

This Opinion is Not a
Precedent of the TTAB

Mailed: June 2, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Delta Faucet Company

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Serial No. 88071960

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Edgar A. Zarins of Masco Corporation,
for Delta Faucet Company.

Alexandra Portaro, Trademark Examining Attorney, Law Office 126,
Andrew Lawrence, Managing Attorney.¹

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Before Cataldo, Wolfson, and Goodman,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Delta Faucet Company (“Applicant”) seeks registration on the Principal Register of the mark BOWERY in standard characters for “bathroom accessories, namely, towel bars, towel rings and toilet tissue holders” in International Class 21.²

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¹ Trademark Examining Attorney Diana Zarick represented the USPTO during prosecution of the application.

² Serial No. 88071960, filed on August 9, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging Applicant’s bona fide intent to use the mark in commerce.

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a prior registration of the mark BOWERY HILL in standard characters for the following goods and services:

- Bathroom furniture; Bedroom furniture; Cabinets; Custom furniture; Furniture; Furniture frames; Furniture parts; Furniture for house, office and garden; Living room furniture; Seating furniture; Tables; Upholstered furniture" in International Class 20;
- Mail order services featuring furniture, housewares and home furnishings; Online advertising and marketing services in the field of furniture; Online retail furniture store services featuring in-store order pickup; Retail store services featuring furniture, housewares and home furnishings in International Class 35.³

After the Examining Attorney made the refusal final, Applicant appealed. For the reasons discussed more fully below, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as "DuPont factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We consider the *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Two key considerations are the similarities between the marks and the relatedness of the goods and services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods*,

³ Registration No. 5545751, issued August 21, 2018.

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.”).

A. Similarity of the Marks

We initially compare the marks BOWERY and BOWERY HILL “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012)).

We find the marks look and sound similar because of the common term BOWERY in each mark. For rational reasons, we may give more or less weight to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). The term BOWERY in Registrant’s mark in particular stands out because it is the first term in the mark and

therefore is “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label). The terms “Bowery” and “Bowery Hill” are similar in connotation as both marks are likely to evoke that section of lower Manhattan known as the Bowery.⁴ The addition of the term “HILL” in Registrant’s mark reinforces the sense of the mark being an actual location, possibly a hill in the Bowery district.

Applicant offers no argument regarding this factor other than to describe the mark BOWERY HILL as designating “a well-known collection of furniture.” 4 TTABVUE 2. In general, fame, or strength of a Registrant’s mark, does not play a role in an ex parte appeal because evidence to demonstrate fame is not available to Examining Attorneys. *See, e.g., In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016); *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). Nonetheless, we accept Applicant’s characterization of Registrant’s mark as well-known for furniture.

The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. Relatedness of the Goods

“[L]ikelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they

⁴ *See, e.g.*, September 19, 2018 Office Action at TSDR 30, attaching a copy of the definition of “Bowery” from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE.

could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling*, 65 USPQ2d at 1205; *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

Applicant’s goods are “bathroom accessories, namely, towel bars, towel rings and toilet tissue holders.” Registrant’s goods include “bathroom furniture.”⁵ The third-party web pages submitted by the Examining Attorney demonstrate that “bathroom furniture” is a class of furniture for use with bathroom accessories such as towel bars and rings. Illustrative examples include:

- American Standard – offering towel bars, towel rings, and vanities under the mark TOWNSEND.⁶

⁵ Registrant’s services include mail order, online and retail stores selling furniture.

⁶ At <https://www.americanstandard-us.com/.../townsend-collection>, attached to April 29, 2019 Office Action, TSDR 8-9.

Serial No. 88071960



Townsend Collection
Townsend Towel Ring



(2)
7353190

\$43 - \$65



Townsend Collection
Townsend Double Towel Bar



(2)
7353224

\$129 - \$194

Our Favorite Townsend Toilets, Vanities, and Sinks



- Home Depot – offering bath vanities and accessories under the mark GLACIER BAY.⁷

⁷ At <https://www.homedepot.com>, attached to April 29, 2019 Office Action, TSDR 12-13.



Exclusive **Glacier Bay**
Woodbrook 31 in. W x 19 in. D Bath Vanity in White Washed Oak with Cultured Marble Vanity Top in White with White Sink
Model# WB30P2-WO
★★★★☆ (175)
\$349⁰⁰



More Options Available

Exclusive **Glacier Bay**
Ashland 37 in. W x 37 in. H x 19 in. D Bathroom Vanity in White with Vanity Top in White with White Sink
Model# ALIP2-WH
★★★★☆ (224)
\$299⁰⁰ ~~\$379.00~~ Save \$80.00 (21%)



Exclusive **Glacier Bay**
Builders Double Post Toilet Paper Holder in Brushed Nickel
Model# BTF31000BN
[View the Collection](#)
★★★★☆ (105)
\$16⁷⁸



More Options Available

Exclusive **Glacier Bay**
Mandouri 3-Piece Bath Hardware Kit in Brushed Nickel
Model# 262A-8804
[View the Collection](#)
★★★★☆ (93)
\$29⁹⁸

- Signature Hardware - displaying furniture (i.e., shower seats and caddies) and hardware (such as towel holders and rings) for the bathroom as “bathroom accessories” on the same web page:⁸

⁸ At <https://www.signaturehardware.com>, attached to April 29, 2019 Office Action, TSDR 23-24.

shop
BATHROOM ACCESSORIES

SELECT A CATEGORY

- Clawfoot Tub Accessories
- Shower Seats
- Towel Holders
- Robe Hooks
- Bathroom Shelves
- Wood Bath Mats
- Shower Caddies

