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Subject: U.S. TRADEMARK APPLICATION NO. 87684401 - R.C. - N/A - EXAMINER BRIEF

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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 87684401

MARK: R.C.



**CORRESPONDENT ADDRESS:**

YOUNG LIVING ESSENTIAL OILS LC

3125 EXECUTIVE PARKWAY

LEHI, UT 84043

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

**APPLICANT:** Young Living Essential Oils, LC

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

N/A

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## **EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant, Young Living Essential Oils, LC, has appealed the final refusal to register the proposed mark R.C. for goods listed as "Essential oils for aromatherapy use," in International Class 003, on the ground that the applied-for mark so resembles the mark in U.S. Registration No. 4733941 so as to create a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

## I. FACTS

On November 14, 2017, applicant filed an application under Trademark Section 1(a), 15 U.S.C. §1051(a), to register the proposed standard character mark R.C. for the goods “essential oils for aromatherapy use” in International Class 003 on the Principal Register. On March 3, 2018, the Examining Attorney refused registration of applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that the applied-for mark was confusingly similar to the registered mark RC COSMETICS (U.S. Registration No. 4733941) for the goods listed as “cosmetics and cosmetic preparations; cosmetics and make-up.” Applicant responded to the initial refusal on August 2, 2018, by presenting arguments in favor of registration. A final action was issued on September 4, 2018, for the Section 2(d) refusal. Applicant subsequently filed an appeal brief on March 5, 2019.

## II. ISSUE ON APPEAL

The sole issue on appeal is whether applicant’s use of the mark R.C. for “essential oils for aromatherapy use,” creates a likelihood of confusion with the registered mark RC COSMETICS for “cosmetics and cosmetic preparations; cosmetics and make-up.”

## III. OBJECTIONS TO EVIDENCE

As evidence against the refusal, applicant provided screen shots or printouts of webpages that do not specify the date it was downloaded or accessed and the complete URL. To properly introduce Internet evidence into the record, an applicant must provide (1) an image file or printout of the downloaded or accessed, (2) the date the evidence was downloaded or accessed, and (3) the complete URL address of the webpage. *See In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018); TBMP §1208.03; *see* TMEP §710.01(b).

#### IV. ARGUMENT

#### **APPLICANT’S AND REGISTRANT’S MARKS ARE CONFUSINGLY SIMILAR AND THE GOODS ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION UNDER SECTION 2(D) OF THE TRADEMARK ACT.**

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods and/or services of the parties. *See* 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the “*du Pont* factors”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Only those factors that are “relevant and of record” need be considered. *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 1382, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1241, 73 USPQ2d 1350, 1353 (Fed. Cir. 2004)); *see In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); TMEP §1207.01.

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

#### A. THE MARKS ARE CONFUSINGLY SIMILAR

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); TMEP §1207.01(b).

Here, the proposed mark R.C., in standard character format, is extremely similar to the registered mark RC COSMETICS in stylized font and design in appearance, sound, connotation and commercial impression because applicant’s mark R.C. is highly similar, if not identical to the dominant element in registrant’s mark. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often

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