

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Hearing:  
May 18, 2010

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re QlikTech International AB

Serial No. 79054312

Amy G. Marino of Williams Mullen for QlikTech International AB.

Katy Halmen, Trademark Examining Attorney, Law Office 109  
(Dan Vavonese, Managing Attorney).

Before Grendel, Kuhlke and Wellington, Administrative  
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

**Introduction.**

QlikTech International AB (applicant) has filed an application<sup>1</sup> seeking registration on the Principal Register of the mark depicted below:

<sup>1</sup> Serial No. 79054312, filed March 28, 2008. The application is a request for an extension of protection under Trademark Act



for Class 9 goods and Class 42 services identified in the application as:

Stored computer software programs for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources; computer software systems comprising computers and software for combining, analyzing, and creating reports of business information, namely sales, real estate and purchasing information, derived from one or more sources

in Class 9; and

Computer programming, excluding programming for computer and video game software; design of computer software for business intelligence; maintenance, updating and improvement of computer software for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources; research and development services regarding new business software products; consultant services regarding computer software systems for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources; electronic data processing (EDP) consultancy, namely computer consultation in the field of electronic data processing; computer

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Section 66(a), 15 U.S.C. §1141f(a)), based on International Registration No. 0943219.

systems analysis; hiring-out of computer hardware and computer equipment, namely rental of computer hardware and computer equipment

in Class 42.

The application includes the following statements regarding the mark: "The mark consists of the letter 'Q', containing two concentric circles (one solid, shaded and one unshaded) at its center"; and "Color is not claimed as a feature of the mark."

The Trademark Examining Attorney has issued a final refusal to register applicant's mark as to both classes of goods and services, citing likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d) as the ground for refusal. Specifically, the refusal is made on the ground that applicant's mark, as applied to the goods and services identified in the application, so resembles the mark depicted below, previously-registered on the Principal Register<sup>2</sup> for the goods and services set forth below, as to be likely to cause confusion, to cause mistake, or to deceive.

The cited registered mark is:

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<sup>2</sup> Registration No. 2944732, issued on April 26, 2005. The registration is based on use in commerce, under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and on registrant's claim of ownership of Canadian registration Reg. No. 585838, under Trademark Act Section 44(e), 15 U.S.C. §1126(e).



The Class 9 goods and Class 42 services identified in the cited registration are:

Point-of-sale computer software namely, software that performs functions similar to cash register and also provides for inventory management; accounting software; customer relationship management software; contact management software; schedule management software; software tools for the design, implementation and operation of electronic commerce sites on the global computer network; electronic commerce and transaction application software to allow users to perform electronic business transactions via a global computer network; computer maintenance software

in Class 9; and

Computer services, namely installing, maintaining and testing of computer software for others; computer consultation services, namely, analyzing customers' existing software and business objectives with regard to individual hardware and software requirements; computer software consultation; designing and customization of software programs and manuals for use therewith to the order and specification of others for their specific field or industry; fixed-price software development for others; computer software maintenance and periodic release of maintenance software; software development methodology, namely providing method skills, processes and approach to customers for the use and development of software components and the

development of their required software systems; computer consulting services, namely providing access by telephone or facsimile to technicians capable of solving any problems, interpreting written materials and explaining functions of features of software and correcting programming errors

in Class 42.

Applicant has appealed the final refusals as to both Class 9 and Class 42. The appeal is fully briefed. An oral hearing was held on May 18, 2010 at which applicant's counsel and the Trademark Examining Attorney presented arguments.

After careful consideration of the evidence of record and all of the arguments of counsel, we **affirm** the refusals to register the mark as to both Class 9 and Class 42.<sup>3</sup>

**Applicant's Request to Remand for Amendment to Identification of Goods and Services.**

As a preliminary matter, we note that in its Reply Brief and at the oral hearing, applicant requested that the

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<sup>3</sup> Together with its Reply Brief, applicant filed a request to divide the application such that the Class 9 goods and the Class 42 services would be divided into two applications. See Trademark Rule 2.87, 37 C.F.R. §2.87. At the May 18, 2010 oral hearing on the case, the Board informed applicant's counsel that such a division is unnecessary because the Board already will be deciding the registrability of the mark as to each class separately in this appeal. Applicant subsequently filed a withdrawal of the request to divide.

application be remanded to the Trademark Examining Attorney for entry of amendments to the identification of goods in Class 9 and to the recitation of services in Class 42. The request for remand is denied because it was submitted much too late in the prosecution of the application (i.e., it was requested for the first time in applicant's Reply Brief on appeal). See Trademark Trial and Appeal Board Manual of Procedure (TBMP) §§1209.04, 1205.01 (2<sup>nd</sup> ed. rev. 2004).

Also, we note that applicant stated in its Reply Brief and at the oral hearing that the proposed amendments are offered for the purpose of overcoming the Section 2(d) refusals as to both classes. In response to the Board's inquiry at the oral hearing, the Trademark Examining Attorney stated that she would maintain the Section 2(d) refusals even if the proposed amendments were to be entered.

**Evidentiary Objections.**

We sustain the Trademark Examining Attorney's objections to Exhibits B, D and E attached to applicant's opening Brief. We have not considered this material because it was submitted by applicant for the first time

with its Brief, and thus is untimely. See Trademark Rule 2.142(d), 37 C.F.R. §2.142(d).<sup>4</sup>

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<sup>4</sup> Exhibits D and E to applicant's Brief are printouts of third-party websites (of IBM and SAP) which advertise software and services that applicant contends are similar to and illustrative of the functions and features of applicant's own software and services. In addition to their untimeliness, these exhibits are without probative value because, as discussed below, our likelihood of confusion findings must be based solely on applicant's goods as they are identified in the application, without regard to any extrinsic evidence.

Exhibit B to applicant's Brief is a printout from what applicant asserts to be the website of the owner of the cited registration which, applicant contends, was the specimen submitted by registrant in support of its claim of use in its application. Applicant asserts that this website printout shows the commercial impression of registrant's mark as it is actually used, and the actual nature of registrant's goods and services (as opposed to the goods and services as identified in the registration.) Applicant cites to and has relied on this Exhibit B throughout its briefs and at the oral hearing. However, this exhibit is untimely, and we reject applicant's arguments that we should consider the exhibit notwithstanding its untimeliness. Specifically, we note that contrary to applicant's suggestion (at pages 5-6 of its Reply Brief), the Trademark Examining Attorney did not refer to nor rely on this purported website specimen in support of her Section 2(d) refusal during prosecution of the present application, and we therefore shall not deem it to be waived into the record. This case thus is distinguishable from the case cited by applicant, *In re 1<sup>st</sup> USA Realty Professionals Inc.*, 84 USPQ2d 1581 (TTAB 2007). Second, we are not persuaded by applicant's argument (Reply Brief at 6 n.1) that Trademark Rule 2.122(b), 37 C.F.R. §2.122(b), which pertains to the evidentiary status of an applicant's application file or a registrant's registration file involved in an inter partes proceeding before the Board, should be extended by analogy to ex parte proceedings. Third, registrant's purported website would be of no probative value even if it had been made of record because, as discussed below, our likelihood of confusion findings must be based solely on registrant's mark as it appears in the registration, and on the registrant's goods as they are identified in the registration.

The other exhibits attached to applicant's brief, i.e., Exhibits A and C, are copies of materials previously made of record, and we therefore shall consider them. However, we note generally that the resubmission, as exhibits to a brief on appeal, of evidentiary materials which already are properly of record (such as the 145 pages of materials attached to

**Section 2(d) Refusals.**

We turn now to the Section 2(d) refusals as to Class 9 and Class 42 that are the subject of this appeal. We first will decide applicant's appeal of the Trademark Examining Attorney's refusal to register applicant's mark for the Class 9 goods identified in the application. Afterward, we will decide applicant's appeal of the Section 2(d) refusal as to the Class 42 services identified in the application. We note here that much of our likelihood of confusion analysis and findings in connection with the Class 9 refusal will be applicable to the Class 42 refusal as well.

**Likelihood of Confusion - Class 9.**

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

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applicant's appeal brief in this case) is unnecessary and should be avoided. Rather, the proper practice is merely to cite clearly to that portion of the record where the evidence is located.



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).

In our analysis of the *du Pont* factors, we need consider and weigh only those factors as to which there is pertinent evidence of record. "...[t]he thirteen *DuPont* factors must be considered when they are of record. However, not all of the *DuPont* factors are relevant or of similar weight in every case. Indeed, any one of the factors may control a particular case." *In re Dixie Restaurants, Inc.*, *supra*, 41 USPQ2d 1531 at 1533 (internal citations and quotation marks omitted).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and services in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 at 29 (CCPA 1976). "While it must consider each factor for which it has evidence, the Board may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods

[and/or services]." *Han Beauty Inc. v. Alberto-Culver Co.*,  
236 F.3d 1333, 57 USPQ2d 1557 at 1559 (Fed. Cir. 2001).

