Mailed:
June 29, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Apple, Inc.[1]

v.

Echospin, LLC

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Opposition No. 91171592
to Application Serial No. 76613376

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Joseph Petersen and Robert N. Potter of Kilpatrick Stockton LLP, for Apple, Inc.

Jon Lowy, *pro se*, for Echospin, LLC.

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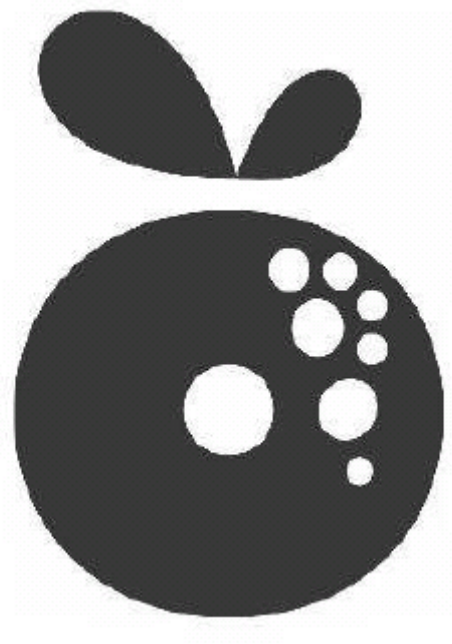
Before Bucher, Walsh, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Apple, Inc. has opposed the application of Echospin, LLC to register the mark shown below for "software for the collection, storage, processing, modification, organization, transmission, and sharing of data and information, including digital media," in International Class 9; and "computer service, namely, acting as an application service provider

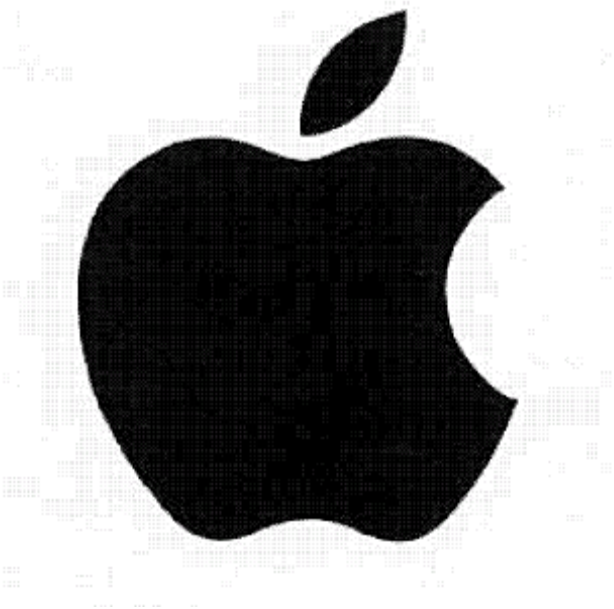
[1] When this opposition was initiated on June 28, 2006, opposer was known as Apple Computer, Inc., but changed its corporate name on January 9, 2007.

in the field of information processing to host computer application software for the collection, storage, processing, modification, organization, transmission, and sharing of data and information, including digital media," in International Class 42[2]:



Opposer has brought this opposition proceeding on the grounds of priority and likelihood of confusion as well as likelihood of dilution. As grounds for opposition, opposer has alleged that it owns registrations for the mark APPLE, in standard character format, as well as the mark as shown below, and a family of marks combined thereof, as follows:

[2] Application Serial No. 76613376, filed September 29, 2004, pursuant to Trademark Act Section 1(b); 35 USC §1052(b), asserting a *bona fide* intent to use in commerce.



1. Registration No. 1078312 (APPLE) for "computers and computer programs recorded on paper and tape," in International Class 9;[3]

2. Registration No. 1114431 (design) for "computers and computer programs recorded on paper and tape," in International Class 9;"[4]

3. Registration No. 2079765 (APPLE) for "communication filed by computer, namely, electronic transmission of data and documents via computer, delivery of

[3] Registered November 29, 1977, based on first use and first use in commerce on April 30, 1964. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.
[4] Registered March 6, 1979, based on first use and first use in commerce on January 31, 1977. Sections 8 and 15 affidavits accepted and acknowledged. Renewed twice.

messages by electronic transmission," in International Class 38;[5]

