

This Opinion is not a
Precedent of the TTAB

Mailed: December 22, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re R. Young Enterprises, Inc.

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Serial No. 86671271

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Howard L. Hoffenberg, IP and Business Law Offices of Howard L. Hoffenberg,
for R. Young Enterprises, Inc.

Barney L. Charlon, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

—
Before Taylor, Masiello, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

R. Young Enterprises, Inc. (“Applicant”) seeks registration on the Principal Register of the mark depicted below for building construction services, namely, roofing, in International Class 37.¹

¹ Application Serial No. 86671271 was filed on June 23, 2015 under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce.



The colors black, blue, brown, green and white are claimed as a feature of the mark. Applicant has disclaimed the exclusive right to use "Roofing," "Residential," "Commercial," and "Industrial" apart from the mark as shown.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the mark ACCURATE in standard characters (Registration No. 2356779)² and the mark ACCURATE in the stylized presentation depicted below (Registration No. 2356977):³

The word "ACCURATE" is written in a bold, black, sans-serif font. Above the first 'A' and the final 'E' is a dark blue triangle pointing to the right.

both owned by the same registrant and both for "construction services, namely, building, roofing and siding, replacement and installation of windows, skylights, ventilation systems, gutters, building trim and chimneys," in International Class 37, as to be likely, when used in connection with Applicant's services, to cause confusion, mistake, or deception. After the Examining Attorney made the refusal final,

² Registration No. 2356779 issued on June 13, 2000 and was renewed on April 24, 2010.

³ Registration No. 2356977 issued on June 13, 2000 and was renewed on May 11, 2010.

Applicant timely appealed and while the appeal was pending, requested remand to the Examining Attorney to submit new evidence. After the Board granted that request, the Examining Attorney considered the new evidence and denied the request for reconsideration, and the appeal was resumed. The case is fully briefed.⁴ We reverse the refusal to register.

I. Prosecution History and Record on Appeal

Prosecution History

Applicant originally sought registration of its mark for “construction services.” The Examining Attorney issued a first Office Action on the case on October 8, 2015, in which the Examining Attorney refused registration on the basis of the two registrations described above, and raised various informalities. Applicant responded to the Office Action on October 21, 2015, and argued against the refusal, amended its identification of services and the description of its mark, and entered disclaimers.

On November 12, 2015, the Examining Attorney issued a second Office Action making final the refusal of registration. On May 11, 2016, Applicant appointed new counsel and filed an appeal of the final refusal. On June 4, 2016, Applicant requested a remand of the application to the Examining Attorney to allow Applicant to

⁴ After the case was submitted to the Board for decision, Applicant filed a document entitled “Request for Leave to File a Supplemental Brief on Recent Authority.” 18 TTABVUE. Rule 2.142 of the Trademark Rules of Practice, 37 C.F.R. § 2.142, makes no provision for the filing of a supplemental brief except where a remand of an application for further examination results in an additional ground for a final refusal of registration, a circumstance not present here. Through this filing, Applicant does not seek to bring to the Board’s attention any new legal authority issued after the completion of the briefing, but instead seeks to rely on the page proofs of a new edition of a treatise on Internet law. We deny Applicant’s request and have given the treatise pages no consideration in our decision.

introduce new evidence. 4 TTABVUE. The Board granted the request. 5 TTABVUE. On July 18, 2016, Applicant made of record the additional evidence described below. 6 TTABVUE. On August 15, 2016, the Examining Attorney denied Applicant's request for reconsideration, 8 TTABVUE, and the appeal was resumed shortly thereafter.

Record on Appeal

The record consists of the following:⁵

- Registrations and pages from third-party websites that the Examining Attorney claims show the similarity of the services in the application and cited registrations (October 8, 2015 and November 12, 2015 Office Actions);
- Pages from Applicant's website at accurateroofingca.com (November 12, 2015 Office Action and Applicant's July 18, 2016 "Voluntary Amendment" (6 TTABVUE 165-166));
- Pages from the website of the owner of the cited registrations at accurateroofing.com (November 12, 2015 Office Action);
- The results of a "Contractor Name Search" that Applicant claims show that "there are about 12 licensed roofing contractors [in California] that use the literal term 'accurate' in their brand names" (4 TTABVUE 5, 24-25 (June 14, 2016 Request for Remand));⁶

⁵ A few items in the record are not germane to the issues on appeal and have not been listed.

