

examining attorney is to apply each of the applicable factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors are:

- (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) the similarity or dissimilarity and nature of the goods as described in an application or registration or in connection with which a prior mark is in use;
- (3) the similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) the conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing;
- (5) the number and nature of similar marks in use on similar services; and
- (6) the absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

See id.

The examining attorney is required to look to the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the examining attorney must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10th Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(citing *Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531, 30 USPQ2d 1930 (10th Cir.

1994)). Even the use of identical dominant words or terms does not automatically mean that two marks are similar. In *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that “Oatmeal Raisin Crisp” and “Apple Raisin Crisp” are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10th Cir. 1996), marks for “FirstBank” and for “First Bank Kansas” were found not to be confusingly similar. Further, in *Luigino’s Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark “Lean Cuisine” was not confusingly similar to “Michelina’s Lean ‘N Tasty” even though both marks use the word “Lean” and are in the same class of services, namely, low-fat frozen food.

Concerning the respective goods with which the marks are used, the nature and scope of a party’s goods must be determined on the basis of the goods recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computergoods Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973). *See generally* TMEP § 1207.01(a)(iii).

If the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are similar, confusion is

not likely. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986) (QR for coaxial cable held not confusingly similar to QR for various products (*e.g.*, lamps, tubes) related to the photocopying field). *See generally* TMEP § 1207.01(a)(i).

Moreover the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. *See generally* TMEP § 1207.01(d)(vii).

Applying the legal standards as enumerated above, it is clear that confusion is not likely to exist and Applicant's mark is entitled to register despite the existence of the cited marks.

Dissimilarities in the Marks as to their Respective Appearances

The Applicant applied to register the mark SPLAT. The cited marks are SPLATT Reg. No. 0619318, SPLATT (and design) Reg. No. 2281006, both previously owned by Bar Products Inc., now registered under James J. Stevens, and prior pending application SPLATZ Ser. No. 86668366. Copies of the application and registrations details of the subject marks are attached hereto as Exhibits 1 – 4, respectively. *See* Exhibits 1-4.

We agree that there is a semblance in the literal elements of the marks. We disagree however that the Applicant's SPLAT is similar in respect to sight with the cited mark's



which is a design mark incorporating design and stylization elements.

The Applicant's mark is a plain word mark, devoid of any stylization and design. In the circumstances, we ask the Examining Attorney to give due consideration to commercial realities that the marks will be perceived by consumers exactly as the marks are depicted. We submit that there are sufficient design and stylization elements in the cited mark that



comfortably distance

from the Applicant's plain word mark, SPLAT.

We agree that the Applicant's mark is identical in sound with the cited marks SPLATT and SPATT (and design) but differs from the prior application SPLATZ.

In terms of connotation and commercial impression, the variations of the word SPLAT may refer to the sound of an object that "hit a hard surface making a noise like a wet object hitting something hard", as defined by the online MacMillan Dictionary. The search result of the MacMillan Dictionary is attached as Exhibit 5. *See* Exhibit 5. It is speculative however that the marks would engender similar connotation and commercial impression as applied to the subject goods, given that it is unclear whether "SPLAT" refers to the object that hit the surface, or the goods itself, e.g., spray on solvent by the Registrant for SPLATT. In the circumstances, we cannot agree that the connotation and commercial impression are similar.

Should the Examining Attorney insist on similarity here, we believe that

consideration of the other *Du Pont* factors favor registration of the Applicant's mark.

Similarity in Goods

As a threshold matter, we agree that a superficial relatedness exists here based on the nature of the goods, i.e., cleaning products. We submit however that consideration of the other *Du Pont* factors favors the Applicant.

Dissimilarities Between the Trade Channels for the Marks

The Applicant's products are available through the Applicant's website and are offered by "As Seen on TV Productions". An excerpt from the Applicant's website providing purchase information is attached as Exhibit 6. *See* Exhibit 6.

There appears to be no commercial use of the cited marks as of date. In the absence of evidence, we would assume that the proprietors of the cited marks' would sell online and in retail establishments selling cleaning products.

As such, it is respectfully submitted that Applicant's goods travel in a channel of trade wholly diverse from those of the goods of the cited marks. It is submitted that the respective goods would not be encountered by the same persons in situations that would create the incorrect assumption that such services originate from the same source and, accordingly, this *du Pont* factor also favors registration of the Applicant's mark.

The Marks' Goods are Marketed Differently

The Applicant promotes its goods through its website and television features, i.e., As Seen on TV and customer testimonials featured on the Applicant's website.

There appears to be no evidence of marketing by the proprietors of the cited marks of date. In the absence of information, we would assume that the Applicant engages in advertising through its own website, social media accounts and tri-media advertising.

The Applicant's promotion focuses on product safety, i.e., use of non-toxic ingredients and that it is safe for pets. An excerpt from the Applicant's website detailing product safety is attached as Exhibit 7. *See* Exhibit 7. There is no evidence of record to indicate that the chemical components of the goods bearing the cited marks are similarly safe.

Based upon this finding, consumers would not be presented with situations that would create the incorrect assumption that such goods originate from the same source and, accordingly, this *du Pont* factor also favors registration of the Applicant's mark.

Dissimilarities in Buyers to Whom Sales are Made

There can be no overlap in consumers here.

The Applicant's buyers are vehicle owners who want to use safe, non-toxic, pet-friendly and biodegradable products. These buyers resonate with the Applicant's harmless and environment friendly approach to using cleaning products. We cannot assume the same of the buyers of cited marks' given the explicit use of the wording "solvent" and "chemicals" in the goods claimed.

As such, it is submitted that the buyers for the respective goods are sophisticated enough to be enable them to discern and distinguish between the marks and the goods on which the marks are used, and thus this *du Pont* factor also favors a finding of an absence of a likelihood of confusion.

Finally, we ask the Examining Attorney to look favorably upon the Applicant's actual and continuous use of the mark as opposed to the presumed use of the cited marks.

CONCLUSION

In conclusion, based upon the foregoing it is submitted that the *du Pont* factors

addressed herein favor registration of the Applicant's mark. The goods themselves appear distinct and do not travel in similar trade channels or marketing channels such that they would be encountered by the same class of purchasers or members.

WHEREFORE it is respectfully requested that the Examining Attorney remove as an impediment the cited marks and approve the instant application for publication upon the Principal Register.

Respectfully submitted this 26th day of April, 2016

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