

<p>This Opinion is Not a Precedent of the TTAB</p>

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Micros Systems, Inc.*¹

Serial No. 85826131

Andrew Roppel of Holland & Hart LLP,
for Micros Systems, Inc.

Odessa Bibbins, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

Before Cataldo, Wellington and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Micros Systems, Inc. (“Applicant”) seeks registration on the Principal Register of
the mark MISTORE (in standard characters) for

Computer software for use in connection with retail point
of sale and inventory management in International Class
9.²

¹ Micros Systems, Inc. acquired the application through mergers from the original applicant, Fry, Inc. after the appeal was filed.

² Application Serial No. 85826131 was filed on January 17, 2013, based upon Applicant’s claim of first use anywhere at least as early as November 4, 2011 and first use in commerce since at least as early as December 21, 2011.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground



that Applicant's mark so resembles the registered mark

“computer e-commerce software to allow users to perform electronic business transactions via a global computer network”³ that, as used in connection with Applicant's goods, it is likely to cause confusion or mistake or to deceive.

The Applicant appealed the final refusal. We reverse the refusal to register.

I. Evidentiary Issue


Before proceeding to the merits of the refusal, we address an evidentiary matter. With its reply brief, Applicant submitted for the first time, two third-party registrations and the file of an abandoned application. Evidence submitted after the filing of an appeal is untimely and will not ordinarily be considered by the Board. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Further, since the evidence was submitted with the reply brief, the Examining Attorney did not have an opportunity to object. Accordingly, the registrations and the file of the abandoned application will not be considered. We note that even if the registrations and the file of the abandoned application had been considered, it would not affect the outcome herein.

³ Registration No. 3630524 issued June 2, 2009. Section 8 Declaration accepted and Section 15 Declaration acknowledged. The description of the mark reads: “The mark consists of a curved line which represents a semicircle on the top and the wording “MYSTORE XPRESS” in stylized letters.

II. Discussion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The similarity or dissimilarity of the marks.

We start our analysis with the first *du Pont* factor, the similarity or dissimilarity of the marks MISTORE (in standard characters) and , which we compare “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 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) (citation omitted). While “the

similarity or dissimilarity of the marks is determined based on the marks in their entirety ... 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.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The cited mark consists of the term **MyStore** bolded and in large-sized font above the term *Xpress*, which is italicized but not bolded and is in a smaller sized font. The mark also includes a minor design above the term **MyStore**, consisting of an arch extending from the letter “y” to the letter “o.” The dominant portion of the cited mark is the term **MyStore**.

While acknowledging the Examining Attorney’s contention that “the letters “I” and “Y” are similar in sound when “Y” is used as a vowel, as here,” Applicant argues that this is “only one element and disregards the different visual appearance.” With respect to the visual appearance, Applicant argues that the marks are not similar because: the registered mark is “a stylized design, whereas the Applicant’s Mark, **mistore**, is standard character.” Appeal Brief, p. 5, 7 TTABVue 6. However, since Applicant applied for the mark in standard character form, Applicant is not restricted to depicting the mark in any particular case or font; indeed, we must consider the possibility that it will be displayed in the same font or stylization as that used by Registrant, including a mixture of upper and lower case lettering. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012) (“Viterra”).

Applicant also argues that the marks are visually different because the registered mark contains an additional word, XPRESS. This argument is not persuasive. It has long been held that

the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical. *See, e.g., China Healthways Inst., Inc. v. Wang*, 491 F.3d 1341, 83 USPQ2d 1123 (Fed. Cir. 2007) (the common word in CHI and CHI PLUS is likely to cause confusion despite differences in the marks' designs); *In re West Point–Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL likely to cause confusion with WEST POINT for similar goods); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (THE LILLY as a mark for women's dresses is likely to be confused with LILLI ANN for women's apparel including dresses); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing)."

In re Mighty Leaf Tea, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (citations revised) (finding likelihood of confusion between Applicant's mark ML in standard character form for personal care and skin care products and cited mark



MARK LEES for skin care products). Here, Applicant's mark MISTORE is the phonetic equivalent of the dominant portion of the cited mark, MYSTORE, and thus, like the terms "LILY" and "LILI" in the marks THE LILY and LILI ANN in the *Lilly Pulitzer* case, may be considered essentially identical.

Next, Applicant argues "that by adding the term XPRESS, the Registered Mark creates a distinct connotation from that of the Applicant's Mark, namely the

impression of speed, ease of use, scaled back features, and other connotations commonly associated with the term ‘express.’” Appeal Brief, p. 5, TTABVUE 7. We are not persuaded by this argument. The dominant portion of the cited mark, MYSTORE is visually similar and aurally identical to Applicant’s mark MISTORE. The addition of the term, “xpress” does not alter the impression created by the marks. In fact, Applicant’s MISTORE software may be viewed as a version of MYSTORE EXPRESS software.

Accordingly we find the marks in their entirety to be similar in appearance, sound, connotation and commercial impression. This finding is not affected by the arguments interposed by Applicant in its reply brief regarding the mark in the cited registration and regarding the intended impression of its mark.

Applicant asserts that the “wording ‘MyStore’ is descriptive of [Registrant’s] goods because it describes the purpose and use of Registrant’s software, which is to enable consumers to operate their own e-commerce stores.” Reply Brief, p. 3, 10 TTABVUE 4. Based thereon, Applicant asserts the “the Cited Mark should only be afforded a narrow scope of protection.” *Id.*

While Applicant has not submitted any evidence to establish that the term “MyStore” is descriptive, Applicant’s argument does persuade us that the term is not arbitrary, which does somewhat narrow the scope of protection afforded the cited mark.

