

From: Kelly, Amy

Sent: 6/11/2015 10:14:51 AM

To: TTAB EFiling

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Subject: U.S. TRADEMARK APPLICATION NO. 85677484 - YAB - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85677484

MARK: YAB



CORRESPONDENT ADDRESS:

KEVIN KURRUS

YABAHABA COMPANY

298 DEBBIE STREET

ISLIP TERRACE, NY 11752-1115

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Yabahaba company

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

kkurru@yahoo.com

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the trademark examining attorney's refusal to register the mark YAB (in special form) for use in connection with "Online social networking services for entertainment purposes provided through an interactive website featuring an online calendar of scheduled events occurring on

the web that may be shared by others” in Class 45 under Section 2(d) of the Trademark Act on the basis that it is confusingly similar to the mark YUB (in standard characters) in U.S. Registration No. 3501822 for the services *“Providing information and a database via a website for facilitating social introductions and interactions”* in Class 45.

FACTS

1. On July 16, 2012, applicant filed to protect its mark YAB (in special form) for use in connection with *“Providing a social networking website for entertainment purposes”*, in Class 45.
2. On November 15, 2012, the examining attorney refused registration based on a likelihood of confusion with the mark YUB in U.S. Registration No. 3501822. The examining attorney stated: *“Although applicant’s mark has been refused registration, applicant may respond to the refusal by submitting evidence and arguments in support of registration. If applicant chooses to respond to this Office action, applicant must respond to the requirements below. However, please note that simply satisfying the outstanding requirements below may not overcome of the refusal issued above.”* The examining attorney then issued requirements regarding applicant’s legal entity, the drawing of record, the significance of the mark, and the specimen of use.
3. On November 23, 2012, applicant responded, resolving issues regarding the legal entity, the drawing of record, the mark’s significance, and specimens of use. Applicant also voluntarily amended its identification of services. Applicant did not submit evidence or arguments in support of registration.
4. On December 26, 2012, the examining attorney issued a final refusal to register under Trademark Act Section 2(d).

5. On May 11, 2013, applicant submitted a request for reconsideration, complete with arguments and evidence in support of registration.
6. On June 3, 2013, the examining attorney issued a subsequent final action, stating that *“applicant’s request for reconsideration presented arguments and evidence for the first time. Applicant must be provided, then, the opportunity to respond to the examining attorney’s reply to applicant’s arguments and evidence. Hence, this Subsequent Final Refusal is issued, enabling applicant to respond to the examining attorney before filing an appeal.”* The examining attorney issued a final refusal with arguments and evidence in reply to applicant’s arguments.
7. On October 19, 2013, applicant filed a notice of appeal with the Trademark Trial and Appeal Board.
8. On April 12, 2015, applicant filed its appeal brief.

ISSUE ON APPEAL

The issue on appeal is whether applicant’s mark YAB (in special form) for use in connection with *“Online social networking services for entertainment purposes provided through an interactive website featuring an online calendar of scheduled events occurring on the web that may be shared by others”* in Class 45 is confusingly similar to the mark YUB (in standard characters) in U.S. Registration No. 3501822 for the services *“Providing information and a database via a website for facilitating social introductions and interactions”* in Class 45, under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

ARGUMENT

THE MARKS ARE CONFUSINGLY SIMILAR AS THE LITERAL ELEMENTS OF THE MARKS ARE NEARLY IDENTICAL AND THE SERVICES ARE CLOSELY RELATED SUCH THAT CONSUMERS ARE LIKELY TO BE CONFUSED OR MISTAKEN OR DECEIVED TO THE SOURCES OF THE SERVICES UNDER SECTION 2(d) OF THE TRADEMARK ACT

1. OVERVIEW OF THE LIKELIHOOD OF CONFUSION ANALYSIS

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the services of the applicant and registrant. *See* 15 U.S.C. §1052(d).

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the services. *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1938 (TTAB 2013) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *see* TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Additionally, the services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

Moreover, a determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following *du Pont* factors are the most relevant: similarity of the marks, similarity and nature of the services, and similarity of the trade channels of the services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

2. THE MARKS ARE CONFUSINGLY SIMILAR

Applicant seeks to register the mark YAB, in special form. Specifically, applicant's mark consists of the letter YAB in stylized font. The cited registered mark is YUB in standard characters.

Visually, the only meaningful difference between the marks is the center vowel, applicant's "A" to registrant's "U", and applicant's stylized presentation.

