

This Opinion is Not a  
Precedent of the TTAB

Mailed: April 11, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Cloud Crowding Corp.*  
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Serial No. 86191213  
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Cloud Crowding Corp., pro se.

Roselle M. Herrera, Trademark Examining Attorney, Law Office 124,  
Lydia Belzer, Managing Attorney.

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Before Bergsman, Shaw, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Cloud Crowding Corp. (“Applicant”) seeks registration on the Principal Register  
of the mark DATA ATOM (“DATA” disclaimed) in standard characters for:

Cloud computing featuring software for use management, storage, protection, movement, preservation, replication, delivery and streaming of any type of data, including, voice, audio, audio/visual, video, text, images, mixed content and transactional data; Computer services, namely, cloud hosting provider services; Computer services, namely, integration of private and public cloud computing environments; Consulting services in the field of cloud computing; Providing temporary use of on-line non-downloadable cloud computing software for management, storage, protection, movement, preservation, replication, delivery and streaming of any type of data, including, voice,

audio, audio/visual, video, text, images, mixed content and transactional data; Providing virtual computer systems and virtual computer environments through cloud computing; Technical support services, namely, remote and on-site infrastructure management services for monitoring, administration and management of public and private cloud computing IT and application systems; Updating and maintaining cloud-based computer software through on-line updates, enhancements, patches, self-automated and autonomously updating software, virtual machines, self-driven downloads, e-mail, CD, DVD, usb key and initial installation, in International Class 42.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the mark ATOMIC DATA ("DATA" disclaimed) in standard characters shown in Registration No. 4851636 for:

Computer services, namely, information technology consulting services; information technology support services, namely, technical oversight and administration of computer systems and software for others and troubleshooting in the nature of diagnosing and resolving computer systems and software problems; design, development and implementation of computer software for others; computer software development services; remote support services, namely, remote administration and management of inhouse and hosted datacenter devices, databases, and software applications, and remote database administration services; remote service desk and helpdesk services, remote monitoring of computer systems for others; analysis and design of technical security and firewall systems for computer networks; providing network operations center services in the nature of computer consulting services in the area of network infrastructure systems and in analysis, assembly, integration and monitoring of information technology infrastructure for

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<sup>1</sup> Application Serial No. 86191213 was filed on February 12, 2014 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), on the basis of Applicant's allegation of a bona fide intention to use the mark in commerce.

others; providing computer monitoring service to track hardware and software performance and processes; remote operation of advanced network management software for others; Web site hosting services; computer hard drive data backup and recovery services; e-mail migration and server migration services; migration of datacenter, server and database applications; database design and creation services; information technology project management services; remote backup of electronic data, in International Class 42;<sup>2</sup>

and the composite word-and-design mark depicted below



shown in Registration No. 5083830 for the same services identified in Registration No. 4851636, as well as other services in International Classes 35, 37, 39, and 42,<sup>3</sup> as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive.

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, 4 TTABVUE, which was denied. 5 TTABVUE. Following the filing of the appeal, the Examining Attorney moved to remand the application in order to cite Registration No. 5083830 as an additional ground for refusal of

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<sup>2</sup> Registration No. 4851636 issued on November 10, 2015. The registration also covers various services in International Classes 35, 37, 39, and 41, but the Examining Attorney does not base the refusal to register on the services in those classes.

<sup>3</sup> Registration No. 5083830 issued on November 15, 2016 to the owner of Registration No. 4851636. As discussed below, we confine our analysis of the refusal of registration to a comparison of Applicant's mark to the mark shown in Registration No. 4851636.

registration, 10 TTABVUE, and the Board restored jurisdiction to the Examining Attorney for that purpose. 11 TTABVUE. After the Examining Attorney cited Registration No. 5083830,<sup>4</sup> and Applicant responded to that citation,<sup>5</sup> the Examining Attorney again made the refusal to register final,<sup>6</sup> and the appeal was resumed. 13 TTABVUE.

The case is fully briefed.<sup>7</sup> We affirm the refusal to register.