In this case, we find that the relevant *du Pont* factors as to which evidence and arguments have been presented are (in the order we shall address them) the first (comparison of the marks), the sixth (use of similar marks on similar goods), the second (comparison of the goods), the third (comparison of the trade channels and purchasers), and the fourth (conditions of purchase).

**Factor 1: Similarity of the Marks.**

Under the first *du Pont* factor, we determine the similarity or dissimilarity of applicant's mark and the cited registered mark when they are viewed in their entirety in terms of appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc., supra*, 73 USPQ2d 1689, 1691-92.

To review, applicant's mark and the cited registered mark are depicted below (applicant's mark is on the left, the cited registered mark is on the right).<sup>5</sup>

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<sup>5</sup> As discussed below, the determination of the similarity or dissimilarity of the marks is not based on such a side-by-side analysis. We are depicting the two marks together here merely to aid review of the marks as set forth earlier in this opinion.



In terms of appearance, we find that the marks are highly similar if not virtually identical. Each of the marks looks like a stylized circular letter "Q", comprised of the black diagonal "stub" of the "Q", a solid black sphere in the center which is surrounded by a white concentric circle or band, which itself is surrounded by a black concentric circle or band.<sup>6</sup> We find that the only visual differences between the two marks are the relative widths of the center sphere and the surrounding concentric circles or bands, and the partial intrusion of the stub of the "Q" into the white circle or band in the cited registered mark.

Contrary to applicant's arguments, we find that these differences are too slight to distinguish the marks in

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<sup>6</sup> As noted above, applicant's description of the mark in the application refers to the central black sphere and the surrounding concentric circles as being "shaded" and "unshaded." However, we shall refer to the sphere and circles as "black" and "white," as they appear in the drawing of the mark. Our analysis is the same either way.

terms of overall appearance, and that they are outweighed by the very similar overall visual impact of both marks which, at bottom, look like the letter "Q" formed by white and black concentric circles or bands surrounding a central black sphere. *See Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187 at 1199 (TTAB 2007) ("...the differences in stylization and placement of the two elements [an "S" and a star] are not as important as the overall visual similarities in the marks"). In the *Nike* case, the Board also noted:

Applicant has made very fine distinctions between the marks and we do not find them either individually or cumulatively significant. It is well settled that marks must be compared in their entirety, not dissected into component parts and the minute details of each part compared with other parts. In the normal marketing environment, purchasers would not usually have the luxury of examining marks in such minute detail. We must also consider that the average purchaser is not infallible in his recollection of trademarks and often retains only a general, rather than a specific, recollection of marks that he may previously have seen in the marketplace.

*Id.* In short, even if applicant's mark and the cited registered mark might be visually distinguishable when carefully viewed side-by-side, that is not the test under the first *du Pont* factor. *See id*; *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). For these

reasons, we find that the marks are similar in terms of appearance.

In terms of sound, we find that the marks are identical, i.e., they both would be pronounced as the letter "Q." In terms of connotation, we find on this record that "Q" is an arbitrary designation as applied to the goods at issue, and that if it has any meaning or connotation at all, it has the same connotation in both marks. Finally in terms of commercial impression, we find the marks to be identical. Both would be perceived and recalled as the arbitrary letter "Q" formed by a central black sphere surrounded by white and black concentric circles.

For all of these reasons, we find that applicant's mark and the cited registered mark are highly similar (if not virtually identical) in terms of appearance, sound, connotation and commercial impression.

However, applicant makes several arguments in support of its contention that the marks are dissimilar. First, applicant argues that the cited registered design mark depicts the letters "iQ", not "Q". Second, applicant argues that it has a family of "Q"-formative marks and that its present mark would be seen and understood to be another mark in that family. Third, applicant argues that in

addition to depicting a "Q", applicant's mark also depicts a magnifying glass, and the cited registered mark does not. We shall address each of these arguments in turn.

First, applicant argues (Brief at 15-16; Reply Brief at 11) that the cited registered design mark in its entirety would be perceived not as a "Q" but rather as the letters "iQ". Applicant argues that "iQ" looks and sounds different than "Q". Applicant also argues that the letters "iQ" give the cited registered mark the connotation and commercial impression of "intelligence quotient," a connotation and commercial impression that applicant's "Q" mark does not have. Applicant asserts three bases for this "iQ" argument.

Applicant contends first that, simply as a matter of appearance, the stub of the "Q" and the inner black sphere in the registered mark together form and would be perceived as a diagonal lowercase dotted letter "i". Applicant argues that this is especially clear if the outermost black circle or band is disregarded. (Reply Brief at 11). However, this argument is unpersuasive because it is based on an impermissible dissection of the mark. *See Nike Inc., supra*, 85 USPQ2d 1187, 1199.

Also, when we consider the appearance of the registered design mark as a whole, we suppose that if one

were to examine the mark carefully enough one might see the stub of the "Q" and the inner black sphere as forming a diagonal lowercase "i". However, as noted above, purchasers would not necessarily have the luxury of examining the mark in such detail. *See id.* We find that purchasers upon initially viewing the overall mark and upon recalling the mark later will be much more likely to view and recall the stub of the "Q" merely as the stub of a "Q", and that they therefore would visually perceive the mark in its entirety as a "Q", not as "iQ."

Secondly in support of its "iQ" argument, applicant contends that the registered design mark would be viewed and understood to be "iQ" because the registration certificate shows that registrant's corporate name is "iQMetrix Software Development Corp." and not "Qmetrix Software Development Corp." However, even assuming *arguendo* that purchasers would make such a connection between registrant's mark and its corporate name, registrant's corporate name is not a part of the mark as registered and thus is of no significance in our determination of the commercial impression of registrant's registered mark or in our comparison of the marks under the

first *du Pont* factor. See *In re Cynosure Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009).<sup>7</sup>

Thirdly (and relatedly) in support of its "iQ" argument, applicant argues that the cited registered mark would be perceived as "iQ" because the registrant's website shows that the registrant owns and uses two other marks which include the letters "iQ", i.e., "RetailiQ" and "iQmetrix". This argument is unpersuasive. Registrant's website is not of record. (See above at footnote 4.) Even if it were, these purported other marks, like registrant's corporate name, are not part of the cited registered mark and will not be considered in our comparison of the marks.<sup>8</sup>

For these reasons, we are not persuaded by applicant's first argument under the first *du Pont* factor that its mark and the cited registered mark are dissimilar because

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<sup>7</sup> Analogously in cases involving a mere descriptiveness analysis, it is settled that trade names, and/or trade dress, and/or marketing materials that might be used in connection with a mark, but which are not included in the mark as sought to be registered, are irrelevant to the determination of the commercial impression of the mark. See *In re The Place Inc.*, 76 USPQ2d 1467 (TTAB 2005); *In re Brown-Forman Corp.* 81 USPQ2d 1284 (TTAB 2006); *In re Wells Fargo & Co.*, 231 USPQ 95 (TTAB 1986).

<sup>8</sup> To the extent that applicant is arguing here that registrant has a "family" of "iQ" marks that would affect the way the cited registered mark is perceived and pronounced, that argument is unsupported on this record and would be unavailing in any event. As discussed immediately below in connection with applicant's claim of its "family of marks," an applicant may not rely even on its own alleged family of marks to overcome a Section 2(d) refusal. We find, *a fortiori*, that it cannot rely on an asserted family of marks owned by the registrant.



purchasers would perceive the cited registered mark as being the letters "iQ", and not the letter "Q". We add that even if we were to assume *arguendo* that the purchaser might see an "i" in the design and perceive the cited registered design mark as "iQ", we still would find the design mark "iQ" to be confusingly similar to applicant's design mark "Q" because the marks as a whole are so highly similar in terms of their overall appearance and basic commercial impression.

Applicant's second argument in support of its contention that its mark and the cited registered mark are dissimilar under the first *du Pont* factor is that applicant owns a "family" of registered "Q"-formative marks which include QLIK, QLIKTECH and QLIKVIEW, and that purchasers encountering the present "Q" design mark applicant seeks to register will readily perceive and understand it to be yet another one of that family of "Q" marks. (Brief at 16.) We are not persuaded by this argument.

