

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Car Wash Co., Inc.

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Serial Nos. 86011273 and 86011285¹

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Joseph S. Heino and Patrick M. Bergin of Davis & Kuelthau, s.c.,
for Car Wash Co., Inc.

Joanna E. H. Fiorelli, Trademark Examining Attorney, Law Office 105,
Susan Hayash, Managing Attorney.

Before Bucher, Zervas and Hightower,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Car Wash Co., Inc. (“Applicant”) seeks registration on the Principal Register of
SHINE ‘N’ SHIELD in standard character form for the following goods and services:

- “clear coating protectant for vehicles” in International Class 2
(Application Serial No. 86011273); and

¹ When, as here, an applicant has filed *ex parte* appeals to the Board in two co-pending applications, and the cases involve common issues of law or fact, the Board, upon request by an applicant or an examining attorney or upon its own initiative, may order the consolidation of the appeals for purposes of briefing, oral hearing, or final decision. TBMP § 1214 (2014). *See also, e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board *sua sponte* consolidated two appeals); *In re America Online Inc.*, 77 USPQ2d 1618, 1618 (TTAB 2006) (Board consolidated appeals in four applications upon applicant's motion). Accordingly, we consolidate these appeals.

- “car wash services” in International Class 37 (Application Serial No. 86011285).²

Applicant disclaimed the term “Shine” in both applications.

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant’s mark is likely to cause confusion or mistake or to deceive in view of Registration No. 4104661 for the mark SHINE & SHIELD (in standard character form) for the following International Class 3 goods:

Automobile and car wax preparations; Automobile cleaners; Automobile polishes; Automobile tire cleaning and polishing preparations; Automobile wax; Automobile, tire, glass and wheel cleaning preparations; Cleaning, washing and polishing preparations; Polymer sealant for cleaning, shining and protecting automobile exterior surfaces.³

After the Examining Attorney made the refusals final, Applicant appealed. Each appeal is fully briefed. We affirm both refusals to register.

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); and *In re Dixie*

² Both applications were filed on July 16, 2013, and claim first use and first use in commerce on August 1, 2012.

³ Registered February 28, 2012. The term “Shine” is disclaimed.

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 Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

In addition to the similarities or dissimilarities of the marks, the relationship between the goods and services, the relevant *du Pont* factors in this case are the similarities or dissimilarities of trade channels, as argued by Applicant and/or the Examining Attorney.

Similarity or Dissimilarity of the Marks

We compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. 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 overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980).

The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Association of the*

United States Army, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). The average purchaser for Applicant's and registrant's goods and services includes members of the general public who own automobiles.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). The individual components of a mark, however, may be weighed to determine its overall commercial impression. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("[I]n articulating reasons for reaching a conclusion on the issue of confusion, 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 consideration of the marks in their entireties.")).

The Examining Attorney's Brief includes a dictionary definition of "N" as an abbreviation for "and."⁴ Because both marks have the words SHINE and SHIELD,

⁴ See definition from *Random House Unabridged Dictionary* (2d ed.) ("n ... conj. Pron. Spelling. and: Stop 'n save. Look 'n listen. Also, 'n'."). The Board may take judicial notice of

in the same order, separated by a term meaning “and,” the marks are identical in meaning. Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. See *Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion”); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar.’”) (citations omitted)).

In addition, the difference in the appearance of “N” and the ampersand (“&”) and the sound of the letter “N” versus the word “and” (pointed out by Applicant), are minor in comparison with the remaining wording in the marks. This is particularly valid when we consider that the focus is on the recollection of the average purchaser who normally retains a general rather than a specific impression of a trademark, and the test is not whether the marks can be distinguished when subjected to a side-by-side comparison. Thus, despite Applicant’s extensive arguments to the contrary, the marks are also similar in appearance and sound. As for commercial impression, in view of the proximity of the marks in sound, meaning and appearance, and because the significance of the mark does not change when applied to Applicant’s goods, the commercial impression of the marks are identical.

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), and we take judicial notice of the definition proffered by the Examining Attorney.

We are not persuaded by Applicant's arguments and evidence, briefly addressed below, in support of its arguments that we should find the marks dissimilar:

- Applicant points out that the Examining Attorney involved in the prosecution of the application which matured into the cited registration found a difference between the word "and" and an ampersand in connection with a specimen requirement.⁵ The opinion of an Examining Attorney in another application, however, is immaterial to the present application. We are not bound by statements made by examining attorneys. Moreover, the statement did not even concern an "N" which appears in Applicant's mark, and it involved a specimen issue, not the issue of likelihood of confusion. *See In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973).

