

This Opinion is not a
Precedent of the TTAB

Mailed: March 7, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Apollo Security International, Inc.

v.

Apollo Investigations, Inc.

—
Opposition No. 91212820
—

Gary W. Smith and Jon C. Cowen of Posternak Blankstein & Lund LLP for Apollo Security International, Inc.

Daniel A. Harvill of Daniel A. Harvill, PLLC for Apollo Investigations, Inc.

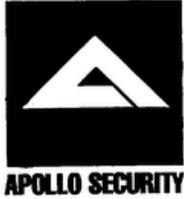
—
Before Quinn, Masiello, and Pologeorgis, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Apollo Investigations, Inc. (“Applicant”) filed an application to register on the Principal Register the mark APOLLO INVESTIGATIONS, INC. in standard characters for “Private investigation,” in International Class 45.¹

¹ Application Serial No. 85897079, filed on April 5, 2013, based on an allegation of use in commerce under Trademark Act Section 1(a), 15 U.S.C. 1051(a), claiming September 30, 2011 as the date of first use of the mark and January 1, 2012 as the date of first use in commerce. Applicant disclaimed the exclusive right to use INVESTIGATIONS, INC. apart from the mark as shown.

Apollo Security International, Inc. (“Opposer”) opposed registration of the mark on the ground that it so resembles Opposer’s earlier used and registered marks as to be likely to cause confusion, mistake or deception under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); and on the ground that the specimen of use filed in connection with the application “shows use of Applicant’s Alleged Mark as a trade name only and does not show use as a mark...”² Opposer pleaded ownership of the following five U.S. registrations:

<u>Reg. No.</u>	<u>Mark</u>	<u>Goods/Services</u>
2554862		Security guard services, in Class 42. ³
2446292	APOLLO SECURITY	Security guard services, in Class 42. ⁴
4309978	APOLLO INTERNATIONAL	Educational services, namely, developing and conducting training in the field of physical and personal security and related policies thereto, in Class 41. Security guard services; security guarding for facilities; security services, namely, providing security assessments of physical locations and working environments; security consultancy; security services, namely, for the protection of property and individuals; provision of information, advice and

² Notice of opposition ¶ 16, 1 TTABVue 7.

³ Issued April 2, 2002, based on an application filed March 17, 2000; Section 8 affidavit accepted; Section 15 affidavit acknowledged; renewed.

⁴ Issued April 24, 2001, based on an application filed March 17, 2000; Section 8 affidavit accepted; Section 15 affidavit acknowledged; renewed.

		consultancy in relation to security services for the protection of property and individuals; security services for controlling admission to buildings and public places; security safety management, namely, providing security assessments for business and governmental agencies; security due diligence services, namely, detailed investigative reports for individuals or businesses traveling or opening an office overseas, in the nature of detailed foreign country briefings, vetting of local personnel, establishing host country government contacts, and providing information on sustainable security measures overseas; intellectual property consultancy; investigation services involving infringements of intellectual property rights and for asset protection; security services, namely, providing executive protection, Class 45. ⁵
4373337	A APOLLO INTERNATIONAL	[Same services in Classes 41 and 45 as Reg. No. 4309978] ⁶
4373338		[Same services in Classes 41 and 45 as Reg. No. 4309978] ⁷

Applicant, in its answer, admitted Opposer’s ownership of the pleaded registrations, but otherwise denied the salient allegations of the notice of opposition. Applicant asserted the “affirmative defense” that “Opposer has not vigorously protected its trademark as there are multiple businesses in other geographic regions

⁵ Issued March 26, 2013, based on an application filed November 9, 2011.

⁶ Issued July 23, 2013, based on an application filed March 28, 2012.

⁷ Issued July 23, 2013, based on an application filed March 28, 2012.

of the United States operating under the name ‘Apollo’, which provide private investigative services ...”⁸ This assertion, if proven, would not suffice to avoid Opposer’s claim. However, it amplifies Applicant’s denial of Opposer’s allegations and will be considered in connection with our analysis of the claim under Section 2(d). The case is fully briefed.

