history⁵ of the Act as a whole describes its objectives as making registration "more liberal," dispensing with "mere technical prohibitions and arbitrary provisions" [**4] and modernizing the trademark statutes "so that they will conform to legitimate present-day business practice." The basic goal of the Act, which dealt with a good deal more than registration, was "the protection of trademarks, securing to the owner the good will of his business and protecting the public against spurious and falsely marked goods." ⁵ Accordingly, we consider the pre-Lanham Act decisions⁶ presented here to be inapt.

⁵ S. Rep. No. 1333, 79th Cong., 2d Sess. (1946) in U.S. Code Cong. Service, 79th Cong., 2d Sess. at 1274-8 (1946).

⁶ *Skookum Packers Association v. Pacific Northwest Canning Co.*, 18 CCPA 792, 45 F.2d 912, 7 USPQ 143 (1930); *Van Camp Sea Food Co., Inc. v. Westgate Sea Products Co.*, 18 CCPA 1311, 48 F.2d 950, 9 USPQ 417 (1931); *Jacob Ries Bottling Works, Inc. v. The Coca-Cola Co.*, 31 CCPA 706, 138 F.2d 56, 59 USPQ 138 (1943).

Sec. 2 (15 USC 1052), in pertinent part reads:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it

* * *

(d) consists of or comprises a mark which so resembles a mark registered [**5] in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant to cause confusion, or to cause mistake or to deceive: * * *

Under the statute the Commissioner must refuse registration when convinced that confusion is likely because of concurrent use of the marks of an applicant and a prior user on their respective goods.

The phrase "on account of its nature" in Sec. 2 clearly applies to the "resembles" element of Sec. 2(d). But the question of confusion is related not to the nature of the mark but to its effect "when applied to the goods of the applicant." The only relevant application is made in the marketplace. The words [**1361] "when applied" do not refer to a mental exercise, but to all of the known circumstances surrounding use of the mark.

The Decisional Process

The ultimate question of the likelihood of consumer confusion has been termed a question of fact. *Coca-Cola Company v. Snow Crest Beverages, Inc.*, 162 F.2d 280, 73 USPQ 518 (1st Cir. 1947), cert. den. 332 US 809, 75 USPQ 365 (1947). If labeled a mixed question or one of law, it is necessarily [**6] drawn from the probative facts in evidence. As so often said, each case must be decided on its own facts. There is no litmus rule which can provide a ready guide to all cases.

In testing for likelihood of confusion under Sec. 2(d), therefore, the following, when of record, must be considered:

(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

(2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.

(3) The similarity or dissimilarity of established, likely-to-continue trade channels.

(4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

(5) The fame of the prior mark (sales, advertising, length of use).

(6) The number and nature of similar marks in use on similar goods.

(7) The nature and extent of any actual confusion.

(8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

(9) The variety of goods on which a mark is or is not [**7] used (house mark, "family" mark, product mark).

(10) The market interface between applicant and the owner of a prior mark:

(a) a mere "consent" to register or use.

(b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.

(c) assignment of mark, application, registration and good will of the related business.

(d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.

(11) The extent to which applicant has a right to exclude others from use of its mark on its goods.

(12) The extent of potential confusion, i.e., whether de minimis or substantial.

(13) Any other established fact probative of the effect of use.

Where the Patent Office follows such process, ⁷ it is not abandoning its duty under Sec. 2(d) or allowing individuals to take the law into their own hands. Consideration of evidence emanating from the only place where confusion can occur, i.e. the marketplace, is not related to who decides but to the process of deciding.

7 See the decisions listed in "Appendix A" to Judge Smith's dissenting opinion in *In re Continental Baking Co.* at 55 CCPA 976, 390 F.2d 753, 156 USPQ 520.

[**8] The required inquiry, though more sweeping, is not unlike that provided for in Patent Office Rule 2.41 wherein the applicant is specifically invited to submit all evidence, including letters from the trade or public, tending to show that the mark, otherwise merely descriptive, distinguishes the goods.

The evidentiary elements are not listed above in order of merit. Each may [**1362] from case to case play a dominant role. In *Schenley Distillers, Inc. v. General Cigar Co., Inc.*, 57 CCPA 1213, 427 F.2d 783, 166 USPQ 142 (1970), and in *McKesson & Robbins, Inc. v. P. Lorillard Co.*, 120 USPQ 306 (TTAB 1959), element (9) led to a finding that confusion was unlikely when the same mark was used on a beverage and a tobacco product. In *John Walker & Sons, Limited v. Tampa Cigar Company, Inc.*, 124 F.Supp. 254, 103 USPQ 21 (S.D. Fla. 1954), aff'd, 222 F.2d 460, 105 USPQ 351 (5th Cir. 1955) element (5) made confusion likely when the same mark was used on beverages and tobacco. See, also, *Carling Brewing Company, Inc. v. Phillip Morris, Inc.*, 277 F.Supp. 326, 156 USPQ 70 (N.D. Ga. 1967) and *Geo. A. Dickel Co. v. Stephano Brothers*, 155 USPQ 744 (TTAB 1967) involving beverages and tobacco.

[**9] We find no warrant, in the statute or elsewhere, for discarding any evidence bearing on the question of likelihood of confusion. Reasonable men may differ as to the weight to give specific evidentiary elements in a particular case. In one case it will indicate that confusion is unlikely; in the next it will not. In neither case is it helpful or necessary to inject broad maxims or references to "the public interest" which do not aid in deciding. Only the facts can do that. In every case turning on likelihood of confusion, it is the duty of the examiner, the board and this court to find, upon consideration of all the evidence, whether or not confusion appears likely. That determination ends the decisional process.

Decision

Applying the above criteria, and after a thorough review of the entire record, we are convinced that confusion is not likely. The agreement and assignment

herein constitute far more than mere "consent." They play, in this case, a dominant role.

The record of DuPont's original application, like so many, included only the application, specimens, reference mark and descriptions of goods. From these the examiner made a judgment, necessarily subjective [**10] and requiring assumptions. The only facts were identical marks on "related" goods. Confusion appeared likely and registration was refused.

The present application, however, was rejected without proper consideration, in our view, of all the evidence. The examiner said the earlier decision had "ruled upon" the issue and referred to the "public interest" as though likelihood of confusion were established. The board, also citing the public interest, found confusion likely "despite any agreement."

It has been said that agreement evidence may resolve "doubt," *In re Harvey Aluminum (Inc.)*, 161 USPQ 366 (TTAB 1969) or may be useful when the issue is "debatable," *In re Vim Corp.*, 161 USPQ 58 (TTAB 1969), but there are only two practical possibilities. Either there is no indication of likely confusion, in which case the registration promptly issues, or there is some indication that confusion may be likely. In the latter case, the question must remain open (i.e., "debatable") until any or all of the elements listed above have been reviewed and studied, the final decision being made on the basis of the entire record.

In considering agreements, a naked "consent" may carry little weight. [**11] Absent more, the consent may continue or expand his use. The consent may be based on ignorance or misconception of the law. The facts may show, on the other hand, that consent could exist only in the absence of any real likelihood of confusion.

The weight to be given more detailed agreements of the type presented here should be substantial. It can be safely taken as fundamental that reputable businessmen-users of valuable trademarks have no interest in causing public confusion. The genius of the free competitive system is the paralleling of the interest of the entrepreneur and the consuming public so far as possible. Altruism aside, it is in his pecuniary interest, [*1363] indeed a matter of economic survival, that the businessman obtain and retain customers, the very purpose and function of a trademark, and that he avoid

and preclude confusion. Millions of advertising dollars are spent daily for that precise purpose. The history of trademark litigation and the substantial body of law to which it relates demonstrate the businessman's alertness in seeking to enjoin confusion. In so doing he guards both his pocketbook and the public interest.

Thus when those most [**12] familiar with use in the marketplace and most interested in precluding confusion enter agreements designed to avoid it, the scales of evidence are clearly tilted. It is at least difficult to maintain a subjective view that confusion will occur when those directly concerned say it won't. A mere assumption that confusion is likely will rarely prevail against uncontroverted evidence from those on the firing line that it is not.