⁶ The results list 15 companies as of June 7, 2016, the apparent date of the search. There are eight listings of entities with licenses with an "Expired" status, in the cities of Tujunga, La Mesa, Pomona, Pacific Palisades, Harbor City, Oroville, and Mill Valley (the two Mill Valley listings have the same license number and appear to be the same entity). There are seven listings of entities with licenses with an "Active" status, in the cities of Huntington Beach

- Pages from the website at yelp.com reviewing a company called Accurate Roofing Solutions with a listed address in Redondo Beach, California (4 TTABVUE 26-33);⁷
- The July 14, 2016 declaration of Applicant’s Vice President Richard Reinhardt and Exhibits 1-3 thereto (Applicant’s advertisements in “Money Mailer” (Ex. 1) and on angleslist.com and networx.com (Exs. 2-3)) (6 TTABVUE 28-36);
- Definitions of the word “accurate” as “correct and without any mistakes” and “exactly aimed and moving on an intended path” from the *Cambridge English Dictionary* (6 TTABVUE 37);
- Pages from the websites at accurateroofingtexas.com and homeadvisor.com regarding a company called Accurate Roofing & Construction with a listed address in Plano, Texas (6 TTABVUE 46-48, 75-77);⁸
- Pages from the websites at accurateroofing.info, yellowpages.com, superpages.com, yahoo.com, and huntingtonbeachbusinesslist.com regarding a company called Accurate Roofing with a listed address in Huntington Beach, California (6 TTABVUE 49, 60, 80-81, 102, 157-161);

(two listings), Los Angeles (two listings), Pomona, Whittier, and Redondo Beach. The Huntington Beach listings have the same license number and appear to be the same entity. The Los Angeles listings have the same license number, and it is the number that appears on Applicant’s website, so these listings appear to be for Applicant itself. As a result, there appear to be four listed third-party entities with licenses with an “Active” status.

⁷ The record indicates that these webpages and the others described below were downloaded between July 13 and July 18, 2016.

⁸ As Applicant acknowledges, the Internet webpage portion of the record contains a number of duplicative listings of entities with the same address and/or telephone number, or with other commonality. We have combined them in our description of this evidence.

- A page from the website at accurateroofers.com regarding a company called Accurate Roofing with a listed telephone number in the Austin, Texas area (6 TTABVUE 50);
- Pages from the website at accurateroofingaustin.com regarding a company called Accurate Roofing & Construction with a listed address in Austin, Texas (6 TTABVUE 129-131);
- A page from the website at accurateroofingpros.com regarding a company called Accurate Roofing Solutions, LLC, which states that the company provides roofing services in the northeast Georgia area (6 TTABVUE 51);
- Pages from the websites at accurateroofingfortworth.com and linkedin.com regarding a company called Accurate Roofing Systems LLC with listed telephone numbers in the Fort Worth and Dallas areas in Texas (6 TTABVUE 52-53, 153-154);
- Pages from the website at accurateroofingandconstructionservices.com regarding a company called Accurate Roofing and Construction Services with a listed address in Fort Worth, Texas (6 TTABVUE 124-126);
- Pages from the websites at buildzoom.com and yelp.com regarding a company called Accurate Roofing with a listed address in Albuquerque, New Mexico (6 TTABVUE 54-59, 82-85);
- Pages from the website at yellowpages.com listing one or more entities called Accurate Roofing (or a close variant) and identified on the pages as “Roofing Contractors,” with listed addresses in the cities of Whittier, Pico Rivera, La Mirada,

El Monte, Garden Grove, Huntington Beach, Hawthorne, Harbor City, Torrance, and Hermosa Beach in California (6 TTABVUE 60-61);⁹

- Pages from the websites at superpages.com and buzzfile.com regarding a company called Accurate Roofing with a listed address in Raymond, New Hampshire (6 TTABVUE 62-64, 115-118);

- Pages from the websites at directorycentral.com, chamberofcommerce.com, and bbb.org regarding a company called Accurate Roofing with a listed address in Tulsa, Oklahoma (6 TTABVUE 65-66, 86-90, 100-101);

