

This Opinion is Not a
Precedent of the TTAB

Mailed: March 17, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Health Payment Systems, Inc.
—

Serial No. 86410359
—

Joseph S. Heino and Erin E. Kaprelian of Davis & Kuelthau s.c.
for Health Payment Systems, Inc.

Andrew Rhim, Trademark Examining Attorney, Law Office 101,
Ronald Sussman, Managing Attorney.

—
Before Kuhlke, Lykos and English,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Health Payment Systems, Inc. (“Applicant”) seeks to register on the Principal
Register the composite mark displayed below



for “payment processing services in the field of healthcare payments” in International

Class 36.¹

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark so resembles the registered standard character mark HPS on the Principal Register for

Financial services, namely, credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts transaction processing services; credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts verification services; check verification and processing services; credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts authorization services; electronic payment services involving electronic processing and subsequent transmission of bill payment data; providing electronic processing of credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts transactions via a proprietary and secure financial global computer network; credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-

¹ Application Serial No. 86410359, filed September 30, 2014, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The description of the mark is as follows: "The mark consists of the letters 'HPS' followed by two comma-shaped figures of different shades." Color is not claimed as a feature of the mark. The application originally included the additional services of "insurance claims processing for the healthcare industry" in International Class 36. Applicant's request to divide these services into a new "child" application was approved on June 27, 2019.

issued stored value card, bank-issued prepaid cash card, stored value smart card and prepaid payment card account services featuring a computer readable card; electronic funds transfer services; payroll tax debiting services; providing online financial services to restaurants and other retail merchants, namely, providing financial account management services and financial clearance services in the nature of clearing and reconciling financial transactions for restaurants and other retail establishments; clearing and reconciling financial transactions via a global computer network; providing account transaction information to merchants, namely, credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts transactions information and balances via a secure Internet website; information, advisory and consultancy services related to credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts transaction processing services; information, advisory and consultancy services related to credit card, debit card, bank card, smart card, prepaid card, stored value card, prepaid cash card, bank-issued stored value card, bank-issued prepaid cash card, stored value smart card, prepaid payment card and smart phone and mobile device payment accounts transaction processing practices for restaurants and other retail establishments; financial transaction services, namely, providing secure commercial transactions and payment options using a mobile device at a point of sale; loyalty program payment processing services; information services, namely, financial information provided by electronic means in International Class 36,²

that it is likely to cause confusion or mistake or to deceive.

The appeal is fully briefed. We affirm.

² Registration No. 4725291, registered April 21, 2015.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These *DuPont* factors, and the others raised by Applicant and/or the Examining Attorney, are discussed below.

A. The Marks

This *DuPont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation

and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). “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). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

Applicant directs our attention to the obvious visual differences, observing that its mark is a composite mark consisting of stylized lettering as well as a design element. Applicant deems it “inappropriate” to “focus exclusively on the similarity of the acronyms ‘HPS’ (one hemmed in with using lower case letters) and give no weight to the design element of the Applicant’s Mark which includes the addition of ‘two

comma-shaped figures of different shades’ to the ‘HPS’ acronym (again, in lower case letters).” Applicant’s Brief, p. 6; 7 TTABVUE 8.

Applicant’s position is unconvincing. In considering the marks, we agree with the Examining Attorney’s assessment that the acronym “hps” in the applied-for mark is dominant. We acknowledge the visual differences in the marks Applicant relies upon. That being said, to state the obvious, the literal portions of Applicant’s and Registrant’s mark are identical making them aurally similar.

In addition, with respect to Applicant’s mark, we find the stylized lettering and design element subordinate to the literal acronym “hps.” It is an often-recited principle that when a mark consists of a literal portion and a design portion, the literal portion is usually more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods or services; therefore, the literal portion is normally accorded greater weight in determining whether marks are confusingly similar. *See, e.g., In re Viterra, Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012); *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). *See also CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011). We do not find *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014)³ which presented an exception to this rule, to be relevant here. The involved mark in that case included design features that played a much more prominent role than those of Applicant’s mark:

³ Applicant points to a case from the 5th Circuit Court of Appeals. In Board proceedings, on the issue of design marks, *Covalinski*, is one of the seminal cases.



The Board, in finding the design to be the dominant element, provided the following rationale:

Here, Applicant's design mark includes the very large, prominently displayed letters RR. The bodies of the Rs are filled with a checkerboard pattern resembling a racing flag. To each R an elongated horizontal "leg" of gradually increasing thickness is appended, each of which ends in a heart design. Inside the legs appear the rest of the letters (i.e., the letter strings "edneck" and "acegirl"), in a form in which the initial letters of each string are displayed in relatively tiny typeface and subsequent letters are displayed in increasing thickness. Together, these graphic devices serve not only to draw attention to the RR letters apart from the wording, but also make the letters that form the "a-c-e" of the word "RACEGIRL" difficult to notice. Since these goods are clothing, consumers would be likely to encounter the mark in a retail setting on hang tags or neck labels. In that context, the visual impression of the mark is likely to be more important.