The parties here agreed to restrict themselves in effect to the general purpose cleaning market (Horizon) and the automobile market (DuPont). Horizon is subject to suit for breach of contract and infringement if it promotes its RALLY products for cleaning automobiles. DuPont can be sued if it promotes its RALLY products in general cleaning. The fact that the goods of one party "could be used" in the field of the other is too conjectural and too widely applicable to form the sole basis of decision, particularly where, as here, the parties have agreed to avoid the promotion of such cross-use.

The mere fact of diverse marketing emphasis alone may not in every case preclude confusion. Without more, it may well be that purchasers active in both markets and [**13] familiar with products sold under a particular mark could attribute to the same source closely related goods sold under the same mark. The agreements herein, however, considered as a whole and notwithstanding certain phrases subject to contrary interpretation, evidence that confusion will be unlikely. As we read them, the very purpose and aim of the present agreements is the avoidance of public confusion. Under provision 6 of the assignment the parties agreed "to take any further actions and execute any further agreements needed to carry out the spirit and intent of this agreement." The words of this court in a concurrent use proceeding, *In re Beatrice Foods, Co.*, 57 CCPA 1302, 429 F.2d 466, 166 USPQ 431 (1970) are particularly apt:

* * * there can be no better assurance of the absence of any likelihood of confusion, mistake or deception than the parties' promises to avoid any activity which might lead to such likelihood.

It is reasonable to conclude that experienced businessmen fully and continuously alert to each others' products, labels, trade channels and advertising and parties to the agreements before us, will be quick to act against confusion. We cannot believe that Horizon [**14] would have sold its automotive business, assigned its mark and entered into the agreement or that DuPont would have accepted and paid for the assignment and entered into the agreement, if either thought for a moment that purchasers would seriously be confused as to source. Dollars were at stake. Decisions of men who stand to lose if wrong are normally more reliable than those of examiners and judges.

We have no hesitancy in holding, therefore, under the facts of this case, that confusion is not likely to stem from concurrent use of RALLY by Horizon and DuPont on their respective goods under the terms of their agreement. Accordingly, the decision of the board must be reversed.

From all of the foregoing, it can be seen that the arguments presented in this and prior cases regarding the effect of a right to use and the need for protection of the public interest against confusion provide of themselves inadequate guides in determining likelihood of confusion under Sec. 2(d).

[*1364] Right to Use - Right to Register

Decisional maxims like "the right to register follows the right to use," sometimes defended as "reflecting the realities of the marketplace," founder on their [**15] non-universality of application and the existence of Sec. 2(d). As attractive as that approach appears in *In re National Distillers Products Co.*, 49 CCPA 854, 297 F.2d 941, 132 USPQ 271 (1962) and in the dissents in *Ultra-White Company, Inc. v. Johnson Chemical Industries, Inc.*, 59 CCPA, 465 F.2d 891, 175 USPQ 166 (1972), *In re Avedis Zildjian Co.*, 55 CCPA 1126, 394 F.2d 860, 157 USPQ 517 (1968) and *In re Continental Baking Co.*, 55 CCPA 967, 390 F.2d 747, 156 USPQ 514 (1968), it is recognized as a goal and that the phrase "as nearly as possible" must be read into it. Clearly, a right to use is not a right to confuse. The rights to use and register are not identical. *Alfred Dunhill of London, Inc. v. Dunhill Tailored Clothes, Inc.*, 49 CCPA 730, 293 F.2d 685, 130 USPQ 412 (1961), cert. den., 369 US 864, 133 USPQ 702 (1962). Many marks, including those described in Sec. 2(a), (b), and (c), merely descriptive terms and those on labels defective under other laws

(Rule 2.69), might all be used but not registered.

Although a naked right to use cannot always result in registration, the Act does intend, as we said above, that registration and use be coincident so far as possible. Post-Lanham [**16] Act opinions relating to Sec. 2(d) which maintain an iron curtain between the rights to use and register do not contribute to stability in the law. Treating those rights as totally divorced entities only perpetuates the "arbitrary provisions" respecting confusion that the Congress thought it was eliminating more than twenty-five years ago.

The Public Interest

Whether offered in response to a right-to-use argument or against any of the evidentiary considerations listed above, citation of "the public interest" as a basis for refusal of registration is a bootless cry.⁸ We need add little to the shattering of that shibboleth in the concurring opinion in *National Distillers, supra*, and in the dissents in *Ultra-White, Zildjian and Continental Baking, supra*. Writers and scholars listed in those reported opinions have also shown the fallacy in the notion that the Patent Office is somehow guarding the public against confusion when it refuses a registration. After a likelihood of confusion is found (and the case thus decided) citation of the public interest is unnecessary.

⁸ We are aware, of course, of our part in encouraging this very cry. In *re Continental Baking Co.*, above.

[**17] The Patent Office does have a guardianship role under Sec. 2(d). It lies not in a negative, nay-saying of refusal alone, but in the protection of a mark by registering it and then rejecting later improper attempts, of which the registrant is unaware, to register it or a similar mark. Refusal to register cannot prevent confusion. At most, it might discourage further use.⁹ Refusal can, under certain circumstances, encourage potential confusion. Absence of a registration of RALLY for auto cleansers in the present case may, for example, lead others to adopt and use that or a similar mark for auto cleansers. Granting a registration will not produce confusion. Use alone can do that and neither we nor the Patent Office can grant or deny a right to use.

⁹ That a rejected applicant might elect to abandon use, and thus reduce the potential for confusion, is a matter of the applicant's choice.

476 F.2d 1357, *1364; 1973 CCPA LEXIS 363, **17;
177 U.S.P.Q. (BNA) 563

Cf. Glenwood Laboratories, Inc. v. American Home Products Corp., 59 CCPA, 455 F.2d 1384, 173 USPQ 19 (1972).

Presumably, everything the Patent Office and this court does is in the public interest. We find no place for "the guardianship of the public interest" as support for refusals [**18] to register under Sec. 2(d).

[*1365] Conclusion

What we have said under the heading "decisional

process," supra, which has been in effect or in part followed on occasion in the past by this and other courts and by the Patent Office, and the elimination of considerations regarding right to use and the public interest should in time lead, we believe, to increased conformity of the register with the realities of use in the marketplace, and to the greater stability sought in the Act.

REVERSED

Baldwin, J., dissents.

THIS OPINION IS A
PRECEDENT OF THE TTAB

Mailed:
May 2, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
Inter IKEA Systems B.V.
v.
Akea, LLC

—
Opposition No. 91196527

Richard Lehv of Fross Zelnick Lehrman & Zissu PC for Inter IKEA Systems B.V.

T. Robert Rehm, Jr. of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan,
L.L.P. for Akea, LLC.

—
Before Taylor, Bergsman and Ritchie, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

On June 17, 2009, Akea, LLC (“applicant”) filed an intent-to-use application to register the mark AKEA, in standard character form, for the following goods and services:¹

Nutritional supplements; herbal supplements; vitamin and mineral supplements, in Class 5;

¹ Serial No. 77761765.

Retail services by direct solicitation by sales agents in the field of nutritional supplements, herbal supplements and vitamin and mineral supplements; online retail store services featuring nutritional supplements, herbal supplements, and vitamin and mineral supplements; providing advice and information in the field of career and business opportunities, in Class 35; and

Providing advice and information to consumers regarding lifestyle topics, namely, diet planning, nutrition, nutritional supplements, and gardening, in Class 44.

During the prosecution of the application, applicant added the statement that “the English translation of ‘AKEA’ in the mark is may you live 100 years.”

Inter IKEA Systems B.V. (“opposer”) opposed the registration of applicant’s mark for all the goods and services on the ground of likelihood of confusion, Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), and dilution, Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c).² With respect to its likelihood of confusion claim, opposer alleges that applicant’s mark AKEA for the goods and services identified in the application so resembles opposer’s registered mark IKEA for a wide variety of goods and services including food products, restaurant services and educational services in the field of personnel management and personal development as to be likely to cause confusion. Opposer claimed ownership of eight (8) registrations including the following:

² Opposer also opposed registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive. Because opposer did not pursue this claim during trial or in its brief, we find, in accordance with the Board’s usual practice, that the claim is waived. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013).

