This Opinion is Not a Precedent of the TTAB

Mailed: September 1, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re S3 Concrete Technologies, Inc.

Serial No. 90156396

Michael J. Tempel of Smith Tempel Blaha, LLC
for S3 Concrete Technologies, Inc.

Niya Rafari-Pearson, Trademark Examining Attorney, Law Office 112,
Matthew J. Cuccias, Managing Attorney.

Before Wellington, Heasley and Dunn,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

S3 Concrete Technologies, Inc. ("Applicant") seeks registration on the Principal Register of the standard-character mark **MEGACLEAN** for "cleaner for use on concrete and specialty concrete" in International Class 3.[1]

The Examining Attorney refused registration under Section 2(d) of the Trademark Act ("the Act"), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark

[1] Application Serial No. 90156396; filed September 3, 2020, based on an allegation of bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

REJUVENATE MEGACLEAN, for "laundry pre-treater and stain/spot remover for fabrics, clothing, and carpet" in International Class 3.[2]

Applicant appealed and the appeal is briefed.[3] We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.,* 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co. Inc.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is argument and evidence. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019)*; M2 Software, Inc. v. M2*

[2] Registration Nos. 5656134 issued on January 15, 2019. The registration is based on a claim of acquired distinctiveness, in part, as to the term REJUVENATE, pursuant to Section 2(f) of the Act.

[3] Applicant submitted an affidavit, for the first time, with its appeal brief (at 4 TTABVUE 28). We sustain the Examining Attorney's objection (at 6 TTABVUE 4) to this submission as untimely submitted because it was not submitted prior to the appeal. "The evidence submitted with Applicant's appeal brief that Applicant did not previously submit during prosecution (including the request for reconsideration) is untimely and will not be considered." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (citing Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)), *aff'd*, 777 Fed. App'x 516 (Fed. Cir. 2019)). Accordingly, the affidavit is not of record.

The Examining Attorney also objected to "information [in Applicant's brief] related to its purported ownership of plural registrations but Applicant has not submitted any evidence to support ownership of said registrations." 6 TTABVUE 4. To the extent Applicant's statements in its brief are not supported by evidence properly of record, they have not been credited, but are merely attorney argument which is "no substitute for evidence." *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

Commc'ns., Inc., 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.").

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004)*; 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."); *see also In re i.am.symbolic, LLC,* 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but 'may focus … on dispositive factors, such as similarity of the marks and relatedness of the goods.'") (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We discuss these factors below.

A. Similarity or Dissimilarity of the Marks

We first consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *DuPont*, 177 USPQ at 567. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The issue 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 such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC,* 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon,* 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant argues:[4]

> In the case at hand, Applicant's Mark is the **single-word** MEGACLEAN, while Registrant's Mark is the **two-word** mark REJUVENATE MEGACLEAN. Not only do these two terms connote distinctly different meanings, their use as a single word or two words reinforces this distinction.

We disagree. In comparing the marks, we find them to be overall very similar in appearance, sound and commercial impression. Although the applied-for mark is missing the initial term, REJUVENATE, from the registered mark the two marks remain very close.

While the terms "rejuvenate" and "megaclean," have different meanings, each is highly suggestive of a cleaning quality or capability of the involved goods described in the application and cited registration. "Rejuvenate" may be defined as "to restore

[4] 4 TTABVUE 11.

to an original or new state,"[5] and "megaclean" strongly suggests an ability to clean "vastly" or "at the highest level of rank, excellence, or importance."[6] Thus, in the context of cleaning products, the marks convey very similar meanings and commercial impressions, albeit in an exaggerated fashion. Specifically, Applicant's MEGACLEAN imparts the connotation that the cleaning products are effective and accomplish a great deal of cleaning and Registrant's REJUVENATE MEGACLEAN will impart the same meaning with the added suggested benefit of restoring what is being cleaned to its original state.

