

This Opinion is Not a
Precedent of the TTAB

Mailed: June 24, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cocobrico Europe Ltd.

Serial No. 79152831

Luke Brean of BreanLaw LLC
for Cocobrico Europe Ltd.

Donald Johnson, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

Before Wolfson, Hightower, and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Cocobrico Europe Ltd. (“Applicant”) seeks registration on the Principal Register
of the mark ECOBRICO in standard characters for “fuels and lighting fuel, namely

charcoal briquettes” in International Class 4.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark ECO BRICKS in standard characters for “Fuel pellets; Wood chips for use as fuel” in International Class 4.²

After the Examining Attorney made the refusal final, Applicant appealed. We affirm the refusal to register.

I. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a 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 Co.*, 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 relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

¹ Application Serial No. 79152831 was filed July 26, 2014 seeking an extension of protection under Section 66(a) of the Trademark Act, based upon International Registration No. 1217950.

² Registration No. 3427470 issued May 13, 2008, and includes a disclaimer of BRICKS; Section 8 affidavit accepted. The Examining Attorney also cited Registration No. 4329369, but, in his brief, withdrew the Section 2(d) refusal as to this registration based on Applicant’s assertion of unity of control and the consent of the registration owner provided in Applicant’s December 4, 2015 Request for Reconsideration. 6 TTABVue 3.

A. Similarity of the Marks

With respect to the marks, we must compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). Moreover, where, as discussed below, the goods are identical in part, the degree of similarity of the marks necessary to find likelihood of confusion need not be as great. *Coach Servs., Inc.*, 101 USPQ2d at 1722; *In re Viterro*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)).

Applicant’s proposed mark is ECOBRICO in standard characters, and the mark in the cited registration is ECO BRICKS, also in standard characters. We find that the marks look and sound similar. As Applicant concedes, “the marks share the components ‘ECO’ and the similar ‘BRICKS’ and ‘BRICO.’”³ In fact, both marks consist of the identical first seven letters, with the same term, ECO, at the beginning, and the following syllable(s), BRICO and BRICKS, also similar. While ECOBRICO

³ 4 TTABVue 6.

ends with an “O” and the registered mark ends with “KS,” this difference does little to overcome the overall similarity in the way the marks look and sound. *See, e.g., Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (affirming Board’s finding that COMMCASH and COMMUNICASH are “strikingly similar in appearance, sound and in the commercial impression engendered”); *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (considering the singular and plural forms of a term “the same mark” for purposes of a likelihood of confusion analysis). We find the commercial impressions of these two marks to be similar, particularly in the context of the overlapping and related goods at issue, as discussed *infra*. Both use the “ECO” prefix, connoting an environmentally friendly product,⁴ as their first component. As the first part of each mark, the term ECO is “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). And the “BRICO” and “BRICKS” portions of the marks suggest or refer to the brick fuel pellets and briquettes identified by both marks.⁵ For these reasons, we disagree with Applicant’s contention that ECOBRICO

⁴ November 14, 2014 Office Action at 6-7 (definitions of “eco,” including as a prefix for “relating to the environment”); *see also* Dictionary.com Unabridged, entry for “eco” including the definition “not harmful to the environment,” based on the *Random House Dictionary* (2016) (accessed June 24, 2016). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁵ The disclaimer of BRICKS in the cited registration reflects a recognition that “bricks” may refer to the fuel pellets identified therein. Further, the term “brico” would likely be perceived as a play on the word “brick” or “briquette,” especially since both the “c” in BRICO and the “ck” in brick or the “qu” in “briquette” would be pronounced the same, i.e., as a letter “k.”

would be perceived as an entirely fanciful term, and instead find it suggestive in association with Applicant's identified goods, charcoal briquettes that are environmentally friendly. The differences in the marks do not outweigh their overall similarities.

Applicant also argues that because the registered mark consists of two words and has different ending letters than Applicant's mark, this results in significant differences in the look, sound, and commercial impression of the marks. As noted above, although we acknowledge some differences, we deem them relatively insignificant when the connotation of both marks is considered in the context of the respective goods. Applicant's contention that the "i" in BRICO necessarily would be pronounced differently than the "i" in BRICK overlooks the established rule that "there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner." *Viterra*, 101 USPQ2d at 1912. Even were we to adopt the pronunciation Applicant recommends, the BRICO and BRICK portions of the marks remain similar in sound regardless of the variation in pronouncing the vowel.

Given the similarity in sight, sound, connotation and commercial impression of the marks in their entirety, the first *du Pont* factor weighs in favor of likely confusion.

