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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Star-Brite Distributing, Inc.

Serial No. 77762719

John Christopher of Christopher & Weisberg PA for Star-Brite Distributing, Inc.

William T. Verhosek,¹ Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Kuhlke, Taylor and Shaw, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Star-Brite Distributing, Inc. (“applicant” or “appellant²”), by amendment during prosecution of the application, seeks to register on the Supplemental Register the following mark:



¹ A different examining attorney was responsible for the application prior to the May 6, 2010, Office Action.

² Throughout its briefs, Star-Brite Distributing, Inc. referred to itself as “Appellant,” however, during prosecution of the application, Star-Brite referred to itself as “applicant.” To lessen confusion, except for direct quotes, we shall refer to Star-Brite as “applicant.”

for goods ultimately described as “Non-chemical additives for oils and fuels” in International Class 4.³ The application includes the following color statement: “The color(s) translucent blue is/are claimed as a feature of the mark.” The mark is also described, as amended, in the application as follows:

The mark consists of translucent blue to be used for a container body and not the cap. The dotted lines are intended to show the position of the mark and are not part of the mark as shown.

Registration has been finally refused on the ground that a likelihood of confusion exists between applicant’s mark and the mark in Registration No. 2186938 (on the Supplemental Register) issued September 1, 1998, renewed; and shown below



for “petroleum based fuel additive” in International Class 4. The registration includes the following color statement: “The drawing is lined for the color blue, and color is claimed as a feature of the mark.” The mark is also described in the registration as follows:

The mark consists of the color blue as applied to the goods visible through a transparent tube. The dotted outline of the goods is intended to show the position of the mark and is not a part of the mark.

Applicant appealed the Section 2(d) refusal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief.

³ Application Serial No. 77762719 filed June 18, 2009, and claiming first use of the mark anywhere and in commerce on February 28, 2004.

Before we begin our likelihood of confusion analysis, we must discuss several preliminary matters. First, the examining attorney has objected to certain evidence referenced by applicant for the first time with its appeal brief.⁴ This evidence consists of hyperlinks to the Wikipedia entry for “petroleum” and to several third-party websites. Apart from being untimely, *see* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) which provides, in pertinent part, that “[t]he record in the application should be complete prior to the filing of an appeal,” the evidence is not properly of record. Links to websites are insufficient to make such evidence of record. *See Calypso Technology Inc. v. Calypso Capital Management LP*, 100 USPQ2d 1213, 1216-19 (TTAB 2011). This is so because there is no assurance that the content of the linked material is the same today as it was when applicant read it. As a result, even if timely, we could give this changeable or changing evidence no probative value.⁵ The better practice was for applicant to have requested remand for the purposes of making additional evidence of record and, if granted, to have submitted copies of the web pages or screen shots of the web pages that were in existence at the time they were accessed.

⁴ By this evidence applicant seeks to “rebut” the presumption that the goods listed in the cited registration move through all normal trade channels.

⁵ With particular regard to the Wikipedia “evidence,” as just stated, it is not properly of record. However, we address for completeness applicant’s contention that if the Board takes judicial notice of dictionary definitions as requested by the examining attorney, “the same courtesy” should be extended to it with respect to the Wikipedia entry. “[T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information. Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information)”. *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032-33 (TTAB 2007). As in this case, at briefing, there is no opportunity for the non-offering party to submit rebuttal evidence.

For those reasons, the examining attorney's objection is sustained and the evidence has not been considered in this decision.⁶ We hasten to add that even if we had considered these materials, our decision would be the same.

Next, applicant's "request for reconsideration," buried on page 10 of its main brief, is denied as manifestly untimely. Requests for reconsideration should be filed with the Trademark Examining Operation before the deadline for filing an appeal to the Board. *See* Trademark Rule 2.64(b), 37 C.F.R. § 2.64(b), Trademark Rule 2.64(b).⁷

We turn then to the merits of this case. Applicant maintains that its mark and the cited mark have different appearances such that confusion is unlikely and, in that regard, contends that "no reasonable consumer would look at a translucent blue bottle with clear goods and a cap, and confuse it with a transparent tube with blue goods." Applicant characterizes the cited mark (as shown in the specimen provided by registrant during prosecution of the application and made of record by the examining attorney) as "a nearly purple-black fluid disposed within a toothpaste tube with transparent edges." Applicant's br. p. 6. Applicant argues:

Registrant's tube is transparent – Appellant's container is translucent blue. If translucence is not a color, as the Examining Attorney concludes, then consumers should have no problem determining the differences between a transparent tube and a blue container. What color the goods are is not paramount. The Examining Attorney is over broadening Registrant's trademark,

⁶ Applicant's additional arguments with respect to its continued position that the goods are unrelated and do not travel in the same trade channels are not affected by this ruling. However, they are largely unsupported and, accordingly, may have little probative value.

