

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 Biztug LLC

Serial No. 90166759

Olivia M. Muller of Erik M. Pelton & Associates, PLLC
for Biztug LLC.

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Before Adlin, Heasley and Lebow, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Biztug LLC seeks registration of the mark BIZTUG, in standard
characters, for

marketing services; advertising and marketing services provided by means of indirect methods of marketing communications, namely, social media, search engine marketing, inquiry marketing, internet marketing, mobile marketing, blogging and other forms of passive, sharable or viral communications channels; marketing services in the nature of providing hyperlinks to websites of others, distributing coupons, developing marketing campaigns; promoting, advertising and marketing on-line web sites of others; promoting, advertising and marketing the on-line databases and electronic publications of others; advertising and marketing services, namely, promoting the goods and services of others; social media strategy and marketing consultancy focusing on helping clients create and extend their product and brand strategies by building virally

engaging marketing solutions; advertising, promotion and marketing services in the nature of e-mail blast campaigns for others; marketing the goods and services of others by providing hyperlinks to websites of others; promoting and marketing the goods and services of others by providing hyperlinks to websites of others; promoting, marketing and advertising the brands and goods of others related to all industries, through all public and private communication means, namely, promoting the brands and goods of others made in the United States in International Class 35.¹

The Examining Attorney refused registration 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 TUGG, in standard characters, for

providing an online marketing collaboration network for social media and online marketing professionals for the purpose of syndicating content through the network to be shared by others; providing consulting services in the field of facilitating the planning, buying, and selling of media; specialty merchandising services, namely, promoting the goods and services of others through the distribution of customized advertising materials, namely, electronic messages, social media messages and postings, websites, print ads, and web ads in International Class 35²

that it is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont*

¹ Application Serial No. 90166759, filed September 8, 2020 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

² Registration No. 4343058, issued May 28, 2013; Section 8 Declaration accepted, Section 15 Declaration acknowledged.

de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See 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 and differences in the marks.”).

A. The Services and Their Channels of Trade and Classes of Consumers

The services are legally identical in part because Applicant’s “marketing services” and “advertising and marketing services, namely, promoting the goods and services of others” are identified broadly and without limitation, and thus encompass Registrant’s “specialty merchandising services, namely, promoting the goods and services of others through the distribution of customized advertising materials, namely, electronic messages, social media messages and postings, websites, print ads, and web ads.” Moreover, both Applicant and Registrant provide advertising/marketing/merchandising services through “social media.” *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). *See also i.am.symbolic*,

LLC, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (“the Board may not read limitations into an unrestricted registration or application”). It is sufficient for a finding of likelihood of confusion if legal identity is established for any item encompassed by the identification of services in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Because the services are legally identical in part, we presume that the channels of trade and classes of purchasers for those services also overlap. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).³

³ The Examining Attorney also introduced evidence showing that third parties use the same marks for one or more of Applicant’s identified services on the one hand, and one or more of Registrant’s identified services on the other, which establishes that Applicant’s and Registrant’s services are related. January 21, 2021 Office Action TSDR 10-35; August 16, 2021 Office Action TSDR 27-30; March 18, 2022 Denial of Request for Reconsideration TSDR 5-16. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”). Moreover, the Examining Attorney introduced use-based third-party registrations showing that the same marks are registered for one or more of Applicant’s identified services, and one or more of Registrant’s identified services. January 21, 2021 Office Action TSDR 36-60. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).

The legal identity of the services and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260; *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

B. The Strength of Registrant’s Mark

Applicant argues that “[w]idespread third-party use of the word ‘TUG’ for advertising, marketing, and consulting services has weakened the trademark significance of the term and narrowed the scope of protection afforded to the cited mark.” 6 TTABVUE 13.⁴ However, the third-party uses on which Applicant relies do not support this argument.

For example, TUG, a “digital performance marketing agency” Applicant cites, appears to provide marketing-related services under a mark highly similar to the cited mark, but its website refers to its “offices in London, Berlin, Toronto and Sydney,” and does not refer to any offices in the United States. July 8, 2021 Office Action response TSDR 34-36. Similarly, the TUGBOAT GROUP Applicant cites is based in Vancouver, Canada, and there is no indication it has offices in the United States. *Id.* at 42-51. More importantly, there is no evidence that either of these

⁴ Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

companies offers services in the United States or that United States consumers are exposed to their marks. *Id.* at 34-36, 42-51. This third-party evidence is therefore not probative of the strength or weakness of the term “TUGG”/“TUG” in the United States. *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089 at *6 n.27 (TTAB 2019); *In re Bel Paese Sales Co.*, 1 USPQ2d 1233, 1235 (TTAB 1986).

