

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
August 1, 2012
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Tyco Fire Products, LP¹ and ADT Services AG

v.

Buckeye Fire Equipment Company

Opposition No. 91192716
against Serial No. 77693791

Brooks R. Bruneau of Porzio Bromberg & Newman, PC, for Tyco
Fire Products, LP and ADT Services AG.

Kathryn A. Gromlovits of Shumaker Loop & Kendrick, LLP, for
Buckeye Fire Equipment Company.

Before Bucher, Grendel and Lykos, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark **KITCHEN GUARD** (*in standard character format*)
for "fire extinguishers" in International Class 9.²

¹ Although the original Notice of Opposition was filed by
Ansul, LLC and ADT Services AG, the records show that Ansul, LLC
merged with assignee, Tyco Fire Products, LP, on December 25,
2009. See Reel 4177/Frame 0921.

² Application Serial No. 77693791 was filed on March 18, 2009,
based upon applicant's allegation of a *bona fide* intention to use
the mark in commerce. No claim is made to the exclusive right to
use the word "Kitchen" apart from the mark as shown.

Tyco Fire Products, LP and ADT Services AG opposed the registration of applicant's mark on the grounds of priority of use and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Opposers' allegations, in connection with their Section 2(d) claim, include the following:

9. The "KITCHEN GUARD" trademark sought to be registered by Applicant is nearly identical in appearance, sound and commercial impression to Opposer's K Marks, namely its "K-GUARD," "KITCHEN ONE" [marks] ...³ registered for portable fire extinguishers

10. Applicant has adopted a combination of Opposer's K Marks, namely using "Guard" from U.S. Registration No. 2398376 (K-GUARD) ... and combined "Guard" with the term "Kitchen," also used by Opposer in its registered marks.

11. Consequently, Applicant's KITCHEN GUARD trademark and associated goods would be viewed by consumers as emanating from Opposer by either erroneously believing it to be an existing trademark of Opposer, or a new trademark that is part of the series of Opposer's K marks.

12. Applicant's KITCHEN GUARD trademark is confusingly and deceptively similar to

³ Opposers originally filed this Notice of Opposition claiming four marks (e.g., **KITCHEN ONE** and **K-GUARD**, **KITCHEN KNIGHT** and **KITCHEN KNIGHT & design**, as shown at right, the latter two owned by ADT Services AG). However, based on discovery in the case, opposers have elected to move to final decision based only upon the **K-GUARD** and **KITCHEN ONE** trademarks now owned solely by Tyco Fire Products.



Opposer's previously used and duly registered K Marks.

13. The goods identified in the "KITCHEN GUARD" Application Serial No. 77693791 are legally identical to the fire extinguisher goods offered by Opposer under its K Marks ... [such] that consumers are likely to believe that Applicant's goods originate with Opposer's goods, or vice versa.

14. The potential consumers for Applicant's goods are the consumers of Opposer's goods.

15. Due to the confusing similarity between Applicant's "KITCHEN GUARD" trademark and Opposer's K Marks, which were previously used and duly registered, the identical nature ... of the parties' goods, and the overlapping of consumers who are likely to believe that Applicant's goods originate with Opposer or vice versa, there would be resulting likelihood of confusion in the marketplace and damage to Opposer. Because of this very strong similarity of the marks and the identical ... nature of the goods, registration of "KITCHEN GUARD" by Applicant is likely to cause a belief by consumers that Applicant's goods are endorsed by, sponsored by, or approved by Opposer, all causing damage to Opposer.

Opposers' pleaded ownership of the following relevant federal trademark registrations:

| | |
|--------------------|--|
| K-GUARD | for "portable fire extinguishers" in International Class 9; ⁴ and |
| KITCHEN ONE | for "portable fire extinguishers" in International Class 9. ⁵ |

⁴ Registration No. 2398376 issued on October 24, 2000; renewed.

⁵ Registration No. 2870427 issued on August 3, 2004; Section 8 affidavit accepted and Section 15 affidavit acknowledged. No

Applicant filed an answer to the notice of opposition, by which it denied the allegations essential to opposers' Section 2(d) claim. Only opposers presented any evidence at trial, but the case has been fully briefed.

We have considered all of the evidence of record and all of the parties' arguments. Based on the evidence discussed below, and for the reasons discussed below, we hereby *sustain* the opposition.⁶

PRELIMINARY MATTER

Applicant's testimonial deposition of its representative, William Vegso, taken on July 20, 2011, was neither submitted to the Board nor served on opposers' counsel until November 8, 2011. Given that it was not filed with the Board or served on opposers in a prompt manner, we have not considered this transcript or the attachments thereto. 37 CFR § 2.125(a); TBMP § 703.01(m) (3rd ed. rev. 2012). We do note that its contents appear to be largely duplicative of Mr. Vegso's earlier confidential testimony deposition of September 22, 2010, that opposers made of

claim is made to the exclusive right to use the word "Kitchen" apart from the mark as shown.

