

This Opinion is not a
Precedent of the TTAB

Mailed: September 28, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Ledwick Enterprises, LLC
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Serial No. 86190311
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Matthew H. Swyers of The Trademark Company,
for Ledwick Enterprises, LLC.

Linda E. Blohm, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Kuhlke, Kuczma and Adlin,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Ledwick Enterprises, LLC (“Applicant”) seeks registration on the Principal Register of the mark CREATIVE GIG (in standard characters) for

Operating on-line marketplace for hiring creative professionals on a contract basis in International Class 35.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the

¹ Application Serial No. 86190311 was filed on February 11, 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.

ground that Applicant's mark is merely descriptive of Applicant's identified services. In addition, the Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) on the ground that Applicant's mark, when used in connection with the identified services, so resembles the registered marks GIG² and GIGS³ (both in standard characters) for "Operating on-line marketplaces for sellers of goods and/or services," in International Class 35, owned by the same party, as to be likely to cause confusion, mistake or to deceive.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal under Section 2(e)(1) and reverse the refusal under Section 2(d).

Mere Descriptiveness

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Commissioner*, 252 U.S. 538, 543 (1920) ("A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark.")). *See also In re*

² Registration No. 4220143, registered on October 9, 2012.

³ Registration No. 4270491, registered on January 8, 2013.

TriVita, Inc., 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). The determination of whether a mark is merely descriptive must be made “in relation to the goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. *In re Phoseon Tech., Inc.*, 103 UPQ2d 1822, 1823 (TTAB 2012); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *Oppedahl & Larson LLP*, 71 USPQ2d at 1371. However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services. *See generally In re Colonial Stores Inc.*, 394 F.2d

549, 157 USPQ 382 (CCPA 1968). *See also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983). Finally, to the extent there is any doubt on this issue, it must be resolved in favor of Applicant. *In re Intelligent Medical Systems Inc.*, 5 USPQ2d 1674, 1676 (TTAB 1987) (“where reasonable men may differ, it is the Board’s practice to resolve the doubt in applicant’s favor and publish the mark for opposition”).

The Examining Attorney argues that the term CREATIVE GIG is merely descriptive of Applicant’s services because the identified “online marketplace will feature creative professionals for hire for a specific project and/or for a specific amount of time, i.e., a GIG.” Ex. Att. Br., 7 TTABVUE 9.

GIG is defined as “a piece of work that you do for money, especially if you are self-employed.”⁴ In addition, the Examining Attorney submitted printouts from third-party websites in which the word “gig” is used to describe piecework or work for hire. A few examples are set out below:

The Gig Economy ... Now that everyone has a project-to-project freelance career, everyone is a hustler. ... Gigs: a bunch of free-floating projects, consultancies, and part-time bits and pieces they try and stitch together to make what they refer to wryly as “the Nut” – the sum that allows them to hang on to the apartment, the health-care policy, the baby sitter, and the school fees.;⁵

Generation X Finance ... Are you part of the gig economy?
... When most people think of people who work gigs, images of musicians and freelancers are the first to pop

⁴ MACMILLAN DICTIONARY (www.macmillandictionary.com 2014), May 21, 2014 Office Action, TSDR p. 5.

⁵ (www.thedailybeast.com), May 21, 2014 Office Action, TSDR p. 7.

up. But believe it or not, many more seemingly regular folks are working gigs these days.⁶ and

An excerpt from Applicant's website explains that Creative Gig is "The Marketplace for Creative Freelancers"⁷ and encourages people to "sign up today for early access to a better way to work as a Creative Freelancer."⁸

The record also includes a handful of third-party registrations set forth below that include the word "gig" in the mark, relied on to provide a sense of how the USPTO views the term:

Reg. No. 3836957, issued August 24, 2010, for the mark GIG ALERT for "online electronic newsletters delivered by email in the field of recruiting, placement, staffing and career networking services" registered under Section 2(f) based on acquired distinctiveness;⁹

Reg. No. 3830119, issued August 10, 2010 for the mark  for "promoting the concerts of others, arranging personal appearances by persons working in the fields of film, music, television, entertainment and sport";¹⁰ and

Reg. No. 3037914, issued January 3, 2006, for the mark SOLOGIG for "providing online personnel recruitment, personnel management information and job search information."¹¹

⁶ (<http://genxfinance.com>) May 21, 2014 Office Action, TSDR p. 12.

