

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ProBleu, Inc.

Serial No. 88310811

Amy A. Rollins of Brannon Sowers & Cracraft PC
for ProBleu, Inc.

Max Faucette, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

Before Cataldo, Wellington, and English,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

ProBleu, Inc. (“Applicant”) seeks registration on the Principal Register of the mark PROBLEU in standard characters for the following services, as amended, in International Class 42:

Computer information security services, namely, remote monitoring of client servers and computer systems for the purpose of detecting, troubleshooting, and resolution of malware threats and security weaknesses; computer and

computer network disaster recovery services; computer network support, namely, off-site maintenance of enterprise computer networks and software; technical consulting services relating to enterprise information security, and cloud integration.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark:



for services that include:

“computer hardware maintenance and repair consulting services” in International Class 37; and

“computer software consulting services; computer virus protection services; providing information about the implementation and use of computer hardware and software; ... technical support services, namely, on-line help desk services for IT infrastructure support, data backup services, virus spyware removal services, and computer security consultancy ...” International Class 42.²

After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed. The Examining Attorney denied the request for reconsideration and the appeal proceedings resumed. The appeal has been briefed.

For the reasons set forth below, we affirm the refusal to register.

¹ Application Serial No. 88310811 was filed February 21, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of first use of the mark in commerce on August 31, 2010.

² Registration No. 4992022 issued July 5, 2016. The mark is described in the registration as “consist[ing] of the letters ‘BLUEPRO’, the ‘O’ displayed as two sets of three arcs, each set beginning as one arc graduating and separating into three arcs, each arc ended by a circle. This design represents electrical circuits.” Color is not claimed as a feature of the mark.

I. Evidentiary Objection

The Examining Attorney objects to evidence, consisting of printouts from 4 third-party websites, attached to Applicant's appeal brief.³ Applicant did not previously introduce these materials as evidence during the prosecution of the application.

The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board and exhibits attached to a brief that were not made of record during examination are untimely, and generally will not be considered. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also In re Jimmy Moore, LLC*, 119 USPQ2d 1764, 1766-67 (TTAB 2016) (excluding as untimely the first page of the applicant's patent submitted with its appeal brief); *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1080 (TTAB 2010) (evidence submitted with applicant's appeal brief that had not been previously submitted is untimely and not considered); *In re Trans Continental Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002) (materials from web search engines submitted with appeal brief not considered); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 1203.02(e) and 1207.01 (2020).

³ 8 TTABVUE 8 (Examining Attorney's objection); 6 TTABVUE 27-38 (objected-to materials attached to Applicant's appeal brief). The Examining Attorney specifically objected to the "screenshots from MorefieldCommunications.com, TFE.com, BlueMogulEnterprise.com, and FultonMaySolutions.com," but did not object to Applicant's submission of the definition of the word "blue" (from the online Oxford Learner's Dictionaries website), 6 TTABVUE 24-25, or a printout involving the pronunciation of the French word "bleu" (from the EasyPronunciation.com website), *id.* at 26. Accordingly, these latter, non-objected-to materials are considered.

Accordingly, the objected-to materials (see Note 3) and Applicant's argument relying on these materials will not be considered.

II. Likelihood of Confusion

Our determination under Section 2(d) involves 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) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods and/or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”).

A. Services Are Legally Identical or Very Closely Related; Trade Channels

We begin our analysis with the *DuPont* factor that involves a comparison as to the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. It is “not necessary that the goods [or services] be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs., 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)). “[L]ikelihood of confusion can be found ‘if the respective

goods [or 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.” *Id.*

In addition, we need not find similarity with respect to all of the services described in the application; rather, similarity as to any of the services identified in the application and registration will suffice as a basis for finding the respective services to be similar for purposes of this *DuPont* factor. See *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Here we find the services are legally identical because, as the Examining Attorney points out, some of Registrant’s computer-related services encompass, or are encompassed by, Applicant’s computer-related services. For example:

- Registrant provides “computer hardware maintenance and repair consulting services” and Applicant’s services include “off-site maintenance of enterprise computer networks and software”;
- Registrant provides “computer virus protection services” and Applicant’s services include “computer information security services, namely, remote monitoring of client servers and computer systems for the purpose of detecting, troubleshooting, and resolution of malware threats and security weaknesses”; and
- Registrant provides “technical support services, namely, ... computer security consultancy,” and Applicant’s services include “technical consulting services relating to enterprise information security.”

Although the services described in the application and registration are not word-for-word identical, they essentially cover the same services. For example, Registrant assists clients with “computer virus protection” and Applicant provides its clients

with protection from “malware threats” and “security weaknesses.” Also, while Applicant’s enterprise computer network maintenance services are described as being rendered “off-site,” Registrant’s computer hardware maintenance and repair consulting services are not limited in this regard and may involve off-site or on-site services.

The third *DuPont* factor involves the trade channels for the involved services. Here, because the services in the cited registration overlap with Applicant’s, and there are no restrictions or limitations to the channels of trade in the respective identifications, we presume that the services travel through at least some of the same channels of trade to the same classes of purchasers. *See Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, “the marketing channels of trade and targeted classes of consumers and donors are the same”); *see also In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). In other words, by way of example, a corporation seeking to improve the security of its computer network may retain Registrant’s computer security consultancy services or seek to engage Applicant’s technical consulting services relating to computer enterprise information security.

