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Mailed: September 26, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re River Pools and Spas, Inc.

Serial No. 87241299

Ian D. Titley of Leading Edge Law Group, PLC
for River Pools and Spas, Inc.

Ashley D. Hayes, Trademark Examining Attorney, Law Office 108,
Steven R. Berk, Managing Attorney.

Before Wellington, Shaw and Heasley,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

River Pools and Spas, Inc. (“Applicant”) seeks registration on the Principal Register of the mark RHINO-ROC in standard characters for “installation of inground swimming pools” in International Class 37.¹

¹ Application Serial No. 87241299 was filed under Section 1(b) of the Trademark Act based upon Applicant’s claim of a bona fide intent to use in the mark in commerce.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark RHINO CONTRACTING in standard characters (CONTRACTING disclaimed) for “contractor services in the field of underground utilities, grading, paving, masonry, hard-scape and landscape” in International Class 37.²

After the Examining Attorney made the refusal final, Applicant appealed. The appeal has been briefed.

For the reasons set forth below, we affirm the refusal to register.

I. Likelihood of Confusion

The 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. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (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 [or services] and differences in the marks.”).

² Registration No. 4894227, issued February 2, 2016.

A. Relatedness of the Services

We begin our analysis by making a comparison of the services identified in Applicant's application vis-à-vis the services identified in the cited registration, the second *du Pont* factor. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is settled that it is not necessary that the respective services be identical or even competitive in order to find that they are related. It is sufficient if the respective services are "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [services] emanate from the same source." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). The issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Here, the Examining Attorney argues that Applicant's pool installation services and Registrant's masonry, hardscaping and landscaping services are related because

they are “frequently provided” by a single entity under one mark.³ In support, she relies on evidence comprising printouts of third-party websites – each advertising pool design and build services, as well as landscaping and hardscaping services. For example:



and

³ 6 TTABVUE 5.

⁴ Attached to Office Action dated September 12, 2017, TSDR pp. 2-3.

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5

This evidence shows that hardscaping services,⁶ such as building pool patios, are also rendered in conjunction with the construction and design of pools. “Hudson Hardscapes” touts their “professional outdoor remodeling experience” on their website and “[n]ot only do have swimming pool installation expertise, but we’re also happy to guide you in designing a pool that fits the vision you have ... we have the

⁵ *Id.* at p. 22.

⁶ “Hardscape” is defined as “structures (such as fountains, benches, or gazebos) that are incorporated into a landscape.” *Merriam-Webster.com*. 2018. <https://www.merriam-webster.com>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

latest pool tiles, stones, and hardware to make sure your swimming pool area reflects your unique personality.”⁷

The established relatedness of the involved services weighs in favor of finding a likelihood of confusion.

B. Trade Channels and Classes of Consumers

Turning to the trade channels and consumers, the third *du Pont* factor, we find that the aforementioned evidence demonstrating the relatedness of the services also demonstrates that pool installation, landscaping and hardscaping services are complementary, are advertised on the same websites, and would be encountered by the same consumers. Specifically, the evidence shows that homeowners interested in having a pool installed would also be targeted, on the same website, with hardscaping and landscaping services to enhance the pool’s appearance or improve its foundation.

Accordingly, the *du Pont* factors involving the channels of trade through which the services may be found and the classes of customers weigh in favor of finding a likelihood of confusion.

C. Similarity of the Marks

We now compare the marks “in their entirety 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, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test under the first *du Pont* factor assesses not whether the marks can be distinguished in a side-by-side comparison,

⁷ *Id.* at 9.

but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods and services offered under the respective marks is likely to result. *Coach Servs. Inc.*, 101 USPQ2d at 1721; *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

The initial presence in each mark of the same term, RHINO, creates strong visual and aural similarities in the marks. RHINO also dominates each mark in terms of source identifying significance. Indeed, it is the sole distinctive element of Registrant's mark as the latter, disclaimed term, CONTRACTING, is generic for Registrant's contractor services. Likewise, Applicant's addition of the letters –ROC is less significant because RHINO appears first in the mark and is an easily recognizable word. *Palm Bay Imps.*, 73 USPQ2d at 1692 (“The presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE.”); *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)(“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word). Thus, while Applicant is correct that –ROC creates an extra syllable and the marks are not visually or aurally identical, we find the marks overall remain extremely similar due to initial presence of RHINO in each mark.