4. Registration No. 2715578 (design) for "computers hardware; computer hardware, namely, server, desktop, laptop, notebook and subnotebook computers; hand held and mobile computers; computer monitors; personal digital assistants; portable digital audio players; electronic organizers; computer keyboards, cables, modems; audio speakers; computer video control devices, namely, computer mice, a full line of computer software for business, home, education, and developer use; computer programs for personal information management; database management software; electronic mail and messaging software; database synchronization software; computer programs for accessing, browsing and searching online databases; operating system software; application development tool programs; blank computer storage media; fonts, typefaces, type designs and symbols recorded on magnetic media; computer software for use in providing multiple user access to a global computer information network for searching, retrieving, transferring, manipulating and disseminating a wide range of information; computer software for use as a programming interface; computer software for use in network server sharing; local

[5] Registered July 15, 1997, based on first use and first use in commerce on April 9, 1994. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

and wide area networking software; computer software for matching, correction, and reproduction of color; computer software for use in digital video and audio editing; computer software for use in enhancing text and graphics; computer software for use in font justification and font quality; computer software for use to navigate and search a global computer information network, as well as to organize and summarize the information retrieved; computer software for use in word processing and database management; word processing software incorporating text, spreadsheets, still and moving images, sounds and clip art; computer software for use in authoring, downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organizing audio, video, still images and other digital data; computer software for analyzing and troubleshooting other computer software; children's educational software; computer game software; computer graphics software; Web site development software; computer program which provides remote viewing, remote control, communications and software distribution within personal computer systems and across computer network; computer programs for file maintenance and data recovery; computer peripherals; instructional manuals

packaged in association with the above," in International Class 9;[6]

5. Registration No. 2753069 (design) for "Application service provider (ASP), namely, hosting computer software applications of others; computer services, namely, displaying the web sites and images of others on a computer server; computer diagnostic services; installation of computer software; updating of computer software; maintenance of computer software; computer hardware development; integration of computer systems and networks; monitoring the computer systems of others for technical purposes and providing back-up computer programs and facilities; computer consultation, design, and testing services; consulting services in the field of design, selection, implementation and use of computer hardware and software systems for others; computer data recovery; computer programming for others; research and development of computer hardware and software; website design, creation and hosting services; computer services, namely, designing and implementing web sites for others; computer services, namely, providing search engines for obtaining data on a global computer network; providing use of on-line non-downloadable software for communications via local or global

[6] Registered May 13, 2003, based on first use and first use in commerce on January 1, 1977. Sections 8 and 15 affidavits accepted and acknowledged.

communications networks, including the Internet, intranets, and extranets; computer consultation, namely, analyzing data to detect, eradicate, and prevent the occurrence of computer viruses; computer consultation, namely, services relating to the protection of computer hardware, computer software, computer networks and computer systems against computer viruses, attacks, or failures; computer consultation, namely, services for optimizing the performance and functionality of computer software and communications networks; technical support services, namely, troubleshooting of computers, computer software, telecommunications, and the Internet systems; leasing of computers, computer peripherals and computer software; leasing computer facilities. providing information in a wide variety of fields over computer networks and global communication networks; computer services, namely, creating indexes of information, web sites and other information sources available on computer networks; providing information concerning a wide range of text, electronic documents, databases, graphics and audiovisual information," in International Class 42;[7]

6. Registration No. 2808567 (APPLE) for "computer consultation, design, testing, research and advisory

[7] Registered August 19, 2003, based on first use and first use in commerce on September 30, 1980. Sections 8 and 15 affidavits accepted and acknowledged.

services; research and development of computer hardware and software; maintenance and repair of computer software applications; updating of computer software; computer programming services; providing information concerning computers and computer software over computer networks and global communication networks; computer services, namely, hosting web sites and providing web site operation and management services to others; computer services, namely, providing search engines for obtaining data on computer networks and global communication networks; leasing of computers, computer peripherals and computer software," in International Class 42.[8]

7. Registration No. 2870477 (design) for "telecommunication services, namely, electronic transmission of data and images via computer networks; electronic mail services; providing on-line electronic bulletin boards for transmission of messages among computer users in the fields of business, creative design, education, computers, information technology, word processing, database management, entertainment, electronic commerce and telecommunications; telecommunications consultation; delivery of messages by electronic transmission; electronic

[8] Registered on January 27, 2004, based on first use and first use in commerce on September 30, 1980.

transmission of data and information by computer, radio, mail, providing Internet access," in International Class 38[9]

8. Registration No. 2926853 (design) for "analysis and consultation in the field of business information management, namely, the selection, adoption and operation of computers and computer information management systems; providing information in the fields of business and commerce over computer networks and global communication networks; business services, namely, providing computer databases regarding the purchase and sale of a wide variety of products and services of others; business services, namely, dissemination of advertising for others via computer networks and global communication networks; retail store services featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; online retail store services provided via computer networks and global communication networks featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto," in International Class 35.[10]