Accordingly, the *DuPont* factors regarding the relatedness of the services and their trade channels strongly favor a finding of likelihood of confusion.

B. Similarity of the Marks

We turn now to the first *DuPont* factor, involving a comparison of the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d 1721; *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

We also keep in mind that, as applicable to this proceeding, “when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Again, Applicant’s standard character mark is PROBLEU and Registrant’s mark

is **BluePro** .

At the outset, we note that both Applicant and the Examining Attorney agree that the term “bleu” is the French word for “blue.”⁴ In addition, Applicant does not dispute the evidence showing that French is a common, modern language and, as of 2017, the 7th most common language spoken at home.⁵ We further note Applicant submitted information showing the phonetic transcription of the French word “bleu” is “blø.”⁶

With this in mind, we find the overall commercial impressions conveyed by the marks are very similar because they are both comprised of essentially the same literal elements – the wording BLUE (or its French equivalent) and PRO, albeit transposed. For the relevant consumers who understand French, we find no reason why they would not stop and translate the mark, and understand it to be merely the transposed French equivalent of the literal element in Registrant’s mark. We must also anticipate that, because the French word “bleu” and its English equivalent “blue” are spelled nearly the same, even consumers unfamiliar with the French term may perceive “bleu” as “blue.” Thus, whether a consumer stops and translates Applicant’s mark or not, the two marks are likely to be understood as the combination of the word for the color blue with the word PRO, which in the context of both Registrant’s and

⁴ See, e.g., 6 TTABVUE 15 (Applicant’s brief, “Applicant would concede that Google Translate, for example, equates BLUE PRO and PRO BLEU in an English-French translation ...”) and (Examining Attorney’s brief, “The fact that the applicant’s spelling of the word ‘blue’ is in French does not change the commercial impression of the mark.”). We note, however, that the Examining Attorney does not specifically raise the doctrine of foreign equivalents. “Under the doctrine of foreign equivalents, foreign words from common [modern] languages are translated into English to determine ... similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay Imps.*, 73 USPQ2d at 1696.

⁵ December 17, 2019 Office Action, TSDR pp. 2-21.

⁶ 6 TTABVUE 26 (see Note 3).

Applicant's services, may suggest a "professional" quality or an overall positive attribute of the services.⁷

The reversed order of the syllabic elements, PRO and BLUE[EU], in the marks does not substantively alter the marks' overall commercial impressions. While there is no absolute rule, the Board has often found similar commercial impressions are conveyed in situations where the same or similar terms in the involved marks are transpositioned. *See, e.g., In re Wine Soc'y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (affirming refusal to register THE WINE SOCIETY OF AMERICA and Design based on registration of AMERICAN WINE SOCIETY 1967 and Design, finding that "the transposition of words does not change the overall commercial impression"); *Bank of Am. Nat'l Trust and Sav. Ass'n v. The Am. Nat'l Bank of St. Joseph*, 201 USPQ 842, 845 (TTAB 1978) ("the words 'BANKAMERICA' and 'BANK OF AMERICA', on the one hand, and 'AMERIBANC', on the other, convey the same meaning and create substantially similar commercial impressions"). *See also In re Nationwide Indus. Inc.*, 6 USPQ2d 1882 (TTAB 1988) ([RUST BUSTER (with "RUST" disclaimed) for rust-penetrating spray lubricant held likely to be confused with BUST RUST for penetrating oil). In other words, consumers are likely to interpret either mark as merely the combination of these terms.

⁷ We take judicial notice of the definition of "PRO (noun) professional ... (prefix) favoring, supporting ... (preposition) in favor of ..." "Pro." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/pro>. Accessed 16 Apr. 2021. 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).

The combination of terms PRO and BLUE[EU] has no demonstrated significance in the context of the involved computer-related services or weakness. Moreover, because the registered mark is on the Principal Register, without a disclaimer or claim of acquired distinctiveness, the term BLUEPRO is presumed to be inherently distinctive of the services. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). Although Applicant contends that Registrant's mark will be understood as suggestive of Registrant's corporate name, Blue Valley Tele-Communications, Inc., we must reject this argument because there is no evidence of the extent to which relevant consumers may be aware of Registrant's name or will make such an association. In other words, we must assume the registered mark will not appear in proximity to Registrant's corporate name, and the mark can be used in connection with Registrant's services without further mention of Registrant's company name.

Applicant argues that the marks at issue in the aforementioned decisions concerning transposition involved a different analysis because, in this case, "[n]either the cited mark nor Applicant's PROBLEU mark give any indication as to the goods and/or services they are selling or providing, and the ordering and appearance of the terms thus makes all the difference."⁸ However, to the extent Applicant is arguing that both its and Registrant's mark are arbitrary and not suggestive of the involved services, we note that this would make it more likely consumers would attribute source to the marks. *See, e.g., Procter & Gamble Co. v. Johnson & Johnson*, 485

⁸ 6 TTABVue 18.