We further point out that the cited registration is based on Registrant's claim that REJUVENATE has acquired distinctiveness (*see* footnote 2). *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive.") In other words, Applicant is essentially seeking to register the only inherently distinctive element of the registered mark, MEGACLEAN. Although REJUVENATE is the initial term in the registered mark, we do not find it to be the more dominant source-identifying element of the registered mark. Consumers familiar with the cited mark, REJUVENATE

[5] "Rejuvenate." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/rejuvenate. Accessed 30 Aug. 2022. We take judicial notice of this dictionary definition. *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); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

[6] "Mega." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/mega. Accessed 30 Aug. 2022. *Id.*

MEGACLEAN, are likely to perceive Applicant's mark, MEGACLEAN, as a merely a truncated version of the registered mark and denoting a related cleaning product line. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product."); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN "more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices").

We hasten to point out that there is no evidence of others using the term MEGACLEAN, either as part of a mark or otherwise, or registered in connection with cleaning products. In other words, despite being suggestive, MEGACLEAN has no demonstrated commercial weakness and we thus consider it to be an integral part of Registrant's overall mark.

In sum, although the term REJUVENATE is absent from the applied-for mark and this is a point of difference, the marks remain close. The applied-for mark, MEGACLEAN, is an important component of the registered mark, REJUVENATE MEGACLEAN, and consumers encountering either mark will clearly notice, visually and aurally, the similarity of the common term. In addition, as explained, the marks share similar meanings. Overall, we find them more similar than not and the first *DuPont* factor therefore weighs in favor of finding a likelihood of confusion.

B. Relatedness of the Goods; Trade Channels

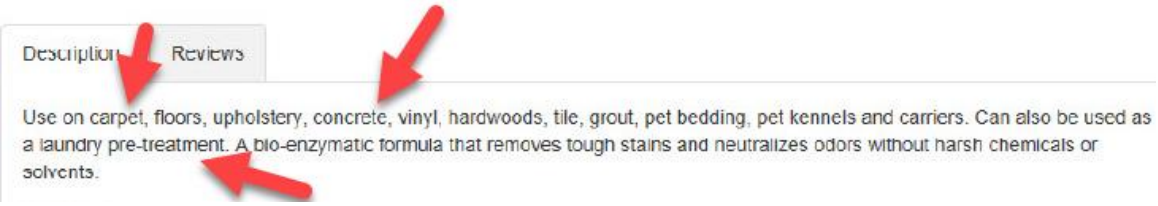
Under the second and third *DuPont* factors, we consider, respectively, "[t]he similarity or dissimilarity and nature of the goods" and the "established, likely-to-continue channels of trade" for these goods. *DuPont*, 177 USPQ at 567. *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). For both factors, we must base our analyses on the identifications in Applicant's application and the cited registration. *See Stone Lion,* 110 USPQ2d at 1162; *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The goods need not be identical or competitive for there to be a likelihood of confusion; there need only be a relationship in some manner, or the conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *Coach Servs. Inc.*, 101 USPQ2d 1721; *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.,* 223 USPQ 830, 831 (TTAB 1984).

Here, Applicant's goods are described as "cleaner for use on concrete and specialty concrete," and the goods in the cited registration are "laundry pre-treater and stain/spot remover for fabrics, clothing, and carpet." The goods can generally be classified as cleaning products, but with different applications—one for concrete and specialty concrete and the other for fabrics, clothing and carpet.

To support her contention that the involved goods are related, the Examining Attorney submitted Internet evidence showing several different manufacturers of products for cleaning concrete or outdoor floor surfaces as well as products for removing stains on fabrics, clothing or carpet.[7] Excerpts from this evidence include:

From website www.unbeatable.com:[8]