First, applicant has not established that it owns a family of "Q"-formative marks.<sup>9</sup> Second, even if such a family had been established, it would avail applicant

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<sup>9</sup> As to proving ownership of a family of marks, see *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Christian Broadcasting Network Inc. v. ABS-CBN Int'l*, 84 USPQ2d 1560 (TTAB 2007).

nothing here. In an ex parte appeal, an applicant may not assert or rely on its claimed ownership of a family of marks to overcome a likelihood of confusion refusal as to the specific mark at issue on appeal. See *In re Cynosure Inc.*, *supra*, 90 USPQ2d 1644, 1645-46; *In re Lar Mor Int'l, Inc.*, 221 USPQ 180 (TTAB 1983); *In re Ald, Inc.*, 148 USPQ 520 (TTAB 1965). See also *In re U.S. Plywood-Champion Papers, Inc.*, 175 USPQ 445 at 446 (TTAB 1972) ("Applicant's ownership and registration of marks other than the mark sought to be registered herein is immaterial and irrelevant to the specific issue before us, and cannot justify the registration of what could be a confusingly similar mark." (Internal citations omitted)).

For these reasons, we reject applicant's argument based on its purported ownership of a family of "Q"-formative marks.

We turn now to applicant's third argument in support of its contention that its mark and the cited registered mark are dissimilar under the first *du Pont* factor. Applicant argues that, because its software product which is the subject of this application includes a "Query" feature, applicant's mark would be perceived not only as a "Q" but also as a magnifying glass (with the stub of the "Q" forming the handle) which suggests to purchasers that

the software enables the user to perform such queries.  
(Brief at 16.) Applicant argues that this additional or double significance of its mark as a magnifying glass distinguishes its mark from the cited registered mark in terms of appearance, connotation and commercial impression.

We are not persuaded by this argument. We find that any such perception of the mark as a magnifying glass, although perhaps possible after careful examination of the mark, would not alter the obvious initial and clear significance of the mark as being a "Q".<sup>10</sup> We note as well that applicant's own "description of mark" statement in the application describes the mark specifically and only as a "Q" and includes no reference to a magnifying glass.

For all of the reasons discussed above, we are not persuaded by applicant's arguments. We find that applicant's mark and the cited registered mark, when they are compared in their entirety in terms of appearance, sound, connotation and commercial impression, are highly similar if not virtually identical. Both marks would be readily perceived and recalled as a stylized letter "Q" made up of a central black sphere surrounded by two

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<sup>10</sup> Cf. *In re The Place Inc.*, *supra*, 76 USPQ2d 1467, 1470 (in a mere descriptiveness context, both meanings of an alleged double entendre must be readily apparent from the mark itself).

concentric circles, along with the diagonal "stub" of the "Q". We therefore find that the first *du Pont* factor weighs in favor of a finding of likelihood of confusion.

**Factor 6: Similar Marks in Use on Similar Goods.**

We will turn next to the sixth *du Pont* factor, under which we determine the scope of protection to be afforded the cited registered mark by considering evidence pertaining to "the number and nature of similar marks in use on similar goods."

Initially, we find that the cited registered mark is a highly distinctive and inherently strong mark and that it therefore starts out with a wide scope of protection in our analysis under the sixth *du Pont* factor.

Applicant argues, however, that the cited registered mark is weak and entitled to only a narrow scope of protection because "Q" marks are so commonly used in the software field that purchasers are accustomed to distinguishing such marks from each other based on minor differences between the marks. Applicant argues that, likewise, purchasers will be able to distinguish applicant's mark from the cited registered mark based on the differences between the marks. (Brief at 16-18; Reply Brief at 11-12.)

In support of this argument under the sixth *du Pont* factor, applicant has made of record copies of over thirty third-party registrations of different "Q"-formative marks for software-related goods and services in Classes 9 and 42.<sup>11</sup>

However, it is settled that third-party registrations of marks are not evidence that the registered marks are in use, and that they therefore have no probative value under the sixth *du Pont* factor as evidence of use of similar marks on similar goods. See *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); *In re Davey Products Pty Ltd.*, 90 USPQ2d 1198, 1204 (TTAB 2009); *Nike Inc. v. WNBA*

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<sup>11</sup> In its Reply Brief, applicant has specifically cited to five of the third-party registrations it has made of record. These five registered marks are depicted below. We add here that, in our analysis under the sixth *du Pont* factor, we have carefully considered all of the other third-party registered marks submitted by applicant as well.



Reg. No. 3168200



Reg. No. 3496539



Reg. No. 2657961



Reg. No. 3259974



Reg. No. 2083473

*Enterprises LLC, supra*, 85 USPQ2d 1187, 1200-01; *In re Opus One Inc.*, 60 USPQ2d 1812, 1814 (TTAB 2001). See also 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §11:89 (4<sup>th</sup> ed. 2009) ("The mere citation of third party registrations is not proof of third party uses for the purpose of showing a crowded field and relative weakness.") (Emphasis in original.)

Moreover, even if there were evidence of record establishing that these third-party registered marks are actually in use on the goods identified in their registrations, we would find that, although they are representations of the letter "Q", essentially all of them are so uniquely and differently stylized when compared to the registrant's mark in our case that they are of little probative value as evidence of common use of "similar marks" under the sixth *du Pont* factor. None of them is as similar to the cited registered mark as applicant's mark is. See *Nike Inc. v. WNBA Enterprises LLC, supra*, 85 USPQ2d 1187 at 1200-01 ("Furthermore, the appearance and/or commercial impressions of the marks in these registrations and applications differ markedly from the appearance and/or commercial impression of opposer's mark. ... Simply put, none of the marks in these registrations and applications is as similar to opposer's mark as applicant's mark.")

Further limiting the probative value of these third-party marks (assuming their actual use had been proven) is the fact that, although the third-party registrations are for software-related products generally speaking, they are for software in fields which are completely unrelated to the registrant's accounting software in this case, and thus would be of limited probative value under the sixth *du Pont* factor as evidence of use of similar marks on "similar goods." The goods identified in these registrations certainly are not as closely related to registrant's accounting software as applicant's software is (as discussed below).

In short, we find that there is no probative evidence pertaining to the sixth *du Pont* factor. The third-party registration evidence submitted by applicant is not evidence of actual use of the registered marks, for purposes of the sixth *du Pont* factor. And even if such evidence were of record, it would not suffice to establish that the use of similar marks on similar goods is so common that the scope of protection to be afforded to registrant's inherently strong "Q" mark should be limited. For these reasons, we find that the sixth *du Pont* factor does not weigh against a finding of likelihood of confusion (as

argued by applicant), but rather that it is neutral in our likelihood of confusion analysis in this case.

**Factor 2: Similarity of the Goods.**

Under the second *du Pont* factor, we determine the similarity or dissimilarity of applicant's Class 9 goods as they are identified in applicant's application, and the registrant's Class 9 goods as they are identified in the cited registration.

We note at the outset that it is fundamental to our analysis (and of particular relevance in the present case given the nature and crux of applicant's arguments) that our comparison of the goods must be based on the goods as they are identified in the application and the cited registration, respectively, regardless of any extrinsic evidence and arguments which might be presented as to the actual or specific nature of the respective goods. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1783 (Fed. Cir. 1990); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637 (TTAB 2009); *In re RSI Systems LLC*, 88 USPQ2d 1445, 1449 (TTAB 2008); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008); and *In re Continental Graphics Corp.*, 52 USPQ2d 1374, 1376 (TTAB 1999).



Also, it is settled that the respective goods need not be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. 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. The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. See *In re RSI Systems LLC*, *supra*, 88 USPQ2d 1445, 1451; *In re Opus One Inc.*, *supra*, 60 USPQ2d 1812, 1815.

In accordance with these general principles, we find as follows.

To review, applicant's Class 9 goods are identified in the application as:

stored computer software programs for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources; computer software systems comprising computers and software for combining, analyzing, and creating reports of business information, namely sales, real estate and purchasing information, derived from one or more sources.

