

**This Opinion Is Not a
Precedent Of The TTAB**

Mailed: September 16, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re United Fibers LLC
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Serial No. 85721638
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Matthew H. Swyers of The Trademark Company, for United Fibers LLC.

Paul Moreno, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

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Before Ritchie, Lykos, and Masiello, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

United Fibers LLC (“Applicant”) filed an application to register the mark GREEN DEPOT, and design, as shown below, for services identified as “recycling,” in International Class 40:¹



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¹ Serial No. 85721638, filed September 6, 2012, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use and first use in commerce in June, 2011, and disclaiming an exclusive right to the term “green” apart from the mark as shown.

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 following marks, all owned by the same registrant, that when used on or in connection with Applicant's identified services, it is likely to cause confusion or mistake or to deceive:

1. ²

The logo for GREENDEPOT features the word "GREENDEPOT" in a bold, black, sans-serif font. The letter "O" is replaced by a stylized black silhouette of a tree.

for "on-line retail store services featuring home improvement products; retail stores featuring home improvement products," in International Class 35.

2. ³

The logo for GREENDEPOT BIOFUEL features the word "GREENDEPOT" in a bold, black, sans-serif font. The letter "O" is replaced by a stylized black silhouette of a flame. Below "GREENDEPOT" is the word "BIOFUEL" in a smaller, black, sans-serif font.

for "public advocacy to promote awareness of bio fuel," in International Class 35.

3. ⁴

² Registration No. 3515774, issued October 14, 2008.

³ Registration No. 3704134, issued November 3, 2009.

⁴ Registration No. 3707465, issued November 10, 2009.



for “marketing and advertising ecologically friendly consumer services, and construction and design professionals,” in International Class 35.

4. ⁵



for, *inter alia*, “retail store services featuring lumber, non-metal doors and frames, non-metal windows and frames, vinyl windows and frames, ceramic floor tiles, non-metal ceiling tiles, ceramic wall tiles, wood flooring, rubber flooring, asphalt roofing, ceramic tile roofing, roofing paper, roofing cement, non-metal pipes and fittings and joints, cement and cement flooring, bricks, mortar and mortar mixes, ceramic pipes, cobbles and boulders, decorative glass, fiberboards, granite, glass blocks, glass tiles, gypsum tiles, grout, joists, laminate flooring, non-metal fencing and fence posts, paving blocks and stones, plaster, plywood, plastic tiles, floors, pipes and fittings, sand, slate, stucco, spackling compounds, vinyl siding, wood posts, joists, paneling, poles, blocks and boards, bamboo flooring, non-metal plumbing pipes and materials,

⁵ Registration No. 3444015, issued June 10, 2008. This registration has goods in other classes, but the Examining Attorney confined the refusal to the services in Class 35.

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metal beams, rolled metal, metal sheets, metal cables, metal building frames, metal hardware, metal roofing materials, metal ceiling tiles, metal pipes-fittings-joints, metal flooring, aluminum, bronze, brass, copper, lead and cast iron materials, metal chains, metal wiring, metal poles, posts, joints, joists, brackets, hooks, pins, bolts, screws, dowels, cleats, fasteners, metal gutter pipes, metal waste pipes, metal plumbing pipes, metal gates, fencing, and fence posts, house paint, exterior paint, floor paint, dyes, colorants, compounds, oils, binding agents, lacquers, stains, power tools, machine tools, home goods, general building materials, lawn and garden goods and tools and machinery,” in International Class 35.

Upon final refusal of registration, Applicant filed a timely appeal. Both Applicant and the Examining Attorney filed briefs.

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 marks”). We consider each of the factors as to which Applicant or the Examining Attorney presented arguments or evidence. The others, we consider to be neutral.

We find the mark in Registration No. 3515774 (GREENDEPOT, and design) to be the most relevant for our *du Pont* analysis, and we proceed accordingly. Since this is the most relevant registration, if we find a likelihood of confusion, we need not find it as to the others. On the other hand, if we do not reach that conclusion, we would not find it as to the other cited registrations either. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Both Applicant’s mark and the mark in the cited registration consist of the term “GREENDEPOT” or “GREEN DEPOT” with a space between the words. Applicant’s mark has the letter “o” formulated in the shape of a fruit, with two leaves on top, while the mark in the cited registration has the letter “o” shaped as a leaf. The existence of a space between the terms has no source-indicating significance. As for the leaf design of the letter “o,” it is typically stated that it is the

words that consumers will use to call for or refer to the goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012), *citing CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). This is especially so where, as here, the design in each is both similar to each other and also merely serves to emphasize the commercial impression of the literal portion of the marks, with a leaf, which is suggestive of the “green” in nature. As such, we find that the marks are very similar in sight, sound, and commercial impression.

