

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Oral Hearing:  
January 17, 2007

Mailed:  
April 27, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re McTech Group, Inc.

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Serial No. 76598838

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William A. Bonk, III of Emerging Strategies, PLLC for  
McTech Group, Inc.

Aisha Clarke, Trademark Examining Attorney, Law Office 101  
(Ronald R. Sussman, Managing Attorney).

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Before Drost, Kuhlke and Bergsman, Administrative Trademark  
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

McTech Group, Inc. seeks registration on the Principal  
Register of the mark ULTRACURE NCF (in standard character  
form) for goods ultimately identified as "slab-on grade  
concrete curing blankets" in International Class 17.<sup>1</sup>

Registration has been refused under Section 2(d) of

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<sup>1</sup> Application Serial No. 76598838, filed June 23, 2004, alleging  
first use and use in commerce on March 1, 2004 under Trademark  
Act Section 1(a). 15 U.S.C. §1051(a).

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the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark ULTRACURE (in typed form) for "elastomeric waterproofing and anti-fracture membrane" in International Class 19 as to be likely to cause confusion, mistake or deception.<sup>2</sup>

When the refusal was made final, applicant filed this appeal. The appeal has been fully briefed and an oral hearing was held on January 17, 2007. We affirm the refusal to register.

As a preliminary matter, in her brief the examining attorney did not object to the specification sheet attached to applicant's brief and confirmed at the hearing that she did not object to this exhibit. In view thereof, we have considered it as part of the record.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

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<sup>2</sup> Registration No. 1713692, issued September 8, 1992; renewed.

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(Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We begin with the first du Pont factor, i.e., whether applicant's mark ULTRACURE NCF and registrant's mark ULTRACURE are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression.

The examining attorney argues that ULTRACURE is the dominant portion of applicant's mark and is "identical to the entire registered mark" (br. p. 3) because it is the first part of the mark and NCF is an abbreviation for natural cellulose fiber which is a component of the "applicant's goods and contributes to the product's ability to 'wick and hold moisture for long periods of time on concrete surfaces'" (br. p. 4) as shown on applicant's website. Applicant has presented no argument or evidence to dispute the examining attorney's contention.

Examining the marks in terms of their appearance, sound, meaning, and commercial impression, we find the

marks to be similar. The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980).

We find that ULTRACURE is the dominant part of the mark and that the addition of the abbreviation NCF is not sufficient to distinguish the marks, particularly in view of the meaning of NCF in relation to applicant's goods. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("That a particular feature is descriptive [or otherwise lacking in distinctiveness] ... with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..."). In addition, the connotation of both marks would be the same in the context of the respective goods. We take judicial notice of the following definitions:<sup>3</sup>

Ultra- *prefix* 3. beyond what is ordinary, proper, or moderate: excessively: extremely.

Cure *n* 4. a process or method of curing  
*vb* 3. to prepare or alter esp. by chemical or physical processing for keeping or use.

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<sup>3</sup> *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1999).

Thus, as to connotation in relation to the respective goods and services, both marks have a similar meaning, beyond what is ordinary processing or curing.

In view of the above, the factor of the similarity of the marks weighs in favor of a finding of likelihood of confusion.

We now turn to a consideration of the goods identified in the application and the cited registration. It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the applicant's goods and the cited registration's goods as they are described in the application and registration. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). Finally, "the greater degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's

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goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion." In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

The examining attorney argues that the goods are related because "they are both used on cement and can be used together in one job" and both "are used to treat concrete: one for curing concrete and the other for prepping cured concrete for tiling." Br. p. 5. She further states that "[a]s described by the applicant, in a typical commercial building project, the applicant's goods curing blankets would [be] applied to a concrete slab, and the registrant's waterproofing would follow." Id. She states that the goods would be used in sequence in a single building project. Br. p. 6. In support of her position, the examining attorney submitted excerpts from registrant's website and she also relies on excerpts from applicant's website submitted by applicant.

In response, applicant essentially argues that its goods are not sold in stores and are only specified or purchased by building designers or contractors, i.e., professional buyers, who are sophisticated and exercise a high degree of care in their purchasing decision.

As noted above, it is not necessary that the goods compete, simply that they be related in some manner that confusion as to source is likely to result. Applicant states that its goods are "intended and configured for...commercial building construction." Applicant further states that registrant's goods are also used in commercial building construction and is "trowled over, for example, cured concrete slabs" to form a "tilesetting adhesive specially developed for the installation of all types of tile, marble and stone." Br. p. 7.