- Pages from the websites at accurateroofingcmh.com and firestonebpco.com regarding a company called Accurate Roofing, Inc. with a listed address in Westerville, Ohio (6 TTABVUE 67, 94-97);

- Pages from the website at mapquest.com regarding a company called Accurate Roofing LLC with a listed address in Kokomo, Indiana (6 TTABVUE 68-69);

- Pages from the website at homeadvisor.com regarding a company called Accurate Roofing and Masonry Services, LLC with a listed address in Denver, Colorado (6 TTABVUE 70-77);

- Pages from the website at aacurateroof.net regarding a company called Accurate Roofing LLC with a listed address in Greentown, Indiana (6 TTABVUE 78-79);

⁹ Applicant appears to claim that the three listings in Whittier and the listings in Pico Rivera and La Mirada are for separate entities, 6 TTABVUE 17-18, but they all have the same telephone number and appear to be the same entity. The Whittier entity is also referenced in the pages from the website at chamberofcommerce.com (6 TTABVUE 98-99), while the Garden Grove entity is also referenced in the pages from the website at foursquare.com (6 TTABVUE 16).

- Pages from the website at superpages.com regarding a company called Accurate Roofing with a listed telephone number in Chicago, Illinois (6 TTABVUE 91-93);
- Pages from the websites at grantspassroofer.com, bbb.org, and local-construction.net regarding a company called Accurate Roofing Company with a listed address in Grants Pass, Oregon (6 TTABVUE 103-114, 127-128);
- A page from the website at roofingcontractornashville.com regarding a company called Accurate Roofs with a listed address in Nashville, Tennessee (6 TTABVUE 119);
- Pages from the website at porch.com regarding a company called Accurate Roofing with a listed location in Tupelo, Mississippi (6 TTABVUE 120-123);
- Pages from the website at yahoo.com regarding a company called Accurate Roofing & Siding Incorporated with a listed address in Yardley, Pennsylvania (6 TTABVUE 132-133);
- Pages from the website at constructionmaps.net regarding a company called Accurate Roofing with a listed address in Holly Springs, Mississippi (6 TTABVUE 134-139);
- Pages from the website at businessfinder.com regarding a company called Accurate Roofing with a listed address in Lowell, Massachusetts (6 TTABVUE 140-143);

- Pages from the website at local-construction.net regarding a company called Accurate Roofing with a listed address in Woolley, Washington (6 TTABVUE 144-150);
- Pages from the website at fixr.com regarding a company called Accurate Roofing with a listed address in San Francisco, California (6 TTABVUE 155-156); and
- Pages from the website at yelp.com reviewing Applicant's business (6 TTABVUE 161-164).

II. Analysis

Section 2(d) of the Trademark Act prohibits the registration of a mark that so resembles a registered mark as to be likely, when used in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based upon an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In every case under Section 2(d), of course, 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, 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.”). On the record here, we also find relevant the fourth *du Pont* factor regarding the conditions under which and buyers to whom sales are

made, and the sixth *du Pont* factor regarding the nature and number of third-party marks in use on similar services.

A. Similarity of the Services

Under the second *du Pont* factor, the determination of the similarities of the subject goods and services is based upon the identifications of goods and services in the involved application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The goods and services do not have to be identical or even competitive for confusion to be likely. They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

The identification of services in the application covers “building construction services, namely roofing.” The identifications of services in the cited registrations cover “construction services, namely . . . roofing” Applicant argues that

[a]t first blush, there is overlap in that both applicant and registrant provide roofing services. Notwithstanding, this is an oversimplification. Applicant provides focused roofing services. Registrant is a generalist providing a variety of services ranging from general contracting, to roofing, to siding to windows to etc. A roofing specialist is a separate product category distinct from a generalist which is desired by consumers, just as is so with medical doctors, lawyers and many other professions.

12 TTABVUE 25.¹⁰ The Examining Attorney correctly responds that “the question of likelihood of confusion is determined based on the description of the services stated in the application and registrations at issue, not on extrinsic evidence of actual use.”

