

This Opinion is not a  
Precedent of the TTAB

Mailed: August 4, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Perry Textiles Inc.*  
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Serial No. 85802574  
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Matthew H. Swyers of The Trademark Company, PLLC  
for Perry Textiles Inc.

Anne C. Gustason, Trademark Examining Attorney, Law Office 117,  
Hellen Bryan-Johnson, Managing Attorney.

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Before Bucher, Greenbaum and Hightower,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Perry Textiles Inc. (“Applicant”) seeks registration on the Principal Register of

the mark  for

“stain repellents for bedding” in International Class 1.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85802574 was filed on December 13, 2012, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as December 13, 2012. The words “ADVANCED MATTRESS PROTECTION TECHNOLOGY WITH ODOR ELIMINATOR” are disclaimed. The application includes the following statements: “The mark consists of the words REPEL in dark blue, next to a yellow dot, next to the light blue

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used on its identified goods, so resembles the registered mark **REPEL-O-TEX** (in typed form)<sup>2</sup> for

“preparation for rendering textiles, fabrics, and textile and other materials, exclusive of lithographic and planographic printing plates and other lithographic and planographic materials, water, stain, and perspiration resistant” in International Class 1

as to be likely to cause confusion, mistake or deception.<sup>3</sup>

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

## I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. In the second to last paragraph of her brief, the Examining Attorney objects to the “new information regarding purported third-party usage of the applied-for mark,” referencing “page 12 of Applicant's brief.”<sup>4</sup> This “new information” consists of the

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letter A, next to a yellow dot, next to the light blue word TEX. In the upper right hand and bottom left hand corner of the mark are clusters of 3 dark blue dots. Below REPEL A TEX are the dark blue words ADVANCED MATTRESS PROTECTION TECHNOLOGY WITH, above a light blue oval, displaying the white words ODOR ELIMINATOR. The color(s) dark blue, light blue, white and yellow is/are claimed as a feature of the mark.”

<sup>2</sup> “Standard character” drawings were known as “typed drawings” prior to November 2, 2003. Standard character and typed marks are legal equivalents. *See* TMEP § 807.03(i) (July 2015).

<sup>3</sup> Registration No. 0398382 registered on October 27, 1942. Third renewal.

<sup>4</sup> 8 TTABVUE 12, referencing 6 TTABVUE 13.

Affidavit of Robert O’Connell, and associated exhibits. As Applicant previously made the O’Connell Affidavit (with exhibits) of record with its April 16, 2014 Request for Reconsideration, the objection is overruled. We discuss below the probative value of the O’Connell Affidavit.

## II. Applicable Law

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); and *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We consider each of the factors as to which Applicant or the Examining Attorney presented arguments or evidence. The others, we consider to be neutral.

### A. The Marks and the Number and Nature of Similar Marks in Use in Connection With Similar Services

We first compare Applicant’s mark  with Registrant’s mark **REPEL-O-TEX** in their entirety in terms of sound, appearance, meaning and

commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “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 Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal citation omitted). In addition, while marks must be compared in their entireties, it is well settled that one feature of a mark may have more significance than another, and there is nothing improper in giving greater weight to the more significant feature. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant argues that the differences in the marks in appearance due to the additional wording and design element in Applicant’s mark are sufficient to distinguish them. The Examining Attorney focuses on the visual and aural similarities between Registrant’s mark REPEL-O-TEX and the literal element REPEL A TEX in Applicant’s mark, which she contends is the most distinctive portion, and therefore the strongest source identifying element, of Applicant’s mark.


Applicant’s mark and Registrant’s mark are similar in that the wording REPEL A TEX in Applicant’s mark is identical in sound and nearly identical in appearance to the entirety of Registrant’s mark REPEL-O-TEX. Indeed, REPEL A TEX and REPEL-O-TEX are identical in pronunciation, structure and length, differing only by the vowel “A” or “O” used as the third syllable in each mark. The colored dots

between the individual terms in the REPEL A TEX portion of Applicant's mark serve the same function as the hyphens between the terms in Registrant's mark REPEL-O-TEX, and would not be viewed as a meaningful distinction.

The addition of the descriptive words ADVANCED MATTRESS PROTECTION TECHNOLOGY WITH ODOR ELIMINATOR, which have been disclaimed, is not sufficient to distinguish the marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" (quoting *National Data*, 224 USPQ at 752)); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). Furthermore, the wording REPEL A TEX is larger and more visually prominent than the additional, disclaimed, wording in Applicant's mark. In addition, the stylization and minimal design in Applicant's mark does not overcome the dominance of the literal element REPEL A TEX. In the case of marks consisting of words and a design, the words normally are given greater weight because they would be used by consumers to request the products. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). Moreover, because the cited mark is registered in standard characters, it is not limited to any particular display and can be used in any

stylization, including that similar to Applicant's mark. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).

For these reasons, we find that REPEL A TEX is the dominant term in Applicant's mark, and accordingly, it is entitled to more weight in our analysis. In coming to this conclusion, we do not discount the presence of the additional wording and design in Applicant's mark. However, for the reasons discussed above, we find that the term REPEL A TEX in Applicant's mark is more prominent, and more likely to be remembered by consumers, than the other elements of the mark.

The term REPEL A TEX in Applicant's mark is identical in sound and nearly identical in appearance to the entirety of Registrant's mark REPEL-O-TEX. As a result, we find that, when viewed in their entireties, the marks  and REPEL-O-TEX are more similar than they are different and, overall, convey similar commercial impressions. That is to say, the marks appear to be variations of each other that point to a common source.

