

Respectfully submitted,

Date: June 6, 2019

RGF Environmental Group, Inc.

By: /s/ Martin M. Zoltick
Martin M. Zoltick
Leo M. Loughlin
Rothwell, Figg, Ernst & Manbeck, P.C.
607 14th Street, N.W.
8th Floor
Washington, DC 20005
Phone: 202-783-6040

Attorneys for Applicant

EXHIBIT A

THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB

Mailed: April 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Triatomic Environmental, Inc.

v.

RGF Environmental Group, Inc.

—
Opposition No. 91232746
—

Brian M. Taillon and Kenneth W. Cohen of McHale & Slavin, P.A.,
for Triatomic Environmental, Inc.

Martin M. Zoltick, Leo M. Loughlin, and Davide F. Schiavetti
of Rothwell Figg Ernst & Manbeck PC, for RGF Environmental Group, Inc.

—
Before Mermelstein, Wolfson, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Applicant, RGF Environmental Group, Inc., seeks registration on the Principal Register of the standard character mark UPCO-QR for “air purification units” in International Class 11. Triatomic Environmental, Inc. (“Opposer”) has opposed registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the basis of alleged likelihood of confusion with its registered mark

APCO (in standard characters) for “air purifiers” in International Class 11.¹ Applicant denied the salient allegations in Opposer’s second amended notice of opposition (the operative pleading) and asserted that the pleading failed to state a claim upon which relief may be granted. “Insofar as [Applicant] neither filed a formal motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) during the interlocutory phase of this proceeding, nor argued this asserted affirmative defense in its brief, it is hereby deemed waived.” *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6. (TTAB 2013).

I. THE RECORD

The record includes the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the subject application. The record also includes:

A. Opposer’s Testimony and Evidence

1. The testimony declaration of Opposer’s president, Christopher Willette, with Exhibits A-N (“Willette testimony”).²
2. The rebuttal testimony declaration of Christopher Willette, with Exhibits A-I.³
3. The cross-examination testimony of Applicant’s executive vice president, Walter Ellis, with Exhibit 1 (“Ellis cross”).
4. Notices of Reliance on:

¹ Reg. No. 3788548, issued May 11, 2010, combined declaration under Sections 8 and 15 accepted and acknowledged.

² 16 TTABVUE. Citations to material or testimony in the record are to the TTABVUE docket entry number and, as applicable, the TTABVUE page number. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

³ 25 TTABVUE.

- a. Applicant's non-confidential responses to Interrogatory Nos. 3, 5, 8, 9, 11, 12, 20 and 22; and documents produced by Applicant;⁴
- b. Printouts from TSDR of the file of Reg. No. 3788548 for Opposer's APCO mark and the file of Reg. No. 4307929 for the mark AHPCO, owned by a third party;⁵
- c. Results of a search of the Trademark Electronic Search System (TESS) database for applications and registrations owned by Applicant.⁶

B. Applicant's Evidence

1. The testimony declaration of Walter Ellis, with Exhibits A-I ("Ellis testimony").⁷
2. The cross-examination testimony of Christopher Willette, with Exhibits 1-15. ("Willette cross").⁸
3. Notice of Reliance on Opposer's answers to interrogatories and request for admissions.⁹

II. STANDING AND PRIORITY

Because Opposer has properly made its pleaded registration of record, showing Opposer as owner and that the registration is valid, Opposer has established its standing. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *see also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). For the same reason, Section 2(d)

⁴ 17 TTABVUE, First Notice of Reliance. In compliance with Trademark Rule 2.120(k)(3)(ii), Opposer obtained Applicant's authentication of the documents.

⁵ 18 TTABVUE, Second Notice of Reliance.

⁶ 26 TTABVUE, Third Notice of Reliance.

⁷ 21 TTABVUE.

⁸ 24 TTABVUE.