⁶ Although the original notice of opposition contained allegations of a likelihood of dilution by blurring (§§ 16 and 17), this basis for opposition has presumably been dropped during the course of this proceeding.

record. We hasten to add that even if we had made it part of the record, it would not have changed the outcome herein.

THE EVIDENCE OF RECORD

During its main testimony period, opposer submitted the following evidence:

- (1) the testimony deposition of James Cox, Senior Manager, Marketing Communications for Tyco Fire Protection Products, a division of opposer, Tyco Fire Products, LP, and exhibit thereto, namely Nos. Opp-1 to Opp-11, TTABVue Entry #23;
- (2) the testimony deposition of Mark Neumann, Director of Product Management for Standard Products at Ansul, a division of Tyco Fire Products, LP, and exhibit thereto, namely Nos. Opp-12 to Opp-13, TTABVue Entry #23;
- (3) opposers' first Notice of Reliance (filed on May 12, 2011) on opposers' claimed registrations (1st NOR Exs. A-D), on an Examiners Amendment retrieved from the United States Patent and Trademark Office database (1st NOR Exs. E), on certain of applicant's discovery responses (1st NOR Exs. F-H), and Post Registration documents related to the maintenance of Tyco Fire Products, LP.'s **K-GUARD**

- and **KITCHEN ONE** registrations (1st NOR Exs. I-J),
TTABVue Entry #21; and,
- (4) opposers' second Notice of Reliance (filed on May 16, 2011) on the "Confidential" testimony deposition of William Vegso, Rule 30(b)(6) representative of applicant, dated September 22, 2010, TTABVue Entry #22.

INITIAL FINDINGS OF FACT

The evidence of record establishes the following pertinent facts regarding the parties.

Opposer

Opposer, Tyco Fire Products, LP, ("Tyco Fire") is a fire suppression and building products company that includes the division Tyco Fire Protection Products. (Cox Test., at 5; Neumann Test. at 3-4). Although ADT Services AG ("ADT") remains in the caption as an opposer, since the results of plaintiffs' discovery, the relevant plaintiff has been Tyco Fire, and specifically its Tyco Fire Protection Products division. Among the Tyco Fire products sold nationwide are two very similar portable fire extinguishers designed to be used in kitchen grease fires

(Neumann Test. at 4-5, 10; Cox Test. at 11-19), sold under the marks **K-GUARD** and **KITCHEN ONE**.

Applicant

Applicant, Buckeye Fire Equipment Company ("Buckeye"), is a competitor of Tyco Fire (Neumann Test. at 5-7), and filed the involved intent-to-use application to register the mark **KITCHEN GUARD** in connection with fire extinguishers. Both the involved product and its chosen source-identifier were developed by William Vegso. Prior to working for applicant, Mr. Vegso was employed by Pyro-Chem when Tyco International purchased Pyro-Chem and made it a division of Ansul, Inc. (See Applicant's Responses Nos. 3-6 to Opposers' First Set of Requests for Admission, 1st NOR – Exhibit H; Vegso Dep. Tr. at 8, 2nd NOR, Ex. K). At the time applicant conducted a trademark search for the **KITCHEN GUARD** trademark, Mr. Vegso was aware of Opposers' **K-GUARD** and **KITCHEN ONE** marks. (see Applicant's Responses Nos. 7, 12 to Opposers' First Set of Requests for Admission, 1st NOR – Exhibit H; Vegso Dep. Tr. at 29-30, 2nd NOR, Ex. K).

Applicant's product line includes fire extinguishers and fire extinguisher systems for commercial kitchens. (See Applicant's Response Nos. 13 to Opposers' First Set of Requests for Admission, 1st NOR – Exhibit H). Applicant

advertises its fire extinguisher products generally as appropriate for commercial buildings that house law firms, retail stores, restaurants, etc. (Vegso Dep. Tr. at 59, 2nd NOR, Exhibit K). Through its wholly-owned and controlled subsidiary, Shield Fire Protection, applicant has allegedly sold a fire extinguisher product for consumers to use for kitchen fires in the home, touting the use of the same wet chemical agent that protects deep fat fryers in commercial kitchens (Vegso Dep. Tr. at 13-15, 46, 65-66, 72-74; Vegso Dep. Tr., and Ex. 3 "Product Catalog" at Bates BUK 0009, Ex. 4 "Aerosol Can"). On its trade dress, applicant states that **KITCHEN GUARD** is a "Kitchen Cooking Oil and Grease

AEROSOL FIRE SUPPRESSANT SPRAYS

Our two aerosol fire suppressant sprays provide an easy-to-use and effective solution to the two leading causes of fire in the home. Kitchen Guard contains a specially formulated wet chemical agent that can be safely used on small cooking oil and grease fires in the kitchen. Home Guard contains our high performance Class A foam, specifically designed for safely tackling common combustible fires around the home.

