

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 7, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Brite and Clean, Inc.
—

Serial No. 87384194
—

Erik M. Pelton of Erik M. Pelton & Associates PLLC for
Brite and Clean, Inc.

Colleen Dombrow, Trademark Examining Attorney, Law Office 101,
Ron Sussman, Managing Attorney.

—
Before Wellington, Lykos, and Goodman,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Brite & Clean, Inc. (“Applicant”) seeks registration of the following mark:



on the Principal Register for the following goods:

Cleaning preparation; water stain removal cleaning preparations; shower cleaning preparation; window cleaning preparation; bathroom cleaning preparation; glass cleaning preparation; cleaning preparation in powder

form; cleaning wipes impregnated with a cleaning preparation; none of the foregoing for use with eyeglasses, in International Class 3.¹

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 standard character mark **CLEAN AND BRIGHT** (CLEAN disclaimed) on the Principal Register for “all-purpose cleaners” in International Class 3.²

After the refusal was made final, Applicant filed an appeal. The appeal is fully briefed. For the following reasons, we affirm the refusal.

I. Applicable Law

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is argument and evidence of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 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

¹ Application Serial No. 87384194 was filed on March 24, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging a date of first use anywhere and in commerce of “2013.” The mark is described in the application as “consist[ing] of a light blue and blue circle with the wording BRITE & CLEAN on top of the circle ... appear[ing] in the colors light red and red and is outlined in white and gray.” The colors have been claimed as features of the mark.

² Registration No. 4212597 issued on September 25, 2012; Section 8 declaration accepted.

to be relevant.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973); *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)). When analyzing these factors, the overriding concern is not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

A. Weakness of the Cited Mark

Applicant argues that “Registrant’s CLEAN AND BRIGHT mark is entitled to a narrow scope of protection due to the widespread third-party use and registrations of marks containing the terms CLEAN and/or BRIGHT for cleaning products.”³ In support of this argument, Applicant relies on the plain meanings of these terms in connection with cleaning products and points to the following third-party registrations for the following goods or services that it made of record:⁴

Registration No.	Mark	Goods or Services
5133875	KLEENBRITE	Class 1: Chemical preparations, namely, degreasing and cleaning solvents

³ 9 TTABVUE 11.

⁴ *Id.* at 15-16; copies of registrations attached to Applicant’s December 18, 2017 response.

Registration No.	Mark	Goods or Services
5030538	START BRITE CLEANERS	Class 37: Dry cleaning services
4110111	TRIPLE ACTION BRIGHT-WHITECLEAN	Class 3: Laundry detergents
4109395	CLEANER WATER FOR A BRIGHER FUTURE	Class 35: Retail store and on-line retail store services featuring water treatment equipment; Wholesale distributorships featuring water treatment equipment services
3788695	CLEAN BRITE	Class 21: Brooms; mops
3790228	AMERI-BRITE CLEANING, LLC	Class 37: Cleaning of residential houses; Furniture polishing; Cleaning of banks, businesses, and offices; Cleaning of floors
1935355		Class 3: all-purpose household cleaning preparation
1669738	CLEAN, FRESH & BRIGHT	Class 37: cleaning and repair services for carpets, upholstery, drapes, valances, shades and venetian blinds
0890247	BRITE-KLENZ	Class 3: Preparation for washing bottles and for use in soaker-type bottle washers

Active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive or suggestive. *See, e.g., Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76; *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). Properly used in this limited manner, third-party registrations are similar to dictionaries showing

how language is generally used. *See, e.g., Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987).

We agree with Applicant that the registered mark is inherently weak in view of the rather obvious meanings of its composite words, CLEAN and BRIGHT, in the context of cleaning products. CLEAN is descriptive of the goods' purpose and BRIGHT suggests a desired result from using the goods, i.e., make the cleaned article or surface appear "bright." The third-party registrations corroborate the descriptive and suggestive meanings of these terms, including variations on their spelling, and how these terms can be used in trademarks. *See Institut National des Appellations D'Origine v. Vintners Int'l Co. Inc.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations show the sense in which a word is used in ordinary parlance and that a particular term has descriptive significance as applied to certain goods or services).