I. The record.

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 C.F.R. § 2.122, the application file for the opposed mark.⁹ Both parties have submitted testimony in the form of affidavits with attached exhibits. In so doing, they have effectively stipulated to the admission of testimony in this form, and we will treat the affidavits as admitted in evidence.¹⁰

Opposer has made of record the following testimony and evidence:

- Testimonial declaration of Dennis M. Crowley III, Opposer’s President, and exhibits thereto (“Crowley I”) (9 TTABVUE).
- Rebuttal testimonial declaration of Dennis M. Crowley III (16 TTABVUE).

Applicant has made of record the following testimony and evidence:

- Testimonial declaration of Michael S. Youlen, Applicant’s President, and exhibits thereto (12 TTABVUE).

⁸ Answer, 5 TTABVUE 4.

⁹ Contrary to the parties’ statements in their briefs, the files of the applications underlying Opposer’s pleaded registrations are *not* automatically part of the record under Rule 2.122(b). Neither party has taken other action to place those files in evidence.

¹⁰ See TBMP § 705 (2015) (“[P]arties may stipulate to ACR-type efficiencies at any stage of a proceeding in order to expedite the remainder of the trial schedule.”)

II. Evidentiary objections of Opposer.

Opposer moves to strike, in its entirety, the Youlen declaration on the ground that it is unsworn. The Youlen declaration was given under an oath. The motion is denied.

Opposer moves to strike various statements in the Youlen declaration on the ground that the testimony exceeds the scope of matters disclosed in Applicant's pre-trial disclosures. However, Opposer has not submitted a copy of those pre-trial disclosures. The motion is denied.

Opposer moves to strike the Internet printouts attached to the Youlen declaration as Exhibit E on the ground that Applicant made no effort to properly verify or authenticate them. The Board allows materials obtained from the Internet to be placed in evidence, for what they show on their face, under a notice of reliance in the same manner as a printed publication in general circulation, in accordance with Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e); *provided that* the document identifies the date that it was accessed and printed and the document's source (*i.e.*, the URL). *See Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012); *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010). The materials at Youlen Exhibit E meet the requirements of *Safer, supra*. The motion to strike is denied.

Opposer moves that various statements in the Youlen declaration should be stricken on the ground that they are hearsay; relate to matters as to which the declarant has no personal knowledge; or are speculative. Opposer's concerns primarily go to the probative weight of the testimony. Opposer's objections are noted; however, the Board is capable of weighing the relevance and strength or weakness of

the questioned testimony, and this precludes the need to strike it from the record. As necessary and appropriate, we will point out in this decision any limitations applied to the evidence or otherwise note that the evidence cannot be relied upon in the manner sought.

III. Opposer's grounds for opposition.

As a preliminary matter, we note that the allegations in paragraph 16 of the notice of opposition, to the effect that registration of Applicant's mark should be refused because the specimen of use filed in connection with the application "shows use of Applicant's Alleged Mark as a trade name only and does not show use as a mark..."¹¹ fail to state a claim upon which relief may be granted. Determinations made by an examining attorney with regard to examination requirements, such as the acceptability of a specimen of use, do not constitute statutory grounds for refusal of registration, and cannot form the basis of an *inter partes* challenge to the registrability of the mark. *See AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1833 (TTAB 2013), *citing Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752 (Fed. Cir. 1998). Paragraph 16 somewhat resembles a claim of "nonuse," but falls far short of a claim that Applicant does not satisfy the requirement, set forth in Section 1(a) of the Trademark Act, that Applicant must have "used" its mark.¹² Accordingly, we will not consider this insufficiently pleaded claim, and will proceed to consider only the claim under Section 2(d).

¹¹ Notice of opposition ¶ 16, 1 TTABVUE 7.