KITCHEN GUARD

WET CHEMICAL FIRE SUPPRESSANT SPRAY
Suitable for tackling residential cooking oil and grease fires. It incorporates the same agent that protects deep fat fryers in commercial kitchens.

Cooking Oil is the #1 Cause of Home Fires

THE WET CHEMICAL AGENT IN OUR KITCHEN GUARD SPRAY IS RIGHT FOR YOUR KITCHEN BECAUSE IT:

- Is recommended by the NFPA for tackling cooking oil fires in commercial kitchens.
- Is tested and certified for use on cooking oil fires.
- Is cleaner than dry chemicals, ensuring minimum clean-up required.
- Has cooling and sealing capabilities, preventing the fire from reigniting.

WHY AN AEROSOL IS SUPERIOR WHEN TACKLING COOKING OIL FIRES
Traditional extinguishers discharge the agent too forcibly, creating a huge cloudy mess and causing burning oil to be ejected from the pan. With no cooling properties, the fire can often reignite. Kitchen Guard discharges a clean and gentle spray to ensure that burning oil does not splash out of the pan, and its cooling properties ensure the fire stays out.

HOME GUARD

CLASS A FOAM FIRE SUPPRESSANT SPRAY
Suitable for tackling residential common combustible fires, it incorporates the same agent that fire departments use for tackling fast spreading forest fires.

Common Combustibles are the #1 Cause of Home Fires

THE FOAM AGENT IN OUR HOME GUARD SPRAY IS RIGHT FOR YOUR HOME BECAUSE IT:


- Is tested and certified for use on common combustible fires.
- Is suitable for tackling combustible fires such as wood, paper, fabric, furnishings, plastics and rubber.
- Has excellent wetting properties, allowing the foam to adhere more of the fire's heat.
- Is cleaner than dry chemicals, ensuring minimum clean-up required.
- Provides greater penetration into burning materials.

| Unit Description | Part # | UPC | Case Qty | Unit Weight | Unit Size H x W x D | Carton Size H x W x D | Case Size H x W x D |
|------------------|---------|--------------|----------|-------------|---------------------|-----------------------|---------------------|
| Kitchen Guard | KGUARD | 850148002042 | 12 | 1.0 lb | 9.75 x 2.75 x 2.75 | N/A | 10.0 x 8.1 x 10.75 |
| Home Guard | HGUARD | 850148002059 | 12 | 1.0 lb | 9.75 x 2.75 x 2.75 | N/A | 10.0 x 8.1 x 10.75 |
| Twin Pack | HKGUARD | 850148002073 | 12 | 2.0 lb | see above | 10 x 5.5 x 5 | 10.5 x 18.3 x 12 |

KITCHEN GUARD WET CHEMICAL FIRE SUPPRESSANT SPRAY
Formulated to tackle residential cooking oil and grease fires. Incorporates the same extinguishing agent that protects deep fat fryers in restaurant kitchens.

WHY THE WET CHEMICAL AGENT IN OUR KITCHEN GUARD SPRAY IS RIGHT FOR PROTECTING YOUR KITCHEN
It's recommended by the National Fire Protection Association for tackling cooking oil fires. It's tested and certified for use on cooking oil fires. It's cleaner than dry chemical to ensure minimal clean-up. It has cooling & sealing capabilities to prevent the fire from reigniting.

WHY AN AEROSOL IS MUCH BETTER ON COOKING OIL FIRES
Traditional extinguishers discharge the agent too forcibly. This can create a huge cloudy mess and result in burning oil being ejected out of the pan. With no cooling properties the fire can often reignite. Kitchen Guard discharges a clean gentle spray to ensure the burning oil does not splash out of the pan and its cooling properties ensure the fire stays out.



Kitchen Guard

- Tested to UL711A
- For Cooking Oil & Grease Fires
- Meets 35kv electrical safety test
- 5-Year Life
- No messy clean-up

Independently tested

UL 711A

Ordering Part #

Kitchen Guard

More Kitchen Guard Information

- Download Data Sheet

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Fire Suppressant" that was "Developed from the same proven wet chemical agent used in restaurant fire suppression systems." (See Exhibit 4, page 2 of Vegso Dep. Tr. at 2nd NOR Exhibit K).

OPPOSERS' BURDEN

To prevail in this opposition proceeding, opposers must establish (1) their standing to oppose and (2) at least one statutory ground of opposition to registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); and *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1726 (TTAB 2010).

