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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hyperloop Transportation Technologies, Inc.

Serial No. 86556581

Elizabeth Lee of Lucas & Mercanti LLP,
for Hyperloop Transportation Technologies, Inc.

Sarah Kunkleman, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

Before Zervas, Kuhlke and Ritchie,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Hyperloop Transportation Technologies, Inc. ("Applicant") seeks registration on the Principal Register for the mark HYPERLOOP, in standard characters, for services ultimately identified as "Providing transportation services and a transportation system, namely, transport of passengers in low friction tubes" in International Class 39.[1]

[1] Application Serial No. 86556581 was filed on March 6, 2015, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

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 Applicant's mark, when used in connection with the identified services, so resembles the registered standard character mark HYPERLOOP for "transportation services, namely, high-speed transportation of goods in tubes,"[2] in International Class 39, as to be likely to cause confusion, mistake or deception.[3]

When the Section 2(d) refusal was made final, Applicant appealed and requested reconsideration. On October 16, 2019, the Examining Attorney denied the request, the appeal resumed and briefs have been filed. We affirm the refusal to register.

I. Likelihood of Confusion

When the question is 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.,* 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 services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d

[2] We note that the broad word "tubes" in Registrant's identification encompasses Applicant's "low friction tubes."

[3] Registration No. 5176643, issued on April 4, 2017. The cited registration is based on an underlying application, filed prior to the subject application on August 2, 2013, under Section 1(b), based on an allegation of a bona fide intention to use the mark in commerce. It is owned by Space Exploration Technologies Corp. ("SpaceX"). SpaceX was founded by Elon Musk. September 26, 2019 Request for Reconsideration, TSDR pp. 4, 34; March 15, 2019 Response, TSDR p. 6. All references to the application record are to the USPTO's Trademark Status and Document Retrieval (TSDR) system.

1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within the *du Pont* list of factors, only factors that are "relevant and of record" need be considered).

A. Similarity/Dissimilarity of the Marks

Applicant's mark is identical to the mark in the cited registration in "appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En* 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Applicant does not dispute this.

In view thereof, the *du Pont* factor of the similarity of the marks weighs heavily in favor of a finding of likelihood of confusion.

As discussed below Applicant asserts there is no likely confusion because the mark HYPERLOOP is weak and the services are sufficiently dissimilar.

B. Strength of the Mark

Applicant argues that the term "Hyperloop" is commonly used in connection with high-speed tube transport and as such should be afforded weak protection. Applicant provided a screenshot from a web page titled "Encyclopedia" with the definition of Hyperloop as: "An ultra-high speed ground transportation system proposed in 2013 by Elon Musk, cofounder of PayPal, Tesla Motors and founder of space transport company SpaceX."[4] Applicant is not challenging "the validity of the cited mark" but simply asserting that it is sufficiently weak to be accorded a narrow scope of

[4] September 26, 2019 Request for Reconsideration, TSDR 34. There is no date or URL on this screenshot; however, the Examining Attorney did not object to it and relies on this document as well. *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018); *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1586-87 (TTAB 2018).

protection where Applicant's mark is distinguishable based on the difference between their services. App. Brief, 10 TTABVUE 10.[5] In support of its position, Applicant states that:

> The term "Hyperloop" is heavily associated as being "An ultra-high-speed ground transportation system." This term was helped promulgated [sic] by companies such as [Applicant] who in 2013, started a crowd[-]sourcing platform to start the scientific research in developing the new Hyperloop transportation system into reality, on JumpStartFund, a crowdsourcing platform for the development of new ideas. Since then, [Applicant's] establishment has grown into a team of "more than 800 engineers, creatives and technologists in 52 multidisciplinary teams with 40 corporate and university partners." Since 2013, [Applicant] has been using multiple marks comprising of the term HYPERLOOP in connection with various lines of scientific research and technological development services involved in the development of a new transportation system. [Applicant] has been using the marks HYPERLOOP TRANSPORTATION, HyperloopTT (in which TT stands for "Transportation Technologies"), HTT (which stands for "Hyperloop Transportation Technologies") and HYPERLOOP TRANSPORTATION TECHNOLOGIES.

App. Brief, 10 TTABVUE 9-10.