In this case, we will base our analysis and findings under the second *du Pont* factor (as have applicant and the Trademark Examining Attorney, largely) on a comparison of

applicant's Class 9 software as identified in the application, and the goods identified in the cited registration as "accounting software." "Likelihood of confusion may be found based on any item that comes within the identification of goods in the involved application and registration." *In re Davey Products Pty Ltd.*, *supra*, 92 USPQ2d 1198 at 1202. *See also Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re La Peregrina Ltd.*, *supra*, 86 USPQ2d 1645, 1647; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).<sup>12</sup>

Applicant argues that the "accounting software" as identified in the cited registration should be construed narrowly because registrant's actual "accounting software" is "targeted to retail management solutions," and thus is more limited in nature, purpose and functionality than the registration's broadly-identified "accounting software." (Brief at 7.) This argument is unavailing. First, there is no evidence to support the argument. Second and in any event, and as discussed above, it is the identification of

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<sup>12</sup> Thus, we do not address applicant's and the Trademark Examining Attorney's arguments regarding the relatedness, *vel non*, of applicant's software pertaining to "sales" and "purchasing information", and the software identified in the cited registration as "point-of-sale computer software, namely, software that performs functions similar to cash register and also provides for inventory management."

goods as set forth in the registration that controls, and "[a]n applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence." *In re La Peregrina Ltd. supra*, 86 USPQ2d 1645 at 1647.<sup>13</sup>

The Trademark Examining Attorney has made of record (with her July 9, 2008 Office action) a dictionary definition of "accounting," i.e., "The bookkeeping methods involved in making a financial record of business transactions and in the preparation of statements concerning the assets, liabilities, and operating results of a business." American Heritage® Dictionary of the English Language (4<sup>th</sup> ed. 2000). We find that the purposes and functions of applicant's software, as it is identified in the application, are related to the purposes and

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<sup>13</sup> Citing Trademark Manual of Examining Procedure (TMPEP) §§1402.11(a), 1402.11(e), and 1402.03(d), (Sixth ed., rev. 2 (May 2010)), applicant also argues (Reply Brief at 9), that it is the Office's policy to require specificity in identifying computer software, and that the "accounting software" identified in the registrant's registration does not comply with this policy and should be narrowly construed. This argument is unavailing. If applicant believes that registrant's "accounting software" is identified too broadly in the registration (a question on which we venture no opinion here), applicant's remedy would be to file a petition seeking partial cancellation or restriction of the registration pursuant to Trademark Act Section 18, 15 U.S.C. 1068. See *In re Thor Tech, supra*, 90 USPQ2d 1634, 1638 n.11; *In re N.A.D. Inc.*, 57 USPQ2d 1872, 1874 (TTAB 2000); *Eurostar Inc. v. "Euro-Star" Reitmoden GmbH & Co. KG*, 34 USPQ2d 1266, 1271 (TTAB 1994).

functions of "accounting," as it is defined in this dictionary definition.

More specifically, we find that applicant's software's function of "...combining, analyzing and creating reports of business information, namely, sales..." is related to the accounting function of "making a financial record of business transactions," as set forth in the dictionary definition. Applicant's software's function of "...combining, analyzing and creating reports of business information, namely ... real estate..." is related to the accounting function of "preparation of statements concerning the assets ... of a business," as set forth in the dictionary definition. And more broadly, applicant's software's stated function of "...combining, analyzing and creating reports of business information, namely, sales, real estate and purchasing information..." is related to the accounting function of "preparation of statements concerning the ... operating results of a business," as set forth in the dictionary definition.

Thus, we find that applicant's software, as it is identified in the application, performs functions which are related to "accounting" functions as that term is defined in the dictionary.

We note as well that, in its January 8, 2009 response to the Trademark Examining Attorney's initial Office action making the Section 2(d) refusal, applicant, while contending that its software is not "accounting software," essentially acknowledged that the functions performed by applicant's software as identified in the application, including analyzing "sales" and analyzing "purchasing information," are functions "relating to accounting":

Applicant's goods are, as described, software offering a wide array of tools. These tools **include some functions relating to accounting**, such as analyzing sales, accounts receivable, and purchasing information. The purpose of Applicant's software is to offer users tools to utilize a broad spectrum of information, **including but not limited to accounting information**, in analyzing a company's overall performance.

(Emphasis added.)<sup>14</sup>

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<sup>14</sup> Regarding the reference in the quoted language to "accounts receivable," we note that applicant's original identification of goods listed "accounts receivable" (in addition to "sales," "real estate" and "purchasing information") among the types of "business information" that applicant's software combines, analyzes and creates reports on. In its request for reconsideration of the Section 2(d) final refusal, applicant deleted "accounts receivable" from its identification of goods, arguing that the deletion should suffice to overcome the Section 2(d) refusal. The Trademark Examining Attorney was not persuaded, and maintained her final refusal despite the deletion of "accounts receivable" from applicant's identification of goods. "Accounts receivable" having been deleted from the identification of goods, our determination under the second *du Pont* factor will not be directly based on it. However, the fact that applicant's original identification of goods included software pertaining to "accounts receivable," which clearly is an accounting function, is entitled to some probative weight as evidence that software like applicant's is similar and related to accounting software. *Cf. Octocom Systems Inc. v. Houston*

In addition to this evidence showing the relationship between applicant's software and "accounting," generally, the record also includes evidence from third-party websites which shows that applicant's software as it is identified in the application, and "accounting software" as that term is understood and used in the marketplace, are used for related purposes and perform related functions.

For example, the evidence attached to the Trademark Examining Attorney's July 9, 2008 Office action includes a printout of a webpage with an advertisement for a software product called "Peachtree Premium Accounting for Manufacturing 2009" ("Peachtree"), which provides among its features "accounting functions for general ledger, inventory and fixed assets" as well as "analysis and reporting functions." It "combines powerful assembly and inventory management tools, advanced operational reporting and core accounting features." "You can compare budgets and financial results across multiple years within your General Ledger reports and Financial Statements to get

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*Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 at 1786 (Fed. Cir. 1990) ("Indeed, that such goods might come from a single source is shown by OSI's original application, which indicates OSI itself used the mark OCTOCOM for both modems and computer programs."). See also *Nike Inc. v. WNBA Enterprises LLC*, *supra*, 85 USPQ2d 1187 at 1195 ("Applicant itself offers or intends to offer both types of products" under the mark.)

improved trending analysis, better research and more accurate forecasts based on prior year activity."

Attached to the same Office action is a printout of a webpage with an advertisement for a software product called "QuickBooks Premier Edition 2008" ("QuickBooks") which is "tailored specifically to suit your business style" and which "saves time on routine tasks, managing payables and receivables and monitoring business performance. Track inventory, create purchase orders, set pricing levels and build budgets."

The evidence attached to the Trademark Examining Attorney's September 7, 2009 Office action includes a printout of a webpage with an advertisement for a software product called "Business Plus Accounting," which features "General Ledger" accounting functions such as "Double Entry Accounting" and "Balance Sheet and Income Statement For Monthly Accounting Periods," as well as "Reporting" functions which provide "custom reports" including "Business Summary (State Of The Business) Report," "Daily Sales Reports," "Monthly Sales Reports," "Yearly Sales Reports," "Sales Reports By Product Type," "Sales Reports For A Specific Sale," "Accounts Receivable Aging Report," "Accounts Receivable Posting Report," and "Accounts Receivable Statements."

Attached to the same Office action is a printout of a webpage with an advertisement for a software product called "MicroBiz Business Controller Plus" ("MicroBiz") which "does inventory, invoicing, customer tracking, accounts receivable, reordering, purchasing and much more. It also includes "a Query module that allows you to design your own reports! ... What are you selling? Where are your profits? Does every item in inventory make you the same amount of money?"

This marketplace evidence shows that products commercially known and referred to as "accounting software" perform functions which are related to the functions performed by applicant's software as it is identified in the application. That is, they can be used to combine, analyze and create reports based on business information pertaining to a business' "sales," "real estate" and "purchasing information."

For example, applicant's software as identified analyzes and creates reports pertaining to a business' "sales." Similarly, the "Business Plus Accounting" software product creates numerous types of "custom reports" including daily, monthly and yearly sales reports, sales reports by product type, and sales reports for a specific sale. Likewise, the "MicroBiz" software product enables a



business to design and create reports which analyze information relating to its sales, i.e., "What are you selling? Where are your profits? Does every item in inventory make you the same amount of money?"

Applicant's software as identified also analyzes and creates reports pertaining to a business' "purchasing information." Similarly, the "MicroBiz" software product includes functions which analyze and report on a business' "inventory," "reordering," and "purchasing." Likewise, the "Peachtree" software product features "inventory management tools," and the "QuickBooks" product enables a business to "track inventory."

Applicant's software also analyzes and creates reports pertaining to a business' "real estate." Similarly, the "Peachtree" software product performs functions relating to a business' "fixed assets."

In short, we find that this evidence of commercially-available third-party accounting software products establishes that applicant's software, as it is identified in the application, performs functions that are related to the reporting and other functions performed by "accounting software," as that term is understood in the relevant marketplace.

Applicant argues that our determination of the relatedness of the goods under the second *du Pont* factor "cannot be made in a vacuum" and should include an "analysis of the actual goods and services at issue."

(Reply brief at 2; Brief at 4.) Applicant argues that applicant's and registrant's goods are dissimilar because the actual software product marketed by applicant is not accounting software and does not perform accounting functions.

