

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

Mailed: April 23, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Ecopetrol S.A.
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Serial No. 85789442
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Susan B. Flohr and Jamie L. Bertha of Blank Rome LLP,
for Ecopetrol S.A.

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

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Before Zervas, Wolfson and Shaw,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Ecopetrol S.A. (“Applicant”) seeks registration on the Principal Register of the
mark depicted below:



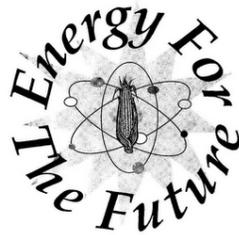
for

All purpose lubricants; benzene fuel; hydrocarbon fuels;
raw petroleum; refined petroleum; petroleum-derived

fuels; oil-based fossil fuels; excluding ethanol fuels, all of the foregoing sold at wholesale; naphtha; paraffin

in International Class 4.¹

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), contending that Applicant's use of its mark for its identified goods is likely to cause confusion with the mark depicted below:



for "ethanol fuels" in International Class 4.²

¹ Application Serial No. 85789442 was filed on November 28, 2012 under Trademark Act Section 44(e), based on Colombian Reg. No. 4456362, registered July 27, 2012. The original application was divided on June 30, 2014 and the following goods and services were placed in child application Serial No. 85981869: "candles; wicks for candles for lighting; wicks for oil lamps" in International Class 4, and "analysis for oil research; analysis of oil fields; analysis services for oil field exploration; design and development of computer hardware and software; exploration and searching of oil and gas; industrial research in the field of oil and gas; providing technology information relating to oil and gas industry; research and development of technology in the field of oil and gas; scientific research and development" in International Class 42. The child application issued on December 30, 2014 under Reg. No. 4661810.

The colors light green, dark green and yellow are claimed as a feature of the mark. The description of the mark reads: "The mark consists of the word 'ECOPETROL' and a stylized design of an iguana, below which [sic] appears the wording 'ENERGY [sic] FOR THE FUTURE'. The color yellow appears in the letters 'ECO' of the word 'ECOPETROL'. The light green color appears in the iguana. The dark green color appears in the letters 'PETROL', in the iguana and in the wording 'ENERGY FOR THE FUTURE'."

² Reg. No. 3560054, registered January 13, 2009. The description of the mark reads: "The mark consists of the words 'ENERGY FOR THE FUTURE' in circular form, a star in the background, a corn cob and husk centrally located about the star within the words, and an

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

A. The Goods

We first turn to a consideration of the goods. In making our determination regarding the relatedness of the goods, we must look to the goods as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion*

illustration of an atom with atomic orbitals and a nucleus centered about the star and behind the corn cob and husk.”

Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 17893, 1787 (Fed. Cir. 1990). It is well settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. It is sufficient instead 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 producer. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

In order to show a relationship between the respective goods, the Examining Attorney has made of record several use-based third-party registrations which indicate that entities have registered their marks for goods of the type listed in Applicant's application (*i.e.*, non-renewable fuels such as hydrocarbon fuels) and for goods of the type listed in the cited registration (*i.e.*, renewable fuels such as ethanol). Although third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, these printouts have probative value to the extent that they serve to suggest that the services listed therein are of a kind that may emanate from a single source. *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck*

Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In addition, the Examining Attorney submitted printouts of the web pages of several entities which offer fuels of all types, including pages from Applicant's website that states that Applicant focuses on "petroleum, gas, petrochemicals and alternative fuels."³ The evidence also shows that many gas stations now offer traditional gasoline products as well as gasolines that are mixtures of petroleum-based fuels and ethanol,⁴ and that some refineries sell both types of fuel.⁵ Applicant, however, specifically excludes "ethanol fuels" from the identification of goods for the involved application.⁶ Nonetheless, we find the goods are related.

B. Trade Channels and Classes of Purchasers; Sophistication

Although Applicant has restricted its trade channels to wholesale channels only, there are no trade channel restrictions or limitations in Registrant's identification of goods. Accordingly, we may presume that Registrant sells ethanol fuels in all

³ At <http://www.ecopetrol.com>, attached to Final Office Action dated October 7, 2013.