OPPOSERS' STANDING

Tyco Fire has properly made its pleaded registrations of record, which establish that the registrations are in effect and are owned by opposer, Tyco Fire. (1st NOR – Exhibits A-B, I-J). In view thereof, and because Tyco Fire has established that its pleaded Section 2(d) claim is not frivolous, we find that opposer, Tyco Fire, has a real

⁷ This image was drawn from applicant's website, <http://www.shieldprotects.com/kguard.html> as accessed on September 20, 2010. Vegso Ex. 25.

interest in the outcome of this proceeding and thus a reasonable basis for believing that it would be damaged by the issuance to applicant of the registration applicant seeks. Accordingly, we find that opposer, Tyco Fire, has established its standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842, 1844. *See also Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

OPPOSER'S SECTION 2(d) CLAIM

Trademark Act Section 2(d) bars registration of an applicant's mark if it " ... so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." Thus, in order to prevail on its Section 2(d) claim, opposer, Tyco Fire, must establish (1) its priority of use of its pleaded mark(s) and/or its ownership of registration(s) of its pleaded mark(s), and (2) the existence of a likelihood of confusion between applicant's mark and opposers' pleaded mark(s).

As noted above, opposer bases its Section 2(d) claim on its ownership of registrations of the marks **K-GUARD** and

KITCHEN ONE used in connection with portable fire extinguishers.

Priority

As noted earlier, opposer, Tyco Fire, has properly made of record its two pleaded registrations, which establish that the registrations are in effect and are owned by opposer. Accordingly, Section 2(d) priority is not at issue in this case as to the marks and the goods covered by those registrations, and opposer therefore is not required to prove actual priority of use with respect to those marks and services. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); and *Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562, 1566 (TTAB 2007).

Likelihood of Confusion

Accordingly, we turn to a consideration of the question of likelihood of confusion. Our determination of likelihood of confusion is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on this issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

The salient question to be determined is whether there is a likelihood that the relevant purchasing and/or using public will be misled to believe that the goods offered under the involved marks originate from a common source.

See J.C. Hall Company v. Hallmark Cards, Incorporated, 340 F.2d 960, 144 USPQ 435 (CCPA 1965); and *The State Historical Society of Wisconsin v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 190 USPQ 25 (TTAB 1976).

Opposer must establish by a preponderance of the evidence that there is a likelihood of confusion. *Crash Dummy Movie LLC v. Mattel Inc.*, 601 F.3d 1387, 94 USPQ2d 1315, 1316 (Fed. Cir. 2010). The relevant *du Pont* factors in the proceeding now before us are discussed below.

Goods and services

Our inquiry into this *du Pont* factor is whether the goods are so related such that a consumer may believe the marks indicate that the goods emanate from a single source. *See On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); and *In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001). As to the parties' respective goods, the evidence shows that opposers' marks are registered in connection with portable

fire extinguishers. Applicant is seeking registration for fire extinguishers. Applicant's "fire extinguishers" encompass opposer's registered "portable fire extinguishers," and therefore the parties' goods are legally identical.

In arguing that the Board should consider the context of the actual marketplace, applicant argues in its brief (at 14-15, citations and footnotes omitted):

Here, Buckeye's goods are listed as "fire extinguishers" and Tyco's goods are listed as "portable fire extinguishers." ... [T]he goods associated with Buckeye's **KITCHEN GUARD** mark are very different from the goods connected to Tyco's **KITCHEN ONE** and **K-GUARD** marks. The goods associated with the **KITCHEN GUARD** mark are residential-use, small, lightweight, disposable aerosol cans that are sold in retail stores like Home Depot or Lowes for a price range of about \$10 to \$20 to homeowners. ... On the other hand, Tyco's goods are industrial-grade large, multi-liter, refillable fire extinguishers that are only sold through distributors for several hundred dollars each for use in industrial and commercial establishments such as schools, hospitals, and restaurants.

However, in making a determination under this *du Pont* factor, it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. Specifically, it is not relevant whether any member of the relevant purchasing public would confuse a

small aerosol can with a large stainless steel industrial-grade extinguisher having a gauge, a set pin and a hose.

Rather, the issue is whether there is a likelihood of confusion as to the source of the goods. The goods need only be sufficiently related that the relevant consumers or users would be likely to assume, upon encountering the goods offered under the respective marks at issue, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007); and *In re Wilson*, 57 USPQ2d 1863, 1866-67 (TTAB 2001).

In reality, most of opposers' fire extinguishers may well be found in restaurants and other similar commercial establishments, while most of applicant's **KITCHEN GUARD** fire extinguishers may well be found in residential settings.

Nonetheless, as seen above, applicant emphasizes that its **KITCHEN GUARD** product has a similar wet chemical agent to the ones used in Tyco Fire's involved portable fire extinguishers, and that they are designed to extinguish the same types of cooking oil and kitchen grease fires. Additionally, both types of products are characterized as backup or follow-up measures, even if the commercial kitchen

has an automatic, pre-engineered fire suppression system (of the types also marketed by Tyco Fire and Buckeye).

Hence, given the facts of this case, the record supports the conclusion that consumers encountering applicant's **KITCHEN GUARD** mark very well may believe that it is a product associated with or sponsored by Tyco Fire because the respective fire extinguishers offered by applicant and Tyco Fire are meant as backup in extinguishing the same types of cooking and grease fires.

