

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: October 1, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Champlain Cable Corporation*  
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Serial No. 87625822  
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Mark Levy of Law Office of Mark Levy,  
for Champlain Cable Corporation.

Andrew Crowder-Schaefer, Trademark Examining Attorney, Law Office 104,  
Zachary B. Cromer, Managing Attorney.

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Before Wellington, Kuczma and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Champlain Cable Corporation, seeks registration of the mark EXRAD ERGOFLEX (in standard characters) on the Principal Register for “battery cable, insulated copper door wires covered in flexible jacket material,” in International Class 9.<sup>1</sup>

The Trademark Examining Attorney refused registration under Section 2(d) of the

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<sup>1</sup> Application Serial No. 87625822 filed on September 28, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use of the mark and first use in commerce as of August 1, 2016.

Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the registered mark



for “cables, electric; electric wires; electric wires and cables; electrical terminal boxes; electrical terminal blocks; connections for electric lines; couplings, electric; wire connectors; electric junction boxes; electrical plugs and sockets; plug connectors; electrical connectors; electric connectors,” in International Class 9,<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, Applicant filed a request for reconsideration, which was denied. Applicant then filed an appeal. The appeal is fully briefed.

We affirm the refusal.

## **I. Evidentiary Issue**

Applicant requested remand of the application on October 7, 2019, one week before filing its appeal brief, to make of record three documents it planned to rely upon in the appeal: a page from Registrant's website; a dictionary definition of “wire”; and an affidavit from Applicant's vice president of business development.<sup>3</sup> Applicant then did rely on those documents in its appeal brief filed on October 14, 2019.

On October 31, 2019, the Board denied Applicant's request for remand for lack of good cause.<sup>4</sup> The Examining Attorney now objects to the late-filed evidence that was included in Applicant's brief.

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<sup>2</sup> Registration No. 5460465, issued May 1, 2018.

<sup>3</sup> 8 TTABVUE.

<sup>4</sup> 13 TTABVUE.

We sustain the Examining Attorney's objection with regard to webpage and declaration evidence, which will not be considered. However, we overrule his objection with regard to the dictionary definition and will consider it.<sup>5</sup>

## II. Applicable Law

The fundamental purpose of Trademark Act § 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004);

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<sup>5</sup> The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

*Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

#### **A. Similarity or Dissimilarity of the Goods and Trade Channels**

We begin our analysis with the second and third *DuPont* factors. The second *DuPont* factor considers the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1296, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567), and the third *DuPont* factor considers the “similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052. It is “not necessary that the goods be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs. 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)). “[L]ikelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.*

Moreover, we need not find similarity as to each and every good listed in an applicant’s identification of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods or services in a particular class in the application. *See SquirtCo*

*v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

The Examining Attorney argues that Registrant’s broadly described “electric wires and cables” encompass Applicant’s more narrowly described “battery cable” and “insulated copper door wires covered in flexible jacket material.”<sup>6</sup> He also provided Internet evidence consisting of pages from five third-party websites pages to show that “electrical cables and wire goods include battery cables and insulated copper wires covered in flexible jacket material”:<sup>7</sup>

- AWC Allied Wire & Cable – offering a variety of wire and cables including automotive wire and battery cables, as well as insulated copper wires with nylon jacket, as a subset of its wire and cable goods;<sup>8</sup>
- Philatron Wire & Cable – offering battery cables and insulated flexible copper wire power cables as a subset of its wire and cable goods;<sup>9</sup>
- Prestolite Wire – offering an assortment of electrical wire and cable products, including batter cables and flexible, jacketed insulated copper wire;<sup>10</sup>

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<sup>6</sup> 19 TTABVUE 10.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> August 1, 2019 Final Office Action, TSDR 9-17.

<sup>9</sup> *Id.* at 18-30.

<sup>10</sup> *Id.* at 31-35

- Velvac – offering a variety of electrical cables including battery cables and jacketed cable wires;<sup>11</sup> and
- Wiringproducts.com – offering a variety of electrical wire and cable products such as batter cables including flexible, jacketed, copper battery cables, and flexible, jacketed, insulated copper electrical wires.<sup>12</sup>

Based on a comparison of the goods and the evidence provided, the Examining Attorney asserts that the parties' goods are legally identical.<sup>13</sup>

Applicant “strenuously disagrees” that that its goods are encompassed by Registrant’s goods because they do not specifically include “battery cables” or “insulated door wires covered in flexible jacket materials.”<sup>14</sup> Applicant offered dictionary definitions of “wire” as meaning “metal in the form of a usually very flexible thread or slender rod,” and “a thread of rod of such material.” Based on these definitions, Applicant makes the following argument:<sup>15</sup>

Note that insulation does not appear in this definition. A vast difference in goods exists between electric wires/cables (the goods recited in the registered mark) and insulated copper door wires covered in flexible jacket material (the goods recited in Appellant’s mark). **Wires and insulated wires are as different from each other as peeled bananas and banana [sic] with their skin intact.** There is simply no likelihood of confusion between peeled and intact bananas just as there is no likelihood of confusion between bare and insulated wires, especially for technically sophisticated customers of electrical components.