It has been established that marks may be confusingly similar in appearance despite the addition, deletion or substitution of letters or words. See, e.g., *Weiss Associates Inc. v. HRL Associates, Inc.*, 902

F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (TMM held confusingly similar to TMS, both for systems software); *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214 (TTAB 2001) (finding confusion between registrant's KING FM and KING-TV and applicant's KYNG); *Canadian Imperial Bank of Commerce, N.A., v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH held likely to be confused with COMMUNICASH, both for banking services); *In re Lamson Oil Co.*, 6 USPQ2d 1041 (TTAB 1987) (TRUCOOL for synthetic coolant held likely to be confused with TURCOOL for cutting oil); *In re Curtice-Burns, Inc.*, 231 USPQ 990 (TTAB 1986) (MCKENZIE'S (stylized) for processed frozen fruits and vegetables held likely to be confused with McKenzie for canned fruits and vegetables); *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985) (NEWPORTS for women's shoes held likely to be confused with NEWPORT for outer shirts); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON for microprocessor used in commercial laundry machines held likely to be confused with MILLTRONICS (stylized) for electronic control devices for machinery); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL for resinous chemicals used in dyeing textiles held likely to be confused with LUTEX for non-resinous chemicals used in the textile industry).

Such is the situation here. The parties' marks have the beginning "Y" and final "B" in common, differing in the center vowel. As both marks are coined, nonsensical terms¹, each mark conveys the same amusing, whimsical commercial impression. The slight visual distinction in the center vowel is not sufficient to overcome the similar commercial impression that both marks share.

Further, the marks are phonetically similar. When consumers request or speak of applicant's services, consumers will use the term YAB to refer to applicant and its services. In turn, when consumers request or speak of registrant's services, consumers use the coined word YUB to refer to registrant and its services. Any distinction in sound between "YAB" and "YUB", even when articulated

¹ See applicant's November 23, 2012, response to Office action which states "YAB appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as applied to the goods/services listed in the application, or any geographical significance."

by a most careful speaker and heard by a most careful listener, is very subtle and would not likely be noticed or fully appreciated. *See In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *see In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv).

As previously noted, applicant's mark is presented in special form, consisting of the word YAB in stylized font. While this stylization is not immaterial, it is also not sufficiently distinctive as to obviate the likelihood of confusion in this instance. It has been established that one feature of a mark may be more significant than another feature, and that greater weight may be given to the dominant feature for purposes of determining likelihood of confusion. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ 390, 395 (Fed. Cir. 1983); TMEP §1207.01(c)(ii). Considering the marks in their entireties, the significant, dominant feature of applicant's mark is the word YAB, and the significant, dominant feature of registrant's mark is the word YUB.

Finally, registrant's mark is registered in standard characters. As the rights in a standard character mark reside in the wording or other literal element and not in any particular display or rendition, registrant's mark may be displayed in any lettering style. Conceivably, then, registrant's mark may appear in the same stylized font as applicant's special form mark. *See In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii).

For these reasons, the marks are confusingly similar.

3. THE SERVICES ARE CLOSELY RELATED

With respect to applicant's and registrant's services, the question of likelihood of confusion is determined based on the description of the services stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

Absent restrictions in an application and/or registration, the identified services are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterro Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all services of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Applicant seeks to register its mark for use in connection with *Online social networking services for entertainment purposes provided through an interactive website featuring an online calendar of scheduled events occurring on the web that may be shared by others*, in Class 45.

Registrant's services are *Providing information and a database via a website for facilitating social introductions and interactions*, in Class 45.

The cited registration includes other services; however, for purposes of this likelihood of confusion analysis, only the Class 45 services are relevant.

It is conceded that these services are worded quite differently. Yet, both parties offer very similar services, that is, an organized, online avenue specifically for instigating and encouraging social interaction. As presented in the December 26, 2012, Office action, the word "network" means to

interact or engage in informal communication with others for mutual assistance or support, and the word “interact” means to engage in verbal or physical contact with someone else. [See Dec. 26, 2012, pp 2-5, Final Office action for attached dictionary definitions.]

In short, applicant’s services consist of providing a social interactive (*i.e.*, engaging in informal communication) calendar, and registrant’s services consists of providing a social interactive (*i.e.*, engaging in informal communication) website.

Neither identification has any restriction as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these services travel in all normal channels of trade, and are available to the same class of purchasers.

Attached to the June 3, 2013, Office action, the examining attorney offered evidence of several third parties that provide opportunities to socially connect and interact (registrant’s services) with other users via shared calendars (applicant’s services), including:

- **UpTo**

UpTo Lets you Glance Into the Future – Share what you’re going to be up to, see what friends are up to and discover new events. UpTo integrates with your calendar to make sharing simple. ...

Discover third-party event streams -- Discover third-party event streams based on your likes and interests. ‘Join’ an event to add it to your calendar and share it with friends. ...

