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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nawkaw, Inc.

Serial No. 98499982

Katarzyna Purzycka, of Nawkaw, Inc.,

Lyal Fox, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

Before Heasley, Thurmon, and Cohen,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Nawkaw, Inc., seeks registration on the Principal Register of the mark ECOTONE (in standard characters) for goods ultimately identified as "Coating compositions in the nature of paint, namely, clear and pigmented coatings specifically formulated for application to concrete and masonry surfaces by professionals, not for retail sale or consumer use, and not for use on wood surfaces," in International Class 2.[1]

[1] Application Serial No. 98499982 was filed on April 15, 2024, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere as of January 10, 2019 and use in commerce since at least as early as January 10, 2020.

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with these goods, so resembles the registered mark ECO-TONES (in standard characters) for "interior and exterior stains, sealers and coatings for roofs, siding and timber; wood preservatives; restorative preparations in the nature of stains for wood; and coatings for wood, namely, stains, coatings, sealers, preservatives and restoratives in the nature of stains," in International Class 2, as to be likely to cause confusion, to cause mistake, or to deceive.[2]

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the Board granted Applicant's request to remand the Application to the Examining Attorney for consideration of additional evidence. The Examining Attorney again denied Applicant's request for reconsideration, and the appeal proceeded. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously

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Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board's TTABVUE online docket system.

[2] Registration No. 3812580, issued on the Principal Register on July 6, 2010. Renewed.

used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive…." 15 U.S.C. § 1052(d).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the "*DuPont* factors"), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.,* 575 U.S. 138, 135 (2015).

In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods. *Bullshine Distillery LLC v. Sazerac Brands, LLC*, 130 F.4th 1025, 1033 (Fed. Cir. 2025). "While the Board is required to consider each *DuPont* factor for which it has evidence, the Board 'may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.' *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001); *see also Oakville Hills Cellar, Inc. v. Georgallis Holdings*, LLC, 826 F.3d 1376, 1379 (Fed. Cir. 2016); *In re Dixie Restaurants*, 105 F.3d [1405,] 1407 [(Fed. Cir. 1997)] ('We see no error in the [B]oard's decision to focus on the *DuPont* factors it deemed dispositive.')." *Stratus Networks v. UBTA-UBET Commc'ns. Inc.,* 995 F.3d 994, 999 (Fed. Cir. 2020).

A. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at

1361. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, No. 87075988, 2018 WL 2734893, *5 (TTAB 2018) *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, No. 85497617, 2014 WL 2531200, *2 (TTAB 2014)); *Cecile Gagnon Co. v. Bourjois, Inc.*, 223 F.2d 731, 733 (CCPA 1955) ("And with respect to sound, meaning, and appearance, substantial identity between the marks in any one or more of such attributes is, in of itself, fatal to the registration of his mark by an applicant.").

The respective marks, once again, are Registrant's ECO-TONES and Applicant's ECOTONE. As the Examining Attorney observes, the marks are virtually identical.[3] Both consist of the component terms ECO and TONE[S], in the same order. "When viewed in their entireties, the marks reveal an identical structure and a similar appearance, sound, connotation, and commercial impression. These similarities go a long way toward causing confusion among consumers." *See In re Detroit Athl. Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018).

The only differences here are that the registered mark is hyphenated and in plural form. "In this case, the peripheral differences fail to distinguish the marks." *In re Dare Foods Inc.,* No. 88758625, 2022 WL 970319, *6 (TTAB 2022).

The presence or absence of the hyphen is insignificant. *See, e.g., Pierce-Arrow Soc'y v. Spintek Filtration, Inc.*, No. 91224343, 2019 WL 3834985, *13 (TTAB 2019) ("PIERCE ARROW is … the dominant term in Opposer's mark, which, but for the missing hyphen, is identical to Applicant's entire mark [PIERCE-ARROW]. The

[3] Examining Attorney's brief, 12 TTABVUE 10.

presence of the hyphen in Applicant's mark does not distinguish it from Opposer's mark."); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, No. 91173963, 2016 WL 3915987, *5 (TTAB 2016) ("the hyphen in Applicant's mark MINI-MELTS does not distinguish it from Opposer's mark [MINI MELTS]"); *Mag Instr. Inc. v. Brinkmann Corp.*, Nos. 91163534, 2010 WL 3253200, *10 (TTAB 2010) ("both marks begin with the term MAGNUM or MAG-NUM. Thus, the initial term in both marks is essentially identical; the hyphen … does not distinguish them."). Customers are therefore not apt to place much significance on the hyphen in the registered mark.