- According to Applicant, the sound of "N" differs from the sound of "&". Any difference in sound between these two terms is slight and consumers will not notice the slight difference in sound of this term located in the middle of each mark between two identical terms which have the same sound.

- Applicant submitted third-party registrations to show weakness of marks with "shine" followed by an ampersand. Evidence of weakness or dilution consisting solely of third-party registrations, such as those submitted by Applicant in this case, is generally entitled to little weight in determining the strength of a mark, because such registrations do not establish that the registered marks identified therein are in actual use in the marketplace or that consumers are accustomed to seeing them. *See AMF*, 177 USPQ at 269.

- Applicant submitted third-party registrations for various marks with "N" and "&" and the same wording (but not for either SHINE or SHIELD) to show their coexistence.⁶ As noted, decisions of prior examining attorneys do not bind us in the present case. In addition,

⁵ The drawing depicted the mark of the cited registration as SHINE AND SHIELD while the specimen was for SHINE & SHIELD.

⁶ For example, the record contains registrations for FIX 'N GO for "automobile repair" and "FIX&GOTEX" for "anti-slip linings of textile materials for vehicle wheels; automobile chains."

many of these registrations are for goods that differ from the goods involved in this appeal.

In view of the foregoing, we find the *du Pont* factor regarding the similarity of the marks heavily favors a finding of a likelihood of confusion.

Relationship between the Goods/Services

We base our evaluation on the goods and services as they are identified in the registration and applications. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Applicant's goods and services and registrant's goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods or services under similar marks, that the goods or services originate from, are sponsored or authorized by, or are otherwise connected to the same source. *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).

Turning first to the goods in application Serial No. 86011273, Applicant's "clear coating protectant for vehicles" is encompassed within registrant's "polymer sealant for cleaning, shining and protecting automobile exterior surfaces." A sealant *for protecting* automobiles is broad enough in scope to include protectants for vehicles, including polymer sealants. In addition, a "clear coating protectant for vehicles" is encompassed within "automobile and car wax preparations" and "automobile wax,"

because an automobile wax functions as a clear coating protectant.⁷ Thus, the goods are legally identical.

Applicant did not address the relationship between the goods in its Brief filed in connection with application Serial No. 86011273.

Next, we turn to Applicant's services and registrant's goods in issue in application Serial No. 86011285. The Examining Attorney introduced (i) webpages from more than ten third-party websites demonstrating that coating protectants for vehicles are used in car washes, during the car wash; (ii) webpages from four other third-party websites demonstrating car wash services and protectants for automobiles are offered under the same mark; and (iii) approximately nine third-party registrations for car wash services and the same or similar goods set forth in the cited registration.⁸ This evidence demonstrates that Applicant's car wash services are related to registrant's goods.

Applicant did not address the relationship between the goods and services in its Brief filed in connection with application Serial No. 86011285.

⁷ See Applicant's website at p. 46 of its response to the first Office Action which states, "Shine 'N' Shield is a total body protectant that protects your vehicle from bugs, birds, dirt and salt while giving your vehicle a brilliant glossy shine." See also, p. 28 of Applicant's Final Office Action stating:

Having your car washed and waxed is better than not having it protected at all. But wax protection will not last as long as a premium poly sealant and its protection level will dissipate when hot water is used to wash and the sun[]s hot rays can take its toll on the carnauba in the wax.

⁸ Third-party registrations suggest that the goods and services listed therein are of a kind that may emanate from a single source under a single mark. See *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).

Thus, the *du Pont* factor regarding the relationship between the goods and services weighs in favor of finding a likelihood of confusion.

Similarity or Dissimilarity of Trade Channels

We next consider Applicant's and registrant's established and likely to continue channels of trade. With regard to Applicant's and registrant's goods, because they are legally identical, we presume that they move through the same channels of trade and are sold to the same classes of purchasers. See *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). With regard to Applicant's services and registrant's goods, as there are no limitations as to channels of trade in the identifications, we presume that the respective goods and services move in all channels of trade that are normal for such goods and services. See *Octocom Systems*, 16 USPQ2d at 1787; *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). The website evidence reflects that the goods and services are offered to the same purchasers; members of the general public who own cars. They also are offered on the same webpages.

In view of the foregoing, we find that the purchasers are identical for the goods and services involved in this appeal, and that registrant's goods, and Applicant's goods and services, travel in the same trade channels.

Conclusion

Because the relevant *du Pont* factors involved herein weigh in favor of a finding of likelihood of confusion, we find that Applicant's mark, when used on the goods and services set forth in its applications, is likely to be confused with registrant's mark for its goods.

Decision: The refusals to register under Section 2(d) of the Trademark Act are affirmed in both application Serial Nos. 85011273 and 86011285.