

This Opinion is Not a
Precedent of the TTAB

Mailed: April 25, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re TransAd, Inc.

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Serial No. 90877894

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Brian C. Kunzler and Robert R. Gempeler of Kunzler Bean & Adamson, for
TransAd, Inc.

Sarah Peritz, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

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Before Zervas, Greenbaum and Thurmon, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

TransAd, Inc. (“Applicant”) seeks registration on the Supplemental Register of the mark IN-AD LANDING PAGE, in standard characters, for “Ad serving, namely, placing advertisements on websites for others using specialized computer software; Advertising and commercial information services, via the internet; Advertising on the Internet for others; Advertising services” in International Class 35.¹ The Examining

¹ Application Serial No. 90877894 was filed on August 11, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The

Attorney finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), finding a likelihood of confusion based on the registered mark LANDINGPAGE, in standard characters, on the Principal Register for “Business and advertising services, namely promoting the goods and services of others by creating advertising, marketing, and promotional material, planning advertising campaigns, conducting market research, and preparing business analytical reports; procurement, namely, purchasing advertisements and media for others; dissemination of advertising for others via a global computer information network; consulting services in the field of advertising and marketing; and electronic mail list preparation; database services, namely, creation, maintenance and management of a database containing electronic mailing lists,” in International Class 35.²

The appeal is fully briefed. We affirm the refusal to register.

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. Applicant’s appeal brief appears at 6 TTABVUE, the Examining Attorney’s brief appears at 8 TTABVUE, and Applicant’s reply brief appears at 9 TTABVUE. Citations to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office’s Trademark Status & Document Retrieval (“TSDR”) system.

² Registration No. 3013808, issued November 8, 2005, and has been renewed. The mark is registered in typeset format. Prior to November 2, 2003, “standard character” drawings in applications were known as “typed” or “typeset” drawings. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012). A typed or typeset mark is the legal equivalent of a standard character mark. *Id.*; *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 807.03(i) (Nov. 2023). The application leading to this registration was filed on March 2, 2003.

Applicant initially sought registration on the Principal Register. The Examining Attorney refused registration under Section 2(e)(1), as well, having found the applied-for mark merely descriptive of a feature or characteristic of the services. Office Action dated May 12, 2022, at 3-4. Applicant then amended the Application to seek registration on the Supplemental Register, and the Examining Attorney withdrew the Section 2(e)(1) refusal.

I. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods or services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Shell Oil Co.*, 26 USPQ2d at 1688 (“the various

evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (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 and differences in the marks.”).

II. Likelihood of Confusion – Analysis

A. Similarity of the Marks

To evaluate the similarity of the marks, we consider the marks in their entireties as to appearance, sound, connotation and commercial impression. *See, e.g., Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (citing *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 LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d, 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

The cited mark is LANDINGPAGE for certain business and advertising services. Applicant's mark is IN-AD LANDING PAGE. We begin with the obvious. Two words in Applicant's mark are identical to the entirety of the cited mark. The fact that there is no space in the cited mark does not change the fact that the same letters are used and that these letters will be recognized by consumers as the words "landing" and "page."³

Not only are two words of Applicant's mark identical to the cited mark in sight and sound, the words "landing page" have an established meaning within the Internet advertising field. The Examining Attorney submitted evidence that a "landing page," is "[t]he section of a website accessed by clicking a hyperlink on another web page, typically the website's home page."⁴ Applicant uses essentially the same definition in its own arguments, while pointing out that its services do "more than merely providing a simple landing page."⁵ There is no dispute that "landing page" has an established meaning within the relevant field.

It is at this point in the analysis that Applicant parts ways with the Examining Attorney. Applicant argues that the first part of its mark, the "IN-AD" part, creates an incongruity because a landing page is understood to be a page on a different web page from the one being viewed, while Applicant's patented technology purports to

³ The cited mark has no space between "LANDING" and "PAGE." This is a difference of minimal importance, as it creates no difference in the pronunciation of the mark and is unlikely to be remembered by consumers. *See, e.g., In re Planalytics Inc.*, 70 USPQ2d 1453 (TTAB 2004) (the absence of a space in GASBUYER does not create a different meaning or perception of the term).