The TUGG website (“tugg.org”) on which Applicant relies indicates that this Boston-focused organization “partners with tech companies and service providers who prioritize community involvement to establish custom annual plans focused on making giving back an integral and fun part of their company’s culture.” July 8, 2021 Office Action response TSDR 41-43. According to its website, TUGG’s goal is “to democratize giving back.” *Id.* A Tugg “annual partnership” includes as benefits “volunteer service engagements,” “ticketing” and “marketing,” including “promotion of custom philanthropic events hosted by your company.” The marketing benefit includes placing the “partner’s” logo on TUGG’s website and event websites, and “monthly tweets highlighting your company to TUGG’s 3k followers.” Thus, the “marketing” benefit appears to be merely ancillary to TUGG’s charity-focused core services and TUGG’s customers (companies seeking to “give back”) would be unlikely to perceive TUGG’s core services as marketing-related. Rather, “BOSTech” businesses partner with Tugg to obtain assistance with their philanthropic efforts.

Applicant’s evidence concerning TUGBOAT GROUP, *id.* at 45-51, indicates that this company provides marketing services, but the term TUGBOAT is much less similar to the cited mark TUGG than the other third-party marks that include the

word TUG. In fact, TUGBOAT looks and sounds different, and conveys a different meaning and commercial impression than TUG alone, or TUG combined with descriptive or otherwise non-distinctive terms. The evidence concerning other uses of TUGBOAT suffers the same flaw, even if we found that these companies provide marketing-related services. *Id.* at 53; February 16, 2022 Request for Reconsideration TSDR 17-34. Indeed, nothing about Applicant’s or Registrant’s mark conveys boating or traveling by sea.

Applicant also introduced evidence regarding The United Group, apparently because The United Group uses the acronym TUG. *Id.* at 55-57. But even if we were to find that The United Group uses TUG as a service mark, there is no evidence that The United Group provides marketing services. Rather, The United Group “is a national, member-owned – group sales, purchasing, and marketing group for independent, B2B distributors of Jan/San, Packaging, Food Service and Safety products and equipment. Our Members recapture profits by earning rebate dollars on their purchases from United Group Preferred Suppliers.” *Id.* at 55. We cannot conclude from this description that The United Group provides marketing services for others.

The evidence about TUG, “the users group for Sage Construction and Real Estate Solutions,” July 8, 2021 Office Action TSDR 38-39, is perhaps somewhat more probative. While the focus of this organization appears to be assisting users of a particular type of software, it offers “advertising opportunities” to its members as an ancillary service, provided the advertisement is “related to products that integrate

with Sage software and do not compete with them.” *Id.* But even if we assumed that these “advertising opportunities” constitute a service “in trade,” this example is not enough by itself, or with Applicant’s other evidence, to establish that TUG is commercially weak for marketing services, especially when we have no evidence about the extent of use of this mark. *See Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241 at *24 (TTAB 2021) (a single third-party use of a similar mark for similar goods or services found insufficient to show the commercial weakness of the plaintiff’s mark).

Applicant also relies on several third-party registrations, some of which are for marketing-related service marks, to establish that the cited mark is weak. February 16, 2022 Request for Reconsideration TSDR 44-48 and 50. Generally, however, “third-party registrations, with no evidence of the extent of the use of the marks in commerce, do not diminish the commercial strength of” a cited mark, though they “may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *In re Embiid*, 2021 USPQ2d 577, at *34 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017)). Indeed, “third-party registrations are not evidence of third-party use of the registered marks in the marketplace, for purposes of the sixth *du Pont* factor.” *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (citing *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992)). Here, Applicant has not introduced evidence that any of the marks in the third-party registrations are in use.

While the third-party registrations may “bear on conceptual weakness,” *Juice Generation, Inc. v. GS Enter., LLC*, 794 F.2d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015), we find that those Applicant introduced in this case do not. With one exception, February 16, 2022 Request for Reconsideration TSDR 49, they all include the term TUGBOAT, rather than TUG or TUGG. And the sole third-party registration that includes TUG (Reg. No. 4331516) is not registered for marketing or related services, and in any event due to its stylization and design, looks and sounds different and conveys a different meaning and commercial impression than BIZTUG or TUGG:



Thus, Applicant has not established that the cited mark is markedly weak, commercially or conceptually. This factor weighs only slightly in Applicant’s favor.

