

**THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re FineLine Lakeshore Services, LLP
and Dock & Lift, Inc.

Serial No. 76428109

Hugh D. Jaeger, Esq. for FineLine Lakeshore Services, LLP
and Dock & Lift, Inc.

William H. Dawe III, Trademark Examining Attorney, Law
Office 108 (Andrew Lawrence, Managing Attorney).

Before Quinn, Zervas and Walsh, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

On June 27, 2002, FineLine Lakeshore Services, LLP and
Dock & Lift, Inc. ("applicants") applied as joint
applicants to register the mark POLYDECK in standard-
character form for goods now identified as "polyethylene
dock sections" in International Class 19. Applicants
assert both first use anywhere and first use of the mark in
commerce on May 1, 2002.

The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with Reg. No. 2586508, which issued on June 25, 2002, for the mark POLYDECK in standard-character form for goods identified as "vinyl boards for building products" in International Class 19. The registration claims first use anywhere on April 1, 2001 and first use of the mark in commerce on July 1, 2001. The Examining Attorney has also refused registration under Trademark Act Section 2(e)(1), 15 U.S.C. § 2(e)(1), on the ground that applicants' mark merely describes the goods. Applicants responded to the refusals, and the Examining Attorney made both refusals final. Applicants and the Examining Attorney have filed briefs. For the reasons stated below, we affirm the refusal under Section 2(d) and reverse the refusal under Section 2(e)(1).

The Section 2(d) Refusal
Likelihood of Confusion

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion ..." 15 U.S.C. § 1052(d). To determine whether there is a likelihood of confusion, we

must consider all evidence of record bearing on the factors delineated in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977). Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the applicants and registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Comparison of the Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of both marks. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In this case the marks are identical. Both the mark in the application and the mark in the cited registration are POLYDECK, and both marks are in standard-character form. Furthermore, as the Board observed in a similar case, "... in a situation such as this, where both parties are using the identical designation, ... the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Indus., Inc., 210 USPQ 70, 78 (TTAB 1981).

Comparison of the Goods and Channels of Trade

To find goods related for the purposes of Trademark Act Section 2(d), the goods need not be identical. The goods need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from the same source. On-Line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

Applicants' entire argument, not only as to the goods but with regard to both grounds for refusal, is as follows:

The issue regarding refusal of registration is very simple—the goods are not the same and the goods are not sold in the same channels of commerce. There is no confusion as to the source of the goods and there never has been any confusion as to the source of the goods.

The Examining Attorney argues that the goods of applicants and the registrant are related in that both are "building products that pass through the same trade channels." In support of his position that the goods are related, the Examining Attorney has presented records of third-party, use-based registrations, including the following:

Reg. No. 2488246 for the mark "21POLY" for goods including "wood coated with protective polymer

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coating, namely, ... boards, ... and beams for use in waterfront walls, sea walls, retaining walls, piers, bulkheads, docks and decks";

Reg. No. 2048875 for the mark "PHOENIX" for goods identified as "recycled plastic lumber, sheets, boards and posts for use in building structures, such as, ... decks, docks, ... fencing, outdoor furniture, plant boxes and shipping pallets";

Reg. No. 2504695 for the mark "YARDCRAFTERS" for goods identified as "non-metal deck board and/or panels ... for the decks, docks ...";

Reg. No. 2159249 for the mark "YOU WILL NEVER GO BACK TO WOOD!" for goods identified as "vinyl decks, docks, fences and component parts thereof"; and

Reg. No. 1787500 for the mark "Vecor" and design for goods identified as "vinyl panels for the construction of docks, decks, ... and accessories therefor";

Applicants' goods are "polyethylene dock sections";

the goods in the cited registration are "vinyl boards for building products." In determining whether the goods are related, we must consider the goods as identified in the application and registration and, in the absence of any restrictions, assume that the goods include all goods identified and that those goods travel in all trade channels appropriate for such goods. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

The registrations provided by the Examining Attorney have some probative value in this regard; specifically, they may indicate that the goods are the types of goods

which may emanate from the same source. In re TSI Brands Inc., 67 USPQ2d 1657, 1659 (TTAB 2002); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993).