⁴ Office Action dated March 12, 2022, at 17 (from Lexico online dictionary).

⁵ 6 TTABVUE 6.

provide a landing page-like experience to the user with ever leaving the original web page. Staying “in-ad” is, Applicant argues, a fundamentally different experience than leaving the ad for a new and different “landing page.”⁶

While Applicant may well provide a new twist on Internet advertising services, the fact remains that the term “landing page” has an established meaning within the Internet advertising field, and this meaning will be attributed to the use of these words in each mark. Does the “IN-AD” portion of Applicant’s mark change this meaning? Does it create an incongruity, as Applicant argues?

We agree, to an extent, with Applicant. The words “in-ad” do suggest that a user will remain on the present web page, and more specifically within the same ad. That is different from the undisputed meaning of a “landing page,” which is the place a user ends up after clicking a hyperlink within an ad. The first part of Applicant’s mark suggests the user is staying put, staying in the ad, rather than leaving for a different “landing page.” The mark, in its entirety, may create an incongruity in the mind of some relevant consumers.

But what is a consumer to make of this purported incongruity? We find it likely that most relevant consumers will understand Applicant’s mark as suggesting a way to do both, stay in the ad and get to a landing page. And that is, as Applicant describes

⁶ *Id.* (“Applicant’s services insert ‘landing pages into advertisements so that consumers are able to stay on the original page on which they found the advertisement while also interacting with landing pages in the advertisements themselves,’ which is different from processing a click-through and redirecting a user to a completely different website hosting a landing page.” (internal quotations from Office Action dated March 12, 2022)).

it, exactly what its technology offers.⁷ But Applicant misses a key point. To recognize the incongruity in Applicant's mark, a consumer must first understand what a landing page is. And if consumers are using the same meaning of landing page in both marks, that increases the similarity of the marks in the minds of consumers.

But what about the incongruity? If we accept Applicant's incongruity argument, that would mean consumers understand IN-AD LANDING PAGE to identify Internet advertising services that provide landing page type of content without leaving the original advertisement. Inherent in that understanding is the ordinary meaning of a landing page and what such pages typically provide. So, even accepting Applicant's argument, we still have overlapping meaning.

We further note that Applicant's argument does not account for consumers who may see its development as an extension of the services typically provided through a landing page. That is, consumers familiar with the cited LANDINGPAGE mark may view Applicant's new-and-improved Internet advertising services as an extension or, perhaps an improvement on, the LANDINGPAGE services provided by Registrant. Even if some consumers notice the incongruity Applicant stresses, that does not mean such consumers will find the marks dissimilar. Indeed, given the nature of these

⁷ *Id.* at 6-7. As Applicant explains, "Here, Applicant's Mark presents a combination of descriptive terms that creates a unitary mark with an incongruous, nondescriptive meaning in relation to the services. As set forth above, a 'landing page' is defined as a 'section of a website accessed by clicking a hyperlink on another page that exists inside of an advertisement.' Applicant's services, on the other hand, do not redirect a consumer to another page, but instead allow consumers to stay on the original page on which they found the advertisement while also interacting with landing pages in the advertisements themselves. Applicant's services are thus exactly opposite of what would be expected by the term 'landing page.'" Response to Office Action dated November 14, 2022, at 5.

marks—that is, Applicant’s mark may be seen as offering an improved version of the services provided under Registrant’s mark—the incongruity could increase the likelihood that some consumers believe both marks identify the same source.

Under the facts involved in this appeal, it does not matter whether consumers appreciate the incongruity in Applicant’s mark. For those consumers who appreciate the incongruity, the similarities in the marks are likely to lead such consumers to view Applicant’s services as an improved version of the services offered under the cited mark. For consumers who reach this conclusion, the marks are similar in sight, sound, meaning and commercial impression, for if one mark represents an extension of the services provided under the other mark, then both marks are creating a similar, and connected, commercial impression.

