

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

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Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Amtrol, Inc. and Water Soft, Inc.¹
v.
Mid-Atlantic Plumbing & Water Treatment Systems, Inc.

Cancellation No. 92041101

Mark W. Freel & Kelly L. Williams of Edwards & Angell, LLP
for Amtrol, Inc. and Water Soft, Inc.

Douglas Clark Hollmann for Mid-Atlantic Plumbing & Water
Treatment Systems, Inc.

Before Hairston, Grendel and Rogers, Administrative
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge.

INTRODUCTION

Mid-Atlantic Plumbing & Water Treatment Systems, Inc.,
respondent herein, is the owner of Registration No. 2447857,

¹ Water Soft, Inc. is a wholly-owned subsidiary of Amtrol, Inc.,
and was joined as party-plaintiff by order of the Board dated
June 8, 2004.

which is of the mark depicted below for services recited in the registration as "water treatment services."²



Amtrol, Inc. and Water Soft, Inc., petitioners herein, have petitioned to cancel respondent's registration, alleging prior trademark rights in the designation WATER SOFT as used in connection with water treatment products, and likelihood of confusion. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).³ Petitioners' trademark is depicted below:



² The registration was issued on May 1, 2001 based on an application filed on April 17, 2000. In the registration, February 15, 2000 is alleged as the date of first use and the date of first use in commerce. Respondent has disclaimed the exclusive right to use WATER SOFT QUALITY WATER TREATMENT SOLUTIONS apart from the mark as shown.

³ In the petition for cancellation, petitioners also alleged dilution as a ground for cancellation, but they have waived that ground by their failure to present any argument in support of it in their brief on the case. It is unproven in any event.

In its answer to the petition for cancellation, respondent denied the salient allegations thereof.⁴

Both parties presented testimony and other evidence at trial, consisting of: respondent's Interrogatory Answers, made of record by petitioners' December 20, 2004 notice of reliance; the parties' December 20, 2004 Stipulation of Facts and the Stipulated Documents submitted therewith; the January 25, 2005 testimony deposition of Richard Deems (petitioners' former employee) and exhibits thereto; the February 1, 2005 testimony deposition of Andrew Beyerlein (respondent's vice president and owner) and exhibits thereto; the affidavit of petitioners' vice president Joseph DePaula and exhibits thereto (filed under seal, and pursuant to stipulation under Trademark Rule 2.123(b)); and the affidavit of petitioners' employee Lynn Taylor and exhibits thereto (filed under seal (except for Exhibit B), and

⁴ Respondent also asserted numerous affirmative defenses in its answer. The first four defenses (failure to state a claim, estoppel due to petitioners' own conduct and lapse of time, estoppel due to acquiescence, and estoppel due to petitioners' abandonment of its pleaded mark) are waived because respondent has presented no argument in support of them in its brief on the case, and we have given them no consideration. (They are not proven in any event.) The fifth through eighth "defenses" (peaceful coexistence of the marks, dissimilarity of the marks, absence of likelihood of confusion, existence of third-party marks, weakness of petitioners' mark and descriptiveness of petitioners' mark) are more properly deemed to be further allegations in support of respondent's denial of petitioners' Section 2(d) ground for cancellation, and we have considered them in that context.

pursuant to stipulation under Trademark Rule 2.123(b)). The case is fully briefed; no oral hearing was held.

STANDING

We turn first to the issue of petitioners' standing to petition for cancellation of respondent's registration. The evidence of record establishes that petitioners use their WATER SOFT trademark in connection with the sale of water treatment products. See, e.g., Stipulation of Facts ¶¶6-8; Exh. WS 0430-51. Based on this evidence of use, and because petitioners' likelihood of confusion claim is not frivolous, we find that petitioners have standing to petition to cancel respondent's registration. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Respondent has not contested petitioners' standing in any event.

SECTION 2(d) - PRIORITY

We turn next to a determination of petitioners' Section 2(d) ground for cancellation.

