

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Arizona Elk Society

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Serial No. 87782453

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for Arizona Elk Society

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Before Wellington, Ritchie, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Arizona Elk Society (Applicant) seeks registration on the Principal Register of the mark HEALING THROUGH HUNTING (in standard characters) for services “conducting guided outdoor expeditions” in International Class 41. Application Serial No. 87782453 was filed on February 2, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging a date of first use anywhere and in commerce of January 12, 2018.

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 so resembles the registered mark HEALING ON THE HUNT (standard characters) for services "organizing hunting, fishing, and outdoor trips for wounded combat veterans to help heal" in International Class 39 as to be likely to cause confusion, mistake or to deceive.¹ Registration No. 4835852 issued October 20, 2015.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on 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, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *du Pont* factors now before us, are discussed below. To the extent that any other *du Pont* factors for which

¹ The Examining Attorney also refused registration on the ground that the mark is merely descriptive of the services, but withdrew the refusal in his appeal brief.

no argument or evidence was presented may nonetheless be applicable, we treat them as neutral.

A. Similarity or Dissimilarity of the Services and Channels of Trade

We turn first to the *du Pont* factors regarding the similarity or dissimilarity of the respective services and channels of trade, including prospective purchasers. Applicant's services are "conducting guided outdoor expeditions" and Registrant's services are "organizing hunting, fishing, and outdoor trips for wounded combat veterans to help heal." Most significantly, by the plain wording of their services, both parties offer the same "outdoor expeditions" or "outdoor trips."² *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) ("The 'data and information processing' description in the ITU application is very similar to HP's registrations covering consulting services, whether for data processing or for data processing products.").

While Applicant's services feature guided outdoor trips, Registrant's services are unrestricted, and so are presumed to include both guided and unguided outdoor trips. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) ("If the cited registration describes goods or

² expedition *noun*

1a : a journey or excursion undertaken for a specific purpose

trip *noun*

1 a voyage, journey

Merriam-Webster, <https://www.merriam-webster.com/dictionary/>. The Board may take judicial notice of widely available online dictionary definitions. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Definitions available from an online resource that are readily available and as such capable of being verified are useful to determine consumer perception.").

services broadly, and there is no limitation as to their nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers.”). While Registrant’s services are directed to “wounded combat veterans”, Applicant’s services are unrestricted, and thus may be offered to all potential consumers, including wounded combat veterans. Likewise, while Registrant’s services “help heal”, Applicant’s services are unrestricted, and thus also may help heal. *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d at 1004 (finding the subject application and cited registrations are themselves “important evidence” on the relationship between the services). In sum, we find Applicant’s services, which may include conducting guided outdoor trips to help heal wounded combat veterans, and Registrant’s services, which may include organizing guided outdoor trips to help heal wounded combat veterans, to be at least in part identical.

In addition to the evidence provided by the similar wording of the parties’ recitations of their services, the Examining Attorney submitted evidence that prospective consumers may regard the different services of organizing and conducting such outdoor trips as emanating from a single source. The organizations High Adventure Ranch, Sportsman’s Foundation for Military Families, Hunting With Soldiers, and North American Hunter for Heroes all have webpages which advertise services organizing and conducting hunts, including hunts for veterans and the disabled. May 17, 2018 Office Action TSDR 9-13.

While we base our comparison of the services on the recitations provided by Applicant and Registrant in their respective application and registration, as corroboration for our finding that the services are closely related or overlap, we note that Applicant's specimen of use makes clear that it both organizes ("mission is to provide Arizona physically disabled veterans the chance to get outdoors and participate in activities") and conducts ("delivers free all-inclusive, comfortable 3- to 4-day guided hunts throughout Arizona's awesome outdoors") its guided outdoor trips. February 2, 2018 Specimen, TSDR 3. We note that Applicant did not contest during examination, and does not contest in its brief, that the services are closely related.