For those consumers who miss the incongruity, the marks are similar in sight, sound, and meaning. For those consumers who don’t appreciate the incongruity, we find the marks are likely to create a similar commercial impression due to the other points of similarity. The central meaning or message conveyed by these marks is that they relate to Internet ads and landing pages. Any more specific meanings or impressions created by the marks are likely to fade, leaving the more general (and more similar) base meanings and impressions noted above. For all these reasons, we find the marks are similar in sight, sound, meaning and commercial impression, regardless of whether consumers appreciate the incongruity that Applicant stresses

in its arguments.⁸ The first *DuPont* factor, therefore, weighs in favor of the Section 2(d) refusal.

B. Similarity of the Services and Trade Channels, and Purchaser Care

We evaluate the second, third and fourth *Du Pont* factors together because all are based on the services identified in the Application and the cited Registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion if similarity or relatedness is established for any service encompassed in the recitation of services in a particular class in an application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *see also Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015). In addition, the services need only be sufficiently related that consumers would be

⁸ We have considered the “IN-AD” and “LANDING PAGE” parts of Applicant’s mark separately, but we have carefully considered Applicant’s mark in its entirety. Moreover, Applicant argues that these two parts of its mark have somewhat inconsistent meanings, which creates an incongruity. This argument requires a separate focus on the two parts of the mark.

Applicant argues that the “IN-AD” part of its mark is dominant, in part because it is the first part of the mark. *Id.* at 5. We have found in other contexts that the first part of a mark is dominant, but we cannot agree with Applicant’s argument here. The two parts of Applicant’s mark work together. Based on the present record, it is impossible to say that one part is more important than the other. Applicant’s incongruity argument, for example, depends on consumers’ understandings of both parts of its mark. We find the “IN-AD” and “LANDING PAGE” parts of Applicant’s mark are both important to evaluating the similarity of the marks in this appeal.

likely to assume, upon encountering the services marketed under the marks at issue, that the services originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007).

The cited Registration identifies a number of advertising services, including “dissemination of advertising for others via a global computer information network ...”⁹ The Application includes the following services: “Advertising and commercial information services, via the internet; Advertising on the Internet for others ...”¹⁰ These services are effectively identical because the Internet is “an electronic communications network that connects computer networks and organizational computer facilities around the world,” which is another way of saying it is a “global computer information network.”¹¹ The Application and cited Registration identify identical services, in part, and that increases the likelihood of confusion. *Century 21 Real Estate Corp.*, 23 USPQ2d at 1701.

Applicant argues that its services are different from traditional advertising services provided on the Internet. In making this argument, Applicant focuses on the “placing advertisements on websites for others using specialized computer software” services identified in the Application, and then argues that its “specialized computer

⁹ Registration No. 3013808.

¹⁰ Application Serial No. 90877894.

¹¹ Merriam-Webster online dictionary, <https://www.merriam-webster.com/dictionary/Internet> (visited April 18, 2024). *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (The Board may take judicial notice of dictionary definitions, including definitions in online dictionaries which exist in printed format or that have regular fixed editions.).

software” does things no other advertising provider can do.¹² That may be true, but it does not matter here, because Applicant also recited in the Application the more general services, “Advertising on the Internet for others.” These services do not depend on any special software and encompass any form of advertising services for others on the Internet.

Applicant, in other words, is making the wrong comparison. It is considering its actual services that do not provide the same experience to an Internet user as a typical landing page. Applicant compares its actual services to what it contends are Registrant’s actual services, based on screenshots of what Applicant asserts is the website of the Registrant to show the actual nature of the services provided under the cited mark.¹³ This approach violates the requirement that we compare the services as identified in the Application and Registration. *Octocom Sys.*, 110 USPQ2d at 1162 (“the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application.”). The fact that Applicant may provide a new and innovative service is irrelevant if it also includes broad, general identifications of Internet advertising services in the Application. When the proper comparison is performed, we see that the services are identical in part.¹⁴

¹² 6 TTABVUE 9-10.

¹³ Request for Reconsideration dated November 14, 2022, at 8.

