

This Opinion is Not a
Precedent of the TTAB

Mailed: January 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re eduConsulting Firm

Serial No. 90196048

Ashley D. Johnson of Dogwood Patent and Trademark Law
for eduConsulting Firm.

Tabitha Messick, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

Before Cataldo, Adlin and Johnson, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant eduConsulting Firm seeks registration of EDUCRATE, in standard
characters, for

subscription-based order fulfillment services in the field of
educational items and resources for teachers, principals,
instructional coaches, and other educators; online retail
services featuring personalized subscription boxes for
educators containing printed teaching materials featuring
teaching tips, leadership strategies, ideas, templates,
samples, lesson plan ideas, activities, instructional
strategies, and related supplies in the nature of pens,
pencils, markers, books, workbooks, flashcards, lesson

plans, highlighters, binders, posters, notebooks 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 MYEDUCRATE, in standard characters, for "subscription-based order fulfillment services in the field of educational items and resources" in International Class 35,² that it is likely to cause confusion. After the refusal became final, Applicant appealed, and filed a request for reconsideration that was denied. Applicant and the Examining Attorney filed briefs.

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 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

¹ Application Serial No. 90196048, filed September 21, 2020 under Section 1(a) of the Trademark Act, based on first use on June 18, 2020 and first use in commerce on July 13, 2020.

² Registration No. 5083597, issued November 15, 2016.

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 in-part legally identical because Registrant’s “subscription-based order fulfillment services in the field of educational items and resources” encompasses Applicant’s slightly more specific “subscription-based order fulfillment services in the field of educational items and resources for teachers, principals, instructional coaches, and other educators.” *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.’”).³ It is sufficient for a finding of likelihood of confusion if identity or 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).⁴

³ In any event, the Examining Attorney introduced evidence that Applicant’s and Registrant’s services are quite closely related. February 9, 2021 Office Action TSDR 6-13; October 18, 2021 Office Action TSDR 24-62. Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) online database, by page number, in the downloadable .pdf format.

⁴ We consider the services as they are identified in the involved application and cited registration. We may not consider any limitations to the services Applicant and Registrant market or offer that are not reflected in their identifications. *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)). Therefore, Applicant’s argument that its services are targeted to

Because the services as identified are in-part legally identical, we presume that the channels of trade and classes of purchasers for those services also overlap. *See 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).

The partial legal identity of the services and their presumed 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. Similarity of the Marks

The marks are highly similar “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. 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). Indeed, Applicant’s mark EDUCRATE is merely Registrant’s mark MYEDUCRATE without its initial term “MY.” This relatively minor difference is not enough to avoid confusion arising from Applicant

professional teachers and educators, while Registrant’s are targeted to children, 6 TTABVue 16, 19-20, is irrelevant.

and Registrant both using marks containing the term “EDUCRATE” for legally identical and otherwise closely related services.

In fact, EDUCRATE and MYEDUCRATE look and sound similar, and rhyme, because both include “EDUCRATE.” See *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985) (HUGGIES and DOUGIES found confusingly similar in part because they “sound much alike and actually rhyme”); *Russell Chem. Co. v. Wyandotte Chem. Corp.*, 337 F.2d 660, 143 USPQ 252, 253 (CCPA 1964) (differences between SENTOL and SEN-TROL have “little effect either upon the eyes of the viewer or the ears of the hearer”); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740-41 (TTAB 2014) (IKEA and AKEA are “similar in appearance” and sound, and rhyme, pointing out that “[r]egardless of the pronunciation of the first vowel, the remainder of the marks will be pronounced the same”); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000) (“Both marks are highly similar in sound, since YO-YO's directly rhymes with HOHOs. Similarity in either form, spelling or sound alone may be sufficient to support a finding of likelihood of confusion.”).⁵

The minor differences between EDUCRATE and MYEDUCRATE in appearance and sound may not be noticed by ordinary consumers of order fulfillment services in

⁵ Applicant’s argument, 6 TTABVUE 13, that it and Registrant display the marks differently – Registrant with a capital “M,” “E” and “C” and the other letters lower-cased, and Applicant with a capital “C” and the other letters lower-cased – is not well taken. Applicant seeks to register its mark, and Registrant’s mark is registered, in standard characters, and the marks could therefore be displayed in any font or style, including with the same letters capitalized or in lower-case. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1158-59 (TTAB 2017).

the field of educational items and resources. And, even if the minor differences are noticed, we must consider whether they are “likely to be recalled by purchasers seeing the marks at spaced intervals,” i.e., consumers who encounter Registrant’s mark first, but do not encounter Applicant’s until later, or vice versa. *Grandpa Pidgeon’s of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). Here, because the differences between the marks are so minor, we find that consumers would likely forget them, especially when we keep in mind: (1) “the fallibility of memory over a period of time;” and (2) that the “average” consumer “normally retains a general rather than a specific impression of trademarks.” *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). *See also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory”) (citation, internal quotation marks, and ellipsis omitted). Furthermore, consumers have a tendency to shorten trademarks, and could very well shorten Registrant’s to EDUCRATE, which is identical to Applicant’s mark. *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (“we also keep in mind the penchant of consumers to shorten marks”); *United Rum Merchs. Ltd. v. Fregal, Inc.*, 216 USPQ 217, 220 (TTAB 1982); *Big M, Inc. v. U.S. Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) (“we cannot ignore the propensity of consumers to often shorten trademarks”).


