

This Opinion is not a
Precedent of the TTAB

Mailed: September 22, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Yabahaba Company

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Serial No. 85677484

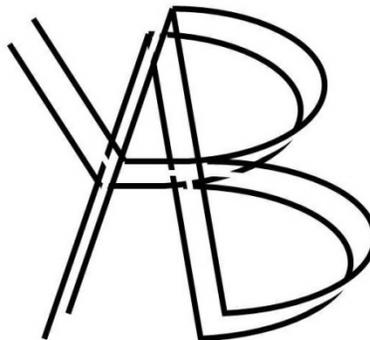
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Yabahaba Company, *pro se*.¹

Amy C. Kelly, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

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Before Bucher, Zervas and Lykos,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On July 16, 2012, Yabahaba Company (“Applicant”) filed an application to register on the Principal Register the mark displayed below



¹ Dr. Kevin Kurrus, Applicant’s General Partner, is acting on Applicant’s behalf.

for recited services, as amended, “[o]nline 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 International Class 45.² The description of the mark is as follows: “The mark consists of a stylized logo including the letters Y, A, and B, in that order, where the letters are merged together.” Color is not claimed as a feature of the mark.

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark **YUB** (standard characters) on the Principal Register for “[p]roviding information and a database via a website for facilitating social introductions and interactions” in International Class 45, that, when used on or in connection with Applicant’s identified services, it is likely to cause confusion or mistake or to deceive.³

The appeal is now fully briefed. For the reasons set forth below, we affirm the Section 2(d) refusal.

² Application Serial No. 85677484, filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging November 24, 2011, as the date of first use anywhere and January 6, 2012, as the date of first use in commerce.

³ Registration No. 3501822, registered on September 16, 2008; Sections 8 and 15 affidavits accepted and acknowledged. The registration also includes services in Class 35; however, during prosecution of the application and in her appeal brief, the Examining Attorney made clear that the refusal was based solely upon the services listed in Class 45.

Likelihood of Confusion Analysis

We base our determination under Section 2(d) on 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) (“*du Pont*”). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and others are discussed below. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

The Services and Trade Channels

We commence with a comparison of the services identified in Applicant’s application vis-à-vis the services identified in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also, Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Applicant argues that the registered **YUB** mark is associated with Buy.com, a website in the field of locating, rating and pricing products that provides consumer purchasing

incentives via merchant discounts, rebates or cash back programs. By contrast, Applicant contends that its services are comprised of an online, shared calendar application that facilitates coordination, communication and scheduling for users to plan get-togethers and share event information. As Applicant explains, users have their own personal calendars and can upload or manually enter their personal contacts information. Using the calendar, the user can inform and invite individuals to events with automatic emails and updates.

Applicant's argument reflects a misunderstanding of the second *du Pont* factor analysis in Board proceedings. We must look to the services as they are worded in the application and cited registration and not to extrinsic evidence regarding use. *See Stone Lion*, 110 USPQ2d at 1161. Both Applicant and Registrant are providing online social interaction services. The stated objective of Applicant's online service is "social networking"; Registrant's online services are designed for "facilitating social introductions and interactions." In fact, Registrant's broadly worded identification of "[p]roviding information and a database via a website for facilitating social introductions and interactions" necessarily encompasses Applicant's more narrowly identified "[o]nline 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 other words, Registrant's online social networking content provision services are so broadly worded that they include Applicant's more specialized online

social calendar services. As such, we find that Applicant's and Registrant's services are legally identical.

We further note that the Examining Attorney provided evidence from third-parties which advertise under the same mark Applicant's more specialized online social networking calendar services and Registrant's broader content provision services in the "social interaction" arena. Note for example the following:

- **UpTo (www.upto.com)**

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 (www.ifreeware.net/download-plango.html)**

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 (<http://eugeneagogo.com>)**

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 (www.kalendi.com)**

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 (<https://itunes.apple.com/us/app/livefamily/id473558719?mt=8>)**

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 (<https://itunes.apple.com/us/app/skedj-mobile/id469237284?mt=8>)**

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 Subsequent Final Office action, pp. 2-30. This constitutes evidence that prospective consumers of Registrant's services are likely to simultaneously encounter Applicant's more narrowly defined services in the marketplace.

Because the recited services in the application and registration are legally identical and unrestricted as to trade channels, we must also presume that both Applicant's and Registrant's legally identical services travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). Accordingly, the second and third *du Pont* factors (the relatedness of the services as described in the application and registration and similarity of established, likely to continue trade channels) weigh in favor of finding a likelihood of confusion.

The Marks

We turn now to the first *du Pont* likelihood of confusion factor which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports*,

Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOV Holdings, LLC*, 82 USPQ2d, 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

That being said, our analysis cannot be predicated on dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. Rather, we are obliged to consider the marks in their entirety. *Id.* See also, *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1161.

Applicant argues that the marks are dissimilar insofar as Registrant’s mark is in standard characters whereas Applicant’s applied-for mark is a “stylized, single

character cluster, where the long stem of the ‘Y’ is also the first leg of the ‘A’ and the second leg of the ‘A’ is also the spine of the ‘B’”; ... is “layered with three images of the same icon on top of one another” as opposed to a single layer; and appears in “thicker, bolder, stylized font.” Applicant’s Brief, p. 3; 16 TTABVUE 4. Applicant also argues that the marks are pronounced differently due to the difference in the vowel sounds represented by the letters “A” versus “U”.⁴

Applicant’s arguments are unconvincing. Because Registrant’s mark is in standard characters, it could conceivably be used in the same stylized and “layered” format as Applicant’s applied-for mark, or for that matter, the same color. *See* Trademark Rule 2.52(a); 37 C.F.R. § 2.52(a). *See also* Trademark Manual of Examining Procedure (“TMEP”) § 807.03(a) (July 2015) (“If the applicant files an application on paper that includes a standard character claim, the applicant may depict the mark in any font style; may use bold or italicized letters; and may use both uppercase and lowercase letters, all uppercase letters, or all lowercase letters, since no claim is made to any *particular* font style, size, or color.”) (emphasis in original). In addition, the literal portions of both marks (**YAB** and **YUB**) are fanciful terms that are similarly constructed. Both are three-letter, monosyllabic terms beginning with the letter “Y” and ending with the letter “B.” The sole distinction is in the vowels “A” versus “U.” And we certainly are not convinced that the marks would be pronounced so differently that consumers would readily distinguish the

⁴ Applicant’s arguments that the **YUB** mark does not appear on a third party’s website, Buy.com, and that the original registrant sold the mark to another are not relevant to the first *du Pont* factor of our Section 2(d) analysis.

marks based on their pronunciation. It is a well-established principle that there is no correct pronunciation of a trademark. *Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1835 (TTAB 2013) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012)); *In re The Belgrade Shoe Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (CCPA 1969). In light of the similar letter pattern of each mark, as aptly put by the Examining Attorney, both marks convey “the same amusing whimsical commercial impression.” 18 TTABVUE 7. Thus, the difference in the spelling and sound of between the two marks is not sufficient to obviate a likelihood of confusion. See *In re Energy Telecomm. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983). Accordingly, the first *du Pont* factor weighs in favor of finding a likelihood of confusion.

Conclusion

In the present case, each of the *du Pont* factors discussed favor a finding of likelihood of confusion. After considering all of the evidence properly of record and arguments pertaining to the relevant *du Pont* likelihood of confusion factors, we find that there is a likelihood of confusion between Applicant’s applied-for and Registrant’s registered mark.

Decision: The Section 2(d) refusal to register Applicant’s mark is affirmed.