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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re P.G.A. Electronic

Serial No. 79191002

Michael W. Garvey and Deborah L. Corpus of Pearne & Gordon LLP,
For P.G.A. Electronic.

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Before Zervas, Wellington and Hightower,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Pursuant to Section 66(a) of the Act, 15 U.S.C. § 1141f(a) (the "Madrid Protocol"), P.G.A. Electronic ("Applicant") has filed a request for extension of protection of an international registration on the Principal Register for the mark

(CARAT in stylized form) for the following International Class 38 services:

> Connectivity communications via computer terminals or via networks to enable aircraft passengers and users to transmit and receive data within the aircraft, between the aircraft and the ground, and between the ground and the aircraft; connectivity communications services for mobile phones and personal electronic devices to enable aircraft passengers and users to transmit and receive data within the aircraft, between the aircraft and the ground, and between the ground and the aircraft; connection and provision of access to global computer networks to enable aircraft passengers and users to transmit and receive data within the aircraft, between the aircraft and the ground, and between the ground and the aircraft; electronic messaging and teleconferencing services to enable aircraft passengers and users to transmit and receive data within the aircraft, between the aircraft and the ground, and between the ground and the aircraft; all the aforesaid services exclusively for installation in aircraft equipment, their maintenance and use.[1]

The Trademark Examining Attorney issued a Final Office Action refusing registration of Applicant's mark for its International Class 38 services on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on the typed mark CARAT (Registration No. 1573741, "the '741

[1] Applicant notes that it amended the International Class 38 identification in its September 25, 2017 Request for Reconsideration, and that the Examining Attorney in the denial of the Request for Reconsideration did not mention whether the amendment was entered. The Office's electronic records reflect that the amendment was entered and we have considered Applicant's International Class 38 services as amended in its request for reconsideration.

registration," registered December 26, 1989)[2] for services including "radio and television broadcasting services"[3] in International Class 38.[4]

Applicant filed a request for reconsideration followed by a notice of appeal. After the Examining Attorney denied the request for reconsideration, the Board resumed the appeal and Applicant and the Examining Attorney filed briefs. We reverse the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) ("*du Pont*"); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences

[2] Registered December 26, 1989, twice renewed.

[3] Broadcasting" is defined in U.S. English as "The transmission of programs or information by radio or television." *See* https://en.oxforddictionaries.com/definition/us/broadcasting. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

[4] The involved application includes additional services in other International Classes; the refusal to register only applies to the International Class 38 services. April 19, 2017 Office Action, TSDR 1.

in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). "Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601. F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir 2010)).

A. The Marks

The marks are identical in sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 73 USPQ2d at 1692. The marks are also legally identical in appearance inasmuch as registrant's mark is a standard character mark and thus may be displayed in any stylization, font, color and size, including the style identical to CARAT in Applicant's mark, because rights reside in the wording and not in any particular display or rendition. *See In re Viterra Inc.,* 671 F.3d 1358, 101 USPQ2d 1905, 1910 (Fed. Cir. 2012); *SquirtCo v. Tomy Corp.,* 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (a mark in standard character form is not limited to the depiction thereof in any special form). Applicant does not offer any comment regarding the first *du Pont* factor in either of its briefs.

The *du Pont* factor regarding the similarity of the marks therefore favors a finding of likelihood of confusion.

B. The Services, Trade Channels, Purchasers and Condition of Purchase

We first consider the respective services in this portion of our decision, bearing in mind that where identical marks are involved, as is the case here, the degree of relatedness between the services that is required to support a finding of likelihood of confusion declines. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-89 (Fed. Cir. 1993); *Helene Curtis Ind. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Services need not be identical or competitive in order to support a finding of likelihood of confusion. "Likelihood of confusion can be found if the respective products [or services] are related in some manner and/or 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. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (internal quotation marks omitted).

