

This Opinion is Not a
Precedent of the TTAB

Mailed: March 17, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Angélique Eriksen and Jacques Levy

Serial No. 79145328

Angélique Eriksen and Jacques Levy, *pro se*

Michael Eisnach, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

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

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Angélique Eriksen and Jacques Levy (“Applicants”) seek registration on the Principal Register of the mark EGG EVENTS, in standard characters and with the term EVENTS disclaimed, for “Organization of exhibitions for commercial or

advertising purposes; public relations” in International Class 35, “Arranging of travel tours; transportation of persons logistics services, namely, transportation of persons by air, rail, road or ship, booking seats of travel” in International Class 39, and “Booking of temporary accommodation” in International Class 43.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicants’ mark is likely to cause confusion with the registered mark EGG JAPAN, in standard characters and with the term JAPAN disclaimed, for services that include, *inter alia*, “Public relations; Advertising, marketing and promotion services” and “Organizing of business competitions” in International Class 35, “Organization of seminars; Party planning; Party planning consultation; Entertainment services in the nature of organizing and conducting social entertainment events” in International Class 41, and “Agency services for booking hotel accommodation” in International Class 43.²

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 affirm the refusal to register.

¹ Application Serial Number 79145358, with a March 5, 2014 filing date. Applicants request an extension of protection under Section 66(a) of the Trademark Act, based upon International Registration No. 1198811.

² Registration Number 4567343, issued July 15, 2014.

II. Evidentiary Issue

Applicants attached new evidence to their appeal brief, and the Examining Attorney objects. Two of the exhibits are definitions from the online Collins English Dictionary of “EVENT” and “JAPAN” not previously entered into the record during prosecution.³ While Applicant listed URLs for the definitions in its brief, 4 TTABVUE at 11, that suggest use of the American English version of the dictionary, the definitions come from the British English version of the dictionary. Although dictionary definitions may be an appropriate subject matter of judicial notice, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), Collins English Dictionary *British* English definitions “are of little or no probative value” because they “are not necessarily the meaning of the words in the United States.” *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313 n.18 (TTAB 2014). Accordingly, we take judicial notice of Applicants’ definitions for whatever probative value they may have. *See In re Red Bull GmbH*, 78 USPQ2d 1375, 1377-78 (TTAB 2006) (taking judicial notice of online dictionary evidence where the dictionaries exist in printed format or have regular fixed editions).

The remaining exhibits constitute printouts from Applicants’ and Registrant’s websites bearing different dates than the printouts from the same websites submitted during prosecution. In some instances the content differs from the earlier printouts. “The record in the application should be complete prior to the filing of an appeal. The

³ 4 TTABVUE at 27-29.

Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Unlike dictionary evidence, the website evidence is not proper subject matter for judicial notice. *See UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1874 (TTAB 2011) (rejecting request for judicial notice of webpages). Thus, the website evidence attached to the appeal brief that was submitted for the first time with the appeal brief is not timely and we give it no consideration.⁴ *See In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1857-58 (TTAB 2014).

III. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the services. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry

⁴ We note that these materials would not change the result herein. Applicants offer the webpages to support arguments regarding their *actual* services and trade channels and those of Registrant, rather than what is reflected in the recitations of services in the subject application and cited registration. Because the services must be assessed as presented in the identifications, rather than as they are in actual use, the proffered evidence would not affect the outcome.

mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the [services] and differences in the marks.”). If likelihood of confusion exists with respect to any of Applicants’ identified services in a particular class, the refusal of registration must be affirmed as to all services in that class. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

A. Similarity of the Marks

With respect to the marks, we must compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicants’ proposed mark is EGG EVENTS, and the mark in the cited Registration is EGG JAPAN. The marks share a very significant visual and phonetic similarity because of the common first word, bearing in mind that “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897

(TTAB 1988). EGG also is the dominant portion of both marks, in large part because the other word in each mark is disclaimed as descriptive or geographically descriptive and consumers would not be inclined to rely on the disclaimed words as source indicators. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In considering the marks in their entireties, we acknowledge some degree of difference in connotation because of the different additional words, EVENTS on the one hand and JAPAN on the other. However, given the dominance of EGG, the overall commercial impression of the marks nonetheless remains similar. A consumer familiar with Registrant's EGG JAPAN mark who encountered Applicants' EGG EVENTS mark for related services likely would view the services as coming from the same source, with the additional wording in Applicants' mark merely reflecting that their services do not relate only to Japan. Given the similarity in sight, sound, and commercial impression, the first *du Pont* factor weighs in favor of likely confusion.