1. Registration No. 1418733 for the mark IKEA, in typed drawing form, for “retail store services in the field of furniture, housewares and home furnishings; and restaurant and catering services,” in Class 42;³ and

2. Registration No. 1661360 for the mark IKEA, in typed drawing form, for *inter alia* the following goods and services:⁴

Canned and frozen meat, fish and shellfish; jams, preserves and pickles, in Class 29;

Coffee, bread, biscuits, cakes, pastry, candy, mustard, sauces excluding cranberry and applesauce, and spices, in Class 30;

Live plants and flowers, dried flowers, and flower seeds, in Class 31; and

Educational courses and seminars in the fields of retailing of furniture and home furnishings, shop window dressing, sales techniques, personnel management, interior decoration and personal development, in Class 41.

Applicant denied the salient allegations of the notice of opposition.

The Record

At the outset, we note that applicant has filed numerous objections to certain testimony and exhibits introduced by opposer. Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence, including any inherent limitations, and this precludes the need to strike the testimony and evidence. Given the circumstances herein, we choose not to make

³ Issued November 25, 1986; renewed. Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term “typed” drawing with “standard character” drawing. A mark depicted as a typed drawing is the legal equivalent of a standard character mark.

⁴ Issued October 22, 1991; renewed.

specific rulings on each and every objection. As necessary and appropriate, we will point out in this decision any limitations applied to the evidence or otherwise note that the evidence cannot be relied upon in the manner sought. While we have considered all the evidence and arguments of the parties, we do not rely on evidence not discussed herein.

On June 22, 2013, the parties filed a stipulation for the introduction of testimony and evidence. Pursuant to the stipulation, the direct testimony of all witnesses could be introduced by sworn declarations or affidavits, and all documents produced in response to a request for production of documents were deemed authentic business records and were admissible subject to any objections other than authenticity.

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), applicant's application file. In addition, the parties introduced the following testimony and evidence:

A. Opposer's evidence and testimony.

1. Notice of reliance on certified copies of opposer's pleaded registrations showing the current status and title of the registrations;
2. Testimony declaration of Robert Wotherspoon, IKEA Food Manager U.S., with attached exhibits; and
3. The rebuttal testimony declaration of Robert Wotherspoon.

B. Applicant's evidence and testimony.

Applicant filed the testimony declaration of William Bernecki, applicant's Chief Operating Officer, with attached exhibits.

Standing and Priority

Opposer is Inter IKEA Systems B.V. The certified copies of opposer's pleaded registrations showing the status of and title to the registrations identify opposer Inter IKEA Systems B.V. as the owner of the registrations. Applicant, citing paragraph No. 2 of the Wotherspoon Declaration, argues that because Mr. Wotherspoon testified that IKEA Group is the owner of the pleaded registrations IKEA Systems B.V. is not the proper opposer.⁵ Specifically, in paragraph No. 2, Mr. Wotherspoon testified as follows:

2. I am employed by IKEA North American Services, LLC, which is part of the IKEA Group. The IKEA Group, which includes Opposer, INTER-IKEA SYSTEMS B.V., is one of the world's largest retailers, and is owner of one of the world's most famous trademarks and service marks, IKEA.

We do not agree with applicant's contention that that Mr. Wotherspoon testified that there has been a change of ownership with respect to opposer's pleaded registrations. Mr. Wotherspoon's explained that opposer is part of the IKEA Group, and that, therefore, the IKEA Group has a direct interest in the IKEA trademark registrations and is entitled to rely on the IKEA trademark registrations through its relationship with Inter IKEA Systems B.V.

⁵ Applicant's Brief, p. 42.

Because opposer has properly made the pleaded registrations of record, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In addition, Section 2(d) priority is not an issue in this case as to the marks and the goods and services covered by the pleaded registrations made of record. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. The fame of opposer's mark.

This *du Pont* factor requires us to consider the fame of opposer's marks. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods and services identified by the marks at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments, and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1305-1306 and 1309. Although raw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, raw numbers alone may be misleading. Some context in which to place raw statistics may be necessary (e.g., the substantiality of the sales or advertising figures for comparable types of products or services). *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309.

Opposer introduced the evidence set forth below to demonstrate the fame of its IKEA marks. Much of opposer’s evidence was designated as confidential and filed under seal and, therefore, we refer to such evidence only in general terms.

1. There are 38 IKEA stores in the United States. These stores are located in the most-heavily populated areas of the country, such as Boston, New York, Philadelphia, etc. Consumers travel up to two hours to visit IKEA stores.⁶

2. “Annually, [opposer] has over fifty million store visits in the U.S.”⁷

Opposer provided specific numbers for 2007 through 2011.

⁶ Wotherspoon Dec., ¶11.

⁷ Wotherspoon Dec., ¶18.

3. “[Opposer] has approximately 150 million visits annual [sic] to its website from Internet users in the U.S.”⁸ Opposer provided documentary support for specific numbers from November 2008 through July 2012.⁹

4. Opposer distributes “well over twenty million catalogs” a year in the United States.¹⁰ Opposer provided specific numbers for 2008 through 2013.

5. Opposer has spent over \$160 million annually advertising and promoting the IKEA marks in the United States.¹¹ Opposer provided specific numbers from 2007 through 2011. Opposer has advertised in national publications such as *Better Homes and Gardens*, *O* magazine and *Everyday with Rachael Ray*. It has also advertised on broadcast and cable television as well as major websites such as shopzilla.com, aol.com, nfl.com and foodnetwork.com.¹²

6. “Opposer also annually distributes hundreds of millions of copies of ‘free standing inserts’ (advertising flyers) directly by mail to homes around the country. ... These are issued 14 to 16 times per year.”¹³ Opposer submitted specific numbers for 2007 through 2012.

⁸ Wotherspoon Dec., ¶19.

⁹ Wotherspoon Dec., Exhibit 3.

¹⁰ Wotherspoon Dec., ¶20.

¹¹ Wotherspoon Dec., ¶23.

¹² Wotherspoon Dec., ¶24. Opposer did not introduce any testimony or evidence regarding how many people saw these advertisements. In general, simply advertising in national magazines without evidence of circulation may be probative for purposes of proving the fame or renown of marks for purposes of likelihood of confusion. However, for the rigorous standard required to prove fame for dilution purposes, more information may be required. See footnote 18 below.

¹³ Wotherspoon Dec., ¶26.

7. “The IKEA brand was ranked No. 28 on the Business Week/Interbrand 2012 list of the Top 100 Brands worldwide, with an estimated brand value of \$12,808,000,000.”¹⁴

8. Opposer’s food sales, including sales in its restaurants and Swedish Food Markets in the United States have been substantial by any standard.¹⁵ Opposer provided annual sales figures for 2007-2012.

9. Opposer’s sale of live plants has been successful but not nearly on the scale of its food sales.¹⁶ Opposer provided annual sales figures for 2008-2012.

10. Opposer asserts that its marks “have received substantial unsolicited media attention” “discussing the fame of the IKEA products or illustrating IKEA products,” as shown by Wotherspoon Exhibits 7 and 8.¹⁷ The following examples are representative:

- a. Chicagotribune.com (March 3, 2011). An article entitled “Bookshelves with a chance of meatballs” refers to IKEA as “Swedish meatball’s greatest ambassador” while noting “[w]ho would have thought a furniture store would lead the noble charge.” There is also a quote from the executive director of the Swedish American Museum in

¹⁴ Wotherspoon Dec., ¶27. The Business Week/Interbrand 2012 list of Top 100 Brands has limited probative value because opposer did not introduce any evidence regarding the criteria used to compile this list or to estimate the brand value. It is admissible only to show what has been published, not the truth of what has been printed. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010).

¹⁵ Wotherspoon Dec., ¶15. The figures were filed under seal and, therefore, we may only refer to them in general terms.

¹⁶ Wotherspoon Dec., ¶17.

¹⁷ Wotherspoon Dec., ¶25.

