This Opinion is not a
Precedent of the TTAB

Mailed: September 25, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Plentyoffish Media, Inc.
v.
Miguel A. Maya

Opposition No. 91205340
to application Serial No. 85494932
and
Cancellation No. 92055201
to Registration No. 4099815

Kevin S. Costanza and Michael J. Freno of Seed IP Law Group PLLC for Plentyoffish Media, Inc.

Biana Borukhovich of The Law Office of Biana Borukhovich, PLLC for Miguel A. Maya.

Before Cataldo, Mermelstein and Ritchie,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Miguel A. Maya ("Defendant") has applied to register on the Principal Register the mark PLENTY OF PROS (standard characters) for

> on-line social networking services geared to professional service providers

in International Class 45.[1] In addition, Defendant is the owner of a registration on the Principal Register for the mark PLENTYOFPROS (standard characters) for

> on-line business directories featuring listings of professional service providers

in International Class 35.[2]

Plentyoffish Media, Inc. ("Plaintiff") has opposed registration of Defendant's application and petitioned to cancel Defendant's registration based upon its allegation, *inter alia*, of likelihood of confusion with the following marks, previously used and registered on the Principal Register: PLENTYOFFISH (standard characters) for

> providing on-line forums for the transmission of messages among computer users concerning making acquaintances, friendship, dating, long-term relationships and marriage

in International Class 38, and

> computer services, namely, providing information regarding, and in the nature of, on-line dating and introduction services

in International Class 45;[3] and PLENTY OF FISH (standard characters) for

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[1] Application Serial No. 85494932 was filed on December 14, 2011 under Section 1(a) of the Trademark Act, asserting December 14, 2011 as the date of first use of the mark anywhere and in commerce.

[2] Registration No. 4099815 issued on February 14, 2012, based upon underlying application Serial No. 85097486, filed on July 31, 2010.

[3] Registration No. 3251639 issued on June 12, 2007, based upon underlying application Serial No. 78945018, filed on August 4, 2006. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

> providing on-line forums for the transmission of messages among computer users concerning making acquaintances, friendship, dating, long-term relationships and marriage

in International Class 38; and

> computer services, namely, providing web-site services featuring on-line dating

in International Class 45.[4]

Plaintiff alleges that it has used its well-known marks in connection with the above listed services since prior to any date upon which Defendant may rely for purposes of priority; that Defendant's marks, when used in connection with Defendant's services, so resembles Plaintiff's well-known marks used in connection with its services as to be likely to cause confusion, to cause mistake, and to deceive; and that Plaintiff will be damaged thereby.[5]

Defendant's answer to the notice of opposition consists of denials of the salient allegations thereof, although Defendant admits to Plaintiff's ownership of its pleaded registrations and that it applied to register the involved mark for the recited services. Defendant's answer to the petition for cancellation denies the salient allegations of paragraphs 7 – 27 thereof, although Defendant admits Petitioner's priority and that "a mere mockup is

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[4] Registration No. 3302508 issued on October 2, 2007, based upon application Serial No. 78945004, filed on August 4, 2006. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

[5] Plaintiff alleged additional grounds for opposition and cancellation but did not pursue them at trial. Accordingly, they are deemed waived.

not actual trademark use, per Section 904.04(A) of the T.M.E.P."[6] Furthermore, by failing to deny paragraphs 1 – 6 of the petition for cancellation, Defendant is deemed to have admitted the allegations contained therein, including Plaintiff's ownership of its pleaded registrations. *See* Fed. R. Civ. P. 8(b)(6). *See also* TBMP § 311.02(a) (2014) and authorities cited therein. Defendant further asserts certain affirmative defenses in its answers but did not pursue them at trial. Accordingly, they are deemed waived. Defendant further asserted as affirmative defenses in its answers matters that are more in the nature of amplifications of his denials, and have been so construed.

Motion to Consolidate

Defendant's July 30, 2012 consented motion to consolidate these proceedings was granted by a Board order issued on August 20, 2012. Accordingly, we will address both proceedings in a single opinion.

The Record

The record in these cases consists of the pleadings and the files of the involved application and registration.[7] *See* Trademark Rule 2.122(b); 37 C.F.R. § 2.122(b). During its testimony period, Plaintiff submitted a notice of reliance upon the following:

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[6] 4 TTABVue p. 7. (Cancellation No. 92055201).