14 TTABVUE 11. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom*, 16 USPQ2d at 1787. Moreover, we must presume that the services encompass all services of the type identified, *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006), and there is nothing in the identification to indicate that the registrant does not provide the services of roofing specialists. We find that the “roofing” services identified in the application and registrations are legally identical. This *du Pont* factor favors a finding of a likelihood of confusion. The identity of the roofing services also requires us to presume that they travel in the same channels of trade to the same classes of customers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). This too favors a finding of a likelihood of confusion under the third and fourth *du Pont* factors.

We turn next to the sixth *du Pont* factor regarding the third-party uses in the record because it bears on our analysis of the first *du Pont* factor regarding the similarity of the marks.

¹⁰ Applicant filed its Appeal Brief on August 24, 2016 (10 TTABVUE) and then filed “Applicant’s Amended Brief” on August 26, 2016 (12 TTABVUE) because Applicant’s first filing had “exceeded the 25 page limit by not including the table of contents and index in the page count.” 12 TTABVUE 2. We will cite in this decision to Applicant’s appeal brief filed at 12 TTABVUE because that is the brief cited by the Examining Attorney.

B. The Number and Nature of Similar Marks in Use on Similar Services

Under the sixth *du Pont* factor, we consider “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 177 USPQ at 567. This factor addresses the strength of a mark with respect to both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on the marketplace recognition of the mark. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014) (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.)”).

With respect to the inherent strength of the word “accurate” as a mark for roofing services, Applicant introduced dictionary definitions of “accurate” as meaning “correct and without any mistakes” and “exactly aimed and moving on an intended path” (*Cambridge English Dictionary* (6 TTABVUE 37)). The dictionary definitions suggest that the word “accurate” has a suggestive significance when it is used as a mark for roofing services because the record indicates that a company’s ability to perform roofing services that are “correct and without any mistakes” and to keep a customer’s job “exactly aimed and moving on an intended path” is an important feature of roofing services to communicate to prospective customers.¹¹

¹¹ For example, the registrant’s website states that “[w]e work hard to achieve the best performing roof system and beautiful, customized exterior tailored to your taste and budget,” November 12, 2015 Office Action, while Applicant’s website states that “[w]e will complete your project on time, within budget, and to your satisfaction.” 6 TTABVUE 166.

With respect to marketplace strength, the Federal Circuit has held that extensive registration and use of a term by others can be powerful evidence of a term's weakness as a mark or part of a mark. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). In addition, "evidence of third-party use of similar marks on similar goods 'can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.'" *Jack Wolfskin*, 116 USPQ2d at 1136 (quoting *Juice Generation*, 115 USPQ2d at 1674).

As described above, Applicant made of record Internet evidence of third-party uses of "Accurate" in connection with roofing services in the marks and names of companies in at least the cities of Redondo Beach, El Monte, Harbor City, Hermosa Beach, Torrance, Huntington Beach, Whittier, Garden Grove, and San Francisco, in California; in the cities of Plano, Austin (two entities), Fort Worth (two entities), and Dallas, in Texas; in Indiana (two entities); in Mississippi (two entities); and in Georgia, New Mexico, New Hampshire, Oklahoma, Ohio, Colorado, Illinois, Oregon, Pennsylvania, Tennessee, Massachusetts, and Washington state. This evidence of the use of "Accurate" for roofing services by at least 30 third parties around the United States "is powerful on its face," even though Applicant does not provide "[t]he 'specifics' as to the extent and impact of use of the third parties' marks." *Juice Generation*, 115 USPQ2d at 1674.

The Examining Attorney acknowledges that “[e]vidence of widespread third-party use of similar marks with similar services ‘is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection’ in that industry or field,” citing *Palm Bay Imports, Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). 14 TTABVUE 7. He rejects Applicant’s evidence, however, because it does not include any third-party registrations of ACCURATE-formative marks, “does not indicate the impact on consumers of third-party use of the term ACCURATE or whether and to what extent such use was promoted to and/or recognized by consumers as a service mark,” and does not make it clear “whether the word ACCURATE is being used as a service mark or merely as a company trade name.” 14 TTABVUE 8. These arguments are unpersuasive, especially following the Federal Circuit’s decisions in *Jack Wolfskin* and *Juice Generation*, which the Examining Attorney notably never discusses.

