

THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.

Oral Hearing:
November 16, 2010

Mailed:
March 28, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Oversee.net*

Serial No. 77542010

Scott R. Miller for *Oversee.net*.

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(Michael W. Baird, Managing Attorney).

Before Kuhlke, Taylor and Lykos Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

On August 7, 2008, *Oversee.net* applied to register in standard characters the mark LOWFARES.COM on the Principal Register based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. §1052(a), for services ultimately identified as "price comparison services, namely, providing on-line price comparisons in the field of travel, lodging, airline transportation, car rental, and travel tour packages via a website featuring links to other travel and lodging websites" in

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International Class 35 and "computer services, namely, providing a portal website featuring links to other websites in the fields of travel and lodging, via a global computer network; providing airline transportation, car rental, travel tour package, and general travel information via a global computer network; providing an Internet website portal in the field of travel" in International Class 39. In response to a refusal based on mere descriptiveness under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e), applicant asserted a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), which was accepted by the examining attorney.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its identified services, so resembles the standard character mark LOWESTFARE.COM registered on the Principal Register based on acquired distinctiveness under Section 2(f) for "travel agency services, namely, making reservations and bookings for transportation for others via the Internet" in International Class 39 and "travel agency services, namely, making reservations and bookings for hotels and other temporary lodgings for others via the

Internet, telephone and facsimile transmission," in International Class 43, as to be likely to cause confusion, mistake or deception.¹ The appeal is fully briefed and an oral hearing was held on November 16, 2010.²

When there is a question of likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In determining the similarity between the marks, we analyze "the marks in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En*

¹ Registration No. 3435703, issued on May 27, 2008.

² The examining attorney objected that applicant's brief exceeds the 25-page limit as prescribed by Trademark Rule 2.142(b)(2). Applicant's brief, including the cover page, is 26 pages. We note that the Rule does not explicitly state that a cover page will be included in the count. In addition, in response to the examining attorney's objection, applicant submitted its brief in 11 point font, which is permissible under Trademark Rule 2.126, and it is well within the page limit. In view thereof, we have considered applicant's brief.

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1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting du Pont, 177 USPQ at 567.

We find the marks LOWESTFARE.COM and LOWFARES.COM to be very similar in terms of sound, appearance, meaning and commercial impression. In sound and appearance the marks differ only by the addition of "EST" in the middle of registrant's mark and the plural form of FARE in applicant's mark. We are not persuaded by applicant's argument that the meanings and commercial impressions of the marks are sufficiently different to distinguish them. Specifically, applicant argues that:

Webster's Dictionary defines "low" as "of a lesser degree, size or amount than average or ordinary." And the term "lowest" is not identified in the dictionary as a synonym for the word "low." Importantly, whether something is "low" is a subjective determination. In stark contrast, the common understanding of the word "lowest" is that it is not just below average; rather it is the point which is the furthest below all others. As such, whether something is the "lowest" is objectively verifiable. This presents a significant difference in meaning and connotation, which creates a far different commercial impression than does a term like "low" which is merely subjective in nature. ... Moreover, the difference in meaning between low fares and the lowest fare further suggests that Applicant's services provide choices, i.e., information about multiple fares that are low in cost; while the services of the Cited Registration will provide the consumer with a the [sic] singular choice - namely, the lowest fare. ... As discussed above, there are significant differences in the meanings of the marks at issue that creates [sic] differing commercial

impressions. And this difference in commercial impressions of the marks should be dispositive of the issue of likelihood of confusion. . . . In the instant case, the differences in the commercial impressions of the marks as a whole, along with the differences in the respective services, the trade channels and the purchasers, are significant in distinguishing the respective marks. Here, one mark presents the consumer with information about many potential choices, the other presents an objectively verifiable claim about the single purchase option offered to the consumer (i.e., the "lowest").

Br. pp. 6-8

The word "lowest" is simply the inflected superlative form of the word "low." The general meaning and overall commercial impression of "a lesser degree, size or amount" is not lost. Thus, the fact that "lowest" is the ultimate of low, does not create a difference in meaning and commercial impression sufficient to distinguish the marks.

