

This Opinion is not a
Precedent of the TTAB

Mailed: July 8, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Big John Products, Inc.
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Serial No. 86118253
—

Michael W. Schroeder and Alex Patel of Patel & Almeida PC,
for Big John Products, Inc.

Tara L. Bhupathi, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

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Before Bucher, Mermelstein and Hightower,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Big John Products, Inc. (“Applicant”) seeks registration on the Principal Register of the mark **Big John Toilet Seat** (in standard characters) for “toilet seats” in International Class 11.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used with the identified goods, so resembles the mark **BIG JON**, registered on the Principal

¹ Application Serial No. 86118253 was filed on November 13, 2013, based upon Applicant’s claim of first use anywhere since at least as early as June 23, 2003, and use in commerce since at least as early as July 1, 2003. No claim is made to the exclusive right to use the term “Toilet Seat” apart from the mark as shown.

Register for “toilet brushes” in International Class 21,² as to be likely to cause confusion, to cause mistake, or to deceive.

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

Likelihood of Confusion Analysis

Our determination under Section 2(d) is based upon an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of 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 relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper 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 discuss each of the *du Pont* factors concerning which Applicant or the Trademark Examining Attorney submitted argument or evidence.

I. Similarity of the Marks

The first *du Pont* likelihood of confusion factor focuses on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation

² Registration No. 2047918 issued on March 25, 1997; renewed.

and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). We begin by noting that “[t]he 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). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013).

Because the similarity or dissimilarity of the marks is determined based upon the marks in their entirety, our 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 Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (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.”). On the other hand, 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 entirety. *In re Nat’l Data*, 224 USPQ at 751.

The cited mark is **BIG JON**. Applicant's mark is **Big John Toilet Seat**. The Trademark Examining Attorney notes that **BIG JON** and **Big John** are phonetic equivalents. **BIG JON** is the entirety of Registrant's mark and **Big John** is the first portion of Applicant's mark. Adding the generic term "Toilet Seat" to the registered mark does not overcome a likelihood of confusion under Section 2(d). *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (the presence of the word "Ale" in the registration does not avoid confusion between **JOSE GASPAR'S GOLD** and **GASPAR'S ALE**). Additionally, the slight difference in appearance created with Applicant's traditional spelling of the word "John" does not obviate confusing similarity herein. We are not persuaded by Applicant's contention that its composite mark connotes a large toilet seat, whereas Registrant's mark connotes a large outhouse. Rather, we agree with the Trademark Examining Attorney that both marks suggest a large toilet. Consequently, we find that even the accumulation of several minor differences in the respective marks does not significantly alter the overall commercial impressions of the marks, and this critical *du Pont* factor favors a finding of likelihood of confusion.

II. The number and nature of similar marks in use on similar goods

Applicant argues that "John-formative" marks are commercially-weak because they are "heavily diluted due to multiple third party uses and registrations in the marketplace of such terms in connection with toilet accessories" For example, Applicant's evidence includes screenshots taken from the Internet, which show usage of variations of "John" in third-party source-indicators. However, the Trademark Examining Attorney argues that usage of marks having different

commercial impressions for quite disparate services is not probative evidence inasmuch as there is no showing of the relationship of the involved services (e.g., supplying portable toilets, bathroom and plumbing supply services, plumbing services, etc.) to Registrant's toilet brushes. We agree with the Examining Attorney that there is no showing that these services are related to the goods involved in this appeal, and hence, Applicant's Internet evidence is not probative on this issue.

Similarly, Applicant has provided a copy of a third-party registration for **BIG JOHN'S** in connection with "retail store services featuring a variety of building materials and home improvement supplies including lumber, tools, hardware, landscaping materials, electrical supplies, paints, stains, and plumbing supplies" and "rental of hand and power tools and construction equipment."³ Again, Applicant has failed to show how a single registration for a lumber yard, hardware store and rental center is probative of dilution of this term in the determination before us.

Hence, at best for Applicant, this *du Pont* factor is neutral in our final analysis.









III. Relatedness of the Goods















We next address the second *du Pont* factor, the relatedness of the goods. It is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re*

³ Registration No. 4592310 issued on August 26, 2014.

Thor Tech Inc., 90 USPQ2d 1634, 1635 (TTAB 2009). We must look to the goods as identified in the involved application and cited registration, not extrinsic evidence of actual use. *See, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (stating that “[i]t was proper ... for the Board to focus on the application and registrations rather than on real-world conditions”); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”).

