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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Treehouse Pictures, LLC

Serial No. 87142861

Amy F. Divino and Channel L. Lattimer of Cozen O'Connor,
for Treehouse Pictures, LLC.

Betty Chang, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Wolfson, Pologeorgis and Larkin,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Treehouse Pictures, LLC (“Applicant”) seeks registration on the Principal Register of the mark TREEHOUSE PICTURES and design (PICTURES disclaimed), as displayed below, for “Financing services, namely, financing of films; Financing services, namely, financing of television show production,” in International Class 36, and “Film production; television show production,” in International Class 41.¹

¹ Application Serial No. 87142861, filed August 18, 2016, based on (1) an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), for “financing services, namely, financing of films” in Class 36 and “film production” in Class 41, claiming



The Trademark Examining Attorney refused registration of Applicant's mark solely as to the services identified in International Class 41 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the mark TREEHOUSEDIRECT, in standard characters, registered on the Principal Register for "Entertainment services, namely, the provision and distribution of prerecorded television programs and films via a global computer network" in International Class 41.²

June 24, 2011 as both the date of first use and the date of first use in commerce as to both services, and (2) 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), for "Financing services, namely, financing of television show production" in Class 36 and "television show production" in Class 41. The description of the mark reads as follows: "The mark consists of the wording 'TREEHOUSE PICTURES' centered below an image of a tree containing a tree house. Birds are flying above the upper right portion of the tree. Leaves are falling from the lower right portion of the tree. The tree is planted in a bunch of soil and grass." Color is not claimed as a feature of the mark.

² Registration No. 3346303, issued on November 27, 2007; renewed.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We affirm the refusal to register.³

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the [services] and differences in the marks.”).

A. Similarity of the Marks

We initially address the first *du Pont* factor, “the similarity or dissimilarity of the marks in their entireties as to 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). “The proper test is not a side-by-side comparison of the marks, but

³ The TTABVue and Trademark Status and Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

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 [owners].” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

Applicant’s mark is TREEHOUSE PICTURES and a design predominantly consisting of a treehouse in a tree. The registered mark is TREEHOUSEDIRECT in standard characters. Both the literal portion of Applicant’s mark and the cited mark begin with the arbitrary term TREEHOUSE which will be pronounced identically in both marks. The only differences with this wording is the stylization of the lettering in Applicant’s mark. As to the stylization, the cited mark is a standard character mark, and marks appearing in standard character form may be displayed in any font style, color and size, including the identical stylization of the verbal portion of Applicant’s mark, because the rights reside in the wording and not in any particular display or rendition. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party.”); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186-87 (TTAB 2018). Thus, because the cited mark may be displayed in the identical manner as the verbal portion of Applicant’s mark, the mere stylization of the words in Applicant’s mark is insufficient to distinguish the respective marks.

Additionally, we find the term TREEHOUSE to be the dominant portion of

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Applicant's mark. When viewing Applicant's mark, the term TREEHOUSE is likely to be accorded more weight by consumers than the word PICTURES because that word is, at a minimum, descriptive of Applicant's services, and has been appropriately disclaimed. As such, PICTURES is less likely to make an impact in the minds of consumers. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (disclaimed matter that is descriptive of or generic for a party's goods is typically less significant or less dominant when comparing marks); *see also In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 753 (Fed. Cir. 1985).

Moreover, although Applicant's mark includes a design element, "the verbal portion of the mark is the one most likely to indicate the origin of the [services] to which it is affixed." *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), (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). Greater weight is often given to the wording in a composite mark because it is the wording that purchasers would use to refer to or request the goods or services. *See, e.g., In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012). The fact that the design element of Applicant's mark includes the pictorial depiction of a treehouse only reinforces the dominant nature of the literal term TREEHOUSE in Applicant's mark.