So too with the plural form of the registered mark. "While each trademark must always be evaluated individually, pluralization commonly does not alter the meaning of a mark." *In re Cordua Rests., Inc.*, 823 F.3d 594, 603 (Fed. Cir. 2016). *See also Wilson v. Delaunay*, 245 F.2d 877, 878 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word 'Zombie' and they will therefore be regarded here as the same mark."), *cited in State Permits, Inc. v. Fieldvine, Inc.*, No. 92075095, 2024 WL 3825297, *9 (TTAB 2024) ("the parties do not disagree that Petitioner's PERMIT.COM mark is virtually identical to Respondent's registered PERMITS.COM mark. The plural nature of Respondent's mark does not change this."). So, the pluralization, like the hyphenation, does not suffice to distinguish the marks.

Applicant does not address these points in its briefs. *See, e.g.*, *In re Morinaga Nyugyo K.K.,* No. 86338392, 2016 WL 5219811, *2 (TTAB 2016) ("apparently conceding the issue." It argues instead that Registrant's "ECO-TONES

appears in marketing materials as descriptive wording associated with Sansin-branded products … and does not appear as a standalone product name or source identifier."[4]

However, Applicant's argument runs counter to the presumption of validity accorded to the cited registered mark. Trademark Act Section 7(b) provides that "[a] certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark…." 15 USC § 1057(b). "The presumption of validity is not conditional; the statute provides that a certificate of registration 'shall' result in the presumption, without specifying any exceptions." *SoClean, Inc. v. Sunset Healthcare Sols., Inc.*, 52 F.4th 1363, 1369 (Fed. Cir. 2022). "The mark registered without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), so it is entitled to all of the presumptions under Section 7(b), 15 U.S.C. § 1057(b), including the presumption of inherent distinctiveness, i.e., that consumers will inherently associate it with a unique source. *See, e.g., Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021)." *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC*, No. 92079099, 2024 WL 2844425, *15 (TTAB 2024). Its conceptual strength is treated as inherently distinctive--at the very least, suggestive of ecologically apposite surface coatings. *In re Fiesta Palms LLC*, 2007 WL 950952, *3 (TTAB 2007). Applicant's attempt to characterize it as descriptive therefore fails.

We find, in sum, that Applicant's ECOTONE mark is very similar—indeed,

[4] Applicant's brief, 10 TTABVUE 3.

virtually identical--to Registrant's presumptively valid ECO-TONES mark, and that the first *DuPont* factor weighs heavily in favor of finding a likelihood of confusion.

B. **Relatedness of the Goods**,

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration…" *DuPont*, 476 F.2d at 1361. Applicant's identified goods, again, are;

> Coating compositions in the nature of paint, namely, clear and pigmented coatings specifically formulated for application to concrete and masonry surfaces by professionals, not for retail sale or consumer use, and not for use on wood surfaces,

And Registrant's identified goods are:

> Interior and exterior stains, sealers and coatings for roofs, siding and timber; wood preservatives; restorative preparations in the nature of stains for wood; and coatings for wood, namely, stains, coatings, sealers, preservatives and restoratives in the nature of stains.

Applicant argues that "Registrant manufactures and markets wood stains exclusively"; that Applicant "manufactures and applies stains exclusively for concrete and masonry…"; and that "[t]he parties' goods serve difference substrates [i.e., surfaces] and purposes: wood versus concrete/masonry."[5] Applicant is mistaken.

"The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration." *In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023). Here, both identify "coatings," Registrant "for roofs, siding and timber;" and Applicant "for application to concrete and masonry surfaces."

[5] Applicant's brief, 10 TTABVUE 3-4.

Notably, Registrant's coatings for roofs and siding are not limited to wood, and may encompass concrete and masonry surfaces. Although the remainder of Registrant's identification describes wood surfaces, the initial part, describing "interior and exterior stains, sealers and coatings for roofs, siding and timber;" is separated by a semicolon from the rest of the identified goods, and is not so delimited. *In re Midwest Gaming & Entm't LLC*, No. 85111552, 2013 WL 1442237, *4 (TTAB 2013) ("Under standard examination practice, a semicolon is used to separate distinct categories of goods or services."). The quoted language thus stands alone, identifying roofs and siding of any composition, including concrete and masonry. The respective goods are therefore legally identical in part. *Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co.*, No. 92079409, 2024 WL 3739358, *5 (TTAB 2024).