Applicant contends that, as is shown by the website evidence of the "QuickBooks" software submitted by the Trademark Examining Attorney (discussed above), "accounting software" "is utilized to save time on routine accounting tasks, such as managing payables and receivables, tracking inventory, creating purchase orders, setting pricing levels and building budgets." (Brief at 6.)<sup>15</sup>

By contrast, applicant contends, applicant's software performs specialized business analysis functions that are fundamentally different than the routine retail management tasks that accounting software performs. Applicant maintains that its software is "business intelligence software" which is designed for the purpose of "analyzing a

company's overall performance." It provides specialized functionalities that enable a business to

analyze advertising metrics, manage supply chains, monitor key performance ratios in real-time, pinpoint compliance detail, compare company performance and new product variations, analyze sales and channel performance, optimize inventory and reduce backlog, ensure compliance such as labeling and FDA requirements, scrutinize supplier performance and pricing, improve customer profitability and loyalty with flexible promotions, and general business analytical functions.

(Brief at 6.)

Citing these features of its software, applicant argues "[t]here is no evidence that Applicant's programs function like accounting or inventory programs. Rather, the parties' respective goods and services represent distinct sectors of the overall business software industry." (Brief at 10.) Applicant argues:

The overarching difference between Registrant's software and Applicant's software is that Applicant's business intelligence software analyzes *existing* data while Registrant's accounting and point of sale software provides a means to input *new* data. ... Registrant's product allows a user to perform the actual tasks, while Applicant's product allows a user to analyze those tasks that have already been performed in real time.

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<sup>15</sup> We note that "monitoring business performance" also is listed (but omitted by applicant here) among the advertised functions of the "QuickBooks" accounting software product.

(Reply Brief at 3-4; emphasis applicant's). Applicant argues that "w]hereas traditional accounting or sales reports are static, Applicant's products analyze live data, where the user can choose the way the data should be analyzed." (Reply Brief at 7.) Applicant argues that its software and accounting software "are not interchangeable" (Brief at 14), and that they "simply do not overlap in core functionality or purpose" (Brief at 9). Applicant argues that "[e]ven to the extent that there is any overlap in functionality between the products, such as reporting or data generating capability, the type and purpose of reporting under Applicant's business intelligence software is vastly different from the Registrant's software and the software products cited by the Examining Attorney." (Reply Brief at 6.) Further with respect to the third-party "software products cited by the Examining Attorney," applicant argues that they lack probative value because they do not perform the same specific functions that applicant's actual software performs. (Brief at 5; Reply Brief at 4-5.)

These arguments are not persuasive. Taking this last argument first, we do not agree that the third-party accounting software products in the record lack probative value because they assertedly do not perform the same exact

functions that applicant's actual software performs. As discussed above, we find that this evidence is probative to the extent that it shows, more generally, that purchasers would expect commercially-available "accounting software" to perform not just routine accounting tasks (as applicant argues), but also to perform analytical and reporting functions which are related to the functions performed by applicant's software (as it is identified in the application).<sup>16</sup>

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<sup>16</sup> Moreover, we note here that several of the specialized features and functions that applicant asserts are performed by its actual software are themselves functions that appear to be related to the functions performed by these third-party accounting software products in the record. These include "manage supply chains," "compare company performance and new product variations," "analyze sales and channel performance," and "optimize inventory and reduce backlog." Applicant asserts that its actual software performs "general business analytical functions." Similarly, the "Peachtree" product provides "analysis and reporting functions," "advanced operational reporting," and "improved trending analysis, better research and accurate forecasts." Applicant asserts that its actual software allows the user to choose the way the data is presented and formatted. Similarly, the "Business Plus Accounting" software product enables the creation of "custom reports," and the "MicroBiz" product includes "a Query module that allows you to design your own reports!" (We note that applicant has asserted that its actual software product also includes a "Query" feature. See above in connection with our discussion of applicant's "magnifying glass" argument under the first *du Pont* factor.)

In short, even if we were to go beyond applicant's identification of goods and consider what applicant asserts to be the features of its actual software, we would find that applicant's software is related to the third-party accounting software in the record in terms of several of the functions it performs.

Indeed, this argument and all of applicant's arguments which are based on the asserted differences between registrant's software and applicant's actual software are unpersuasive because the specialized features, functions and purposes of applicant's actual software are not reflected in the identification of the goods in the application, and applicant may not rely on them to distinguish its goods from the registrant's "accounting software." See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, *supra*, 209 USPQ 986 at 988 (CCPA 1981) ("The question of the likelihood of confusion must be based upon a consideration of appellant's goods as described in the application."); *In re La Peregrina Ltd.*, *supra*, 86 USPQ2d 1645, 1646; *In re Jump Designs LLC*, *supra*, 80 USPQ2d 1370, 1374.

In the application, applicant's goods are identified simply as computer software which is used "for combining, analyzing, and creating reports of business information, namely sales, real estate and purchasing information, derived from one or more sources." As is shown by the evidence discussed above, and as acknowledged by applicant in its January 8, 2009 response to the initial Office action, these functions of applicant's software as it is identified in the application are accounting-related

functions. They also are similar and related to functions performed by commercially-available "accounting software."

Moreover, even accepting applicant's contentions that its software is not "accounting software," that it does not perform "accounting" functions, and that it is not interchangeable with "accounting software," we still would find that applicant's software and "accounting software" are related goods under the second *du Pont* factor. As noted above at the beginning of our discussion of the second *du Pont* factor, it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. See *In re RSI Systems LLC*, *supra*, 88 USPQ2d 1445 at 1451 ("The test for whether goods and services are related is not whether the goods and services are the same or interoperable."). See also *In re Opus One Inc.*, *supra*, 60 USPQ2d 1812, 1814.

Thus, even if applicant's software and registrant's software products are not "interchangeable," we find that they are complementary products which could be used in conjunction with each other for the same underlying purpose. That is, they both are business management software products that would be used by a business seeking to make effective use of business information such as its

sales and purchasing information, in order to optimize its processes and performance. As noted by applicant itself, a business would use accounting software for the initial collection, analysis and reporting of the data. Then it could use applicant's software to perform further analysis and reporting functions based on that data.<sup>17</sup>

Applicant is correct in arguing that there is no *per se* rule that all computer software products necessarily are related for purposes of the second *du Pont* factor. However, the cases cited by applicant which set out and apply this principle are distinguishable because they all

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<sup>17</sup> Compare *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (two different medical diagnostic imaging products (MRI machines and ultrasound equipment), used in conjunction with each other in diagnosing and treating the same patient, are complementary and thus related products).

Applicant argues (Reply Brief at 3) that the difference between applicant's software (which is used to initially input data) and registrant's software (which is used to analyze that data once it is collected), is analogous to "the difference between operating a music soundboard and analyzing and editing the recorded product." This hypothetical argument does not aid applicant here. Operating a music soundboard to initially record the music as it is being performed in the studio or on stage, and then subsequently analyzing and editing the resulting initial recording, might be different specific activities. But they nonetheless would be complementary and related activities undertaken in conjunction with each other as steps in the same process for achieving the same ultimate purpose, i.e., producing the final musical recording.

In the same way, applicant's software and registrant's software, even if they perform different specific functions, would be used in conjunction with each other to perform related and complementary steps in the same process and for the same ultimate purpose, i.e., enabling a business to effectively manage and use its business information in order to optimize its processes and performance.



involved products that were much more dissimilar to each other than are applicant's and registrant's business management software products in the present case.<sup>18</sup> We emphasize that our finding in this case, i.e., that applicant's software product and registrant's software product are related under the second *du Pont* factor, is based not on the fact that both are software products, nor

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<sup>18</sup> The cases cited by applicant (several of which are not "software vs. software" cases like the present case) are: *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944 (Fed. Cir. 2006) ("computer software featuring business management applications for the film and music industries" unrelated to "interactive multimedia CD-ROMS containing educational information in the fields of pharmaceutical and medical product information, therapies and strategies, and medical, pharmaceutical, and healthcare issues"); *Reynolds & Reynolds v. I.E. Sys. Inc.*, 5 USPQ2d 1749 (TTAB 1987) ("accounting software" unrelated to "asynchronous data communication terminal emulation system" which "allows a microcomputer to function as a 'dumb terminal'"); *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460 (TTAB 1992) ("computer programs for electrical distribution system analysis and design" unrelated to "computer programming services including the design, implementation and management of electronic data processing programs"); *Information Resources Inc. v. X\*Press Information Services*, 6 USPQ2d 1034 (TTAB 1988) ("information analysis" software unrelated to "a news service in the nature of a data stream delivered by satellite to cable television operators, who in turn deliver the data stream by television cables to the personal computers of subscribers"); *Checkpoint Systems Inc. v. Check Point Software Tech. Inc.*, 269 F.2d 270, 60 USPQ2d 1609 (3d Cir. 2001) (commercial electronic security control and monitoring devices and systems for preventing theft of physical merchandise items unrelated to firewall software programs used to prevent unauthorized internal or external entry into computer networks); and *Moore Business Forms Inc. v. Rite Aid Corp.*, 21 USPQ2d 2024 (W.D.N.Y. 1991) ("computer-assisted custom printed business forms that contain both fixed and variable data provided by the customer" unrelated to "a computer-based record-keeping system that tracks its customers' prescription orders").

even on the fact that both can be described generally as what applicant calls "business software" products. Rather, our finding is based on our careful analysis of the similar and complementary functions and purposes of the respective software products themselves, as they are identified in the application and registration.