### **I. Record on Appeal**

The record on appeal consists of definitions of the words “data,” “atom,” and “atomic” from THE AMERICAN HERITAGE DICTIONARY (ahdictionary.com);<sup>8</sup> and the declaration of Applicant’s corporate secretary, Moshe B. Wilshinsky, and exhibits thereto, comprising webpages regarding the meaning of the terms “atomic data” and “source data” in connection with computing.<sup>9</sup>

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<sup>4</sup> February 15, 2017 Office Action at 1.

<sup>5</sup> March 22, 2017 Response to Office Action.

<sup>6</sup> April 12, 2017 Office Action.

<sup>7</sup> Applicant filed its main appeal brief directed to the citation of Registration No. 4851636, 7 TTABVUE, before the application was remanded for citation of Registration No. 5083830. In the Board’s order resuming the appeal, Applicant was granted permission to file a supplemental brief “directed solely to the newly raised issue of Registration No. 5083830.” 16 TTABVUE 2. Applicant subsequently filed a Supplemental Brief directed in large part to that registration. 17 TTABVUE.

<sup>8</sup> February 22, 2016 Office Action at 5-6; March 15, 2016 Office Action at 2-3; February 15, 2017 Office Action at 9-11.

<sup>9</sup> September 6, 2016 Request for Reconsideration at 5-17. On appeal, Applicant resubmitted the Wilshinsky declaration as a separate document, 8 TTABVUE, when it filed its main appeal brief. 7 TTABVUE. We discourage the resubmission on appeal of materials made of record during prosecution. *See generally In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007).

## II. Likelihood of Confusion Analysis

Section 2(d) of the Trademark Act prohibits the registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based upon an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We consider each *duPont* factor that is relevant and for which there is record evidence. *See, e.g., M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015). Two key factors in every Section 2(d) case are the similarity of the marks and the similarity of the goods or services, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We will confine our *duPont* analysis to a comparison of Applicant’s standard character mark to the standard character mark ATOMIC DATA, which we find to be the more relevant of the two cited registered marks. If we find a likelihood of confusion as to the cited standard character mark, we need not find it as to the cited composite word-and-design mark; conversely, if we do not find a likelihood of confusion as to the cited standard character mark, we would not find it as to the cited

composite mark.<sup>10</sup> *See Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015); *In re Max Capital Grp., Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We turn first to the issue of the similarity of the services.

**A. Similarity of the Services, Channels of Trade, and Classes of Customers**

The second *duPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration . . . .” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014). The analysis of this factor is premised upon the identifications of goods or services in the application and in the cited registration. *Id.* at 1161-63; *Octocom Sys., Inc. v. Houston Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “[L]ikelihood of confusion can be found ‘if the respective [services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant “concedes there is some overlap in the services.” 7 TTABVUE 10. The Examining Attorney notes this concession and that Applicant “has not argued that

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<sup>10</sup> We note that the identifications of services in the registrations of the standard character mark and the composite mark are identical with respect to the services that are most closely related to those identified in the application.

the services are unrelated,” 19 TTABVUE 14,<sup>11</sup> and further argues that “the identifications set forth in the application and registration(s) are closely related or nearly identical and have no restrictions as to nature, type, channels of trade, or classes of purchasers.” *Id.* The Examining Attorney points to several places in the respective identifications where the services overlap, or one set of services encompasses another. *Id.* at 14-15.

The registrant’s broadly identified “Computer services, namely, information technology consulting services” encompass Applicant’s narrower, field-specific “Consulting services in the field of cloud computing.”<sup>12</sup> Similarly, the registrant’s broadly identified “remote support services, namely, remote administration and management of in-house and hosted datacenter devices, databases, and software applications, and remote database administration services” encompass Applicant’s narrower, field-specific “technical support services, namely, remote and on-site

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<sup>11</sup> Other than conceding that the services overlap, Applicant does not address this *duPont* factor in its briefs. It argues instead that the marks “are as different as night and day and there is not the slightest possibility of confusion.” 7 TTABVUE 10.

<sup>12</sup> The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed form or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We take judicial notice that “information technology” means “the development, implementation, and maintenance of computer hardware and software systems to organize and communicate information electronically,” DICTIONARY.COM (Dictionary.com Unabridged Random House, Inc., accessed on April 3, 2018), and that “cloud computing” means “Internet based computing in which large groups of remote servers are networked so as to allow sharing of data-processing tasks, centralized data storage, and online access to computer services or resources.” DICTIONARY.COM (Dictionary.com Unabridged Random House, Inc., accessed on April 3, 2018).

infrastructure management services for monitoring, administration and management of public and private cloud computing IT and application system.”