Opposer has brought this opposition proceeding on the grounds of priority and likelihood of confusion as well as likelihood of dilution. Applicant has denied the salient

[9] Registered August 3, 2004, based on first use and first use in commerce on April 9, 1994.

allegations in the notice of opposition. Both parties filed briefs, and opposer filed a reply brief. Applicant filed a document that it referred to as "Applicant's Reply Brief," to which opposer filed a motion to strike. We note that, as applicant points out, it is represented *pro se* by one of its co-founders. However, the Board did refer applicant to Trademark Rule 2.128 several times, including in orders dated August 25, 2009 and October 6, 2009. Accordingly, we refer applicant to that rule in stating that there is no provision for the filing of a sur-reply in this proceeding.[11] Accordingly, opposer's motion to strike is granted and we have not considered applicant's filing,

The Record and Facts of the Proceeding

The record includes the pleadings; the file of the opposed registration by operation of Trademark Rule 2.122(b)(1); and the testimony, with exhibits, of the following witnesses:

1. Thomas R. La Perle, Director of Legal of Apple, Inc., dated April 23, 2009.
2. Sarah Walters, freelance graphics designer, dated February 4, 2009.
3. Jon Walter Lowy, co-founder of Echospin, dated July 23, 2009.

[10] Registered February 15, 2005, based on first use and first use in commerce on December 31, 1983 in both classes.

The record also contains six separate notices of reliance filed by opposer including:

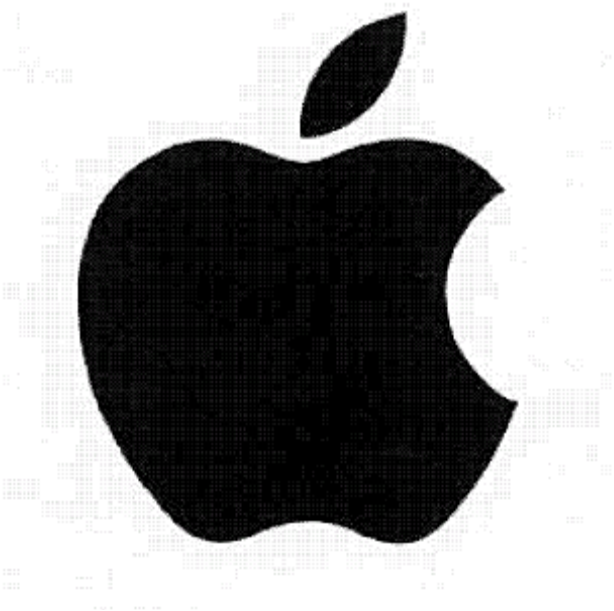
1. Portions of the discovery deposition and accompanying exhibits of Jon Lowy, co-founder of Echospin;
2. Certain discovery responses from applicant.
3. Print publications, submitted to show the fame of Apple, Inc., and its marks.
4. Certified status and title copies of the eight pleaded registrations.
5. A certified copy of Apple, Inc.'s Form 10-K for the fiscal year ended September 27, 2008, as filed with the Securities and Exchange Commission, submitted to show information about the company, as well as to show the fame of Apple, Inc. and its marks.
6. Print publications, submitted to show the fame of Apple, Inc.

Finally, we note that opposer designated a good portion of the record, including the entire La Perle deposition with all exhibits, as "Confidential." In rendering a decision in this proceeding, we will treat only testimony and evidence that is truly confidential and commercially sensitive as confidential.

Standing and Priority

[11] Applicant was also cautioned earlier in the proceeding as a

Opposer has established its standing to oppose registration of the involved application. In particular, opposer has properly made of record its pleaded registrations for APPLE and for the mark shown below:



This establishes opposer's standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). In view of opposer's ownership of valid and subsisting registrations as mentioned above, there is no issue regarding opposer's priority. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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pro se litigant to consider obtaining legal counsel.

Likelihood of Confusion

Our determination under Section 2(d) must be based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence.

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). *See also In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The relevant *du Pont* factors in the proceeding now before us are discussed below.

For our analysis of the likelihood of confusion, we have chosen to focus on the most relevant registration

pleaded by opposer, Registration No. 2715578, since it covers the most relevant mark and the most relevant goods and services. If we find a likelihood of confusion with applicant's goods and services vis-à-vis this mark, then the analysis will be moot as to opposer's other pleaded marks. Likewise, if we do not, then we would not find it for the others.