Applicant’s argument is unavailing. Just as a registration for bananas covers all bananas, peeled or unpeeled, a registration for electrical wires covers all wires,

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<sup>11</sup> *Id.* at 36-39.

<sup>12</sup> *Id.* at 40-45.

<sup>13</sup> 19 TTABVUE 12.

<sup>14</sup> 11 TTABVUE 13.

<sup>15</sup> *Id.* (emphasis added).

insulated or uninsulated. Moreover, the issue is not whether the goods would be confused, but whether they are related and to what extent. We find that the goods are legally identical.

We therefore must also assume that the relevant purchasers and channels of trade are identical and overlapping to the same extent. *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 Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.”).

The second and third *DuPont* factors strongly support a finding of likelihood of confusion.

### **B. Similarity or Dissimilarity of the Marks**

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic* 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019).

The test is not whether the marks can be distinguished in a side-by-side

comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). Our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”). In making our determination, we keep in mind that the more closely related the goods are, the more “the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

The Examining Attorney argues that the marks are “essentially identical in sound and highly similar in appearance and commercial impression” because Applicant’s mark EXRAD ERGOFLEX includes the word portion of Registrant’s mark



.<sup>16</sup> Although Registrant’s mark is stylized and “contains a design element of a stylized electrical cable and plug design ... [n]othing about this design ... alters the meaning or commercial impression of the shared wording

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<sup>16</sup> 19 TTABVUE 7.

ERGOFLEX.”<sup>17</sup>

Applicant concedes that the marks are identical in part, but asserts nonetheless that the marks are different in appearance, sound, and meaning when considered in their entireties.<sup>18</sup> According to Applicant, “[i]t is the first word in [Applicant’s] mark, EXRAD, that distinguishes its mark from the registered mark” because ERGOFLEX in both marks is “merely a combination of the descriptive prefix ERGO, meaning ‘work,’ and the descriptive suffix FLEX, meaning ‘flexible,’” which is “highly suggestive of the flexibility of the goods.”<sup>19</sup>

While it is often the first part of a mark that is most likely to be impressed upon the mind of a purchaser and remembered when making purchasing decisions, *see Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005), that is not always the case. *See e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (“Board did not err in finding that ‘STONE LION CAPITAL’ is ‘similar in sight, sound, meaning, and overall commercial impression’ to ‘LION CAPITAL’ and ‘LION.’”); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (finding CAREER IMAGE likely to be confused with mark CREST CAREER IMAGES).

As the Examining Attorney notes, Applicant did not provide any evidence to

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<sup>17</sup> *Id.* at 8.

<sup>18</sup> 11 TTABVUE 9.

<sup>19</sup> *Id.* at 12.

support its asserted definitions of ERGO as “work,” and FLEX as “flexible.” However, we take judicial notice of the term “FLEX,” which means “bend,” so part of term ERGOFLEX appears suggestive of cables and wires that flex or bend. But that does not resolve the matter because suggestive marks are inherently distinctive and entitled to appropriate protection against the registration of confusingly similar marks. *See Maytag Co. v. Luskin’s, Inc.*, 228 USPQ 747, 750 (TTAB 1986) (“there is nothing in our trademark law which prescribes any different protection for suggestive, nondescriptive marks than that which is accorded arbitrary and fanciful marks”); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection”).