Because the general consulting and support services identified in the registration encompass the specific consulting and support services identified in the application, the services are legally identical. *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934-35 (TTAB 2012); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). “It is therefore unnecessary to rule as to whether each of the other items set forth in the involved application are so related to those in the cited registration that confusion would be likely.” *Id.*<sup>13</sup> This *duPont* factor supports a finding of a likelihood of confusion.

Given the legal identity of the services in part, and the absence of any restrictions on the services in their identifications, they are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)); *see also Stone Lion*, 110 USPQ2d at 1161-62 (legal identity of services in part justified Board’s conclusion, without resort to extrinsic evidence, that they “covered the same potential purchasers and channels of trade.”). This *duPont* factor also supports a finding of a likelihood of confusion.

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<sup>13</sup> Likelihood of confusion may be found, and the refusal to register may be affirmed, “if there is a likelihood of confusion involving *any item* that comes within the identification of [services] in the involved application.” *Jump Designs*, 80 USPQ2d at 1374 (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 209 USPQ 986, 988 (CCPA 1981)).



## B. Similarity of the Marks

This *duPont* factor focuses on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *duPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). “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.*, 101 USPQ2d at 1721. The legal identity of certain of the identified services reduces the degree of similarity between the marks that is necessary for confusion to be likely. *See, e.g., Viterra*, 101 USPQ2d at 1912; *In re Mighty Tea Leaf*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant argues that the marks are not similar in sound and appearance, in part because “the words are reversed in the two marks . . . .” 7 TTABVUE 14. The Examining Attorney concedes that the marks are “slightly different in appearance or sound . . . .” 19 TTABVUE 12, but argues that “[c]onsumer confusion has even been held likely for marks that do not physically sound or look alike but that convey the

same idea, stimulate the same mental reaction, or may have the same overall meaning.” *Id.* at 11.

We find that the marks are slightly different in appearance and sound. For purposes of these means of comparison, it is significant that the two marks are not mere transpositions of exactly the same two elements (i.e., they are not ATOM DATA and DATA ATOM). The marks begin and end with different words and contain the different words ATOMIC and ATOM, and Applicant’s mark is shorter in length and more compact visually than the cited mark. With respect to sound, the cited mark begins with the three-syllable word ATOMIC and contains a total of five syllables, while Applicant’s mark begins with the two-syllable word DATA and contains a total of four. The marks have different cadences when spoken due to the presence of the three-syllable word ATOMIC at the start of the cited mark, and the presence of two two-syllable words in Applicant’s mark.

As noted above, both Applicant and the Examining Attorney acknowledge these differences in appearance and sound, and they devote almost all of their respective arguments on the similarity of the marks to the comparison of them in connotation and commercial impression. We turn now to that issue.

Applicant argues that “the commercial impressions of the subject marks are so radically different that persons who encounter these marks are not likely at all to assume any connection between the parties.” 7 TTABVUE 11. Applicant bases this argument on two primary grounds: (1) the cited mark ATOMIC DATA “is at best a weak mark and is not entitled to a broad scope of protection,” *id.*; and (2) “the

reversing of the words in the respective marks is significant and creates a very different commercial impression.” *Id.* at 17.

In support of its first argument, Applicant cites *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015), *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015), and other Federal Circuit and Board authorities discussing the sixth *duPont* factor (the number and nature of similar marks in use on similar goods or services), claiming that “[b]ased on third party usage, the term ‘atomic data’ is perceived as a generic, or at least a highly descriptive, term, and it is not perceived as a trademark.” *Id.* at 12. According to Applicant, “Atomic Data is a widely recognized generic/descriptive term, widely used in this industry to refer to ‘data elements that represent the lowest level of detail,” which renders the cited mark “exceptionally weak,” *id.* at 14, and “it probably was error for a registration to even have issued.” *Id.* at 16.