Calendar view with heat map – See which days are busier for you or for any of your UpTo groups. Tap and hold a date on the calendar to add an event on that day.

- **Plango**

Plango is a mobile social calendar on Facebook. With Plango you can easily set up private group activities with your closest friends, buddies, and family members on the go. Reach everyone in minutes using push notifications and free SMS.

- Social planning of private get-togethers

- Invite friends to activities using push notifications and free SMS
- Coordinate plan details and last minute changes with group messages
- Check latest updates and see who's coming with Inbox

- **Eugene a Go-Go**

Eugene A Go-Go is the place where you can find out about all of the arts and culture activities happening throughout Eugene and our surrounding community - from festivals, performances and exhibits to classes, auditions and ways to engage with the arts through volunteer and board opportunities. ... Anyone can use the site, either as an anonymous patron or a logged-in user. ... We encourage artists, arts producers and art patrons to experience the cross-organizational collaboration possible with the site. ... Connect with other people with your interests via our unique social networking system.

- **Kalendi**

Share calendars with your employees, students, customers, and remote workers from any Web-enabled device in the world! Setup a group calendar to track meetings, conference calls, and project deadlines. Setup unlimited calendars to share across teams, departments, or remote locations.

- **Family Tree**

Family Tree is a great way to keep in touch with your family. It is an extension of the popular Family Tree app on Facebook that has over 40 million users.

Family Tree lets you:

 1. Create a home for your relatives who are on Facebook where you can communicate and stay in touch
 2. Access the Family Tree Facebook app from your mobile device.
 3. Share photos and statuses with just your family.
 4. Keep track of birthdays and plan family events on the family calendar.
 5. See all the photos from family members in one place!

- **Skedj Mobile**

Skedj is the simple and smart way to manage your schedule, share events with friends, and follow the calendars that matter to you. With one stream of your plans and possibilities, Skedj makes sure you never miss a thing. ...

- Don't replace your calendar. Improve it. Skedj syncs with most popular calendar apps to keep track of events between the two.
- Share doesn't have to mean broadcast. Selective sharing means you decide, event by event, friend by friend, who see what and when.

[See June 3, 2013, pp 2-30, Subsequent Final Office action for attached evidence.]

In addition, gathered from USPTO's X-Search database, the examining attorney presented numerous third-party registrations consisting of third-party marks registered for use in connection with the same or similar services as those of applicant and registrant in this case. [See Dec. 26, 2012 Final Office action and June 3, 2013 Subsequent Final Office action for USPTO's X-Search database evidence included at the bottom of each Office action below the response guidelines.] This evidence shows that the services listed therein -- specifically, social interaction websites and social calendar websites -- are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *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); TMEP §1207.01(d)(iii).

Based on a review of the identifications of services at issue as well as the evidence of record, the services are considered very closely related, if not effectively and functionally the same.

APPLICANT'S ARGUMENTS

The marks are dissimilar.

In its brief, applicant argues that the marks at issue are significantly different. Applicant contends that the stylized presentation of its YAB mark requires careful analysis by the public before recognizing the letters in the mark, and that "more time will only allow the public to further distinguish the two marks." [Applicant's Brief, p. 4.]

Applicant goes on to argue that vowels “A” and “U” are significantly different, rendering very different sounds between the marks.

In response, applicant’s contention that the marks are significantly different is not convincing. Each mark consists of three letters. Each mark starts with the letter Y. Each mark ends with the letter B. Each mark uses one vowel in the center, with applicant using an “A” and registrant using a “U.” The constitutions of these marks not only render them visually similar but also phonetically similar.

Registrant’s YUB mark is considered a coined or fanciful mark. Fanciful marks are comprised of terms that have been invented for the sole purpose of functioning as a trademark or service mark. Such marks comprise words that are either unknown in the language (such as PEPSI, KODAK, and EXXON) or are completely out of common usage (such as FLIVVER). TMEP §1209.01(a). In this instance, the coined nature of the cited registered mark YUB used in relation to *Providing information and a database via a website for facilitating social introductions and interactions* services not only entitles the cited registration to a broad scope of protection, but also significantly increases the likelihood that a similar mark used in connection with similar services would cause confusion. *See In re Ginc UK Limited*, 90 USPQ2d 1472 (TTAB 2007) (finding “ZOGGS TOGGS” confusingly similar to “the completely unique and arbitrary, if not coined” registered mark “ZOG”); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“VEUVE is an arbitrary term as applied to champagne and sparkling wine, and thus conceptually strong as a trademark”); and *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 230 USPQ 831, 834 (2d Cir. 1986) (a fanciful mark “is entitled to the most protection the Lanham Act can provide”).

For these reasons, as well as those presented above, applicant’s YAB mark is confusingly similar to the registered YUB mark.

