

This Opinion is not a
Precedent of the TTAB

Mailed: August 27, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Thriveon Inc.

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Serial No. 86178339

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Tyson B. Benson of Advent, LLP,
for Thriveon Inc.

Evin L. Kozak, Trademark Examining Attorney, Law Office 116,
Christine H. Cooper, Managing Attorney.

—
Before Seeherman, Kuhlke and Wellington,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Thriveon Inc. has appealed from the final refusal of the Trademark Examining Attorney to register THRIVEON in standard characters for “computer services, namely, remote and on-site management of information technology (IT) systems of others” in Class 42.¹ Registration was refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with

¹ Application Serial No. 86178339, filed January 29, 2014, asserting first use as early as April 1, 2012 and first use in commerce as early as May 1, 2012.

Registration No. 4104397 for the mark (hereafter THRIVE NETWORKS) and services shown below:²



Information technology technical support services and consulting, namely, troubleshooting in the nature of diagnosing of computer hardware and software problems; planning and development of electronic communications networks; computer monitoring service which tracks software performance, performs periodic maintenance and provides reports and alerts concerning such performance; computer programming for others; computer software development, engineering, and software maintenance of computer projects; data encryption services; leasing computer facilities for the location of computer servers and related networking and communication equipment, namely, storage servers, Web servers, disk arrays, tape backup equipment of others; integration of computer systems and networks; computer network design for others; computer software design for others; remote computer data back-up services; consulting in the field of information technology; computer disaster recovery planning; remote online back-up services for computer data. (Class 42).

The mark is described in the registration as consisting “of an arch over the word ‘THRIVE’ followed by the word ‘NETWORKS’.” Color is not claimed as a feature of the mark; exclusive right to use of the word NETWORKS was disclaimed.

We affirm the refusal to register.

Applicable Law

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).

² Issued February 28, 2012.

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).

With respect to the services, the Examining Attorney has submitted evidence to show the services that would fall under the general category of management of information technology systems, which are Applicant's identified services. "Information technology management (IT management) is the process whereby all resources related to information technology are managed," and "includes tangible resources like networking hardware, computers and people, as well as intangible resources like software and data."³ It includes "software development, change management, network planning and tech support," *id.*, as well as "technical diagnostics/troubleshooting, configuration management, system repair management and generation of management reports."⁴ These services encompass the services listed as part of the Registrant's identified information technology technical support services and consulting, including "troubleshooting in the nature of diagnosing of computer hardware and software problems." Thus, we treat the services as being, in

³ Technopedia, "Information Technology Management (IT Management)," www.techopedia.com, May 6, 2014 Office action at 9.

⁴ Gartner, IT Glossary, "IT management services," www.gartner.com, May 6, 2014 Office action at 10.

part, legally identical. Applicant does not dispute this; in fact, Applicant does not even address this *du Pont* factor.

Because the services are, in part, legally identical, and the identifications contain no restriction as to the channels of trade, they are deemed to move in identical channels of trade. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (absent restrictions in the application and registration, legally identical goods and services are presumed to travel in the same channels of trade to the same class of purchasers). Applicant acknowledges that the purchasers of its services and those of the Registrant are the same:

The likely purchasers of Applicant's computer services and Registrant's ... computer services would be Chief Information/Technical Officers or persons sufficiently knowledgeable about computer services ... to select, implement, and maintain the computer services on behalf of their company.

Brief, 8 TTABVUE 17. Thus, the *du Pont* factors of the similarity of the services and channels of trade weigh in favor of a finding of likelihood of confusion.

We now turn to a consideration of the marks, keeping in mind that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We compare the marks in terms of 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 (Fed. Cir. 2005). We are also guided by the well-established principle that, in articulating reasons for

reaching a conclusion on the issue of likelihood of confusion, 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 entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Both marks begin with the word THRIVE; as the first word, it is a prominent feature of the marks. *See Palm Bay Imports*, 73 USPQ2d at 1692. We recognize that in both marks there is no space between THRIVE and the following word, but Applicant's mark would still be understood as THRIVE ON because both words are common words that would be immediately apparent despite their being run together. *See In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (the compression of the words URBAN HOUSING into URBANHOUSING still conveys the commercial impression of two words, and consumers would recognize the mark as consisting of the separate elements URBAN and HOUSING); *In re Planalytics Inc.*, 70 USPQ2d 1453 (TTAB 2004) (the absence of the space in GASBUYER does not create a different meaning or perception of the term). As for the Registrant's mark, because of the manner in which it is displayed, with THRIVE being in bold type, it, too, would be understood as THRIVE NETWORKS. The word NETWORKS, which has been disclaimed, is descriptive of the Registrant's services, which include "planning and development of electronic communications networks," "integration of computer systems and networks" and "computer network design." As for the design element in the Registrant's mark, the arch acts almost as a background geometric

figure that, if anything, serves to emphasize the word THRIVE. For the foregoing reasons, it is appropriate to give more weight to the word THRIVE in the Registrant's mark, as it is the portion with the greater source-indicating significance. We cannot say that THRIVE is the dominant part of Applicant's mark, as the mark as a whole, THRIVE ON, would appear to consumers as a phrase. Nonetheless, THRIVE is a very noticeable part of the mark, and gives the marks a similarity in appearance.