Id. at 1168. None of these reasons are present in this case. That is to say, the acronym "hps" in Applicant's mark does not appear in "relatively tiny typeface" in a letter string "difficult to notice." To the contrary, the font is large, bold, easy-to-read lettering.

In addition, the cited registered mark is in standard characters. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). *See Viterra*, 101 USPQ2d at 1909; *In re*

Mighty Leaf Tea, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010). Thus, a mark presented in stylized lettering will not avoid likelihood of confusion with a mark in typed or standard characters consisting of the same lettering because the literal portion could be presented in the same manner of display. *See, e.g., Viterra*, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that “the argument concerning a difference in type style is not viable where one party asserts rights in no particular display”).

Applicant contends that Registrant’s website www.heartlandpaymentssystems.com is devoid of any service mark use of the acronym “HPS.” See Applicant’s Response to Office Action dated November 19, 2018, pp. 11-13. Applicant, pointing to the specimen of record for the cited registration, contends that the phrase “Heartland A Global Payments Company” serves as Registrant’s only brand identifier. See Applicant’s Response to Office Action dated November 19, 2018, Exhibit A, p. 10. Applicant’s argument is misplaced. To the extent Applicant is implying that Registrant is no longer using its mark in commerce, such arguments constitute a collateral attack on an existing registration that can only be considered in the context of a petition to cancel, not in an ex parte appeal. *See In re Dixie Rests.*, 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). During ex parte examination, the marks are compared as they appear on the drawing page of the application and registration certificate; the USPTO does not consider how an applicant and registrant actually use their marks in the marketplace. *In re Aquitaine*

Wine USA, LLC, 126 USPQ2d 1181, 1186 (TTAB 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

Although we have pointed to the identical dominant portions of the marks, we acknowledge the fundamental rule that the marks must be considered in their entireties. See *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015). Nevertheless, it is likely that consumers, when encountering Applicant's mark, will focus on the dominant literal portion, namely the acronym "hps," the sole element of Registrant's mark. The distinctions in each mark, namely the stylized lettering and design element in Applicant's mark are likely to be overlooked when consumers consider the marks in their entireties.

In sum, we acknowledge the specific differences in appearance pointed out by Applicant. These differences, however, are outweighed by the similarities of the marks. Thus, when comparing the marks overall, they are similar in sound, connotation and commercial impression. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. The Services

Next we compare the services as they are identified in the involved application and cited registration. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and

Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Applicant acknowledges that the cited registration covers a large number of services but requests that the Board focus on “providing online financial services to restaurants and other retail merchants, namely, providing financial account management services and financial clearance services in the nature of clearing and reconciling financial transactions for restaurants and other retail establishments.” In this regard, Applicant is misguided. The Examining Attorney need not prove, and we need not find, similarity as to each service listed in the cited mark. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of services in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“it is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

We agree, instead with the Examining Attorney’s focus on another service listed in the cited registration: “electronic payment services involving electronic processing and subsequent transmission of bill payment data.” This service, as identified, is unrestricted as to any particular type or field. As such, it necessarily encompasses all fields, including Applicant’s more specific “payment processing services in the field of healthcare payments.” *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial

furniture.”). *See also Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *Paula Payne Prods. Co. v. Johnson Publ'g Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77-78 (CCPA 1973). Thus, based on the identifications alone, Applicant’s and Registrant’s services are legally identical.

We therefore find this *DuPont* factor supports a finding of a likelihood of confusion.

C. Established, Likely-to-Continue Channels of Trade

Lastly, we consider the established, likely-to-continue channels of trade. As noted above, because the services are in-part legally identical and unrestricted as to trade channels, we must also presume that these particular services travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *See Viterra*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Because Registrant’s services are not restricted to any field, we must assume that they are offered in all fields,

including healthcare.

Accordingly, we find this *DuPont* factor also favors a finding of likelihood of confusion.

II. Balancing the Factors

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. The similarities of the marks coupled with the legally identical nature of the services and presumed overlapping trade channels leads us to the conclusion that prospective consumers are likely to confuse the source of the involved services. In doing so, we have kept in mind the principle that where the services are identical, less similarity between the marks is needed for us to find a likelihood of confusion. *See, e.g., Viterra*, 101 USPQ2d at 1908; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”). This is not a situation, as Applicant urges, where the marks are so different as to obviate a likelihood of confusion. *See, e.g., Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

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