The services are different.

Applicant submits that the parties' services are not closely related.

Applicant argues that the online trademark application process "only allowed [applicant] to select, 'providing a social networking website for entertainment purposes,'" and that applicant "had no other choice of service categories that would come close to matching [applicant's] mark's associated services."

[Applicant's Brief, p. 4.]

Applicant contends that the trademarks and their respective services are completely different. Applicant notes that registrant's YUB mark is associated with Buy.com and applicant's YAB mark is associated with Yabahaha.com. Applicant argues that "one look for a few minutes at each of the websites and it will be easy and apparent to see that the two services of each of these marks are not related at all." [Appeal Brief, p. 12.] Applicant notes that screen shots of these two websites were attached as evidence to applicant's May 11, 2013, Request for Reconsideration after Final Office Action.

Applicant contends that only after it amended its identification of services from the originally-submitted wording "*Providing a social networking website for entertainment purposes*" to the amended wording "*Online social networking services for entertainment purposes provided through an interactive website featuring an online calendar of scheduled events occurring on the web that may be shared by others*" did the examining attorney submit third-party evidence of the relatedness of the services.

Applicant's argument that the services differ is not supported by the evidence of record.

Throughout its brief, applicant frequently refers to its amended identification of services. Applicant asserts that it amended its identification based on suggestions from the examining attorney. Moreover, applicant contends that only after it amended its identification of services did the examining attorney submit third-party evidence of the relatedness of the services.

The record reflects that applicant filed its application using the following identification of services: *Providing a social networking website for entertainment purposes*, in Class 45. [July 16, 2012, application.]

The record also reflects that in the initial Office action, the examining attorney determined applicant's services to be essentially the same as registrant's services. ["In this case, the identifications set forth in the application and registration are essentially the same and have no restrictions as to nature, type, channels of trade, or classes of purchasers." Nov. 15, 2012, Office action.] Applicant's original identification of services was acceptable; the examining attorney did not require amendments to applicant's identification of services.

On its own behalf, applicant voluntarily amended its identification of services. [Nov. 23, 2012, response.] As the amended wording further clarified and narrowed applicant's services, evidence of the relatedness of the services was then required. The examining attorney offered dictionary definitions of words used in the two identifications of services. [See Dec. 26, 2012, pp 2-5, Final Office action for attached dictionary definitions.]

In its request for reconsideration, applicant offered arguments and evidence for the first time in support of registration of its mark. Consequently, the examining attorney issued a *subsequent* Final Office action as opposed to a denial of applicant's request for reconsideration, noting that applicant must be provided the opportunity to respond to the examining attorney's reply to applicant's newly-presented arguments and evidence. [June 3, 2013, Subsequent Final Office action.] To this subsequent Final Office action and as discussed above [pp 8-10, *supra*], the examining attorney attached third-party marketplace evidence and numerous third-party registered marks showing the close relationship of the services in question.

Due to its amended identification, applicant's services were no longer considered the same based simply on the wording as registrant's services, and third-party, marketplace evidence was required to support the substantive refusal of applicant's mark.

Applicant's argument against the relationship of the services chiefly rests on how the two marks are actually used in commerce, relying on the parties' respective websites as evidence of these differences. However, as previously stated, analyzing the applicant's and registrant's services for relatedness is based on the description of the services set forth in the application and registration at issue, and not on extrinsic evidence of actual use of the marks. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

Screen shots of the parties' respective websites constitute extrinsic evidence of actual use, and such evidence is improper in a likelihood of confusion analysis.

Proper evidence in a likelihood of confusion analysis may consist of marketplace evidence of third parties rendering the same or similar services, offered under the same brand. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007). It may also consist of third-party registrations for marks used in connection with the same or similar services as the services in question. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *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); TMEP §1207.01(d)(iii).

In this instance, the examining attorney presented both marketplace evidence of the relatedness of the services as well as evidence of third-party-registrations for marks used in connection with the same or similar services as the parties in this action.

Based on this evidence, applicant's services are considered closely related to registrant's services.

Ultimately, the overriding concern is not only to prevent buyer confusion as to the source of the services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Accordingly, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

CONCLUSION

Therefore, because the marks are confusingly similar and the services of the applicant and registrant are closely related, purchasers are likely to be confused or mistaken or deceived as to the sources of the services.

For the foregoing reasons, the refusal to register on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(s), due to the mark in U.S. Registration No. 3501822, should be affirmed.

Respectfully submitted,

/amyckelly/

U.S. Patent and Trademark Office

Attorney Advisor - Trademarks

Law Office 113

(571) 272 4492

Amy.Kelly@uspto.gov

Odette Bonnet

Managing Attorney

Law Office 113