The Examining Attorney argues that "the same telecommunications entity commonly provides or bundles services that include television and/or radio broadcasting services across various platforms, as well as data transmission services,"[5] relying on the following third-party registrations:[6]

> • CHARTER (Reg. No. 3899216): Services include "the distribution of analog and digital cable television broadcasting and transmission services; pay-per-view

[5] 9 TTABVUE 8.

[6] Although third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind that may emanate from a single source under a single mark. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)).

television transmission services; video-on-demand television transmission services; and interactive television broadcasting and transmission services providing access to information from third-party sources; internet access; internet access services to end users."

• GRANDE COMMUNICATIONS (Reg. No. 4095695): Services include "Television, cable television, subscription television and radio broadcasting services; video broadcasting services; satellite television broadcasting services; communications by means of radio, satellite, cable, fiber optic networks, and computer terminals, namely, transmission of data, sound, images and messages by means of radio, satellite, cable, fiber optic networks, and computer terminals."

• FAVE TV (Reg. No. 4306245): Services include "Subscription television and video services, namely, audio broadcasting, radio broadcasting, video broadcasting, subscription television broadcasting, television broadcasting; data and voice telecommunications, namely, electronic transmission of data and voice by means of fiber, cable, satellite and internet."

• DISH (Reg. No. 4339515): Services include "Providing high-speed wireless internet access; Providing broadband internet access; providing multiple-user access to the internet, global computer networks, and electronic communications networks; providing access to global information networks; webcasting of audio and visual data via local and global communications networks; Television broadcasting and webcasting of audio-visual programs; Television broadcasting services via the internet, global computer networks, and electronic communications networks. Television broadcasting to handheld mobile devices, namely, mobile phones, smartphones, laptops and tablet PC's."

• MICROCOM COMMUNICATIONS SOLUTIONS (Reg. No. 4475006): Services include "Satellite television broadcasting; Satellite communication services; Satellite transmission services; Transmission of data, sound and images by satellite."

> • TELEXITOS (Registration No. 4827987): Services are "Television broadcasting services; cable television broadcasting; satellite television broadcasting; transmission services, namely, cable television transmission, satellite transmission, television transmission, and electronic transmission of data, graphics, sound and video; transmission and streaming of programming, audio and visual content, and entertainment media content via global computer networks and wireless communication networks; video on demand transmissions."

In addition, the Examining Attorney submitted the webpages of three "large American telecommunications companies," only one of which (DirecTV) concerns television and radio services for aircraft.[7]

Applicant offers no persuasive argument that the Examining Attorney's evidence fails to establish a relationship between the services. Applicant further maintains, however, that "the relevant purchasers of each are substantially different."[8] Applicant characterizes the issue before us as follows:

> [R]egistrant's services relate to delivering content whereas applicant's services relate to providing a connection for communications. … Applicant makes and installs equipment for airplanes - primarily for passenger entertainment and comfort - including TVs, lighting, wi-fi, power connections, seat controls, etc. Applicant provides related services … that allow an airline passenger to communicate using an electronic device, such as a mobile phone, tablet, or laptop computer. The amended description emphasizes that these services are limited to communications for aircraft passengers. … Given how and where the programs are delivered, customers would not expect these different services to be provided from the same source. Indeed, passengers on an airplane trying to connect their devices to a network would not expect a radio or

[7] 9 TTABVUE 7-8.

[8] 7 TTABVUE 4.

> television broadcast company to provide the connection, but would understand that they are using an onboard data communications system.[9]