Applicant argues that the terms “green” and “depot” are weak. We note that both Applicant and the Examining Attorney submitted third-party registrations that include the term “green,” and indeed the Examining Attorney submitted ten registrations including the term “green” for “recycling” and which disclaim the term. Applicant submitted eight registrations containing “green” (two disclaiming green), and five containing “depot.” Finally, the Examining Attorney submitted a dictionary definition of “green” as meaning “beneficial to the environment.”⁶ There are, however, no third-party registrations of record that include both “green” and “depot,” and none are as close to the mark in the cited registration as is Applicant’s mark. We accept that the term “green” is highly suggestive or merely descriptive for Applicant’s “recycling” services. But it has not been shown to be descriptive of the services in the cited registration. Further, we note that even the owner of a weak mark is entitled to protection from likelihood of confusion by competing marks. *See Giant Food Inc. v. Roos and Mastacco, Inc.*, 218 USPQ 521 (TTAB 1982).

We find this *du Pont* factor favors finding a likelihood of consumer confusion.

⁶ <http://education.yahoo.com>.

The Services and Channels of Trade and Classes of Consumers

We next consider the similarity or dissimilarity of the services at issue in the application and the cited registration. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's identification of services specifies "recycling," while the identification in the cited registration includes "on-line retail store services featuring home improvement products; retail stores featuring home improvement products." The Examining Attorney submitted a number of third-party websites that reference the use of recycling with retail home improvement services.⁷ Excerpts include the following:

Insider's Guide to Recycled, Reclaimed and Sustainable Home Improvement Materials: How to go green with recycled, reclaimed and salvaged home improvement products and materials
By M.G. Hardiman, Yahoo Contributor Network
Attached to October 23, 2013 Office Action, p17.
Voices.yahoo.com (August 2, 2010)

Don't demolish that old house; recycle it: Items such as appliances, cabinetry and wood flooring can be reused, . . . I'm a small time home improvement contractor and I try to recycle as much as possible.
Attached to October 23, 2013 Office Action, p26.
Realestate.msn.com

Question: I want to build a super-energy-efficient house using building products that are made from recycled materials.
Attached to October 23, 2013 Office Action, p26.
Articles.latimes.com

⁷ The Examining Attorney also included third-party registrations. But as they did not specifically include retail or on-line services of home improvement products, we give them no consideration in our analysis.

Cardboard Crew Success!: It was the first day first day [sic] that the class of 2015 was on campus together as they all moved into their dorms on The Commons. It was our goal to collect and recycle all the discarded cardboard, plastic, and Styrofoam from this busy day.

Attached to January 6, 2014 Final Office Action, p22.

http://vadyspear.wordpress.com

EcoBuilding Bargains: Welcome to EcoBuilding Bargains! As seen on This Old House: We are the largest used building materials store in New England! From plumbing and lighting fixtures to lumber, vanities, and cabinets, our prices will amaze you. We also have products to make your home greener and more energy efficient. . . . Our new and recycled building materials, tools and even appliances can help you save money and make your home more beautiful.

Attached to January 6, 2014 Final Office Action, p42.

Ecobuildingbargains.org

Shop Demo Depot: Shop Demo Depot – Saving You \$\$\$ By Reclaiming and Reusing:

Looking for inexpensive building materials? One-of-a-kind pieces? Recycled furniture or paint? We have it all in our store! . . . Rather than toss used building materials in a dumpster or out on the curb for garbage pickup, contractors and homeowners now have an outlet for reusable building materials from new construction, remodeling or demolition projects.

Attached to January 6, 2014 Final Office Action, p44.

Shoptemodetpot.com

We find these Internet excerpts to be persuasive evidence of the relatedness of the services and to weigh in favor of a likelihood of confusion.

As to channels of trade and classes of consumers, neither the identification of goods in the application nor the identification of goods in the cited registration contains any limitations. Accordingly, we must assume that applicant's and registrant's services may travel via all normal channels of trade and be marketed to typical consumers, which would include overlapping members of the general public that recycle by choice and by law, and those that shop for home improvement

products. *See Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). We note that Applicant submitted the declaration of Larry Williams, dated July 11, 2013, which commented that Applicant offers its services “through direct mailings” as well as “word of mouth.” There is nothing to preclude the registrant from offering its services through some of these same channels. Nevertheless, without further evidence, we find the third *du Pont* factor to be neutral.

Consumer Sophistication

Applicant urges us to consider consumer sophistication as a factor. The Williams declaration asserts that Applicant’s clients exercise a “very high level of sophistication.” (Williams decl. at para. 9). We note, however, that recycling services include all general consumers, and may include services that are low cost, or as Applicant describes its product, “free of charge.” *Id.* Accordingly, we find this *du Pont* factor to be neutral as well.

Conclusion

Considering all of the evidence and arguments of record as it pertains to the *du Pont* factors, we find the marks to be highly similar, and the goods to be related, although there is no specific evidence that they are offered via the same channels of trade to the same classes of purchasers. We also find that that they are offered to all classes of consumers, including unsophisticated purchasers. Overall, we find a likelihood of confusion between Applicant’s mark and the mark in cited Registration

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No. 3515774, which obviates a need for us to perform a Section 2(d) analysis with respect to the other cited registrations.

Decision: The Section 2(d) refusal to register is affirmed.