With regard to the cited TREEHOUSEDIRECT mark, the evidence of record shows that the wording "DIRECT" merely describes the Registrant's television program and film distribution services as "direct distribution," *i.e.*, distribution of

television programming and films by their producers directly to consumers, without a third-party distributor.⁴ Thus, this wording is less significant in terms of affecting the cited mark's commercial impression, and renders the wording "TREEHOUSE" the more dominant element of the mark. In addition, the term TREEHOUSE is the first literal element in both of the marks at issue. "[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions." *Palm Bay*, 73 USPQ2d at 1692; *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).

We have taken into account the stylization of Applicant's mark, the presence in the mark of both the term PICTURES and a design element primarily consisting of a treehouse in a tree, and the additional term "DIRECT" in the cited mark, but we conclude that, when considered in their entirety, the similarities in sound, appearance, meaning and commercial impression between Applicant's mark and the cited mark clearly outweigh any differences.

The first *du Pont* factor thus supports a finding that confusion is likely.

B. Strength/Weakness of the Cited TREEHOUSEDIRECT Mark

The fifth *du Pont* factor, the fame of the prior mark, and the sixth *du Pont* factor, the number and nature of similar marks in use for similar services, *du Pont*, 177 USPQ at 567, are considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled. *Bell's Brewery, Inc. v. Innovation*

⁴ March 30, 2017 Office Action, TSDR pp. 8-17; September 6, 2017 Office Action, TSDR p. 69 ("A distribution system is said to be direct when the product or service leaves the producer and goes directly to the customer with no middlemen involved.")

Brewing, 125 USPQ2d 1340, 1345 (TTAB 2017).⁵ “In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition.” *Bell’s Brewery*, 125 USPQ2d at 1345 (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

In an ex parte appeal such as this, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate the exposure or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, “in an ex parte analysis of the *du Pont* factors for determining likelihood of confusion ..., the ‘fame of the mark’ [fifth] factor is normally treated as neutral when no evidence as to fame has been provided.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(d)(ix) (Oct. 2017). Thus, because there is no evidence of record regarding the fame of the cited mark, the fifth *du Pont* factor is neutral.

The sixth *du Pont* factor requires us to consider the number and nature of similar marks in use on similar services. *du Pont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016).

⁵ The Federal Circuit recently reiterated that “[w]hile dilution fame is an either/or proposition—fame either does or does not exist—likelihood of confusion fame varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quoting *Palm Bay Imps.* 73 USPQ2d at 1694 (internal quotation omitted)).

Applicant contends that the cited mark TREEHOUSEDIRECT comprises such weak, commonly used elements that consumers will look to the other features in Applicant's mark to differentiate the marks in appearance, sound, meaning and commercial impression. Specifically, Applicant maintains that the designations TREE HOUSE or TREEHOUSE are diluted when used in association with services similar to those identified in the cited registration. To demonstrate such weakness, Applicant submitted 15 active, use-based third-party registrations for marks consisting of or containing the term (as one word or two), as used in connection with services purportedly similar to those identified in the cited registration.⁶ The registrations are as follows:



- (HOTEL RESIDENCES disclaimed) (Reg. No. 4112038) for, among other things, “casinos, namely, gambling and gaming services; live entertainment, namely, live performances by musical bands and live comedy shows; night club services; health club services, namely, providing instruction and equipment in the field of physical exercise; leisure club services, namely, country club

⁶ March 29, 2017 Response to Office Action, TSDR pp. 26-54; July 13, 2017 Response to Office Action, TSDR pp. 16-36. Applicant also submitted pending third-party applications for marks comprising in part the term TREE HOUSE. Applications, whether live or abandoned, are not evidence of anything except for the dates on which they are filed. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003) (applications are only probative to show that the application has been filed). They are certainly not evidence of the weakness or usage of the designation TREEHOUSE or TREE HOUSE. Contrary to Applicant's argument, the fact that notices of allowance may have been issued with respect to these pending applications does not demonstrate that the marks are in use in commerce. Thus, we have given the third-party applications no consideration.

