

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Hearing:
April 6, 2011

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The LETCO Group, LLC

Serial No. 77541687

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The LETCO Group, LLC.

Odessa Bibbons, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Seeherman, Bucher, and Lykos, Administrative Trademark
Judges.

Opinion by Lykos, Administrative Trademark Judge:

The LETCO Group, LLC ("applicant") filed an application to
register the mark LIVING EARTH, in standard character format,
for "soil amendments; potting soil; planting soil" in
International Class 1; "sand; gravel" in International Class 19;
and "mulch; natural recycled wood fiber mulch for use as a
playground ground cover" in International Class 31.¹

¹ Serial No. 77541687, filed August 7, 2008, pursuant to Section 1(a)
of the Trademark Act, 15 U.S.C. § 1051(a), alleging August 2006 as the
date of first use anywhere and in commerce.

As to International Class 1 only, the Trademark Examining Attorney refused registration of applicant's 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 registered mark LIVING SOIL, also in standard character format, for "planting soil, namely, planting mix" in International Class 1,² that when used on or in connection with applicant's identified goods in Class 1, it is likely to cause confusion or mistake or to deceive.

Registration has also been finally refused as to Class 1 in light of applicant's failure to comply with the examining attorney's requirement for a disclaimer of the word "EARTH," pursuant to Trademark Act § 6(a), 15 U.S.C. § 1056(a), on the ground that the term is generic for the identified goods.

First, we consider the refusal to register the mark LIVING EARTH under Section 2(d). 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

² Registration No. 3289351, issued September 11, 2007 on the Principal Register under Section 1(a) of the Trademark Act, claiming March 2003 as the date of first use anywhere and in commerce. Registrant has disclaimed the word SOIL.

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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 Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted relevant argument or evidence.

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. See *Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980). The proper focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Here, we find that both applicant's and registrant's marks create the same commercial impression because the significance of the marks is identical. The first term in each mark consists of the same word LIVING. While the second term in each mark (EARTH and SOIL), is different as to sound and appearance, both have the same meaning as "soil" or "dirt." According to the definitions of record, the word "earth" is defined as "soil, especially productive soil." *American Heritage Dictionary of the English Language*: 4th ed. 2000. The word "dirt" is defined as "[e]arth or soil." *American Heritage Dictionary of the English Language*: 4th ed. 2000. This supports a finding that both applicant's and registrant's marks LIVING EARTH and LIVING SOIL will have the same meaning to consumers, when used in connection with applicant's and registrant's goods. Consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. See *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1336, 164 USPQ 301, 304 (C.C.P.A. 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on competing cleaning products); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125 (TTAB 1978) (holding TUNA O' THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105 (TTAB 1973) (holding

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UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services).

Applicant has submitted a dictionary definition of EARTH to support its argument that the word is not limited to the meaning of "dirt" but in fact has a wide range of different meanings, including the proper name for the planet we inhabit. Applicant contends that when used in combination with "LIVING," the term "EARTH" in applicant's mark conveys to consumers the image of a vibrant, fertile planet, suggesting that applicant's goods are conducive to fostering the ecological and environmental health of the planet Earth. Applicant further argues that because the meaning of the word "soil" focuses on the rocky mineral substance in which plant life grows, or on agriculture and plant growth itself, the registered mark LIVING SOIL gives rise to a different commercial impression.

We do not find this argument persuasive. The fact that the word "earth" has other meanings does not obviate the fact that when considered in relation to applicant's goods, it does have the meaning of "dirt" or "soil." In addition, although applicant has submitted a dictionary definition of the term EARTH, applicant did not submit any evidence of usage of the phrase "living earth" to support the contention that prospective consumers would perceive applicant's mark as suggesting that applicant's goods have environmentally friendly attributes.

Applicant also argues that registrant's mark is a weak mark entitled to a narrow scope of protection. In support thereof, applicant has submitted 12 third-party registrations to show that the term "LIVING" is used in connection with goods and services similar or related to those of applicant and registrant, as set forth in the chart below.