F.Supp. 1185, 205 USPQ 697, 708 (S.D.N.Y. 1979) (“When arbitrary or fanciful marks are involved, the distinctiveness of the marks will make the public more conscious of similarities than differences.”), *aff’d without opinion*, 636 F.2d 1203 (2d Cir. 1980)).

We do not ignore the differences between the marks, but find them to be less significant and do little to distinguish the marks for purposes of avoiding confusion. For example, one difference is the presence of the design for the letter O in Registrant’s mark. This design element, however, appears at the end of the mark and does not create a strong visual impression. Consumers may overlook this or regard it as merely a stylized or fanciful letter O in the word PRO. The word portion of Registrant’s mark will make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the services. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra*, 101 USPQ2d at 1908). Additionally, the stylization of lettering in Registrant’s mark is minimal and not very distinctive. Because Applicant seeks registration of its mark in standard-character form, it is not limited to any special stylization, and we must assume that it could be displayed in a similar font style to Registrant’s mark. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). Specifically, we must anticipate that Applicant may employ mixed upper- and lower-case lettering, e.g., ProBleu.

As to the pronunciation of the marks, there is no “correct” pronunciation of a mark because it is difficult to predict how the public will pronounce a particular mark. *See, e.g., In re Viterra Inc.*, 101 USPQ2d at 1912; *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014) (“There is no correct

pronunciation of a trademark that is not a recognized word.”) (citing *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969)). Thus, with respect to the BLEU portion of Applicant’s mark, there can be no certainty how consumers will pronounce this term, but given their near-identical spelling, it may be verbalized similarly to the word “blue.” Nevertheless, we note that Applicant argues that “the proper French pronunciation for bleu is closer to ‘bluh.’”⁹ Applicant also “acknowledges” that both marks include the same sound “pro,” albeit only if each mark is dissected into syllables.¹⁰

We find that whether or not consumers are familiar with the French word “bleu” and know how to pronounce the term, there will be little difference in how the marks are likely to be verbalized. That is, by Applicant’s account, consumers familiar with French are likely pronounce Applicant’s mark as “pro bluh” and this is not very different from an inversion of Registrant’s mark, BLUEPRO (“blue pro”). Additionally, many consumers unfamiliar with how to pronounce the French word “bleu” are likely to pronounce this portion of Applicant’s mark like “blue” or very close, given the terms are spelled so similarly.

Finally, we are cognizant that our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of 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.*

⁹ 6 TTABVUE 11.

¹⁰ 6 TTABVUE 11.

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.”). However, “in articulating reasons for reaching a conclusion on the issue 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 consideration of the marks in their entirety.” *In re Nat’l Data*, 224 USPQ at 751.

In this case, although there are some dissimilarities, we find the marks are overall more similar than not. Accordingly, this *DuPont* factor weighs in favor of likely confusion.

C. Alleged Weakness of the Cited Mark

The sixth *DuPont* factor considers “[t]he number and nature of similar marks in use on similar goods” or services. *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). This factor potentially impacts our analysis of the similarity or dissimilarity of the marks because the “purpose of introducing evidence of third-party use 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.” *Id.* (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694 (internal quotation and quotation marks omitted)).

Applicant argues that the cited mark “is not a coined term” and that “there are other examples of the mark BLUEPRO in the USPTO trademark database.”¹¹ Applicant concludes, “[t]he Cited Mark is thus the type of mark afforded less protection.”¹²

Applicant did not submit any third-party registration evidence for BLUEPRO mark[s], let alone evidence of third-party use in commerce of any such marks. Rather, Applicant submitted copies of third-party registrations for either BLUE-formative or PRO-formative marks, but **none with the terms combined**. The evidence therefore does not show that the combination of the terms BLUE and PRO is weak in connection with the involved services. We also point out that even if there was evidence of third-party registrations with such a combination of terms, this would not, by itself, show use in commerce or what happens in the market place. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973).

Accordingly, we do not find the cited mark is weak, and we accord it the normal scope of protection afforded to inherently distinctive marks.

D. Sophistication of Consumers

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant makes the argument that confusion is not likely because the services are “sold to buyers who are more likely to exercise a higher

¹¹ 6 TTABVUE 17.

¹² *Id.*

degree of care when making their buying decisions.”¹³ However, there is no evidence to support this conclusion.

Nevertheless, given the nature of the computer-related services, including those services that we have found to be overlapping or encompassing, we agree it is likely that some consumers will have an awareness of their own computer maintenance and security needs. But we must also anticipate the least-sophisticated consumer with no special knowledge who would not necessarily exercise heightened care. *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (“Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’”) (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB 2014)). Also, 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. *See In re Cynosure, Inc.*, 90 USPQ2d 1644, 1647 (TTAB 2009). Even careful purchasers can be confused as to source where similar marks are used in connection with closely related or the same services. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)) (“Human memories even of discriminating purchasers ... are not infallible.”).

Accordingly, this *DuPont* factor is neutral.

¹³ 6 TTABVUE 19.

III. Conclusion

Based on the overall similarity of these marks used in connection with legally identical services that move in the same channels of trade to the same classes of customers, we find confusion is likely.

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