and golf club services; provision of sport and recreational facilities; arranging and conducting educational conferences; arranging and conducting entertainment exhibitions in the nature of comedy acts, dance acts, theater acts, plays, stage productions, magic shows, performance art shows; theatrical booking agencies, namely, theater, opera and concert ticket reservations” in Class 41;



- **MORTGAGE GROUP** (MORTGAGE GROUP disclaimed) (Reg. No. 2552487) for “real estate financing services” in Class 36;
- **TREEHOUSE** (in standard characters) (Reg. No. 4490118) for, among other things, “on-line educational and training services, namely, conducting on-line video tutorials, lessons in the nature of seminars, workshops and distribution of course materials in the nature of quizzes in connection therewith in the fields of IT, computer software, web design and development, and accounting; entertainment services, namely, conducting on-line quizzes and on-line tests, in the nature of analyzing educational tests scores and data for others; entertainment services, namely, talk shows concerning IT, computer software, web design and development, and accounting ; entertainment services, namely, providing a website featuring podcasts and blogs all in the fields of IT, computer software, web design and development, and accounting via a global computer network” in Class 41;
- **THE TEACHING TREEHOUSE** (in standard characters) (Reg. No. 4873244) for “downloadable electronic publications in the nature of instructional, educational, classroom, and teaching materials in the field of core curriculum, namely, language arts, math, science and social studies, for preschool through 12th grade” in Class 9;
- **TREEHOUSE TROUPE** (in standard characters; **TROUPE** disclaimed) (Reg. No. 4579611) for “entertainment in the nature of theater productions” in Class 41;
- **TREEHOUSE MUSEUM** (in standard characters; **MUSEUM** disclaimed) (Reg. No. 4674071) for, among other things, “educational services, namely, conducting tours, classes, workshops, displays, exhibitions, and multicultural activities in the field of children's literature, history, math, science, geography, art, and music;

entertainment in the nature of theater productions; Museum services” in Class 41;

- TREEHOUSE SHAKERS (in standard characters) (Reg. No. 3515818) for “Writing of original dance-plays for adults and children; providing dance instruction, workshops and lessons for adults and children; entertainment in the nature of dance and theater productions; entertainment in the nature of dance and theater performances; educational services, namely, providing and conducting workshops in the fields of dance and theater; presentation of plays; providing and composing original choreography” in Class 41;
- TREEHOUSE! (in standard characters) (Reg. No. 4509778) for, among other things, “entertainment, namely, live music concerts; Entertainment, namely, live performances by a musical band” in Class 41;



- (CHILDREN'S and FOUNDATION disclaimed) (Reg. No. 2813053) for “educational support group services, namely, providing classes, seminars, art and other activities, and educational information related to cancer for the children of parents with cancer; charitable services, namely, providing books, activities, and related materials to children of parents with cancer” in Class 41;
- JONAH'S TREEHOUSE (in standard characters) (Red. No. 3188232) for “Educational services, namely, conducting classes for children in the field of children's play and movement” in Class 41;
- TARZAN'S TREEHOUSE (in standard characters; TREEHOUSE disclaimed) (Reg. No. 2357488) for “entertainment in the nature of an amusement park attraction” in Class 41;
- THE LITTLE TREEHOUSE (in standard characters; TREEHOUSE disclaimed) (Reg. No. 3898454) for, among other things, “educational and entertainment services, namely, the provision of play facilities for children with supervised play activities, namely, providing furnished play space with crafts and craft activities” in Class 41;



- **CITY TREEHOUSE** (Reg. No. 3896824) for “Operation of children's entertainment and amusement centers; Providing recreational areas in the nature of play areas for children; Providing interactive play areas for water play for children; Providing children's party centers for the purpose of entertaining children and celebrating birthdays; Educational services, namely, developing curriculum for teachers, parents, educators and children; providing interactive classes, seminars, workshops, training and curriculum development for children, parents and educators in the fields of language, reading, dance, arts, crafts, music, science, cooking, yoga, parenting and childcare; Providing on-line newsletters in the field of parenting concerning the health, education and entertainment of children” in Class 41;
- **TREEHOUSE MASTERS** (in standard characters; **TREEHOUSE** disclaimed) (Reg. No. 4807152) for “entertainment and educational services in the nature of television and multimedia program series featuring subjects of general human interest distributed via various platforms across multiple forms of transmission media; providing entertainment information to others via a global computer network” in Class 41; and
- **MAGIC TREE HOUSE** (in standard characters) (Reg. No. 2502559) for “prerecorded audio and video cassettes, featuring children's television shows, movies and radio shows” in Class 9.