Federal Registered Trademarks

Mark	Registration No.	Goods/Services	Owner
LIV-E-ARTH	2,189,793	Soil amendments and fertilizers for agricultural and horticultural use (CI 01) Mineral supplements (CI 05)	Live Earth Products, Inc.
DR. SUBLER'S LIVING SOIL (Disclaims "LIVING SOIL")	2,912,899	Natural, organic and synthetic soil additives; plant food supplements; soil amendments; soil conditioners; and fertilizers, all for domestic and commercial plant care, gardening, landscaping, horticultural and agricultural use (IC 01)	Pacific Garden Company
LIVING MULCH (Disclaims "MULCH")	3,456,111	Growing media and potting soil for plants, namely, earthworm castings compost and compost (IC 01)	EarthSweet, Inc.
SOILS ALIVE (Disclaims "SOILS")	3,493,184	Fertilizers; soil amendments (CI 01)	Soils Alive, LLC
COMPOST ALIVE! (Disclaims "COMPOST")	1,972,632	Materials useful in the production of gardening mulch, namely compost (CI 01)	Gardens Alive, Inc.
ORGANICS ALIVE (Disclaims "Organics")	3,363,134	Biological fertilizer in the nature of dry worm castings and dry worm castings with composts mixes and aerobically activated worm castings tea which may be comprised of worm castings only and may also contain basic organic products such as molasses, seaweed extract, rock mineral, and other products to make a complete mix or liquid (CI 01)	California Vermiculture, LLC
BRINGING SOIL TO LIFE	3,080,064	Fertilizers, soil conditioners, and plant growth regulators for agricultural and domestic use; surfactants and adjuvants for use in connection	Wilbur-Ellis Company

		with agricultural pesticides and herbicides (CI 01)	
PUT LIFE BACK INTO YOUR SOIL	2,637,157	Liquid inoculants in the nature of fertilizer and soil supplements, used in agriculture, horticulture, turf, and bioremediation industries (CI 01)	Biologically Integrated Organics, Inc.
LAND LIFE	3,234,033	Soil conditioners for agricultural and horticultural use (CI 01)	I & OC of Japan Co., Ltd.
MEADOW-LIFE	1,806,638	Liming agents, synthetic soil substitute, soil conditioner and fertilizer for agricultural use (CI 01)	Middlesex County Utilities Authority
LIVING DESIGNS (Disclaims "Designs")	2,633,606	Landscape design (CI 42)	Robert E. Jones
LANDSCAPES FOR LIVING	3,267,921	Retail lawn, garden and nursery stores (CI 35) Landscape construction (CI 37) Landscape gardening design for others (CI 44)	Mickman Brothers

Third-party registrations are not evidence that the marks shown therein are in use, or that the public is familiar with them. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992). However, third-party registrations may be considered in the same manner as a dictionary to show a term's significance in a particular trade. *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588, 592 (TTAB 1975). In this case, we find that the third-party registrations noted above show that the word LIVING and derivations thereof (e.g. LIVE, LIFE) have a suggestive meaning with regard to the goods at issue, and further that registrant's mark has a limited scope of protection. However, even weak marks are entitled to protection from the registration of very similar marks for

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identical goods, as discussed below. See *Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521 (TTAB 1982).

Next we consider the second *du Pont* factor, the similarities or dissimilarities of the goods. As to the goods, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. *In re Shell Oil Co.*, 26 USPQ2d at 1690 n.4; and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992).

With regard to this issue, we note that the examining attorney focused her analysis on whether applicant's goods are related to registrant's goods, and submitted third-party registrations in support thereof. However, based on the identification of goods as written, we need not reach the question as to whether applicant's and registrant's goods are related since in fact they are identical.

The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration. See, e.g., *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 1208 n.4, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993).

Applicant's identified goods are:

"Soil amendments; potting soil; planting soil;"

Registrant's identified goods are:

"Planting soil, namely, planting mix."

(emphasis added).

Because "planting soil" is recited broadly in applicant's identification without any limitation as to the type, it necessarily encompasses registrant's more specific type of "planting soil" identified as "planting mix." As such, applicant's goods necessarily encompass registrant's goods and are therefore legally identical. Moreover, because the goods are legally identical, they are presumed to move in the same channels of trade and to be sold to the same classes of consumers. Thus, these *du Pont* factors of the similarity of the goods and channels of trade weighs in favor of finding a likelihood of confusion.³

To the extent that there are any other relevant *du Pont*

³ In view of our finding that the goods are in part identical, we need not discuss the evidence regarding the relatedness of the remaining goods. If there is likely to be confusion with respect to any item that comes within the identification of goods of applicant's application in Class 1 and the cited registration, this is sufficient to find a likelihood of confusion for all goods listed in Class 1. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

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factors, we treat them as neutral. After considering all of the evidence of record and argument pertaining to the *du Pont* likelihood of confusion factors, we conclude that there is a likelihood of confusion between applicant's LIVING EARTH mark for "soil amendments; potting soil; planting soil" in International Class 1, and the registered mark LIVING SOIL for "planting soil, namely, planting mix."

In light of our decision, we need not consider applicant's failure to comply with the examining attorney's requirement for a disclaimer of the term EARTH.

Decision: The Section 2(d) refusal is affirmed. The application will be forwarded for publication in Classes 19 and 31 only.