

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 6, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Asept-Air Inc.*

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Serial No. 88265476

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Harris A. Wolin of Myers Wolin LLC,  
for Asept-Air Inc.

Carolyn Wlodarczyk, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Mermelstein, Lykos and Adlin,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Asept-Air Inc. (“Applicant”) seeks to register on the Principal Register the standard character mark ASEPT-AIR for “Air purification machinery units for residential, commercial and industrial use and accessories, namely, filters for air

purification” in International Class 11.<sup>1</sup>

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the mark displayed below on the Principal Register



for “UV light disinfection systems comprised primarily of ultraviolet lamps for use in medical and healthcare facilities; Air purifiers for commercial and domestic use” in International Class 11,<sup>2</sup> that it is likely to cause confusion or mistake or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusal to register and denied the request for reconsideration. The appeal is now fully briefed.<sup>3</sup>

We reverse.

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<sup>1</sup> Application Serial No. 88265476, filed January 17, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging April 3, 2012 as the date of first use anywhere and in commerce.

Citations to the prosecution history in the USPTO’s Trademark Status & Document Retrieval (“TSDR”) database are to the downloadable .pdf version and identify documents by title and date. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

<sup>2</sup> Registration No. 4942479, registered April 19, 2016. Color is not claimed as a feature of the mark.

<sup>3</sup> In its reply brief, Applicant points to evidence allegedly found in 16 website hyperlinks. Applicant also submitted new website evidence not previously made of record. None of this late-filed evidence has been considered. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff’d mem.*, 777 F. App’x (Fed. Cir. 2019); *In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014). In addition, even if the references to the links had been timely, providing

## I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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). 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. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (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

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only a link is insufficient to make Internet materials of record. *In re Change Wind Corp.*, 123 USPQ2d 1453, 1462 n.8 (TTAB 2017).

Furthermore, Applicant’s submission with its main appeal brief of materials previously made of record was superfluous. *See In re Allegiance Staffing*, 115 USPQ2d 1319, 1323 (TTAB 2015) (practice of attaching to appeal brief copies of the same exhibits submitted with responses is discouraged). “It is of far more utility to the Board for the applicant and examining attorney to provide citations directly to the record and, when there are a large number of attachments to an Office action or response, to the specific page number where the attachment may be found.” *In re Sela Prods. LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013).

in the essential characteristics of the goods and differences in the marks.”). We discuss these factors and others below.

### **A. The Goods**

We compare the goods as they are identified in the involved application and cited registration. *See 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, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 98 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

To reiterate, Applicant’s goods are identified as “air purification machinery units for residential, commercial and industrial use and accessories, namely, filters for air purification” and Registrant’s goods are delineated as “UV light disinfection systems comprised primarily of ultraviolet lamps for use in medical and healthcare facilities; Air purifiers for commercial and domestic use” in International Class 11. The Examining Attorney has determined that Registrant’s “air purifiers for commercial and domestic use” encompass Applicant’s “air purification machinery units for residential, commercial and industrial use and accessories, namely, filters for air purification,” making the goods in-part legally identical. Applicant has not questioned this finding. Accordingly, this *DuPont* factor supports a finding of a likelihood of confusion.

### **B. The established, likely-to-continue channels of trade and classes of consumers**

Next we consider the established, likely-to-continue channels of trade and classes

of consumers. With the determination that the goods are legally identical in part and unrestricted as to trade channels, we must presume that these particular goods travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *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). As such, the *DuPont* factor regarding the similarity or dissimilarity of established, likely-to-continue trade channels and classes of consumers also favors a likelihood of confusion.

