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**United States Patent and Trademark Office (USPTO)**

**U.S. Application Serial No.** 87707617

**Mark:** PORTAL

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**Applicant:** T3 PRODUCTIONS, LLC

**Reference/Docket No.** 9820-99671-1

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**EXAMINING ATTORNEY’S APPEAL BRIEF**

T3 Productions, LLC, (applicant), a limited liability company existing under the laws of Oregon, has appealed the examining attorney’s final refusal to register the mark PORTAL for use with “entertainment services, namely, escape rooms attraction.” Registration was refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the basis that the mark, as applied to the services, is likely to be confused with the mark PORTAL in U.S. Registration No. 5397743 for use with the services of “providing facilities for virtual reality gaming and entertainment experiences in the form of virtual reality arcades.”

**STATEMENT OF FACTS**

On December 4, 2017, applicant applied to register the mark PORTAL for use with services that were ultimately amended to “entertainment services, namely, escape rooms attraction.”

On March 20, 2018, the examining attorney refused registration on the Principal Register under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because of a likelihood of confusion with the identical mark PORTAL in U.S. Registration No. 5397743.

The applicant responded on September 20, 2018, arguing no likelihood of confusion existed between the identical marks. The examining attorney found applicant's arguments against the refusal unpersuasive, and on April 19, 2019, issued a final refusal pursuant to Section 2(d).

On October 21, 2019, applicant filed a request for reconsideration in conjunction with a notice of appeal. The examining attorney denied applicant's request for reconsideration, and applicant subsequently filed its appeal brief on January 21, 2020.

### **ISSUE**

The sole issue for consideration on appeal is whether the applied-for mark, PORTAL, is likely to be confused with the identical registered mark, PORTAL, when used in connection with the identified services in International Class 41 for both applicant and registrant.

### **ARGUMENT**

Applicant's mark is likely to cause consumer confusion with registrant's mark, and thus the refusal to register applicant's mark should be affirmed. Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the services of the parties. See 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the "du Pont factors"). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Any evidence of record related to those factors need be considered; however, "not all of the *DuPont* factors are relevant or of similar weight in every case." *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared services. See *In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) ("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks."); TMEP §1207.01.

#### **I. APPLICANT'S MARK IS CONFUSINGLY SIMILAR TO REGISTRANT'S MARK BECAUSE THE MARKS ARE IDENTICAL**

In a likelihood of confusion determination, the marks in their entireties are compared for similarities in appearance, sound, connotation, and commercial impression. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1323, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); *In re E.*

*I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b)-(b)(v).

In the present case, applicant's mark is the standard character mark PORTAL and registrant's mark is the standard character mark PORTAL. These marks are identical in appearance, sound, and meaning, "and have the potential to be used . . . in exactly the same manner." *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). Additionally, because they are identical, these marks are likely to engender the same connotation and overall commercial impression when considered in connection with applicant's and registrant's respective services. *Id.*

Therefore, because applicant's and registrant's mark are identical, the marks are confusingly similar, and the first prong of the likelihood of confusion test has been met.

## **II. APPLICANT'S SERVICES ARE CLOSELY RELATED TO REGISTRANT'S SERVICES, TRAVEL IN THE SAME CHANNELS OF TRADE, AND ARE MARKETED TO THE SAME CLASS OF CONSUMERS**

In addition to applicant's mark being identical to registrant's mark, applicant's services are also closely related to registrant's services, thereby creating a likelihood of confusion.

In a likelihood of confusion analysis, the compared services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); TMEP §1207.01(a)(i). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Here, applicant's services as amended are "entertainment services, namely, escape rooms attraction" in International Class 41. *See* Response to Office action dated September 20, 2018, TSDR pp. 1. Registrant's services are "providing facilities for virtual reality gaming and entertainment experiences in the form of virtual reality arcades" in International Class 41. *See* Office action dated March 20, 2018, TSDR p. 1.