Respondent began using its mark on February 15, 2000, the date of first use alleged in its application for registration. (Beyerlein Depo. at 18-19.) Respondent has not contested petitioners' evidence of their use of the

designation WATER SOFT in connection with water treatment products since prior to respondent's first use on February 15, 2000. Indeed, in its brief, respondent has not presented any argument at all on the issue of priority. We find that there is no issue as to petitioners' Section 2(d) priority.

SECTION 2(d) - LIKELIHOOD OF CONFUSION

We turn now to the second element of petitioners' Section 2(d) claim, i.e., likelihood of confusion. Our 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 *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Parties' Market Interface

The record establishes the following facts which are pertinent because they reveal the background of the parties' dispute in this case, and because they are probative under the tenth *du Pont* factor (the parties' market interface).

In addition to and in conjunction with rendering the "water treatment services" recited in its registration,

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respondent sells, installs and maintains water treatment products such as those manufactured by petitioners. (Beyerlein Depo. at 3-5). In fact, respondent was an authorized dealer of petitioners' WATER SOFT water treatment products for approximately eleven years, from the formation of respondent's business in 1989 until late 1999 or early 2000. (Beyerlein Depo. at 8, 9). The primary reason respondent formed its business was its desire to market petitioners' WATER SOFT line of water treatment products. (Beyerlein Depo. at 8).

In late 1999, respondent became dissatisfied with the customer service it was receiving from petitioners, and became concerned about the continuing viability of petitioners as a source of water treatment products. (Beyerlein Depo. at 8-9, 80-81). Respondent ceased purchasing petitioners' WATER SOFT water treatment products at or around that time. (Stipulated Facts ¶13). Also at that time, respondent designed its own WATER SOFT mark (the registered mark involved herein), because respondent felt that respondent alone was responsible for having built up goodwill in the WATER SOFT designation in its geographic area, and respondent wanted to preserve that goodwill for respondent's benefit. (Beyerlein Depo. at 25, 81).

We find that these facts weigh in favor of a finding of likelihood of confusion, under the tenth *du Pont* factor.

Contrary to respondent's assumption, any goodwill in the WATER SOFT designation which resulted from respondent's sale of petitioners' WATER SOFT products between 1989 and 1999 inured to petitioners' benefit, not to respondent's.

Moreover, purchasers who purchased petitioners' WATER SOFT products from respondent while respondent was an authorized dealer of those products, and who now need those products to be serviced, repaired or replaced, are likely to contact respondent on the assumption that respondent continues to be an authorized dealer of petitioners' WATER SOFT products. Such purchasers would regard that assumption as being especially reasonable based on respondent's continued use of a mark which prominently includes the designation WATER SOFT. For these reasons, we find that the parties' market interface, i.e., the fact that respondent formerly was (but no longer is) an authorized dealer of petitioners' WATER SOFT products, supports a finding of likelihood of confusion under the tenth *du Pont* factor.

Similarity of the Marks

We turn next to the first *du Pont* factor, i.e., a determination of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles.

The test, under the first *du Pont* factor, 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 that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Respondent has conceded in its brief (at p. 7) that the dominant feature of respondent's mark is the wording WATER SOFT. We agree. The additional wording "Quality Water Treatment Solutions" is non-distinctive and merely informational, and it appears in much smaller type than does the wording WATER SOFT. The water droplets design element essentially evokes and reinforces the concept of "water" in the designation WATER SOFT, and the "swoosh" design element

is essentially a decorative carrier device. These additional elements contribute relatively little to the source-indicating significance of the mark. Although we do not ignore these other elements of respondent's mark, we find that it is the dominant wording WATER SOFT which is entitled to the most weight in our analysis under the first *du Pont* factor. See *In re National Data Corp.*, *supra*.

Likewise, we find that the dominant feature of petitioners' trademark is the wording WATER SOFT. The entity designation "INC." is devoid of source-indicating significance and contributes essentially nothing to the commercial impression of petitioners' trademark. In the trademark, the words WATER SOFT appear in dominant, very large type; petitioners' house mark AMTROL appears in much smaller type. The umbrella design element, like the water droplets design element in respondent's mark, essentially evokes and reinforces the concept of "water" in the designation WATER SOFT. Although we do not ignore these other elements of petitioners' mark, we find that it is the dominant wording WATER SOFT which is entitled to the most weight in our analysis under the first *du Pont* factor. See *In re National Data Corp.*, *supra*.