⁷ We point out that the examining attorney in his brief addressed applicant's position regarding the sophistication of the purchasers. As such, the issue applicant sought to address by reconsideration is moot.

and overly simplifying Appellant's application. Simply, it doesn't matter what color Registrant's goods are because its tube must be clear, and Appellant's bottle must be blue with a non blue cap. These are readily determinable differences even for unsophisticated consumers.

Applicant's reply br. p. 4. With respect to the goods, applicant argues that they are mutually exclusive of one another by definition; one is petroleum based and the other non-chemical. As such, applicant continues, the respective goods are unlikely to encounter each other in the marketplace. Last, applicant contends that the sophistication of the consumers of both applicant's and registrant's goods minimize any chance of confusion.⁸

The examining attorney maintains that applicant's color mark "blue" is legally identical to registrant's color mark "blue," specifically asserting that "there is no such thing as 'translucent blue'." With respect to the goods, the examining attorney argues that they are identical and otherwise closely related because applicant's identification is broad enough to cover the more specific goods of the registrant, that they have the same purpose of treating fuels and oils, and that they are marketed to the same consumers who use such products in their engines and vehicles. In support of the refusal, the examining attorney has made of record dictionary definitions, excerpts from third-party websites and copies of third-party registrations.

⁸ Because applicant misidentified the registrant's mark in its assertion that "[c]onsumers would readily perceive the differences between a blue bottle (Appellant's mark) and a clear squeeze tube (Registrant's mark) regardless of what color the goods are," Applicant's reply br. p. 3, this argument has not been considered.

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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *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”). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

This case requires a less traditional likelihood of confusion determination involving the comparison of two color marks. As pointed out in the recent Board decision, *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012), “in the seminal case on color trademarks, *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 34 USPQ2d 1161 (1995) (“*Qualitex*”), the Supreme Court indicated that the practical problem of deciding an issue of shade confusion is no more difficult than determining whether differences in word marks would be likely to cause confusion. *Id.* at 1164-65 (“We do not believe, however, that color, in this respect, is special.”). Here, we are asked to compare the color blue as applied to the goods with the color “translucent” blue to be used for a container body (discussed, *infra*).

We consider first the goods and compare applicant's "non-chemical additives for oils and fuels" with the registrant's "petroleum based fuel additive." In analyzing the relatedness of these goods, it is well-settled that they need not be identical or competitive, or even offered through the same channels of trade, to support a finding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009).

The examining attorney has made of record several use based third-party registrations to show that applicant's identification of goods is broad enough to encompass the more specific goods of the cited registration, i.e., that applicant's non-chemical additives could be petroleum based. These registrations, specifically, Registration No. 1643301 for the mark RPM X1000 RED LINE SYNTHETIC OIL and design, Registration No. 1938720 for the mark PRO-MA SYSTEMS, Registration No. 2478740 for the mark SUN COAST RESOURCES, INC and design and Registration No. 3928296 for the mark RACING INTO THE RED ZONE,

include goods identified as “non-chemical petroleum based additives” for oils and fuels.⁹

The examining attorney also made of record evidence from third-party websites showing that enzyme fuel treatments, as a non-chemical based fuel additive, and petroleum based fuel additives have the same purpose of treating fuels and oils, are marketed to the same consumers who use such products in their engines and vehicles.¹⁰ Examining Attorney’s Final Office Action, (TICRS Outgoing) at pp. 54-65. For example, an article from the website of Alternative Energy, www.alternative-energy-news.info/green-fuel-additive-production/ entitled “Fuel Additive Production Takes the Green Route” states:

Research is on for the organic production of isobutene (isobutylene) [generally used as a fuel additive]. Thomas Bobik, Professor of Biochemistry, Biophysics and Molecular Biology and David Gogerty, a doctoral student are doing pioneer research for producing isobutylene with the help of a new but natural enzyme rather than from the traditional petroleum-based products.

Another example is from the article “To Store Your Boat With a Full or Empty Fuel Tank?” which includes a discussion of fuel additives and, in pertinent part, states:

(SeaFoam) ... A 100% pure petroleum product for use in a; gasoline & diesel type engines. Both 2 & 4 cycles. ... Cleans dirty engine parts internally by removing harmful gums, varnish & carbon. ... Removes moisture from ols crankcases & fuel tanks.

