

This Opinion is not a  
Precedent of the TTAB

Mailed: May 3, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Happy Hound LLC*  
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Serial No. 86167663  
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James C. Wray,  
for Happy Hound LLC.

Linda A. Powell, Trademark Examining Attorney, Law Office 106,  
Mary I. Sparrow, Managing Attorney.

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Before Quinn, Hightower and Goodman,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Happy Hound LLC (“Applicant”) seeks registration on the Principal Register of  
the mark HAPPY HOUND (in standard characters) for

Retail store services featuring dog and pet products made  
by others in International Class 35.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86167663 was filed on January 16, 2014, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of the application 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



for “Pet boarding services; Pet day care services; Pet hotel services” in International Class 43<sup>2</sup> as to be likely to cause confusion, mistake or deceive.

After the Trademark Examining Attorney made the refusal final, Applicant requested reconsideration and appealed to this Board. The Board remanded the application to the Examining Attorney for consideration of the request for reconsideration, suspending the appeal. The Examining Attorney then withdrew her final Office Action, noting it was premature, considered Applicant's request for reconsideration, and issued a non-final office action. After receiving Applicant's response to the non-final office action, a final office action issued. Applicant again

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<sup>2</sup> Registration No. 4546980. Registered on June 10, 2014. “Hound” and “Training Daycare Boarding Spa” disclaimed. The description of the mark states that “The mark consists of the words ‘Happy Hound’ with a dog wagging its tail between the words ‘Happy Hound’ above the words ‘Training,’ ‘Daycare,’ ‘Boarding,’ ‘Spa’ all in an oval.” Color is not claimed as a feature of the mark.

requested reconsideration, which the Examining Attorney denied, and the appeal was resumed.<sup>3</sup> The case is fully briefed. We affirm the refusal to register.

### I. Applicable Law, Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *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.*, 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). These factors, and the other relevant *du Pont* factors now before us, are discussed below. To the extent that any other *du Pont* factors for which no argument or evidence was presented may nonetheless be applicable, we treat them as neutral.

1. The similarities or dissimilarities between the marks in their entirety, in terms of appearance, sound, connotation and commercial impression

We first compare the marks “in their entirety as to appearance, sound, connotation and commercial impression” to determine the similarity or dissimilarity between them. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En*

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<sup>3</sup> The Examining Attorney issued a premature final refusal on October 6, 2014 and Applicant filed a request for reconsideration on March 20, 2015. The final Office Action issued on November 20, 2015 and Applicant filed its second request for reconsideration on May 19, 2016.

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) (quoting *Leading Jewelers Guild, Inc. v. LJOW 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 Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

Applicant’s mark is the standard character mark HAPPY HOUND. The cited registered mark is the composite shown below.



When evaluating a composite mark containing both words and a design, the verbal portion of the mark is typically the one most likely to indicate the origin of the goods or services to which it is affixed because it is the portion of the mark that consumers would use to refer to or request the goods or services. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012); *see also In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1593-95 (TTAB 1999). We find that the dominant portion of the

cited mark is the phrase HAPPY HOUND, which is identical to the entirety of Applicant's mark. Notwithstanding the fact that HOUND is disclaimed in Registrant's mark, we accord the phrase HAPPY HOUND more weight here due to its place of prominence as the first part of the cited mark and its display in large letters relative to the descriptive wording below. *See Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”); *see also Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (on encountering the marks, consumers will first notice the identical lead word).

Because we consider the marks in their entireties, we also recognize that the cited mark contains the additional disclaimed terms TRAINING DAYCARE BOARDING SPA, which are descriptive or generic for Registrant's services. Given their placement in much smaller letters below HAPPY HOUND, we find this wording to contribute far less to the cited mark's overall commercial impression than the phrase above it, HAPPY HOUND. The cited mark also incorporates an oval background carrier and an image of a dog. The oval carrier design has very little source-identifying significance and the design of the dog reinforces the meaning of the descriptive term HOUND.

We find the marks are substantially similar. HAPPY HOUND, the dominant feature of Registrant's mark, is identical to Applicant's mark HAPPY HOUND in terms of appearance, sound, and connotation. In comparing the marks' overall

commercial impressions, we find that any dissimilarity that may result from the presence in Registrant's mark of the design and the descriptive or generic disclaimed words TRAINING DAYCARE BOARDING SPA is greatly outweighed by the similarity between the marks which results from the presence in both marks of the term HAPPY HOUND. The *du Pont* factor of similarity of the marks favors a finding of likelihood of confusion.