Third-party registrations and use of similar marks can bear on the strength or weakness of a registrant’s mark in two ways: commercially and conceptually. First, if a mark, or an element of a mark, is used extensively in commerce by a number of third parties, that could undermine its commercial strength, as the consuming public may have become familiar with a multiplicity of the same or similar marks, and can distinguish them based on minor differences. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). “Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a

mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps.*, 73 USPQ2d at 1693, *quoted in Jack Wolfskin*, 116 USPQ2d at 1136. “The weaker [a registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674.

Second, if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin*, 116 USPQ2d at 1136 (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak’”) (quoting *Juice Generation*, 115 USPQ2d at 1674 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015))).

In this case, with respect to commercial strength, Applicant has not submitted evidence of third-party usage of the marks shown in the third-party registrations, or any other pertinent marks demonstrating use in commerce. What is missing is evidence of the extent of use or recognition of such marks in the marketplace: “existence of [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with them....” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) *quoted in In re Inn at St. John’s*,

LLC, 126 USPQ2d 1742, 1746 (TTAB 2018). That differentiates this case from *inter partes* cases such as *Jack Wolfskin* and *Juice Generation*, in which evidence of commercial use was submitted. *See Jack Wolfskin*, 116 USPQ2d at 1136 (noting that third-party registrations were accompanied by evidence of the marks in use in Internet commerce: “Jack Wolfskin presented extensive evidence of third-party registrations depicting paw prints and evidence of these marks being used in internet commerce for clothing”); *Juice Generation*, 115 USPQ2d at 1674 (acknowledging testimony of applicant’s founder concerning third-party use of similar marks).

With regard to conceptual strength of the mark, we note that none of the third-party registrations submitted by Applicant identify services that are identical to those offered by Registrant. Applicant argues that the “theatre productions” services identified in the registrations for the marks “TREEHOUSE TROUPE” and “TREEHOUSE MUSEUM” may be related to the services identified in the cited registration; however, no evidence of record supports this argument and Applicant does not make clear the significance of this relationship. Similarly, the goods and services associated with the “TREEHOUSE!” mark in Registration No. 4509778, Class 9 musical recordings and Class 41 live music concerts and performances, are not identified in the cited registration; and no evidence of record shows that these goods or services are related to the services of Registrant. Thus, in support of the asserted weakness of the cited mark, Applicant has made of record no evidence to show that any of the services listed in the third-party registrations are related to

Registrant's identified services. Moreover, the commercial impressions of the third-party marks differ from the commercial impression conveyed by the cited mark.

Because the "TREEHOUSE" marks submitted by Applicant convey different commercial impressions from the cited mark and the listed marks are associated with services unrelated to those identified in the cited registration, we find that the coexistence of the listed registrations does not demonstrate conceptual weakness of the cited TREEHOUSEDIRECT mark.

In view thereof, the sixth *du Pont* fact is neutral.

C. Similarity of the Services

The next step in our analysis is a comparison under the second *du Pont* factor of the Class 41 services identified in Applicant's application vis-à-vis the services identified in the cited registration. *See 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. Comps. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is well-settled that it is not necessary that the services be identical or even competitive in nature in order to support a finding of likelihood of confusion, it being sufficient that the services are related in some manner and/or that the circumstances surrounding their marketing be such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks employed thereon, to the mistaken belief that they emanate from the same source. *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Martin's Famous Pastry*

Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant services are offered to the same purchasers; advertisements or webpages showing that the relevant services are advertised or sold together or offered by the same entity; and/or copies of prior use-based registrations of the same mark for both Applicant's services and the services listed in the cited registration. *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of the services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

In support of the refusal, the Examining Attorney made of record numerous third-party, use-based registrations, each identifying, under a single mark, both Applicant's services and Registrant's services.⁷ Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the services listed therein are of a kind which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86

⁷ September 6, 2017 Office Action, TSDR pp. 8-63.

(TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). As examples:⁸

- MOONLIGHT BRUNCH (Reg. No. 5276607) for services including “production and distribution of television shows and movies,” in Class 41;
- BLACK BELT TV (TV disclaimed; registered, in its entirety, under Section 2(f))(Reg. No. 5131028) for services including “distribution of television programs for others; entertainment media production services for motion pictures, television and Internet; production and distribution of television shows and movies,” in Class 41;
- WILD ABOUT NEW YORK CITY (Reg. No. 5191766) for services including “production and distribution of television shows and movies,” in Class 41;
-  (ENTERTAINMENT disclaimed) (Reg. No. 5147229) for services including “production and distribution of television shows and movies,” in Class 41;
- HOLD THESE TRUTHS (Reg. No. 5281762) for services including “entertainment in the nature of television news shows; Entertainment services in the nature of creation, development, and production of television programming; production and distribution of television shows and movies,” in Class 41;
- PRIMO TV (TV disclaimed) (Reg. No. 5228837) for services including “entertainment services, namely, providing ongoing webisodes featuring Spanish language children's programming via a global computer network; production and distribution of television shows and movies; production of cable television programs; Production of television programs; providing a website for entertainment purposes featuring Spanish language videos about topics of interest to children,” in Class 41;

⁸ We note that several of the third-party registrations submitted by the Examining Attorney are broadly worded, i.e., distribution of television shows and movies. As such, these broadly-worded identifications encompass Registrant’s more limited identification of “distribution of prerecorded television programs and films via a global computer network.”

- CINETAİN (Reg. No. 5220794) for services including “entertainment services, namely, live, televised and movie appearances by a professional entertainer; production and distribution of television shows and movies; television, video and movie filming services,” in Class 41;
- POKE MY HEART (Reg. No. 5125879) for services including “production and distribution of television shows and movies; providing non-downloadable films and television programs via a video-on-demand service; entertainment services, namely, providing a website featuring photographic, audio, video, and prose presentations featuring comedy,” in Class 41;
- DILIGENTLY DATING (DATING disclaimed) (Reg. No. 5136141) for services including “entertainment services in the nature of development, creation, production, distribution, and post-production of multimedia entertainment content in the field of dating; film distribution; production and distribution of independent motion pictures; production and distribution of monoscopic and stereoscopic, electronic, digital video and film; production and distribution of motion pictures; production and distribution of television shows and movies,” in Class 41;

The Examining Attorney also submitted internet evidence demonstrating that third parties such as Walt Disney Studios, NBCUniversal, CBS, Warner Bros. Entertainment, FremantleMedia, BBC, Sundial Pictures and Sony Pictures commonly provide both Applicant’s services and Registrant’s services under the same mark.⁹

The Examining Attorney argues that the foregoing evidence establishes that the services described in Applicant’s involved application and in the cited registration are

⁹ February 21, 2018 Denial of Request for Reconsideration, TSDR pp. 8-38.

related because these services are often offered, advertised and marketed by the same company to the same consumers under the same mark.¹⁰

In traversing the refusal, Applicant argues that its identified services are not related to those identified in the cited registration.¹¹ Specifically, Applicant argues that because it amended the identification of its International Class 41 services to delete “distribution services,” its currently identified services do not overlap with those services identified in the cited registration.¹² Applicant also argues that since the Patent and Trademark Office has allowed numerous sets of registrations to coexist on the Principal Register that share a common term where one mark is used in connection with TV and film production services and the other mark is used in association with the provision and distribution of TV programs and films, the Office has determined that film and TV production services and the distribution and provision of films and television programs are not related. In support of its argument, Applicant submitted copies of third-party registrations, most of which are summarized in the chart below:¹³

¹⁰ Trademark Examining Attorney’s Appeal Brief, p. 7, 11 TTABVUE 7.