In terms of connotation, RHINO, as the only clear, recognizable word in both marks will likely convey a notion of toughness or durability. The record contains a few examples of third-parties using the term RHINO in marks to suggest a sense of durability.⁸ The secondary terms in the involved marks does not alter this meaning - CONTRACTING is, again, generic for Registrant's services and Applicant's addition of -ROC will likely be understood as "rock" and accentuate any suggestive durable or strong work product connotation. Thus, the marks may possess a similar, albeit suggestive, meaning.

In sum, we find the marks to be very similar in appearance, sound, meaning, and overall commercial impression, and this factor weighs in favor of finding a likelihood of confusion.

D. Third-Party Use and Registration of RHINO Marks

We now address Applicant's contention that "co-existing third-party RHINO registrations and extensive common-law uses of RHINO in the building and construction trades establish that RHINO is suggestive and should be afforded a narrow scope of protection."⁹ In support, Applicant points to the record that includes third-party registrations for marks containing the term RHINO and copies of screenshots of various third-party websites showing RHINO as an element of the

⁸ See, e.g., "Rhino Masonry, Inc. ... Here to Stay" and "Rhino Rooter ... Nothing Beats the Rhino," attached to Applicant's response filed August 19, 2017, respectively at TSDR p. 51 and p. 66.

⁹ 4 TTABVUE 9.

company name.¹⁰ In particular, Applicant contends that eight registrations cover services that “direct[ly] overlap” with those in the cited registration.¹¹

“Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc.*, 73 USPQ2d at 1693 (citation omitted). Internet printouts, such as those offered by Applicant, “on their face, show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein.” *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011). Moreover, although Applicant has not presented specific evidence concerning the extent and impact of these uses, the Federal Circuit has held that “*extensive* evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established,” *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (emphasis added) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Upon careful review of Applicant’s evidence of third-party registration and uses of marks with the term RHINO, we are not persuaded that this term is commercially weak. Specifically, as explained further below, there are several shortcomings in the probative value of the evidence, especially when trying to determine any weakness in

¹⁰ Submitted with Applicant’s response filed August 19, 2017.

¹¹ 4 TTABVUE 11.

the context of Applicant's pool installation services or Registrant's landscaping and hardscaping services.

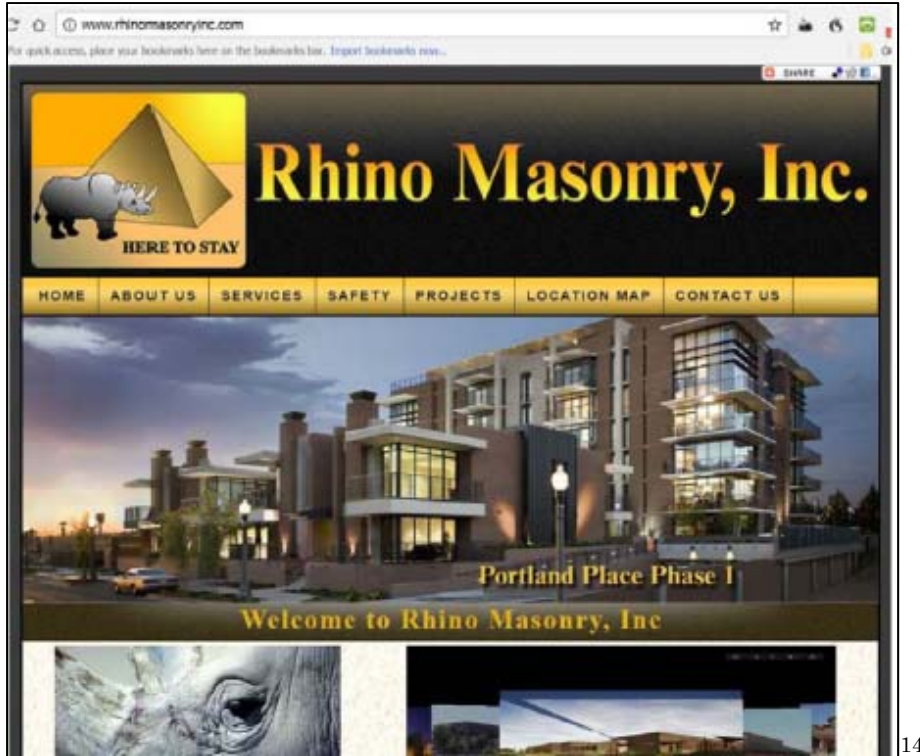
With respect to the seventeen third-party registrations submitted by Applicant, we note at the outset that five do not include dates of use in commerce in the U.S.¹² With respect to the remaining eleven registrations, four are owned by a single entity and do not involve related services.¹³ Indeed, we find only one third-party registration for services that arguably could be related to either pool installation, hardscaping and landscaping services – Registration No. 4909479 (RHINO CARBON FIBER) for “repair of building walls using carbon fiber supports.” The remaining registrations cover a diverse range of unrelated services and goods, including roof repair, painting, stabilizer mats used in roadway support, garage door repair, etc. As we have often pointed out, third-party registrations for goods or services that are not to those at issue have little relevance in our analysis regarding the strength or weakness of the cited mark. *In re Melville Corp.*, 18 USPQ2d at 1388-89 (“Registrations for goods unrelated to the clothing field are irrelevant to our discussion”); *SBS Prods. Inc. v. Sterling Plastic & Rubber Prods. Inc.*, 8 USPQ2d 1147, 1149 n.6 (TTAB 1988) (“[E]ven if evidence of such third-party use were submitted, it would be of no aid to respondent