2. The similarity or dissimilarity and nature of the services and similarity or dissimilarity of trade channels

We must make our determinations under the second and third *du Pont* factors based on the services as they are identified in the application and registration. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). When analyzing the similarity of the services, it is not necessary that the services of the parties be similar or even competitive to support a finding of likelihood of confusion. *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (products need not be identical or even competitive to find a likelihood of confusion). Rather, "likelihood of confusion can be found if the respective 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.*, 101 USPQ2d at 1722 (quoting *7-Eleven*, 83 USPQ2d at 1724). The issue is whether there is a likelihood of confusion as to the source of the services, not whether purchasers would confuse the services. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

As noted above, the services identified in the registration are “pet boarding services; pet day care services; pet hotel services” and the services identified in the application are “retail store services featuring dog and pet products made by others.” In order to demonstrate the relatedness of the services, the Examining Attorney has made of record excerpts from various websites showing that services such as Applicant’s and the Registrant’s are advertised and offered together. The websites include the following:

petco.com provides pet grooming services as well as supplies for dogs, cats and small animals. November 20, 2015 Office Action pp. 5-6.

thedogstop.net offers boarding, grooming and retail store for pet supplies. November 20, 2015 Office Action pp. 11-12.

morganspaws.com offers grooming, boarding, dog day care and a pet store. November 20, 2015 Office Action p. 14.

suitepaws.com offers pet boarding, dog daycare, grooming and pet store. November 20, 2015 Office Action p. 17.

poespetdepot.com offers pet food, a bakery for dog treats and dog day care center. November 20, 2015 Office Action p. 21.

yourdogsbestfriends.com offers services which include a store for dog products as well as daycare, boarding, and grooming. November 20, 2015 Office Action p. 28.

petsmart.com offers pet boarding, grooming, and pet products. October 6, 2014 Office Action, p. 6.

bevanspetsupply.com offers dog grooming, boarding, daycare, holistic pet foods, treats and supplies. October 6, 2014 Office Action p. 8.

Cabrillo Pet Hospital offers a pet store, pet boarding facility and dog day care. October 6, 2014 Office Action p. 9.

The evidence shows that retail stores featuring dog and pet supplies, dog day care and dog boarding services may originate from the same source. Not only does this evidence establish a relationship between Applicant's and Registrant's services, but it also establishes that the channels of trade overlap. That is, the third-party websites show that Applicant's and Registrant's services are advertised and offered to the same consumers at the same time and, therefore, the services at issue move in the same channels of trade.

Applicant argues that Applicant's trade channels are in Northern Virginia while Registrant is located in Oakland, California. As stated before, we look to the registration itself, not to extrinsic evidence about Registrant's services, customers or channels of trade. Because there are no geographic restrictions or limitations as to the channels of trade in the identification of services in either the application or the cited registration, we must presume that the services move through all the usual channels of trade and are offered to all normal potential purchasers throughout the United States. *See Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (citing *Hewlett Packard Co. v. Packard Press, Inc.*, 62 USPQ2d at 1005)); *In re Midwest Gaming & Ent. LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).



In view of the above, the *du Pont* factors of the similarity of the services and the channels of trade favor a finding of likelihood of confusion as to the cited registration.

3. The number and nature of similar marks in use on similar services

This *du Pont* factor requires us to consider evidence pertaining to the number and nature of similar marks registered and in use on similar services. “The purpose of ... introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’” *Palm Bay*, 73 USPQ2d at 1691.

Applicant has identified third-party registrations<sup>4</sup> with HAPPY HOUND or a variant thereof:

Reg. No. 3919621 HAPPY HOUNDS for Class 28: toys.<sup>5</sup>

Reg. No. 3203474 HAPPIHOUND for Class 16: Coloring books, address books, appointment books, notebooks, binders, bookends, bookmarks, trading cards, post cards, posters, calendars, paper gift wrap, paper gift wrap bows, paper party decorations, paper party bags, stickers, printed paper invitations, writing paper, memo pads, stationery notes and note pads containing temporary adhesive on one side of the sheets for attachment to surfaces, removable decals, temporary tattoos, appliqués in the form of decals, photograph and scrapbook albums, diaries, writing instruments, namely pens, pencils, markers, and chalk, pen and pencil cases, greeting cards, stationary, envelopes, paperweights, erasers.<sup>6</sup>