Applicant’s second argument for dissimilarity in meaning is as follows:

Regarding ATOMIC DATA, the word “data” is the noun or subject and the modifier or adjective is “atom.” Thus the meaning is data that is atomic. Regarding applicant’s mark DATA ATOM, the word “atom” is the noun or subject and the modifier or adjective is “data.” Hence the meaning is an atom that has data. Therefore, the meanings and perceptions of the marks are quite distinct from each other.

*Id.* at 17.

In response to Applicant’s first argument that the cited mark is weak, the Examining Attorney argues that “one cannot presume that the registrant’s marks are merely descriptive or weak” because they are not on the Supplemental Register and

did not register on the basis of acquired distinctiveness. 19 TTABVUE 12. The Examining Attorney further argues that Applicant has failed to provide “any evidence of third party registrations of the terms ATOMIC or DATA for similar services, which would be probative in showing the weakness of the mark,” and that Applicant’s Internet evidence “does not show wide spread use of the term ‘atomic data’ to prove that it is highly descriptive of the applied for services.” *Id.* at 12-13.

With respect to the significance of the word orders in the marks, the Examining Attorney argues that the words ATOM and ATOMIC are the dominant features of the marks because DATA is disclaimed in both. 19 TTABVUE 8-9. According to the Examining Attorney, the “root word for ATOMIC is ATOM. Both words connote the idea of something very small. In this case, the . . . average purchaser will remember the idea or commercial impression of the words DATA, ATOM or ATOMIC” and “may not specifically remember if the wording was ATOM or ATOMIC.” *Id.* at 9. She argues “[m]ore specifically [that] the applicant has merely transposed the words of the registrant’s marks and slightly altered the wording ATOMIC to ATOM.” *Id.* Citing *In re Wine Soc’y. of Am. Inc.*, 12 USPQ2d 1139 (TTAB 1989) and *In re Nationwide Indus. Inc.*, 6 USPQ2d 1882 (TTAB 1988), she contends that “[c]onfusion is likely between two marks consisting of reverse combinations of the same elements if they convey the same meaning or create substantially similar commercial impressions.” *Id.* She concludes that the marks “create a confusingly similar commercial impression, convey the same idea, stimulate the same mental reaction, and have the same overall meaning.” *Id.* at 12.

We first consider Applicant's argument that the cited mark ATOMIC DATA "is at best a weak mark and is not entitled to a broad scope of protection." 7 TTABVUE 11. Because the mark is registered on the Principal Register, we cannot entertain Applicant's claim that "the term 'atomic data' is perceived as a generic, or at least a highly descriptive, term, and it is not perceived as a trademark," *id.* at 12, or that "it probably was error for a registration even to have issued." *Id.* at 16.<sup>14</sup> "To do so would fail to accord the registration and the mark the validity to which they are entitled under Sections 7(b) and 33(a)" of the Trademark Act. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016).

We can consider, however, whether Applicant's evidence shows that the mark ATOMIC DATA, "while presumptively distinctive, is nevertheless weak as a source indicator," *id.* at 1517-18, or that the words "atomic data" have a particular meaning, in the context of the relevant services, that imbues the cited mark with a different connotation and commercial impression from Applicant's mark. *Cf. Juice Generation*, 115 USPQ2d at 1674-75 (third-party uses and registrations may be probative of whether a term is weak or has a suggestive or descriptive connotation in a particular industry).

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<sup>14</sup> These arguments constitute a collateral attack on the registration, which we cannot entertain on this *ex parte* appeal because of the statutory presumptions that we must accord the registration under Section 7(b) of the Trademark Act. *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997). An appeal "is not the proper forum for such a challenge," *id.* at 1534, which would properly be made in an *inter partes* proceeding for cancellation of the registration.

Applicant relies entirely upon the declaration of a corporate officer, Moshe B. Wilshinsky, 8 TTABVUE, made of record during prosecution.<sup>15</sup> Mr. Wilshinsky states that “Atomic Data is a commonly used generic/descriptive term and does not serve to identify the source of any goods or services,” that even “assuming that it is entitled to registration as a trademark, it would be a very weak trademark and would be entitled to a very limited scope of protection,” and that Atomic Data “is a widely recognized generic term, widely used in this industry to refer to ‘data elements that represent the lowest level of detail.’” 8 TTABVUE 2-3 (Wilshinsky Decl. ¶¶ 4, 12). His declaration does not establish that he is qualified as an expert to opine about the meaning or trademark significance of the term in the computer services industry, or that he has personal knowledge about its use in the industry sufficient to permit him to testify as a lay witness to those matters. Accordingly, we give no weight to his opinions and statements on those issues, or to his opinions regarding the dissimilarity of the marks. 8 TTABVUE 3 (Wilshinsky Decl. ¶ 13).