[7] In this decision, we will refer to the record as presented in Opposition No. 91205340 unless otherwise noted.

Copies of its pleaded registrations showing their current status and title to Plaintiff, and the file wrappers therefor;

Copies of screenshots taken from Internet web pages, displaying the URL of the websites from which the materials were obtained and the dates upon which the materials were accessed, and consisting of articles discussing Plaintiff and its founder, marks and services;

A copy of the complaint in an infringement action brought by Plaintiff against a third party; and

Copies of written discovery requests to Defendant and responses and documents produced by Defendant, as well as a transcript of the discovery deposition of Defendant.[8]

In addition, during its testimony period, Plaintiff submitted the testimony declaration of its Manager, Mr. Paul Bloudoff and exhibits introduced thereby, many of which are duplicative of the materials Plaintiff submitted by notice of reliance.[9] Those exhibits that are not duplicative consist of copies of screenshots from Google Analytics displaying the results of his search for data concerning Plaintiff, its website and marks from June 2010, December 2011, January 2013 and September 2013. In a Board inter partes proceeding, a party normally may submit testimony in the form of an affidavit or declaration only by written stipulation with the adverse party, approved by the Board. *See* Trademark Rule 2.123(b). *See also* TBMP §705

[8] 28 TTABVue p. 1-379.

[9] 27 TTABVue p. 1-63.

(2014). In this case, there is no indication that the parties entered into any stipulation allowing the parties to introduce testimony by affidavits or declarations. However, we note that Defendant also submitted a copy of Mr. Bloudoff's declaration with its notice of reliance, discussed below and did not object thereto. As a result, we infer Defendant's consent to Plaintiff's introduction of Mr. Bloudoff's testimony declaration, as evidence of the matters of fact asserted therein and as foundation for exhibits attached thereto.

During its assigned testimony period, Defendant submitted a notice of reliance, upon the following:

Copies of the file wrappers of its involved application and registration;

Copies of the file wrappers of Plaintiff's pleaded registrations and an additional application (Serial No. 85922827) owned by Plaintiff;

Copies of the results of Defendant's search of the USPTO Trademark Electronic Search System (TESS) for marks consisting of the terms "plenty of" and "plenty of pros;"

Copies of screenshots taken from Internet web pages, displaying the URL of the websites from which the materials were obtained and the dates upon which the materials were accessed, and consisting of articles and postings discussing Plaintiff and Defendant;

A copy of the testimony declaration of Plaintiff's Manager, Mr. Paul Bloudoff;

Copies of the pleadings; the discovery deposition of Defendant; copies of certain of Plaintiff's responses to Defendant's written discovery requests;

The affidavit of Defendant; and

Copies of Defendant's email messages.[10]

During its rebuttal testimony period, Plaintiff submitted a notice of reliance upon complete copies of its responses to Defendant's first set of interrogatories.[11]

To the extent that any of the above evidence made of record by the parties by notice of reliance was submitted in a manner not in conformance with the evidentiary rules applicable thereto, we observe that none of the non-conforming evidence is outcome determinative. The evidence that we have relied upon in coming to our determination is discussed below. *See Krause v. Krause Publications Inc.*, 76 USPQ2d 1904, 1907 (TTAB 2005) ("[w]here we have relied on testimony to which respondent objected, it should be apparent to the parties that we have deemed the material both admissible and probative to the extent indicated in the opinion.").

However, the attachments to Defendant's main brief will be given no consideration. To the extent they were not submitted during Defendant's testimony period, they are not properly of record. To the extent they were timely submitted during Defendant's testimony period, they are duplicative

[10] 29 TTABVue p. 1-345.

[11] 30 TTABVue p. 1-35.

and unnecessary. In view thereof, Plaintiff's motion to strike such exhibits, submitted with its reply brief, is moot

The proceedings are fully briefed.