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<sup>4</sup> One of the registrations identified by Applicant, Reg. No. 3528313 (*see* March 20, 2015 Request for Reconsideration p. 11; April 23, 2014 Office Action pp. 3-5), is cancelled and we do not consider it. *In re Hartz Hotel Servs. Inc.*, 102 USPQ2d 1150, 1152 n.5 (TTAB 2012). In connection with the Section 2(d) refusal, the Examining Attorney cited these same registrations (April 23, 2014 Office Action pp. 6-10), but they were withdrawn by the Examining Attorney after Applicant traversed the refusal. March 20, 2015 Response to Office Action pp. 9-10; October 6, 2014 Office Action p. 1.

<sup>5</sup> March 20, 2015 Request for Reconsideration p. 9; April 23, 2014 Office Action pp. 9-10.

<sup>6</sup> March 20, 2015 Request for Reconsideration p. 10; April 23, 2014 Office Action pp. 6-8.

However, we do not find these registrations particularly probative as they are not for services similar to Registrant's, but rather recite goods that do not relate to the services at issue herein. Thus, registration by two third parties of variations of HAPPY HOUND for unrelated goods does not convince us that the mark in the cited registration should be afforded such a narrow scope of protection as to allow registration of a confusingly similar mark for related services. *See, e.g., In re Sela Prods., LLC*, 107 USPQ2d 1580, 1588 (TTAB 2013) (two third-party registrations for marks similar to Registrant did not demonstrate weakness because they were for unrelated goods).

Applicant also has relied on forty-four third-party websites to show instances of HAPPY HOUND and variations thereof.<sup>7</sup> Thirty-one of these websites show use of HAPPY HOUND in connection with one or more of the following services: dog day care, boarding, grooming, pet sitting, dog walking and dog training.<sup>8</sup> Given the evidence regarding third-party uses, consumers are likely to be accustomed to encountering the phrase HAPPY HOUND in relation to Registrant's services. This fact tends to show that Registrant's mark is relatively weak in connection with dog boarding, grooming, training and daycare and entitled only to a restricted scope of protection. *See In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996) (multiple sources corroborate that third-party use is extensive). As such, Registrant's

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<sup>7</sup> Applicant submitted evidence of 49 websites using the term. Five of these websites that identify both related and unrelated services or goods originating from Canada or the United Kingdom have been omitted from the total above.

<sup>8</sup> For related services, we have omitted three foreign uses from this total number of websites.



mark is not entitled to such a broad scope of protection that it is a bar to the registration of every mark comprising, in whole or in part, the phrase HAPPY HOUND; it will only bar the registration of marks “as to which the resemblance to [Registrant’s mark] is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two.” *Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff’d*, 415 Fed. Appx. (Fed. Cir. 2010). We find this *du Pont* factor to be neutral.

4. The conditions under which and buyers to whom sales are made

The fourth *du Pont* factor considers “‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 177 USPQ at 567. Although Applicant maintains that purchasers of Applicant’s and Registrant’s services are sophisticated, the services are offered to the general public, and there is nothing in the record to indicate that these consumers are particularly sophisticated with respect to such services. Even assuming that Applicant’s and Registrant’s services may involve a careful purchase after exercising due diligence, it is settled that the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion, especially in cases such as the instant one involving highly similar marks and related services. *See, e.g., Stone Lion Capital Partners, L.P.*, 110 USPQ2d

at 1163; *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Therefore, we find this *du Pont* factor neutral.

#### 5. Fame

Applicant's arguments regarding the purported lack of fame of Registrant's mark are of little consequence. In an *ex parte* appeal the "fame of the mark" factor is normally treated as neutral because the record generally includes no evidence as to fame. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (noting that the absence of evidence as to the fame of the registered mark "is not particularly significant in the context of an *ex parte* proceeding"). We find this to be the case here. Further, although evidence of fame strongly supports a finding of likelihood of confusion, its absence only rarely suggests that confusion is not likely. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205.

#### II. Conclusion

After considering all of the evidence of record as it pertains to the relevant *du Pont* factors, including all of Applicant's arguments and evidence, even if not specifically discussed herein, we find that confusion is likely because the marks are similar, the services are related, and the trade channels are the same. The remaining *du Pont* factors are neutral.

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