

**THIS OPINION IS NOT A  
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Clayton Corporation

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Serial No. 77462009

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Bryan K. Wheelock of Harness Dickey & Pierce PLC, for Clayton Corporation.

John Kelly, Trademark Examining Attorney, Law Office 117 (Brett Golden, Managing Attorney).

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Before Seeherman, Holtzman, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Clayton Corporation filed an application to register the mark HOMESEAL and design, as shown below, for goods ultimately identified as "sealants, adhesives, expansion joint fillers and insulation materials in the nature of a spray-applied curable foam for building, construction, repair and maintenance uses," in International Class 17<sup>1</sup>:

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<sup>1</sup> Application Serial No. 77462009, filed April 30, 2008, pursuant to Section 1(b) of the Trademark Act, 15 USC §1051(b), alleging a bona fide intent to use in commerce, and disclaiming the exclusive right to use the term "HOMESEAL" apart from the mark as shown. The mark is described as follows: The mark consists of the term "HOMESEAL" in a stylized font and a building design.



The trademark examining attorney refused registration of the mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark HOMESEAL, registered in typed drawing format, for "asphalt, modified asphalt and rubberized asphalt based peel and stick membranes for use on roofing," in International Class 19,<sup>2</sup> that when used in connection with applicant's identified goods, it will be likely to cause confusion, mistake, or to deceive. Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. After careful consideration of the arguments and evidence of record, we affirm the refusal to register.

Before we discuss likelihood of confusion, we turn to an evidentiary objection by the examining attorney regarding some evidence presented by applicant for the first time with its appeal brief. The examining attorney objects to two images included in applicant's brief. One is an image of applicant's mark, apparently displayed on a spray can. (Appl's. brief at

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<sup>2</sup> Registration No. 2421784, issued January 16, 2001. Renewed.

2). The other is an image of a third-party registration for the mark HOMESEAL, Registration No. 189381. (Appl's. brief at 3). It is well-settled that the record in an *ex parte* proceeding must be complete prior to appeal. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Exhibits that are attached to a brief but not made of record during examination are untimely, and will not be considered. *See In re Fitch IBCA, Inc.*, 64 USP2d 1058, 1059 n.2 (TTAB 2002); *see also* TBMP §§1203.02(e) and 1207.01 (3d. ed. 2011). Although in this case applicant did not attach the images as exhibits, but rather included them in the body of its brief, we cannot, in either event, consider the images, submitted for the first time with the appeal brief, as evidence in our analysis. Accordingly, the objection is sustained.<sup>3</sup>

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the

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<sup>3</sup> In any event, as discussed in the "Marks" section below, even if we had considered this evidence, it would not have changed our decision.

marks"). We consider each of the factors as to which applicant or the examining attorney presented arguments or evidence.

#### The Marks

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 and/or services offered under the respective marks is likely to result. *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).

The mark in the cited registration consists solely of the word "HOMESEAL," in typed drawing format. Applicant's mark is as follows:



The literal portion of applicant's mark, i.e., the word "HOMESEAL," is in sight and sound identical to the mark in the cited registration. Indeed, with a mark registered in typed form, the registrant is entitled to present its mark in any of a number of different formats, including one resembling that presented by applicant's mark. See *Citigroup Inc. v. Capital City Bank Group Inc.*, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) ("If the registrant ... obtains a standard character mark without claim to 'any particular font style, size or color,' the registrant is entitled to depictions of the standard character mark regardless of font, style, size, or color).<sup>4</sup>

Finally, there is nothing to indicate that the term "HOMESEAL" in the cited registration would have a different commercial impression from the term "HOMESEAL" with design element in the application. Generally, it is the words and not the design that will be used by consumers to call for or refer to the goods, particularly where, as here, the design merely serves to emphasize the literal element of the mark. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Since applicant's design consists of a drawing of a home, it does not change the commercial impression created by the words "HOMESEAL."

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<sup>4</sup> Trademark Rule 2.52(a) was amended in 2003 to refer to "typed drawings" as "standard character" drawings. See Trademark Rule 2.52(a); 37 C.F.R. 2.52(a).

Applicant argues that the cited registration is weak, and that the shared term "HOMESEAL" has been included in at least one third-party registration. However, as discussed regarding the evidentiary objection above, the third-party registration is not of record. We note, in any case, that, were it relevant here, even weak marks are entitled to protection against registration of a confusingly similar mark. *See Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521 (TTAB 1982). Finally, we note that applicant has disclaimed the term "HOMESEAL." However, the disclaimer of the shared term HOMESEAL does not serve to avoid confusion. A disclaimer does not remove the disclaimed matter from the mark. The mark must still be regarded as a whole, including the disclaimed matter, in evaluating similarity to other marks. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

On balance, we find that the marks are similar in appearance, pronunciation and meaning, and project very similar commercial impressions. Accordingly, we find this *du Pont* factor to weigh in favor of finding a likelihood of consumer confusion.