Andersonville, Illinois that “most of us will go to Ikea and buy their meatballs so we don’t have to make them at home.”

b. Philly.com (September 11, 2009). An article entitled “Ikea cafeteria: Serious bang for the buck.” This article notes how opposer is trying to keep consumers in opposer’s stores by making a visit a family event and providing a review of opposer’s restaurant services. *See also* Raisingarizonakids.com (September 2009), “On top of those meatballs.”

c. The remainder of the references are to IKEA products as design innovations. For example, in the January 2011 issue of *Better Homes and Gardens*, “In plain sight,” the author wrote the following:

Designer Amy Meier squeezed a fully functioning office into her San Diego dining area. She started with an IKEA bookcase and shelves and a metal desk. Next she organized fabric samples and papers into a carefully planned mix of baskets, bins, and binders.

We note that the probative value of opposer’s evidence of fame might be bolstered if opposer also offered evidence that would provide additional context to the data, such as data concerning competitors’ performance as to the criteria at issue. However, we acknowledge that some such comparative information may be difficult, if not impossible to obtain, because companies may view such information as proprietary and not disclose it publicly. Nevertheless, after carefully reviewing this evidence, we find that opposer’s IKEA mark has become famous for purposes of likelihood of confusion for its “retail store services in the field of furniture,

housewares and home furnishings.”¹⁸ The testimony and evidence regarding particular products and restaurant services are not specific enough to support finding fame of the mark for individual products and the other listed services. To the extent that consumers recognize the IKEA mark in connection with furniture, housewares, home furnishings, food products and restaurant services, that is a result of the fame of the retail stores.

In view of the foregoing, we find that for purposes of the likelihood of confusion analysis, the IKEA mark is famous for “retail store services in the field of furniture, housewares and home furnishings” and otherwise a strong mark for the furniture, housewares, home furnishings, food products, and restaurant services themselves.

B. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn next to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In comparing the marks, we are mindful that the test 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 so that confusion as to the source of the goods offered under

¹⁸ For purposes of likelihood of confusion, the Board generally accepts and considers evidence related to likelihood of confusion for the period up to the time of trial, and this includes evidence of the fame of a plaintiff's mark. This is distinct from a claim of dilution under Section 43(c) of the Trademark Act where an element of the claim is the acquisition of fame prior to the defendant's first use or application filing date. *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ 1584, 1595 n. 13 (TTAB 2011).

the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Opposer's mark is IKEA and applicant's mark is AKEA. The marks are similar in appearance in that they are the same number of letters, they both begin with a vowel and end in "K-E-A." Thus, because the two marks have the same structure, there are similarities in the way they sound (ī key ä vs. ā key ä or ä key ä).¹⁹ In fact, IKEA and AKEA rhyme. Regardless of the pronunciation of the first vowel, the remainder of the marks will be pronounced the same.

¹⁹ We are aware that there is not necessarily one correct pronunciation for a mark. Therefore, we have considered all the reasonable possibilities. *Centraz Industries, Inc. v. Spartan Chemical Company*, 77 USPQ2d 1698, 1701 (TTAB 2006) (in comparing the marks iShine and ICE SHINE, the Board found "that purchasers may roll the 's' sound from the pronunciation of "ice" into the "sh" sound beginning the second syllable "shine."); *Edison Brothers Stores, Inc. v. Brutting E.B. Sport-International GmbH*, 230 USPQ 530, 533 (TTAB 1986) (while noting that it is impossible for a trademark owner to control how its mark will be pronounced, the Board stated that with regard to sound, "absent evidence to the contrary, we must consider all of the possibilities that are reasonable, considering the nature of the goods and their purchasers."). See also *Pfizer Inc. v. Cody John Cosmetics, Inc.*, 211 USPQ 64, 69 n.4 (TTAB 1981) ("the pronunciation of 'COTY' as 'CODY' is *not* incorrect.") (emphasis in the original).

IKEA is a coined and arbitrary term with no apparent meaning in any language. Robert Wotherspoon testified that IKEA “was coined from the first letters of [opposer’s founder] Ingva Kamprad’s first and last names, and the first letters of the name of the farm (Elmtaryd) and village (Agunnaryd) in which he grew up.”²⁰

AKEA also is a coined term and apparently not a word in any language. Although applicant’s application includes a translation statement, William Bernecki, applicant’s Chief Operating Officer, testified that AKEA is derived from the Sardinian greeting “A kent’annos,” “a traditional saying that has been translated as ‘may you live to 100,’ ‘may you live 100 years,’ and variations thereon [sic].”²¹ Whether AKEA is a coined term or a Sardinian greeting, it is an inherently strong mark.

Where, as here, both marks are coined terms that look alike and sound alike and there are no known differences in the meaning to distinguish them, the marks engender a similar commercial impression. *See E.I. du Pont de Nemours and Co. v. Yoshida International Inc.*, 393 F.Supp. 502, 185 USPQ 597, 604 (EDNY 1975) (TEFLON and EFLON found similar because of the shared letters and because the use of coined words without known, distinctive meanings renders confusion more likely); *Procter & Gamble Co. v. Johnson & Johnson*, 485 F.Supp. 1185, 205 USPQ 697, 708 (SDNY 1979) (“When arbitrary or fanciful marks are involved, the distinctiveness of the marks will make the public more conscious of similarities

²⁰ Wotherspoon Dec., ¶9.

²¹ Bernecki Dec., ¶¶5 and 6.

than differences. ... In contrast when common words are involved ... the degree of difference rather than the degree of similarity is likely to be more noticeable.”), *aff'd without opinion*, 636 F.2d 1203 (2d Cir. 1980). Compare *Ava Enterprises, Inc. v. P.A.C. Trading Group, Inc.*, 86 USPQ2d 1659, 1661 (TTAB 2008) (the word BOSS in opposer’s pleaded mark and the word BOOSTER in applicant’s mark have such different meanings that they cannot be found to be similar). In other words, the average purchaser would not associate the names IKEA and AKEA with any familiar meanings through common usage and exposure and, therefore, this is not a basis on which average purchasers would be able to distinguish them.

In view of the foregoing, we find that the marks are similar when considered in light of a purchaser's general recollection or imperfect recall of marks and the absence of a situation whereby side-by-side comparisons of the marks would be readily available. This is especially true in this case where we have found opposer’s IKEA mark to be famous for certain services and, as discussed above, the fame of opposer’s mark necessarily weighs heavily in opposer’s favor.

C. The similarity or dissimilarity and nature of the goods and services.

Opposer has registered its IKEA marks for “retail store services in the field of furniture, housewares and home furnishing; and restaurant and catering services,” as well as for a wide variety of goods and services including food products and educational services in the field of personnel management and personal development.

Applicant is seeking to register its AKEA mark for (1) nutritional, herbal, vitamin and mineral supplements; (2) direct solicitation retail services and online retail sales of nutritional, herbal, vitamin and mineral supplements; (3) providing advice and information in the field of career and business opportunities; (4) and providing advice and information to consumers regarding lifestyle topics, namely, diet planning, nutrition, nutritional supplements, and gardening.

Opposer argues that its IKEA goods and services are related to applicant's nutritional, herbal, vitamin and mineral supplements because opposer sells a Rosehip Drink which contains vitamins A and C, an Elderflower Drink, and a Lingonberry Drink and because opposer sells seeds to grow herbs at home.²² The fruit juices are not listed in the description of goods for any of opposer's registrations and opposer did not plead common law use of its mark on fruit juices. Although opposer alleged use of its IKEA mark on "food" (Notice of Opposition, ¶2), that does not put applicant on notice that opposer is claiming use of its mark on fruit juices. In this regard, we note that applicant in its brief at pages 16-17 states that opposer appears to rely on registration Nos. 1418733, 1661360 and 3561226. In the appendix to its brief, applicant objected to any testimony and exhibits related to any products not listed in these pleaded registrations. (Applicant's Brief, pp. 41, 45 and 60). In view of the foregoing, we find that the issue of likelihood of confusion with opposer's IKEA mark on fruit juices was not tried by implied consent and therefore should not be considered. Fed.R.Civ.P. 15(b)(2). Also, we note that

²² Wotherspoon Dec., ¶¶ 14 and 17 and Exhibit 2.

because opposer has not registered its IKEA mark for fruit juices and because it has not introduced any testimony or evidence regarding the first use of its mark for fruit juices, it has not established priority of its IKEA mark for fruit juices.

