

This opinion is not a  
Precedent of the TTAB

Mailed: December 9, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re CP Bio, Inc.*  
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Serial No. 85692806  
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Jen-Feng Lee, Esq. for CP Bio, Inc.

Brian P. Callaghan, Trademark Examining Attorney, Law Office 108,  
Andrew Lawrence, Managing Attorney.  
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Before Cataldo, Wolfson, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

CP Bio, Inc. (“Applicant”) filed an application to register on the Principal Register the mark **PhotoGro**, in standard characters, for “Fertilizers for agricultural use,” in International Class 1.<sup>1</sup> Applicant has voluntarily disclaimed the exclusive right to use the word “Photo” apart from the mark as shown.

The Trademark Examining Attorney refused registration under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used in connection with Applicant’s goods, so resembles the registered mark PHOTO

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<sup>1</sup> Application Serial No. 85692806, filed under Trademark Act § 1(a), 15 U.S.C. § 1051(a), on August 1, 2012, with a claim of first use as of 2001 and first use in commerce as of 2002.

MAX (also in standard characters) as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is registered on the Principal Register for “Fertilizers; Plant nutrition preparations,” in International Class 1.<sup>2</sup> When the refusal was made final, Applicant appealed. The case is fully briefed.

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 as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the goods of Applicant and Registrant, we find that they are legally identical. The cited registration covers “Fertilizers” and Applicant seeks registration of its mark for “Fertilizers for agricultural use.” We must presume that Registrant’s goods encompass all goods of the nature and type identified in the registration. *In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006). Accordingly, Registrant’s “fertilizers” encompass within their scope Applicant’s more specifically identified “fertilizers for agricultural use.” There is no need for us to consider whether Applicant’s goods are similar to Registrant’s “Plant nutrition preparations.” In the context of an analysis under Section 2(d), where all of the goods in the application are in a single International Class, it is sufficient if

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<sup>2</sup> Reg. No. 4234686, issued on October 30, 2012.



likelihood of confusion is found with respect to use of the mark on any item that comes within the description of goods in the application or registration. *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, the *du Pont* factor of the similarity or dissimilarity of the goods weighs in favor of a finding of likelihood of confusion.

Because Applicant's goods are legally identical to those identified in the cited registration, we must presume that the goods of Applicant and Registrant move in the same channels of trade and are available to the same classes of customers for such goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). These factors also favor a finding of likelihood of confusion.

We now turn to the similarity or dissimilarity of the marks at issue as to appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In our analysis under Section 2(d) we compare the marks at issue in their entirety. However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in

their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant and the Examining Attorney have argued extensively over which portions of the marks at issue should be considered “dominant” for purposes of our analysis. The Examining Attorney contends that PHOTO is the dominant portion of each mark because it is the first element of each mark. To reinforce his contention that PHOTO, rather than -GRO, is the dominant portion of Applicant’s mark, the Examining Attorney has presented a number of third-party registrations<sup>3</sup> of fertilizer trademarks that include the element GROW with a disclaimer of the exclusive right to use GROW apart from the mark as a whole. Among these, we note the following:

<u>Reg. No.</u>	<u>Mark</u>
2473308	<b>NUTRI GROW</b>
3590484	<b>MONSTER GROW</b>
3084359	<b>GROW  MORE</b>
3984093	<b>NACHURS SOY GROW</b>
4104340	<b>Atomic Grow</b>
4178086	<b>Mighty Grow Organics</b>
4257139	<b>EC  GROW</b>

The Examining Attorney argues that -GRO in Applicant’s mark is a misspelling of the word “grow.” In support of this contention, the Examining Attorney has

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<sup>3</sup> Office Action of July 2, 2013 at 11-44.

submitted a copy of Reg. No. 1948136 for the mark HUMA GRO, for fertilizers, which contains a disclaimer of the exclusive right to use the word “Grow.”<sup>4</sup> The Examining Attorney argues further that the disclaimers in the registrations listed above demonstrate that “grow” is a descriptive term in the field of fertilizers; and that a descriptive term “is typically less significant or less dominant” as a component of a mark for purposes of an analysis of likelihood of confusion.<sup>5</sup> (The Examining Attorney has not presented any evidence to demonstrate that the element MAX in Registrant’s mark should be considered less dominant or weak.)