The Examining Attorney maintains that airline passengers are registrant's consumers because registrant's recitation of services "is broad enough to include broadcasts and allow airline passengers to receive broadcasts of radio and television programming."[10] We do not disagree; as evidenced by the webpage from DirecTV submitted with the November 19, 2017 Office Action, DirecTV, offers "[o]ver 75 available channels," "[m]ore live sports than any other cable or satellite provider" and "XM Satellite Radio while criss-crossing [sic] the country" on airplanes "[a]nywhere in the sky."[11] The Examining Attorney, however, does not identify who the purchasers of Applicant's services are, and Applicant does not include airline passengers as purchasers of Applicant's services, but maintains that its purchasers are "professionally trained and technical experts in the field of aircraft equipment, installation, maintenance and use thereof." While airline passengers may be the ultimate beneficiaries of Applicant's services, the evidence does not reflect that airline passengers are consumers of Applicant's services or would even be aware that Applicant is the entity providing the connectivity services. Passengers do not participate in purchasing decisions involving an airplane's connectivity services. Based on Applicant's recitation of services, and the dearth of evidence in the record suggesting otherwise, we find that purchasers of Applicant's services are

[9] Sept. 25, 2017 Req. for Recon., TSDR 1.

[10] 9 TTABVUE 10.

[11] Nov. 19, 2017 Office Action, TSDR 2.

"professionally trained and technical experts in the field of aircraft equipment, installation, maintenance and use thereof," as identified by Applicant. The question, then, is whether this group of purchasers are also purchasers of radio and television broadcasting services. *See Elec. Design & Sales Inc. v. Elec. Data Syst. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) ("*EDS*") ("For commercially sold items, only those users who might influence future purchasers can be considered 'relevant persons.'").

We find nothing in the record that suggests that "professionally trained and technical experts in the field of aircraft equipment, installation, maintenance and use thereof" are also purchasers of radio and television broadcasting services. In *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017), the Federal Circuit stated that likelihood of confusion "must be resolved on the basis of the goods [or services] named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution," citing *SquirtCo v. Tomy Corp.*, 216 USPQ at 940. There is nothing in the record to suggest that the normal and usual channels of trade and methods of distribution of such services intersect. The third-party registrations and the webpages do not provide any information that would lead us to conclude that the normal and usual channels of trade and methods of distribution are related to one another.

Applicant urges us to consider consumer sophistication. Beyond inferences we can draw from the services themselves, there is nothing in the record that would give us

additional insight as to the possible sophistication of consumers of Applicant's and registrant's services. *See, e.g., Gen. Aniline & Film Corp. v. Hukill Chem. Corp.*, 287 F.2d 926, 129 USPQ 147, 148 (CCPA 1961) ("There is no evidence other than the nature of the goods themselves from which we can determine whether purchasers of applicant's goods defined in the opposed application are discriminating purchasers and as such are 'probably informed and wary.'"). It appears, however, that relevant potential customers – who, we make clear, are not airline passengers - would be sophisticated and knowledgeable, and as such, would be expected to exercise greater care in making purchasing decisions. *EDS*, 21 USPQ2d at 1392 (Fed. Cir. 1992) ("sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care.").

In sum, while the third-party registration evidence is appropriate evidence for demonstrating a relationship between services, the services identified therein are very broadly described, without trade channel or purchaser limitations. Additionally, of the three webpages the Examining Attorney introduced into evidence, only one addresses the trade channel limitations appearing in Applicant's recitation of services. We therefore find that on the present record, the *du Pont* factor regarding the relationship between the services weighs slightly in favor of finding a likelihood of confusion, and that the *du Pont* factors regarding the trade channels and purchasers weigh against a finding of likelihood of confusion.

C. Conclusion

Upon consideration of all of the evidence in the record and the arguments of the Examining Attorney and Applicant, including evidence and arguments not specifically addressed in this decision, we find that the *du Pont* factors regarding trade channels and purchasers outweigh other *du Pont* factors, and that confusion is not likely between Applicant's mark for its services and registrant's identical mark for its services. We find that the likelihood of confusion claim posited by the Examining Attorney is a speculative, theoretical possibility, notwithstanding that identical marks are involved. Language by our primary reviewing court is helpful in analyzing the likelihood of confusion issue in this case:

> We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

EDS, 21 USPQ2d at 1391 (citing *Witco Chem. Co. v. Whitfield Chem. Co.,* 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967)).

Decision: The refusal to register is reversed.