Moreover, even if opposer had properly pleaded and proved common law rights in its IKEA mark for its fruit juices, the testimony and evidence fail to show that “retail store services in the field of furniture, housewares and home furnishing and restaurant and catering services” as well as opposer’s wide variety of goods and services including food products and Rosehip, Elderflower and Lingonberry drinks are related to nutritional, herbal, vitamin and mineral supplements, direct solicitation retail services and online retail sales of nutritional, herbal, vitamin and mineral supplements or providing advice and information to consumers regarding lifestyle topics, namely, diet planning, nutrition, nutritional supplements, and gardening. We specifically note the lack of any evidence regarding the purported health benefits of opposer’s fruit juices that would provide any link to applicant’s dietary supplements.

Opposer argues that there is a direct connection between applicant’s supplements and opposer’s fruit juices because applicant’s supplements may be mixed into juices.²³ Again, opposer’s use of its mark for juices was not pleaded or tried by consent. Moreover, we are not persuaded that consumers will believe that nutritional, vitamin, herbal and mineral supplements emanate from the same

²³ Opposer’s Reply Brief, p. 9.

source as fruit juices just because the dietary supplements may theoretically be mixed into fruit juices.

Opposer further argues that “[n]umerous cases have held nutritional supplements to be related to food and beverages for purposes of the likelihood of confusion analysis,” relying on three non-precedential decisions.²⁴ However, prior cases, precedential or not, are only useful to the extent that the facts in the prior cases are somewhat analogous to the facts in the current case. *See In re Fleet-Wing Corp.*, 188 F.2d 476, 89 USPQ 369, 370 (CCPA 1951) (“It may be said at the outset that in cases like that at bar where the registration of one mark over a similar mark for goods of the same class is involved, there is rarely any decision of any court that is sufficiently analogous to be absolutely controlling. . . . Where the circumstances in a decided case differ, even only to a slight degree, from those in a case to be decided, it is often difficult to determine just what effect those differences should be given.”) (citation omitted); *In re Jeep Corporation*, 222 USPQ 333, 335 n.2 (TTAB 1984) (each case must be decided on its own facts and merits, but prior cases have precedential value to the extent that they may involve similar facts); *cf. In re Johanna Farms Inc.*, 8 USPQ2d 1408, 1410 (TTAB 1988) (*stare decisis* provides that “when a court has laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where the facts are

²⁴ Opposer’s Brief, p. 15. Although parties may cite to non-precedential decisions, the Board does not encourage the practice. *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1875 n.5 (TTAB 2011). *See also In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011) (parties may cite to non-precedential decisions, but they are not binding on the Board and because they have no precedential effect, the Board generally will not discuss them in other decisions).

substantially the same, regardless of whether the parties and properties are the same.”). In this case, there is no testimony or evidence regarding the relationship between opposer’s goods and services and applicant’s nutritional, herbal, vitamin and mineral supplements to compare to the facts in the cited cases.

On the other hand, opposer’s “educational courses and seminars in the fields of ... personal development” and applicant’s “providing advice and information in the field of career and business opportunities” are closely related because the term educational services regarding personal development is broad enough to encompass advice and information regarding career and business opportunities. Personal development means individual growth or progress. Individual growth or progress may include one’s career and business opportunities. Accordingly, educational services in the field of personal development are closely related to providing advice regarding career and business development.

We find that the record in this case shows that the only related goods and services are opposer’s “educational courses and seminars in the fields of ... personal development” and applicant’s “providing advice and information in the field of career and business opportunities.”

D. The established likely-to-continue channels of trade and classes of consumers.

Opposer sells its products through its retail stores, its website and through catalogs.²⁵

²⁵ Wotherspoon Dec., ¶¶11, 12 and 18- 21.

Applicant does not sell its products through retail stores. Applicant sells its products through “independent sales consultants.” “After a customer places an order with a consultant, [applicant] delivers [the products] to the customers via a drop shipment.”²⁶ Applicant also has a website through which customers may purchase products.²⁷

Opposer argues that because the description of goods for applicant’s nutritional, herbal, vitamin and mineral supplements is not restricted to any channels of trade or classes of consumers, the supplements are presumed to move through all the ordinary and usual channels of trade and to all the usual customers for nutritional, herbal, vitamin and mineral supplements. Accordingly, opposer concludes that, “the trade channels of and customers for Applicant’s goods offered under the AKEA Mark are presumed to overlap with Opposer’s trade channels and customers for its goods under the IKEA Mark. Applicant could, like Opposer, offer its products in retail stores, through catalogs, and over the Internet.”²⁸

There are two problems with opposer’s argument. First, there is no evidence in the record, except applicant’s description of how it sells its nutritional, herbal, vitamin and mineral supplements, as to the ordinary and usual channels of trade for nutritional, herbal, vitamin and mineral supplements. Accordingly, opposer is asking us to assume, rather than require opposer to prove, that nutritional, herbal, vitamin and mineral supplements move in the same channels of trade and are sold

²⁶ Bernecki Dec., ¶10.

²⁷ Bernecki Dec., ¶11.

²⁸ Applicant’s Brief, p. 16.

to the same classes of consumers as furniture, housewares and home furnishings. That is not something we can or will do, because it would not be faithful to the underlying legal principle. When an application or registration fails to specify or limit the channels of trade of classes of customers, we must assume that the goods or services in question travel in all the normal channels of trade and to all prospective purchasers *for the relevant goods or services*. See, e.g., *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Kangol Ltd. v. KangaROOS U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992). Thus, when the dispute involves the comparison of *different* goods or services, this principle does not help the party asserting a likelihood of confusion unless there is further evidence that would permit a comparison of the normal trade channels for the parties' respective goods or services. That evidence is lacking here.

Second, and more important, that applicant could conceivably sell its nutritional, herbal, vitamin and mineral supplements through a retail store, catalogs and over the internet does not prove that opposer's goods and services and applicant's goods and services move through the same channels of trade and are sold to the same classes of consumers. For example, there is no evidence that any company rendering retail store services in the field of furniture, housewares and home furnishings, as well as restaurant and catering services, also sells nutritional, herbal, vitamin and mineral supplements. Under opposer's theory, any goods or services sold through retail stores, catalogs or over the Internet move through the

same channels of trade and, therefore, for all intents and purposes, all goods and services potentially move through the same channels of trade. *But see Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (evidence that the only link between the goods is that they are sold in the same area of a supermarket is not sufficient to establish that the goods are related); *Parfums de Couer Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007) (“the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade.”); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171-72 (TTAB 1987) (there is “no ‘per rule that all food products are related goods by ... virtue of their capability of being sold in the same food markets.”); *Nestle Co. v. Nash-Finch Co.*, 4 USPQ2d 1085, 1090 (TTAB 1987) (“the same availability of different food products in the same stores carrying a wide variety of food items in [sic] insufficient, in and of itself, to warrant a finding of likelihood of confusion.”).

With respect to applicant’s services of “providing advice and information in the field of career and business opportunities” and opposer’s “educational courses and seminars in the fields of ... personal development,” there are no restrictions or limitations in the recitation of services. Therefore, it is presumed that opposer’s services and applicant’s services move in all channels of trade normal for those services, and that they are available to all classes of purchasers for those services. *See Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139

(CCPA 1958); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Because, as previously stated, opposer's "educational courses and seminars in the fields of ... personal development" is broad enough to encompass applicant's services of "providing advice and information in the field of career and business opportunities," we find that the channels of trade and classes of purchasers for these services overlap.

E. The conditions under which and buyers to whom sales are made (i.e., "impulse" vs. careful, sophisticated purchasing).

According to William Bernecki, applicant's Chief Operating Officer, applicant's products are not the subject of impulse purchases. Applicant "is a wellness company based on the philosophy that a healthier life can be achieved by studying and adopting the lifestyle habits of the people in the longevity hot spots, including their diets, [applicant's] customers generally are very careful about the substances that they put into their bodies."²⁹ Opposer, on the other hand, argues that "since there are no restrictions on the price levels of Applicant's goods in its application, the products Applicant intends to sell under the AKEA mark may be inexpensive."³⁰

Applicant's Bernecki Exhibit No. 4 is a photocopy of its Internet shopping cart that Mr. Bernecki accessed from applicant's website. It has been designated as confidential. A printout of applicant's Shopping Cart webpage available to the

²⁹ Bernecki Dec., ¶21. A "longevity hot spot" is a community in which the population routinely live to between 90 to 100 years and do not suffer from chronic diseases or illnesses. (Bernecki Dec., ¶3).