⁴ For example, gas stations such as Gulf Oil, Citgo, Sunoco, and BP offer gasoline, lubricants, and ethanol-blended fuels. At <http://www.gulfoil.com>, <http://www.citgo.com>, <http://www.gosunoco.com>, and <http://www.bp.com>, *id.*

⁵ Valero Marketing and Supply Company lists its fuels as "gasoline, diesel, jet fuel, and renewables"; under the renewables tab Valero advertises itself as "the first traditional refiner[y] to enter production of ethanol." At <http://www.valero.com>, *id.*

⁶ The identification is slightly ambiguous because the limiting language "excluding ethanol fuels...wholesale" is preceded by a semi-colon, thus separating the wording from the remainder of the goods into its own statement. However, the record suggests that the limitation is intended to apply to Applicant's entire identification except for "naphtha; paraffin." We have so construed the identification of goods. As for naphtha and paraffin, neither contain ethanol fuels; naphtha is a general term that refers to flammable liquid hydrocarbon mixtures, and paraffin is a type of wax obtained from crude petroleum. At Dictionary.com, based on the Random House Dictionary, © Random House, Inc. 2015. The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

normal channels of trade for such goods, and to all the usual classes of purchasers for such goods, including at wholesale to refineries. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Applicant argues that these channels do not include refineries because ethanol fuel “is a final product, typically sold directly to fuel stations or the end consumer” while Applicant sells to “oil companies that take the crude material and refine it into an end product,” trade channels that are typically “one step removed from the end consumer.”⁷ Inasmuch as ethanol fuels are made from biological raw materials such as corn, while petroleum products are fossil fuels that come from drilling in the earth, the processes involved in extracting oil and natural gas from the earth are vastly different from those required to grow and harvest corn for refinement into ethanol.⁸ Accordingly, even if the trade channels overlap, and Registrant sells ethanol to refineries rather than directly to gas stations or other end users, these consumers are sophisticated about the nature of the fuel mixtures they create. It is unlikely they would confuse the producer of a biofuel with the manufacturing source of a hydrocarbon fuel, and as the online advertising submitted by the Examining Attorney makes clear, the percentage amount of ethanol mixed with gasoline is significant in creating a proper formula. Refineries purchasing ethanol fuels and traditional fuels are likely to exercise caution in their purchasers, and care in discerning the products they are selecting. We therefore

⁷ Applicant’s Brief, 13 TTABVUE 19.

⁸ Attached to Applicant’s September 16, 2013 response. Applicant’s production of crude oil and gas includes “the extraction, collection, treatment, storage and pumping or compression of hydrocarbons.” At www.ecopetrol.com. Registrant’s mission is to “improve and stabilize the agricultural economic resources of the multi-state region by establishing corn based ethanol as the premier renewable fuel.” At www.bigriverresources.com.

find that the presumption of overlapping trade channels only slightly favors a finding of likelihood of confusion, while the fourth *du Pont* factor, the sophistication of the relevant purchasers, favors a finding of no likelihood of confusion.

C. The Marks

Turning then to the marks, there is no dispute that the phrase ENERGY FOR THE FUTURE appears in both marks. The Examining Attorney contends that this literal element should be given more weight because it is most easily remembered by purchasers and are the means by which consumers call for the goods. Applicant argues, on the other hand, that the shared element in the marks is diluted and that the Examining Attorney impermissibly dissected the marks, failing to appreciate that the wording ECOPETROL and lizard design dominate the mark overall and that when considered in their entireties, there is no likelihood of confusion.

When comparing the marks, it is well established that we consider each mark as to appearance, sound, connotation and commercial impression, to determine the similarity or dissimilarity between them. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (*quoting du Pont*); *Palm Bay*, 73 USPQ2d at 1692. Our decision must be based on the entire marks, not just part of the marks, but more or less weight may be 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). The test, under the first *du Pont* factor, 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 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).