Notwithstanding its concession that WATER SOFT is the dominant feature of its mark, respondent argues that WATER SOFT is a generic or merely descriptive designation as

applied to the parties' goods and services, and that its presence as the only common element in both respondent's and petitioners' marks therefore cannot be a sufficient basis for finding confusing similarity under the first *du Pont* factor. In support of this argument, respondent cites *Kellogg Co. v. Pack'Em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), *aff'g* 14 USPQ2d 1545 (TTAB 1990)(FROOT LOOPS for cereal not confusingly similar to FROOTEE ICE for flavored liquid frozen into bars), and *Keebler Company v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989)(PECAN SANDIES and PECAN SHORTIES not confusingly similar as applied to cookies).

We are not persuaded by this argument. Respondent has not presented any evidence which establishes, under the genericness test set forth in *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986), that WATER SOFT is understood by the relevant purchasing public to be a generic term for water treatment goods and services. Nor does the evidence of record (including respondent's evidence of alleged third-party use, discussed *infra*,) establish that WATER SOFT is merely descriptive of such goods and services. On this record, we find that WATER SOFT is, at most, suggestive of the "water softening" function and purpose of the parties' goods and services. Unlike the terms FROOT and

PECAN which were the only common elements of the marks at issue in *Kellogg Co. and Keebler*, the designation at issue in this case, WATER SOFT, is inherently distinctive, and its presence in both respondent's mark and petitioners' mark therefore may suffice as a basis for finding confusing similarity under the first *du Pont* factor. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).⁵

Respondent's mark and petitioners' mark are somewhat different in terms of appearance and sound, because petitioners' mark includes the designation AMTROL and an umbrella design element, while respondent's mark includes the wording "Quality Water Treatment Solutions" and the water droplets and swoosh design elements. However, even though the overall appearances of the marks are different, they utilize a remarkably similar typeface for the common,

⁵ Even if petitioners' WATER SOFT mark were deemed to be not inherently distinctive, we would find that the designation had acquired distinctiveness as an indication of source prior to respondent's first use of its mark. Respondent's stated intention in designing its own mark, i.e., its desire to retain the goodwill that had been developed in the WATER SOFT designation due to respondent's sales of petitioners' products (goodwill which inured to petitioners' benefit, not respondent's), is evidence that WATER SOFT had acquired distinctiveness. The existence of such goodwill necessarily implies distinctiveness. Whatever the other changes to its mark made by respondent in its asserted effort to create a mark which is not confusingly similar to petitioners' mark, respondent's copying of the WATER SOFT portion of petitioners' mark in order to retain the goodwill existing therein is evidence that the designation WATER SOFT functioned as an indication of source as of the time that respondent adopted its mark.

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dominant term, WATER SOFT. In terms of connotation and overall commercial impression, we find that respondent's mark is virtually identical to petitioners' mark insofar as the designation WATER SOFT appears as the dominant feature in both marks. This fundamental point of similarity between the marks, i.e., the fact that they are both dominated by the presence of the designation WATER SOFT, is not overcome by the differences between the marks.

The presence (in small letters) of the house mark AMTROL in petitioners' mark does not suffice to distinguish the marks in terms of their overall commercial impressions. *See In re The U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985)(CAREER IMAGE (stylized) for clothing held likely to be confused with CREST CAREER IMAGES (stylized) for uniforms); *In re Apparel Ventures, Inc.*, 229 USPQ 225 (TTAB 1986)(SPARKS BY SASSAFRAS (stylized) for clothing held likely to be confused with SPARKS (stylized) for footwear). Respondent's addition to its mark (in small letters) of the non-distinctive informational wording "Quality Water Treatment Solutions" does not distinguish the marks in terms of their overall source-indicating significance. The umbrella design element in petitioners' mark is different than the water droplets design element in respondent's mark, but both designs evoke the concept of "water." The swoosh design element in respondent's mark contributes nothing to

the source-indicating significance of the mark, and it does not distinguish respondent's mark from petitioners' mark.