In this case the goods in the cited registration are vinyl boards which could be component parts of applicants' polyethylene dock sections. The third-party registrations indicate that finished goods, such as applicant's dock sections, could include component parts, such as, the vinyl boards identified in the registration. As such, applicants' goods and those identified in the cited registration, as the Examining Attorney notes, are both closely related building products. Accordingly, we conclude that applicants' goods and the goods identified in the cited registration are related.

Although applicants state that the channels of trade for the goods differ, applicants do not either explain how they might differ or provide any evidence to show that they differ. Neither the application nor the cited registration specifies any restrictions as to trade channels.

Consequently, we must assume that the goods identified in both the application and the cited registrations move in the same trade channels, namely, trade channels which would apply generally to building products. See In re Melville Corp., 18 USPQ2d at 1388. Accordingly, we conclude that

the trade channels for the goods of applicants and the cited registrant could be overlapping or the same.

Actual Confusion

Applicants also argue that the absence of actual confusion indicates no likelihood of confusion without further explanation. However, there is no evidence that there has been an opportunity for confusion to occur in this case, for example, evidence that the applicants and the registrant have sold their goods in the same territory. Furthermore, particularly in an ex parte proceeding, "uncorroborated statements of no known instances of actual confusion are of little evidentiary value." In re Majestic Distilling Co., 65 USPQ2d at 1205. See also In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984). Therefore, we find applicants' argument regarding actual confusion unpersuasive.

In sum, after considering all evidence of record bearing on the du Pont factors, we conclude that there is a likelihood of confusion in this case. We conclude so principally because applicants' mark and the mark in the cited registration are identical and because the goods identified in the application and the cited registration are related and could travel in the same trade channels.

The Section 2(e)(1) Refusal
Descriptiveness

The Examining Attorney has also refused registration on the ground that POLYDECK is merely descriptive of "polyethylene dock sections." The Examining Attorney argues that PLOYDECK is a compound term with two merely descriptive components: "deck" which is an alternative generic term for "dock" and "poly" which is an abbreviation for "polyethylene." To support his position that "poly" is an abbreviation for "polyethylene" the Examining Attorney made the following definition of record: "pol-y **noun** 1. polyester 2. polyethylene." This definition is from the electronic version of the American Heritage® Dictionary of the English Language (3rd ed. 1992). Applicant has not presented any evidence or arguments with regard to the descriptiveness refusal.

A term is merely descriptive of goods within the meaning of Trademark Act Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

To determine whether a term is merely descriptive we must consider the term not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods in that context. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

When two or more merely descriptive terms are combined, we must determine whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, then the resulting combination is also merely descriptive. See, e.g., In re Tower Tech, Inc., 64 USPQ2d 1314 (TTAB 2002)(SMARTTOWER merely descriptive of commercial and industrial cooling towers).

The definition for "poly" which the Examining Attorney provided is for "poly" standing alone and includes two alternative meanings. The same dictionary also includes a definition for "poly-" when used as a prefix. We must consider this additional definition in view of the fact that, in this instance, relevant purchasers may also perceive "poly" as a prefix. The definition for the prefix "poly-" is as follows: "**prefix** 1. more than one; many; much: *polyatomic*. 2. more than usual; excessive;

abnormal: *polydipsia* 3. polymer; polymeric: *polyethylene* [From Greek *polus*, many]."¹ The dictionary also includes scores of entries for terms indicating the common use of "poly-" as a prefix, for example: **polychromatic, polygon, polygamy, polysyllabic**, etc.² This evidence indicates that relevant consumers may view POLYDECK as a coined term with "poly-" as a prefix suggesting, for example, that the goods, dock sections, may be configured in many ways. In re Remacle, 66 USPQ2d 1222, 1224 (TTAB 2002)(BIO-CD held not merely descriptive for various scientific and medical products and services). This indicates further that the combination of "poly" and "deck" may have a suggestive meaning which is more than the sum of its parts contrary to the Examining Attorney's position.

Accordingly, we conclude that POLYDECK is not merely descriptive of "polyethylene dock sections." In concluding so we acknowledge that there is some doubt and that, in such a case under Trademark Act Section 2(e)(1), we must resolve doubt in favor of applicant. In re Rank Organisation Ltd., 222 USPQ 324, 326 (TTAB 1984).

¹ We take judicial notice of this dictionary definition. University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

² We take judicial notice of these examples from the Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Id.

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Decision: The refusal under Section 2(d) is affirmed and the refusal under Section 2(e)(1) is reversed. Registration is refused.