### **C. Strength of the Cited Mark**

Applicant challenges the inherent or conceptual strength of the ASEPT component of the cited mark, claiming it is highly suggestive of product quality and function.<sup>4</sup> See *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength

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<sup>4</sup> Because we have no timely evidence of third-party uses of ASEPT, we have not considered the cited mark’s commercial strength under the sixth *DuPont* factor.

of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). In support thereof, Applicant argues that the term ASEPT in both marks is merely a shortened form of the word “aseptic”<sup>5</sup> connoting a pure or clean environment. Applicant has also made of record third-party registrations of the marks ASEPTIWAVE, ASEPTICSD, ASEPTI-CLEANSE and ASEPTICSURE all for sanitizing and sterilization products.<sup>6</sup> Based on this evidence, Applicant contends that the cited mark is entitled to only a narrow scope of protection.

Third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). Here, the third-party registration and dictionary evidence leaves no doubt that ASEPT is inherently weak as a source identifier since it is highly suggestive of the purification function of the goods. Thus, the ASEPT component is conceptually weak making the cited registration entitled to only a limited scope of protection.

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<sup>5</sup> The hyperlink Applicant provided in its brief to the online definition of “aseptic” from [www.merriam-webster.com](http://www.merriam-webster.com) does not suffice to make the evidence of record. However, the Board takes judicial notice of the dictionary definition of “aseptic” from the online version of Merriam-Webster as “free or freed from pathogenic microorganisms.” See *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions).

<sup>6</sup> Registration Nos. 5274547, 5209852, 3261308, 3129601, and 4206269 submitted with May 4, 2020 Request for Reconsideration pp. 5-14.

#### **D. The Marks**

This *DuPont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their entireties 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, 1692 (Fed. Cir. 2005) (citing *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 at 1746. *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)).

“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) (citation omitted). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks. *Stone Lion*, 110 USPQ2d at 1161; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, there 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 a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d 1161 (citing *In re Nat'l Data Corp.*, 224 USPQ at 751).

The Examining Attorney postulates that the term ASEPT in each mark is dominant thereby rendering the marks similar in sound, appearance, connotation and commercial impression. With regard to Applicant's mark, the Examining Attorney points to the hyphen and the merely descriptive word "AIR" as less prominent than the initial term ASEPT. As to the cited mark, the Examining Attorney reasons that the "house mark" SANUVOX appearing in smaller sized font and term ".1X" in the cited mark are of lesser significance.

The Examining Attorney focuses on the fact that both marks contain ASEPT as a literal component. However, the similarities stop there. When we compare the marks as a whole, overall we find them to be dissimilar in sound, appearance, connotation and commercial impression. Consumers generally focus on the initial word in a mark. *See, e.g., Palm Bay*, 73 USPQ2d at 1692 (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because "VEUVE . . . remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word"). In this case, however, the first literal element in the cited mark



is the arbitrary term SANUVOX. As explained above, the term that follows, ASEPT, is highly suggestive of the goods and conceptually weak. For these reasons, SANUVOX, not ASEPT, is the dominant element in the cited mark. Although this term does appear in relatively smaller sized lettering, it is the initial element of Registrant's mark, meaning that consumers are likely to perceive and pronounce the mark in a completely different manner than Applicant's mark ASEPT-AIR.

The Examining Attorney, without pointing to any evidence, asserts that SANUVOX is a house mark, making it less critical in engendering a commercial impression. The Examining Attorney's logic represents a misunderstanding of the relevant case law governing the Section 2(d) analysis in an ex parte appeal. All elements of a mark must be considered.

Hence, we find critical the obvious distinctions between the marks in appearance, sound, connotation and commercial impression. This *DuPont* factor weighs against finding a likelihood of confusion.

#### **E. Balancing the Factors**

Any of the *DuPont* factors may play a dominant role. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. In fact, in some cases, a single factor may be dispositive. *Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In the present appeal, the record evidence shows that the term ASEPT is conceptually weak and that the dissimilarity of the marks in appearance, meaning and commercial impression is so great as to outweigh the in part legal identity of the

goods and overlapping trade channels. For that reason, we find the first *DuPont* factor to be pivotal, and that confusion is unlikely.

**Decision:** The Section 2(d) refusal is reversed.