

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 1, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board

—  
*In re Luxe Energy, LLC*

—  
Serial No. 88064929

—  
Bobby W. Braxton of Braxton Perrone, PLLC,  
for Luxe Energy, LLC.

John S. Miranda, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

—  
Before Zervas, Lykos and Coggins,  
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Luxe Energy, LLC (“Applicant”) seeks registration on the Principal Register of the  
composite mark




for the following International Class 37 services:

Drilling of deep oil or gas wells; Drilling of wells; Extraction of oil and gas; Extraction of natural gas; Oil and gas drilling; Well improvement services, namely, hydraulic fracturing of subsurface geologic formations to enhance well production; Laying and construction of pipelines; Oil and gas pipeline construction; Oil and gas pipeline maintenance; Pipeline construction and maintenance.<sup>1</sup>

The mark is described as consisting “of a stylized flame design, to the right of which is the stylized literal element ‘PECAN BAYOU ENERGY.’” Color is not claimed as a feature of the mark. Applicant disclaimed PECAN BAYOU ENERGY pursuant to a requirement by the Examining Attorney.

The Examining Attorney refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark is likely to

cause confusion with the mark  registered on the Principal Register for “natural gas transmission” in International Class 39 and “compression and conditioning of natural gas” in International Class 40.<sup>2</sup> The registration includes a disclaimer of the term “pipeline.”

After the refusal was made final, Applicant appealed and filed a request for reconsideration. The Board suspended the appeal and remanded the application to the Examining Attorney for consideration of the request for reconsideration. The Examining Attorney denied the request for reconsideration, the appeal was resumed

---

<sup>1</sup> Application Serial No. 88064929, filed on August 3, 2018 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), claiming a bona fide intent to use the mark in commerce.

<sup>2</sup> Registration No. 3361755 (renewed).

and Applicant and the Examining Attorney filed briefs. We reverse the refusal to register.

### I. Preliminary Issues

Applicant submitted for the first time in its brief a screenshot of search results on the USPTO's TESS database showing that 372 records were found for the term "pecan" in the database. Evidence submitted after appeal, without a granted request to suspend and remand for additional evidence, may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.03 (June 2020). Because the Examining Attorney has not objected to Applicant's submission of this screen shot and addressed the screen shot in his brief, the Examining Attorney waived any objection to the screenshot and we have considered the screenshot. *See, e.g., In re Olin Corp.*, 124 USPQ2d 1327, 1335 n.22 (TTAB 2017) (because the examining attorney addressed applicant's registrations in her brief and neither objected to the discussion of the other, Board treated both registrations as though they were of record).

In addition, Applicant states, it relies on the arguments set forth in its brief and "the arguments made in the previously filed responses, and the evidence on file in the application file wrapper, all of which are incorporated by reference herein as if fully set forth at length."<sup>3</sup> We deem Applicant to have waived any arguments that it made

---

<sup>3</sup> Applicant's brief at p. 3, 4 TTABVUE 4.

during prosecution but did not maintain in its main appeal brief. *See, e.g., In re E5 LLC*, 103 USPQ2d 1578, 1579 n.2 (TTAB 2012). We have, of course, considered all evidence made of record by Applicant.

## II. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). The *DuPont* factors addressed by Applicant and the Examining Attorney are discussed below.

### a. Similarity or Dissimilarity of the Services

Services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed.

Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the 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)).

We evaluate the relatedness of the respective services based on their identifications in the subject application and cited registration. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *see also Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed.”); *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods [or services]”).

When we consider the similarity of the parties’ services, it is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of services in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988

(CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

The Examining Attorney submitted two use-based third-party registrations and webpage printouts to demonstrate that Applicant's and Registrant's services are commercially related. Third-party registrations based on use in commerce that individually cover a number of different goods or services may have probative value to the extent that they serve to suggest that the listed goods or services are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.*, 864 F.2d 149 (Fed. Cir. 1988).<sup>4</sup>

One third-party registration concerns gas transmission or distribution and pipeline construction.<sup>5</sup> The other registration is silent on pipeline construction and concerns gas drilling services, as well as gas transmission and distribution.<sup>6</sup>

Turning to the webpage printouts, the Examining Attorney submitted information concerning just two entities, ONEOK and Kinder Morgan. As discussed below, these webpages do not demonstrate that a single entity provides services of the kind

---

<sup>4</sup> The registration for CITIZENS ENERGY GROUP (Registration No. 3931400) is not use-based and is not further considered.

<sup>5</sup> See Reg. No. 4756051 for the mark DOMINION MIDSTREAM PARTNERS and design for "Construction of structures for the storage of natural gas; Pipeline construction" and "Public utility services in the nature of natural gas distribution."

<sup>6</sup> See Reg. No. 4476695 for the mark DUNDEE ENERGY LIMITED and design for "services in the oil and gas sector, namely, oil and gas drilling" and "services in the oil and gas sector, namely, public utility services in the nature of natural gas distribution, transmission of oil and gas through pipelines."

identified in Applicant's and Registrant's identifications of services under a single trademark.

i. ONEOK

The Examining Attorney submitted webpages from oneok.com and pipeline-news.com to demonstrate that ONEOK offers pipeline construction and maintenance services and natural gas transmission services under the same mark.<sup>7</sup> The oneok.com webpages establish that ONEOK offers natural gas transmission services. The pipeline-news.com webpages contain an article entitled "ONEOK Plans Elk Creek NGL Pipeline from Montana to Kansas," which at best states "ONEOK Inc. plans to invest \$1.4 billion to construct a new pipeline, and related infrastructure, to transport natural gas liquids (NGLs) from the Rocky Mountain region to the company's existing Mid-Continent NGL facilities."<sup>8</sup> The article does not state that ONEOK will build the new pipeline itself; it states only that it will invest in the construction of a new pipeline. The webpages concerning ONEOK fail to persuade us that ONEOK is engaged in the construction and maintenance of pipelines for others.

ii. Kinder Morgan

The Examining Attorney states that Kinder Morgan offers "pipeline construction and maintenance services" and "natural gas transmission services" under the same

---

<sup>7</sup> December 16, 2019 Office Action, TSDR 2-7.