However, Applicant’s speculative arguments that its mark is a coined term that would “not immediately be recognized by potential users as a word or compound

word,” and that “the use of the ‘MI-’ in Applicant’s Mark evokes the name of Applicant, MICROS Systems, Inc.”⁴ are unpersuasive. The issue is the similarity between the marks MISTORE (in standard character form) and MYSTORE EXPRESS (stylized with a design). Applicant’s misspelling of the term “MY STORE” does not render “MI STORE” a “coined term.” Moreover, the intended impression of Applicant’s mark is irrelevant. It is the actual impression of the mark in the application, which is MISTORE, alone in standard character form that we consider.

Accordingly, we find that the first *du Pont* factor favors a holding of likelihood of confusion.

The similiarity or dissimilarity and nature of the goods.

We continue our analysis with the second *du Pont* factor and look at the relationship between the goods at issue. When determining the relationship between the goods,

[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014). Applicant’s goods are identified in its application as: “computer software for use in

⁴ Reply Brief, p. 6, 10 TTABVUE 7.

connection with retail point of sale and inventory management.” The goods in the cited registration are identified as: “computer e-commerce software to allow users to perform electronic business transactions via a global computer network.” Applicant argues that “[o]n the basis of those descriptions alone, the goods and services are distinguishable because e-commerce software and point-of-sale and inventory management software are entirely different types of software with distinct features and functionality.” Appeal Brief, p. 2, 7 TTABVue 3.

To establish a relationship between the goods, the Examining Attorney relies on dictionary definitions of “business transactions,” “point-of-sale,” and “e-commerce,” and information about Applicant’s software, which was discussed in Applicant’s brief. To make the dictionary definitions of record, the Examining Attorney requested that we take judicial notice thereof. See, the following definitions:

Business transaction(s) - A business transaction, in the context of electronic commerce, is any monetary transaction that is made between consumers or businesses via the Internet. Technopedia. Copyright © 2010 – 2014 Janalta Interactive Inc., <http://www.techopedia.com/definition/26415/business-transaction>.

Point-of-sale describes capturing data at the time and place of sale. Point of sale systems use computers or specialized terminals that are combined with cash registers, bar code readers, optical scanners and magnetic stripe readers for accurately and instantly capturing the transaction. **Point of sale systems may be online** to a central computer for credit checking and inventory updating, **or they may be stand-alone machines** that store the daily transactions until they can be delivered or transmitted to the main computer for processing. Your Dictionary, © 1996-2014 LoveToKnow, Corp. All Rights Reserved. Audio pronunciation provided by LoveToKnow, Corp <http://www.yourdictionary.com/point-of-sale>.

E-commerce means business transactions conducted on the Internet. Collins English Dictionaries, Online © Collins 2014. <http://www.collinsdictionary.com>.

To take judicial notice of definitions from online dictionaries, the online dictionaries must exist in printed format or have regular fixed editions. *See In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). There is no evidence that either Technopedia or Your Dictionary exists in printed format or has regular fixed editions. As such, we cannot take judicial notice of these definitions, however, as discussed, *infra*, the acceptance of these definitions does not change the outcome in this matter. The definition of “e-commerce,” on the other hand, while obtained from a dictionary published in the United Kingdom, was obtained from the dictionary’s American English database so we can and do take judicial notice thereof.

The Examining Attorney argues that “electronic business transactions encompass retail point of sale and are similar functions of Applicant’s and Registrant’s software. Examining Attorney’s Brief, p. 6, 9 TTABVue 7. In support of this contention, the Examining Attorney notes that Applicant’s

“MISTORE software is a mobile application designed exclusively for Apple products such as iPhone and iPad which allows large retailers to increase their efficiency by allowing their sales associates to leave the checkout counter and engage customers anywhere on the sales floor. This software allows sales associates to search inventory, ring-up sales, store customer contacts, and order products from any store within the chain, while flowing information through to back office ...’ and it cannot be used by the general public.”

Id. This argument is not persuasive. The definition of e-commerce relied on by the Examining Attorney requires that the business transaction be conducted **on** the

Internet. There is no evidence that Applicant's software relates to any business transaction conducted on the Internet. To the contrary, access and use of the electronic data is restricted to store personal and not the general public. Moreover, the Examining Attorney's conclusion is contradicted by the definition she submitted for a business transaction in electronic commerce, which is a "monetary transaction that is made between consumers or businesses via the Internet."

Accordingly, we find that the sparse record in this case does not establish that the goods are related and this *du Point* factor favors a reversal of the refusal.

The similarity of dissimilarity of the channels of trade and the conditions under which and buyers to whom the goods are sold.

The Examining Attorney argues that "there are no limitations as to channels of trade or classes of purchasers in the identification of goods in Applicant's application, ... it is therefore presumed that Applicant's goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. Examining Attorney's Brief, pp. 6-7, 9 TTABVUE 7-8. However, the Examining Attorney has not submitted evidence showing what are the usual or normal channels of trade for Applicant's goods. Moreover, since the Examining Attorney has not established that Applicant's goods are related to the goods in the cited registration, we cannot presume that the channels of trade for the respective identified goods are either the same or closely related. *See Vitterra* at 1908.

Accordingly, we find these *du Pont* factors to be neutral.

Conclusion.

Having considered all the evidence and argument on the relevant *du Pont* factors, whether specifically discussed herein or not, we find that the differences in the goods outweigh any similarity between the marks at issue and thus, Applicant's mark, MISTORE is not likely to cause confusion with the mark in the cited registration, MYSTORE XPRESS & design.

Decision: The refusal to register Applicant's mark MISTORE is reversed.