However, we disagree with Applicant's contention that the record demonstrates "widespread third-party use" of the marks. Indeed, there is no evidence of the aforementioned registered third-party marks being used in commerce or any other similar mark for that matter. *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) ("[C]itation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone

that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”) Thus, on the record before us, we cannot infer the possible extent of consumer exposure to marks similar to the registered mark or any similar mark containing the terms CLEAN and BRIGHT (or variations on the spellings of these terms). *Cf. Juice Generation*, 115 USPQ2d 1674 (“considerable number” of third-party use “powerful on its face”); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

In sum, we find Registrant's mark is inherently weak in connection with cleaning products. As a result, the scope of protection accorded to Registrant's mark is not as wide as that of an arbitrary or coined strong mark. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) stating that likelihood of confusion fame varies along a spectrum from very strong to very weak). However, the record does not show the registered mark to be commercially weak based on third-party use of similar marks in connection with similar goods.

Because Registrant's mark has a narrower scope of protection, this necessarily decreases the likelihood for confusion. Nevertheless, we must accept that even weak marks are entitled to protection and confusion must be avoided amongst weak marks as well as strong marks. *See In re Max Capital Grp.*, 93 USPQ2d 1243, 1246 (TTAB

2010). *See also King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974); *In re Chica Inc.*, 84 USPQ2d 1845, 1850 (TTAB 2007); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982).

B. Similar Marks

Under the first *du Pont* factor, we compare the involved marks “in their entireties as to appearance, sound, connotation and commercial impression.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc.*, 73 USPQ2d 1691. “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 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, (Fed. Cir. Sept. 13, 2019). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (Citation omitted).

Here, the wording in Applicant’s composite mark, BRITE & CLEAN, is essentially a transposition of the same words (or the equivalent thereto) comprising the registered mark, CLEAN AND BRIGHT. In “reverse combination” mark circumstances, like this one, the Board found the marks to be very similar because the same wording, albeit transposed, helps create the same or very similar overall commercial impression and connotation. *See, e.g., In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (affirming refusal to register THE WINE SOCIETY OF AMERICA & Design based on registration of AMERICAN WINE SOCIETY 1967

& Design, finding that “the transposition of words does not change the overall commercial impression”); *Bank of Am. Nat’l Trust and Sav. Ass’n v. The Am. Nat’l Bank of St. Joseph*, 201 USPQ 842, 845 (TTAB 1978) (“the words ‘BANKAMERICA’ and ‘BANK OF AMERICA’, on the one hand, and ‘AMERIBANC’, on the other, convey the same meaning and create substantially similar commercial impressions”). That is what we have here in this appeal. In other words, both Applicant’s mark and the registered mark strongly convey to the consumers that the respective cleaning products are intended to “clean” and make “bright.” In a similar case involving marks comprised of suggestive and descriptive terms, the Board found a likelihood of confusion existed, finding “the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions.” *In re Nationwide Industries, Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (Affirming refusal to register RUST BUSTER for rust-penetrating spray lubricant based on the mark BUST RUST for penetrating oil).

The differences between the marks are insignificant and do not overcome the overall similarity. Applicant’s misspelling of BRITE is not very creative and consumers will immediately understand this phonetic equivalent as an alternative spelling of the word BRIGHT. Indeed, Applicant’s evidence of registered third-party marks shows that this is not a novel misspelling and is often used in place of the word “bright.” Likewise, the ampersand (which is the equivalent to and would be pronounced as “and”) in Applicant’s mark is not distinctive. The circular, blue

background design in Applicant's mark is not unique and would make very little impression. Rather, in viewing Applicant's mark, consumers will perceive the circular blue background as merely a decorative or ornamental background for the wording in the mark. Moreover, because the cited mark is registered in standard characters, it is not limited "to any particular font style, size, or color." Trademark Rule 2.52(a). As such, we must consider it to cover any stylization or color, including the identical, red stylized lettering found in Applicant's mark. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).

In sum and viewing the marks in their entirety, we find them to be extremely similar. In making this finding, we bear in mind that marks are to be considered in light of the fallibility of memory. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014). That is, consumers will not always have the luxury of a side-by-side comparison. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). Thus, we must look to decide whether the marks' overall commercial impressions that will be retained in consumers' minds are sufficiently similar that confusion as to the source of the goods is likely to result. Here, for reasons mentioned supra, we find the marks convey the same commercial impression.

Accordingly, this factor weighs in favor of finding confusion likely.