Plaintiff's Standing

Because Plaintiff has properly made its pleaded registrations of record, and further has shown, by its use and registration of marks that are at least arguably similar to Defendant's marks that it is not a mere intermeddler, we find that Plaintiff has established its standing to oppose registration of Defendant's application and petition to cancel Defendant's registration for its involved marks. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority of Use

Because Plaintiff's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to the marks and services covered thereby with regard to Defendant's application Serial No. 85494932. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Similarly, because Defendant has not established earlier use of its PLENTYOFPROS mark in connection with the services recited in its Registration No. 4099815, the earliest date upon which Defendant may rely for purposes of priority is the July 31, 2010 filing date of application Serial

No. 85097486, underlying its involved registration. *See* Trademark Act Section 7(c), 15 U.S.C. §1057(c). *See also Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840 (TTAB 1995). The filing date of Plaintiff's pleaded Registration Nos. 3251639 and 3302508 is August 4, 2006. Because the filing dates of Plaintiff's underlying applications predate the filing date of the application underlying Defendant's involved registration, Plaintiff clearly has established its priority as to its pleaded registrations. In addition, and as noted above, Defendant admits to Plaintiff's priority in paragraph 2 of his answer to the petition for cancellation.

Defendant argues that

> since Petitioner has not registered its PLENTY OF FISH marks under business and professional networking services and because it has not introduced any testimony or evidence regarding the first use of its mark for such services, it has not established priority of its PLENTY OF FISH mark for business and professional networking services.[12]

However, Plaintiff has not pleaded or argued that it has used its marks with "business and professional networking services," but relies upon the services recited in its pleaded registrations. Thus, while we agree with Defendant that Plaintiff has not established priority for "business and professional networking services," Plaintiff has not attempted to do so. Rather, Plaintiff clearly has established priority with regard to the services recited in its pleaded registrations, and our likelihood of confusion determination is based thereupon. Our analysis of the similarities and dissimilarities between the

[12] Defendant's brief, 32 TTABVue p. 33.

parties' services is addressed below as part of our likelihood of confusion discussion.

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue, even those not specifically discussed in this decision. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Plaintiff's Registration No. 3251639

For purposes of our likelihood of confusion determination, we will concentrate on Plaintiff's pleaded Registration No. 3251639 for the mark PLENTYOFFISH for the following services:

> providing on-line forums for the transmission of messages among computer users concerning making acquaintances, friendship, dating, long-term relationships and marriage

and

> computer services, namely, providing information regarding, and in the nature of, on-line dating and introduction services.[13]

[13] Plaintiff pleaded ownership of both registrations in its above-captioned opposition and cancellation proceeding.

In the event we find likelihood of confusion with the mark and services recited in this registration, we need not consider the mark and services in Plaintiff's other pleaded registration. In the event we do not find likelihood of confusion with the mark and services recited in this registration, we would not so find with Plaintiff's other pleaded registration. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Strength of Plaintiff's Mark

The evidence of record establishes that Plaintiff's PLENTYOFFISH mark identifies the world's largest online dating site, with 69 million registered users, 697 million visits per month, and 9 billion page views per month as of September 2013.[14] During various times in 2010, 2011, and 2013, PLENTYOFFISH was the most visited website in the United States and the world and is valued at $100 million.[15] PLENTYOFFISH and the services offered thereunder have received unsolicited media attention from such paper and on-line publications as Inc. Magazine, New York Times, and Forbes.[16] Defendant also acknowledges that PLENTYOFFISH is a well-known mark used in connection with a dating website.[17] On the other hand, Defendant argues that PLENTYOFFISH describes Plaintiff's services that offer access to "plenty of fish in the sea" and conceptually is a weak mark.[18] Nonetheless, Defendant acknowledges that he may not claim that a pleaded

[14] 27 TTABVue p. 3 - 22.
[15] *Id.*
[16] *Id.* at 4, 23 - 63.
[17] 28 TTABVue p. 279, 304.
[18] 32 TTABVue p. 30.

registration is descriptive in the absence of a counterclaim to cancel it.[19] *See also* Trademark Rule 2.106(b)(2)(ii). In any event, Plaintiff's registered marks appear to be no more than generally suggestive of its recited services.

On the record of this combined proceeding, we find that Plaintiff's mark PLENTYOFFISH is very strong in connection with its services particularly in the field of dating, and is entitled to broad protection.

The Marks

In comparing the marks, we consider the first *du Pont* factor, i.e., whether Defendant's marks and Plaintiff's mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot,* 73 USPQ2d at 1692. "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).

In this case, Plaintiff's mark is PLENTYOFFISH. Defendant's marks are PLENTY OF PROS and PLENTYOFPROS. We begin by observing that the presence or absence of spaces between the component terms of the marks is not a significant difference. *Cf. Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir.