Fame

We turn first to the factor of fame because this factor plays a dominant role in cases featuring a famous or strong mark. *Kenner Parker Toys Inc. v. Rose Arts Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Famous marks are accorded more protection precisely because they are more likely to be remembered and associated in the public mind than a weaker mark. *Id.* A famous mark is one "with extensive public recognition and renown." *Id.* *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). Given the great deference that is accorded a famous mark, one asserting that its mark is famous must clearly prove it. *Id.*

To provide context for its assertion of fame, in its fifth notice of reliance, opposer submitted its Form 10K to the Securities and Exchange Commission, for the fiscal year

ended September 27, 2008.[12] The 10K report describes the company background, stating, in part: "Apple Inc. [together with its wholly-owned subsidiaries] design, manufacture, and market personal computers, portable digital music players, and mobile communication devices and sell a variety of related software, services, and peripherals and networking solutions. The Company sells its products worldwide through its online stores, its retail stores, its direct sales force, and third party wholesalers, resellers, and value-added resellers." (Oppr's 2008 SEC 10K, at 4).

Opposer contends that its mark is famous. In determining whether a mark is famous, we may consider relevant factors such as opposer's sales and revenue related thereto. *Bose Corp. v. QSC Audio Products Inc.,* 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002); *Blue Man Productions Inc. v. Tarmann,* 75 USPQ2s 1811, 1817 (TTAB 2005). Apple's 2008 10K report attests to company net sales of over $39 billion in 2008, up from over $8 billion in 2004. (Oppr's 2008 SEC 10K, at 39). It also shows net income of $4,834,000,000 in 2008, up from $266,000,000 in 2004. *Id.* Net sales for the United States was shown to be over $18 billion in 2008. *Id.* at 93. Advertising expenses were listed as "$486 million, $467 million, and $338 million

[12] The report qualifies as an official record of the Securities and Exchange Commission. *Raccioppi v. Apoggee Inc.*, 47 USPQ2d

for 2008, 2007, and 2006 respectively." *Id.* at 62. Meanwhile the report notes that "the Company's research and development expenditures totaled $1.1 billion, $782 million, and $712 million in 2008, 2007, and 2006 respectively." *Id.* at 13.

Opposer submitted dozens of news articles via its various notices of reliance, discussing the reputation and fame of its brand.[13] Excerpts include the following:

> "Apple plans cybercafé chain: Apple Computer plans to work with a restaurant operator to open cybercafés in the United States and Europe starting late next year. . . .
> The company licensed its name and famous apple logo to Mega Bytes International of London, a developer of theme parks." *The San Diego Union-Tribune*, November 13, 1996.
>
> "Think of it as Planet Macintosh. . . .
> Apple Computer Inc., always on the lookout for a marketing edge, said it is licensing its name and logo to a restaurant company that plans a chain of Apple Cafes around the world." *The Wall Street Journal,* November 13, 1996.
>
> "Apple Computer is quietly changing its stripes. The company has been slowly removing the rainbow-colored stripes from the bitten apple that has been its signature since the 1970s – a logo that has been one of the best-known icons of the personal-computer revolution. . . .
> In Apple's new advertising and products, the profile of the fruit remains, as does the bite. But the apples are polished and solid-colored, with a three-dimensional bulge." *The Wall Street Journal*, January 18, 2000.

1368, 1370 (TTAB 1998); *see also Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010).

[13] These articles are relevant and admissible to show what others are writing about opposer, and that opposer and its mark have been the subject of unsolicited publicity.

> They tattoo Apples' logo on their arm. They help sell Apple products, even though they're not paid to. One couple met at the Macworld Expo conference, got engaged, and were married there. Apple customers are a loyal bunch. *San Francisco Chronicle*, March 26, 2006.
>
> "Onlookers were bathed in the milky-white glow of the Apple logo, suspended in a freestanding cube of glass at the corner of Fifth Avenue and Central Park South in Manhattan. Dazzling in clarity and 32 feet on a side, the structure was likened variously to a temple, the Louvre Pyramid, Apple's G4 'Cube' computer, a giant button, and even – in the words of NBC's Brian Williams – Steve Job's Model T. But it was, everyone could agree, manifestly a store." *Fortune*, March 19, 2007.
>
> "What does your brand do for consumers? If you're Apple you make them more creative, and if you're Disney, you make them more honest. . . . So says research published in the April issue of the Journal of Consumer Research that found test subjects who were shown a logo for 30 milliseconds - a subliminal flash that was not actually "seen" – were much more likely to be creative or candid in the cases of Apple and the Disney Channel, respectively." *Advertising Age,* March 24, 2008.