<sup>8</sup> *Id.* at 5.

mark.<sup>9</sup> While the Kinder Morgan webpage refers to the transmission of natural gas, it is silent on construction and maintenance services. The webpage from bizjournal.com discussing Kinder Morgan's activities refers to the future construction of a pipeline - it does not indicate whether Kinder Morgan will actually perform the construction or has ever constructed or maintained pipelines in the past. Further, the article states that the company "has about 85 percent of the right-of-way secured for the line's route," which leaves open the possibility that construction is not a certainty.

Upon consideration of the foregoing evidence, we find that it does not establish a relationship between any of Applicant's and Registrant's services. The two registrations identifying different combinations of services are simply insufficient in quantity to persuade us that the *DuPont* factor regarding the similarity or dissimilarity of the services favors a finding of likelihood of confusion.

#### b. Similarity or Dissimilarity of the Marks

We next consider whether Applicant's and Registrant's marks are similar when viewed in their entireties in terms of appearance, sound, connotation and commercial impression. *See Stone Lion Capital Partners*, 110 USPQ2d at 1160 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1689). The test under this *DuPont* 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 that confusion as to the source of the services offered under the respective marks is likely to result. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Coach Servs.*, 101

---

<sup>9</sup> *Id.* at 8-15.



USPQ2d at 1721. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks than to the less distinctive elements in determining whether the marks are similar. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.”). When a mark comprises both words and a design, the words are normally accorded greater weight because they are more likely to be impressed upon a purchaser’s memory and would typically be used by purchasers to request the goods or services. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012).

According to the Examining Attorney, the dominant term in each mark is the word PECAN since consumers are generally more inclined to focus on the first word in any service mark.<sup>10</sup> With regard to Applicant’s mark, the Examining Attorney states, “the wording ‘PECAN’ is the largest visual element of applicant’s mark; in fact, the wording ‘PECAN’ is larger than the other two terms, ‘BAYOU’ and ‘ENERGY’, combined, and it is placed on its own line, above the other two terms. Therefore,

---

<sup>10</sup> Examining Attorney’s brief, 11 TTABVUE 8.

consumers are likely to view ‘PECAN’ as the dominant portion of applicant’s mark.”<sup>11</sup> With regard to Registrant’s mark, the Examining Attorney states, “the wording ‘PIPELINE’ in registrant’s mark, ‘PECAN PIPELINE’, has been disclaimed as descriptive, rendering ‘PECAN’ the sole distinctive literal element in registrant’s mark. ... Since ‘PECAN’ is the dominant and sole distinctive literal portion of registrant’s mark, consumers are highly likely to perceive the term ‘PECAN’ as referring directly to registrant ....”<sup>12</sup>

The Examining Attorney has not commented on how his disclaimer requirement — and the ensuing disclaimer — factors into the analysis. A review of the file wrapper reveals that the Examining Attorney submitted evidence with the first Office Action supporting his contention that PECAN BAYOU is geographically descriptive, i.e, that it is a generally known location in Texas.<sup>13</sup> This contention is inconsistent with the Examining Attorney’s analysis of the dominant element in Applicant’s mark. If PECAN BAYOU is a single term which identifies a generally known geographic location, it follows that PECAN BAYOU as a single geographic term would be the dominant term in Applicant’s mark, which has a different connotation than PECAN

---

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

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

<sup>13</sup> November 28, 2018 Office Action, TSDR 1.

connoting the edible nut or tree.<sup>14</sup> We agree with Applicant that the meaning and commercial impression of the marks differ.<sup>15</sup>

As for appearance, there are slight differences in the marks due to the differences in the flame designs in the marks, use of all capitals by Applicant but use of all lower case letters in the cited mark, and stylization, as well as the additional wording in the marks after the term PECAN.<sup>16</sup> The different wording also differentiates the marks in sound.

On balance, we find ourselves unpersuaded by the Examining Attorney that the marks are similar due to the shared term PECAN and the flame designs. We therefore resolve the *DuPont* factor regarding the similarity or dissimilarity of the marks against a finding of likelihood of confusion based on the differences in connotation and commercial impression.

### c. Conclusion

We have considered all of the evidence in the record and the arguments of the Examining Attorney and Applicant. The Examining Attorney's minimal evidence has not persuaded us that the services are related. In addition, the marks are sufficiently

---

<sup>14</sup> See definition of "pecan" from Merriam-Webster's Online Dictionary (accessed on August 28, 2020) at <https://www.merriam-webster.com/dictionary/pecan>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. 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).

<sup>15</sup> Applicant argues that "Pecan standing alone suggests a tree or nut" and "Applicant's mark gives the commercial impression of a location." Applicant's brief at p. 6, 4 TTABVUE 7.

<sup>16</sup> The placement and stylization of the flame design are similar.

different in connotation and commercial impression. We therefore conclude that Applicant's mark for its services would not likely be confused with Registrant's mark for its services.

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