The absence of evidence of third-party registrations of ACCURATE-formative marks is not significant because Applicant introduced evidence of third-party uses of ACCURATE. “The probative value of third-party trademarks depends entirely upon their usage,” *Palm Bay Imports*, 73 USPQ2d at 1693, and “the mere existence of third-party registrations is not evidence that the registered marks are actually in use or that the public is familiar with them.” *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

We also reject the Examining Attorney's suggestion that there is a meaningful distinction, for purposes of this *du Pont* factor, between third-party use of ACCURATE "as a service mark or merely as a company trade name." 14 TTABVUE 8. Although trade names are not eligible for federal registration, *In re Letica Corp.*, 226 USPQ 276, 277 (TTAB 1985), both service marks and trade names serve the same source-identifying function.¹² The Trademark Act defines "trade name" as "any name used by a person to identify his or her vocation," 15 U.S.C. Section 1127, and trade name use can be asserted as the basis for an opposition. 15 U.S.C. Section 1052(d). Assuming, without deciding, that some of the third-party uses are "merely as a company trade name," and not "as a service mark," we find that they nevertheless serve to weaken ACCURATE as a source-identifier for roofing services.

The inherent weakness of the word "accurate" as a mark for roofing services and the significant third-party use of ACCURATE in the marks and names of roofing companies suggest that roofing marks containing the word ACCURATE are capable of co-existing without confusion where "the remaining portions of the mark may be sufficient to distinguish the marks as a whole from one another." *Promark v. GFA Brands. Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015). Against the backdrop of the third-party use evidence, we turn now to the first *du Pont* factor regarding the similarity of the marks.

¹² The Examining Attorney acknowledges as much in his discussion of Applicant's own mark and trade name. He states that "applicant promotes itself primarily through its business name ACCURATE, which is paired with the generic and disclaimed term ROOFING, and uses this name when instructing consumers on how to contact it." 14 TTABVUE 6.

C. Similarities Between the Marks

This *du Pont* factor focuses on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports*, 73 USPQ2d at 1691 (quoting *du Pont*, 177 USPQ at 567). “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*, 101 USPQ2d at 1721 (quotation omitted). Because the services at issue are identical, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. See, e.g., *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004).

We will focus our analysis on a comparison of Applicant’s mark to the mark ACCURATE shown in Registration No. 2356779, which we find to be the more relevant of the two cited marks for our *du Pont* analysis. If we find a likelihood of confusion as to this cited mark, we need not find it as to the cited stylized mark shown in Registration No. 2356977; conversely, if we do not find a likelihood of confusion as to this cited mark, we would not find it as to the cited stylized mark. See *Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015); *In re Max Capital Group, Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Applicant’s mark and the cited mark have the word “ACCURATE” in common, but “likelihood of confusion cannot be predicated on dissection of a mark, that is, on only

part of a mark.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). “On the other hand, in 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. Indeed, this type of analysis appears to be unavoidable.” *Id.*

For ease of reference in our analysis of this factor, we reproduce Applicant’s mark again below:



The Examining Attorney argues that “the word ACCURATE, stylized, is the dominant feature of applicant's mark, which otherwise consists of the disclaimed word ROOFING, the slogan ‘ROOFING MADE TO LAST’, the disclaimed wording RESIDENTIAL · COMMERCIAL · INDUSTRIAL, and a design element.” 14 TTABVUE 4. Applicant argues that the dominant portion of Applicant’s mark is the design element, which Applicant claims has achieved significant recognition. 12 TTABVUE 23.

We find that the words “ACCURATE ROOFING” are the dominant portion of Applicant’s mark. “In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of

the goods to which it is affixed.” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218, USPQ 198, 200 (Fed. Cir. 1983)). “[T]he literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers.” *Id.* at 1911. The words “Accurate Roofing” are the most prominent words of Applicant’s mark, as they appear in the largest and boldest type and are positioned at the top of the mark. As a result, the words “Accurate Roofing” are the portion of the mark that “would make an impression upon purchasers that would be remembered and relied upon to identify the . . . services.” *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