Applicant, in response, argues that PHOTO is not the dominant component of its mark, because Applicant has disclaimed PHOTO; and that “the greater weight for overall analysis should be placed on ‘PHOTO MAX’ v.s. [sic] ‘GRO.’”<sup>6</sup> However, Applicant’s voluntary disclaimer of the exclusive right to use PHOTO (which was not required by the Examining Attorney) does not automatically deprive the element PHOTO of dominance. The question of whether an element of a mark is dominant over other elements goes to the expected (or demonstrated) perceptions of the relevant customers for the goods. When such customers see the mark, they are not aware of the existence of a disclaimer in the records of the USPTO. *In re MCI Communications Corp.*, 21 USPQ2d 1534, 1537 (Comr. Pats. 1991) (“Therefore,

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<sup>4</sup> USPTO procedure indicates that where disclaimable matter is “misspelled,” the disclaimed word should be set forth in its correct spelling. TMEP § 1213.08(c) (October 2014). See *In re Omaha Nat’l Corp.*, 819 F.2d 1117, 1119, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987).

<sup>5</sup> Examining Attorney’s brief, 12 TTABVUE 7.

<sup>6</sup> Applicant’s brief at 6-7, 10 TTABVUE 7-8.

disclaimer of matter will never serve to obviate the issue of likelihood of confusion.”), *citing In re National Data Corporation*, 224 USPQ at 751.

Applicant also asks that we consider the dictionary definition of the word “photosynthesis,” and argues that, in the marks at issue, the term PHOTO is suggestive of “a product for plants.”<sup>7</sup> Applicant argues that this suggestive meaning renders the PHOTO component of its mark “much less dominant.” We take notice of the following definition:

**Pho•to•synthesis** ... synthesis of chemical compounds with the aid of light ... *esp* : the formation of carbohydrates from carbon dioxide and a source of hydrogen (as water) in chlorophyll-containing cells (as of green plants) exposed to light ....

1703 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993).<sup>8</sup>

Applicant further urges us to consider, without supporting evidence, that “Photo’ is the Greek word for light.”<sup>9</sup> However, Applicant submits no evidence to indicate that the relevant customers for the goods at issue would have knowledge of this meaning of “Photo.”

Applicant also points out that it owns or owned the following registrations, arguing that they show that Applicant places commercial emphasis on the -GRO portion of its marks:

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<sup>7</sup> Applicant’s Reply Brief at 3, 13 TTABVUE 4.

<sup>8</sup> 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).

<sup>9</sup> Applicant’s Reply Brief at 3, 13 TTABVUE 4.

<u>Reg. No.</u>	<u>Mark</u>
3126857	<b>HappyGro</b>
3126856	<b>MegaGro</b>
3126853	<b>GoldenGro</b>
2662906	<b>PHOTOGRO</b> (cancelled)

Applicant further points out that Registrant owns the following registrations in addition to the cited registration of PHOTO MAX, and argues that these registrations demonstrate that Registrant places commercial emphasis on the MAX component of its marks:

<u>Reg. No.</u>	<u>Mark</u>
3619370	<b>MAX SET</b>
2979919	<b>WECO MAX</b>
4155312	<b>MAX SET ULTRA</b> <sup>10</sup>

We note that Applicant refers to “the prevalence of various coexisting trademarks all starting with the word PHOTO which are all being used on fertilizer.”<sup>11</sup> However, there is no evidence of record of such marks. In its reply brief, Applicant cites a third-party registration of the mark PHOTOTRON. However, such

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<sup>10</sup> Applicant listed the above registrations of itself and Registrant, without submitting actual copies of the registrations, in its response of June 5, 2013. The Examining Attorney did not object or advise Applicant that a listing is insufficient to make such registrations of record at a time when Applicant could cure the insufficiency. Accordingly, we deem waived any objection of the Examining Attorney to the consideration of this list of registrations. *In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012); TBMP § 1207.03.