¹⁴ Applicant’s services are patented and purportedly perform functions that other Internet advertising services cannot provide. Office Action dated May 12, 2022, at 24 (“At TransAd we leverage our patented technology (US patent # 10,121,163) to create an engaging and interactive ad experience without requiring anyone to leave the page.”). While this may be true, the similarity of the services must be evaluated based on the identifications in the

With respect to similarity of the established trade channels through which the services reach customers, we presume identical services move in the same channels of trade and are available to the same classes of customers for such services—here, website operators who run advertising on their websites. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (“[I]t is well established that, absent restrictions in the application and registration, [identical] goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”) (internal quotation marks and citation omitted); *L. & J.G. Stickley, Inc. v. Cosser*, 81 USPQ2d 1956, 1971 (TTAB 2007) (“Because the goods of both parties are at least overlapping, we must presume that the purchasers and channels of trade would at least overlap.”). As discussed above, the Application and cited Registration identify identical services, in part, and therefore this presumption applies.

Applicant argues that the “nature of the services provided by both Applicant and Registrant are of such a nature and expense that purchasing these services requires careful consideration and planning by consumers.”¹⁵ Applicant submitted evidence with its appeal brief to show that billions of dollars are spent annually on Internet advertising. The Examining Attorney objected to and did not further address this evidence because it was not submitted prior to the appeal.¹⁶ For that reason, we will not consider it. The record in an application should be complete prior to the filing of

Application and Registration. Applicant errs by focusing on the actual services it provides rather than what it identified in the Application.

¹⁵ 6 TTABVUE 10.

¹⁶ 8 TTABVUE 3.

an appeal. 37 C.F.R. §2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§1203.02(e), 1207.01 (June 2023); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §710.01(c) (November, 2023).¹⁷

Applicant's argument falls under the fourth *DuPont* factor: the conditions under which the services are likely to be purchased, for example, whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive services may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695. We reiterate that we must consider the conditions of sale based on the identifications of services in the Application and Registration. *Stone Lion Cap. Partners*, 110 USPQ2d at 1161-62 (quoting *Octocom Sys*, 16 USPQ2d at 1787).

Neither the Application nor Registration is restricted as to purchaser or price. We therefore must presume that advertising services identified in the Application and Registration are available to all types of website operators who run advertising on

¹⁷ Applicant submitted evidence purportedly from the Registrant's website with its Request for Reconsideration, and resubmitted that evidence with its appeal brief, which was not necessary and tends to complicate our review. *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1315 (TTAB 2011) (attaching evidence from record to brief is duplicative, unnecessary, and discouraged).

their webpages, and at all possible price points. When relevant consumers include both discerning purchasers and less sophisticated consumers, precedent requires that we base our decision on the least sophisticated potential purchases. *Stone Lion Cap. Partners*, 110 USPQ2d at 1163.

Given the enormous range of Internet websites with ads, we find that the relevant consumers will include some website operators who exercise little care in picking Internet ads for their websites and others who may exercise more care in their selection because they derive revenue from webpage ads. For that reason, we find the fourth *DuPont* factor is neutral.

To summarize, we find the services are identical in part and move through the same trade channels, and that strongly supports the Section 2(d) refusal. The customer care factor is neutral.

C. Weighing the *DuPont* Factors

The marks are similar, the services are identical in part and the trade channels overlap. These three *DuPont* factors weigh in favor of a likelihood of confusion, with the second and third factors weighing heavily in favor of this finding. In addition, given the identical services, less similarity of the marks is needed to create a likelihood of confusion. *Coach Servs., Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

Some relevant consumers may exercise more than average care in selecting the advertising services at issue here, but others may not. Because we must base our finding on the least sophisticated purchaser, *see Stone Lion Cap. Partners*, 110 USPQ2d at 1163 (“the applicable standard of care is that of the least sophisticated consumer”), we have found the fourth *DuPont* factor to be neutral.

No other *DuPont* factors were briefed by Applicant or the Examining Attorney. On the record before us, we find confusion is likely.

Decision: The Section 2(d) refusal is affirmed.