

<p>This Opinion is Not a Precedent of the TTAB</p>

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Franchise Group Pty Ltd

Serial No. 79122789

Pamela N. Hirschman and Sabrina C. Stavish of Sheridan Ross P.C.,
for The Franchise Group Pty Ltd.

Deborah E. Lobo, Trademark Examining Attorney, Law Office 109,
Dan Vavonese, Managing Attorney.

Before Seeherman, Kuhlke and Masiello,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

The Franchise Group Pty Ltd. (“Applicant”) seeks registration on the Principal Register of the mark shown below for “Washing and grooming services for animals, including dogs; beautician services for animals; pet walking services for dogs; nail clipping for animals including dogs; animal care services, namely, pet walking, pet bathing and non-medicated pet grooming; pet care services, namely, administration of medication; pet dentist services; pet grooming services; animal feeding services; grooming salon services for pet animals; massage services for animals; providing advice relating to the feeding of animals; advisory services relating to the care of pet

animals; providing information, including on-line information, about animal grooming, animal care and animal feeding” in International Class 44.¹



The word DOGWASH is disclaimed and the application includes the following description of the mark:

The mark consists of the stylized wording "DASH DOGWASH" with two drops of water spilling out from each side of the word "DASH", and the stylized image of a smiling dog above the wording.

The Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant's mark so resembles the previously registered mark shown below for "dog grooming services" in International Class 44.²



¹ Application Serial No. 79122789 was filed on April 24, 2012, based on a request for extension of protection under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141(f).

² Registration No. 4056130 issued on November 15, 2011.

The wording FOR DOGS is disclaimed and the application includes the following description of the mark:

The mark consists of the stylized text "Splash and Dash for Dogs" with 4 elongated curved simulated "drops of water" in an upward direction extending above the word "Splash" in the first line of text. There are 4 small arcs between the letter L and the letter A that simulate the origin of the "water splash." There are three smaller "drops of water" extending from beneath the "o" in "dogs" in the bottom line. There is a curved line between the two lines of text that follow the contour of the upper line. The line is pointed at each end.

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With regard to the services, we base our comparison of the services as they are identified in the registration and application. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom*

Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Registrant's "washing and grooming services for animals, including dogs" and "pet grooming services" encompass Applicant's "dog grooming services." As such the services are legally identical. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981). *See also Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004). However, the Examining Attorney has also submitted evidence establishing that several of Applicant's remaining services are complementary or otherwise related to Registrant's dog grooming. The evidence includes printouts from websites showing various services listed in the application and registration offered under the same mark by a single source. *See, e.g.*, barkplacesouthend.com showing "pet sitting and dog walking," "dog grooming" and "spa treatments";³ americanpetgrooming.net showing "teeth brushing," "grooming," "nail trimming," "facial scrub," "ear cleaning" and "eyebrows trim";⁴ and atouchofclasspetgrooming.com offering "grooming" and "online information about animal grooming."⁵

Further, in view of the identical nature of some of the services and because there are no limitations as to channels of trade or classes of purchasers in the descriptions

³ First Office Action (January 16, 2013).

⁴ Final Office Action (May 24, 2013).

⁵ *Id.*

of services in the application and cited registration, it is presumed that Applicant's and Registrant's services are offered in the same channels of trade and to the same classes of purchasers normal for those services. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (the Board may rely on this legal presumption in determining likelihood of confusion). *See also Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.").

In view thereof, the *du Pont* factors relating to the similarity of the services, channels of trade and classes of customers weigh in favor of likely confusion.

Turning to the factor of the similarity or dissimilarity of the marks, in making our determination, we compare the marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) *quoting du Pont*, 177 USPQ at 567.

The Examining Attorney argues the marks are similar in that both marks contain the "identical term 'DASH' and the 'dog' formative terms 'DOGWASH' and 'DOGS' respectively." Ex. Att. Br. p. 11. The Examining Attorney also contends that

the water droplet designs in both marks create similar connotations and commercial impressions.

Applicant argues that the marks are very different in view of the different words and different designs such that the marks in their entireties convey significantly different commercial impressions. In addition, Applicant argues that the matter common to the marks is weak and should be accorded a narrow scope of protection.

The word DOG is generic for these services and, in any event, the Examining Attorney focuses her comparison on the common word DASH. As to the word DASH, the dictionary definition showing the term to mean “move very quickly,”⁶ supports a finding that the term DASH is suggestive of the dog grooming services in that it suggests the services are provided quickly. While it may also evoke the meaning “stylish”⁷ in either of the marks this meaning does not overtake the suggestive meaning “move very quickly.”

In support of its position that the mark is diluted, Applicant submitted web pages from third-party websites showing use of the word DASH as part of trademarks in connection with dog grooming services as shown below.



DoggyDASH - Downtown
Dog-Grooming Package or Dog-Walking Services from DoggyDASH |

⁶ Vocabulary.com, App. Response (May 10, 2013).

⁷ Id.



Bath & Dash
(some restrictions apply)
Perfect for your busy lifestyle

Bath N Doggie Dash LLC

Under the sixth *du Pont* factor, a mark may be shown to be weak based on extensive third-party use of a particular term. *Palm Bay*, 73 USPQ2d at 1693; *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1155 (TTAB 2012) (“Because of the highly suggestive nature of the mark ‘Grand Hotel,’ the proliferation of registered ‘Grand Hotel’ marks and the unregistered uses of ‘Grand Hotel’ marks, the mark ‘Grand Hotel,’ itself, is entitled to only a very narrow scope of protection or exclusivity of use ... we conclude that consumers are able to distinguish between different GRAND HOTEL marks based on small differences in the marks ...”). We find the third-party uses here to be persuasive evidence under the sixth *du Pont* factor of “the number and nature of similar marks in use on similar goods.” This factor weighs in favor of Applicant.

In view of the above, the scope of protection to be accorded the common portion of the marks is narrow.

Looking at the marks in their entirety, the design portions are very different overall. While they both incorporate water droplets, in Registrant’s mark they look like a fountain and a flourish in contrast to Applicant’s mark where they look like droplets coming off of a shaking dog. Regarding the literal portions, which in general are the more likely portions of the marks to be remembered by potential

consumers, they have a very different commercial impression – the word DASH versus the phrase SPLASH AND DASH which consumers would not likely abbreviate to just the word DASH. Considering then the evidence of multiple third-party use of the word DASH with dog grooming services, consumers will look to other aspects of these marks to distinguish source.⁸

Accordingly, we find that because the common element DASH is weak in that it is both suggestive of the services and in use by third parties for dog grooming services, the differences in the marks discussed above create an overall different commercial impression sufficient to distinguish the marks. Moreover, we find this factor to be pivotal in that this factor of the dissimilarities of the marks outweighs the other factors such that confusion is not likely. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single du Pont factor may not be dispositive”).

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

⁸ The Examining Attorney’s argument that the third-party websites “are of little probative value in this case because applicant has not shown that any of those marks are in fact registered marks” is misplaced. The relevance of third-party registrations is that they “are similar to dictionaries showing how language is generally used.” TMEP § 1207.01(d)(iii) and cases cited therein. Evidence of third-party use, in this case the printouts from third-party websites, falls under the sixth *du Pont* factor and may establish that “the consuming public is *exposed* to third-party *use* of similar marks on similar goods [and] ‘is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.’” *Id.* quoting *Palm Bay*, 73 USPQ2d at 1693 (emphasis added). Whether or not they are registered does not detract from their probative value.