Finally, opposer has submitted evidence of high consumer recognition based on magazine survey evidence. Business Week magazine, together with the global Interbrand survey, has ranked Apple (about mid-way) among the "100 Top Brands" in its survey every year from 2001 through 2008, the last year for which data was available in the record. In this regard, we note that opposer's witness, Mr. La Perle, testified that the Apple logo at issue in this proceeding is featured on every product sold by Apple, and is heavily promoted as the Apple mark. *See for example La Perle depo.*

at 41-46 ("As far as I'm aware, the Apple – all of our products are used with the Apple logo."); *at 84* ("I've never seen an Apple ad that does not have the Apple logo.") and *at 103* ("In Apple television advertising, there's always a dissolve at the end to the Apple logo.")

We conclude that opposer has shown significant market exposure, revenue, and overall fame amongst the relevant public. The evidence clearly establishes that both the APPLE word mark and the APPLE design logo are famous marks in connection with at least the software and computer-related services as pleaded by opposer in this proceeding.

The Goods and Services

The application identifies both "software for the collection, storage, processing, modification, organization, transmission, and sharing of data and information, including digital media," and "computer service, namely, acting as an application service provider in the field of information processing to host computer application software for the collection, storage, processing, modification, organization, transmission, and sharing of data and information, including digital media." The relevant goods and services in Registration No. 2715578 also include the similarly worded "computer programs for personal information management;" "database management software;" "computer software for use in providing multiple user access to a global computer information network for searching, retrieving, transferring,

manipulating and disseminating a wide range of information." computer software for use as a programming interface;" "computer software for use in network server sharing;" "local and wide area networking software;" and "computer software for computer software for use to navigate and search a global computer information network, as well as to organize and summarize the information retrieved."

Hence, the goods and services in the application are legally identical to those in the Registration No. 2715578,[14] and we find that this *du Pont* factor strongly favors finding a likelihood of confusion.

The Channels of Trade and Classes of Purchasers

Under the third *du Pont* factor, we consider evidence pertaining to the similarity or dissimilarity of the trade channels in which and the purchasers to whom applicant's and opposer's services are or would be marketed. Because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of goods and services, we presume that they are marketed in all normal trade channels and to all normal classes of purchasers for such goods and services, regardless of what the evidence might show to be the actual trade channels and purchasers for them to be. *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351 (Fed. Cir. 2000);

[14] By highlighting opposer's registration closest to the mark and goods of applicant, we do not mean to imply that there would not also be a likelihood of confusion with opposer's other pleaded registrations.

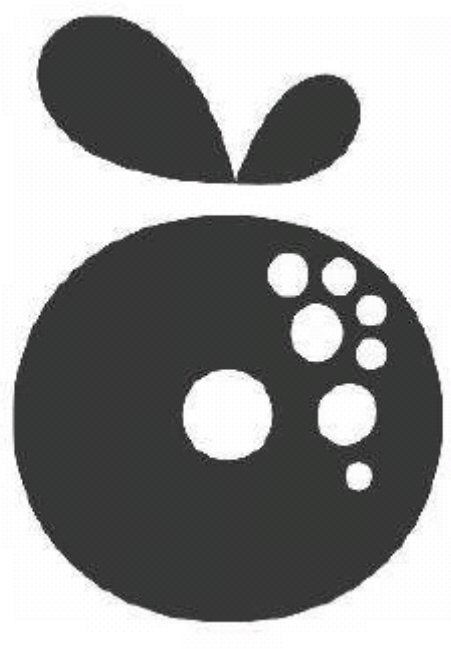
Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Moreover, because opposer's and applicant's goods and services as identified in the application and the registration are legally identical, we presume that the respective goods and services are or will be sold in the same trade channels and to the same classes of purchasers. *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752 (TTAB 2009); *Genesco Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). Accordingly, we find that this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