⁷ (www.creativegig.com) May 21, 2014 Office Action, TSDR p. 21.

⁸ (www.creativegig.com) November 6, 2014 Response, TSDR p. 31.

⁹ November 24, 2014 Office Action, TSDR p. 4.

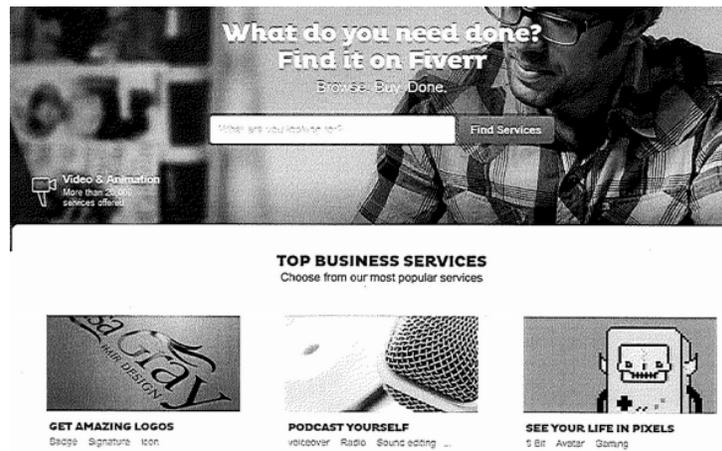
¹⁰ November 6, 2014 Response, TSDR p. 38.

¹¹ November 6, 2014 Response, TSDR p. 40.

In response to the refusal, Applicant submitted the declaration of Mr. Dann Ledwick, Applicant’s CEO and founder, accompanied by printouts from Applicant’s and Registrant’s respective websites. One of the listings on Applicant’s website is from a graphic design company that has a column listing “NEW GIG” and “SHOP SECTION GIGS.”¹²



Registrant’s website offers various business services, including making logos, podcasting and creating avatars:



The declaration also includes search results on the word “gig,” all showing the word “gig” used in connection with music or computer memory and a Wikipedia

¹² November 6, 2014 Response, TSDR p. 32.

excerpt for “Gig (music).”¹³ Applicant argues that the word GIG has “multiple potential meanings, and the average consumer could interpret the mark as a reference to a wide range of things.” App. Br., 7 TTABVUE 11.

As is well established, we must view the meaning of the proposed mark, not in the abstract, but in connection with the services consisting of providing an online marketplace for hiring creative professionals. The only relevant meaning is “a piece of work done for money” on a contract basis, including music gigs. Similarly, the word “creative” directly describes the subject matter of the services identified as “hiring creative professionals.” The combination does nothing to diminish the immediacy of meaning of the individual words when a consumer is using Applicant’s services the meaning CREATIVE GIG directly describes what is being offered, a creative gig, and what is being sought, a creative gig. In any event, “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Chopper Industries*, 222 USPQ 258, 259 (TTAB 1984); *see also, In re IP Carrier Consulting Group*, 84

¹³ Applicant attached to its brief the following dictionary definition for the word “gig”:

something that whirls or is whirled: a *obsolete*: top, whirligig b:
a 3-digit selection in a numbers game : a person of odd or
grotesque appearance.

We accept this definition into the record. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). As to the remaining pages ostensibly from Wikipedia, while the Examining Attorney indicated she did not object to them, the pages are blank and add nothing to the record.

USPQ2d 1028, 1034 (TTAB 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

In view thereof, the term CREATIVE GIG is merely descriptive of Applicant's "operating on-line marketplace for hiring creative professionals on a contract basis" services. In making this determination, we do not rely on the three third-party registrations as they do not reveal a specific Office approach to the word "gig." We do note that GIG ALERT is registered under Section 2(f), indicating GIG was considered merely descriptive, and the other two marks, STREET GIGS and design and SOLOGIG, are unitary marks combining the word GIG with other elements. These third-party registrations do, however, show the allowance of other GIG marks for arguably similar services.

Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Further, "[a]lthough confusion, mistake or deception about source or origin is the usual issue posed under Section 2(d), any confusion made likely by a junior user's mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship, affiliation or

connection.” *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1429 (TTAB 1993); *see also Majestic*, 65 USPQ2d at 1205 (“...mistaken belief that [a good] is manufactured or sponsored by the same entity ... is precisely the mistake that Section 2(d) of the Lanham Act seeks to prevent”).

Relatedness of the Services, Channels of Trade, Classes of Consumers

We first consider the services, channels of trade and classes of consumers. We must make our determinations under these factors based on the services as they are identified in the registration and application. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). 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 services] emanate from the same source.” *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) *quoting 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007).

Applicant’s services, “operating on-line marketplace for hiring creative professionals on a contract basis,” are encompassed by the Registration’s more

broadly worded services “operating on-line marketplaces for sellers of goods and/or services.” Registrant’s “sellers of ... services” would include “hiring creative professionals on a contract basis.” Thus, the services are legally identical. In view thereof, the *du Pont* factor of the similarity of the services weighs in favor of a finding of likelihood of confusion.

In addition, because the services are legally identical and the identification of services in the cited registration is not limited to any specific channels of trade, we presume an overlap in trade channels and classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board “was entitled to rely on this legal presumption in determining likelihood of confusion”).

Applicant’s attempt to distinguish the services and channels of trade impermissibly reads a limitation into the registration. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (registrant’s goods may not be limited by extrinsic evidence or argument). The identification of services in the registration does not limit the channels of trade in any way, nor does it exclude creative professionals from its broad identification of operating an online marketplace for sellers of goods and/or services.

Applicant argues, without evidentiary support, that purchasers of Applicant’s services would be sophisticated. At minimum these services would not be considered impulse purchases, but there is nothing in the record to understand the level of care such purchases would entail and we deem this *du Pont* factor neutral in our analysis.

Similarity/Dissimilarity of the Marks

We consider the marks CREATIVE GIG and GIG¹⁴ and compare them “in their entireties 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 difference between the marks is the addition of the word CREATIVE at the beginning of Applicant’s mark. Often the first part of a mark is most likely to be impressed upon the mind of a purchaser and remembered. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). In addition, when the only common element between marks is weak because it is merely descriptive or highly suggestive, the addition of other material may be sufficient to distinguish the marks. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (CAPITAL CITY BANK for banking and financial services not confusingly similar to CITIBANK for banking and financial services); *In re Shawnee Milling Company*, 225 USPQ 747 (TTAB 1985) (GOLDEN CRUST for flour not confusingly similar to ADOLPH’S GOLD’N CRUST for coating and seasoning for poultry, fish and vegetables). Registrant’s mark is entitled to the

¹⁴ We focus on Opposer’s registration for the typed mark GIG for “Operating on-line marketplaces for sellers of goods and/or services” because if we do not find a likelihood of confusion with that mark and its associated services, then there would be no likelihood of confusion with the mark GIGS in the other cited registration. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

presumptions under Section 7(b) of the Trademark Act and may not be considered merely descriptive; however, as shown above, the term GIG is, at minimum, highly suggestive of services that provide an online marketplace to buy and sell services, that is, to buy and sell gigs. Confusion is unlikely when marks are of such non-arbitrary nature that the public easily distinguishes slight differences in the marks under consideration. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 182 USPQ 108, 110 (CCPA 1974). *See also Sure-fit Products Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295 (CCPA 1958) (where a party has a weak mark, competitors may come closer to the mark than would be the case with a strong mark without violating the party's rights; marks SURE-FIT and RITE-FIT, both for slip-covers, held not confusingly similar).

In conclusion, we find that, despite the legal identity of the services and the overlap in trade channels and customers, the marks are sufficiently dissimilar in view of the very weak nature of the common element GIG. *See In re Box Solutions Corp.*, 79 USPQ2d 1953 (TTAB 2006) (BOX SOLUTIONS not confusingly similar to BOX and design in view of weakness of BOX).

Decision: The refusal to register Applicant's mark CREATIVE GIG as merely descriptive under Section 2(e)(1) is affirmed. The refusal to register under Section 2(d) based on likely confusion is reversed.