[19] *Id*. at 29.

1984). The parties' marks are similar to the extent that both Plaintiff's mark and Defendant's marks begin with the identical terms "PLENTY OF." The marks differ to the extent that in Plaintiff's mark, the wording "PLENTY OF" modifies "FISH" and in Defendant's marks, the wording "PLENTY OF" modifies "PROS."

We find that the wording "PLENTY OF" in both parties' marks is the dominant feature thereof. This is because the terms "PLENTY OF" modify the term that follows and serve to suggest that the services provide plenty of "fish" (individuals available for dating) or professionals. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood 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 a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In addition, the significance of "PLENTY OF" in the parties' marks is reinforced by its location as the first portion thereof. *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897) TTAB 1988) ("It is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered."). *See also Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Viewed as a whole, we find that Plaintiff's very strong PLENTYOFFISH mark is relatively similar to PLENTYOFPROS and PLENTY OF PROS in appearance. More importantly, the marks are similar in connotation inasmuch as both suggest a source of plenty of individuals to meet and date or plenty of professionals to meet. Recognizing the obvious differences between the last term in the marks, we find that the similarities, particularly in connotation, outweigh the differences, and that the marks convey similar commercial impressions. Put another way, we find that consumers viewing Defendant's PLENTYOFPROS and PLENTY OF PROS marks would believe that Plaintiff established these marks to denote services providing business directories and social networking services geared to professionals, but nonetheless pointing to the same source as its PLENTYOFFISH mark.

Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola 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"); and *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar.'") (citations omitted)).

Particularly in light of the strength of Plaintiff's mark, this *du Pont* factor favors a finding of likelihood of confusion.

The Services

Next, we turn to our consideration of the similarities or dissimilarities between the parties' services. It is well established that the goods or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods or services of the parties are related in some manner, or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telephone Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods and/or services, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

In this case, the services recited in Plaintiff's Registration No. 3251639 are

> providing on-line forums for the transmission of messages among computer users concerning making acquaintances, friendship, dating, long-term relationships and marriage; and

> computer services, namely, providing information regarding, and in the nature of, on-line dating and introduction services.

Defendant's services are recited as follows:

> on-line social networking services geared to professional service providers

in application Serial No. 85494932; and

> online business directories featuring listings of professional service providers

in Registration No. 4099815.

In his discovery deposition, Defendant offered the following testimony:

> Q. Now, with regard to the services for the marks, are you providing on-line forums?
>
> A. Yes.
>
> Q. And so are you providing on-line forums for people to communicate with one another?
>
> A. Yes.
>
> Q. And do the services of your website include introducing users to one another?
>
> A. Any social network would have that, Counselor, underneath the class itself.
>
> Q. Do you provide on-line forums for the transmission of messages among computer users concerning making acquaintances?
>
> A. For professionals, yes, also.
>
> Q. Are you providing services whereby users can develop relationship --
>
> A. Acquaintances --

Q. I'm sorry, let me finish the question.
Are you providing services whereby users can
develop relationships with one another?

A. Professional relationships, Counselor.

Q. Is there any limitation that says that
romantic relationships are off limits?

A. It's a professional network.

Q. Are you introduce -- so you are introducing
professionals to one another?

A. Yes, that is so.

Q. Do you provide information about the
individuals so that they can select the people that
they want to meet?

A. Basically the members, as far as the profile
is concerned, the questions that I give are
professional in nature. For instance; are you
licensed? What profession you are. What -- you know,
it's all professional questions. So yes, they can
search underneath those questions to find the
professionals that they need.[20]

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Q. Now, I believe you said that the purpose of
the website is for professionals like you so that they
can communicate with one another; is that correct?

A. That is correct, Counselor.

Q. Communicate about what?

A. About their profession.
It's not only just for professionals, it's
for everyone, but it's geared for professionals. The
tag line is professionals, products, and protocols.

[20] 28 TTABVue p. 323-5.