Because we have found that the goods identified in the involved application are legally identical to some of the goods identified in the cited registration, "there is no need for us to further consider the relatedness of the goods," *In re FabFitFun, Inc.*, No. 86847381, 2018 WL 4043156**,** *2 (TTAB 2018). We therefore acknowledge, but need not rely on, the Examining Attorney's evidence of seven entities—such as Behr, Sherwin-Williams, Valspar, and Rust-Oleum--that offer coatings for wood, concrete, and masonry under the same brand name.[6] Evidence that other companies offer the goods of both parties under the same mark tends to show that consumers will perceive

[6] Examining Attorney's brief, 12 TTABVUE 9, Sept. 30, 2025 Office Action at 4-43; May 16, 2025 Office Action at 7-45

the goods as related. *See, e.g., Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024); *In re Detroit Athl.*, 903 F.3d at 1306.

Thus, Applicant's and Registrant's goods are legally identical in part, and the second *DuPont* factor weighs in favor of a likelihood of confusion.

C. Channels of Trade and Sophistication of Customers

The third *DuPont* factor concerns "[t]he similarity or dissimilarity of established, likely-to-continue trade channels," and the fourth concerns "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361.

We look to the language of the identifications to ascertain the trade channels. *Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 WL 4925901, *34 (TTAB 2024). Applicant's identification provides, in pertinent part, that its goods are "coatings specifically formulated for application to concrete and masonry surfaces by professionals, not for retail sale or consumer use…." Applicant argues that "ECOTONE is sold and applied exclusively by [Applicant] in professional, non-retail settings to architects, contractors, and project owners under [Applicant's] guidance. Purchasers are sophisticated and make technical, substrate-specific choices. … The separate branding, controlled distribution, and exclusive substrate focus eliminate any realistic likelihood of confusion."[7]

But even if Applicant's identification of goods delimits, to some extent, its intended

[7] Applicant's brief, 10 TTABVUE 4-5.

channels of trade to a certain class of customers, Registrant's identification does not. Registrant's "coatings for roofs, siding and timber" are available to professionals and members of the general public alike. Further, "[b]ecause we have found that Applicant's and Registrant's goods … are legally identical in part, we must presume that these goods and services travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers." *In re Information Builders Inc.*, No. 87753964, 2020 WL 2094122, *4 (TTAB 2020). In this case, the overlap occurs in Registrant's offering and sale of its goods

As the Examining Attorney points out, Applicant has not provided any evidence proving the sophistication of the relevant purchasers.[8] The Board has declared, "Applicant urges us to consider consumer sophistication as a factor. However, applicant has submitted no evidence that either its consumers or those of registrant would be sophisticated. Furthermore, as our precedent dictates, even sophisticated buyers are not immune from source confusion where, as here, the marks are substantially identical." *In re Iolo Techs., LLC*, No. 77399654, 2010 WL 2513865, *5 (2010). "[E]ven if Applicant's unsupported argument is credited, purchaser sophistication does not always result in a finding that confusion is unlikely, especially where legally identical in part goods and services are involved and … the marks are similar." *In re Information Builders,* 2020 WL 2094122, at *5. Even professional paint and coating crews will have persons of varying experience, who, in the course of purchasing supplies, could easily mistake one mark for the other, or assume they

[8] Examining Attorney's brief, 12 TTABVUE 10.

indicate a common source.

For these reasons, we find that the channels of trade overlap under the third *DuPont* factor, and that the fourth *DuPont* factor, sophistication of purchasers, does not avert a likelihood of confusion.

II. Conclusion

On careful consideration of the arguments and evidence of record, we find that the respective marks are very similar under the first *DuPont* factor; that the identified goods are legally identical in part under the second *DuPon*t factor; that the channels of trade overlap under the third *DuPont* factor; and that purchaser sophistication would not avert a likelihood of confusion under the fourth *DuPont* factor.

On the whole, we find that there is a likelihood of confusion within the meaning of 15 U.S.C. §1052(d).

Decision: The refusal to register Applicant's mark is affirmed.