¹¹ Applicant’s Appeal Brief, p. 19, 11 TTABVUE 20.

¹² *Id.*

¹³ February 12, 2018 Request for Reconsideration, Exh. C, TSDR pp. 29-134.

Relevant Class 41 Services	Mark and Owner	Mark and Owner	Relevant Services Class 41
television show production	YOU'RE INVITED Reg: 4799384 Omole, Eunice I Dba Eunice Omole	YOU'RE WHOLE Reg: 4343939 The Cartoon Network, Inc.	entertainment services, namely, provision of ongoing multimedia programs in the field of comedy, action and adventure distributed via various platforms across multiple forms of transmission media
media production services, namely, video and film production	360E Reg: 4027873  360e Productions, LLC	AC360 Reg: 4712414 Cable News Network, Inc.	entertainment services, namely, a multimedia program series featuring news and current events distributed via various platforms across multiple forms of transmission media
motion picture film production	COPTER X Reg: 4249795 Chien, Taylor	AGENT X Reg: 5041800 Turner Network Television, Inc.	entertainment services, namely, a multimedia program series featuring comedy, action, drama and adventure distributed via various platforms across multiple forms of transmission media
motion picture film production	AMERICA'S NEXT PAGEANT Reg: 4526786 Rita Mezrahi	AMERICA'S SECRET SLANG Reg: 4508226 A&E Television Networks, LLC	entertainment services, namely, a multimedia program series featuring subjects of general human interest distributed via various platforms across multiple forms of transmission media
film and video film production	THE PAIN WHISPERER Reg: 4264406 Chi, Tom	ZOMBIE WHISPERER Reg: 4760720 Fowler, Matthew Michael Boutte, Kelsey Sue	entertainment services, namely, a multimedia program series featuring comedy, action and adventure distributed via various platforms across multiple forms of transmission media
film production	I AM Reg: 4716609 I.Am. Symbolic, LLC	I AM HOMICIDE Reg: 5051297 Discovery Communications, LLC	providing entertainment information to others via a global computer network
media production services, namely, video and film production	MISFIT IDEAS Reg: 5213775 Misfit Ideas, LLC	MISFIT GARAGE Reg: 4931105 Discovery Communications, LLC	providing entertainment information to others via a global computer network

Relevant Class 41 Services	Mark and Owner	Mark and Owner	Relevant Services Class 41
entertainment services, namely, television programming, television show production, and distribution of television programs	<p>24 24 24 24</p>  <p>Reg: 4796631</p> <p>Arewa 24, LLC</p>	<p>24 TO LIFE</p> <p>Reg: 5177362</p> <p>Lifetime Entertainment Services, LLC</p>	entertainment services, namely, a multimedia program series featuring subjects of general human interest distributed via various platforms across multiple forms of transmission media
motion picture film production, production of video discs, television programming production, and computer animation production services	<p>EVOLVING EDUCATION ONLINE</p> <p>Reg: 3707887</p> <p>Full Sail, LLC</p>	<p>CIRCLE OF EDUCATION</p> <p>Reg: 4154640</p> <p>Deli Brainy</p>	provision of non-downloadable films and television programs via a video-on-demand service
television show production	<p>AMERICA'S NEXT GREAT TRAINER</p> <p>Reg: 4214672</p> <p>Angt, LLC</p>	<p>AMERICA'S BOOK OF SECRETS</p> <p>Reg: 4227847</p> <p>A&E Television Networks, LLC</p>	entertainment services, namely, a multimedia program series featuring subjects of general human interest distributed via various platforms across multiple forms of transmission media
motion picture film production	<p>RED HOOK FILMS</p> <p>Reg: 4073735</p> <p>Red Hook Films</p>	<p>RED IBEX FILMS</p> <p>Reg: 4893423</p> <p>Rescue Response Gear, Inc.</p>	provision of non-downloadable films and movies via a video-on-demand service
media production services, namely, video and film production	<p>SCREEN ADDICTION</p> <p>Reg: 3560456</p> <p>Screen Addiction LLC</p>	<p>MY STRANGE ADDICTION</p> <p>Reg: 4036266</p> <p>Discovery Communications, LLC</p>	providing entertainment information to others via a global computer network
media production services, namely, video and film production	<p>WINE ADVENTURE TV</p> <p>Reg: 4228560</p> <p>Wine Adventure TV, LLC</p> 	<p>ADVENTURE TIME</p> <p>Reg: 3819209</p> <p>The Cartoon Network,</p>	entertainment services, namely, a multimedia program series featuring comedy, action and adventure distributed via various platforms across multiple forms of transmission media