These points of dissimilarity between the marks, viewed collectively, do not suffice to overcome the basic similarity between the marks which arises from the presence of the designation WATER SOFT as the dominant feature of each mark. We find that purchasers are more likely to assume, based on the presence of WATER SOFT in both marks, that a source connection exists, than they are to assume, based on the dissimilarities between the marks, that no such source connection exists. Comparing the marks in their entirety, we find that they are substantially similar.

For these reasons, we find that the first *du Pont* likelihood of confusion factor weighs in favor of a finding of likelihood of confusion.

Similarity of Goods and Services, Trade Channels and Classes of Purchasers

Under the second and third *du Pont* factors, we consider the similarity or dissimilarity of the parties' respective goods and services, as well as the similarity or dissimilarity of the trade channels in which and the classes of customers to whom the goods and services are marketed. These factors will weigh in favor of a finding of likelihood of confusion if the evidence establishes that the goods and services are related in some manner, or that the

circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the similarity of the marks, 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 and services. 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). It is settled that goods may be related to services, for purposes of the second *du Pont* factor. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (finding similarity between furniture products and furniture refinishing services).

Petitioners use their WATER SOFT mark in connection with the manufacture and sale of water treatment products. Such products include "residential and commercial lines, everything from a water softener, iron filters, sulfur treatment and removal, drinking water systems, whole house filters to remove taste and odor as well as to raise or lower pH or neutralize low acidic condition." (Deems Depo. at 10.) Petitioners sell their water treatment products to wholesalers, who distribute the products to dealers, who

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then sell to the ultimate purchasers and end users of the products, i.e., to residential homeowners and commercial property owners. (Deems Depo. at 9-10.) From 1989 to 1999, petitioners also had one dealer, i.e., respondent, to whom they distributed their products directly (without an intervening wholesaler); respondent would then resell the products at retail to homeowners and other end users. (Deems Depo. at 10.)

Respondent's services, as recited in respondent's registration, are "water treatment services." The evidence establishes that such services include the sale or leasing of water treatment products, and the delivery, installation, servicing and repair of such products. (Beyerlein Depo. at 4.) These products are the very type of products manufactured and sold by petitioners; indeed, respondent formerly was an authorized dealer of petitioners' WATER SOFT line of water treatment products, and provided its water treatment services "in connection with" petitioners' water treatment products. (Stipulation of Facts, ¶10.) Respondent's customers are "Joe Blow homeowners, some commercial, but mostly residential." (Beyerlein Depo. at 4.)

Based on this evidence, we find that respondent's services and petitioners' goods, and the parties' trade channels and classes of purchasers, are similar. The

ultimate customers for the respective goods and services are the same, i.e., homeowners and other end users of water treatment products. We are not persuaded by respondent's argument that the parties' customers are different because petitioners sell their products to wholesalers, and make no direct sales to homeowners. Homeowners are the ultimate purchasers of petitioners' products, and they are the relevant class of purchasers for purposes of our likelihood of confusion determination.

These homeowners purchase water treatment products and water treatment services in the same channel of trade, i.e., from dealers such as respondent, who both sell water treatment products and render water treatment services. It is not dispositive that petitioners sell their products initially to wholesalers; the ultimate purchasers (homeowners) are unlikely to be aware of or care about the existence of or the number of earlier stages in the chain of distribution through which the products ultimately reach them. See *Luzier Incorporated v. Marlyn Chemical Co., Inc.*, 169 USPQ 797, 799 (CCPA 1971) ("We do not think that 'movement through the same trade channels' is the controlling consideration if the goods may end up in the same purchaser's hands under conditions where that purchaser might logically suppose they had a common origin because of the use thereon of [confusingly similar] trademarks.

Purchasers may not be aware of the channels through which goods ultimately reach them.").