In addition, use of the term "lowest" in connection with registrant's services, does not obviate the meaning or impression of comparison shopping. It can mean that the travel consumer will be presented with the lowest fares available from various hotels and airlines and the consumer may compare the various fares. The facts here are distinguished from the cases upon which applicant relies. In *Champagne Louis Roederer S.A. v. Delicato Vinyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) the Court upheld the Board's finding that the word "CRISTAL"

"suggested the clarity of the wine within the bottle or the glass of which the bottle itself was made" and "CRYSTAL CREEK" "suggested 'a very clear (and hence probably remote from civilization) creek or stream.'" The marks involved in that case evoked completely different meanings, as opposed to the marks here which differ only in gradation - low versus lowest. In *In re Sydel Lingerie Co., Ltd.*, 197 USPQ2d 629, 630 (TTAB 1997) the Board, finding that the respective goods of the parties changed the meaning and commercial impression of the marks, stated that "if 'BOTTOMS UP' can be deemed to have any suggestive connotation as applied to men's suits, coats and trousers, it will be in association with the drinking phrase, 'drink up!' This is hardly the connotation that 'BOTTOMS UP' should generate as applied to applicant's ladies' and children's underwear." Here, to the extent the services evoke different meanings, it is not so distinct, but rather one of a comparative nature.³ Moreover, as discussed below, we do not find the services to be so distinct as applicant contends. In view thereof, the striking similarities in

³ The facts in the case not designated as Board precedent to which applicant refers, *In re Edward M. Shin*, Serial No. 77186384 (TTAB March 24, 2009), are also quite different. There, the Board found that WI-NOTIFI and WENOTIFY evoked different meanings in connection with the services in view of consumers' understanding of the meaning of WI-FI which is completely different from WE.

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sound, appearance, meaning and commercial impression, outweigh the minor differences.

We turn then to consider the du Pont factors of the relatedness of the services, channels of trade and classes of consumers. We make our analysis based on the identification of services listed in the application and registration. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). The services of the parties need not be identical or competitive to find a likelihood of confusion; it is sufficient that they are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the services come from a common source. In re *Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Applicant argues that its services are different because:

... consumers use Applicant's services in order to obtain information about travel [and] Applicant's site cannot book reservations for, or sell tickets to, travelers. Applicant cannot provide the sole services provided by

registrant's site, and making reservations and purchasing tickets is significantly different from the comparison services and other information provided by applicant. Comparing registrant's services, as identified in its registrations, with Applicant's services subject to this appeal, it is clear that the respective services, are mutually exclusive of each other and would not be considered related.

Br. p. 10.

Applicant provides travel information to consumers about various modes of transportation and lodging, focusing on available prices. In addition, applicant's services, as identified, include the provision of links, or access to, websites where the consumer may purchase or book transportation and hotels. Registrant's services provide both comparison shopping and the ability to book transportation and lodging. In addition, inherent within registrant's travel agency services is the comparison of various options for transportation and lodging, including based on price and, to that extent, registrant's services encompass applicant's travel information services. This understanding of the online travel agency services is supported by the record. See Final Office Action (April 2, 2010) printout of registrant's website. Thus, we find the services to be closely related. The fact that applicant's consumers have to click on a link to complete a booking is

not sufficient to distinguish the services sufficiently to obviate a likelihood of confusion.

We also find that the trade channels and classes of purchasers overlap. As identified, applicant's and registrant's services are specifically provided over the Internet and would be located by searches designed to find travel sites. Applicant attempts to distinguish the trade channels by arguing that the "composition of the audience" of the respective sites is different. First, there are no such limitations in the identifications and we cannot limit registrant's or applicant's channels of trade or classes of purchasers to what any evidence shows their "actual" channels of trade or classes of purchasers to be. In re Bercut-Vandervoort & Co., 229 USPQ 763 (TTAB 1986). Moreover, the distinction applicant makes does not eliminate the overlap in trade channels and classes of purchasers. In view of the above, we find that the trade channels and potential purchasers overlap.