> The original idea came from being an acupuncturist and dealing with western patients not understanding the stuff that I do, or that we do as a profession, so the products part was basically, you know, to help people understand the herbs that we use, some of the processes that we use.
> The protocol part was basically for, you know, discussions on what we do, how we do it, and why we do it. That actually was taken from Acupros.com and I developed it into Plentyofpros.
>
> Q. You said that it's not geared just for professionals; for everybody?
>
> A. It is geared for professionals, but anyone can join. There is [sic] questions once you join as a member that state whether or not you are a professional or not, yes or no answer.[21]
>
> ____
>
> Q. And so are you -- you are targeting professionals throughout the country; is that correct?
>
> A. Yes.
>
> Q. And you want professionals all over the country to collaborate about their work; is that correct?
>
> A. About their work, you know, about their profession.
>
> Q. And is the purpose to bring professionals together to form relationships with one another?
>
> A. Professional relationships, Counselor.[22]
>
> ____

[21] *Id*. at 312-3.
[22] *Id*. at 314.

Q. Were you providing directory listings of professional service providers in 2011?

A. You -- as a member of the site you can actually look up other members through search functions, so that is correct.

Q. I'm not sure if I understood. So you provided search functionality so that users could look up other users, and you are saying that that is a directory listing professional service providers?

A. Yes.

Q. What is a directory, in your mind?

A. A directory is basically a listing of practitioners, or people, profiles. With the members, basically I give them a bunch of questions when they join they can answer. Each of the answers are [sic] searchable through the search functions of the site itself.

Q. Would you consider Plentyoffish to have a directory of individuals?

A. I don't know about Plentyoffish.

Q. For your websites in 2011 can you describe what the social networking capabilities were?

A. You can join. Is that what you mean?

Q. Yes. And then also chat with other members, or what were the social networking functionalities that you provided to users or potential users?

A. Well, basically members can join. You can send email messages.

Q. What is an in mail message?

A. Email.

> Q. Oh, email.
> I'm not sure if I'm following. So you can
> send emails outside of the site to communicate with
> other users, or are you saying that within the website
> you can communicate with other members through email?
>
> A. The second one, within the website.
>
> Q. And so did you provide email addresses to
> new members?
>
> A. Email -- the profile itself, that's
> basically what I mean, the member profile, you can
> send emails from profile to profile.[23]

In addition, Defendant admits that his services provide an on-line forum, available over the Internet, to anyone seeking directory services related to professional service providers.[24] Defendant further admits that he provides computer users with introductions to professional service providers.[25]

Based upon the evidence of record, some of which is excerpted above, we make the following findings of fact:

- Defendant provides an on-line forum over the Internet, available to anyone, allowing users to communicate with one another via email. Plaintiff's services, as identified, provide on-line forums allowing users to communicate with one another via email.
- Defendant's services provide its users with introductions to professional service providers with the intention of forming professional relationships. Plaintiff's services, as identified, provide

[23] *Id.* at 316-7.
[24] *Id.* at 350.
[25] *Id.* at 351.

users with introductions among users for purposes of, inter alia, dating.

- Defendant's services allow users to create profiles and communicate from profile to profile. Plaintiff's services also allow users to create profiles and communicate profile to profile.[26]
- Defendant's services provide listings of profiles containing searchable information. Plaintiff's services also provide listings of profiles containing searchable information.[27]
- Both parties' basic services are free, although certain features of Plaintiff's services require a fee.[28]

With regard to Defendant's services in its Reg. No. 4099815, namely, "on-line business directories featuring listings of professional service providers," a directory, according to Defendant, is a listing of profiles of people and professionals. These listings provide information concerning professional service providers and allow users to make professional introductions, form professional relationships, and communicate with one another via email. These services are related to Plaintiff's services in Class 38 that provide transmission of messages among computer users concerning making acquaintances, and Plaintiff's services in Class 45 that provide information regarding, inter alia, introduction services inasmuch as both

[26] 29 TTABVue p. 124.
[27] *Id*. at 35-46.
[28] *Id*. at 298

enable computer users to create informational profiles to introduce themselves, establish relationships and communicate with one another.

Defendant argues that his services are intended to allow professional service providers to exchange professional information and establish professional relationships whereas Plaintiff provides dating services. However, Plaintiff's services, as identified, are not limited to dating and romantic relationships but include "acquaintances" and "friendship" in Class 38 and "introduction" in Class 45 that are not limited to romantic relationships. Likelihood of confusion is determined on the basis of the services as they are identified in Plaintiff's pleaded registrations and Defendant's involved application and registration. *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.,* 190 USPQ 47, 48 (TTAB 1976). *See also Octocom Systems, Inc. v. Houston Computers Services Inc.,* 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("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 the sales of goods are directed"). Plaintiff's services, similarly, are available to anyone, including professional service providers, and Defendant's services, while listing professional service providers, are available for anyone to join.