In summary, we find that applicant's software as identified in the application performs functions that are related to "accounting" functions, as that term is defined in the dictionary evidence discussed above. Applicant acknowledged in its January 8, 2009 response to the initial Office action that its software performs functions "relating to accounting." Purchasers of commercially-available "accounting software" would expect such software to perform not only basic accounting tasks, but also analytical and reporting functions related to those performed by applicant's software as it is identified in the application. Finally, we find that even if applicant's software is not interchangeable with "accounting software," applicant's software and "accounting software" are related and complementary products used for the same basic business purpose and need, i.e., enabling a business to make effective use of its sales and purchasing information and

other business information in order to optimize internal processes and business performance.

For all of these reasons, we find that applicant's software, as it is identified in the application, is related to the "accounting software" identified in the cited registration. In our Section 2(d) likelihood of confusion analysis as to applicant's Class 9 goods, we find that the second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

**Factor 3: Similarity of Trade Channels and Purchasers.**

Under the third *du Pont* factor, we determine the similarity or dissimilarity of the trade channels in which, and the purchasers to whom, applicant's goods and the registrant's goods, as they are identified in the application and in the registration, are or would be marketed.

Because there are no limitations or restrictions as to trade channels or classes of purchasers in applicant's and registrant's respective identifications of goods, we presume that the goods are marketed in all normal trade channels and to all normal classes of purchasers for such goods, regardless of what any evidence might show to be the actual trade channels and purchasers for the parties'

goods. *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1355 (Fed. Cir. 2000); *Octocom Systems Inc. v. Houston Computers Services Inc.*, *supra*, 16 USPQ2d 1783, 1787 ; *In re Jump Designs LLC*, *supra*, 80 USPQ2d 1370, 1374, ; *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

We find that registrant's "accounting software" and applicant's software "for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information" are or would be marketed to the same purchasers in the same trade channels. These purchasers would be owners of businesses of all sizes, including owners of small retail and other businesses.

Applicant argues that its software and registrant's accounting software are sold

...in distinctly disparate channels of trade. Applicant's goods and services are directed to business executives and market analysts. ... Conversely, Registrant's accounting and point-of-sale software is targeted to those in the retail industry, and those working in accounting, sales, and inventory. ... Consequently, it is highly unlikely that the consumers of either party's goods and services will overlap or confuse the source of the goods and services.

(Brief at 12.) Applicant further argues:

Even without a limitation of Applicant's software to executives or a limitation of Registrant's software to the retail industry, the nature of the respective software products identified under the respective marks is sufficient to target specific consumers. Accounting and point of sale software will naturally target those consumers who are performing operational, routine tasks and financial reporting. Business intelligence software will naturally target those consumers who are analyzing the existing data to target trends and improve business performance. Even if the software products are used within the same industry or field, Registrant's product targets those personnel in accounting and operations, while Applicant's product targets the market analysts and business owners. Because these respective consumers have different targets and goals in the performance of their business, there is little overlap in trade channels, such that there would be a likelihood of confusion.

(Reply Brief at 10.) Applicant argues that "...because the goods and services have such different functions, they target different consumers who have different goals in their respective businesses. Accountants and retail managers will not be making decisions regarding business intelligence and analysis software, and business executives will not be choosing retail management solutions to analyze their businesses." (Brief at 12.)

These arguments are unpersuasive. First, they are not supported by any evidence. Second, even if there were such evidence it would be of no probative value because, again, we will not consider extrinsic evidence and argument

regarding the purported actual trade channels and purchasers of the respective goods.

Third and more fundamentally, even if the respective software products would be purchased to perform different specific functions, that does not make the "consumers" of the software products different, for purposes of the third *du Pont* factor. That is, even if registrant's accounting software would be used by a business' "personnel in accounting and operations" for accounting tasks, while applicant's software would be used by the business owners for business analysis functions, these are not different "consumers" of the respective goods, nor do they constitute "distinctly disparate channels of trade." The "consumers" of the products, for purposes of our likelihood of confusion analysis in this case, would not be the day-to-day users of the respective products, but rather would be the actual purchasers of the products, i.e., the business owners (including small business owners) to whom the respective products would be marketed and who would be making the decision to purchase the goods.<sup>19</sup>

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<sup>19</sup> This is not a case where the goods by nature are such that the purchasers of the goods necessarily would be large corporations or other institutions (such as hospitals), with separate and autonomous departments whose particular personnel would be deemed to be the relevant "consumers" to whom the respective goods are actually marketed, and who would be making the decisions (or recommendations) to purchase the goods. *Compare, e.g., Electronic*

Moreover, in these small businesses, the "personnel in accounting and operations" who would use accounting software, and the "market analysts and business owners" who would use applicant's software, could very well be the same individuals. Even if not, it is the business owner who will be making the decision to purchase both of the products, for use by the appropriate personnel.

For these reasons, we find that registrant's accounting software, and applicant's software as it is identified in the application, are or would be marketed in the same trade channels to the same classes of purchasers, including small business owners. The third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

**Factor 4: Conditions of Purchase.**

We turn finally to the fourth *du Pont* factor, under which we consider evidence pertaining to the "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing."

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*Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992); *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399 (TTAB 2010). This case is more like *In re Toshiba Medical Systems Corp.*, *supra*, 91 USPQ2d 1266, 1272 (trade channels and purchasers similar where goods are complementary products (related diagnostic imaging apparatus products) marketed to the same department of the hospital).

Applicant contends that the goods involved in this case are purchased with care by sophisticated purchasers, and that the fourth *du Pont* factor therefore weighs against a finding of likelihood of confusion. We find that applicant has failed to submit evidence to support this contention. See *In re Iolo Technologies LLC*, 95 USPQ2d 1498, 1501 (TTAB 2010) ("Applicant urges us to consider consumer sophistication as a factor. However, applicant has submitted no evidence that either its consumers or those of registrant would be sophisticated.")

The applicable standard of care is that of the least sophisticated purchaser of the goods. See *Giersch v. Scripps Networks Inc.*, *supra*, 90 USPQ2d 1020, 1027; *Alfacell Corp. v. Anticancer, Inc.*, *supra*, 71 USPQ2d 1301, 1306. We find in this case that it would be the small business owner who is the least sophisticated purchaser. As discussed above, we find that the purchasers of these goods, as the goods are identified in the application and registration, would include not only whom applicant calls "sophisticated, educated business executives" but also small business owners who would exercise only a normal degree of care. Applicant contends, but has not proven, that these purchasers necessarily would exercise a heightened degree of care in purchasing the goods.



Applicant argues that because applicant's goods and registrant's goods are not interchangeable, the purchasers of applicant's and registrant's respective software products will exercise care because they are entering the marketplace with "...different and focused needs. Such consumers will make very deliberate selection decisions because they are consuming such services and goods for different reasons." (Brief at 13.)

We are not persuaded by this argument. First, applicant has presented no evidence to support it. Second, and as discussed above in connection with the second *du Pont* factor, even if applicant's goods and registrant's goods are not interchangeable and might be deemed to meet different "focused needs," they nonetheless are related and complementary goods, which would be purchased by the same purchasers to meet the same basic, underlying need, i.e., to enable them to effectively use and manage their business information, such as sales and purchasing information.

Third as to applicant's "focused needs" argument, to the extent that applicant here is arguing more generally that purchasers necessarily will be sophisticated and careful purchasers under the fourth *du Pont* factor whenever the goods at issue are not interchangeable and thus serve different "focused needs," we are not persuaded. The fact

that a purchaser might be entering the market with a "focused need" for the particular goods it seeks to purchase (which arguably is the case in every purchasing situation) is not determinative under the fourth *du Pont* factor.<sup>20</sup>

Applicant next argues that "[c]ases and Board decisions suggest that software purchasers are generally sophisticated consumers who exercise a heightened standard of care." (Brief at 13.) However, the cases cited by applicant for this proposition (*Checkpoint Systems Inc.*,

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<sup>20</sup> Applicant cites *G.H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635 (Fed. Cir. 1990) for its "focused need" argument. However, the court's use of the words "focused need" was in the following context:

It is also true that substantial pricing differences normally exist and actually exist in this case between champagne and beer. Mumm markets its product as a premium good; the purchaser of Mumm champagne can be presumed to be in the market for an upscale item for consumption and to have a reasonably focused need. Desnoes does not market its product as a premium good.