Respondent's "water treatment services" include and involve the sale and servicing (as well as the leasing, delivery, installation and repair) of water treatment products of the type manufactured and sold by petitioners. Homeowners familiar with petitioners' water treatment products sold under the WATER SOFT trademark are likely to assume, upon encountering water treatment services marketed under respondent's confusingly similar WATER SOFT mark, that a source connection or other affiliation exists. Consider, for example, a homeowner who has decided to purchase one of petitioners' WATER SOFT water treatment products, or who already owns such a product and needs to have it serviced or repaired. Upon encountering respondent's water treatment services offered under respondent's WATER SOFT mark, the homeowner is likely to mistakenly assume that respondent is a dealer authorized to sell and/or service petitioners' WATER SOFT products.

For these reasons, we find that the parties' respective goods and services are similar, as are the parties' trade channels and classes of purchasers. The second and third *du Pont* factors accordingly weigh in favor of a finding of likelihood of confusion.

Conditions of Purchase/Sophistication of Purchasers

Under the fourth *du Pont* factor, we find that the purchasers of petitioners' goods and respondent's services include homeowners, i.e., ordinary consumers. There is nothing in the record to indicate that these purchasers exercise anything more than a normal degree of care in deciding to purchase these goods and services. We therefore are not persuaded by respondent's contention that this *du Pont* factor weighs against a finding of likelihood of confusion.

Third-party Use of Similar Marks on Similar Goods

The sixth *du Pont* factor requires us to consider evidence of "the number and nature of similar marks in use on similar goods." "Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, *supra*, 396 F.3d at 1373, 73 USPQ2d at 1693. However, it is settled that "[t]he probative value of third-party trademarks depends entirely upon their usage." *Id.* The defendant's third-party use evidence must show "that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers." *Id.*, quoting from *Scarves by*

Vera, Inc. v. Todo Imports, Ltd., 544 F.2d 1167, 1173, 192 USPQ 289, 294 (2d Cir. 1976). Thus, the probative value of third-party use evidence is minimal absent evidence showing the extent of such third-party uses. *Palm Bay Imports, supra*, 396 F.3d at 1373-74, 73 USPQ2d at 1693; *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001). As the court noted, “[t]he purpose of a defendant introducing third party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Palm Bay Imports, supra*, 396 F.3d at 1374, 73 USPQ2d at 1694 (internal quotation from J. Thomas McCarthy, 2 McCarthy on Trademarks and Unfair Competition §11:88 (4th ed. 2001)).

In this case, the evidence of record fails to establish that there is any significant actual use by third parties of WATERSOFT or WATER SOFT marks in the United States in connection with water treatment products, much less that the extent of such third-party use is so widespread that consumers have been “conditioned” to distinguish between such marks on the basis of minute distinctions. The evidence of record is discussed below.⁶

⁶ The only evidence of record pertaining to the issue of third-party use is found among the exhibits to the Beyerlein Deposition, i.e., Exh. 000016-48, 000052-55, 000054A-55B, 000066-

The third-party federal trademark registrations and applications relied on by respondent (Beyerlein Depo. Exh. 000017-000036; A-000001-000033) are not evidence, under the sixth *du Pont* factor, of third-party use of the marks depicted therein, and they therefore are not evidence that

69, and A-000001-55. Exh. A-000001-55 is respondent's commercial search report.

We note that at page 11 (and footnote 6) of its brief, respondent states that petitioner also submitted its own commercial search report as evidence, and identifies that evidence as Exh. WS 0462-0752. However, the official file of this proceeding includes no such search report. The referenced exhibit pages WS 0462-0752 are not found among the documents submitted pursuant to the parties' December 20, 2004 "Motion to Enter Stipulation of Facts and to Submit Stipulated Documents," nor are they found elsewhere in the record. We note that the Stipulation of Facts (at ¶14) makes reference to the fact that petitioner commissioned and received a commercial search report on or about July 5, 2001, but it does not state that the search report is being submitted as part of the stipulated documents, nor does it identify or make any reference or citation to the report by any document production number. (The parties' motion accompanying the stipulation states: "Where appropriate, documents that support a particular factual allegation are referenced in the Factual Stipulation by corresponding production numbers." This practice was followed elsewhere in the Stipulation.) Thus, it appears that although the search report was produced in discovery, it was never made of record as evidence at trial.