⁹ 22 TTABVUE.

priority is not at issue in this case as to the mark and the goods covered by the registration. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

III. LIKELIHOOD OF CONFUSION

Our determination of the issue of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). In addition, we address the conditions under which and buyers to whom sales are made, *i.e.*, “impulse” vs. careful, sophisticated purchasing and any evidence of actual confusion. We have considered all of the arguments and evidence of record, including any matters not expressly discussed.

A. The Goods

We begin our likelihood of confusion analysis with a consideration of the goods. The goods identified in the subject application are “air purification units.” The goods identified in Opposer’s pleaded registration are “air purifiers.” At oral argument, the parties confirmed that “air purification units” and “air purifiers” are identical. Moreover, Opposer’s president, Christopher Willette, affirms the identity of the goods on which the parties actually use their marks: “the APCO and UPCO-QR Marks are

used only on the air purifier products identified in the '548 Registration and the '085 Application and referenced in Paragraphs 5-13 [of my declaration testimony].”¹⁰

We are usually guided by the fundamental principle of registration practice that regardless of the parties' actual business activities, the goods in an application or registration are construed to include all goods of the type identified, sold in all normal channels of trade for such goods, to all usual purchasers of them. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1825-26 (TTAB 2009). In this case, the parties use their respective marks on a particular type of air purifier, and have prosecuted this opposition solely with respect to that subset of the identified goods. The parties' litigation conduct is, in effect, a tacit stipulation to narrow the scope of the proceeding to consideration of the parties' actual air purifiers, and the channels of trade and purchasers relevant to them. We will limit our consideration accordingly.

Paragraph 8 of the Willette declaration includes a picture of Opposer's APCO air purifier, at 16 TTABVUE 4, and paragraph 12 includes a picture of Applicant's air purification unit, at 16 TTABVUE 6:



¹⁰ 16 TTABVUE 7.

The goods are identical, and the parties do not argue otherwise. Thus, the second *du Pont* factor strongly favors a finding of likelihood of confusion.

B. Channels of Trade; Classes of Purchasers

The parties also agree that neither party sells directly to residential end-users or commercial building owners, who are the ultimate consumers of the air purifiers, but rather to professional distributors and installers. Mr. Ellis, Applicant's executive vice-president, confirmed for Applicant, "RGF sells its UPCO-QR product only to wholesale HVAC distributors who in turn sell it to HVAC contractors."¹¹ Opposer's president confirmed for Opposer, "In addition to being the same type of product, the APCO and UPCO-QR products are marketed to the same customers in the same channels of trade via the same media."¹² Both parties also promote their goods at industry trade shows, and advertise in trade journals and HVAC industry magazines, and Applicant exclusively advertises in such publications.¹³

The parties sell in the same trade channels to the same classes of consumers. The third *du Pont* factor also favors a finding of likelihood of confusion.

C. Conditions of Sale

Under the fourth *du Pont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, *i.e.*, 'impulse' vs. careful, sophisticated purchasing." *du Pont*, 177 USPQ at 567. We are mindful that where, as here, the goods of the parties are identical and without limitation as to the trade channels or classes of

¹¹ 21 TTABVUE 9.

¹² Willette test., 16 TTABVUE 8.

¹³ 16 TTABVUE 135.

consumers, we may presume that the marketing channels of trade and targeted classes of purchasers are the same, *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011), and base our analysis “on the least sophisticated potential purchasers,” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014). However, because the parties agree that their customers comprise only sophisticated professional consumers,¹⁴ and have based their arguments on this premise, we accept that the goods are purchased by only sophisticated consumers exercising a higher level of care. We also note the record evidence shows that the goods, utilizing photocatalytic oxidation technology and ultraviolet light, require a level of expertise to install the product, making it reasonable to presume a higher level of care in purchasing.¹⁵

¹⁴ See Applicant’s Response to Interrogatory No. 9, 16 TTABVUE 136: “RGF sells its UPCO-QR product only to Wholesale Distributors who in turn sell to HVAC Contractors. RGF does not sell the product to consumers directly.” See also Willette test., 16 TTABVUE 8 “Triatomic’s customers for APCO products also include wholesalers who sell to HVAC contractors”; Ellis test., 21 TTABVUE 9: “The purchasers of the APCO and UPCO-QR products are therefore trained professionals in the IAQ industry and are sophisticated as to particular products sold as well as the manufacturers of a particular product.”