The record includes one third-party website printout of a possible competitor (Virgin Hyperloop One) and two third-party websites from research teams, using the term "Hyperloop." However, all of the examples reference Registrant in particular.[6]

[5] Citations to the briefs are to TTABVUE, the Board's online file record.

[6] October 16, 2019 Reconsideration Letter p. 32 ("Is Elon Musk and investor or affiliated with Virgin Hyperloop One?"); pp. 36-7 ("Swissloop is a student-led initiative with the goal of contributing to the research on and advancement of the Hyperloop technology and its application in the real world."…"Today, the Hyperloop concept usually refers to a well-known white paper published in 2013 by Elon Musk in collaboration with a joint team from Tesla

In addition, the record includes six articles from online sources (e.g., CNBC, Digital Trends, PBS NewsHour) that discuss the Hyperloop concept and, again, reference Registrant.[7] Between Applicant's use as a mark and the third-party uses all referencing Registrant, this record does not support limiting the scope of protection for the cited mark. *In re i.am.symbolic*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (stating that evidence of third-party use for similar goods "falls short of the 'ubiquitous' or 'considerable' use of the mark components present in [applicant's] cited cases"). We further note that because Applicant's mark is identical to the mark in the cited registration, there are no other terms or elements that we could consider in distinguishing between them. In any event, even weak marks are entitled to protection and likely confusion may be found where the marks are identical and the services closely related. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010).

C. Similarity of the Services

With regard to the services, we must make our determinations under this factor based on the services as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110

and SpaceX."); p. 41 ("Virginia Tech claims fourth place in SpaceX's international Hyperloop competition.") As noted above, Elon Musk is the founder of Registrant, SpaceX.

[7] March 15, 2019 Response, TSDR pp. 128-129, 133-137, 142-143; September 26, 2019 Request for Reconsideration, TSDR pp. 5-6, 8-16, 20-24.

USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Where the marks of the respective parties are identical or virtually identical, the relationship between the goods and/or services need not be as close to support a finding of likelihood of confusion as would be required if there were differences between the marks. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010).

The goods and/or services do not have to be identical or even competitive in order to find that there is a likelihood of confusion. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009). The issue is not whether the goods and/or services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) "[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis."). It is sufficient that the goods and/or services of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *See, e.g., 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); *On-line Careline Inc. v. America Online Inc.,* 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

Applicant argues that "Appellant provides transportation services for the transporting of passengers, whereas, Registrant provides transportation services for transporting goods." App. Brief, 10 TTABVUE 6. The Examining Attorney submitted various third-party website printouts showing the same entity under the same mark providing transportation services for both goods and passengers.[8] Applicant counters that "the comparison between Appellant's mode of transportation and common carriers that provide both the transportation of goods and passengers is an unfair assessment" because the transportation of passengers through low friction tubes is much more complicated than the transportation of goods due to safety ramifications. Applicant's point being while buses, trains and airplanes commonly transport both passengers and goods, there is no real difference in capability to transport both with those modes of transportation. By comparison, transporting goods in low friction tubes does not face the "many technical challenges" as are faced by trying to transport passengers through low friction tubes. In other words, it is more difficult to hurl a human through a tube at 760 miles per hour than a box of tools, assuming you want the human to be alive at the end of the ride.[9]

[8] March 27, 2019 Office Action, TSDR pp. 2-31.

[9] September 26, 2019 Request for Reconsideration, TSDR p. 2 ("This new mode of transportation travels at 760 mph.").

The Examining Attorney correctly summarized the issue as being "whether someone would confuse the source of a cargo transportation service with the source of a passenger transportation service using the identical mark." Ex. Att. Brief, 12 TTABVUE 8. The record is quite clear that both Registrant's and Applicant's services may be used for transportation of both goods and passengers through low friction tubes.[10] For example, the following is found on Applicant's website:

> Hyperloop brings airplane speeds to ground level, safely. Passengers and cargo capsules will hover through a network of low-pressure tubes between cities and transforming travel time from hours to minutes;[11]
>
> The Hyperloop Transportation System is an entirely new mode of transport that will revolutionize travel by connecting people and goods safely and efficiently;[12] and
>
> This could revolutionize transport between global cities, for people and goods.[13]

The record also includes an article on Registrant discussing possible future use of the HYPERLOOP transportation service for passengers as well:

> It's anyone's guess how long it will take for Elon Musk's Hyperloop dream of an ultra high-speed transit system to become reality. But with SpaceX's annual Hyperloop Pod Competition taking place on Sunday … at least one group of designers is already offering a conceptual look at what the high-speed system could eventually look like. …

[10] Applicant is correct that we make our determination based on the goods or services as identified; however, the evidence from the marketplace is relevant to understand what consumers would expect or be accustomed to seeing. Here, potential consumers are exposed to the same entity discussing the provision of both passenger and goods transport under the same mark. We note also that the underlying application of the cited registration included passengers in the identification of services. *See* June 11, 2015 Office Action, TSDR p. 2.

[11] March 15 2019 Response, TSDR 13 (https:/www.hyperloop.global).

[12] *Id.* at 28 (https://www.jumpstartfund.com).

[13] *Id.* at 37 (facebook page screenprint).

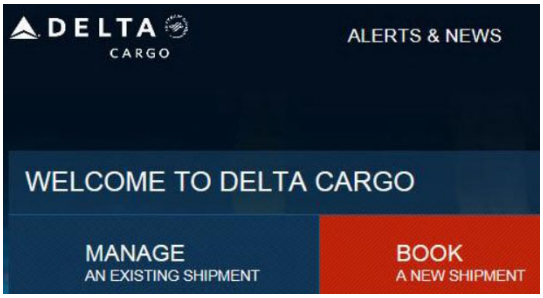
> SpaceX, Musk's aerospace company, built a test track near its Hawthorne, California headquarters. … SpaceX has also looked for an open source solution to Musk's Hyperloop dream … ideas for prototypes of the high-speed transportation pods that would one day make a Hyperloop system possible.[14]

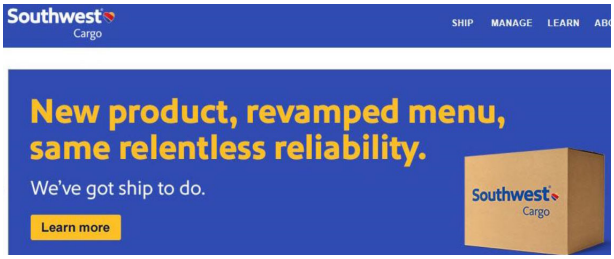
This shows consumer exposure to use of low friction tubes for passenger transportation as well as goods. The record also includes third-party website printouts discussing the development of low friction tube transportation for both passengers and goods.[15]

While we need not rely on the other evidence of relatedness submitted, we agree with the Examining Attorney that third-party evidence in the transportation industry generally has some relevance in that both Applicant's, Registrant's, and these examples show consumer exposure to transportation services for both goods and passengers offered under one mark. Applicant's and Registrant's services are transportation services, although in a still developing mode. The Examining Attorney submitted several website printouts showing third-party use of a single mark in connection with transportation of both passengers and goods. For example:

[14] October 16, 2019, Reconsideration Letter, TSDR pp. 21, 24.

[15] *Id.*, TSDR pp. 31-45.





The Examining Attorney also submitted several third-party registrations for transportation services for both passengers and goods *See, e.g.*, Registration No. 5218396 for the mark BLUE HAWAIIAN for transportation of passengers and/or goods by air, namely, aircraft charter services; Registration No. 5559493 for the mark LIMOLINER for, inter alia, transportation of passengers and/or goods by bus; Registration No. 5709072 for the mark HALLCON for, inter alia, transport of goods, transport of persons, transport of persons and goods.[16] *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd per curiam*, 864 F.2d 149 (Fed. Cir. 1988).

The record shows consumers exposed to low friction tube transportation for both goods and passengers under a single mark. Indeed, consumers are generally

[16] March 27, 2019 Office Action, TSDR pp. 32-57.

accustomed to seeing transportation services for goods and passengers under a single mark. We find Applicant's and Registrant's services to be closely related.[17]

In view thereof, this *du Pont* factor strongly favors a finding of likelihood of confusion.

II. Conclusion

In view of the identical marks and related services, confusion is likely between Applicant's mark HYPERLOOP and Registrant's mark HYPERLOOP.

Decision: The refusal to register Applicant's mark is affirmed.

[17] We make no specific findings as to channels of trade inasmuch as the passenger service is not yet offered anywhere.