³⁰ Opposer's Brief, p. 19.

public is not confidential. Applicant's products are not inexpensive. Various combinations of educational videos and supplements cost between \$50 and \$145.

Moreover, the significance of the price of applicant's products must be weighed against other factors such as the type of product and the conditions of purchase as described in the Bernecki Declaration. Low prices do not necessarily imply a low degree of consumer care in the selection of dietary supplements where the prospective consumers would be expected to exercise a reasonable degree of care regarding the products that they ingest to improve their health. *See Stouffer Corp. v. Health Valley Natural Foods, Inc.*, 1 USPQ2d 1900 (TTAB 1986), where the Board found that consumers exercised a reasonable degree of care even though the dinner entrees were relatively inexpensive.

Considering the particular nature of the goods herein, we do not believe that purchasing decisions are apt to be made impulsively or carelessly, as would be the case of a child purchasing candy or a toy. Thus, even in the hustle and bustle atmosphere of a supermarket, diet-conscious purchasers of these prepared entrees are a special class of purchasers who may be expected, at least, to examine the front of the packages in order to determine what kind of entree is contained therein and its caloric content. On both of these parties' packages, as well as on most of the competitive brands, this information is prominently displayed in close association with the trademarks. Therefore, a lesser standard of care is not justified.

Id. at 1902. *See also Weight Watchers International v. I. Rokeach & Sons, Inc.*, 211 USPQ 700, 706 (TTAB 1981), *aff'd on other ground*, 576 F.Supp. 841, 216 USPQ 1090 (SDNY 1982) ("it seems to us that weight-conscious supermarket purchasers are quite apt to be more deliberate. Whether members of the program or not, such purchasers are inclined to examine labels carefully.").

We find that consumers who are potential purchasers of both opposer's goods and services and of applicant's products will exercise at least a moderate degree of consumer care when purchasing dietary supplements and, therefore, this *du Pont* factor weighs against finding that there is a likelihood of confusion.

F. Balancing the factors.

1. Applicant's goods in Class 5 and services in Class 44.

Although opposer's mark IKEA is famous for "retail store services in the field of furniture, housewares and home furnishing" and the marks IKEA and AKEA are similar, because of the differences in the goods and services and channels of trade and the degree of care that will be exercised by applicant's prospective purchasers, we find that applicant's mark for the goods in Class 5 and services in Class 44 are not likely to cause confusion with opposer's IKEA mark for opposer's goods and services.

2. Applicant's services in Class 35.

Because the marks are similar, because opposer's "educational courses and seminars in the fields of ... personal development" is broad enough to encompass applicant's services of "providing advice and information in the field of career and business opportunities" and because of the presumption that, because the services are in part legally identical, the services move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's mark is likely to cause confusion with opposer's mark. In the context of likelihood of confusion, it is sufficient to find likelihood of confusion as to the entire class if likelihood of

confusion is found with respect to use of the mark on any item in a class that comes within the description of goods. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). Accordingly, registration for all of applicant's class 35 services must be refused.

Dilution

The Trademark Act provides a cause of action for the dilution of famous marks. Sections 13 and 43(c) of the Trademark Act, 15 U.S.C. §§ 1063 and 1125(c) allow for oppositions based on dilution, with the latter section providing as follows (emphasis added):

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person **who, at any time after the owner's mark has become famous, commences use of a mark** or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

Opposer contends that applicant's AKEA mark will "blur" the distinctiveness of opposer's IKEA mark. The Trademark Act defines dilution by blurring as follows:

"[D]ilution by blurring" is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.

Section 43(c)(2)(B) of the Trademark Act, 15 U.S.C. § 1125(c)(2)(B).

In deciding opposer's dilution claim, we consider the following factors:

1. Whether opposer's IKEA mark is famous and distinctive;

2. Whether opposer's IKEA mark became famous prior to applicant's date of constructive use;³¹ and

3. Whether applicant's AKEA mark is likely to cause dilution by blurring the distinctiveness of opposer's IKEA mark.

See Coach Services Inc. v. Triumph Learning LLC, 96 USPQ2d 1600 (TTAB 2010) (“Coach Services”), *aff’d* 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012). *See also National Pork Board v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1494-5 (TTAB 2010).

Even assuming that opposer’s mark is famous for purposes of dilution, the record does not support our finding that opposer’s mark became famous prior to the filing date of applicant’s application. Opposer’s evidence regarding fame is recounted above. This evidentiary showing is not sufficient to show that opposer’s mark is famous for purposes of dilution because most of the evidence points to events that occurred after the filing date of applicant’s application. For example, opposer’s evidence that the IKEA brand was ranked No. 28 on the Business Week/Interbrand 2012 list of the Top 100 Brands worldwide, with an estimated

³¹ While opposer did not properly plead the fame of its mark *prior to the earliest date on which applicant can rely for purposes of priority*, because applicant did not move to strike the dilution claim for failure to state a claim and, in its brief, treated the dilution claim as if it were properly pleaded, we deem the dilution claim to have been amended by implied consent of the parties. See Fed. R. Civ. P. 15(b). In other words, we deem the dilution claim to allege that opposer's IKEA mark became famous prior to the filing date of applicant’s intent-to-use application.

brand value of \$12,808,000,000 is subsequent to the filing date of applicant's application and, therefore, is not relevant.³²

With respect to opposer's evidence of media attention regarding opposer's mark, only two articles referencing opposer were published prior to the filing date of the application: (1) Arrive: The Education Issue (from AMTRAK); and (2) a monitoring report of television and radio (March 8, 2009 and March 9, 2009) that listed eleven (11) references to opposer identifying a total audience of 1,005,739. The reference in the Arrive magazine was a short piece (quarter page) describing an IKEA computer desk. With respect to the monitoring report, of the eleven (11) references, five (5) reported an ongoing investigation regarding credit card fraud that targeted opposer and Target stores in the Orlando area, two were a consumer alert regarding a recall of opposer's coffee makers, and four were stories referencing opposer's products, including one that reported that the callers to a radio or television program in Las Vegas wanted opposer to open a store there. That last reference demonstrates opposer's renown; but it is only one reference that is limited to Las Vegas with an unidentified number of listeners for the program.

On this record, opposer cannot prevail on its dilution claim because we have found that opposer has not met its burden of proving that its IKEA mark became famous prior to the filing date of applicant's application.

³² Since the application is based on intent-to-use, the earliest date upon which applicant may rely is the filing date of its application, June 17, 2009. Section 43(c) of the Trademark Act. *See also General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ at 1595 n. 13 (an element of a dilution claim is the plaintiff's acquisition of fame prior to the defendant's first use or application filing date).

Decision: With respect to the applicant's services in Class 35, the opposition is sustained on opposer's claim under Section 2(d) alone and registration is refused.

With respect to applicant's goods in Class 5 and services in Class 44, the opposition is dismissed. A notice of allowance will be issued in due course.

United States Court of Appeals for the Federal Circuit

IN RE PAMELA GELLER AND
ROBERT B. SPENCER

2013-1412

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board, in Serial No. 77940879.

Decided: May 13, 2014

DAVID YERUSHALMI, American Freedom Law Center, of Washington, DC, argued for appellants.

THOMAS L. CASAGRANDE, Associate Solicitor, United States Patent and Trademark Office, of Alexandria, Virginia, argued for appellee. With him on the brief were NATHAN K. KELLEY, Solicitor, BENJAMIN T. HICKMAN, and Christina Hieber, Associate Solicitor.

Before NEWMAN, O'MALLEY, and WALLACH, *Circuit Judges*.

WALLACH, *Circuit Judge*.

Applicants Pamela Geller and Robert B. Spencer (“Appellants”) appeal from the Trademark Trial and Appeal Board’s (“Board”) refusal to register the mark

STOP THE ISLAMISATION OF AMERICA in connection with the recited services of “understanding and preventing terrorism.” J.A. 27. The Board found the mark contains “matter which may disparage” a group of persons in violation of § 2(a) of the Trademark Act. Because the Board’s finding is supported by substantial evidence and in accordance with law, this court affirms.