In coming to our determination regarding the similarity of the marks, we have considered Applicant's arguments and evidence as to several third-party registrations for purportedly similar goods that, according to Applicant, have marks that arguably serve to dilute Registrant's REPEL-O-TEX mark. Applicant has submitted nine third-party registrations. In fact, these marks bear little overall resemblance to the marks at issue herein.<sup>5</sup> In addition, the nine registrations have

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<sup>5</sup> The nine registrations are for the marks KIWI PROTECT-ALL, BARTEX, AEROTEX, MILLIGUARD CARPET & RUG PROTECTOR, SIMPLY TECH, NOVATECH, GUARDIAN CARPET PROTECTOR AND FORTIFIER, TECHSTAR, and COMBITEX.

little weight in determining the strength of a mark because they do not establish that the registered marks identified therein are in actual use in the marketplace or that customers are accustomed to seeing them. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Max Capital Group Ltd.*, 90 USPQ2d 1243, 1248 (TTAB 2010).

Accordingly, the *du Pont* factors of the similarity of the marks and the number and nature of similar marks weigh strongly in favor of a finding of likelihood of confusion.

B. Relatedness of the Goods, Channels of Trade and Conditions of Purchase

We turn now to the *du Pont* factors of the relatedness of the goods, channels of trade and conditions of purchase. We base our evaluation on the goods as they are identified in the application and registration, and we cannot read limitations into these goods. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

A “repellent” is defined as “any of various durable or nondurable solutions applied to a fabric, garment, surface, etc., to increase its resistance, as to water, moths, mildew, etc.”<sup>6</sup> The goods therefore share the same function in that they both

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<sup>6</sup> Random House Dictionary (2015) posted at Dictionary.com. The Board may take judicial notice of dictionary definitions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

are used to increase the stain resistance of the product to which they are applied. In the case of Registrant, that product includes “textiles,” without limitation, and therefore includes “home textiles.” *See Stone Lion*, 110 USPQ2d at 1161. The record evidence indicates that at least one chemical company that manufactures textile chemicals for stain repellents lists “mattress covers” and “bed linens” under the heading “home textiles.”<sup>7</sup> We therefore are persuaded that the “preparation for rendering textiles [and] fabrics ... stain ... resistant” identified in the registration encompasses, and therefore must be considered to be legally identical to, the “stain repellants for bedding” identified in the application. *See In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)) (unrestricted and broad identifications are presumed to encompass all goods of the type described).

Concerning the channels of trade and classes of purchasers, because the goods are legally identical, and there are no limitations as to channels of trade or classes of purchasers in either the application or cited registration, we must presume that the goods identified in the application and registration will be sold in the same channels of trade, and will be bought by the same classes of purchasers. *Viterra*, 101 USPQ2d at 1908 (absent restrictions in an application and/or registration, the identified goods are “presumed to travel in the same channels of trade to the same

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*See also University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>7</sup> Printout from BASF <performancechemicals.basf.com> attached to October 22, 2013 Office Action, at 6.



class of purchasers” (quoting *Hewlett-Packard*, 62 USPQ2d at 1001). *See also Stone Lion*, 110 USPQ2d at 1161; *In re Linkvest*, 24 USPQ2d 1716, 1716 (TTAB 1992).

With its Request for Reconsideration, Applicant submitted the above-noted O’Connell Affidavit (with exhibits). Mr. O’Connell is an individual presumably associated with Applicant, but he failed to identify his position with Applicant, and provided no foundation for his statements. The probative value of the O’Connell Affidavit is therefore quite limited. In any event, much of Applicant’s argument, including the differences in the goods and marketing channels, and the purchasing conditions, relies not on the goods identified in the cited registration but on Registrant’s actual goods, which, according to Mr. O’Connell, “appear[] [to be] a chemical that is added to liquid laundry formulations to impart soil release properties to polyester fabrics, offering protection against adhesion of greasy soils between wash cycles.” The identification in the registration is not limited (nor does it allude) to “laundry formulations,” and as discussed above, neither Applicant’s nor Registrant’s identification is restricted to trade channels, marketing, or types of customers. In considering the scope of the application and registration, we are bound by the identifications in the application and registration themselves, and not to extrinsic evidence about Applicant’s or Registrant’s goods. *See Hewlett-Packard*, 62 USPQ2d at 1004; *Octocom*, 16 USPQ2d at 1787; *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008).

The *du Pont* factors of the similarity of the marks and channels of trade weigh strongly in favor of finding a likelihood of confusion. However, because there is no

probative evidence regarding the purchasing conditions, we consider this *du Pont* factor neutral.

### C. Actual Confusion

Applicant's argument that there have been no known instances of actual confusion is not persuasive. The contemporaneous use of Applicant's and Registrant's marks for a period of approximately three years without actual confusion is entitled to little weight. *See Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 ("uncorroborated statements of no known instance of actual confusion are of little evidentiary value"). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. In any event, the record is devoid of probative evidence relating to the extent of use of Registrant's mark and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillete Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

### III. Conclusion

Having considered the arguments and evidence of record and all relevant *du Pont* factors, we find that Applicant's mark, used on Applicant's goods, so closely resembles the cited registered mark, used on Registrant's goods, as to be likely to cause confusion, mistake or deception as to the source of Applicant's goods.

**Decision:** The refusal to register Applicant's mark  is affirmed.