16 USPQ2d at 1638. Thus, the case involved a specific type of consumer product, namely, a champagne which is marketed as an "upscale" item to brand-conscious consumers willing to pay a "premium" price. We do not read the court's reference to "reasonably focused need" as setting forth a rule for determination of purchaser sophistication under the fourth *du Pont* factor in every case involving goods that are not interchangeable. (Moreover, we are assuming that the court is even referring here to the issue of purchaser sophistication under the fourth *du Pont* factor, and not to the issue of the similarity or dissimilarity of the goods themselves, i.e., "premium" vs. "non-premium" goods, and/or the similarity or dissimilarity of the likely classes of customers for "premium" vs. "non-premium" goods.)

*supra*, 60 USPQ2d 1609, and *Information Resources Inc.*, *supra*, 6 USPQ2d 1034), do not establish or even suggest such a broad, general principle. The decisions in both cases were based on their specific facts, with each case involving highly specialized software products costing tens of thousands of dollars.<sup>21</sup> In short, in a case like this one involving computer software products, as in any other case, our analysis under the fourth *du Pont* factor is based on the specific facts established by the record.

Finally with respect to the fourth *du Pont* factor, we find that even if applicant had established that its goods and the registrant's goods necessarily are purchased by consumers who know what they need in terms of product functionality and quality and are able to distinguish between the respective goods themselves, that does not end the inquiry. The issue is source confusion.

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<sup>21</sup> In *Information Resources Inc.*, *supra*, 6 USPQ2d 1034 at 1039, the Board specifically stated: "Finally, we note that the goods and services involved in this case are relatively expensive items purchased with a certain amount of care and thought, rather than inexpensive items purchased on impulse." (Emphasis added. We note that in its Brief at 13, applicant omitted this emphasized language in quoting from the case.) Similarly in *Checkpoint Systems Inc.*, the court did not say that software purchasers in general are careful and knowledgeable purchasers. Rather, the court was referring to the specialized software product at issue in the case, finding that "purchasers of Check Point Software's firewall technology are highly technical computer and information specialists that must ensure the software is compatible with other programs." *Checkpoint Systems Inc.*, *supra*, 60 USPQ2d 1609 at 1618.

Just because purchasers are knowledgeable in their field or industry, or knowledgeable as to the nature and quality of the goods they want to purchase, that does not mean that they necessarily understand and are familiar with the significance of trademarks and the manners in which trademarks are used in the relevant marketplace, nor that they are accustomed to distinguishing the sources of goods on the basis of the marks they bear. It does not mean that they necessarily would be immune to source confusion when encountering or recalling similar marks used on similar goods. This is our well-settled law. See *In re Research and Trading Corp.*, 793 F.2d 1276, 1279, 230 USPQ 49 at 50 (Fed. Cir. 1986) ("That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods."); *Marion Laboratories Inc. v. Biochemical/Diagnostics Inc.*, 6 USPQ2d 1215 at 1220 (TTAB 1998) ("...the expertise of a person in his field does not necessarily mean that he will be knowledgeable about trademarks, or that his technical skill will avoid confusion"). See also *In re Davey Products Pty Ltd.*, *supra*, 92 USPQ2d 1198, 1204; *Giersch v. Scripps Networks Inc.*, *supra*, 90 USPQ2d 1020, 1027; *Alfacell Corp. v. Anticancer, Inc.*, *supra*, 71 USPQ2d 1301, 1306; *In re*

*Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001); and *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988).<sup>22</sup>

In short, we find that applicant has failed to establish that the purchasers (including small business owners) of applicant's and registrant's goods, as they are identified in the application and registration, necessarily are sophisticated and knowledgeable purchasers for purposes of the fourth *du Pont* factor. Even if we assume that they are knowledgeable as to the goods, we find that they would not necessarily be immune to source confusion when

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<sup>22</sup> Applicant argues (Reply Brief at 12):

The Examining Attorney argues that the fact "that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion." However, the issue is "the conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing," *not whether a purchaser is knowledgeable in the field of trademarks. Du Pont*, 476 F.2d at 1361.

(Emphasis added.) It perhaps is true that this general principle as recited by the Trademark Examining Attorney, and as sometimes set out in our case law, is inartfully worded when it refers to a purchaser being sophisticated or knowledgeable "in the field of trademarks." That phrase perhaps could be seen as referring to a purchaser's familiarity with the legal principles of trademark law generally, or with the marketing principles of product branding generally, or the like. However, the intended significance of the phrase "sophisticated or knowledgeable in the field of trademarks," as it is used in our case law in the context of the fourth *du Pont* factor, should be understood to refer to the purchaser's ability to understand and use trademarks as a means of distinguishing the source of goods and services in the relevant marketplace.

encountering or attempting to recall the similar marks involved in this case, as used on the related goods involved in this case.

For all of these reasons, we find that the fourth *du Pont* factor is neutral in our overall likelihood of confusion analysis in this case. If it weighs in applicant's favor at all, it does not do so significantly.

**Class 9 Section 2(d) Refusal: Summary.**

Considering and weighing all of the evidence of record as it pertains to the relevant *du Pont* likelihood of confusion factors, we conclude that confusion is likely. Under the first factor, we find that applicant's mark and the cited registered mark are highly similar (if not virtually identical). Under the second factor, we find that applicant's goods as identified in the application and the goods as identified in the cited registration are related. Under the third factor, we find that these goods are or would be marketed in the same or overlapping trade channels and to the same or overlapping classes of purchasers. All of these *du Pont* factors clearly weigh in favor of our conclusion that confusion is likely.

Under the sixth factor, we find that there is no evidence of any third-party use of similar marks on similar

goods which would lessen the scope of protection to which the cited registered mark is entitled. The sixth factor is neutral in our likelihood of confusion analysis.

Under the fourth *du Pont* factor, we find that applicant has failed to prove its contention that the respective goods, as identified in the application and the registration, necessarily are purchased with such a heightened degree of care that the likelihood of confusion is mitigated.

Moreover, even if we were to find in applicant's favor under the fourth factor that the goods are or would be purchased with a degree of care, we deem that fact to be outweighed by all of the facts of record under the other *du Pont* factors, which when considered together suffice to establish that a likelihood of confusion exists. *See In re Research and Trading Corp.*, *supra*, 230 USPQ 49 at 50 ("Sophistication of buyers and purchaser care are relevant considerations, but are not controlling on this factual record."); *In re Wilson*, *supra*, 57 USPQ2d 1863 at 1866 ("... in view of our findings on the other relevant *du Pont* factors, as discussed elsewhere in this opinion, we also find that the sophistication and care of purchasers under the fourth *du Pont* factor is not controlling in this case...").

For all of the reasons discussed above, we find that a likelihood of confusion exists as to applicant's Class 9 goods. We have considered all of applicant's arguments to the contrary (including any arguments not specifically discussed in this opinion, if any there be), but we are not persuaded by them.

To the extent that any doubt might exist as to the correctness of our conclusion that confusion is likely, we resolve such doubt against applicant, as we must. *See In re Chatam International*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004); *In re Toshiba Medical Systems Corp.*, *supra*, 91 USPQ2d 1266, 1274.

Having found that a likelihood of confusion exists, we **affirm** the Section 2(d) refusal to register applicant's mark in Class 9.

**Section 2(d) Refusal as to Class 42.**

We turn now to the Trademark Examining Attorney's Section 2(d) refusal to register applicant's mark in Class 42.

**Factor 1: Similarity of the Marks.**

For all of the reasons discussed above in connection with our Class 9 likelihood of confusion analysis as to the



first *du Pont* factor, we find that applicant's mark and the cited registered mark are highly similar (if not virtually identical) in terms of appearance, sound, connotation and commercial impression. Thus, we find that the first *du Pont* factor weighs in favor of a finding of likelihood of confusion as to Class 42.

**Factor 6: Similar Marks in Use on Similar Services.**

For all of the reasons discussed above in connection with our Class 9 likelihood of confusion analysis as to the sixth *du Pont* factor, we find that there is no evidence in the record of third-party use of similar marks on similar services which would narrow the scope of protection to be afforded to the cited registered mark. Thus, we find that the sixth *du Pont* factor is neutral in our likelihood of confusion analysis as to Class 42.

**Factor 2: Similarity of the Services.**

Applicant's and registrant's Class 42 services, as they are recited in the application and in the registration, respectively, are services related to computer systems, hardware and software. We will set out the respective recitations of services below.

Initially, however, we note generally that in our analysis pertaining to the second *du Pont* factor in connection with the Class 9 refusal, we discussed at length the legal principles governing our analysis under the second *du Pont* factor. Those principles apply to the Class 42 refusal as well. We reiterate in particular the basic principle that our comparison of the respective services must be based on the services as they are identified in the application and registration, respectively. Based on that principle, we reject at the outset of our discussion the two related arguments applicant offers to support its contention that registrant's and applicant's services are dissimilar under the second *du Pont* factor.