Applicant’s goods are toilet seats. The goods identified in the cited registration are toilet brushes. The Trademark Examining Attorney has provided evidence from the Internet showing national manufacturers and merchants that market both toilet brushes and toilet seats:

	<p>Cowboy Boot Toilet Brush Hold</p>  <p>Hand painted poly resin design Features excellent detail and realism. 12" tall. Toilet brush included.</p> <p>SKU: 472</p> <p>Add to Cart</p> <table><tr><th>Unit</th><th>Qty Per Unit</th><th>Unit Price</th><th>Qty</th></tr><tr><td>EACH</td><td>1</td><td>\$29.95</td><td><input type="text"/></td></tr></table> <p>Add to Cart</p> <p>In Stock</p>	Unit	Qty Per Unit	Unit Price	Qty	EACH	1	\$29.95	<input type="text"/>	<p>Horse Toilet Seat-V Schultz</p>  <p>Wood material construction in standard size of 15 1/2" x 13 1/2". Features beautiful "Rush Hour" licensed art on seat and lid by renowned artist Victoria Wilson-Schultz. See the whole line of "Rush Hour" bath accessories.</p> <p>SKU: 748</p> <p>Add to Cart</p> <table><tr><th>Unit</th><th>Qty Per Unit</th><th>Unit Price</th><th>Qty</th></tr><tr><td>EACH</td><td>1</td><td>\$59.95</td><td><input type="text"/></td></tr></table> <p>Add to Cart</p> <p>In Stock</p>	Unit	Qty Per Unit	Unit Price	Qty	EACH	1	\$59.95	<input type="text"/>
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 	<p>Toilet Brush & Canister #36181V3</p>  <p>OVERVIEW FEATURES & BENEFITS SPECIFICATIONS</p> <p>OXO's Toilet Brush & Canister is the perfect addition to any bathroom. The elegant canister design allows the Toilet Brush to be stored within easy reach. Simply lift the Brush and the Canister automatically springs open! The patented, flexible neck allows for easy cleaning under the rim and in other hard-to-reach places.</p> <p>LIFESTYLE EXTENDED TOILET BRUSH</p> <ul style="list-style-type: none">▶ 30" handle with a 3" diameter bristle brush for scrubbing▶ Extra-wide base is more sturdy than traditional bases	<p>Sit Right Potty Seat - New #634970011</p>  <p>OVERVIEW FEATURES & BENEFITS</p> <p>Look forward to potty training with the OXO Tot Sit Right Potty Seat. The Sit Right Potty Seat is the perfect size for tot's bath and the removable edge helps it slide on virtually any size toilet seat. The soft side handles are comfortable for your training tot to grip, and the angle of the Potty Seat positions your little one in a comfortable position to prevent unwanted messes. The generous shield prevents splashes and the exterior is scratch and scuff-free, making clean-up a breeze. The Sit Right Potty Seat has a fat base, allowing it to stand up for compact, convenient storage.</p> <p>Raised Toilet Seat With Lock</p> 																

	<p>Toilet Bowl Brush</p> <ul style="list-style-type: none"> • Standard toilet bowl brush with wire bristles • Resists most common cleaning solvents and chemicals 	 <p>Elevated Toilet Seat</p> <ul style="list-style-type: none"> • Constructed of heavy-duty white polyethylene, it raises seat level by 4-1/2". • Seat width is 15"; 300-lb. weight capacity • Limited lifetime warranty on frame; six month warranty on handles, "wearable" parts, grips, screws. 												
	 <p>Residential Bathroom Accessories Model #3043-010-000 Toilet Brush + Porcelain Holder + Stainless Steel Shelf Can be sold separately or with Stainless Steel Shelf</p>													
	 <p>Nameeks Windisch Chrome Brass Toilet Brush Holder Item # 432345 Model # 80118M CR ★★★★★ Be the first to write a review! \$262.50</p>	 <p>Nameeks Scarabeo Zefiro White Round Toilet Seat Item # 432345 Model # ART 8213/B ★★★★★ Be the first to write a review! \$327.60</p>												
	 <p>Essential Home Toilet Brush with Canister White ★★★★★ (1) \$6.79 \$7.99</p>	 <p>Essential Home Toilet Seat Round Soft White ★★★★★ (7) \$8.49 \$9.99</p>												
	 <p>Exquisite Tahoe Toilet Brush and Can, White ★★★★★ (1) • Includes canister and toilet brush • Coordinates with Exquisite Tahoe bathware</p>	 <p>Exquisite Round Soft Toilet Seat, White ★★★★★ (5) • Color-matched bumpers • Plastic hinges come with non-corrosive nuts • Easy to install</p>												
	<p>Singular® Toilet Brush Singular® Toilet Brush 2014-15000 (43272) Toilet brush for Kohler bathroom accessories. Product Code: 43272</p> <p>Features: • Premium metal construction for durability and reliability • Kwik-Set brushhead mount system and fastening • Quick and easy template included for easy installation • Polished chrome • Gold-brass construction • No visible flange • Coordinates with Singular hardware</p> <p>Included Components: • Installation hardware</p> <p>Material: • Gold-brass construction</p> 	<p>Elongated Toilet Seats</p>  <p>18" or more</p>												
	<p>Toilet Bowl Brush W/Lip ITEM #5386 MODEL #YB3273, by HomeBasix</p> <table border="1"> <thead> <tr> <th>QTY</th> <th>PRICE</th> <th>AVAILABILITY</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>\$9.49 / each</td> <td>✓ In Stock Online</td> </tr> </tbody> </table> 	QTY	PRICE	AVAILABILITY	1	\$9.49 / each	✓ In Stock Online	<p>Round Toilet Seat, 17" Natural Oak ITEM #1082 MODEL #1-TWO-3, by HomeBasix</p> <table border="1"> <thead> <tr> <th>QTY</th> <th>PRICE</th> <th>AVAILABILITY</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>\$22.49 / each</td> <td>✓ In Stock Online</td> </tr> </tbody> </table> 	QTY	PRICE	AVAILABILITY	1	\$22.49 / each	✓ In Stock Online
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From the Trademark Examining Attorney's evidence, we note a range of retailers that sell both toilet seats and toilet brushes. For example, Kmart touts its "Essential Home" products and Walmart chose "Exquisite." We do not agree with Applicant that these Internet examples provided by the Trademark Examining