His declaration, however, also authenticates excerpts from several webpages regarding the meaning of the term “atomic data,” 8 TTABVUE 2-3 ((Wilshinsky Decl. ¶¶ 5-10; Exs. 1-6), and we will consider those pages for whatever probative value they may have on the meaning of the term in the context of the services identified in the application and in the cited registration.<sup>16</sup>

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<sup>15</sup> September 6, 2016 Request for Reconsideration at 5-17.

<sup>16</sup> Mr. Wilshinsky refers to exhibit numbers in the body of his declaration, but he does not designate the attachments by those numbers. We have identified the putative exhibits by reference to Mr. Wilshinsky’s descriptions of them.

A page from [whatis.com](http://whatis.com) states that “[i]n a data warehouse, atomic data is the lowest level of detail. Atomic data provides the base data for all data transformations.” 8 TTABVUE 5 (Wilshinsky Decl. ¶ 5; Ex. 1).<sup>17</sup> A page from [learn.geekinterview.com](http://learn.geekinterview.com) states that “[a]tomic data are data elements that represent the lowest level of detail. For example, in a daily sales report, the individual items sold would be atomic data, while rollups such as invoice and summary totals from invoices are aggregate data.” 8 TTABVUE 6 (Wilshinsky Decl. ¶ 6; Ex. 2). According to this page, “atomic data is the smallest data that has details that come up with a complete meaning.” *Id.* The page provides an example of the concept in computer programming, “a data type whether it is an action or an object that can no longer be broken down into smaller unites [sic].”

A page from [businessdictionary.com](http://businessdictionary.com) defines “atomic data” as the “[l]owest level of detail (such as number of goods sold) from which the aggregate data (such as daily sales summary) is computed.” 8 TTABVUE 8 (Wilshinsky Decl. ¶ 7; Ex. 3). A page from [businessintelligence.com](http://businessintelligence.com) defines “atomic data,” as used in computing, as “the most basic piece of information among all levels of information. Large data sets, from which analyses are conducted and business intelligence conclusions are drawn, are constructed from many piece of atomic data.” 8 TTABVUE 9 (Wilshinsky Decl. ¶ 8; Ex. 4). A page from Wikipedia entitled “Source data” states that such source data, defined as raw data “that has not been processed for meaningful use to become Information,” is sometimes called atomic data. 8 TTABVUE 11 (Wilshinsky Decl. ¶ 9;

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<sup>17</sup> The meaning of the term “data warehouse” is not set forth on this webpage.

Ex. 5).<sup>18</sup> Finally, pages from the website at cs.cmu.edu discuss various “Atomic Data Types,” but do not define the term. 8 TTABVUE 13-14 (Wilshinsky Decl. ¶ 10; Ex. 6).<sup>19</sup>

Applicant argues that widespread use of “atomic data” in the computing industry is evidenced by these webpages and “a myriad of other Internet websites.” 7 TTABVUE 15. The referenced “other Internet websites” are not in the record, and we agree with the Examining Attorney that Mr. Wilshinsky’s declaration and attachments do “not show wide spread use of the term ‘atomic data’ to prove that it is highly descriptive of the applied for services.”<sup>20</sup> 19 TTABVUE 13. Applicant’s evidence is in the nature of dictionary definitions of the term “atomic data,” and the record is devoid of evidence of third-party uses or registrations of marks comprising or containing the words “atomic data” for the services identified in the application and in the cited registration. While Applicant’s evidence suffices to show that the

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<sup>18</sup> “Wikipedia is an Internet source whose contents are continuously subject to change via collaborative user input.” *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016). The Board “permit[s] evidence from Wikipedia and similar such sources to be made of record when timely introduced, so that the examining attorney has an opportunity to submit rebuttal evidence . . . .” *Id.* “Our consideration of Wikipedia evidence is with the recognition of the limitations inherent in Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information).” *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032 (TTAB 2007).