Applicant has attempted to recast the standard of review on this factor. In effect, applicant would have us consider its identification of goods as if it were "small, disposable fire extinguisher in an aerosol can." However, to do so would be to suspend our legal precedent that this determination must be made based upon the goods as identified in the application papers, when compared with the goods identified in opposers' pleaded registrations. *Cunningham v. Laser Golf Corp.*, 55 USPQ 2d 1842 (Fed. Cir. 2000).

Applicant points to the dissimilarity in the goods based on the addition of the word "portable" in Tyco Fire's identifications of goods, arguing that this dissimilarity is determinative. That is, applicant argues that in order to be classified as "portable," opposers'

involved fire extinguishers must pass rigorous testing by Underwriters Laboratories to be "UL listed" under UL 711, for example. By contrast, its disposable **KITCHEN GUARD** aerosol cans cannot be "UL listed" under this standard. Nonetheless, in touting its aerosol product, applicant repeatedly makes reference in its catalogues, websites and product trade dress to official sounding approvals, e.g., "Tested to UL 711A," "recommended by the National Fire Protection Association for tackling cooking oil fires in commercial kitchens," etc.

On the total record, we find that applicant's argument is entitled to little or no probative value under this *du Pont* factor. In addition to the fact that applicant is intentionally blurring the difference in the products' respective fire suppression capabilities in the event of a kitchen fire, nothing in the record shows that opposers' potential customers or users, including restaurateurs who might be aware of these differences in suppressing fires would attribute any source-distinguishing significance to such details.

While it is clear there are more stringent testing requirements for a fire extinguisher required by fire codes to be placed prominently in a commercial kitchen than is the case for a disposable aerosol can in a residence, we construe the "portable" in Tyco Fire's

identifications of goods less as a term of art and more as a way of distinguishing them from larger, built-in, automatic fire suppression systems in restaurant kitchens, for example. Accordingly, we construe opposers' "portable fire extinguishers" as a subset of applicant's "fire extinguishers."

The record shows that applicant's entry into the fire extinguisher market ties in very closely with the market for kitchen fire suppressants. We find that that the relevant purchasing public, who in this case would include restaurant owners seeking additional fire protection, are likely to assume that opposer, Tyco Fire, has expanded from industrial-grade fire extinguishers to disposable fire extinguishers for residential-use, much as Buckeye has done with its **KITCHEN GUARD** product. Thus, even though Buckeye has allegedly been assiduous in creating a wall between its Shield Fire Protection division and Buckeye's traditional market for industrial-grade fire suppression equipment, we find nonetheless that when one focuses on protection for kitchen fires, the "fire extinguishers" of Buckeye's Shield Division and Tyco Fire's claimed goods are legally closely related.

Additionally, even if we were to assume that opposers' "portable fire extinguishers" are not legally encompassed

within the "fire extinguishers" identified in applicant's involved application, we still find as a factual matter, for all of the reasons stated above, that "portable fire extinguishers" and "fire extinguishers" are at the very least closely related for purposes of this *du Pont* factor.

This case is easily distinguishable from various cases cited by applicant. In many of the cases where tribunals found goods and/or services were not related, the only claim or proof was that both were deemed to be within broadly-defined categories. For example:

- *Electrical:*

In an *ex parte* refusal, the examiner, with absolutely no evidence as to trade channels, purchasers or even fields of application, relied solely on the fact that the goods of both applicant and registrant were all electrical in character. However, while the summary opinion is brief, we learn that applicant's goods were electrical fixtures whereas the goods identified in the cited registration were electronic devices used in the communication field. *In re EMCO, Inc.*, 177 USPQ 415, 415-16 (TTAB 1973).

Automotive batteries sold at retail and household electrical lighting fixtures sold at wholesale are not related goods. *Pep Boys-Manny, Moe & Jack v. Edwin F. Guth Co.*, 197 F.2d 527, 528, 94 USPQ 158, 159-60 (CCPA 1952).

- *Computers:*

This is a case cited by applicant that stands for the startling proposition that a relationship does not exist between listed goods and services simply because each involves the use of computers. *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1463-64 (TTAB 1992).

- *Electronic testing equipment in the aviation industry:*

This is an infringement action (not one for registration) where the Court found purchasers would exercise a very high degree of care inasmuch as plaintiff's products cost in the tens of thousands of dollars while defendant's product costs between two and five million dollars. Furthermore, the Court found a substantial difference between the functions of the respective products (e.g., both electronic testing equipment in aviation industry, but one for testing equipment to monitor the mechanical performance of propulsion systems vs. testing software) and a seeming disjunction between their respective purchasers (e.g., military versus civilian aircraft). *Atec, Inc. v. Societe Nationale Industrielle Aerospatiale*, 798 F.Supp. 411, 413, 24 USPQ2d 1951, 1953-54 (S.D. Tex. 1992).