¹² Neither does paragraph 16 sufficiently state a claim that Applicant fails to meet the requirement of Section 1 that the matter sought to be registered must be a mark.

IV. Standing.

Opposer has properly made of record its pleaded registrations¹³ and has thus established its standing to oppose registration of Applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

V. Opposer's claim under Section 2(d).

We turn, then, to Opposer's claim under Trademark Act Section 2(d) on the ground of priority and likelihood of confusion. For the sake of economy, we will confine our analysis to the issue of likelihood of confusion between Applicant's mark and the mark in Opposer's Reg. No. 4309978, which is APOLLO INTERNATIONAL in standard characters. Of all the pleaded marks, this one is the most similar to Applicant's mark, inasmuch as each of the other pleaded marks contains additional points of difference as compared to Applicant's mark. In addition, Opposer's services in Class 45, for which the mark is registered, are more similar to Applicant's services than are Opposer's other services. If the opposition cannot be sustained on the basis of this registered mark, it could not be sustained on the basis of the other pleaded marks. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

¹³ Crowley I, Exhibits A-E, 9 TTABVUE 9-41. Opposer has also submitted evidence of its ownership and the status of Reg. No. 4471527 for the mark APOLLO SECURITY INTERNATIONAL, Crowley I, Exhibit F, 9 TTABVUE 42-47. The notice of opposition made no mention of this registration or of the application underlying it; but Applicant has not objected to its admission in evidence. We deem it to be of record; however, it has not altered our analysis.

In view of Opposer's ownership of a valid and subsisting registration of its pleaded mark, priority is not in issue with respect to the mark and the services identified in the registration. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion is based on an analysis of all probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

A. The marks.

First we consider the similarity or dissimilarity of the marks APOLLO INVESTIGATIONS, INC. and APOLLO INTERNATIONAL in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

The two marks are similar in appearance, sound and meaning to the extent that each has, as its initial component, the term APOLLO. The other wording of the marks, INVESTIGATIONS, INC. and INTERNATIONAL, respectively, are points of difference in appearance, sound, and meaning. These additional words provide

relatively little distinctiveness to the two marks: INVESTIGATIONS, INC. is generic as applied to Applicant's services, and customers would not perceive this wording as a source-indicating element of the mark. Neither does this wording do much to distinguish the mark from Opposer's mark, which is used, in part, for certain "investigation services." Similarly, the word INTERNATIONAL is a relatively nondistinctive component of Opposer's mark, because the services of both Applicant and Opposer are of types that can be rendered on an international basis. Thus, although the different wording of the two marks results in different literal meanings, the difference in meaning only weakly distinguishes the marks from each other.

While there are differences in appearance, sound and meaning between the parties' marks, we find that the similarities outweigh the differences and that the two marks create similar commercial impressions overall. This *du Pont* factor favors a finding of likelihood of confusion.

B. The services.

We next consider the similarity or dissimilarity of the parties' respective services as they are identified in the application and registration at issue. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014); *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant seeks to register its marks for "Private investigation." We take notice of the following dictionary definitions:

private investigator. See **private detective.** *Abbr:* p.i., P.I. ...

private detective, a detective who is not a member of an official force but is employed by private parties. Also called **private investigator**.

1540 RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2nd ed. 1986).

private detective or private investigator *n* : a person concerned with the maintenance of lawful conduct or the investigation of crime or other irregularities either as the regular employee of a private interest (as a hotel or store) or as contractor for fees <obtained a *private detective* to report on his wife's associates>

1805 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).¹⁴

Opposer's pleaded registration covers, among other services, the following:

investigation services involving infringements of intellectual property rights and for asset protection;

and

security due diligence services, namely, detailed investigative reports for individuals or businesses traveling or opening an office overseas, in the nature of detailed foreign country briefings, vetting of local personnel, establishing host country government contacts, and providing information on sustainable security measures overseas.