C. Overlapping Goods and Same Trade Channels

With respect to the second and third *du Pont* factors, the similarity of the goods and their channels of trade, we must make our determinations as to these factors

based on the goods as they are identified in the application and cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Dixie Rests. Inc.*, 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).

Here, the goods are legally identical because, as identified, they are encompassing of one another. That is, Applicant's "cleaning preparation ... [and] cleaning preparation in powder form" goods are sufficiently broad to include Registrant's "all-purpose cleaner." Aside from this overlapping of the goods, the respective goods are also on their face very closely related because Registrant's "all-purpose cleaner" may be used for many of the same cleaning tasks that Applicant's other cleaning products are designed, e.g., cleaning preparations for "water stain removal ... shower ... window ... bathroom ... glass cleaning and wipes impregnated with a cleaning preparation."

Because these goods are legally identical in part, they must be presumed to travel in the same channels of trade and be sold to the same classes of purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of

purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Channels of trade include “the same type of distribution channel” and are not limited to “identical stores or agents.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Accordingly, these *DuPont* factors weigh in favor of finding a likelihood of confusion.

D. Applicant’s Prior Registration

Applicant points out that its principal, Timothy L. Bloom, is the owner of a registration for the mark BRITE & CLEAN WINDOWS for “window cleaning services” in International Class 37.⁵

We consider Applicant’s prior registration argument under the thirteenth *du Pont* factor which relates “to ‘any other established fact probative of the effect of use.’” *See In re Inn at St. John’s, LLC*, 126 USPQ2d at 1745-46. “Where an applicant owns a prior registration that is over five years old and the mark is substantially the same as in the applied-for application, this can weigh against finding that there is a likelihood of confusion.” *In re Inn at St. John’s, LLC*, 126 USPQ2d at 1746, citing *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012). In *Strategic Partners*, the Board addressed this “unique situation” of coexistence of an applicant’s existing registration with a cited registration for over five years, when the applicant’s applied-

⁵ Registration No. 4644234, issued on November 25, 2014. Applicant mentioned ownership of this registration in its response (filed December 18, 2017) to the first Office Action, and attached a copy to the response.

for ANYWEAR mark is substantially similar to its existing registered ANYWEARS mark and both are for identical goods (footwear). The Board noted that the latter registered mark had co-existed with the cited ANYWEAR BY JOSEPH NATORI (stylized with a design) mark for jackets, shirts, pants, stretch T-tops and stoles and ultimately held:

Applicant's registered mark, a mark that is substantially similar to the applied-for mark, both covering "footwear," has coexisted with the cited mark for over five years. At this stage, applicant's existing registration is over five years old, and thus is not subject to attack by the owner of the cited registration on a claim of priority and likelihood of confusion. *Cf. In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994). We find that these facts tip the scale in favor of applicant and a finding of no likelihood of confusion.

Id. at 1399.

The circumstances of this appeal are clearly different from those in *Strategic Partners*. Specifically, Mr. Bloom's registration is not yet over five years old and it covers window cleaning services which clearly are not identical to the goods identified in the involved application. *Compare In re Inn at St. John's, LLC*, 126 at 1745-46 (Board distinguished the circumstances of the appeal from *Strategic Partners* because "Applicant's applied-for mark — 5IVE STEAKHOUSE and design — moves closer to the cited registration — 5IVESTEAK and design — than the mark in Applicant's prior registration — 5IVE RESTAURANT and design — rendering the new mark more similar in appearance, sound, and meaning to Registrant's mark").

Accordingly, and in contrast to our finding in *Strategic Partners*, we find that Mr. Bloom's prior registration in this case does not help 'tip the scale' in making our determination as whether there is a likelihood of confusion.

II. Conclusion

Given that the goods, as identified in the application and cited registration are encompassing of one another and thus legally identical, said goods will be offered to the same classes of purchasers in the same trade channels, and Applicant's mark, BRITE & CLEAN (stylized with design), is very similar overall to the registered mark, CLEAN AND BRIGHT, we find that confusion is likely. We make this ultimate finding with the understanding that the cited mark is inherently weak and thus has a limited scope of protection, but also bearing in mind that it is Applicant's duty, as the newcomer, to avoid confusion. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) ("This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks."); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

Decision: For the aforementioned reasons, the refusal under Section 2(d) to register Applicant's mark is affirmed.