With respect to pronunciation, the word THRIVE is likely to be pronounced identically in both marks, and this gives the marks a similarity in sound. We note Applicant's assertion, supported by the affidavit of its Chief Executive Office, that its mark is pronounced "THRIV-E-ON." However, "there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner." *Viterra*, 101 USPQ2d at 1912. Since consumers will recognize THRIVEON as made of up of the two words THRIVE and ON, they are likely to pronounce it in the normal manner for these words.

The meanings and commercial impressions of the marks are also similar because of the word THRIVE. As the Examining Attorney argues, brief, 10 TTABVUE 12, consumers are likely to view THRIVEON as a slogan indicating services emanating from the same company offering the same services under the mark THRIVE NETWORKS. To be clear, we acknowledge that there are some differences between the marks. However, these differences do not distinguish the marks; Applicant's mark, when used for the same services as the Registrant's mark, will be viewed as a

variation of the mark THRIVE NETWORKS, not as a mark indicating a separate source for the services.

We have taken into consideration Applicant's argument that THRIVE is a weak element, and that the presence of this term in both marks is not a sufficient basis on which to find a likelihood of confusion. The support for this argument is the presence of the following three third-party "THRIVE" registrations on the Register:⁵

THRIVE METRICS for "design and development of computer software for analyzing and presenting real-time, integrated business management intelligence from various company sources such as emails[,] social media, customer relationship management (CRM), call logs, instant messaging, technical support and project management technologies all in an easy-to-understand user interface for use in developing computer software;⁶

WE THRIVE ON MAKING CUSTOMERS HAPPY for "computer services, namely, domain forwarding services; computer services, namely, interactive hosting services which allow the user to publish and share their own content and images online; domain name search services, namely, conducting online computerized searches for the availability of domain names; hosting internet sites for others; hosting of digital content on the Internet; hosting of web sites; hosting websites on the Internet; maintenance of websites and hosting on-line web facilities for others; online computer services, namely, providing spam filtering services to protect websites and online applications and from receiving unsolicited messages; web site hosting services;⁷ and

⁵ In his brief the Examining Attorney points out that the submission of a list of third-party registrations does not make such registrations of record, although the Examining Attorney has not objected to our consideration of the registrations. 10 TTABVUE 13. Applicant first submitted this list, which includes the mark, registration number and issue date, goods and services, and registrant, with its response to the first Office action on July 24, 2014, and repeated it again with its request for reconsideration filed January 20, 2015. In responding to these submissions, the Examining Attorney never advised Applicant that the submission was not acceptable to make the registrations of record. Therefore, any objection to the registrations is deemed waived, and we have considered the information provided about the registrations. *See* TBMP § 1208.02.

⁶ Registration No. 4394834.

⁷ Registration No. 4509015.

THRIVE for “computer services, namely, creating an on-line community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in social networking.”⁸

Third-party registrations can be used to show the sense in which a mark is used in ordinary parlance. *Juice Generation, Inc. v. GS Enterprises LLC*, __F.3d__, 115 USPQ2d 1671, 1675, No. 2014-1853 (Fed. Cir. July 20, 2015). Even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used.” *Id.*, quoting *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976). In the present case, the fact that three third parties have adopted marks that contain the word THRIVE are not sufficient to show that THRIVE has a particular significance for services in the computer field. Further, the services in these registrations, while generally described as computer services, are very different from the services in Applicant’s application and the cited registration. Certainly we cannot conclude from these third-party registrations that consumers would distinguish the marks THRIVEON and THRIVE NETWORKS based on the ending ON in Applicant’s mark and the descriptive word NETWORKS and the non-distinctive design in Registrant’s mark.

Accordingly, we find that the first *du Pont* factor of the similarity of the marks favors a finding of likelihood of confusion, and the scope of protection to be accorded

⁸ Registration No. 3947412.

the cited registration extends to prevent the registration of the similar mark THRIVEON for legally identical services.

The final *du Pont* factor discussed by Applicant is the conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing. Applicant asserts, as previously noted, that the purchasers of Applicant’s and the Registrant’s services would be Chief Information/Technical Officers or persons sufficiently knowledgeable about computer services to select, implement and maintain the computer services. Brief, 8 TTABVUE 17. Applicant also asserts that those making purchasing decisions are professionals and specialists who would exercise care, and that the decision to purchase would be made only after careful and due consideration of the services offered. *Id.* We accept, based on the identifications, that the involved services would be purchased with care and by consumers who would have some knowledge of the subject matter. However, even though this *du Pont* factor favors Applicant, it is not sufficient to outweigh the similarity of the marks and the legal identity of the services. Even if purchasers would be aware of the differences in the marks, as previously discussed, they are likely to view the marks as being variations of each other, indicating origin of the services in a single source, rather than to view the differences as indicating separate sources of the services.

These are the only *du Pont* factors for which there is evidence or argument. To the extent any other factors are relevant, we treat them as neutral.

In view of the legal identity of the services and channels of trade, and the similarity of the marks, we find that Applicant's mark THRIVEON for its identified services is likely to cause confusion with the mark THRIVE NETWORKS in the cited registration.

Decision: The refusal to register Applicant's mark THRIVEON is affirmed.