⁹ Registration No. 3893550 also includes goods identified as “non-chemical petroleum based additives,” but we note that it is owned by the same entity that owns Registration No. 1643301 listed above.

¹⁰ Notably, applicant’s product advertising states: “the unique enzyme formula actually improves fuel quality, allowing any engine to run better on Star-Tron treated fuel.” Applicant’s November 1, 2010, Response to Office Action, Exh. A.

(Startron) ... Their catalog says – New enzyme-based additive increases fuel economy and engine power while reducing emissions. ... Increases octane and removes water from the fuel...

(Soltron) ... This is called an enzyme fuel treatment & uses 100% natural enzyme technology to deliver multiple benefits to gasoline and & diesel engines. ... It is a powerful dispersant & may loosen & dislodge heavy accumulations of sludge, including deposits caused by overuse of other fuel additives.

The examining attorney has also made of record several used-based third-party registrations showing that a single entity adopted a single mark for goods of the type identified in both applicant's application and the cited registration. In that regard, we have considered registrations that list fuel additives without any limiting language to encompass both petroleum-based and non-chemical additives. Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods and services are of a type that may emanate from a single source. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d at 1467, 1470 n.6 (TTAB 1988) ("Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). The registrations include, by way of example:

Registration No. 2905589 for *inter alia* "non-chemical additives and petroleum based additives for motor oil";

Registration No. 0687067 for, *inter alia*, "oil additives and fuel additives";

Registration No. 0900046 for, *inter alia*, “motor fuel additives”;
and

Registration No. 0954863 for, *inter alia*, “motor fuel additives.”¹¹

We find the third-party registrations and website evidence sufficient to show not only that applicant’s broadly worded non-chemical additives for oils and fuels may encompass registrant’s petroleum based fuel additive, but also that applicant’s goods are closely related to those of registrant, both types of additives being used to improve fuel quality in engines and commonly emanating from the same source.

The *du Pont* factor of the relatedness of the goods thus favors a finding of likelihood of confusion.

Applicant’s argument that the goods differ because its fuel additives are non-chemical whereas the registrant’s fuel additive is petroleum based is not well taken. As stated, the goods need not be identical to find a likelihood of confusion; they need only be related in a manner which leads to a mistaken belief that they emanate from the same source. *In re Accelerate s.a.l., supra*. As just stated, both applicant’s and registrant’s fuel additives will be purchased by consumers for the same purpose, often emanate from the same source, and may be purchased in the same trade channels (discussed below). Accordingly, their particular formulation is not distinguishing.¹²

¹¹ The following third-party registrations have no persuasive value because they did not list goods of the type identified in both applicant’s application and the cited registration: Registration Nos. 1680891, 2423760, 2988410, 3131927, 3183089, 3334531 and 3608910.

¹² Applicant also contends that “the goods ... are different owing to the office’s own taxonomy classifying the respective goods differently.” Applicant’s reply br. p. 2. It is unclear what applicant means by this statement. We note that the goods are classified in the same international class. And, even if they were not, the classification of goods and services by the USPTO is merely an administrative determination and has no bearing on

Further, because there are no limitations as to channels of trade or classes of purchasers in the identifications of goods in the application and cited registration, it is presumed that applicant's and registrant's goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *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); and *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Both applicant's and registrant's fuel additives are presumed to be sold through automotive stores, marine stores and hardware stores and, in fact, the record confirms this presumption. In addition, applicant's advertising material offers insight into the purpose of applicant's goods and, by extension, its consumers. For example, in one advertisement applicant states that its goods "work[] in any 2 or 4- cycle engine of any size, from the smallest string trimmer to the largest RV, as well as boats, motorcycles, trucks, generators, lawn mowers, jetskis [sic], cars or any other gas-powered engine." Applicant's November 1, 2010, Response to Office Action, Exh. A. Given that applicant's fuel additives are formulated for use in the engines of yard and garden machinery, such as string trimmers and lawn mowers, as well in those of cars and trucks, we conclude that applicant's consumers will include members of the general public seeking to improve fuel quality in various types of engines. Accordingly, the trade channels and classes of purchasers overlap.

the issue of likelihood of confusion. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); and *National Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212 (TTAB 1990).

Applicant erroneously attempts to rebut the presumptions concerning trade channels and classes of purchasers by arguing that while its goods are sold in brick and mortar stores as well as online, and marketed to “marine owners,” it found no such presence of registrant’s goods. However, in considering the scope of the cited registration, we look to the registration itself, and not to extrinsic evidence about the registrant’s actual goods, customers, or channels of trade. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958).