As to the conditions of sale, applicant argues that "special care will be taken in using the services due to the high price tag on airline flights and other travel arrangements [and] consumers look to see to whom they are providing personal information such as credit cards and the like." Br. p. 20. We agree that the relevant overlapping

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consumers, those seeking to purchase transportation or lodging, would exercise a higher degree of care. However, this is not a circumstance where this factor would outweigh the other relevant du Pont factors. See *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992).

Applicant argues that there have been no known instances of actual confusion over four years of concurrent use. Applicant supports its argument with a declaration from applicant's General Manager attesting to, inter alia, applicant's advertising efforts and the volume of traffic on applicant's and registrant's respective sites. The main type of advertising described by applicant is in the form of sponsored links wherein applicant purchases key words and the search results on key words include a sponsored link that displays LOWFARES.COM. However, if registrant does not "advertise" by way of sponsored links, then it will not necessarily appear on the first page of the search result. Thus, it remains unclear whether there has been a meaningful opportunity for confusion to occur. In addition, other than the subscriber base to applicant's newsletter, it is not clear how any actual confusion, by relevant consumers in the general public, would become known to applicant, or that consumers would be aware of

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their mistake. Moreover, the inquiry here is likelihood of confusion, not actual confusion. *HRL Associates Inc. v. Weiss Associates Inc.*, 12 USPQ2d 1819, 1824 (TTAB 1989) aff'd, 14 USPQ2d 1840 (Fed. Cir. 1990). The Court of Appeals for the Federal Circuit has observed, "A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an ex parte context." *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). Thus, regardless of the evidence, an ex parte proceeding is ill equipped for a fair determination inasmuch as the registrant does not have an opportunity to defend its registration.

Applicant's argument that registrant has not objected to its use is not persuasive. Whether or not a registrant has objected to use of a mark has minimal probative value in the context of an ex parte proceeding. The issue before us is one of registration and not use. Moreover, such analysis requires impermissible speculation as to whether

registrant is aware of applicant's use and if so why it has not objected to that use.⁴

Finally, applicant relies on a survey to show that there is no likelihood of confusion. We begin by observing that typically surveys are used to prove likelihood of confusion rather than to prove no likelihood of confusion. While the survey follows the accepted format set out in *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976, cert. denied, 191 USPQ 416 (1976)), and followed by the Board (see *Starbucks U.S. Brands LLC v. Ruben*, 788 USPQ2d 1741 (TTAB 2006)), we find that it is compromised by the initial statement to the survey participants. In the preliminary statement of purpose, the participants are told "that the research [is] related to website names." The reference to "website names" does not prepare the participant to perceive these examples as brands or trademarks but rather more as simply the virtual world's version of an address. Therefore, it is not surprising that when asked questions about who operates the LOWFARES.COM website, or if the website is operated with

⁴ We note that even if registrant were aware of applicant's use of its mark and had not objected, such inaction would not serve to bar a registrant from opposing an applicant's registration of a mark. See *Teledyne Technologies Inc. v. Western Skyways Inc.*, 78 USPQ2d 1203 (TTAB 2006) (earliest date from which laches may begin to run is the filing date of an application where a petitioner had prior knowledge of a respondent's use).

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the approval or consent of any other company or affiliated with any other company, the vast majority of responses pointed to other unnamed third parties such as "airlines" or "a travel agency" and the next highest was one of the listed well-known websites ORBITZ. It appears clear from the results that the questions referring the participants to "any other company" prompted them to conjure up unnamed third parties. Moreover, it appears that out of 300 participants only 67 answered the first question regarding operation, only 36 answered the question regarding consent and only 27 answered the question regarding affiliation. Overall, we find that the survey results are of little probative value on the issue of likelihood of confusion presented in this case.

In making our determination we have considered the relative strength of the marks. It cannot be disputed that the marks are conceptually weak. However, as has often been stated even weak marks are afforded protection, in particular, where the marks are very similar and the services closely related. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). See also *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978) (even marks on the Supplemental Register are afforded protection).

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In conclusion, we find that because the marks are very similar, the services are related, and, as identified, the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the mark in the cited registration. To the extent there are any doubts, we resolve them, as we must, in registrant's favor. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.