¹⁵ Willette test., 16 TTABVUE 3: “The APCO Mark is used in connection with air purifiers which are installed into the ductwork of a central air system and scrub the air as it passes through the system.” See also Ellis test., 21 TTABVUE 9: “the installation of [a] PCO unit must be installed in the HVAC duct and should be done by a trained professional.” The installation instructions contain the following notice: “This unit is intended to be installed by a qualified, licensed contractor.” Exhibit H to Willette test., 16 TTABVUE 166-182.

Circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. *DuPont*, 177 USPQ at 567; *In re N.A.D., Inc.*, 754 F.2d 996 , 224 USPQ 969, 971 (Fed. Cir. 1985) (confusion is unlikely when sophisticated purchasers are buying goods with great care). Nonetheless, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *Stone Lion*, 110 USPQ2d at 1163-64; *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Even discerning and sophisticated purchasers are likely to be confused between the sources of identical goods when offered under similar marks.

In view of the sophistication of the consumers and the technical nature of the goods, the fourth *du Pont* factor slightly favors a finding of no likelihood of confusion.

D. The Marks

We now consider the similarity or dissimilarity of the marks at issue 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, 1691 (Fed. Cir. 2005) (citing *du Pont*, 177 USPQ at 567). Because the parties’ goods are identical, “the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prods. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

In comparing the marks, we bear in mind that 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). 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 consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant has applied to register the mark UPCO-QR. Opposer’s mark is APCO. The marks are similar in appearance and pronunciation because they share a common initial structure: a coined term comprised of a similar-sounding vowel in front of the letters “PCO.” Although the addition of the hyphen and letters “QR” in Applicant’s mark are points of dissimilarities, because they are at the end of Applicant’s mark, consumers are less likely to focus on this portion. It is well-accepted that the first part of a mark is usually its most significant feature in terms of consumer perception. Consumers are more likely to remember and recall the term UPCO in Applicant’s mark for this reason. *See Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first

part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

The marks are also similar in connotation and overall commercial impression. The terms APCO and UPCO-QR standing alone have no meaning. However, the parties have each argued that their mark carries a specific connotation built upon the individual letters of the mark. As for APCO, Opposer states that the “A” stands for “advanced.”¹⁶ Applicant asserts that the “U” in UPCO means “ultimate” and that “QR” means “quick-release.”¹⁷ Both agree that “PCO” means “photocatalytic oxidation,” and that this term is generic.¹⁸ Applicant argues that the marks are

¹⁶ 16 TTABVUE 4: “APCO’ is an acronym for ‘advanced photocatalytic oxidation.’ In earlier Triatomic marketing materials ‘APCO’ stood for ‘absorptive photocatalytic oxidation.’”

¹⁷ Applicant’s Response to Interrogatory No. 5, 17 TTABVUE 10: “This QR suffix stands for ‘quick release.’”

¹⁸ Ellis test., 21 TTABVUE 5: “PCO is a generic term in the IAQ industry that refers to products which use photocatalytic oxidation technology.” *See also* Willette test., 24 TTABVUE 20-21 and 24 TTABVUE 25-26:

Q. So it’s your understanding that “PCO” is an acronym for photocatalytic oxidation?

A. Yes.

Q. Describe PCO.

A. It’s a process that’s a catalytic reaction between UV light and a catalyst, often titanium oxide, that causes a photocatalytic oxidation reaction.