The terms also convey highly similar meanings and commercial impressions because they share the term EDUCRATE. In fact, the term “MY” that precedes EDUCRATE in Registrant’s mark merely specifies, and draws attention to, who owns

or uses the identified “educational items and resources” acquired through Registrant’s EDUCRATE “subscription-based order fulfillment services.” October 18, 2021 Office Action TSDR 9 (“my” is defined as “of or relating to me or myself especially as possessor, agent, object of an action, or familiar person”). *Cf. In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (“The absence of the possessive form in applicant’s mark BINION has little, if any, significance for consumers in distinguishing it from the cited mark [BINION’S ROADHOUSE].”). We therefore disagree with Applicant’s argument, 6 TTABVUE 14,⁶ that “MY” is the dominant portion of the cited mark. The essence of Registrant’s mark is EDUCRATE, which is the entirety of Applicant’s mark.

Thus, this factor also weighs heavily in support of finding a likelihood of confusion.

C. The Strength of Registrant’s Mark and Applicant’s Third-Party Registration Evidence

Applicant argues that “there are numerous live marks used with services in Class 035 that differ only by the term ‘MY.’” 6 TTABVUE 20-21. For example, MYUB is registered for “educational services, namely, providing online e-learning courses in

the field of cultural intelligence,”⁷ and the composite UB and design mark  is registered for “continuing and community education services, namely, providing live

⁶ 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.

⁷ Registration No. 6146529.

and on-line continuing education seminars in the legal, business, arts, sciences and public affairs fields.”⁸ April 15, 2022 Request for Reconsideration TSDR 41-42; *see also, id.* at 43-81, September 14, 2021 Office Action response TSDR 23-72 and July 27, 2021 Office Action response TSDR 38-78. This evidence is unpersuasive for several reasons.

First, Applicant failed to include enough information about the registrations to enable us to determine that the “paired” marks “that differ only by the term ‘MY’” are registered to different owners. Second, even if we assume that they are, as the Examining Attorney points out, 8 TTABVUE 4, there is no evidence showing that the Class 35 services identified in the “paired” registrations are related to each other or to the services at issue in this case. Third, many of the “paired” marks are not as similar to each other as Applicant’s mark is to Registrant’s mark. Finally, some of the marks Applicant cites appear to be conceptually weak for the identified services. In any event, neither the existence of these third-party registrations nor any of the evidence in their prosecution records (even if it were of record here) compels a specific result in later, allegedly analogous cases. *See, e.g., Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1377 (Fed. Cir. 2018) (“these prior registrations do not compel registration of [Applicant’s] proposed mar[k]”) (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016)); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009). As we recently stated in an analogous situation, to the extent that our decision here is inconsistent with

⁸ Registration No. 4356112.

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the third-party registrations, “it is the decision required under the statute on the record before us.” *In re Ala. Tourism Dept.*, 2020 USPQ2d 10485, at *11 (TTAB 2020). Thus, Applicant’s argument that “customers have been educated to distinguish” between “marks that differ only by the term MY,” 6 TTABVUE 21, is not supported by the evidence upon which it is based.

We acknowledge that MYEDUCRATE is conceptually somewhat weak, because it sounds like and calls to mind the word “educate” and Registrant ships its “educational items” in a “crate” or box. However, the cited registration is on the Principal Register and is entitled to a presumption of validity, 15 U.S.C. § 1057(b), and even weak marks are entitled to protection against confusingly similar marks. Indeed, likelihood of confusion “is to be avoided as much between weak marks as between strong marks.” *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982).

This factor is neutral.

D. Consumer Sophistication and Care

Applicant has not introduced any evidence on this factor, but argues that educational goods and services are “important purchases” and expensive. 6 TTABVUE 18-19. Even if we accept this argument, we find that it is outweighed by the other factors. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also, HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff’d*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweighed sophisticated purchasers, careful purchasing decision, and expensive goods).

II. Conclusion

The services are in-part legally identical, and presumed to travel in the same channels of trade to the same classes of consumers. The marks are quite similar. These factors outweigh any consumer sophistication or care in purchasing. Confusion is likely.

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