B. Relatedness of the Services

Turning next to the services, we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe Applicants' and Registrant's services emanate from the same source. As a threshold matter, we note Applicants' assertions in their brief, 4 TTABVUE at 8-9, regarding their actual services. We must focus, however, on the services as identified in the application and registration, not on extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014);

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

The identifications of services in the subject application and cited registration overlap in part. Both identify “public relations” in International Class 35. Also, Applicants’ services “booking of temporary accommodation” in Class 43 and “arranging of travel tours” in Class 39 encompass Registrant’s “agency services for booking hotel accommodation.” This overlap renders the services legally identical.

The record also includes evidence establishing the relatedness of the travel-related services identified in the subject application and cited registration. For example:

- AAA promoting under the same mark services to arrange tours and travel, as well as hotel accommodations;⁵
- Apple Vacations promoting under the same mark the booking of flights, hotels, and tours;⁶
- Liberty Travel promoting under the same mark its services of arranging tours, “group travel,” and “celebrations” and “meetings”;⁷
- The Funjet Vacations webpages shows the offer to book flights, hotels, and cars, all under the same mark;⁸

⁵ February 20, 2015 Office Action at 5-7 (<http://midatlantic.aaa.com>).

⁶ *Id.* at 8-10 (www.applevacations.com).

⁷ *Id.* at 11-14 (www.libertytravel.com).

⁸ March 31, 2015 Office Action at 2-8 (www.funjet.com).

- Bursch Travel promoting booking of “Vacation Packages” including cruises, “Travel Seminars,” and “Escorted Tours,” all under the same mark;⁹
- Burkhalter Travel promoting under the same mark its services of booking cruises, tours, and temporary accommodations such as resorts and vacation homes.¹⁰

This evidence demonstrates that consumers may encounter travel services such as those identified in the application and cited registration promoted together under the same mark. The respective services may be deemed related “if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722.

As noted above, under the second *du Pont* factor, we need not find relatedness as to every service listed in the identification. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for a service in each class. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Tuxedo Monopoly*, 209 USPQ at 988.

Thus, this factor weighs in favor of likely confusion.

C. Trade Channels and Purchaser Sophistication

We next consider the third and fourth *du Pont* factors relating to trade channels and purchaser sophistication. Based on the partial overlap in services between the application and the registration, it follows that the classes of purchasers and channels

⁹ *Id.* at 9-17 (www.burschtravel.com).

¹⁰ *Id.* at 18-32 (www.burkhaltertravel.com).

of trade for such services also would overlap and be considered legally identical. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”); *see also 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.”). The recitations in the application and registration are unrestricted, and we presume that Registrant’s and Applicants’ services are marketed in all usual trade channels and to all normal classes of purchasers for the services. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re Wilson*, 57 USPQ2d 1863, 1865 (TTAB 2001). All of the services identified in Classes 39 and 43 in the application may travel in channels to ordinary consumers such as those who might be interested in a travel tour, or assistance booking transportation or temporary accommodation. Even for the Class 35 services such as “Organization of exhibitions for commercial or advertising purposes” that might travel in business channels, these channels include relatively small businesses and individuals operating sole proprietorships.

Applicants again improperly turn outside of the identifications when addressing these factors. Applicants point to their website to argue that their services qualify as “highly specialized and technical services to be provided to business professionals,”¹¹ but the correct analysis must focus on the identification. The identification of services, which lacks limitations, controls, not the services as offered in the marketplace. *See Cunningham*, 55 USPQ2d at 1846. Applicants’ effort to limit the cited registration to services provided to “sophisticated and knowledgeable customers, i.e. businessmen/businesswomen,” fails for the same reason. In addition, just as with Applicants’ services, even though some of the services in the registration relate to business, the services still may be offered to all types of businesses including small businesses whose decision-making personnel may vary widely in terms of experience, care and sophistication. Thus, we do not find Applicants’ arguments regarding trade channels and customer sophistication persuasive.

Conclusion

We have considered all of the arguments and evidence of record as they pertain to the *du Pont* likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicants or the Trademark Examining Attorney may nonetheless be applicable, we treat them as neutral.

Based on the similarity of EGG EVENTS and EGG JAPAN, as well as the overlap and relatedness of the services, and the overlapping and similar trade channels and

¹¹ 4 TTABVue at 13 (Applicants’ brief).

classes of purchasers, we find that Applicants' mark is likely to cause confusion with the mark in cited Registration No. 4567343 when used in association with the services identified in International Classes 35, 39, and 43 in the subject application.

Decision: The refusal to register Applicants' mark EGG EVENTS is affirmed.