Q. How long has the PCO process been around?

A. Probably decades, since the ‘80s. That was when it was researched and discovered.

Q. Did Triatomic coin the term PCO?

A. No.

Q. Is it fair to say that PCO is a generic term in the HVAC industry, or the IAQ industry?

A. Yes.

...

Q. Is it fair to say it’s necessary to use PCO to describe the technology?

A. Yes.

Q. So it’s necessary for people to use the term PCO to accurately describe their photocatalytic oxidation products, is that fair?

A. Yes.

distinguishable on this basis. The defect in this argument rests with the parties' focus on their own perceptions, rather than the likely perception of relevant purchasers. There is slight record evidence that consumers will perceive that APCO and UPCO-QR contain the generic term "PCO" or that consumers will recognize "A" is intended to mean "advanced" and "U" is intended to mean "ultimate."¹⁹ There is only the parties' testimony as to their own perceptions, and evidence that Applicant uses "ultimate" on its packaging, as depicted below, and that Opposer uses the tagline "next generation PCO" and depicts its mark with a larger letter "A" on one of its advertisements:²⁰



¹⁹ Note Applicant's reference to the term "ultimate" as internal: "As the UPCO-QR product was being developed, it was referred to internally as the 'Upgraded-PCO-QR' and then changed from 'Upgraded' to 'Ultimate.'" At 17 TTABVUE 11.

²⁰ Applicant's packaging at 16 TTABVUE 118; Opposer's advertising at 16 TTABVUE 15.

NEXT GENERATION PCO TECHNOLOGY
APCO
FRESH-AIRE UV PATENT PENDING™

In-Duct Air Purifier

The Fresh-Aire APCO is the next generation in air purification incorporating an advanced absorptive photo-catalytic oxidation (APCO) monolithic cell.

Current PCO technology is limited by only being capable of breaking down simple indoor air contaminants such as odors in the air as they pass by the PCO cell.

Traditional PCO cells are ineffective on more complex VOCs such as formaldehyde or toluene. The Fresh-Aire Purity's APCO cell absorbs these contaminants and allows time for complete oxidation of these contaminants. Plus, the cell is regenerative, breaking down the captured impurities to simple carbon dioxide and water vapor.

In addition, the Fresh-Aire APCO uses our proven shielded 200 series UV-C lamp for airborne disinfection.



FEATURES

- Advanced Monolithic Absorptive PCO cell with proprietary absorption media and proven TiO₂ photo-catalytic coating for the reduction of complex VOCs and household odors.
- Non-Ozone quartz shielded 254 NM UV-C lamp for airborne germicidal disinfection

This evidence is insufficient to prove that consumers will recognize the “PCO” portion embedded within each parties’ mark, or that even if they do, that they will consequently distinguish, rather than confuse, the two marks overall. The evidence also does not show that consumers have come to recognize any of the supposed meanings behind the letters “A” or “U.” See, e.g., *Christian Broad. Network, Inc. v. ABS-CBN Int’l*, 84 USPQ2d 1560, 1569, (TTAB 2007) (no evidence that the public was aware of the meaning of the conflicting initials). Even if PCO is descriptive or generic, the marks at issue each include another letter before PCO, making APCO and UPCO distinctive terms. Moreover, the initial vowel “U” in Applicant’s mark bonds with the “P” of PCO to create a recognizable sound (“up”) that overrides the

imbedded PCO element in the same way that the initial vowel “A” in Opposer’s mark forms the sound (“ap”) in its mark. Separate consideration of the PCO component of these marks would amount to dissection.