Applicant's services, as identified, are broad and encompass within their scope intellectual property investigations of the type identified in Opposer's registration, as well as the "vetting of local personnel" that Opposer provides as part of its "security due diligence" services. Applicant argues:

Applicant is in the business of offering private investigator services to individuals, focusing primarily on matrimonial

¹⁴ 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).

private investigations and surveillance, as well as service of process.¹⁵

Opposer's evidence shows that it is a large asset and personal protection firm representing primarily corporations or institutions, which appears to only investigate sabotage, destruction and/or theft of assets it is already protecting.¹⁶

Applicant's recitation of services is not limited to matrimonial investigations, nor is it limited to services offered to individuals; and we must presume that Applicant's services encompass all services of the nature and type identified. *See In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006). Neither is Opposer's registration limited to services offered to corporations or institutions: the registration refers to "investigative reports for individuals or businesses ..." Because Applicant's recitation of services is broad, it encompasses private investigation services of the type identified in the registration; accordingly, the parties' services are, in part, legally identical. *See Octocom Sys. Inc. v. Houston Computers Svcs. Inc.*, 16 USPQ2d at 1787 ("The authority is legion that 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 regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.") Accordingly, the *du Pont* factor of the similarity or dissimilarity of the services heavily favors a finding of likelihood of confusion.

¹⁵ Applicant's brief at 2, 20 TTTAVVUE 6.

¹⁶ *Id.* at 4, 20 TTABVUE 8.

C. Trade channels.

Because the services at issue are, in part, legally identical, we must presume that the services of Applicant and Opposer move in the same channels of trade and are offered to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

D. Sophistication of customers; Conditions of sale.

Applicant argues:

Applicant is hired by local individuals for local work, such as spousal investigations, service of process and skip traces (missing person's search). Opposer represents large corporations and institutions on large contracts with tens of millions of dollars of annual revenue. They do not compete for customers ...

[Opposer's] customers are sophisticated corporate or institutional entities in need of security and asset-protection services, including Boston Scientific Group, Putnam Investments, Shriner's Hospital for Children, Fidelity Investments, GTE, etc. (*Citing Crowley I*, ¶ [27].)¹⁷

As Applicant's services are broadly defined, they might be offered to sophisticated or unsophisticated customers. However, Opposer's investigation services, by their nature, would be offered only to persons or businesses having intellectual property in need of protection; or persons or businesses needing "security due diligence" services in connection with their foreign operations. Thus, Opposer's customers are likely to

¹⁷ Applicant's brief at 8, 20 TTABVUE 12.

be relatively sophisticated and would exercise an elevated degree of care in the selection of investigation services. To the extent that potential customers of Applicant might overlap with Opposer's class of customers, such customers would be similarly sophisticated and careful. Accordingly, the *du Pont* factor of the conditions of sale and the customers to whom sales are made weighs against a finding of likelihood of confusion.

E. Similar marks of third parties.

Applicant argues that there are many companies unrelated to Opposer that use the term APOLLO in connection with investigative services.¹⁸ Applicant implies that Opposer's mark should be given a limited scope of protection, because the APOLLO component of the mark is weak. Applicant has made of record evidence from the Internet showing that third parties have advertised investigative services under the following marks:¹⁹

<u>Mark</u>	<u>Location</u>
APOLLO INVESTIGATIONS, INC.	Tampa and St. Petersburg, FL
APOLLO INVESTIGATIONS LLC	Chelsea, AL
APOLLO INVESTIGATIVE SERVICES, LLC	Anchorage, AK
APOLLO USA SECURITY & SURVEILLANCE	Englewood, CO
APOLLO PROTECTIVE SERVICES	Chino, CA

¹⁸ Applicant's brief at 10, 20 TTABVUE 14.

¹⁹ Youlen Exhibit E, 12 TTABVUE 31-44.