The *du Pont* factors of the relatedness of the goods, channels of trade and classes of purchasers thus favor a finding of likelihood of confusion.

We turn then to the marks, the similarity of which is the key point of this appeal. When, as here, the marks at issue are non-literal design marks, the similarity of the marks must be decided primarily on the basis of visual similarity. *General Foods Corp. v. Ito Yokado Co., Ltd.*, 219 USPQ 822, 828 (TTAB 1983) (the comparison of design marks comes down to a “subjective ‘eye ball’ reaction”); *cf. Diamond Alkali Co. v. Dundee Cement Co.*, 343 F.2d 781, 145 USPQ 211, 213 (CCPA 1965) (“When symbol marks...are being considered, appearance is most significant. Symbols of this kind do not sound.”) (citation and internal quotation marks omitted). “When comparing the color marks at issue, 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 appearance and overall commercial impression so that confusion as to the

source of the goods offered under the respective marks is likely to result.” *Cook Medical Technologies*, 105 USPQ2d at 1381, citing *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

In addition, where, as here, the goods are closely related, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); and *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Further, in analyzing the marks, we of course must compare them as they appear in the drawings. However, our analysis does not end there because the record includes descriptions of the involved marks and they, too, must be considered in determining the commercial impressions conveyed to relevant consumers and whether the marks are, or are not, confusingly similar. As set forth in TMEP § 807.07(a)(ii) (2012): “The color location statement must include the generic name of the color claimed. The statement may also include a reference to a commercial color identification system. The USPTO does not endorse or recommend any one commercial color identification system.” TMEP § 1202.05(e) reads as follows:

The description of the mark must be clear and specific, use ordinary language, and identify the mark as consisting of the particular color as applied to the goods or services. If the color is

applied only to a portion of the goods, the description must indicate the specific portion. Similarly, if the mark includes gradations of color, the description should so indicate. If the applicant is claiming a shade of color, the shade must be described in ordinary language, for example, “maroon,” “turquoise,” “navy blue,” “reddish orange.” This is required even if the applicant also describes the color using a commercial coloring system.

With these principles in mind, we now compare the marks, focusing on the similarity or dissimilarity of the marks in their entirety as to appearance. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567.

Registrant’s mark is described as follows: “The drawing is lined for the color blue, and color is claimed as a feature of the mark. The mark consists of the color blue as applied to the goods visible through a transparent tube.” Applicant’s mark is described as follows: “The color(s) translucent blue is/are claimed as a feature of the mark. The mark consists of translucent blue to be used for a container body and not the cap.” We also find it helpful to reproduce both applicant’s and the registrant’s specimens showing how each mark is actually used in commerce, but we hasten to add with respect to registrant’s mark that, despite the depiction of registrant’s color mark showing a particular shade, because we decide this *ex parte* appeal on the information on the face of the registration, registrant’s mark covers all shades of “blue.”¹³

¹³ We note that at the time registrant applied for registration of the cited mark, the practice and rules governing applications for color marks only required: 1) a black and white drawing depicting color in the Office’s color lining system; and 2) a description describing the color(s) in the application which matched one of the twelve colors (namely, brown, blue, green, orange, red or pink, gray or silver, violet or purple, yellow or gold) set forth in prior Trademark Rule 2.52(e). An applicant was only asked to explain a particular color/shade if that color was significantly different from the colors set out in the rule. Contrary to applicant’s contention, registrant was not required to set forth a gradient or shade of color.



Registrant's specimen



Applicant's specimen

We find that applicant's blue color mark appearing over the entire container body and registrant's blue color mark applied to the goods which is visible through the entirety of a transparent tube are similar in appearance. We thus find that, in the context of the goods in this case, registrant's and applicant's colors are identical. We find so even though applicant's mark appears on containers for the goods and registrant's mark appears on the goods themselves, because consumers encountering registrant's goods in the marketplace can clearly see the color of