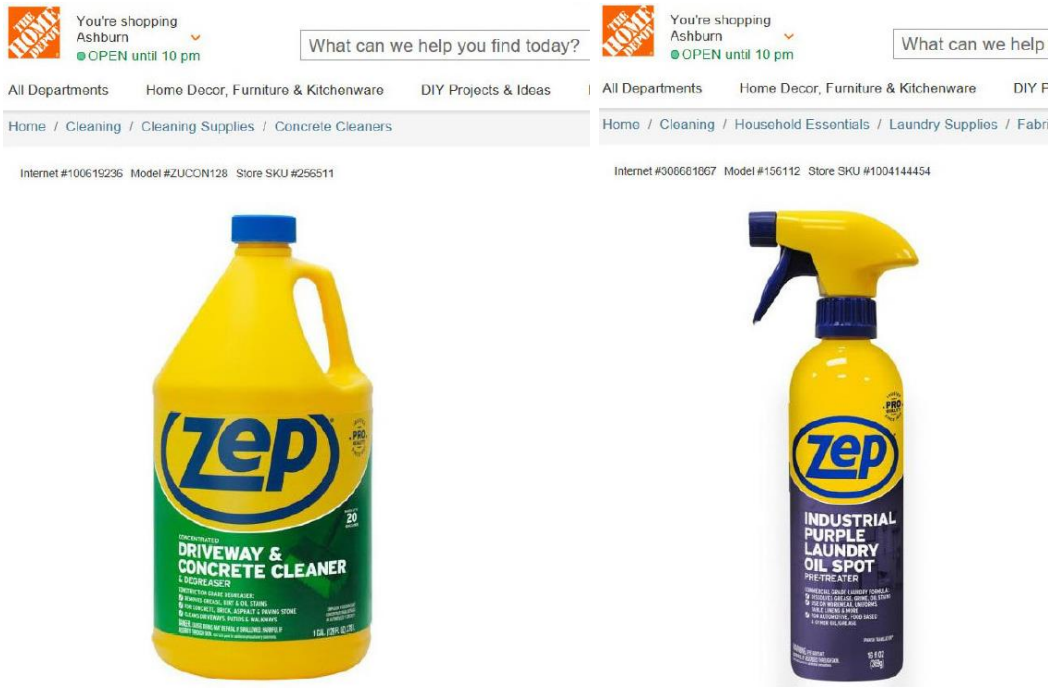


;

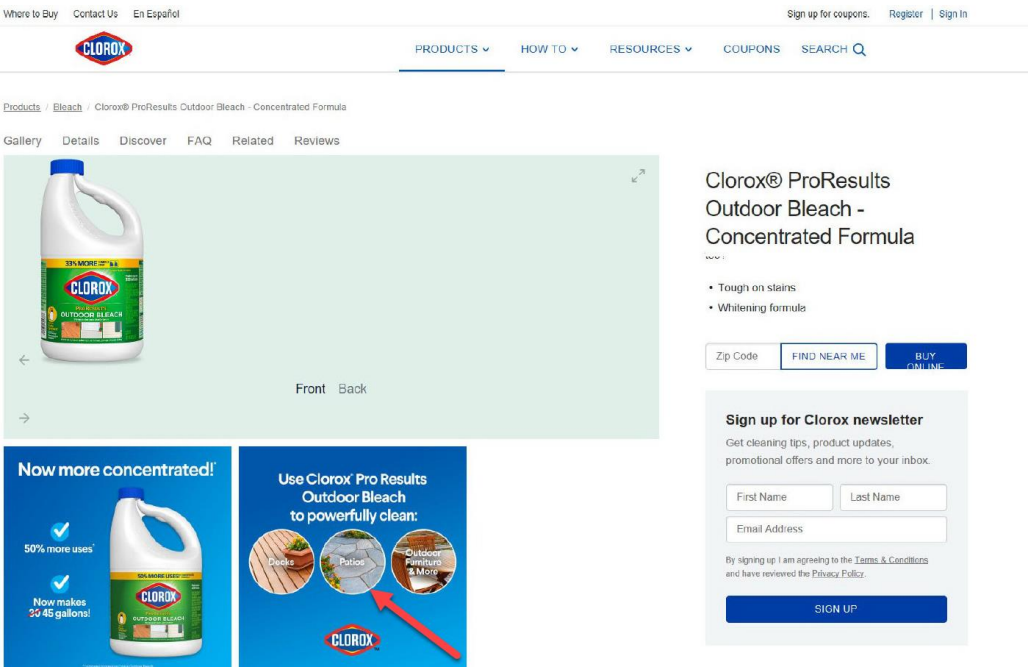
[7] Attached to Office Actions issued on November 12, 2020 and July 8, 2021.