Therefore, respondent's citations (at pp. 11-12 of its brief) to Exh. WS 0592 and WS 0599-601, and to the alleged third-party uses identified on those pages, are not supported by the record. However, it appears that most of those alleged third-party uses (i.e., companies in Saxonburg, PA, Twelve Mile, IN, New City, NY, Saline, MI, Illiopolis, IN, Pacific, MO, London, KY and Oak Brook, IL) also are represented in respondent's search report (which is in the record), and we have considered them in that context. As to the remaining four companies cited by respondent (in Dallas, TX, Pearl River, NY, Toms River, NJ and Ann Arbor, MI), we have no basis for making any findings; we cannot even determine what the names of those companies are. Regardless, however, and as discussed below, the mere listing of company names and marks in a commercial search report, without any evidence as to the extent of use of the names and marks or as to consumers' awareness of them, is of little or no probative value under the sixth *du Pont* factor.

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WATER SOFT is a weak mark. *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 204, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992). In any event, with the exception of two applications owned by petitioners (Exh. 000017, 000028 and A-000025) and one abandoned third-party application (Exh. 000018, A-000024 and A-000031), all of these registrations and applications depict marks other than WATER SOFT, or cover goods or services other than water treatment products. They therefore are of little or no probative value in this case.

Likewise, the third-party state trademark registrations (Beyerlein Depo. Exh. pp. A-000049-000055) are not evidence of third-party use. *Faultless Starch Co. v. Sales Producers Associates, Inc.*, 530 F.2d 1400, 189 USPQ 141, 142 n.2 (CCPA 1976); *Kraft, Inc. v. Balin*, 209 USPQ 877, 880 (TTAB 1981). Only one of these (Exh. p. A-000049) is of the mark WATER SOFT in any event.

The printouts of the results of three Internet searches (one by Ask Jeeves and two by Google; Beyerlein Depo. Exh. 000047-48, 000054-55 and 000054A-55B) are of little probative value in themselves due to the brevity of, and lack of context for, each of the approximately twenty-seven Internet references depicted in the printouts. See *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002). In any event, nine of the references (in the Ask Jeeves list) make

no mention at all of WATERSOFT or WATER SOFT. Many of the remaining references clearly refer to petitioners, their dealers, or their products. Several more appear to refer to petitioners or their products, although less clearly; we cannot conclude that they do not refer to petitioners. The few remaining references are not probative because they refer to foreign companies, or to goods other than water treatment products.

In addition to these Internet search results printouts, there are full printouts of seven third-party web pages wherein WATERSOFT or WATER SOFT appears. Four of the seven web pages refer to petitioners, its dealers or its products. (Exh. 000016 (Waterwell), Exh. 000040-41 (True Pump), Exh. 000052-53 (PureWater 4U), and Exh. 000067 (Speck Industrial).) One web page (Exh. 000066) refers to a third party, apparently not affiliated with petitioners, which uses WATERSOFT in connection with water treatment services. However, this company is located outside the United States, in Manitoba, Canada; its use of WATERSOFT therefore is of little probative value under the sixth *du Pont* factor. The remaining two web pages are irrelevant because they refer to uses of WATERSOFT in connection with goods other than water treatment products. (Exh. 000044-45 refers to computer software, and Exh. 000068 refers to lens tinting chemicals.)

The "Company Name Listing" section of respondent's search report (Exh. A-000035-36) and the "White Page Listings" section of the search report (Exh. A-000037-41) include listings for "Water Soft Inc." of Saxonburg, PA, "Water Soft of Indiana" of Twelve Mile, IN, and "Water Soft of Rockland Inc." of New City, NY. However, we cannot determine from these mere listings the extent to which these names are actually in use and actually known by consumers, or even if they are currently in use at all. This evidence therefore is of little or no probative value under the sixth *du Pont* factor. The other companies included in these listings also are irrelevant because their names are not WATERSOFT or WATER SOFT but rather are some variation of "Soft Water" or "Water Softener," or because they do not appear to be in the water treatment business (e.g. "Water Soft Development" of Oak Brook, IL, identified as a computer company).