- *Color control:*

The Court found that merely because both involved products had some application to color control was insufficient to find the goods related given the obvious difference in the goods. *Sal Iannelli, Inc. v. Wasser*, 411 F.2d 1350, 162 USPQ 260, 261 (CCPA 1969).

- *Facilities engineering / planning:*

The record contained absolutely no evidence that restaurants having an interest in registrant's financial services would assume a connection with applicant's engineering services designed for manufacturing facilities. *In re Planprint Co.*, 229 USPQ 621, 623-24 (TTAB 1986)

- *Medical / health care:*

Applicant cites to *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786, 791 (1st Cir. 1983). In *Astra*, for example, the Beckman analyzer was a highly technical instrument costing between \$35,000 and \$60,000. However, there are also significant facts distinguishing this case from the case at bar. For example, that case was an infringement case, where **Astra** functioned as Astra Pharmaceutical's house mark, but Beckman's product mark was always used closely with the **BECKMAN** house mark. This type of reasoning may be relevant to a likelihood of confusion decision in an *infringement* case, but cannot be considered in a *registration determination*. Finally, there were also found to be distinct channels of trade, inasmuch as one set of goods went to the hospital's pharmacy while the other went to the hospital's chemistry labs.

All the above tribunals were faced with likelihood of confusion determinations based on broadly-defined categories in cases where the plaintiff or the Trademark Examining Attorney failed to provide proof of the relationships of the goods and/or services. Additionally, some of these case involved additional factors, such as distinct channels of trade, an absence of any common descriptive characteristics between the allegedly-related goods or services, expensive goods/services prompting the added care of quite sophisticated purchasers, etc.

We find in this case, by contrast, that applicant's goods are fairly inexpensive and might well be purchased with a low standard of care, they have substantially the same purpose as opposers' goods, there is a potential

overlap in the customer/user base, and opposers have provided clear evidence of a relationship between the respective goods.

For all of these reasons, we find that the parties' respective goods are at a minimum related sufficiently, if not identical, to support a finding that this *du Pont* factor favors a conclusion that confusion is likely.

Similarity of Trade Channels and Purchasers.

Under this *du Pont* factor, we determine the similarity or dissimilarity of the trade channels in which, and the classes of purchasers to whom, opposers' and applicant's respective goods are or would be marketed.

As to trade channels, applicant argues that its Shield Fire Protection subsidiary operates in a totally different trade channel from those of opposers. However, we have to assume that the respective goods will be offered in all appropriate trade channels for such goods, and we find ample evidence that there will not be a complete disjunction in the trade channels and purchasers/users of the respective goods.

Because there are no limitations or restrictions as to trade channels or classes of purchasers in applicant's and opposers' respective identifications of goods, we presume

that the goods are or would be marketed in all normal trade channels for such services and to all normal classes of purchasers of such services, regardless of what any evidence might show to be differences in the actual trade channels and purchasers for applicant's and opposers' goods. See *Packard Press Inc. v. Hewlett-Packard Co.*, 56 USPQ2d 1351, 1355. Accordingly, given that the **KITCHEN GUARD** application seeks registration in connection with "fire extinguishers" without restriction, and Tyco Fire's registrations both list the goods as "portable fire extinguishers," also without restriction, the Board must presume the channels of trade and classes of purchasers for applicant's and Tyco Fire's goods are the same. *Genesco, Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003); and *In re Smith & Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

However, based on applicant's approach to this litigation, we set aside for the moment the fact that there are no restrictions on channels of trade in the application or in the cited registrations. Ignoring this critical fact, applicant has asserted throughout this appeal that in actuality, the respective goods currently being sold under its mark and opposers' cited marks are sold to a different class of consumers in completely separate channels of trade.

Nonetheless, applicant's marketing strategy consistently links its **KITCHEN GUARD** product to opposers' class of commercial kitchen fire protection products. As seen above, applicant touts its **KITCHEN GUARD** product as a "wet fire suppressant spray, suitable for tackling residential cooking oil and grease fires, it incorporates the same agent that protects deep fat fryers in commercial kitchens." (See Exhibit 3 to Vegso Dep. Tr., Bates No. BUK0009; at 8 *supra*). At the same time that applicant is asking us to evaluate the relatedness of the goods by looking to extrinsic evidence, applicant is also asking us to turn a blind eye to the way in which it promotes the sales of its **KITCHEN GUARD** product. Namely, that we ignore completely applicant's repeated statements to consumers that the **KITCHEN GUARD** product is similar to the type of product Tyco Fire markets under the **K-GUARD** and **KITCHEN ONE** marks, thereby amplifying the potential for consumer confusion as to the source or origin of this disposable product.