[8] Printouts attached to Office Action issued on July 8, 2021, at TSDR pp. 27-28.

From The Home Depot website (www.homedepot.com):[9]

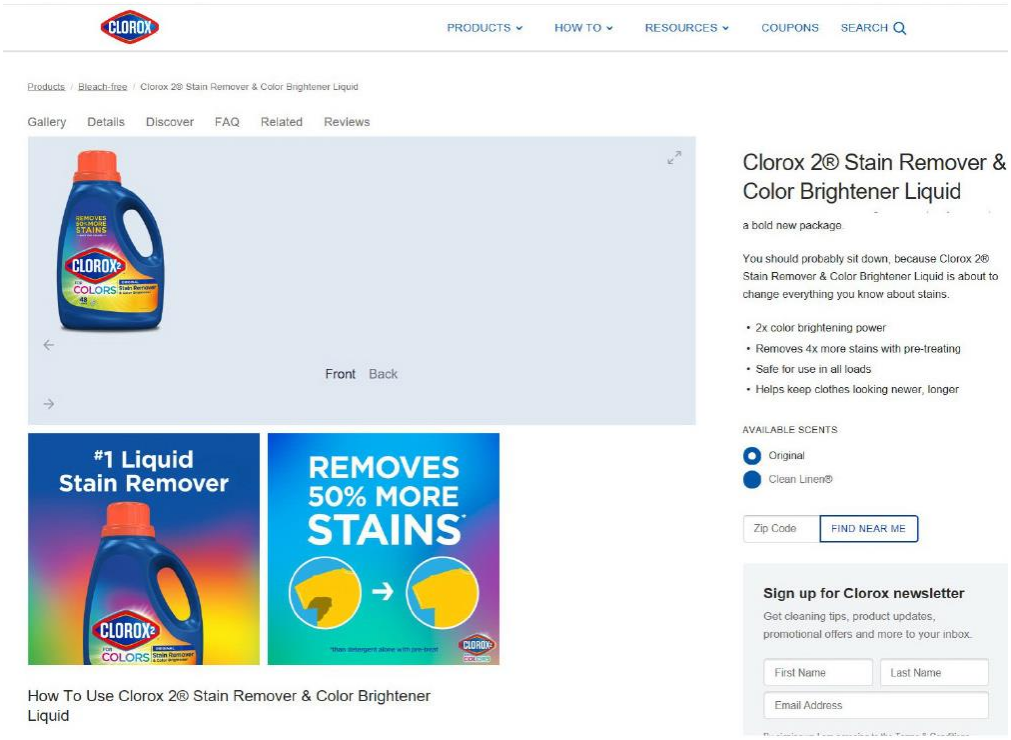


From the Clorox website (www.clorox.com):[10]



[9] *Id.* at pp. 35-38.

[10] *Id.* at pp. 21-25.



How To Use Clorox 2® Stain Remover & Color Brightener Liquid

The third-party Internet evidence adduced by the Examining Attorney demonstrates that others use a single mark for the same types of goods as those involved in this appeal. Indeed, at least with respect to the Instant Power product, it is possible that single product may be used for the same purposes as Applicant's and Registrant's goods, e.g., cleaning concrete and stain removal on fabrics and carpet. The evidence also demonstrates that the goods may be sold in the same trade channels, like the The Home Depot store, and will be encountered by consumers on the websites of the manufacturers. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (internet evidence shows overlapping trade channels).