For the same reasons, we also find that the parties' respective services are likely to travel through some of the same channels of trade to some of the same classes of purchasers.

We find that the second and third *du Pont* factors weigh heavily in favor of finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

We must compare the marks HEALING THROUGH HUNTING and HEALING ON THE HUNT in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1690 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side

comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir.1992)). Given our finding that the services are in-part identical or overlap, we further keep in mind that, in such situations, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. See *Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

As shown by the standard character drawings, both parties seek registration of the respective word marks without stylization or design. This ability to employ any font, size, style, or color when using the mark could result in use of displays which increase or emphasize the similarities between the marks. See *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014).

Both Applicant's mark HEALING THROUGH HUNTING and Registrant's mark HEALING ON THE HUNT possess the identical and predominant term, HEALING.

The identity of this initial term in the marks, along with their shared use of HUNT[ING], not only creates strong visual and aural similarities, but also creates the situation where both marks in their entireties evoke the same therapeutic result to be obtained from their outdoor expedition or trip services. The dictionary definition submitted by the Examining Attorney defines the term HEAL as “to make well again; to restore to health.” May 17, 2018 Office Action TSDR 14. The latter respective wording in the marks, THROUGH HUNTING and ON THE HUNT, merely describe or strongly suggest that the healing will be brought upon via participation in the parties’ services offering guided outdoor trips to help heal wounded combat veterans. Thus, we disagree with Applicant’s argument that its mark suggests that “the healing will take place through hunting activities” while Registrant’s mark suggests that healing “will take place ON-THE-HUNT itself. Brief, 4 TTABVUE 10. Consumers are unlikely to perceive such a distinction, but rather grasp the overall same suggestive meaning of the marks -- that HEALING takes place as a result of hunting activity.

In addition to its contribution to the overall commercial impression of each mark through its meaning, we note that the term HEALING is placed first in both marks, generally considered to be the term which will be remembered, and thus the most prominent part of the mark. *See Palm Bay Imps.* 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438-1439 (TTAB 2012) (“In applicant’s mark, the term L’OREAL is the first component, and purchasers in general are inclined to focus on the first word or portion in a

trademark.”). The identical beginning, and a brief explanatory term that follows with the similar terms HUNTING and HUNT, results in two marks which create highly similar commercial impressions.

In conjunction with the withdrawn descriptiveness refusal the Examining Attorney submitted dictionary definitions and evidence of third party use of the terms HEALING and HUNTING in two Internet articles and two program descriptions featuring veterans described as healing from post combat conditions through the act of hunting and being outdoors. May 17, 2018 Office Action TSDR 17-19, 21. These few articles are insufficient to demonstrate that potential purchasers of either party’s services perceive the term HEALING as descriptive of guided outdoor trips to help heal wounded combat veterans. To the extent that Applicant contends that the combination of the terms HEALING with the more descriptive terms HUNT or HUNTING is so conceptually weak that any alteration serves to distinguish the marks, the evidence is too sparse to support that argument. *Compare In re Bed & Breakfast Registry*, 791 F.2d 157, 159 229 USPQ 818, 819 (Fed. Cir. 1986); *U.S. Shoe Corp. v. Chapman*, 229 USPQ 74 (TTAB 1985).

We find that, despite the differences between HUNTING and HUNT, and one mark having three words and one mark having four words, with the corresponding differences in sound and appearance, the marks HEALING THROUGH HUNTING and Registrant’s mark HEALING ON THE HUNT, viewed in their entirety, create highly similar overall commercial impressions. *See Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff’d sub nom.*

Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n, 811 F.2d 1490, USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar).

The *du Pont* factor regarding the similarity or dissimilarity of the marks weighs in favor of finding a likelihood of confusion.

II. Decision

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *du Pont* factors. When we balance the *du Pont* factors, we conclude that confusion is likely to occur between Applicant's mark and Registrant's mark.

The refusal to register Applicant's mark HEALING THROUGH HUNTING is affirmed.