<sup>11</sup> Applicant’s reply brief at 1, 13 TTABVUE 2.

a reference is insufficient to make this registration of record. The Board does not take judicial notice of the files of applications or registrations residing in the Office. *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012).

Taking into consideration all of the foregoing, we see little cause to give substantially more weight to any component of either mark. The components PHOTO, GRO, and MAX are of relatively equal distinctiveness. The fact that Applicant and Registrant may own, respectively, other -GRO marks and other MAX marks, is of little relevance. There is no evidence to show that members of the relevant public are aware of the existence of such other marks. We do, however, acknowledge that the position of the PHOTO component as the initial element of each mark may give it slightly more prominence than the remainder of the marks. *Palm Bay Imports*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

Considering the two marks PhotoGro and PHOTO MAX in their entireties, we note that they resemble each other visually, phonetically, and in meaning to the extent that each begins with the element PHOTO. Although we acknowledge the differences in sound, meaning and appearance that arise from the different endings -GRO and MAX, the marks share a structural similarity, in that each consists of PHOTO with three additional letters. The fact that Registrant’s mark includes a



space before the final three letters while Applicant's mark lacks such a space is insignificant. The applicable test is not whether the marks can be distinguished when subjected to a side-by-side comparison. *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). Rather, 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).

Considering the overall commercial impressions of the two marks, we find it likely that customers would perceive the two marks as related to each other. In reaching this conclusion, we bear in mind that when marks would appear on virtually identical goods, the degree of similarity necessary to support a conclusion of likely confusion declines. *Bridgestone Americas Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Accordingly, we find that the *du Pont* factor of the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

Applicant has raised a number of other issues in support of its appeal. First, Applicant claims to have made use of its mark prior to Registrant's adoption of the cited mark.<sup>12</sup> This allegation is unsupported by evidence of record. It is also not relevant to this *ex parte* proceeding. *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ

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<sup>12</sup> Applicant's brief at 4, 4 TTABVUE 5.

278, 280 (CCPA 1971). The Examining Attorney's refusal was issued under Section 2(d) of the Trademark Act, which provides for refusal on the basis of a mark's resemblance to "a mark registered in the Patent and Trademark Office ...," without regard to the applicant's alleged priority. 15 U.S.C. § 1052(d). An *ex parte* appeal is not the proper forum for challenging the validity of a registration. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997).

Applicant discusses in its reply brief the prosecution of applications for other marks and its own earlier successful prosecution of an application for the mark PHOTOGRO:

PHOTOTRON 4,166,596 did not prevent the registration of PHOTO MAX 4234686 several months later. ... PHOTO MAX and PHOTOGRO were not confusingly similar with each other in 2002, so should not be confusingly similar with each other now. ... Applicant's predecessor in interest filed for and received PHOTOGRO February 7, 2002 while PHOTO MAX was registered by a different party for the same exact goods, namely fertilizer.

Reply brief at 2, 13 TTABVUE 3. Applicant's contentions cannot be confirmed because the prosecution records discussed by Applicant are not of record in this proceeding. Even if they were, their relevance is questionable. We must decide each case on its own merits and "[e]ven if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board." *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Finally, Applicant contends that its mark and Registrant's mark "have been coexisting for at least 15 years now" without actual confusion.<sup>13</sup> Again, Applicant has submitted no evidence to support this contention. Uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). This is particularly true in this *ex parte* proceeding in which we do not have the benefit of Registrant's input as to any instances of confusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. In view of the similarity of the marks at issue, the identical nature of the goods, and our assumption that they must travel through the same channels of trade to the same classes of customers, we find that Applicant's mark so closely resembles the registered mark as to be likely to cause confusion, mistake or deception as to the source of Applicant's goods.

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

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<sup>13</sup> *Id.* at 2, 13 TTABVUE 3.