The trademark examining attorney also submitted copies of six third-party, use-based registrations covering cleaning products for concrete, like those listed in the application, as well as cleaning products for fabrics, clothing or carpet, like those

listed in the registration.[11] These include the following marks and goods: ECOBRITEEC for "cleaning preparations for . . . concrete . . . polyester fabrics, polyester carpets," "stain removers," and "stain removing preparations";[12] STEARNS for "laundry detergents," "stain removing preparations," "cleaning preparations for concrete floors";[13] DYNASOL for "cleaner for concrete floors," "stain removers," "laundry detergents";[14] SYNTEC for "cleaning products, namely, degreasers for . . . concrete" and "laundry detergents";[15] SUMMIT BRANDS for "stain remover," "laundry detergents, laundry detergents with deodorizers, stain removers," "all-purpose rust and iron stain remover for whitening, brightening and removing stains from clothing . . . concrete," "all-purpose rust and stain remover for use in . . . and for whitening clothing . . . concrete."[16] There is also a registration for the INSTANT POWER mark, as shown above in use on the Unbeatable website, and this registration covers cleaning and stain removal products for clothing, fabrics, as well as surfaces like concrete.[17]

The third-party registration evidence helps show that the involved goods are the types of goods that may emanate from a single source under a single mark. *See In re*

[11] *Id.* at pp. 2-20.

[12] *Id.* at pp. 2-4; Reg. No. 6079664.

[13] *Id.* at pp. 5-8; Reg. No. 5062375.

[14] *Id.* at pp. 9-11; Reg. No. 5831627.

[15] *Id.* at pp. 12-14; Reg. No. 6065230.

[16] *Id.* at pp. 18-21; Reg. No. 6117074.

[17] *Id.* at pp. 15-17; Reg. No. 6197993.

I-Coat Co., 126 USPQ2d 1730, 1737 (TTAB 2018). *See also Albert Trostel*, 29 USPQ2d 1785-86; *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Based on the evidence, the involved goods are related and may be offered in the same channels of trade. Accordingly, the second and third *DuPont* factors weigh in favor of finding a likelihood of confusion.

C. Alleged Sophistication of Consumers

The fourth *DuPont* factor concerns the conditions under which and buyers to whom sales are made, i.e. "impulse" versus careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567.

Applicant argues:[18]

> The TTAB should take notice that Applicant's goods are specialty products for use in building and construction activities by persons sophisticated in such activities, while Registrant's goods are, quite simply, laundry pre-treatments. Applicant's Mark is used on specialized construction goods directed to expensive and complex structures, namely concrete, concrete slabs, and specialty concrete products that require significant knowledge and expertise, while the Registered Mark's goods are related to a laundry pretreater and stain/spot remover for fabrics, clothing and carpet. Consumers in need of the types of sophisticated concrete building materials are careful about choosing providers for these types of goods.

As explained above, however, we must base our analysis on the goods as they are described in the application and registration. *See Stone Lion*, 110 USPQ2d at 1161; *Octocom*, 16 USPQ2d at 1787 ("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

[18] 4 TTABVUE 18.

the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). Applicant's goods are described as, in part, "cleaner for use on concrete," and this is not limited to marketing to any particular field of use or class of clientele. As the record demonstrates, concrete cleaners may be marketed in The Home Depot and can be used on driveways or patios, in which case, the intended purchaser is the general homeowning public. Similarly, Registrant's goods are for anyone in the general public seeking to clean clothing, carpet or fabrics. This is the same class of consumers, who would exercise a normal level of care in their purchasing decisions.

Accordingly, the fourth *DuPont* factor remains neutral in our analysis.

D. Balancing the *DuPont* Factors - Conclusion

For the above-mentioned reasons, we find the applied-for mark, MEGACLEAN, is overall similar to Registrant's mark, REJUVENATE MEGACLEAN, and the evidence shows the goods are related and may be offered in the same trade channels. No factor weighs in favor of finding confusion unlikely. For these reasons, we find confusion is likely to occur should Applicant's mark be used concurrently with the registered mark.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Act, 15 U.S.C. § 1052(d), is affirmed.