

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 17, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Progressive Foam Technologies, Inc.
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Serial No. 85738691
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Richard M. Klein of Fay Sharpe LLP for Progressive Foam Technologies, Inc.

Daniel F. Capshaw, Trademark Examining Attorney, Law Office 110,
Chris A.F. Pedersen, Managing Attorney.

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Before Zervas, Cataldo, and Wellington,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Progressive Foam Technologies, Inc. (“Applicant”) seeks registration on the
Principal Register of the mark:

Progressive  **Foam**

for “construction materials, namely, exterior building insulation made of
polystyrene, expanded polystyrene, or other foamed thermoplastic, shaped to

conform with other building products such as siding, roofing, decking, or fencing” in International Class 17.¹ Applicant has disclaimed exclusive use of the term FOAM.

The Trademark Examining Attorney has refused registration of Applicant’s mark on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the registered mark:



for “home energy assessments leading to and including installation of advanced insulation systems to create a more energy efficient home thermal envelope” in International Class 37.² The registration contains a disclaimer of exclusive use of the wording INSULATION & WINDOWS.

Applicant filed a request for reconsideration and appealed and the final refusal. The Examining Attorney denied the request for reconsideration.³ The refusal has been fully briefed by Applicant and the Examining Attorney, including a reply brief from Applicant.

¹ Application Serial No. 85738691 was filed on September 26, 2012, based upon Applicant’s allegation of first use of the mark anywhere and in commerce on March 13, 2002, under Section 1(a) of the Trademark Act.

² Registration No. 3647161 issued June 30, 2009.

³ Applicant filed a proposed amendment to its identification of goods with the request for reconsideration which the Examining Attorney found improperly exceeded the scope of the identification previously accepted. In its appeal brief, Applicant does not raise the issue of the proposed amendment to the identification of goods. Accordingly, the issue is not before us and we give it no further consideration.

Based upon the record and the arguments made, we affirm the likelihood of confusion refusal.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Similarity of the Marks

We begin by comparing the two marks in their entireties and, in doing so, look to their appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). We keep in mind that, under this factor, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison; “[i]nstead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.” *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735,

1741 (TTAB 1991); *see also*, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Thus, although we place the marks alongside each other in the following paragraph for purposes of this decision, consumers will rarely have the luxury of viewing the marks in such a manner.

Here, upon evaluating the following two marks:



we agree with the Examining Attorney that the dominant feature of each mark is the term “Progressive.” Because this term appears first in each mark, it is most likely to be impressed in purchasers’ memories. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Moreover, for source-identifying purposes, consumers will likely focus on the PROGRESSIVE element in each mark in view of the fact that the additional literal portions in the marks are descriptive of the goods and services and thus disclaimed. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), *quoting*, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1983) (“Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60

USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark's commercial impression”). As explained by the Examining Attorney and not contradicted by Applicant, “FOAM describes the composition/type of Applicant’s goods and INSULATION & WINDOWS describes the goods installed and the field of services provided by Registrant.”⁴

Applicant argues that the respective design elements in the marks suffice for purposes of avoiding a likelihood of confusion. Specifically, it argues the design elements are “notably different” and that “[t]hese visual differences cannot be confused with each other, so that there is no likelihood of confusion between [the marks].”⁵ There is certainly no dispute that the design elements are different from each other; however, we disagree with Applicant’s ultimate conclusion regarding whether this difference avoids a likelihood of confusion. None of the design portions in either mark is so unique or overwhelming to make a substantial impact on the overall commercial impression of either mark. The roof design in Registrant’s mark perhaps may be understood by consumers as being suggestive of homes or home construction when considered in the context of the services and the stylized letter “O” appears to be nothing more than a stylized O. Likewise, the “sunburst” design in Applicant’s mark has little meaning other than that of a stylized sun separating the words PROGRESSIVE and FOAM. Thus, as mentioned and for the foregoing

⁴ Examining Attorney’s Brief at (unnumbered) p. 5. In its Reply Brief, Applicant acknowledges that “the word ‘Foam’ emphasizes what the product is made of, whereas the phrase ‘Insulation & Windows’ emphasizes what the product is used for.” Reply Brief at p. 4

⁵ Reply Brief at p. 4

reasons, we remain convinced that the source-identifying essence of both marks is the literal term PROGRESSIVE.

In sum, we view the marks in their entirety and find them to be very similar. The fact that each mark is dominated by the same term PROGRESSIVE simply outweighs the points of dissimilarity. *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here 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 consideration of the marks in their entirety.”). Thus, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

Similarity of the Goods and Services Described in the Application and Registration

We turn now to the *du Pont* factor involving the relatedness of Applicant’s goods and Registrant’s services. It is settled that in making our determination, we must look to the goods and services as identified in the application vis-à-vis those recited in the cited registration. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). It is also not necessary that the respective goods and services be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, or that the conditions and activities surrounding the marketing of the goods or services 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 originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Based on the plain meaning of the recitations of the goods and services in the respective application and registration, it is evident that Applicant's "exterior building insulation products" are related to Registrant's "home energy assessments leading to and including installation of advanced insulation systems to create a more energy efficient home thermal envelope." Simply put, Registrant's services include the installation of insulation systems in homes and Applicant's insulation products may be used in homes. Put another way, it is feasible that a homeowner may have Registrant installing Applicant's goods. As the Examining Attorney pointed out, a potential consumer of the products and services would be the same, namely a homeowner, but there is also the common field or purpose of insulating the consumer's home.

The evidence of record confirms the relatedness of the goods and services. The Examining Attorney submitted numerous third-party website printouts for companies touting their insulation products and services.⁶ The Examining Attorney has efficiently laid out representative and relevant sample excerpts from these websites in his brief and we see no point in repeating this information. Suffice it to say that this evidence clearly demonstrates that insulation companies will not only provide insulation products but will install these insulation products. We further

⁶ Submitted with Office Actions issued on October 22, 2012 and May 24, 2013.

note that many of the company website excerpts include those that specialize in foam insulation products like those of Applicant.

The Examining Attorney also submitted printouts of eleven use-based, third-party registrations which include both insulation products, as well as the service of installing the insulation products, in their identifications of goods and services.⁷ These registrations have probative value to the extent that they suggest that insulation products and services are the type of goods and services that could be marketed by a single source under a single mark. *See In re Association of the United States Army*, 85 USPQ2d 1264, 1270 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In sum, it has been shown that Applicant's insulation goods, as described in the application, and Registrant's insulation installation services are clearly related. The products and services are not only complementary, but will be targeting the same class of consumers and will be found in the same trade channels.

Conclusion

Because the marks are similar, the goods and services are related, with the goods and services targeting homeowners and found in the same trade channels, we find that Applicant's mark, if used in association with the goods identified in the application, is likely to cause confusion with the registered mark in connection with the services recited in the registration.

⁷ *Id.*

Decision: The likelihood of confusion refusal to register Applicant's mark is affirmed.