To be most clear about our findings herein, nothing in the record would lead us to believe that Tyco Fire sells aerosol products. As to the channels of trade for Tyco Fire, substantially all of its involved products would appear to flow through distributor within the fire equipment

industry. Although it seems one might be able to order a portable fire extinguisher over the Internet from opposer, Tyco Fire, we have no reason to believe that Tyco Fire, is directly targeting the retail market. In fact, the majority of its products are not appropriate for use by residential consumers.

Conversely, for purposes of this *du Pont* factor, should we consider the extrinsic evidence as to the current reality of applicant's marketing plans, we find in this case that the purchasers of applicant's "aerosol product" also include the restaurant owner who may decide to increase the fire protection in her restaurant by purchasing quantities of applicant's inexpensive product at the local home improvement store.

In short, the fact that there are no limitations or restrictions as to trade channels or classes of purchasers in applicant's and opposers' respective identifications of goods supports a conclusion that a likelihood of confusion exists. Additionally, to the extent that applicant's sales pitch for a disposable fire extinguisher might well appeal to businesspersons such as restaurateurs in need of increased fire protection, that too supports a finding of likelihood of confusion.

Conditions of Purchase/Use

Under this *du Pont* factor, we consider the conditions under which the parties' goods are purchased, including the sophistication of consumers and the care exercised in purchasing the goods. We find that the ultimate consumers to whom applicant markets its goods are not likely to be knowledgeable or careful purchasers. This stands in sharp contrast to the facts in *Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 217 USPQ 649, 650 (Fed. Cir. 1983), a case cited by applicant, where the respective goods were quite distinct, were directed to sophisticated purchasing agents in large corporations and government agencies, and any overlap in customers would be *de minimis*. As to conditions of purchase, the instant case is also quite different from the facts of *Electronic Data Systems Corp.*, 23 USPQ2d at 1463-64, and *Astra v. Beckman*, 220 USPQ at 791, cited again by applicant in its discussion of this particular *du Pont* factor.

Furthermore, within commercial kitchens, all the involved fire extinguishers will be placed in clear view and in plain sight in a cooking environment. *Cox Test.* at 27. Tyco Fire's involved products are intended to be used by kitchen personnel or whoever else is working near the fire - not necessarily trained firefighting personnel. *Id.* at 10,

26. In this context, we conclude that neither deliberation nor sophistication would be the norm.

For these reasons, we find that the *du Pont* factor focusing on the conditions of purchase and/or use, weighs in favor of a conclusion that a likelihood of confusion exists.

Similarity of the Marks

Under this *du Pont* factor, we determine the similarity or dissimilarity of applicant's mark and opposers' marks when they are viewed in their entirety in terms of appearance, sound, connotation and commercial impression.

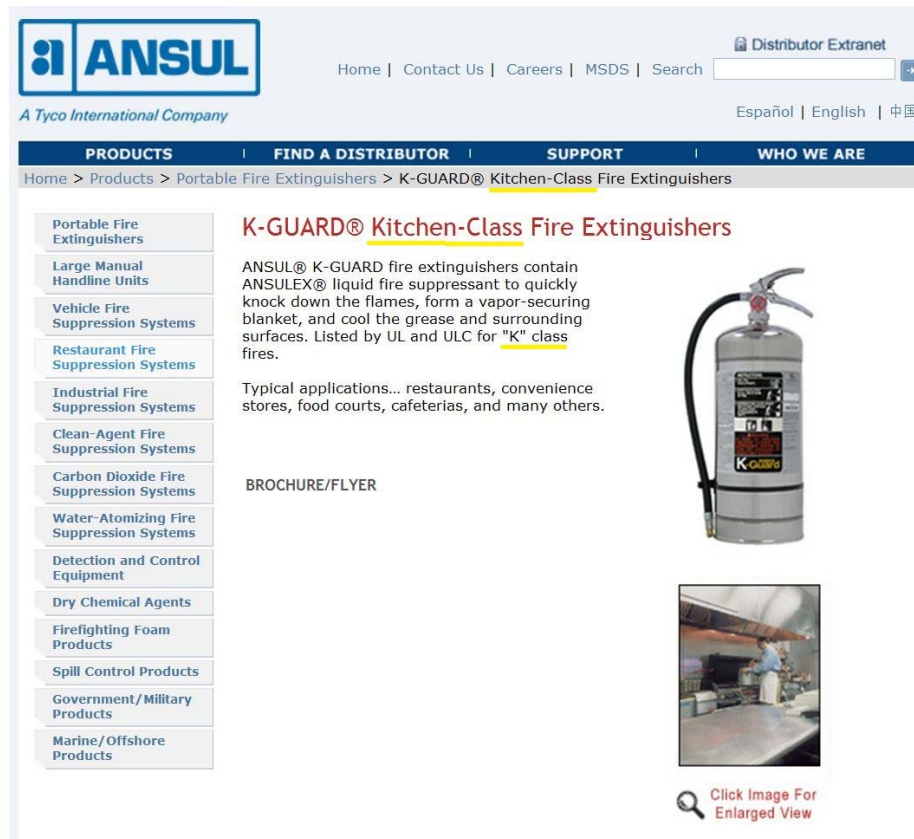
See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The test under this *du Pont* factor 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 their overall commercial impressions as to be likely to cause confusion when used on or in connection with the goods at issue. This necessarily requires us to take into account the fallibility of memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks. *See Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1660 (TTAB

