

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Hagemeyer North America, Inc.

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Serial No. 78582349

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Sidney R. Brown of Jones, Day for Hagemeyer North America,  
Inc.

Saima Makhdoom,<sup>1</sup> Trademark Examining Attorney, Law Office  
101 (Ronald R. Sussman, Managing Attorney).

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Before Walters, Grendel and Drost, Administrative Trademark  
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register  
of the mark **VERSAPRO**, in standard character form, for Class  
5 goods identified in the application, as amended, as  
"industrial deodorants, germicides, insect repellents, weed  
killers for commercial use, insecticides, air fresheners,

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<sup>1</sup> A different Trademark Examining Attorney handled this case  
prior to appeal.

rubbing alcohol, herbicides, and all-purpose disinfectants."<sup>2</sup>

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as applied to the goods identified in the application, so resembles the mark **VERSAPRO**, previously registered<sup>3</sup> on the Principal Register (in standard character form) for

Air compressors, tool bits for machines, bits for power drills, drill chucks for power drills, electric handle-held drilling machines and parts therefor, pile drivers, pneumatic hammers, impact wrenches, hydraulic jacks, electric knives, air brushes for applying paint, power-driven wrenches, extension bars for power tools, power tools, namely drills, routers, saws, screwdrivers, shears, wrenches and ratchet wrenches

in Class 7, and

Bits for hand drills, blades for hand saws, manual jacks, pocket knives, garden tools, namely trowels, weeding forks, spades, hoes, hand tools, namely pliers, shovels, wrenches, screwdrivers, hammers, saws, scrapers, ratchet wrenches, socket sets, clamps, drills, planners [sic - planers?], tweezers, knives, scissors

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<sup>2</sup> Serial No. 78582349, filed on March 8, 2005. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

<sup>3</sup> Reg. No. 2540609, issued on February 19, 2002. Affidavits under Sections 8 and 15 accepted and acknowledged.

in Class 8, as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant and the Trademark Examining Attorney have filed appeal briefs. After careful consideration of the evidence of record and the arguments of counsel, we reverse the Section 2(d) refusal to register.

Our likelihood of confusion determination under Section 2(d) 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 (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We begin with the first *du Pont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imports, Inc., supra*. We find that

applicant's VERSAPRO mark is identical in every respect to the cited registered VERSAPRO mark. The first *du Pont* factor weighs in favor of a finding of likelihood of confusion.

The second *du Pont* factor requires us to determine the similarity or dissimilarity of the goods as recited in the application and in the cited registration. It is settled that it is not necessary that the goods be identical or even competitive in order to support a finding of likelihood of confusion. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. See *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). It is sufficient that the goods be related in some manner, or that the circumstances surrounding their use be such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197

USPQ 910 (TTAB 1978). Finally, in cases such as this where the applicant's mark is identical to the cited registered mark, there need be only a viable relationship between the respective goods in order to find that a likelihood of confusion exists. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001); and *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

The Trademark Examining Attorney contends that certain of applicant's goods as identified in the application are similar and related to certain of the goods identified in the cited registration.<sup>4</sup> In particular, the Trademark Examining Attorney contends that applicant's "weed killers for commercial use," "insecticides," and "herbicides" are related to registrant's various garden tools, for purposes of the second *du Pont* factor. According to the Trademark Examining Attorney, these goods of applicant's are related to registrant's garden tools because they are complementary products which are used together in maintaining lawns and

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<sup>4</sup> If confusion is likely as to any of the goods or services identified in a particular class in an application, Section 2(d) bars registration as to all of the identified goods or services in that class in the application. See *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 381 F.2d 328, 137 USPQ 881 (CCPA 1963); *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 n.9 (TTAB 2004); *In re Alfred Dunhill Ltd.*, 224 USPQ 501, 504 (TTAB 1984); and *In re Multivox Corp. of America*, 209 USPQ 627, 632 (TTAB 1981).

gardens, and, further, that applicant's weed killers and herbicides are related to registrant's garden tools because they are competitive or alternative products which offer either chemical or organic methods of performing the same function, i.e., controlling weeds. The Trademark Examining Attorney has made of record a printout from the website of Home and Garden TV (HGTV), which states that gardeners can control weeds by using either hand tools or herbicides.

We find that this evidence does not suffice to establish that the respective goods are similar and related, for purposes of the second *du Pont* factor. Applicant's products are chemicals, not garden tools. Even if we assume that chemicals and garden tools might be used together (or alternatively) for lawn and garden care, the evidence of record does not establish that manufacturers of chemical products also manufacture garden tools, or that purchasers would assume or expect such disparate goods to originate from a single source. The second *du Pont* factor weighs against a finding of likelihood of confusion.

The third *du Pont* factor requires us to determine the similarity or dissimilarity of the trade channels in which applicant's and registrant's respective goods are marketed. The Trademark Examining Attorney contends that registrant's garden tools and applicant's insecticides, herbicides and

weed killers are sold in the same trade channels and to the same classes of purchasers. She has submitted evidence consisting of the websites of two hardware/garden supply retailers and two industrial supply companies which offer for sale a wide variety of products, including both weed killers, insecticides and herbicides like applicant's and garden tools like registrant's. However, hardware stores and industrial supply companies sell quite a wide variety of products, a fact which lessens the probative weight to be accorded to this factor in our likelihood of confusion analysis. On balance, we find that the third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Under the fourth *du Pont* factor (conditions of purchase), we find that the purchasers of registrant's garden tools and applicant's herbicides and insecticides would include both professional landscapers or gardeners and ordinary homeowners. Ordinary homeowners would exercise only an ordinary degree of care in purchasing the respective products. We assume that professional purchasers are more knowledgeable about these products, but we cannot conclude that such knowledge necessarily would eliminate any likelihood of confusion. For these reasons,

we find that the fourth *du Pont* factor, if it weighs in applicant's favor, does so only slightly.

Upon balancing all of the *du Pont* factors for which there is evidence of record, we conclude that there is no likelihood of confusion. Although the marks are identical and the goods move in the same trade channels to the same purchasers, including to ordinary homeowners, we find that purchasers simply are unlikely to assume or expect that applicant's chemical products and registrant's garden tools originate from a single source. This is so, notwithstanding the fact that the respective products might be used together or alternatively in caring for lawns and gardens. The tenuous relationship between the respective goods does not satisfy even the lesser "viable relationship" standard required to support a finding of likelihood of confusion in cases involving identical marks, like this case. Stated differently, we find that the dissimilarity of the goods under the second *du Pont* factor is dispositive in this case, outweighing all of the evidence of record pertaining to the other *du Pont* factors in our likelihood of confusion analysis. See *Kellogg Co. v. Pack'Em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

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Decision: The refusal to register is reversed.