

**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 ND Industries, Inc.

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Serial No. 78667419

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Daniel H. Bliss of Bliss McGlynn, P.C. for ND Industries,  
Inc.

Alicia P. Collins, Trademark Examining Attorney, Law Office  
115 (Tomas V. Vlcek, Managing Attorney).

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Before Seeherman, Holtzman and Bergsman, Administrative  
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

ND Industries, Inc. filed a use-based application for  
the mark LM-1293, in standard character form, for goods  
ultimately identified as "coated metal fasteners, namely,  
nuts, screws, bolts, and specialty threaded fasteners  
having a masking, insulating, and/or lubricating coating  
applied thereto" (Serial No. 78667419). In response to an  
inquiry from the Examining Attorney, applicant included a  
statement in the application explaining that "[t]he letters  
and numbers that comprise the mark do not have any

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significance in the relevant trade or as applied to the goods or does not identify a particular model number.”<sup>1</sup>

The Examining Attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant’s mark LM-1293, when used in connection with applicant’s “coated metal fasteners,” so resembles the mark LM for “metal fasteners, namely, screws, nuts, bolts, washers and thread rods and studs,” as to be likely to cause confusion.

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by §2(d) goes to the cumulative effect of

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<sup>1</sup> August 10, 2006 Response.

differences in the essential characteristics of the goods and differences in the marks”).

A. The similarity or dissimilarity and nature of the goods.

In an *ex parte* appeal, likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed”). As the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court, explained in *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981):

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this

appeal prevent likelihood of confusion.  
We cannot take such facts into  
consideration unless set forth in its  
application.

In this case, the cited registration is for "metal fasteners, namely, screws, nuts, bolts, washers and thread rods and studs." Because there are no restrictions or limitations as to the type of metal fasteners described in the cited registration, we must presume that it includes all types of metal fasteners, including coated metal fasteners "having a masking, insulating, and/or lubricating coating applied thereto." *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum, supra*.

To the extent that the application and the cited registration both include screws, nuts, and bolts, the goods in the application and cited registration are, in part, identical. The fact that there are some differences in the description of goods for the application and cited registration does not obviate the fact that both

descriptions of goods are in part identical. *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 209 USPQ at 988.

B. The similarity or dissimilarity of likely-to-continue trade channels.

Because the goods in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers at least in part are the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

C. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound,

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connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated*, 207 USPQ 443, 449 (TTAB 1980).

In addition, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991),

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*aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

At the outset of our analysis of the marks, we note that during the prosecution of its application applicant stated that the letters "LM" have no significance in the relevant industry. In fact, in its brief, applicant emphasized that "the word (sic) 'LM' does not connote anything about 'fasteners'."<sup>2</sup> Accordingly, the letters "LM" are fanciful or arbitrary when used in connection with fasteners. In this regard, it is well settled that it is more difficult to remember a series of arbitrarily arranged letters than it is to remember figures, syllables, or phrases. The difficulty in remembering letter marks makes confusion between such marks, when similar, more likely. *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990); *Edison Brothers Stores, Inc. v. Brutting E.B. Sport-International*

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<sup>2</sup> Applicant's Brief, p. 5.

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*GmbH*, 230 USPQ 530, 533 (TTAB 1986); *ECI Division of E-Systems, Inc. v. Environmental Communications, Inc.*, 207 USPQ 443, 451 (TTAB 1980).

The marks are similar in appearance because the registered mark is comprised of the letters "LM," and applicant's mark feature the letters "LM." The significance of the letters "LM" in applicant's mark is highlighted by their location at the beginning of applicant's mark. As such, they are the first features consumers will see when encountering applicant's mark. Thus, they are likely to have a greater impact on purchasers and be remembered by them. *Presto Products Inc. v. Nice-Pak Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed on the mind of a purchaser and remembered). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

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Also, in comparing the marks, we note that applicant's mark incorporates registrant's entire mark. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) ("When one incorporates the entire arbitrary mark of another into a composite mark, inclusion in the composite mark of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion"); *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER and BENGAL are similar); *Johnson Publishing Company, Inc. v. International Development Ltd., Inc.*, 221 USPQ 155, 156 (TTAB 1982) ("likelihood of confusion has frequently been found where contested marks used on related products involve one mark which consists of a single word and another which is comprised of that same word followed by a second term").

The marks are aurally similar and have a similar connotation to the extent that they share the letters "LM."

Because the letters "LM" are arbitrary or fanciful when used in connection with fasteners, the marks engender similar, if not identical, commercial impressions. We are cognizant that we must consider the marks in their

entireties. However, in view of the identity of the products and the letters "LM" in both marks, consumers encountering applicant's mark who are familiar with the registered mark are likely to believe that applicant's coated fasteners are somehow associated or affiliated with registrant's fasteners (e.g., LM-1293 fasteners are the coated version of the LM fasteners with which they are familiar).

D. Balancing the factors.

In view of the fact that all of the likelihood of confusion factors favor finding that there is a likelihood of confusion and because there is no countervailing evidence that there will be no likelihood of confusion, we find that applicant's mark LM-1293, when used in connection with "coated metal fasteners, namely, nuts, screws, bolts, and specialty threaded fasteners having a masking, insulating, and/or lubricating coating applied thereto," so resembles the mark LM for "metal fasteners, namely, screws, nuts, bolts, washers and thread rods and studs," as to be likely to cause confusion.

Decision: The refusal to register is affirmed.