2002); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1468 (TTAB 1988); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Although the marks at issue must be considered in their entirety, it is well-settled that one feature of a mark may be found to be more significant than another in terms of the mark's function as a source-indicator, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark, and in comparing the marks at issue under this *du Pont* factor. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004). "Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We begin with a comparison of applicant's mark and Tyco Fire's **K-GUARD** mark. On its website Tyco Fire refers to its **K-GUARD** fire extinguisher as its "**K-GUARD** Kitchen-Class Fire Extinguisher":



In comparing Tyco Fire's **K-GUARD** with applicant's **KITCHEN GUARD**, it is clear that both marks share in common the inherently distinctive term "Guard" as the terminal word. While both parties seem to agree that the word "Guard" might well be seen as somewhat suggestive for these goods, we see no support in the record that it should be found merely descriptive or commercially weak for these goods.

Turning then to the leading portions of both marks, applicant claims that the letter "K" in the **K-GUARD** mark stands for the "K" class of fire extinguishers.

Under the codes and standards of the National Fire Protection Association (NFPA), Class K fire extinguishers are for use on Class K fires - fires in cooking appliances that involve combustible cooking media (vegetable or animal oils and fats). The parties agree that grease fires originating with deep, fat fryers or cooking oil fires are referred to as "K" class fires in the fire prevention and suppression industry.

When this particularized class of fires was given the "K" designation within the United States, it was clear that the danger of grease and cooking oil fires centered on locations commonly known as "kitchens." Even if the record is not clear that this was the reason the letter "K" was chosen, these wet chemical extinguishers are definitely designed to address the special cooking appliance fire hazards found in a commercial kitchen setting. Currently, then, it is not surprising that the involved extinguishers may sometimes be listed throughout the industry as "Class 'K' Kitchen Extinguishers." In fact, as seen above, Tyco Fire refers regularly to its "K-GUARD® Kitchen Class Fire Extinguishers."

When comparing in their entirety the marks **KITCHEN GUARD** and **K-GUARD**, we agree with applicant that they have obvious differences as to appearance and sound. On the

other hand, we find that it is likely that many consumers knowledgeable about Class K fire extinguishers would naturally associate "K" class with the word "kitchen." For such consumers or users of the product, **K-GUARD** and **KITCHEN GUARD** would have identical connotations and create substantially identical commercial impressions. In fact, as Tyco Fire noted in its brief, on at least one occasion in the record, applicant itself abbreviated the term "Kitchen" to simply the letter "K."⁸

Although opposers also make the case that the overall similarities between the **KITCHEN ONE** and **KITCHEN GUARD** marks as to sound and appearance outweigh any differences in connotation, we confine our analysis to the issue of likelihood of confusion between applicant's mark and the cited registration for **K-GUARD**. Inasmuch as we have found that confusion is likely between those marks, there is no need for us to consider the likelihood of confusion with the cited mark for **KITCHEN ONE**. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Hence, considering opposers' most relevant mark and applicant's mark in their entireties, we find them to be

⁸ As seen in footnote 7, *supra*, the full URL for this page of applicant's Shield Fire Protection division's website abbreviated its own **KITCHEN GUARD** mark as "**KGUARD**."

similar. The finding under this *du Pont* factor supports a conclusion that a likelihood of confusion exists.

The Number and Nature of Similar Marks in Use on Similar Goods

Although applicant points to case law in support of our finding opposers' marks to be commercially weak (see *Sure-Fit Products Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295 (CCPA 1958)), we find in the record no evidence of the use of similar marks on similar goods. At best for applicant, this is a neutral factor.

Conclusion on Likelihood of Confusion

After finding that opposers have established their standing to oppose and their priority, we have considered all of the evidence of record as it pertains to the relevant *du Pont* factors (including any evidence not specifically discussed in this opinion), and we conclude, based upon a preponderance of the evidence, that a likelihood of confusion exists. For the reasons discussed above, we find that the parties' marks are similar and that the parties' goods are sufficiently related that source confusion is likely to result from use of these similar marks in connection with such goods. The evidence of record pertaining to the other *du Pont* factors, on balance, also leads to the conclusion that confusion is likely. To the

extent that any evidence in the record might weigh in applicant's favor, we find that it is clearly outweighed by all of the evidence in the record which supports the ultimate conclusion that a likelihood of confusion exists.

Decision: Opposers are entitled to prevail in this proceeding under their Section 2(d) likelihood of confusion ground of opposition, the opposition is sustained, and registration to applicant is hereby refused.