The breadth of evidence in the record, consisting of screenshots from webpages, firmly establishes that the same entity commonly provides escape room attractions and entertainment facilities, as well as virtual reality arcades under the same mark. In addition, the extensive evidence of record establishes that these services are also used by the same classes of consumers in the same field of use, and are provided via the same source and through the same trade channels. Specifically, this evidence includes the following:

- Evidence from the website Rush Hour Gaming, demonstrating that this entity provides facilities for virtual reality arcade services and also provides escape room attractions and entertainment facilities.<sup>1</sup>
- Evidence from the website Escape Room NJ, <http://escaperoomnj.com> and <http://escaperoomnj.com/virtual-reality-escape-room/>, demonstrating that this entity

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<sup>1</sup> *See* Office action dated March 20, 2018, TSDR pp. 5 – 17

provides facilities for escape room attractions and entertainment facilities, which also includes facilities for virtual reality escape room services.<sup>2</sup>

- Evidence from the website Urban Enigmas, demonstrating that this entity provides facilities for escape room attractions and entertainment, as well as virtual reality arcade services.<sup>3</sup>
- Evidence from the website Escape Reality Sarasota, <https://escaperealitysarasota.com>, <https://escaperealitysarasota.com/descent-into-madness>, and <https://escaperealitysarasota.com/escape-the-lost-pyramid>, demonstrating that this entity's services include the provision of facilities for escape room attractions, which also feature virtual reality escape room games.<sup>4</sup>
- Evidence from the website My Escape Mission, <https://myescapemission.com>, <https://myescapemission.com/rooms/>, and <https://myescapemission.com/virtual-reality-arcade/>, demonstrating that this entity's services include the provision of facilities for escape room attractions and a virtual reality arcade.<sup>5</sup>
- Evidence from the website Lake Geneva Clue Room, <https://www.lakegenevaclueroom.com/>, demonstrating that this entity's services include the provision of facilities for escape room attractions and a virtual reality arcade.<sup>6</sup>
- Evidence from the website Escape Challenge St. Louis, <https://www.escapechallengestl.com/> and <https://www.escapechallengestl.com/matrixvr>, demonstrating that this entity's services include the provision of facilities for escape room attractions, as well as virtual reality gaming features.<sup>7</sup>
- Evidence from the website Xtreme Action Park, <https://xtremeactionpark.com/>, demonstrating that this entity's services include the provision of facilities for escape room attractions and a virtual reality arcade.<sup>8</sup>
- Evidence from the website Zenith Fun, <https://www.zenithfun.com/>, demonstrating that this entity's services include the provision of facilities for escape room attractions and a virtual reality arcade.<sup>9</sup>

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<sup>2</sup> See Office action dated March 20, 2018, TSDR pp. 18 – 31

<sup>3</sup> See Office action dated March 20, 2018, TSDR pp. 32 – 33

<sup>4</sup> See Final Office action dated April 19, 2019, TSDR pp. 6 – 11

<sup>5</sup> See Final Office action dated April 19, 2019, TSDR pp. 1 – 5

<sup>6</sup> See Final Office action dated April 19, 2019, TSDR pp. 12 – 15

<sup>7</sup> See Final Office action dated April 19, 2019, TSDR pp. 16 – 29

<sup>8</sup> See Final Office action dated April 19, 2019, TSDR pp. 30 – 38

<sup>9</sup> See Final Office action dated April 19, 2019, TSDR pp. 39 – 46

- Evidence from the website VR Zone DC, <https://www.vrzonedc.com/>, <https://www.vrzonedc.com/birthday-parties>, <https://www.vrzonedc.com/experiences>, and <https://www.vrzonedc.com/vr-escape-games>, demonstrating that this entity's services feature a virtual reality arcade, which includes virtual reality escape rooms.<sup>10</sup>
- Evidence from the website Warrior VR Arcade, <https://warriorvrarcade.com>, demonstrating that this entity's services feature a virtual reality arcade, which includes virtual reality escape rooms.<sup>11</sup>
- Evidence from the website VR Tech Lounge, <https://vrtechlounge.com/>, <https://vrtechlounge.com/virtual-reality-gaming/>, and <https://vrtechlounge.com/escape-room/>, demonstrating that this entity's services feature a virtual reality arcade, which includes virtual reality and live escape rooms.<sup>12</sup>
- Evidence from the website Quest Ledge, <https://www.questledge.com/>, <https://www.questledge.com/blog>, and <https://www.questledge.com/blog/categories/escape-room-multi-player-vr>, demonstrating that this entity's services feature a virtual reality arcade, which includes virtual reality escape rooms.<sup>13</sup>
- Evidence from the website VR Territory, <https://orlando.vrterritory.zone/portfolio/escape-room-vr/> and <https://orlando.vrterritory.zone/portfolio/premium-vr/>, demonstrating that this entity's services feature a virtual reality arcade, which includes virtual reality escape rooms.<sup>14</sup>
- Evidence from the website Xperience Kelowna, <https://www.xperiencekelowna.com/exit-escape-room/> and <https://www.xperiencekelowna.com/virtual-reality/>, demonstrating that this entity's services include the provision of facilities for escape room attractions and a virtual reality arcade.<sup>15</sup>
- Evidence from the website Mayze Games, <http://mayzegames.ca/>, demonstrating that this entity's services include the provision of facilities for escape room attractions and a virtual reality arcade.<sup>16</sup>