<sup>19</sup> The URL for these webpages contains the top level domain “.edu,” which indicates that the pages are from the website of an educational institution, *see In re Reed Elsevier Props. Inc.*, 77 USPQ2d 1649, 1652 (TTAB 2005), but their exact source is not clear on the face of the pages. During prosecution, however, the Examining Attorney stated that the pages were from the website of Carnegie Mellon University, October 3, 2016 Denial of Request for Reconsideration at 1, so we have considered them.

<sup>20</sup> “If an applicant has relevant information, it is incumbent on applicant to make this information of record. A mere reference to a website does not make the information of record. In order to review the facts in this case, there should be evidence in the record.” *In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004) (footnote omitted).



phrase “atomic data” has a particular meaning as the lowest or most elemental level of information, we cannot find, on this record, that the cited mark ATOMIC DATA is weak “and would be entitled to a very limited scope of protection.” 7 TTABVUE 12.

With respect to Applicant’s second argument regarding the significance of the word order in the DATA ATOM and ATOMIC DATA marks, the Examining Attorney invokes the principle that “the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions.” *Nationwide Indus.*, 6 USPQ2d at 1884 (RUST BUSTER for rust-penetrating spray lubricant found to be confusingly similar to BUST RUST for penetrating oil because both marks were “likely to be perceived by purchasers as signifying that the product sold thereunder busts through, or breaks up, rust.”); *see generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE Section 1207.01(b)(vii) (Oct. 2017). The Examining Attorney argues that based upon the dictionary definitions of the words “atom” and “data,” “the commercial impression of the term DATA ATOM would be the smallest form of data available” and Applicant “also defines ATOMIC DATA as the smallest form of data available.” 19 TTABVUE 10. According to the Examining Attorney, “both marks convey the commercial impression that the data is very small in size. Hence, the commercial impressions would be confusingly similar if not identical despite the transposition of the terms.” *Id.*

We find that the transposed marks do not create “distinctly different commercial impressions.” *Nationwide Indus.*, 6 USPQ2d at 1884. Applicant’s argument that in

the mark ATOMIC DATA, “the word ‘data’ is the noun or subject and the modifier or adjective is ‘atom,’” while in the mark DATA ATOM, “the word ‘atom’ is the noun or subject and the modifier or adjective is ‘data,’” 7 TTABVUE 17, is correct as a grammatical matter, but it relies upon a level of attention to the marks that is unsupported by any record evidence,<sup>21</sup> and inconsistent with the recollection of the average purchaser, whom Applicant acknowledges “normally retains general rather than a specific impression of trademarks.” *Id.* at 11 (quoting *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016)). From the standpoint of the average purchaser of the legally identical computer-related consulting and support services, DATA ATOM and ATOMIC DATA both connote data at the elemental level.

Applicant cites several precedential and non-precedential cases in support of its argument that the marks have different meanings. 7 TTABVUE 16-18.<sup>22</sup> Only one, *In re Best Prods. Co.*, 231 USPQ 988 (TTAB 1986), deals with transposed elements, and all are readily distinguishable on their facts. Three of the cases involved evidence of third-party uses of elements of the subject marks, which is absent from the record here. In *Nazon*, the Board found that “voluminous third-party use of ‘sexstrology” rendered the opposer’s claimed SEXSTROLOGY mark unprotectable. 119 USPQ2d at 1186.<sup>23</sup> In *In re SDI Petroleum, LLC*, Serial No. 86011946 (TTAB November 30,

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<sup>21</sup> Applicant does not argue that the consumers of its services are sophisticated or purchase the services with any heightened degree of care.

<sup>22</sup> Applicant cites the TTABVUE versions of the *Mini Melts* decision and the decision in *Nazon v. Ghiorse*, 119 USPQ2d 1178 (TTAB 2016), both of which are precedential decisions reported in the United States Patents Quarterly. We will cite to the reported decisions.