- Bathroom Hardware Sets
- Toilet Paper Holders
- Toilet Brushes
- Soap Dishes and Dispensers
- Toothbrush and Tumbler Holders
- Bathroom Accents
- Grab Bars

- Linen Cabinets
- Laundry Hampers
- Bath Pillows
- Bathtub and Spa Steps
- Kitchen and Bath Cleaners



CLAWFOOT TUB ACCESSORIES



SHOWER SEATS



TOWEL HOLDERS



ROBE HOOKS



BATHROOM SHELVES



WOOD BATH MATS



SHOWER CADDIES



BATHROOM HARDWARE SETS



TOILET PAPER HOLDERS

Serial No. 88071960

The website evidence demonstrates that the same entity sells both furniture and accessories for use in a bathroom under a single mark. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis...”) *quoted in Integrated Embedded*, 120 USPQ2d at 1514-15. The Examining Attorney also provided copies of eleven third-party, use-based registrations to show that Applicant’s and Registrant’s goods are related.⁹

These registrations include:

- Reg. No. 3960568 for the mark NEWBURY, issued May 17, 2011, Section 8/15 declarations accepted and acknowledged; for “bathroom furniture, namely, shelving, towel stands, bath stools” and “bathroom accessories, namely, toilet brushes and plungers, tissue storage canisters, standing tissue holders, wastebaskets, canisters.”
- Reg. No. 3176545 for the mark DECOLAV, issued November 28, 2006, renewed; for “bathroom furniture, namely, vanities, medicine cabinets, countertops, pedestal and assembly fittings sold as a unit therewith” and “bathroom fixtures, namely, towel bars, towel rings, toilet rings, toilet tissue holders, toilet paper dispensers, soap dishes, soap dispensers and wash basins.”
- Reg. No. 4508189 for the mark ZENNA HOME, issued April 1, 2014, for “bathroom furniture” and “toilet tissue holders.”
- Reg. No. 4924240 for the mark NIZZA (stylized), issued March 22, 2016, for “bathroom furniture” and “toilet paper holders; towel bars; towel rings.”
- Reg. No. 5305055 for the mark TUSCANY, October 10, 2017, for “bathroom furniture” and “toilet paper holders; towel bars; towel rings.”

Third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent

⁹ April 29, 2019 Office Action, TSDR 35-68.

Serial No. 88071960

that they serve to suggest that the listed goods are of a type which may emanate from a single source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.6 (TTAB 2015); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant notes that it “has already gained allowance of its application for plumbing products” and argues that plumbing products “are much more related to bath hardware as they are typically offered as a matching collection.” 4 TTABVUE 3. Applicant’s argument is unsupported by record evidence. Moreover, that plumbing products are related to bathroom hardware is irrelevant to whether bathroom hardware and bathroom furniture are related. It has been noted many times that 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); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

We find that circumstances surrounding the sale and marketing of Registrant’s bathroom furniture and Applicant’s bathroom accessories show that such goods are related. Accordingly, the second *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Channels of Trade and Classes of Purchasers

Regarding channels of trade and classes of purchasers, where, as here, there is an absence of any restrictions or limitations in the application or registration, we must assume the goods are sold or marketed through all the normal and usual trade

channels for such goods and that they are offered to all the usual purchasers of such goods. *See Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Hewlett-Packard Co.*, 62 USPQ2d at 1005; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Applicant argues that its bathroom accessories are “typically sold through do-it-yourself home centers” and contrasts these goods with Registrant’s “traditional free-standing furniture...sold through retail establishments which specialize in such goods and create a showroom atmosphere.” 4 TTABVUE 2. An applicant may not restrict the scope of the goods covered in its application or in the cited registration by argument or extrinsic evidence. *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008) (“it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods”). As noted above, neither of the identifications of goods includes any limitations in trade channels, classes of purchasers or prices. Thus, any specific differences between the actual trade channels or in the nature of the goods are irrelevant in our analysis.

The third *DuPont* factor weighs in favor of likelihood of confusion.

D. Sophisticated Purchasing

Applicant argues that because Registrant’s consumers make “careful comparisons to ensure the particular furniture piece fits the décor of the room,” 4 TTABVUE 2, and that the “price of the furniture adds to the deliberate buying process,” relevant buyers will not be confused. However, in determining who is a relevant purchaser, “Board precedent requires the decision to be based ‘on the least sophisticated

potential purchasers.” See *Stone Lion*, 110 USPQ2d at 1163. Ordinary members of the public are potential purchasers of both Applicant’s bathroom accessories and Registrant’s bathroom furniture. They are unlikely to exercise a greater than normal degree of care. This *DuPont* factor is neutral.

II. Balancing the Factors

After considering all of the arguments and evidence of record as they pertain to the relevant *DuPont* factors, we find that the marks are substantially similar in sight, sound, connotation and commercial impression. We further find the goods are related, as are the channels of trade, and that the purchasers are not likely to exercise a heightened degree of care.

Accordingly, we find that there is a likelihood of confusion between Applicant’s mark BOWERY and the cited mark BOWERY HILL for the goods as identified.¹⁰

Decision: The Section 2(d) refusal to register Applicant’s mark is affirmed.

¹⁰ Because we have found Applicant’s mark for bathroom accessories related to the cited mark for bathroom furniture, we need not consider whether the other goods or services in Registrant’s registration would also cause a likelihood of confusion with Applicant’s mark for its goods.