The Office has since changed its practice and rules. Because color marks are visual, such marks now must be depicted in color drawings, accompanied by: (1) a claim naming the color(s) that are a feature of the mark; and (2) a separate element naming the color(s) and describing where the color(s) appear and how they are used on the mark. Trademark Rules 2.37 and 2.52(b)(1). See TMEP § 1202.05(d) generally, §§ 807.07-807.07(g) for a discussion of color mark drawings, and §§ 808-808.03(f) for a discussion of descriptions of marks. The differences in the rules and requirements in place at the time the registrant filed the application that matured into the cited mark and those which govern applicant's mark highlight the USPTO's present goal for clear, complete and accurate descriptions of marks and are not intended to be restrictive in any manner. While it is clear that applicant's applied-for mark includes a color drawing and a more precise description of the mark than that of the cited registration, as stated, we decide this ex parte appeal based on the information on the face of applicant's application and registrant's registration; we do not read in limitations, for example, we do not limit registrant's mark to any specific shade or hue. Nonetheless, applicant was not without possible remedies, including seeking a consent from the owner of the cited registration, or seeking, under Section 18 of the Trademark Act, 15 U.S.C. § 1068, a restriction of the registration to modify the description of the mark from "blue" to the specific shade of blue actually used in the marketplace. See generally, *Cook Medical Technologies*, 105 USPQ2d at 1384-85.

registrant's goods through the transparent tubes in which they are contained and, as such, registrant's mark is visible, and is therefore subject to comparison. *See, e.g., Smithkline Beckman Corp. v. Pennex Products Co., Inc.*, 605 F. Supp 746, 225 USPQ 963 (E.D. Pa. 1985) (Where a trademark is asserted in the color orange of a type of non-prescription aspirin, defendant does not infringe if its container is opaque and customers cannot see that its tablets are orange, but if the container is translucent, then likely confusion is possible). As regards placement of the colors, they almost completely comprise both registrant's and applicant's goods. Although the container caps for applicant's containers are not blue, they are much smaller in size as compared to the containers, and do not serve to distinguish applicant's mark from registrant's mark.

There is some dispute as to whether applicant's mark is "translucent blue" in color or is the color blue with translucent qualities. While we are unaware of the color, "translucent blue," however viewed, our findings lead to the same outcome. Because registrant's "blue" mark is not limited to a certain shade of blue, it would encompass the "color" "translucent blue." That applicant's blue color mark may appear translucent, which is defined as "transmitting and diffusing light so that objects beyond cannot be seen clearly,"¹⁴ is not sufficient to distinguish the goods for purposes of our likelihood of confusion analysis. In certain lighting conditions, the

¹⁴ We take judicial notice of the definition of "translucent" taken from the Merriam-Webster Online Dictionary (11th ed.), and retrieved at www.merriam-webster.com/translucent on March 4, 2013, instead of the one requested by the examining attorney. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

translucence may not be noticed. Because the marks are similar in appearance, we find they have similar commercial impressions when applied to closely related goods.

The similarity between the marks thus favors a finding of likelihood of confusion.

Applicant argues with respect to the *du Pont* factor of conditions under which sales are made that consumers who decide to purchase one or another of “non-chemical additives” or “petroleum based fuel products” are sophisticated and know exactly what they are buying and from whom they are buying it, thus minimizing any chance of confusion. Applicant further argues that “because consumers of fuel additives are knowledgeable, slight differences in the products, (i.e., a blue [sic] translucent blue bottle with enzyme additives versus [a] transparent bottle with blue petroleum) would further distinguish the products in the minds of sophisticated consumers.” Applicant’s br. p. 9.

The problem with this argument is that applicant has introduced no evidence whatsoever to support its position. On the other hand, the examining attorney made of record with his November 3, 2010, Office Action, a copy of a screen shot taken from the website of ACE Hardware showing that a bottle of applicant’s fuel additive may be purchased for \$4.99.¹⁵ Although we have no information concerning the specific cost of registrant’s fuel additives, we believe they may include relatively low cost items. We base this belief on examples of other relatively

¹⁵ Retrieved on November 3, 2010, at <http://www.acehardwareoutlet.com/productdetails.aspx?sku=8239378&source=GoogleBase>.

low cost fuel additives, e.g., a gas stabilizer from Fuel Fresh cost \$9.95. *See* Exhibits to the Office Action issued November 3, 2010. Based on the relatively inexpensive costs of fuel additives, we believe that consumers would exercise no more than an ordinary degree of care in their purchasing decisions. However, even assuming *arguendo* that purchasers of fuel additives would exercise some degree of care in their purchasing decisions, even knowledgeable and careful purchasers can be confused as to source, where, as here, very similar marks are used in connection with overlapping goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible."). *See also Refreshment Machinery Inc. v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not automatically eliminate the likelihood of confusion because "[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved").

We thus find this *du Pont* factor neutral.

After careful consideration of the arguments and all of the evidence of record, even if not specifically addressed, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and the cited mark,

their contemporaneous use on closely related goods sold in overlapping trade channels is likely to cause confusion as to the source or sponsorship of such goods.

To the extent that any of applicant's points raises a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 223 USPQ at 1290.

Decision: The refusal to register is affirmed.