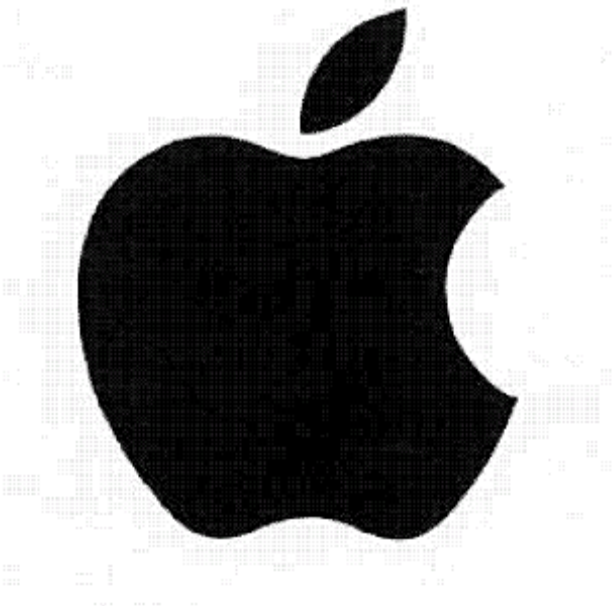
The Marks

Preliminarily, we note that the more similar the goods and services at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant's mark is as follows:



The mark in Registration No. 2715578 is as follows:



Applicant admits that its mark is meant to depict an "orange" and otherwise a "fruit." On brief, applicant

noted: "Echospin's mark is an orange, not an apple." (Appl's brief at 1). Applicant's brief further stated:

> "In fact, the evidence . . . . clearly shows that Echospin picked the orange logo to make that very distinction, that Echospin is the no-Apple, the opposite of Apple, an alternative to Apple, and an improvement over Apple." (Appl's brief at 3).[15]

We take this as an admission that applicant's mark is shaped like a fruit. Witness testimony confirms the admissions in applicant's brief. Opposer submitted the testimony of the freelance graphics designer who designed the mark at issue:

> A: They also discussed that they would like me to pursue looking at the idea of an orange logo.
>
> Q: That was conveyed to you at the first meeting you attended with them?
>
> A: Yes.
> (Sarah Williams depo. at 27).
>
> Q: At any time, was it discussed that an orange would be used as any kind of a means to differentiate them from Apple, who makes iTunes?
>
> A: I think that was an idea that they were interested in playing on; the idea of comparing apples to oranges and that oranges are different from apples.
>
> Q: That idea was conveyed to you at the first meeting as well?
>
> A: Yes.
> (*Id.* 28-29).

[15] To the extent that applicant may have been attempting to make a "fair-use" argument under the Lanham Act, that argument is misplaced in an opposition proceeding, which is concerned with the right to register a mark.

Applicant also submitted testimony from Echospin's principle and co-founder Jon Lowy:

> "Eventually, from Sarah's work, we selected our identity, which incorporates a playfully stylized orange."
> (Jon Lowy depo. at 11)
>
> "We don't think it is fair for Apple to try to prevent us from registering the mark just because it resembles a fruit"
> (*Id.* at 47)

In comparing the marks, we are mindful that the test 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 so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.,* 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975).

Accordingly, we look to the general characteristics of the designs. The marks are quite similar in concept and

style, both being simple, abstract representations of fruit, rather than photographic pictures thereof. Both also are whole representations of fruit rather than pieces thereof; and in both the application and the pleaded registration, the fruit comprises the entirety of the mark, rather than being presented with any other designs or words. Furthermore, opposer's mark contains a bite in the upper-right section of the fruit. Applicant's mark contains a series of small, white circles in the same area of its fruit, thereby creating a similar commercial impression of a missing piece of the fruit. Finally, opposer's mark is in the shape of an apple, with a short, detached leaf at the top, pointed to the right. Applicant's mark is also by admission a fruit, with two short, detached leaves at the top, one of which is quite similar in size and direction to that in opposer's mark.

In sum, although the marks in their entireties appear different, we deem them to have similar connotations and commercial impressions. We also keep in mind that opposer has established that its mark is famous and, thus, "it casts a long shadow which competitors must avoid." *Kenner Parker Toys Inc. v. Rose Arts Industries, Inc.*, 22 USPQ2d at 1456. Accordingly, we find this *du Pont* factor to also favor finding a likelihood of confusion.

Conclusion

Opposer has established that its mark is famous. Furthermore, we find that the goods and services are legally identical, and the marks are similar. Accordingly, we find a likelihood of confusion between applicant's mark for the goods and services identified in the application and the goods and services identified in the pleaded registrations, namely Registration No. 2715578, as discussed herein.[16]

Decision: The opposition is sustained on the ground of likelihood of confusion, and registration to applicant is refused.

[16] Since we find a likelihood of confusion, we need not consider opposer's claim of dilution.