This market evidence clearly demonstrates that “entertainment services, namely, escape rooms attraction” and “providing facilities for virtual reality gaming and entertainment experiences in the form

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<sup>10</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 2 – 27

<sup>11</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 28 – 36

<sup>12</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 37 – 57

<sup>13</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 58 – 69

<sup>14</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 70 – 77

<sup>15</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 78 – 85

<sup>16</sup> See Request for Reconsideration Denial Office action dated November, 13, 2019, TSDR pp. 86 - 93

of virtual reality arcades” are services extensively provided by the same entity, marketed under the same mark, used by the same class of consumers in the same field of use, and are provided via the same source and through the same trade channels. Thus, applicant’s and registrant’s identified services are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Applicant nonetheless maintains that the parties’ identical marks are not confusingly similar because the services “are of such a distinct nature and marketed to consumers exercising a high degree of care...that it is unlikely consumers will be confused as to the source of the respective services.” *See* Applicant’s Appeal Brief, pp. 6. In support of applicant’s argument that the services for these identical marks are unrelated, applicant notes third party registrations that feature PORTAL formative marks for various entertainment services in International Class 41. *See* Applicant’s Appeal Brief, pp. 6 – 7.

Applicant’s arguments are unsupported given the breadth of evidence in the record that demonstrates that applicant’s and registrant’s services are commonly provided by the same entity and marketed under the same mark. Applicant’s discerning consumer argument is also unpersuasive because even if consumers of the compared services could be considered sophisticated and discriminating, it is settled that “even sophisticated purchasers are not immune from source confusion, especially in cases such as the present one involving identical marks and related goods [and/or services].” *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1413 (TTAB 2015) (citing *In re Research & Trading Corp.*, 793 F.2d 1276, 1279, 230 USPQ 49, 50 (Fed. Cir. 1986)), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *see also In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). The identity of the marks and the relatedness of the services “outweigh any presumed sophisticated purchasing decision.” *In re i.am.symbolic, llc*, 116 USPQ2d at 1413 (citing *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff’d*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990)); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014).

The overriding concern is not only to prevent buyer confusion as to the source of the services, but 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, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

In addition, applicant’s argument that the identical marks are not confusingly similar because of the small number of PORTAL formative third-party registrations for various entertainment services in International Class 41 fails to take into account that the cited registrations contain additional elements, unlike applicant’s and registrant’s marks which are identical. Notwithstanding the extensive evidence of record demonstrating that applicant’s and registrant’s services are related, where the marks of the respective parties are identical, as in this case, the degree of similarity or relatedness between the services needed to support a finding of likelihood of confusion declines. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993)), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); TMEP §1207.01(a).

In addition, the weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar services. See *Nat'l Cable Tel. Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Evidence of widespread third-party use of similar marks with similar services “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection” in that particular industry or field. *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)).

However, evidence comprising only a small number of third-party registrations for similar marks with similar services, as in the present case, is generally entitled to little weight in determining the strength of a mark. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 1328-29, 123 USPQ2d 1744, 1751-52 (Fed. Cir. 2017); *AMF Inc. v. Am. Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973). These few registrations are “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 at 1406, 177 USPQ at 269; *In re I-Coat Co.*, 126 USPQ2d 1730, 1735 (TTAB 2018). Thus, the few similar third-party registrations submitted by applicant are insufficient to establish that the wording PORTAL is weak or diluted.

#### **CONCLUSION**

Applicant’s mark is confusingly similar to registrant’s mark because the marks are identical. In addition, these identical marks are used in connection with highly related entertainment services in International Class 41, as clearly established by the evidence of record. Thus, the two key components of the likelihood of confusion test have been met, and applicant’s refusal of registration should be affirmed as to the identical mark PORTAL in U.S. Registration No. 5397743 under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Respectfully submitted,

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