B. Relatedness of the Goods and Trade Channels

We next address the second and third *du Pont* factors, the similarity or dissimilarity of the goods and channels of trade. The test is not whether consumers

would be likely to confuse the goods, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding of likelihood of confusion, the goods need not be identical or even competitive. “Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or there is an association or connection between the sources of the goods.” *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). We must focus on the goods as identified in the application and cited registration, not on any extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

We find that the registrant’s “fuel pellets” encompass the “charcoal briquettes” identified in the application. We take judicial notice of the definition of “fuel” as “combustible matter used to maintain fire, as coal, wood, oil, or gas, in order to create heat or power,” and “pellet” as a rounded body.⁶ The broad identification of “fuel pellets” in the cited registration is presumed to encompass all goods of the type described, including charcoal pellets. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). These pellets can be

⁶ Dictionary.com Unabridged, entries for “fuel” and “pellet,” based on the *Random House Dictionary* (2016) (accessed June 20, 2016).

in briquette – or block – form.⁷ Blocks may be defined as compact, solid pieces of material, and may come in any shape, thus including the rounded shape of a pellet.⁸ Therefore, a rounded block of charcoal may constitute both a charcoal briquette and a fuel pellet, such that the goods in the application and cited registration overlap in part.

Moreover, the record includes evidence of the relatedness of the goods in the cited registration and in the application. Specifically, the DURAFLAME website advertises wood “fire starters” as well as charcoal briquettes under the DURAFLAME mark.⁹ In addition, numerous third party registrations identify both combustible or charcoal briquettes and wood chips or fuel pellets under the same mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (third-party registrations which cover the same types of goods and are based on use in commerce suggest that the listed goods may emanate from the same source). For example, SUNBEAM is registered for charcoal briquettes and wood chips for use as fuel,¹⁰ and BIOBRICKS is registered for combustible briquettes, fuel pellets, and wood pellets.¹¹ Also, EZBRICKS is registered for charcoal briquettes, fuel pellets, and wood pellets,¹² and

⁷ “Briquette” is defined as “a small block of compressed coal dust or charcoal used for fuel, especially in barbecuing; a molded block of any material.” Dictionary.com Unabridged, entry for “briquette,” based on the *Random House Dictionary* (2016) (accessed June 20, 2016).

⁸ “Block” is defined as “a compact usually solid piece of substantial material especially when worked or altered to serve a particular purpose.” Merriam-Webster.com (2015), entry for “block” (accessed June 21, 2016).

⁹ November 14, 2014 Office Action at 47, 49 (www.duraflame.com).

¹⁰ *Id.* at 10-13 (Registration No. 2436123).

¹¹ *Id.* at 14-15 (Registration No. 3605104).

¹² *Id.* at 24-26 (Registration No. 3973660).

the registration for DRAIOCHT MONA covers briquettes of wood, combustible briquettes, compressed carbon briquettes, fuel pellets, wood pellets, and wood chips.¹³ As another example, BELGIN is registered for charcoal briquettes, wood chips for use as fuel, and briquettes of wood.¹⁴

We reject Applicant's attempt to distinguish the goods based on restrictions outside the identifications of goods. Applicant alleges that the registrant's goods actually are narrower than what is set forth in the identification, as they allegedly are used exclusively for heating and not for cooking. Applicant claims that its charcoal briquettes, on the other hand, are for grilling. However, as neither identification includes these limitations, Applicant's argument runs afoul of the settled principle that "the identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issue." *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). Thus, the goods in the application and cited registration must be considered identical in part and otherwise related.

Turning to the trade channels, Applicant's goods and those in the cited registration, for which both recitations are unrestricted, are presumed to move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers. *See id.* (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to

¹³ *Id.* at 27-29 (Registration No. 4005700).

¹⁴ *Id.* at 40-42 (Registration No. 4532481).

all potential purchasers of such goods”); *In re Jump Designs LLC*, 80 USPQ2d at 1374; *In re Elbaum*, 211 USPQ at 640. Thus, because the goods in the subject application and the cited registration overlap in part, we must presume that they travel through the same channels of trade to the same class of purchasers. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). In addition, the relatedness evidence set forth above and the similar nature of wood chips, charcoal briquettes, and fuel pellets also support a finding that the goods move in the same trade channels. Thus, the *du Pont* factor relating to the identity of trade channels weighs in favor of likely confusion.

II. Conclusion

Based on the similarity of the marks, the overlapping and related goods at issue, and the presumption that the goods flow through identical trade channels, we find that Applicant’s mark is likely to cause confusion with the mark in the cited registration.

Decision: The refusal to register Applicant’s mark is affirmed.