When we compare the marks in their entireties, we find that they are different in appearance, sound, meaning and commercial impression. The word ECOPETROL in Applicant’s mark, and the design features in both marks, gives each mark a different appearance and sound. Applicant’s mark is dominated by the large, green and yellow, iguana and its house mark, “ECOPETROL.” The shared wording, ENERGY FOR THE FUTURE, is of less significance in Applicant’s mark, and even though “petrol” in the term ECOPETROL would be understood to refer to “petroleum,” and “eco” to ecology, the telescoped word ECOPETROL is, at worst, suggestive of petroleum products, while the iguana design is inherently distinctive and fanciful. On the other hand, Registrant’s mark also contains a prominent, distinctive design of a stylized atom with a corn shape as its nucleus, which has been integrated with the highly suggestive wording ENERGY FOR THE FUTURE. Because of the presence of these design features in both marks, as well as the addition in Applicant’s mark of the term ECOPETROL, we find the marks to be more dissimilar than similar in sight and sound. As for the meanings of the marks, as noted, Applicant’s mark suggests petroleum products; on the other hand, because of the drawing of the ear of corn surrounded by “atomic orbitals” in the registered mark, it suggests a biofuel derived from corn. In terms of overall commercial

impressions, while Applicant's mark also includes the phrase ENERGY FOR THE FUTURE, this shared element is highly suggestive as applied to the goods in this case, playing upon commonly used terms in the industry. Where the shared component of the marks in question is highly suggestive, merely descriptive, or plays upon commonly used or registered terms, the addition of a house mark or other material to the allegedly conflicting mark has been determined sufficient to render the marks as a whole sufficiently distinguishable. *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005) (NORTON MCNAUGHTON ESSENTIALS for ladies' sportswear not likely to cause confusion with ESSENTIALS for women's clothing). *See also Bass Pro Trademarks, L.L.C. v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1857-58 (TTAB 2008) (design elements and stylized presentation of marks outweigh similarity resulting from common appearance of descriptive term "Sportsman's Warehouse"); *MarCon Ltd. v. Avon Products Inc.*, 4 USPQ2d 1474, 1476 (TTAB 1987) (applicant's addition of its house mark AVON to suggestive term SILKEN is sufficient to distinguish its AVON SILKEN SOAP from opposer's SILK for hair and skin care products). In the phrase ENERGY FOR THE FUTURE, the term "energy" describes the usable power that comes from oil, gas, ethanol, and other types of fuels. The term "future" is used to indicate symbolically what may be at a later time. The phrase "energy for the future" readily suggests a forward-looking energy company, attributes both Applicant and Registrant, as well as unrelated third parties, may seek to promote in their products. To show that the phrase "energy for the future" has a commonly

accepted meaning, Applicant submitted copies of three registrations held by unrelated third parties: the mark WIND VISION “ENERGY FOR THE FUTURE” L.L.C. and design, registered for “generation of wind energy”;⁹ the mark JX THE FUTURE OF ENERGY RESOURCES AND MATERIALS and design, registered for oil and gas related services;¹⁰ and FUTURE NOW ENERGY, registered for “natural gas.”¹¹ The co-existence of these marks on the Principal Register supports our finding that ENERGY FOR THE FUTURE is highly suggestive of energy products. “Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D’Origine v. Vintners International Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). The first *du Pont* factor does not favor a finding of likelihood of confusion.

II. Balancing the factors.

Having considered all the evidence and arguments of record as pertains to the relevant likelihood of confusion factors, we find that confusion is unlikely to result from the contemporaneous use of Applicant’s mark

⁹ Reg. No. 3634549, registered June 9, 2009, a Section 8 declaration has been accepted.

¹⁰ Reg. No. 4315560, registered April 9, 2013; services include “propane gas supplying; liquefied natural gas supplying; liquefied petroleum gas supplying; design of machines and apparatus in the fields of refining, processing, developing or manufacturing oil.”

¹¹ Reg. No. 4267803, registered January 1, 2013.



ENERGY FOR THE FUTURE and Registrant's mark



. Even though

the marks are used on related goods, Applicant has specifically excluded “ethanol” from its identification of goods. Further, while we are constrained to find that the goods move in the same channels of trade, the only overlapping consumers are wholesalers, typically sophisticated purchasers. Finally, the dissimilarity of the marks simply outweighs the other factors. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Decision: The refusal to register Applicant's mark is reversed.