BACKGROUND

In February 2010, Appellants filed an intent-to-use application to register the mark STOP THE ISLAMISATION¹ OF AMERICA in connection with “[p]roviding information regarding understanding and preventing terrorism.” J.A. 27. The Examining Attorney refused the application on January 19, 2011, on the ground that the mark may be disparaging to American Muslims pursuant to § 2(a) of the Trademark Act, 15 U.S.C. § 1052(a) (2006). Appellants filed an appeal to the Board, which affirmed the § 2(a) refusal. In reaching this conclusion, the Board considered the likely meaning of the mark, and then determined whether that meaning was likely to disparage “a substantial composite of the referenced group.” J.A. 2–3 (quoting *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010)).

The Board found the term “Islamisation,” as used in the mark, had two likely meanings: (1) “the conversion or conformance to Islam” (“the religious meaning”), J.A. 8; and (2) “a sectarianization of a political society through efforts to ‘make [it] subject to Islamic law’” (“the political meaning”), J.A. 9 (alteration in original). The religious meaning was supported by dictionary definitions and

¹ The Board and the parties alternate between spelling “Islamisation” with an “s” (“Islamisation”) and with a “z” (“Islamization”). All agree the spelling variation is immaterial.

evidence of how the term was used in the marketplace, J.A. 3–8, and the Board found this meaning was “more reflective of the public’s current understanding of the term.” J.A. 12. The political meaning of “Islamisation,” in turn, was supported by various publications by “professionals, academics and religious and legal experts.” J.A. 9. Such evidence was “less widely available” and “not necessarily reflective of the general public’s understanding” of Islamisation. J.A. 11. Nevertheless, the Board found it established “a second meaning” of Islamisation, “at least to academic, professional, legal and religious experts.” J.A. 12.

The Board determined the mark may be disparaging to American Muslims under both meanings of “Islamisation.” J.A. 23. With respect to the religious meaning, the Board found the mark was disparaging to American Muslims because “[t]he admonition in the mark to STOP sets a negative tone and signals that Islamization is undesirable and is something that must be brought to an end in America.” J.A. 16. Moreover, the Board found Appellants’ proposed use of the mark for “understanding and preventing terrorism” resulted in “a direct association of Islam and its followers with terrorism.”² J.A. 16.

² Appellants do not contest the Board’s reliance on an online dictionary definition of “terrorism” as “the use of violence and threats to intimidate or coerce, esp. for political purposes.” J.A. 4 (quoting J.A. 73 (*Terrorism*, Dictionary.com, <http://dictionary.reference.com/browse/terrorism> (as retrieved on Apr. 28, 2010))). Other more specific definitions may be found in various treaties (*see, e.g.*, International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, 116 Stat. 721, 2149 U.N.T.S. 284, 285–86), and national statutes (*see, e.g.*, 18 U.S.C. § 2331(1), (5) (2012)), but the broad definition is certainly adequate for the purposes of this case.

Because “the majority of Muslims are not terrorists and are offended by being associated as such,” the Board determined the mark was disparaging under the religious meaning of Islamisation. J.A. 16.

The Board also found the mark would be disparaging under the political meaning of Islamisation. J.A. 19. It determined that even this narrower definition does not “mandate the use of violence or terrorism,” so the application’s suggestion that political Islamisation must be “stop[ped]” to “prevent[] terrorism” would be disparaging to a substantial composite of American Muslims. J.A. 18–19, 21. The Board accordingly affirmed the Examining Attorney’s refusal to register the mark under § 2(a) of the Trademark Act.

Appellants filed this timely appeal. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(4)(B) (2012).

DISCUSSION

On appeal, Appellants argue there is no substantial evidence to support the Board’s finding that the proposed mark may be disparaging in violation of § 2(a) of the Trademark Act. They contend the Board improperly relied “on arbitrary and anecdotal evidence” in determining the mark’s meaning and in finding that meaning may disparage American Muslims. Appellants’ Br. 2, 13, 19.

Section 2(a) of the Trademark Act provides that the Board may refuse an application when the trademark “[c]onsists of or comprises . . . *matter which may disparage* . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a) (emphasis added). Although neither party was able to identify a prior case in this court or its predecessor setting forth the legal analysis for a § 2(a) refusal based on disparagement, all parties agree the proper inquiry was set forth by the Board in *In re Lebanese Arak Corp.*:

(1) what is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and

(2) if that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

In re Lebanese Arak Corp., 94 U.S.P.Q.2d at 1217; *see also Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1740–41 (T.T.A.B. 1999), *rev'd on other grounds*, 284 F. Supp. 2d 96 (D.D.C. 2003). A mark may disparage when it “dishonor[s] by comparison with what is inferior, slight[s], deprecate[s], degrade[s], or affect[s] or injure[s] by unjust comparison.” *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003) (quoting *Harjo*, 50 U.S.P.Q.2d at 1737 n.98).

The determination that a mark may be disparaging “is a conclusion of law based upon underlying factual inquiries.” *Cf. In re Mavety*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (applying that standard with respect to whether a mark is “scandalous” under § 2(a)). The Board’s factual findings are reviewed for substantial evidence, “while its ultimate conclusion as to registrability is reviewed de novo.” *In re Fox*, 702 F.3d 633, 637 (Fed. Cir. 2012).

I.

The first prong of the disparagement test determines “the likely meaning of the matter in question.” *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d at 1217. The Board found the term ISLAMISATION used in Appellants’ mark

has two likely meanings: the religious meaning and the political meaning.³ On appeal, Appellants argue the Board “ignore[d] the overwhelming evidence in the record that the term ‘Islamisation’ has *only* been used in the public domain to refer to a political and military process replacing civilian laws with Islamic religious law.” Appellants’ Br. 13 (emphasis added).

To the extent Appellants argue the political meaning of Islamisation is the *sole* likely meaning under prong one, they are incorrect. The Board relied on three separate types of evidence in support of the religious meaning. First, it considered dictionaries that listed the primary definition of “Islamize” as “to convert” or “conform” to Islam. J.A. 4 (quoting, *e.g.*, J.A. 58 (*Islamize*, Dictionary.com, <http://dictionary.reference.com> (as retrieved on Apr. 28, 2010))); J.A. 1040 (*Islamize*, YourDictionary, <http://yourdictionary.com/Islamize> (as retrieved on Sept. 1, 2010)); *see also* J.A. 3 n.3 (“The definitions indicate that ‘Islamization’ is the noun form of the transitive verb ‘Islamize.’”). Next, the Board considered certain essays posted on Appellants’ website, www.sioaonline.com,⁴ which were “featured immediately underneath the website’s STOP THE ISLAMIZATION OF AMERICA banner.” J.A. 6. Two of these essays opposed construction of mosques in the United States, and another essay discussed an ad campaign to provide “assistance” to Muslims considering leaving the Islamic faith. J.A. 5–6, 1043–46, 1064–67, 1075–77. Finally, the Board considered readers’

³ As noted above, the “religious meaning” of Islamisation is “the conversion or conformance to Islam,” J.A. 8, and the “political meaning” is “a sectarianization of a political society through efforts to ‘make [it] subject to Islamic law,” J.A. 9.

⁴ This website is no longer available (last checked Mar. 17, 2014).

comments posted on Appellants' website as "reflect[ive of] the website's message of stopping the spread of Islam in the United States." J.A. 6.

Appellants do not challenge the Board's reliance on online dictionaries, but instead assert error in the remainder of the Board's analysis of "Islamisation." They argue the Board improperly relied on "irrelevant essays and arbitrarily selected anonymous 'comments' posted to Appellants' blog." Appellants' Br. 13.