Relevant Class 41 Services	Mark and Owner	Mark and Owner	Relevant Services Class 41
film production	BROOKLYN UNDERGROUND FILMS Reg: 4862930 Brooklyn Underground Films, LLC	UNDERGROUND YOGA Reg: 4288564 Rosario, Luis Lemay, Michelle M	provision of non-downloadable films and movies via a video-on-demand service
film production	LIVING IN LIMBO Reg: 4563803 Living In Limbo, Inc.	LIVING IN SECRET Reg: 4875627 Lifetime Entertainment Services, LLC	entertainment services, namely, a multimedia program series featuring subjects of general human interest distributed via various platforms across multiple forms of transmission media
entertainment services, namely, television and motion picture film production services, and interactive multimedia production services	HOUSE OF PAYNE Reg: 4080481 House Of Payne, LLC	HOUSE OF CARDS Reg: 3642647 D2 Holdings LLC	entertainment services, namely, a multimedia program series featuring comedy, action and adventure distributed via various platforms across multiple forms of transmission media

We are not persuaded by Applicant’s arguments. The fact that Applicant may have deleted “distribution services” from its identification of services does not compel a finding that the involved services are unrelated. As stated above, it is not necessary that the services be identical or even competitive in nature in order to support a finding of likelihood of confusion. The record clearly demonstrates that while the respective services may not be identical in nature, single entities provide both film production and film distribution services under a single mark. Moreover, the fact the third-party registrations submitted by Applicant coexist on the Principal Register does not demonstrate that the respective services are unrelated. Here, the sets of registered marks submitted by Applicant, when viewed in tandem, are clearly not identical. The fact that they may share a single term does not, in and of itself, demonstrate that the marks are similar. Because of the dissimilarities of marks that

are subject to the sets of registrations submitted by Applicant, we find that these registrations do not demonstrate that the parties' respective services are unrelated. For these reasons, we reject Applicant's arguments.

Notwithstanding, prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Board. TMEP §1207.01(d)(vi); *see In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case is decided on its own facts, and each mark stands on its own merits. *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (quoting *In re Boulevard Entm't*, 334 F.3d 1336, 1343, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)).

Based on the internet and third-party registration evidence of record submitted by the Examining Attorney, we conclude that Applicant's services and Registrant's services are related and are the types of services that have been offered under a single mark by a single entity such that, when identified by similar marks, as is the case here, confusion as to source is likely. *Cf. In re Shell Oil Co.*, 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“...even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.”).

Thus, the second *du Pont* factor favors a finding of likelihood of confusion.