With regard to Defendant's services in its application Serial No. 85494932, namely, "on-line social networking services geared to professional service providers," Defendant acknowledges that his services provide an on-line forum allowing users to make introductions and acquaintances with other users. These services are highly similar, if not identical, to Plaintiff's on-line forums allowing users to make acquaintances and similar to Plaintiff's information regarding introduction services. Defendant's services are "geared to professional service providers." However, Plaintiff's services are not limited in scope and may be used by professional service providers. In addition, both parties' services are available, for free, for anyone to use.

Based upon the foregoing, we find that the parties' services are related for purposes of likelihood of confusion.

The second *du Pont* factor thus also weighs in favor of a finding of likelihood of confusion.

Channels of Trade and Classes of Consumers

Because there are no recited restrictions as to the channels of trade or classes of purchasers of the services identified in Plaintiff's pleaded registrations, we must assume that the services are available in all the normal channels of trade to all the usual purchasers for such services. *See Octocom,* 16 USPQ2d at 1787. *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the

basis of the respective descriptions of goods [or services]."). As such, Plaintiff's services are presumed to be marketed to the general public through all normal trade channels therefor. Defendant's services are marketed to professional service providers and those seeking their services, although Defendant acknowledges they are available to anyone. Furthermore, the evidence of record discussed above establishes that the services of both parties, as identified, are provided over the Internet and, therefore, the classes of consumers of Defendant's services overlap or are encompassed by those of Plaintiff.

The third *du Pont* factor also supports a finding of likely confusion.

Defendant's Intent in Adopting His Marks

Next, Plaintiff points out that Defendant has admitted that his selection and use of his involved marks, and the filing of his involved application and application underlying his involved registration, were made with actual knowledge of Plaintiff's marks and services. To the extent that Plaintiff is arguing that Defendant adopted his marks in bad faith, there is insufficient evidence to show or from we which we can infer this. Mere knowledge of the existence of Plaintiff's marks does not, in and of itself, constitute bad faith. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ 1307 (Fed. Cir. 1989) ; and *Ava Enterprises, Inc. V. Audio Boss USA, Inc.*, 77 USPQ2d 1783 (TTAB 2006). Plaintiff has not

sufficiently shown that Defendant intentionally sought to trade on Plaintiff's good will.[29] Accordingly, we treat this *du Pont* factor as neutral.

Sophistication of Consumers

Defendant argues that "since the trade channels of the parties' respective services do not overlap, the relative sophistication of purchasers is not relevant to the likelihood of confusion analysis here."[30] As discussed above, Plaintiff's unrestricted trade channels are presumed to overlap with or encompass those of Defendant. Nonetheless, there is nothing in the record that would give us insight as to the possible sophistication of consumers of the relevant services. To the extent that the related services may be marketed to more careful users of Internet social networking and membership sites, we expect that with highly similar marks used on similar services, even a careful, sophisticated consumer of these services is unlikely to notice subtle differences between the marks or ascribe them to different sources. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). This *du Pont* factor is also considered neutral.

Actual Confusion

Finally, we agree with Plaintiff that proof of actual confusion is not necessary to show a likelihood of confusion, and its absence is not dispositive. *See Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840,

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[29] Similarly, and contrary to the assertions of Defendant, we find no evidence of bad faith on the part of Plaintiff in its filing of an application for a mark not at issue herein.

[30] 32 TTABVue p. 27.

1843 (Fed. Cir. 1990); and *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). Furthermore, it has often been recognized that such evidence is difficult to obtain. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1834 (TTAB 2012). We find that the *du Pont* factors pertaining to actual confusion are neutral.

Conclusion

To the extent that any other *du Pont* factors for which no evidence was presented may be applicable, we treat them as neutral. In view of our findings that Plaintiff has priority of use, that Defendant's marks are similar to Plaintiff's mark, that their services are related, and that Plaintiff's channels of trade encompass those of Defendant, we find that Defendant's marks are likely to cause confusion with Plaintiff's mark when used in association with the parties' services.

DECISION: The opposition is sustained on the ground of likelihood of confusion, and registration to applicant is refused.

The petition for cancellation is granted, and Defendant's involved registration will be cancelled in due course.