⁴ www.kmart.com/, as attached to Office Action of April 7, 2014.

Attorney fail to demonstrate that toilet seats and toilet brushes sometimes share the same source identifier as they move through the same trade channels.

The Trademark Examining Attorney also provided use-based, third-party registrations for both toilet seats and toilet brushes, such as the following, to support the conclusion that the goods are related:



While these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they suggest that Applicant's goods and the goods identified in the cited registration are of a kind that may emanate from a single source under a single mark. See *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). In response to this limited number of third-party registrations, Applicant submitted results of a search on the Office's database purporting to show that of the 1,143 registrations containing goods identified as "toilet seats," 119 of them also contained a listing for "toilet brushes." Applicant's mere listing is not probative of much of anything inasmuch as it could well contain applications, deleted goods, cancelled

and expired registrations, and live registrations evidencing no use in commerce. Nonetheless, Applicant's own summary of this data seems to support the position of the Trademark Examining Attorney that third-party registrations show that a close commercial relationship exists between these respective goods.

Moreover, we note that these are complementary products in the sense that both are used in the bathroom side-by-side as toilet accessories.

Hence, on balance, we find that this *du Pont* factor favors a finding of likelihood of confusion.

IV. Any other fact probative of the effect of use

Applicant also argues that it is relevant that its prior, inadvertently cancelled registration co-existed with the cited registration for six years without any evidence of actual confusion. We disagree that this fact should change the result herein.

A cancelled registration is “only evidence that the registration issued and does not afford an applicant any legal presumptions under [Section] 7(b),” including presumptions that the registration was valid, owned by the registrant, and that the registrant had (or has) the exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate. *In re Pedersen*, 109 USPQ2d 1185, 1197 (TTAB 2013) (citing *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973) (statutory benefits of registration disappear when the registration is cancelled); *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1047 n.2 (TTAB 2002)).

V. Actual confusion

Finally, to the extent that Applicant is arguing above that its prior registration demonstrates coexistence in the marketplace with Registrant's goods without any evidence of actual confusion, we note that lack of actual confusion is rarely relevant, especially in *ex parte* cases. For example, we cannot know whether these respective goods have been sold in the same markets for a significant period of time such that, if confusion were likely to occur, it could be expected to have happened. *See In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984). Moreover, the reported lack of any occurrences of actual confusion is not dispositive inasmuch as such evidence is notoriously difficult to come by. Hence, any alleged absence of actual confusion is unpersuasive. In any event, the test under Section 2(d) of the Trademark Act is likelihood of confusion, not actual confusion. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ2d 390, 395 (Fed. Cir. 1983). Therefore, the eighth and thirteenth *du Pont* factors, at best for Applicant, are deemed to be neutral in our final analysis.

VI. Conclusion

Given the similar overall commercial impressions of the marks as well as the relationship in the marketplace of the respective goods, we find that when Applicant's mark is used on toilet seats, it is likely to cause confusion with the cited mark registered for toilet brushes.

Decision: The refusal to register Applicant's mark **Big John Toilet Seat** under Section 2(d) of the Lanham Act is hereby affirmed.