The search report's listing of common law marks (Exh. A-000034) includes only one apparent third-party mark in the water treatment field, but there is no evidence that this mark is in use nor evidence as to the extent of such use. This evidence therefore is of no probative value under the sixth *du Pont* factor.

Finally, the search report's "Internet Domain Name Search" (Exh. A-000042-48), which lists several domain name

registrations, is of no probative value under the sixth *du Pont* factor. The mere fact that these domain names have been registered is not evidence that they are in use, or that consumers are aware of them.

In summary, although respondent's proffered evidence of third-party use is fairly voluminous, it is essentially all irrelevant or non-probative for the reasons stated above. Only a handful of the third-party references appear to pertain to the WATER SOFT (or WATERSOFT) designation and to the water treatment products involved in this case, and, even as to these few, there is no evidence from which we might conclude that the extent of use is such that consumers have become conditioned to distinguish between the marks based on minute distinctions. *Palm Bay Imports, supra*. Considering all of the evidence of record, we find that the strength of petitioners' WATER SOFT mark is not undermined by third-party use. We therefore reject respondent's contention that the sixth *du Pont* factor weighs against a finding of likelihood of confusion.

Actual Confusion

Respondent's owner testified: "As a matter of fact I had a service call the other day, last week when a gentleman called me up and asked me if I was associated with WaterSoft in Ohio [petitioners] and I explained to him that I was

not." (Beyerlein Depo. at 19.) We find that this is evidence of actual confusion which supports a finding of likelihood of confusion under the seventh *du Pont* factor ("the nature and extent of any actual confusion"). Respondent argues that this evidence is de minimis, but it is settled that "[a]ny evidence of actual confusion is strong proof of the fact of a likelihood of confusion." J. Thomas McCarthy, 3 McCarthy on Trademarks and Unfair Competition §23:13 (4th ed.)(emphasis added). See *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975)(even a single instance of actual confusion is at least "illustrative of a situation showing how and why confusion is likely"). The seventh *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.⁷

Likelihood of Confusion - Summary

Weighing all of the evidence pertaining to the *du Pont* likelihood of confusion factors, and for the reasons

⁷ Even if this incident were not deemed to be evidence of actual confusion, or deemed to be de minimis evidence, it is settled that "[w]hile evidence of actual confusion factors into the *DuPont* analysis, the test under §1052(d) is likelihood of confusion, not actual confusion. Hence, a showing of actual confusion is not necessary to establish a likelihood of confusion." *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002). Moreover, an absence of actual confusion may be discounted in the likelihood of confusion analysis in cases (such as this one) where the other likelihood of confusion factors are dominant. *Han Beauty Inc. v. Alberto-Culver Co.*, *supra*, 236 F.3d at 1338, 57 USPQ2d at 1561.

discussed above, we conclude that a likelihood of confusion exists. Respondent's mark and petitioners' mark are confusingly similar when viewed in their entireties. Respondent's services are similar and related to petitioners' goods, and the parties' trade channels and classes of purchasers are similar. The purchasers of the goods and services are ordinary consumers who exercise ordinary care in making their purchases. Petitioners' mark has not been shown to be weakened or diluted by third-party use of similar marks on similar goods. At least one instance of actual confusion has occurred, a fact which corroborates the conclusion that a likelihood of confusion exists. Finally, the parties' market interface, i.e., the fact that respondent was formerly an authorized dealer of petitioners' products, enhances the likelihood that consumers will mistakenly assume that a connection or affiliation between respondent and petitioners exists. All of these facts support a finding that confusion is likely.

CONCLUSION

For the reasons discussed above, we find that petitioners have established their standing and their Section 2(d) ground for cancellation.

Decision: The petition to cancel is granted. Registration No. 2447857 shall be canceled in due course.