<sup>23</sup> The Board analyzed the dissimilarity of the marks in *Nazon* solely for the purpose of rendering a complete opinion on opposer’s claim under Section 2(d) of the Trademark Act. *Id.*

2015), a non-precedential decision, the Board reversed a refusal to register DASH NEIGHBORHOOD for retail store services featuring gasoline over registrations of DASH IN and D DASH IN and design for identical services, where the applicant had “submitted examples of at least 17 uses of ‘DASH’ in connection with convenience store services around the country . . .” 14 TTABVUE 11 (Serial No. 86011946). The Board found that “this evidence indicates that consumers are accustomed to encountering the term ‘DASH’ in relation to convenience store services” and that “consumers will look to slight differences in the marks and although their commercial impressions are somewhat similar, the differences in sight and sound are sufficient, given the weakness of DASH for these services” to make confusion unlikely. *Id.* at 12. In *In re Zen Mktg., LLC*, Serial No. 86487195 (TTAB September 29, 2016), a non-precedential decision, the Board found that the mark ZEN TEA TRADERS and design for tea was not confusingly similar to the marks ZEN TEA EXPERIENCE THE ZEN OF TEA and design and MY ZEN TEA for tea, against the backdrop of record evidence of a third-party registration of NINE LIVES TEA HOUSE FIND YOUR ZEN and design for tea and “advertisements submitted by Applicant for various teas sold by other third-parties that include the term ZEN as a source identifier for the goods,” which the Board found “tend[ed] to show that the term ZEN is relatively weak as a source indicator for tea.” 8 TTABVUE 11 (Serial No. 86487195). The Board concluded that “[i]n light of the relative weakness of the term

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at 1187. In its analysis of that claim, the Board found that the opposer had failed to establish proprietary rights in its claimed mark, *id.* at 1182-87, but the Board then assumed that the opposer had done so for purposes of completing the analysis under § 2(d). *Id.* at 1187.

ZEN in connection with ‘tea,’ we find that the differences between Applicant’s mark and the marks in the cited registrations are sufficient to distinguish them.” *Id.*

In *Best Prods.*, the Board found that the mark BEST JEWELRY and design for retail jewelry store services was dissimilar to the mark JEWELERS’ BEST for bracelets because the cited mark was “a purely laudatory expression” and the applicant’s mark involved a surname and was presented in a unique manner that reinforced the “house mark impression” of BEST JEWELRY. 231 USPQ at 990. The marks here do not share those characteristics.

Finally, in *In re Allegiance Staffing*, Serial No. 85663950 (TTAB July 9, 2015), a non-precedential decision, the Board reversed a refusal to register ALLEGIANCE STAFFING for temporary employment agency services over eight cited registrations of ALLEGIS-formative marks for legally identical services. The Board found that “ALLEGIANCE has a clear meaning, while ALLEGIS is a coined term which has no meaning, 14 TTABVUE 11 (Serial No. 85663950), that the services, “by their nature, do not fall in the category of impulse purchasing,” but rather would be purchased with “a heightened level of care,” *id.* at 12-13, and that the case was “one of the rare cases in which the thirteenth *du Pont* factor, ‘any other established fact probative of the effect of use,’ play[ed] a role.” *Id.* at 7. The “fact probative of the effect of use” was that all of the eight cited registrations had issued over a registration of the applied-for mark ALLEGIANCE STAFFING for temporary employment agency services that the applicant had previously owned, but had inadvertently allowed to expire. None of the circumstances present in *Allegiance Staffing* are present here.

We find that the DATA ATOM and ATOMIC DATA marks are similar in connotation and commercial impression when used for legally identical computing consulting and support services, and that this similarity in meaning is more significant than, and outweighs, the modest dissimilarities in sound and appearance. *Davia*, 110 USPQ2d at 1812. This *duPont* factor supports a finding of a likelihood of confusion.

### **Conclusion**

All of the relevant *duPont* factors support a finding of a likelihood of confusion. The identified services, channels of trade, and classes of customers are legally identical in part. Taking into account the evidence on those *duPont* factors and the absence of evidence of any third-party use or registration of similar marks for the identified services, DATA ATOM and ATOMIC DATA “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.*, 101 USPQ2d at 1721. Confusion as to the source or sponsorship of Applicant’s computer consulting and support services is likely.

**Decision:** The refusal to register is affirmed.