D. Similarities in Trade Channels and Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. We initially note that while the trade channels for Registrant's services are restricted, i.e., they are provided via a global computer network, there is no such

restriction in Applicant's International Class 41 identification of services. Therefore, Applicant's unrestricted trade channels encompass the specific channels of trade listed in the cited registration. Second, inasmuch as there is no restriction to the types of purchasers in either Applicant's application or the cited registration, we must presume that the services identified in Applicant's application and the cited registration are provided to all classes of prospective purchasers for those services. *Stone Lion Capital*, 110 USPQ2d at 1161. The only probative evidence relating to the trade channels through which the services at issue travel and the class of consumers to whom the services are offered is the third-party website evidence submitted by the Examining Attorney and discussed above. This evidence shows that Applicant's services and Registrant's services are the type that may be provided in the same marketplace to similar or overlapping purchasers. Therefore, the third *du Pont* factor also weighs in favor of finding a likelihood of confusion.

E. Sophistication of Consumers

We next consider Applicant's arguments under the fourth *du Pont* factor: the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing. *du Pont*, 177 USPQ at 567. Applicant argues that the high cost of the respective services, coupled with the sophistication and knowledge that purchasers of Applicant's services possess, further lessens any chance of likelihood of confusion between Applicant's mark and the cited mark.¹⁴ While Applicant does not concede that the services offered under the cited mark and Applicant's mark are

¹⁴ Applicant's Appeal Brief, p. 17, 11 TTABVUE 18.

related, Applicant contends that both sets of services are highly expensive inasmuch as the production and distribution of films and TV shows can easily run into the millions of dollars.¹⁵ Applicant further contends that not only do the services offered under Applicant's mark and the cited mark require greater care given their high value, the purchasers of such services are highly knowledgeable and sophisticated. Additionally, Applicant maintains that it markets its services to TV and film executives and has worked with a number of award-winning directors and screenwriters.¹⁶

Our precedent requires that we base our decision on the least sophisticated potential purchasers of the identified services. *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1039 (TTAB 2016) (citing *Stone Lion*, 110 USPQ2d 1157 at 1163). Here, Applicant has not submitted any evidence to demonstrate that the consumers of either Applicant's services or Registrant's services are sophisticated or knowledgeable in the movie and TV industry or that their respective services are highly expensive. Even if such evidence were of record, that would not necessarily mean that these consumers are immune from source confusion. *See In re Cynosure, Inc.*, 90 USPQ2d 1644 (TTAB 2009). With substantially similar marks and related services, even a careful, sophisticated consumer of such services is not likely to understand that the services emanate from different sources, particularly where, as here, there is evidence that the types of services offered by both

¹⁵ *Id.*

¹⁶ February 12, 2018 Request for Reconsideration, Exh. E, TSDR pp. 138-149.

Applicant and Registrant may emanate from a single source under a single mark. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000).

The fourth *du Pont* factor is therefore neutral.

F. Nature and Extent of Any Actual Confusion

Applicant argues that, although the respective marks have coexisted for nearly seven years, there is no evidence of actual confusion, and therefore, the seventh *du Pont* factor weighs in its favor.¹⁷ A showing of actual confusion would of course be highly probative of a 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, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the likelihood of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Further, any suggestion that there has been no actual confusion between the marks based on the coexistence of Applicant's mark and the mark in the cited registration is entitled to little probative value in the context of an ex parte appeal, in which the owner of the cited registration is not a party. *In re Majestic Distilling Co.*, 65 USPQ2d at 1205; see also *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Therefore, this *du Pont* factor is also neutral.

II. Conclusion

We have considered all of the arguments and evidence of record, including those

¹⁷ Applicant's Appeal Brief, pp. 24-25, 11 TTABVUE 25-26.

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not specifically discussed herein, and all relevant *du Pont* factors. Because we have found that the marks at issue are similar; that Applicant's identified Class 41 services are related to Registrant's services; and that the parties' services move in similar or overlapping trade channels and that they would be offered to the same or similar classes of purchasers, we conclude that Applicant's TREEHOUSE PICTURES and design mark, as used in connection with the Class 41 services identified in its involved application, so resembles the cited mark TREEHOUSEDIRECT as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's TREEHOUSE PICTURES and design mark for the identified Class 41 services under Section 2(d) of the Trademark Act is affirmed. Applicant's application Serial No. 87142861 will proceed to publication only in connection with the identified International Class 36 services.