In comparing the marks in their entirety, we begin with the fact that Applicant’s mark contains the entirety of the cited mark ACCURATE (as part of the phrase Accurate Roofing), combined with significant other visual and textual matter. Likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding a house mark or other distinctive matter. *Stone Lion*, 110 USPQ2d at 1161. The addition of matter to a mark may be sufficient to avoid a likelihood of confusion, however, if the common portion of the marks is weak because it is merely descriptive or diluted. *See, e.g., Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (CAPITAL CITY BANK for banking and financial services and CITIBANK for the same services not likely to cause confusion, based in part on finding that the phrase “City Bank” was frequently used in the banking industry); *In re Shawnee Milling Co.*, 225 USPQ 747, 749 (TTAB 1985) (GOLDEN CRUST for flour and ADOLPH’S GOLD’N CRUST and design for

coating and seasoning for food items not likely to cause confusion because “GOLDEN CRUST” and “GOLD’N CRUST” were highly suggestive as applied to the respective goods); *see also Knight Textile Corp. v. Jones Investment Co.* 75 USPQ2d 1313, 1314-17 (TTAB 2006) (dismissing opposition to registration of NORTON MCNAUGHTON ESSENTIALS for clothing by owner of registration of ESSENTIALS for clothing because of suggestiveness of ESSENTIALS and third-party registrations of other composite marks for clothing containing ESSENTIALS); *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (ZU ELEMENTS for printed products, leather goods, and clothing found not to be confusingly similar to ELEMENT and ELEMENTALITY for same goods due to suggestiveness and weakness of “ELEMENT” formative arising from third-party uses). The record shows that “Accurate” has a suggestive meaning as applied to roofing services, and that its source-identifying capacity has been further weakened by multiple third-party uses. Where the common element of two marks is weak, it is unlikely that consumers will be confused unless the marks have other commonality. *Juice Generation*, 115 USPQ2d at 1674-75. On the record here, we find that Applicant’s use of a design element, the slogan “Roofing made to last!”, and other words in addition to the words “Accurate Roofing” makes the mark, when considered in its entirety, sufficiently dissimilar from the cited mark ACCURATE to avoid a likelihood of confusion. *Id.* This *du Pont* factor weighs against a finding of a likelihood of confusion.

D. The Conditions Under Which and Buyers to Whom Sales Are Made

“The fourth *DuPont* factor considers ‘[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.’” *Stone Lion*, 110 USPQ2d at 1161 (quoting *du Pont*, 476 F.2d at 1361). “Board precedent requires [our] decision to be based ‘on the least sophisticated potential purchasers’” of roofing services, *id.* at 1163, who could be ordinary homeowners as opposed to owners of commercial buildings.

Applicant argues that “the relevant consuming public is sophisticated” and points out that the cost of roofing is substantial and “there is a substantial amount of one on one in sale of roofing,” including “discussing scope of work, nuances of what the property owner wants and estimating the cost of the job.” 12 TTABVUE 26. We find, on the basis of the record as a whole,¹³ that purchasers of roofing services, including ordinary homeowners of the sort who provided the yelp.com reviews in the record, are not uniformly sophisticated, but nonetheless are likely to exercise a good deal of care in their purchasing decisions and are likely to be aware of the source of the services being provided to them. Applicant’s website, the website of the owner of the cited registrations, the third-party websites, and the customer reviews of various roofing companies in the record together establish that roofing services rendered to ordinary homeowners are generally purchased on the basis of a pre-job cost estimate, are often customized to a homeowner’s specific needs or circumstances, are rendered in a

¹³ The declaration of Applicant’s Vice President Richard Reinhardt (6 TTABVUE 28-31) is silent on this issue, but we have reviewed the rest of the record to determine whether there is support for Applicant’s argument on this factor.

direct, one-on-one relationship between the service provider and the homeowner, and are relatively expensive and of particular importance to most homeowners because they involve the homeowners' dwelling. The record shows that roofing services are likely to be purchased with a good deal of care as to the identity of the provider. *See In re Homeland Vinyl Prods. Inc.*, 81 USPQ2d 1378, 1380 (TTAB 2006) (purchasers of fence rails found to be likely to exercise a relatively high degree of care in their purchasing decisions). This *du Pont* factor weighs against a finding of likelihood of confusion.

Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. In balancing the *du Pont* factors on the basis of the record as a whole, we find that the differences in the marks, the relative weakness of their common elements, and the circumstances surrounding the purchase of roofing services, make confusion unlikely even though the marks are used on identical services.

Decision: The refusal to register is reversed.