First, applicant argues that registrant's actual Class 42 computer-related services, like its Class 9 software, pertain solely to "retail management solutions,"<sup>23</sup> and that registrant's recitation of services accordingly should be narrowly construed in our comparison of the Class 42 services under the second *du Pont* factor. However, as was the case in Class 9, there is no evidence to support this

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<sup>23</sup> Applicant argues that "Registrant's specimens indicate that [registrant's] services are targeted to retail management solutions, just like its goods." (Brief at 7.) As was the case in Class 9, applicant's asserted factual basis for this contention is registrant's purported website (Exhibit B to applicant's brief), which is not of record. See above at footnote 4.

contention. More importantly, the recitation of services in the cited registration includes no such limitation, and "[a]n applicant may not restrict the scope of the goods [or services] covered in the cited registration by argument or extrinsic evidence." *In re La Peregrina Ltd.*, *supra*, 86 USPQ2d 1645 at 1646. See also *In re Continental Graphics Corp.*, *supra*, 52 USPQ2d 1374, 1376.

Likewise, because registrant's computer-related services are identified broadly in the registration's recitation of services, we must presume that the services encompass all services of the nature and type identified. This includes applicant's services which as identified in the application might be more specific as to subject matter but which still are encompassed by registrant's more broadly-identified services. See, e.g., *In re Thor Tech, Inc.*, *supra*, 90 USPQ2d 1634 (applicant's specific types of trailers encompassed within broadly-identified "trailers" in cited registration); *In re Jump Designs, LLC*, *supra*, 80 USPQ2d 1370 (same - "furniture"); *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992) (same - "computer programs recorded on magnetic disks").

Applicant's Class 42 services, as they are recited in the application, are:

Computer programming, excluding programming for computer and video game software; design of computer software for business intelligence; maintenance, updating and improvement of computer software for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources; research and development services regarding new business software products; consultant services regarding computer software systems for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources; electronic data processing (EDP) consultancy, namely computer consultation in the field of electronic data processing; computer systems analysis; hiring-out of computer hardware and computer equipment, namely rental of computer hardware and computer equipment.

The Class 42 services recited in the cited registration are:

Computer services, namely installing, maintaining and testing of computer software for others; computer consultation services, namely, analyzing customers' existing software and business objectives with regard to individual hardware and software requirements; computer software consultation; designing and customization of software programs and manuals for use therewith to the order and specification of others for their specific field or industry; fixed-price software development for others; computer software maintenance and periodic release of maintenance software; software development methodology, namely providing method skills, processes and approach to customers for the use and development of software components and the development of their required software systems; computer consulting services, namely providing access by telephone or facsimile to technicians capable of solving any problems, interpreting written materials and explaining functions of

features of software and correcting programming errors.

We find that registrant's services as they are recited in the cited registration and applicant's services as they are recited in the application are similar and related in several respects. Indeed, some of the respective services are overlapping and thus legally identical. Specifically, we compare the respective services as follows, with the similarities and/or overlaps highlighted:

1. Registrant:

Computer services, namely installing, **maintaining and testing of computer software** for others" and "computer software **maintenance and periodic release of maintenance software**

Applicant:

**maintenance, updating and improvement of computer software** for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources.

2. Registrant:

**Designing and customization of software programs** and manuals for use therewith to the order and specification of others for their specific field or industry

Applicant:

**Design of computer software** for business intelligence.

3. Registrant:

Fixed-price **software development** for others

Applicant:

Research and **development services regarding new business software products.**

4. Registrant:

**computer consultation services** namely, analyzing customers' existing software and business objectives **with regard to individual hardware and software requirements.**

Applicant:

**consultant services regarding computer software systems** for combining, analyzing, and creating reports of business information, namely sales, real estate, and purchasing information, derived from one or more sources

5. Applicant:

**Computer systems analysis**

Registrant:

computer consultation services namely, **analyzing customers' existing software** and business objectives with regard to **individual hardware and software requirements.**

Based on these points of similarity and overlap between applicant's services as they are identified in the application and the services identified in the cited registration, and for the reasons discussed above, we find that the second *du Pont* factor weighs in favor of a finding of likelihood of confusion as to the Class 42 Section 2(d) refusal.

**Factor 3: Similarity of Trade Channels and Purchasers.**

We have discussed above, in connection with the Class 9 Section 2(d) refusal, the legal principles governing our analysis of the third *du Pont* factor. Those principles apply to the Class 42 refusal as well.

In particular, we find that because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective recitation of services, we presume and find that the goods are or would be marketed in all normal trade channels and to all normal classes of purchasers for such services, regardless of what any evidence might show to be the actual trade channels and purchasers for the services. We find that the normal trade channels purchasers for applicant's and registrant's respective services are similar.

Indeed, to the extent that applicant's services as recited in the application and the services recited in the cited registration overlap and thus are legally identical (as we have already found), we find that the trade channels for and purchasers of the respective services also overlap and are legally identical. See *In re Jump Designs LLC*, *supra*, 80 USPQ 1370, 1374. Both would be marketed to businesses of all sizes, including to small businesses. As discussed above in connection with Class 9, it is the owner of the small business who would be making the decision to purchase the services for use by the appropriate personnel in the business.

For these reasons, we find that the third *du Pont* factor weighs in favor of a finding of likelihood of confusion in our Section 2(d) analysis as to Class 42.

**Factor 4: Conditions of Purchase.**

We turn finally to the fourth *du Pont* factor, pertaining to the conditions under which the respective services are purchased. We have discussed the pertinent legal principles above, in connection with the Class 9 refusal. Those principles apply here as well.

We find that some of the Class 42 services recited in the application and in the registration are types of services which might be purchased with a degree of care because (unlike the Class 9 software products, necessarily) they would appear to be customized to meet the particular needs of the purchaser. Again, however, even these purchasers are not necessarily immune to source confusion arising from the use of these confusingly similar marks in connection with similar and overlapping services. We find on balance, however, that the fourth *du Pont* factor tends to weigh against a finding of likelihood of confusion with respect to the Class 42 services.

**Class 42 Section 2(d) Refusal: Summary.**



In summary, we have reviewed all of the evidence of record for Class 42 as it pertains to the relevant *du Pont* factors. Under the first factor, we find that applicant's mark and the cited registered mark are highly similar if not virtually identical. Under the second factor, we find that applicant's services as identified in the application and the services identified in the cited registration are similar and related, and in certain respects legally identical. Under the third factor, we find that these services are or would be marketed in the same or overlapping trade channels and to the same or overlapping classes of purchasers. All of these *du Pont* factors clearly weigh in favor of our conclusion that confusion is likely.

Under the sixth factor, we find that there is no evidence of any third-party use of similar marks in connection with similar services which would lessen the scope of protection to which the cited registered mark is entitled. The sixth factor is neutral in our likelihood of confusion analysis.

Under the fourth *du Pont* factor, we find that purchasers are likely to exercise at least some degree of care in purchasing the relevant services. To that extent,

fourth *du Pont* factor weighs against a finding of likelihood of confusion.

Considering and balancing all of the evidence as it pertains to the relevant *du Pont* factors, we conclude that a likelihood of confusion exists as to Class 42. Purchaser care under the fourth *du Pont* factor tends to weigh against a conclusion that confusion is likely, but we deem that fact to be outweighed by all of the facts of record under the other *du Pont* factors, which when considered together suffice to establish that a likelihood of confusion exists. *See In re Research and Trading Corp.*, *supra*, 230 USPQ 49 at 50 ("Sophistication of buyers and purchaser care are relevant considerations, but are not controlling on this factual record."); *In re Wilson*, *supra*, 57 USPQ2d 1863 at 1866 ("... in view of our findings on the other relevant *du Pont* factors, as discussed elsewhere in this opinion, we also find that the sophistication and care of purchasers under the fourth *du Pont* factor is not controlling in this case...").

We have considered all of applicant's arguments in opposition to the Class 42 Section 2(d) refusal (including any arguments not specifically discussed in this opinion, if any there be), but we are not persuaded by them.

To the extent that any doubt might exist as to the correctness of our conclusion that confusion is likely, we resolve such doubt against applicant, as we must. See *In re Chatam International*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004); *In re Toshiba Medical Systems Corp.*, *supra*, 91 USPQ2d 1266, 1274.

Having found that a likelihood of confusion exists, we **affirm** the Section 2(d) refusal to register applicant's mark in Class 42.

**Decision:** The Section 2(d) refusal as to Class 9 is **affirmed**. The Section 2(d) refusal as to Class 42 is **affirmed**.