Appellants contend the essays posted on their website do not advocate suppression of the Islamic faith, but only oppose political Islamisation. The Board disagreed, as do we. The first essay they discuss is titled "[Stop the Islamisation of America] Mosque Manifesto: All Mosques are Not Created Equal, A Handy Guide to Fighting the Muslim Brotherhood." J.A. 1043. Appellants characterize this essay as merely opposing "Islamist Muslim Brotherhood groups" that "use mosque-building as a political tool to accomplish Islamisation." Appellants' Br. at 14. This is an overly narrow interpretation of the "Mosque Manifesto" essay, which provides tips for opposing "huge monster mosque[s]" proposed in people's communities. J.A. 1044. Although portions of the essay refer to political forces such as the Muslim Brotherhood, the article as a whole implicates Islam more generally. *See, e.g.*, J.A. 1045 (quoting a source that "80% of American mosques were controlled by 'extremists'"); J.A. 1043 ("As we have been reminded time after time after grisly Islamic terror plots have been exposed, there is always a mosque, and the imprimatur of a cleric, behind every operation."). Taken generally, as Appellants do, mosques in this country are respectable and respected community religious institutions. Substantial evidence supports the Board's finding that the "Mosque Manifesto" essay advocates

suppression of the Islamic faith, taught and practiced in those places of prayer.⁵

Appellants also challenge the Board's reliance on the essay, "Detroit Transit Sued for Nixing [Stop the Islamisation of America] 'Leaving Islam?' Bus ads." J.A. 1075. They contend the essay "merely recounts the debate over an advertisement . . . to provide Muslims who have offended Islamists with a refuge from retaliatory violence." Appellants' Br. 16. The record supports the Board's finding that the "Bus ads" essay is not about political beliefs, but rather about the Islamic faith. It describes an ad campaign run by Appellants and others "in response to bus ads in Florida inviting people to *convert to Islam*." J.A. 1076 (emphasis added). As characterized by Appellants, the ads offered "assistance" to people considering leaving Islam, and suggested those individuals would otherwise be subject to "retaliatory violence" by other Muslims. Appellants' Br. 16. This essay supports the Board's conclusion that Appellants used the mark in the context of stopping the spread of the Islamic faith.

Appellants further argue the Board erred in relying on "cherry-picked anonymous comments" posted on their website. Appellants' Br. 17. They contend such comments "are *not* indicative of how Appellants use the Mark in the marketplace" and "are not even remotely representative of 'consumers' of Appellants[], but rather a biased selection of people who leave comments at blogs." *Id.* The Board considered these drawbacks of anonymous public comments, and noted "the probative value of the

⁵ Another essay on Appellants' website opposed a mosque and Islamic Center being built in New York City near the site of the former World Trade Center. J.A. 1081–82. The Board was correct that this essay also addresses the spread of the Islamic faith, not political Islamisation. *See* J.A. 6.

blog comments . . . is less than that of the articles themselves due to the anonymity of the authors.” J.A. 8. With that caveat, the Board properly found the comments “provide additional insight into the public’s perception of and reaction to applicants’ STOP THE ISLAMISATION OF AMERICA mark and services as used in the marketplace.” J.A. 8. The referenced comments reflect the religious meaning of Islamisation, and evidence a desire to stop the spread of Islam in America. *See* J.A. 6–7 (quoting comments) (“Islam is evil”; “[T]here’s only one thing you can do and that’s say no to Islam and the [I]slamization of America”; “[T]he name you chose [Stop the Islamisation of America] does imply that you wish to stop [I]slam in this country . . .”). The Board did not err in concluding that such comments showed the religious meaning of Islamisation.

Finally, the remaining evidence does not establish the political definition of “Islamisation” as the sole likely meaning. The online dictionary definitions in the record list the political meaning as secondary. J.A. 4 (quoting, *e.g.*, J.A. 1039 (*Islamize*, Encarta, <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861622547> (as retrieved on Sept. 1, 2010) (“2. [M]ake subject to Islamic law: to cause people, institutions, or countries to follow Islamic law.”))). As further support, Appellants submitted Congressional testimony, course materials, academic articles, and a doctoral dissertation using the term “Islamisation” in its political sense. The Board considered these additional sources but found they were “less widely available” and “not necessarily reflective of the general public’s understanding of the meaning of applicants’ mark.” J.A. 11–12. The Board, however, found Appellants had established the political definition as *one* likely meaning of Islamisation, and therefore considered both the religious and political meanings in the second part of the analysis.

II.

The second prong of the disparagement inquiry asks whether the likely meaning identified in prong one “is found to refer to identifiable persons, institutions, beliefs or national symbols,” and if so, whether that meaning “may be disparaging to a substantial composite of the referenced group.” *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d at 1217. The Board found both meanings of Islamisation refer to all American Muslims. J.A. 13 (noting that Appellants agreed). It then determined that the mark may be disparaging to American Muslims under both the religious and the political meanings of Islamisation. J.A. 23.

With respect to the religious meaning, the Board found the mark’s admonition to “STOP” Islamisation in America “sets a negative tone and signals that Islamization is undesirable and is something that must be brought to an end in America.” J.A. 16. Moreover, it determined that using the mark in connection with preventing terrorism “creates a direct association of Islam and its followers with terrorism.” J.A. 16. The Board explained that “the majority of Muslims are not terrorists and are offended by being associated as such.” J.A. 16. The Board listed multiple sources where Muslims stated they were concerned by, e.g., “anti-Muslim sentiment that automatically associates Islam with terrorism.” J.A. 16–17 (quoting J.A. 1020 (Andy Grimm, *Show of Support for Muslims: Religious Leaders Call for Tolerance Amid Tensions*, Chicago Tribune, Sept. 12, 2010, at C10)); *see also* J.A. 16 (quoting J.A. 53 (Bob Makin, *Muslims Say Terrorists Have Hijacked Their Faith*, Courier News, June 2, 2008) (“We believe [Islamic terrorist] is not the right terminology to use, because it links something very positive, like Islam, with the word ‘terrorist.’”)).

On appeal, Appellants argue this evidence “has nothing to do with Appellants’ Mark literally or in context of

the meaning of the terms used in the marketplace of ideas.” Appellants’ Br. 21. This argument merely restates Appellants’ prong-one arguments about the mark’s likely meaning. As discussed above, the Board properly found that one meaning of Islamisation—the “more reflective” meaning—is to convert to Islam. J.A. 12. Appellants conceded at oral argument that their mark is disparaging under a religious meaning of Islamisation. Oral Arg. at 1:27–52, *In re Geller*, No. 2013-1412 (Mar. 4, 2014), available at <http://www.cafc.uscourts.gov/oral-argument-recordings/all/geller.html>.

Substantial evidence supports the Board’s finding that Appellants’ mark is also disparaging in the context of the political meaning of Islamisation. J.A. 19. The Board reasoned the political meaning “refers to a political movement to replace man-made laws with the religious laws of Islam,” which does not “mandate the use of violence or terrorism.” J.A. 19. The Board found associating such political beliefs with “preventing terrorism,” as recited in the application, “creates an association with terrorism that would be disparaging to a substantial composite of Muslims, whether or not they embrace [political] Islamization.” J.A. 21–22.

Appellants challenge the Board’s determination that political Islamisation includes nonviolent activity, and instead contend that “all of the record points to the fact that Islamisation ultimately includes terrorism.” Oral Arg. at 26:20–33. Appellants maintain their mark to “STOP” Islamisation therefore does not disparage “loyal, patriotic American Muslims.” Appellants’ Br. 25. Contrary to Appellants’ contention, nothing in the record suggests that the political meaning of Islamisation requires violence or terrorism. Appellants’ own evidence describes “political Islamists” as “by and large, people who are non-violent, yet . . . have an ideological agenda,” and states that “Islamism manifests itself in activist agendas that span the complete spectrum from *democratic politics*

to violent efforts aimed at imposing Shariah law worldwide.” J.A. 20 (emphasis added) (internal quotation marks and citations omitted). To the extent Appellants established that one likely meaning of Islamisation is a political movement to spread Islamic law, they certainly did not show that violence is required to achieve that goal. The political meaning of Islamisation does not require violence or terrorism, and the Board properly found that associating peaceful political Islamisation with terrorism would be disparaging to a substantial composite of American Muslims. *See* J.A. 21–23. The Board’s refusal of Appellants’ mark as disparaging matter under § 2(a) is therefore affirmed.

CONCLUSION

For the foregoing reasons, and because this court finds Appellants’ remaining arguments unpersuasive, the Board’s refusal of Appellants’ mark **STOP THE ISLAMISATION OF AMERICA** is affirmed.

AFFIRMED