C. The Marks

The marks are similar “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). Indeed, Registrant’s mark closely resembles and only slightly misspells the term “tug,” which is the most distinctive portion of Applicant’s compound mark. The other portion of Applicant’s mark, the term “biz,” is merely a shortened version of the word “business,” which is suggestive and thus conceptually weak for Applicant’s business-focused services.

Obviously, Registrant’s mark TUGG is highly similar in appearance and most likely to be pronounced identically to the TUG component of Applicant’s mark, as it

differs by only one letter, specifically a repeated letter “G” added to the end of the word “TUG.” Moreover, because “tugg” is not itself a word, but rather merely a slight misspelling of the common word “tug,” it will convey the same meaning and create the same commercial impression as “tug.” As Applicant puts it, Registrant’s “target consumers” would “understand that Registrant’s services allow them to ‘TUG’ or ‘pull’ their projects to success” 6 TTABVUE 21. *Cf. Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U.S. 446, 455 (1911) (“Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning”); *Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (“Nupla’s mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *In re Quik-Print*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (finding QUIK-PRINT merely descriptive of printing and copying services, stating “[t]here is no legally significant difference here between ‘quik’ and ‘quick.’”).

Applicant’s argument that consumers will focus on the first part of its mark, the term “BIZ,” is not well-taken. As Applicant points out, “‘BIZ’ is short for ‘business,’” 6 TTABVUE 21, and is therefore suggestive of the target market for Applicant’s marketing services. Thus, while we often find that consumers are likely to focus on the first part of a mark, here the first part of Applicant’s mark is less distinctive than the term “TUG,” and “TUG” is the part of Applicant’s mark on which consumers are most likely to focus. *See In re RiseSmart*, 104 USPQ2d 1931, 1935 (TTAB 2012)

(ASSURANCE found to be dominant term in the marks TALENT ASSURANCE and JOB ASSURANCE, where “TALENT” and “JOB” were both found to be descriptive).

Notwithstanding its concessions that “BIZ” means “business” and that “TUGG” conveys the same meaning and creates the same commercial impression as “TUG,” Applicant argues that Registrant’s mark “creates an entirely separate commercial impression” than Applicant’s mark. Specifically, Applicant argues that Registrant’s mark creates the impression that “Registrant’s services allow [Registrant’s “target consumers”] to ‘TUG’ or ‘pull’ their projects to success,” *id.*, while Applicant’s mark creates the impression that Applicant’s services “provide a boon for those businesses that choose to purchase them,” that Applicant’s services “‘TUG’ target audiences to the business,” and that Applicant’s services “‘TUG’ the business to success.” *Id.* Applicant’s argument about cited mark’s meaning and commercial impression is based on its reading of Registrant’s specimen of use, which Applicant made of record. July 8, 2021 Office Action response TSDR 27-32.⁵ However, we fail to see a meaningful difference between the commercial impression Applicant attributes to Registrant’s mark and the commercial impression Applicant attributes to its own

⁵ Applicant’s reliance on Registrant’s specimen of use is misplaced. We are constrained to focus on the services as they are identified in the involved application and cited registration, without regard to Applicant’s or Registrant’s actual use of the marks in the “real world.” See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (“It is well established that the Board may not read limitations into an unrestricted registration or application.”) (quoting *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (unrestricted and broad identifications are presumed to encompass all goods of the type described).

mark – in fact, Applicant contends that both marks convey “tugging,” i.e. pulling, businesses or their projects to success, perhaps by “tugging” or pulling customers to the businesses or their projects. 6 TTABVUE 21.⁶

Therefore, we find that the marks are more similar than dissimilar. This factor weighs in favor of finding a likelihood of confusion.

II. Conclusion

The services are legally identical and presumed to travel in the same channels of trade to the same classes of consumers. The marks are similar. To the extent that Applicant has established that the cited mark has a degree of weakness, it is not so weak as to be unentitled to protection against Applicant’s similar mark used for legally identical services. Indeed, “likelihood of confusion, mistake or deception is to be avoided as much between weak marks as between strong marks.” *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)).

Decision: The refusal to register Applicant’s mark for the identified goods under Section 2(d) of the Trademark Act is affirmed.

⁶ Thus, Applicant’s argument that its mark is “unitary,” 9 TTABVUE 6, is not well taken. In fact, the elements of a unitary mark are “inseparable,” in that “the mark has a distinct meaning of its own independent of the meaning of its constituent elements.” *Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). But here, Applicant argues that the mark is separable and conveys the standard meaning of its constituent elements, specifically that Applicant’s services “tug” a “biz.” Thus, Applicant does not posit any “distinct meaning” of its mark that is “independent of its constituent elements.”