Applicant also points to its purported ownership of a prior registration for the mark EXRAD as a basis for contending that its applied-for mark EXRAD ERGOFLEX is distinct from Registrant’s ERGOFLEX mark:<sup>20</sup>

The EXRAD portion of Appellant’s mark therefore acts as a strong, well-known umbrella brand. The word ERGOFLEX ... is an integral part of the composite mark, EXRAD ERGOFLEX. In effect, “ERGOFLEX is in the shade of the EXRAD umbrella, much as the word “zero” in COKE ZERO (Reg. No. 5,771,915) is under the COKE umbrella (Reg. No. 2,490,517) or “light” in BUD LIGHT (Reg. No. 1,694,621) is under the BUD umbrella (Reg. No. 0,666,367). Appellant’s customers are very familiar with Appellant’s mark and are not expected to ignore its significance as part of the subject composite mark, EXRAD ERGOFLEX, nor be confused as to the source of goods sold thereunder <sup>21</sup>

Applicant provided no evidence regarding its purported ownership of a prior

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<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 12.

registration for EXRAD which, in any event, is of no moment, since a registration is not evidence of use of the mark or that the public is familiar with it. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). And Applicant's analogy of its mark EXRAD ERGOFLEX to the marks COKE ZERO and BUD LIGHT is inapposite. The terms "ZERO" and "LIGHT" in those examples are clearly descriptive or generic, which is not the case here.

As discussed earlier, Registrant's mark, like any mark registered on the Principal Register, is presumed to be inherently distinctive. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (cited in *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Nevertheless, Applicant argues that Registrant's ERGOFLEX mark is weak as "highlighted by numerous coexisting marks in Class 9 which encompass these elements."<sup>22</sup> However, as observed by the Examining Attorney, Applicant provided no evidence to support its contention that numerous marks "encompassing these elements" are in use and coexisting. Accordingly, we find that Registrant's mark is a mark of ordinary strength entitled to all protections accorded to marks registered on the Principal Register consistent with Trademark Act Section 7(b), 15 U.S.C. § 1051(b).

Inasmuch as ERGOFLEX comprises the entirety of Registrant's mark, Applicant has adopted Registrant's mark in its entirety, and there is simply no other element in Registrant's mark to give any weight or to distinguish the marks. It is long established that the mere addition of a term to a registered mark generally does not

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<sup>22</sup> *Id.*

obviate the similarity between the marks nor does it overcome a likelihood of confusion under Trademark Act § 2(d). *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (BENGAL and BENGAL LANCER); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 54 C.C.P.A. 1295, 153 USPQ 406 (CCPA 1967) (THE LILLY and LILLI ANN); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (TITAN and VANTAGE TITAN); and *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR'S ALE and JOSE GASPAR GOLD).

Considering the Applicant's and Registrant's marks in their entireties, we find them similar in appearance, sound, connotation and commercial impression. The first *DuPont* factor thus also supports a finding of likelihood of confusion.

### **C. Purchasing Conditions**

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. On the one hand, circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion between similar marks. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED).

On the other hand, the fact that purchasers are sophisticated or knowledgeable in a particular field does not mean they are immune to source confusion. *See In re Shell*

*Oil Co.*, 26 USPQ2d at 1690 (“even sophisticated purchasers can be confused by very similar marks”); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Board precedent requires our decision to be based “on the least sophisticated potential purchasers.” *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110 USPQ2d at 1163 (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014).

Applicant argues that its goods “are purchased with care only by informed, professional, deliberative buyers – often employees of original equipment manufacturers (OEMs) – who have a full understanding of the source of the goods they are purchasing,” whereas Registrant’s goods “are intended for use by the general public.”<sup>23</sup> Applicant’s contentions are unsupported by the evidence and unavailing. Because the identification of goods in the application and cited registration are legally identical and neither identification is limited in any manner, our decision must be based on “the least sophisticated potential purchasers,” who may not exercise a heightened degree of care. *Stone Lion*, 110 USPQ2d at 1163.

Accordingly, the fourth *DuPont* factor favors a finding of likelihood of confusion.

#### **D. Actual Confusion**

Applicant points to the absence of evidence of actual confusion, the seventh *DuPont* factor, as weighing in its favor, *DuPont*, 177 USPQ at 567, but we accord no probative value to that contention, which has no evidentiary support. Accordingly,

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<sup>23</sup> *Id.* at 15-17.

Applicant’s “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2011) (citing *In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973)). “[W]hile examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not compelling in support of a finding of no likelihood of confusion.” *In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016).

The seventh *DuPont* factor is therefore neutral in our analysis.

### III. Conclusion

In sum, we find that the marks are similar in overall appearance, sound, connotation, and commercial impression, and that the goods are legally identical and travel in the same trade channels to the same classes of purchasers. Accordingly, Applicant’s mark is EXRAD ERGOFLEX is likely to cause confusion with

Registrant’s mark  for the goods recited in the application and cited registration.

**Decision:** The refusal to register is affirmed.