APOLLO SECURITY INC.	Providence, RI
APOLLO MEDICAL INVESTIGATIONS & APOLLO NURSING HOME	(location unknown)

There is also evidence of the offering of security equipment and systems under the marks APOLLO INTELLIGENT SECURITY SOLUTIONS (Newport Beach, CA) and APOLLO SECURITY GROUP, INC. (Arizona).²⁰

Although Applicant’s evidence tells us little about the extent to which the third-party marks may have been used or the amount of exposure relevant customers may have had to them, the Federal Circuit has held that “even where the specific extent and impact of the usage has not been established,” such evidence of third-party use is relevant to show that a term “may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that [term] is relatively weak,” and “can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (internal quotation marks omitted). The amount of third-party evidence in this case is much less voluminous than that in *Jack Wolfskin* and other similar cases. See also *Juice Generation, Inc. v. GS Enterprises*

²⁰ We have not considered evidence relating to two foreign entities in Canada and the United Kingdom, respectively. We have also not considered the website at <apolloparanormal.com>, because the website does not show use of APOLLO otherwise than in the URL; and because the services offered (investigation of paranormal activity) are quite different from those of Applicant and Opposer.

LLC, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015). To a limited degree the evidence indicates that APOLLO may be perceived as suggestive of superiority; however, we find the evidence too sparse to demonstrate that relevant customers have been exposed to so many different APOLLO marks that they have become alert to “minute distinctions” between them. We find that the *du Pont* factor of the number and nature of similar marks in use in connection with similar services weighs slightly against a finding of likelihood of confusion.

F. Absence of actual confusion.

Applicant points out that there is no evidence of actual confusion engendered by the similarity of the marks despite contemporaneous use for approximately four years.²¹ The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its marks. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010) *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011). Although Applicant seeks registration of its mark for the full scope of private investigation services, in reality it has used its mark in a relatively limited range of services that do not, in fact, overlap with those of Opposer and are not directed to the same classes of customers. Thus, there is no indication that there has been a meaningful opportunity for confusion to occur (such as might exist if Applicant were to expand its business to serve a broader range of customers for investigative services). Under the

²¹ Applicant’s brief at 8-9, 20 TTABVUE 10-11.

circumstances, we find the lack of evidence of actual confusion to be a neutral factor in our analysis of likelihood of confusion.

G. Extent of potential confusion.

Both parties have offered arguments as to the *du Pont* factor of the extent of potential confusion. However, on this very thin record we find no evidence upon which to make a meaningful determination as to this factor. Accordingly, we deem it neutral.

H. Balancing the factors.

We have considered all of the evidence of record and all arguments of the parties relevant to the issues before us, including those not specifically discussed herein. We have found Applicant's mark to be quite similar to Opposer's mark; and we have found the parties' services, trade channels, and customers to be legally identical. Despite the demonstration of some weakness of the term APOLLO and the likelihood that customers exposed to both parties' marks may be sophisticated and careful, we find that Applicant's mark, as used in connection with the identified services, so closely resembles Opposer's mark as to be likely to cause confusion, mistake or deception as to the source of Applicant's services.

In making this determination, it is important to note that Applicant's recitation of services is broader than the range of services that Applicant actually provides. The registration that Applicant seeks would apply to "private investigation" of all types, marketed in all manners normal for such services, and the registration's effectiveness would subsist even if Applicant were to substantially change the character of its

current operations (for example, by offering investigation services for large businesses relating to business assets, such as investigations of infringements of intellectual property). We have found that Applicant is not entitled to a registration for such a broad scope of services, considering the significance that a registration for such services would have under Trademark Act Section 7, 15 U.S.C. § 1057(b). We hasten to add that we have made a determination of *registrability* only, a determination that, in some regards, does not take into consideration all of the current market realities of Applicant's business, such as its current focus on matrimonial investigations for individuals. Our decision in this proceeding has no effect on Applicant's right to continue to do business under its mark as it currently does.

Decision:

The opposition is SUSTAINED on grounds of likelihood of confusion under Trademark Act Section 2(d).