Applicant also submitted copies of third-party uses of the term “PCO” to show that consumers will recognize PCO as generic. Applicant contends that “numerous third parties currently offer[] PCO products incorporating PCO in the names of the products,”²¹ and argues that “[a]s such, Triatomic’s rights in APCO are very diluted in view of numerous third parties using PCO for competing products.” Applicant submitted printouts from third-party websites showing use of “PCO” in marks for air purifiers, such as AHPCO; PureAir PCO; Pro-Cell PCO and General Aire VectorFlo PCO/UVC.²² 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. But the existence of these marks, while tending to show that PCO has a commonly understood meaning, does not prove that consumers would view APCO as diluted. None of the marks adduced by Applicant, with the exception of the mark AHPCO, are remotely similar to APCO. The existence of a single registration is insufficient as a basis upon which to find that Opposer’s mark is weak. Accordingly, the evidence fails to show that consumers have come to recognize that there is an embedded “PCO” in APCO and to distinguish the marks on the basis of their other

²¹ 21 TTABVUE 8.

²² 21 TTABVUE 169-198, Exhibit I.

features. In considering the marks in their entireties, consumers will perceive a single arbitrary term, APCO and a single arbitrary term comprised of two parts: UPCO-QR.

For the reasons discussed above, the marks are similar in appearance, pronunciation, connotation and overall commercial impression. The first *du Pont* factor favors a finding of likelihood of confusion.

E. Actual Confusion

We treat *du Pont* factor 7 (whether actual confusion has been shown) and factor 8 (whether there has been a significant opportunity for confusion to have occurred) as neutral. Although Opposer stated that it is “generally aware of there being confusion with AirZone in Oldsmar, Florida between goods bearing the APCO and UPCO-QR marks,”²³ Opposer did not adduce any evidence in support of its statement. The length of time during which the parties have been concurrently using their respective marks, is, at best, three years from the date of first use of the UPCO-QR mark in 2015²⁴ to the start of trial in May 2018. Actual confusion evidence is lacking and there has not been a significant opportunity for confusion to have occurred; these factors are neutral.

²³ Response to Interrogatory No. 18, 16 TTABVUE 149.

²⁴ Applicant responded to Opposer’s Interrogatory No. 3, by stating that it “has used [UPCO-QR] since July 2016.” 16 TTABVUE 132. The earlier date of 2015 was provided by Mr. Ellis. 21 TTABVUE 7: “In 2015, RGF introduced its UPCO-QR product.” Our conclusion as to the actual confusion factors is not affected by whether we use 2015 or July 2016 as Applicant’s date of first use.

IV. CONCLUSION

After considering all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion, we conclude that confusion is likely between Applicant's UPCO-QR mark for "air purification units" and Opposer's mark APCO for "air purifiers." The goods are identical, the trade channels and classes of consumers are same, and the marks are similar. Although the consumers are professional distributors and contractors, we find that the identity between the goods and the similarities of the marks outweighs any purchaser sophistication. The other factors we have considered are neutral.

Decision: The opposition on the ground of likelihood of confusion is sustained.

CERTIFICATE OF FILING

I hereby certify that, in addition to being filed electronically through the Board's ESTTA System in Opposition 91232746, the original version of the foregoing **APPLICANT'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT** was filed by hand on this 6th day of June, 2019, with the Director of the United States Patent and Trademark Office, at the following address:

Director of the United States Patent and Trademark Office
c/o Office of the General Counsel
United States Patent and Trademark Office
Madison Building East, 10B20
600 Dulany Street
Alexandria, VA 22314-5793

CERTIFICATE OF FILING

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT** was electronically filed on this 6th day of June, 2019, with the United States Court of Appeals for the Federal Circuit, using the Court's CM/ECF System.

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of June, 2019, a true and correct copy of the foregoing **APPLICANT'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT** was served by electronic mail on the following counsel of record for Opposer:

Brian M. Taillon
Kenneth W. Cohen
Mchale & Slavin PA
Emails: ustrademarks@mchaleslavin.com
litigation@mchaleslavin.com
btailon@mchaleslavin.com

/s/ Erik van Leeuwen

Erik van Leeuwen
Litigation Operations Coordinator
Rothwell, Figg, Ernst & Manbeck, P.C.