#### The Goods and Channels of Trade

Preliminarily, we note that the more similar the marks at issue, the less similar the goods need to be for the Board to find a likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d

1812, 1815 (TTAB 2001). Moreover, goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

The examining attorney submitted evidence of various websites that explain the relatedness of the goods identified in the application to those identified in the cited registration. In particular, the evidence shows how "adhesive" forms of "spray-applied curable foam" for "building, construction, repair, and maintenance uses," as identified by applicant, may be used specifically for "roofing," as identified in the cited registration. Some examples from the record include the following:

Spray Foam Roofing: Benefits of Spray Foam Roof Systems

- Leak free monolithic seal over your entire roof deck . . .
- High insulation value . . .
- Strong adhesion . . .

[www.sprayfoam.com](http://www.sprayfoam.com).

LaPolla Spray Foam Systems: Spray Foam Systems are performance-based "GREEN" products for use in a variety of Spray Foam Insulation, Roofing and Waterproofing applications.  
*www.sprayfoamsystems.com.*

Sierra spray foam roofing: For over 35 years, the family of Sierra Spray Foam Roofing (SSFR) has been pioneers of polyurethane roof systems. . . We service a wide variety of roof systems for commercial and residential clients as well as hand crafted wine storage applications. SSFR has clients throughout California & Nevada such as, Robert Mondavi Vineyards, SASCO, John Hancock Insurance . . . All other roofs do not function as a complete system, meaning that these roofs must be applied in pieces. Whether it is a plastic sheet that is custom built for your roof, tar & gravel or a roof heated to a bond . . .  
*www.sierrasprayfoam.com.*

Spray Polyurethane Foam Alliance: Spray polyurethane foam, commonly referred to as SPF is a spray-applied insulating foam plastic that is installed as a liquid and then expands many times its original size . . . the same basic raw materials that can make insulation foam semi-rigid and soft to the touch also creates high density roofing foam that is resistant to foot traffic and water. . . . For roofing, spray polyurethane foam insulates and eliminates thermal bridging through fasteners or gaps in decking while providing a long-lasting roofing system . . .  
*www.sprayfoam.org.*

Applicant argues that the goods are not related because consumers would not "substitute" applicant's goods for those in the cited registration. (Appl's. brief at 5). The issue is not, however, whether consumers would confuse the goods but whether consumers would be confused into believing that the goods emanate from a single source. Here, there is evidence



that both applicant's "sealants" and "adhesives" forms of "spray-applied curable foam" and registrant's "peel and stick" membranes may be applied to "roofing." Furthermore, even when used in other home "construction," applicant's foam is likely to be purchased and/or used by the same person who purchases and uses registrant's roofing membranes, *i.e.*, a contractor or a handyman, or a homeowner fixing his or her home.

With regard to channels of trade, the goods in the application are identified for use in "building, construction, repair and maintenance uses," while the goods in the cited registration are identified for "roofing," which is a subset thereof. Accordingly, they are likely to travel through the same trade channels and be purchased by the same classes of purchasers. *See Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). In other words, as identified, both applicant's "spray-applied curable foam," and registrant's "peel and stick membranes for use on roofing" could be sold in the same stores, possibly even on the same shelves since they could both be used for roofing. Further, because the goods could be used for the same roofing/construction project, consumers could purchase them together. Accordingly, the second and third *du Pont* factors also weigh in favor of finding a likelihood of confusion.

### **Consumer Sophistication**

Applicant argues that its consumers are potentially sophisticated and would recognize the difference between registrant's HOMESEAL mark and applicant's HOMESEAL and design mark when used on their respective goods. As discussed above, the goods identified by both applicant and registrant are both identified for "construction" uses, or "roofing" as a subset thereof. The likely purchasers are either contractors, builders, or, as applicant says, "do-it-yourselfers." (Appl's. brief at 2).

Even if we are to assume that the goods identified by the cited registration, at least, would be marketed to professionals, who would be presumed to exercise a higher degree of care in their purchase than would ordinary consumers, with nearly identical marks and related goods, even a careful, sophisticated consumer of such goods is not likely to note the difference of source. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). Accordingly, the fourth *du Pont* factor weighs in favor of finding a likelihood of confusion.

### **Balancing the Factors**

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that the marks are essentially identical; the goods are related; and, as identified, they would be sold through the same channels of trade to the same classes

of purchasers. As our precedent dictates, we resolve doubt in favor of the prior registrant. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); see also *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Accordingly, we find a likelihood of confusion between applicant's mark and the cited registration.

**Decision:** The refusal to register is affirmed.