

<p><b>This Opinion is Not a Precedent of the TTAB</b></p>
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Mailed: November 14, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re SuperShuttle International, Inc.*

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Serial No. 85765129

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for SuperShuttle International, Inc.

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Before Cataldo, Lykos, and Greenbaum,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

SuperShuttle International, Inc. (“Applicant”) seeks registration on the Principal Register of the mark **MyECar** in standard character format for, as amended, “[t]ransportation services, namely, airport ground, charter, and door-to-door transportation services of passengers by motor vehicles, and not car leasing or reservation services for vehicle rental” in International Class 39.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85765129, filed October 26, 2012, alleging a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

During *ex parte* prosecution, Applicant amended the identification of services to add the exclusionary language “and not car leasing or reservation services for vehicle rental.”

Registration was refused under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark so resembles the following two registered marks owned by Enterprise Rent-A-Car Company that, when used on or in connection with Applicant's identified services, it is likely to cause confusion or mistake or to deceive:

Registration No. 2132926 issued January 27, 1998 for the mark **ECAR** in typed format<sup>2</sup> on the Principal Register pursuant to Section 2(f), for "vehicles leasing services and reservation services for vehicle rental" in International Class 39 and "automobile dealership services" in International Class 42, renewed; and

Registration No. 2130856 issued January 20, 1998 also for the mark **ECAR** in typed format on the Principal Register pursuant to Section 2(f) for "vehicle leasing and rental services and reservation services for the rental and leasing of vehicles" in International Class 39 and "vehicle dealership services" in International Class 42, renewed.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the Request for Reconsideration, the appeal was resumed. For the reasons set forth below, we affirm the refusal to register.

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

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<sup>2</sup> Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure ("TMEP") § 807.03(i) (October 2014).

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). These factors, and the other relevant *du Pont* factors, are discussed below.

Initially, we consider 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) (“*Palm Bay*”). “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) (“*Coach Servs. Inc.*”). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *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.”).

Consistent with these principles, we observe that both Applicant’s and Registrant’s marks are comprised, either in whole or in part, of the term “ECAR.”

Indeed, the only distinction is the presence of the possessive pronoun “my” in Applicant’s mark which is defined as “of, belonging to, made by, or done by me.” *Collins American English Dictionary*, September 17, 2013 Office Action. Thus, the placement of the prefatory pronoun “my” before “ecar” merely serves to reinforce the dominance of “ECAR” by indicating possession of some sort. We therefore agree with the Examining Attorney’s determination that Applicant’s mark is similar in sound, appearance, connotation, and commercial impression to the registered mark. This first *du Pont* factor weighs in favor of finding a likelihood of confusion.

Next we compare Applicant’s and Registrant’s respective services as they are identified in the application and the cited registrations. *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 essentially argues that its amendment to the identification of services to exclude “car leasing or reservation services for vehicle rental” obviates any likelihood of confusion by rendering Applicant’s and Registrant’s services dissimilar.

Applicant’s argument reflects a misunderstanding of the second *du Pont* factor analysis. The respective services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83

USPQ2d 1715, 1724 (TTAB 2007)). *See also On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). The issue here is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).


To show that the involved services are related and may originate from the same source, the Examining Attorney submitted numerous copies of use-based third-party registrations showing that the same entity has registered a single mark for identifying some of the services identified both in the application and the cited registrations. *See, e.g.*, Registration Nos. 1371775, 3629631, 3579262, 3635125, 4046062, 3982389, 3522628, 4095234, and 4297548 (September 17, 2013 Office Action). Copies of use-based, third-party registrations may serve to suggest that the services are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

More compelling is the Examining Attorney's evidence showing numerous third parties offering the same services, in part, as identified in Applicant's application and the cited registrations. For instance, companies such as Avis, Budget, Hertz, Thrifty, Alamo, Payless, Fox Rent A Car, Ace Rent A Car, and U-Save Car & Truck Rental rent cars to customers and also provide airport shuttle bus passenger services. *See* September 17, 2013 Office Action. Another company, Avalon Transportation Service, offers rental or lease car services as well as airport

transfers by sedan. *See* April 8, 2014 Office Action. As the aforementioned evidence demonstrates, it is not uncommon for car rental companies to also provide airport shuttle transportation services under the same mark. This constitutes evidence that consumers may expect to find both Applicant's and Registrant's services as identified in the involved application and cited registrations as emanating from a common source. As such, we agree with the Examining Attorney's determination that both Applicant's and Registrant's services will be marketed to the same prospective consumers and are sufficiently related "such that they could give rise to the mistaken belief that [the services] emanate from the same source." *See Coach Servs., Inc.*, 101 USPQ2d at 1722. Thus, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

We turn now to the sixth *du Pont*, the number and nature of similar marks in use on or registered for similar services. At the outset we observe that Applicant has devoted the majority of its appeal brief to this factor, arguing that because the term "ecar" is at a minimum descriptive, if not generic, Registrant's mark ECAR is entitled only to a narrow scope of protection. In support thereof, Applicant submitted online definitions derived from the *Collins World English Dictionary* of the term "ecar" defined as "a car powered by electricity." August 26, 2013 Office Action Response, Ex. 1. In addition, Applicant relies on the following third-party registrations as further evidence that that Registrant's mark is at best descriptive:

Registration No. 4251757 for the mark **eCars** (standard character format) on the Supplemental Register for "[d]ealerships in the field of electric, hybrid and environmentally friendly vehicles" in International Class 35; and

Registration No. 3576307 for the mark  on the Principal Register for, in relevant part, “[b]us, tramway, trucks, scooters, rail, air, boat and ferry transportation services and warehousing services; rental of motor vehicles; vehicle parking garage services and rental of garage space; vehicle breakdown assistance in the nature of vehicle towing services; information with respect to air, land and water transport services, and with respect to vehicle rental” in International Class 39, under Section 66(a) of the Trademark Act, 15 U.S.C. §1141f(a).<sup>3</sup>

Lastly, to show actual use of the term “ecar” in the marketplace, Applicant made of record trade name use by third-parties. *See, e.g.*, “E Car Inc.,” “E-Car Supplies, Inc.,” “ECAR Center” and “Ecar Rental,” August 26, 2013 Office Action Response. Applicant also submitted a sample of the search results in truncated format for the terms “ecar” and “auto” from the Google search engine showing 803,000 hits. *See* March 18, 2014 Request for Reconsideration.

The dictionary evidence submitted by Applicant is of limited utility because it was obtained from a dictionary of worldwide English, not American English.<sup>4</sup> And although we have considered Applicant's evidence of the third-party registrations, it too is of limited probative value. As we often stated, “[t]he existence of [third-party] registrations is not evidence of what happens in the marketplace or that consumers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion,

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<sup>3</sup> Section 66(a) of the Act, provides for a request for extension of protection of an international registration to the United States pursuant to the Madrid Protocol. *See* 37 C.F.R. § 2.34(a)(5). Use in commerce prior to registration is not required. Section 68(a)(3) of the Trademark Act, 15 U.S.C. §1141h(a)(3). However, after registration, periodic affidavits of use or excusable nonuse are required to maintain a registered extension of protection. Section 71 of the Trademark Act, 15 U.S.C. §1141k.

<sup>4</sup> We observe that the website for *Collins World English Dictionary* allows the user to choose between “English Worldwide” and “American English” definitions. However, Applicant utilized the “English Worldwide” definition in this case.

mistake or to deceive.” *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010). We hasten to add that a single third-party registration for the mark ECAR on the Supplemental Register along with another Section 66(a) registration for a mark with matter which is so distinct (namely the additional word “blue”) is of little persuasive value. In any event, we are not bound by the determinations made by Trademark Examining Attorneys in examining other applications which eventually mature to registration. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

The Google search engine summary results for the query “ecar” and “auto” are of limited probative value too because there is insufficient surrounding text for each result to show the context within which the term “ecar” is used. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (“Search engine results—which provide little context to discern how a term is actually used on the web page that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.”); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006) (listing of Google hits without any context for the hits is irrelevant). Further, the mere fact that the Google search engine retrieved a large number of hits is of minimal probative value. *See In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013) (while Google search engine retrieved over 100,000 results, evidence was of “limited probative value”); *In re BetaBatt Inc.*, 89



USPQ2d 1152, 1153 n.1 (TTAB 2008) (no probative weight given to fact that search using Google search engine retrieved 22,200 hits; further, “hit list” does not corroborate that there are 22,200 relevant references). Lastly, we note that the trade name usage by third parties is of minimal probative value to show that the term “ecar” is generic. *Cf. In re Country Music Ass’n*, 100 USPQ2d 1824, 1829 (TTAB 2011) (evidence that some third-party organizations use the term “Country Music Association” in combination with other descriptive, geographic, or other terms to designate the name of their respective organizations does not constitute clear evidence that the relevant purchasers perceive the phrase as naming the genus of the services at issue).

That being said, it is clear that Registrant's mark ECAR is, at the very least, descriptive in relation to the identified services in the cited registration and has been used as a brand name by some third parties. However, as noted earlier and as acknowledged by Applicant, the cited mark ECAR was registered under Section 2(f).<sup>5</sup> To the extent Applicant seeks to attack the validity of Registrant's ECAR

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<sup>5</sup> Section 2(f) of the Lanham Act provides that “nothing...shall prevent the registration of a mark used by the applicant that has become distinctive of the applicant's goods [or services] in commerce.” 15 U.S.C. § 1052(f). Some courts have explained Section 2(f) as follows:

[U]nlike the first five sections of 15 U.S.C. § 1052 which define the grounds upon which a trademark registration is to be refused, Section 2(f) serves as an exception to a rejection under the provisions of one of the other sections, Section 2(e) (citation omitted). Section 2(f) permits registration of marks that, despite not qualifying for registration in light of Section 2(e), have nevertheless “become distinctive of the applicant's goods in commerce.” Thus, “Section 2(f) is not a provision on which registration can be refused,” ... but is a provision under which an applicant has a chance to prove that he is entitled to a federal trademark registration which would otherwise be refused.

*Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1580, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988) (internal citation omitted).

registrations, such efforts are inappropriate in an *ex parte* context. The presumption of validity that attaches to a registration issued pursuant to Section 2(f) includes a presumption that the registered mark has acquired distinctiveness. Accordingly, we deem this *du Pont* factor neutral.

To the extent that there are any other *du Pont* factors which may be relevant, we treat them as neutral.

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, we find that the Examining Attorney has carried the Office's burden of showing a likelihood of confusion between Applicant's mark **MyECar** and the Registrant's mark **ECAR** for the services identified therein.

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