Inasmuch as these goods are used sequentially in preparing slab concrete flooring we find that they are related. Therefore, the du Pont factor of the similarity of the goods favors a finding of likelihood of confusion.

Considering the channels of trade and class of purchasers, the examining attorney correctly states that absent limitations in the identifications we must consider all normal channels of trade. Registrant's goods would include both professional and general consumers and could be offered in stores. There is nothing in the record or the identification to infer otherwise. As for applicant's goods, the identification does not explicitly limit the trade channels or class of purchasers and it is not clear from the record if the normal channels of trade and class

of purchasers would be limited to professional buyers for commercial use. Thus, based on the identifications both goods could be found in stores and purchased by general consumers.

Applicant's arguments seek to impermissibly limit the trade channels for its goods by asserting that they are "intended and configured for, and exclusively utilized by professional contractors for slab-on-grade installations for commercial building construction." Br. p. 6.

Applicant indicates that "'slab on grade' refers to a type of foundation with a concrete floor which is placed directly on soil." Br. p. 6. Further, applicant states that "curing blankets for slab-on-grade work, come[] on a very large roll that is approximately eight feet wide and holds about 200 feet of material length." Id. Applicant states that its goods "are not available in stores, rather [they] must be specially ordered according to the specifications of a building construction contract" and "qualify to become listed in a building specification only after the building designer deems them appropriate for a particular application based on properties learned from lengthy evaluation." Br. pp. 9-10. Finally, applicant states that its goods are very expensive and that "it is not

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unusual for a job to require on the order of \$100,000 of concrete curing blanket materials." Br. p. 11.

As noted above, these limitations are not in the identification of goods in the application and it is not entirely clear from the record that applicant's goods would never be available in a store. However, if we infer some limitation in applicant's goods based on the wording "slab on grade," then at a minimum, applicant and registrant share the same professional purchasers, designers who specify applicant's product or builders and contractors who chose and purchase non-specified goods for a particular project, and the same commercial channel of trade.

In view thereof, the overlap in the channels of trade and class of customers favors a finding of likelihood of confusion.

Applicant argues that registrant's purchasers would be sophisticated in view of the expensive nature of those goods. Applicant contends that "[b]uilders and contractors must understand every aspect of the job undertaken, thus are virtually certain to be informed, deliberative buyers of the products they use, such as Applicants concrete curing blankets or Registrant's waterproof membrane, to get the job done. This is because, even if the materials that may be used are not specified in a building design or

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contract, the end result is. Since the contractor or builder must obtain results, the contractor or builder must be very confident in the materials used to obtain those results. Because arbitrary substitutions of non-proven materials could have disastrous, expensive consequences, a contractor or builder takes great care to employ only the appropriate materials to complete a job correctly." Br. p. 14.

It is not clear from the record that a builder or contractor would test registrant's types of goods prior to purchase, particularly if they share the same trademark as the curing blankets that have been specified or are already familiar to the contractor/purchaser. We point out, again, that there is no such limitation in the broad identification of goods in the registration or application. However, even if we infer from applicant's identification that it is not sold in stores and only purchased by professional buyers based on an evaluation by building designers, the goods could still be confused by a contractor having seen the two products together on a specification sheet in a prior project and making a purchasing decision on another project where the curing blankets and/or waterproofing agent have not been specified based on the false premise that these products originate

from the same source. Even sophisticated purchasers are not necessarily immune from source confusion. In re Decombe, 9 USP2d 1812 (TTAB 1998). Thus, even limiting our analysis to the professional buyers, builders or contractors purchasing non-specified materials, because the goods are related to a specific part of the building project, i.e., the curing and preparation of concrete flooring, and are used sequentially, despite the higher level of care, we believe confusion is still likely to result. However, to the extent this factor may favor applicant it does not outweigh the other factors.

Finally, applicant also submitted an affidavit from Mr. Stephen F. McDonald, applicant's president, stating that applicant has used its mark since March 1, 2004 and there have been no known instances of actual confusion. We do not accord significant weight to applicant's contention that there have been no instances of actual confusion despite contemporaneous use of the respective marks. While a showing of actual confusion may be highly probative, the lack of evidence of actual confusion carries little weight, particularly in an ex parte proceeding. *Majestic Distilling*, 65 USPQ2d at 1205.

In conclusion, we find that because of the close similarities in the marks, the relatedness of the goods,

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and the overlap in trade channels, confusion is likely between applicant's mark and the mark in the cited registration. To the extent there are any doubts, we resolve them, as we must, in registrant's favor. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.