¹² Registration Nos.: 4604884; 4595240; 4582571; 5015379; and 3369314, were all registered under Section 44(e) of the Trademark Act based on a foreign registration and do not include any use in commerce dates. *Cf. Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213, 1221 (TTAB 2011). We further note that three of these registrations are owned by a single entity.

¹³ Registration Nos. 4230640; 3759999; 4550651; and 5057215, are all owned Rhino Linings Corporation and generally involve the application of polyurethane floor finishes and coatings for residential and commercial application.

herein where the third-party usage was for goods unrelated to either petitioner's skin care products or respondent's stuffing box sealant"); *Anderson, Clayton & Co. v. Christie Food Prods. Inc.*, 4 USPQ2d 1555, 1557 n.6 (TTAB 1987) ("The other third-party registrations relating to marks in unrelated fields are of no probative value").

As to Applicant's third-party use evidence, this too is lacking because it does not show RHINO-formative marks in connection with the involved pool installation, hardscaping or landscaping services. The evidence, consisting of screenshots of individual website home pages, shows various RHINO-formative marks being used primarily in connection with residential and commercial general contractors, roofing companies, and plumbing services. Indeed, of all of the third-party use evidence, the following screenshot comes the closest to being relevant:



14

The only possible significance of this website is the inclusion of “masonry” in the company name with “Rhino.” However, without further information, it is not possible to discern what services are actually rendered by the company. The photograph of a large residential building with caption “Portland Place Phase I” seems to indicate the company may be a commercial builder.

Ultimately, Applicant’s third-party registration and use evidence is not the type of probative evidence needed to show that the term RHINO is commercially weak in connection with any of the related services involved in this proceeding, namely, pool installation, landscaping or hardscaping. The record before us certainly does not rise to the level of relevant evidence that our primary reviewing court found to be

¹⁴ Applicant’s response filed August 19, 2017, TSDR p. 45.

persuasive for purposes of establishing weakness. *Cf.*, *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co.*, 116 USPQ2d at 1135-36 (at least fourteen *relevant* third-party uses or registrations of record); *Juice Generation, Inc.*, 115 USPQ2d at 1674-75 (at least twenty-six *relevant* third-party uses or registrations of record).

Accordingly, we do not find the term RHINO is weak and this factor remains neutral in our analysis.

E. Conclusion

We have carefully considered all arguments and evidence. Here, we find confusion is likely in light of our findings that Applicant's RHINO-ROC mark and Registrant's RHINO CONTRACTING mark are overall very similar, and the marks will be used in connection with the related services of pool installation, landscaping and hardscaping, that travel in the same channels of trade to the same classes of customers.

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