

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: June 18, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

GS Enterprises LLC
v.
Juice Generation, Inc.

Opposition No. 91206450

L. Jeremy Craft of Craft Chu for GS Enterprises LLC.

Joseph V. Myers III of Seyfarth Shaw for Juice Generation, Inc.

Before Quinn, Taylor and Hightower, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Juice Generation, Inc. ("Applicant") filed, on February 22, 2012, an intent-to-use application under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), to register on the Principal Register the mark shown below



Opposition No. 91206450

("JUICE" disclaimed) for "juice bar services" in International Class 43.¹

GS Enterprises LLC ("Opposer") opposed the application under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with Applicant's services, so resembles Opposer's previously used and registered PEACE & LOVE marks for "restaurant services" in International Class 43 as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; testimony, with related exhibits, taken by Applicant; status and title copies of Opposer's pleaded registrations, and copies of third-party registrations introduced by Opposer's notices of reliance; Opposer's responses to certain of Applicant's discovery requests, excerpts of third-party websites, and third-party registrations, all made of record by way of Applicant's notices of reliance. Opposer and Applicant filed briefs on the case.

¹ Application Serial No. 85549820. The application includes the following statements: "The mark consists of the word 'Peace' in stylized letters outlined in light blue and filled with dark blue above the word 'Love' in stylized letters with floral design on the sides and under the 'L,' the floral design is a dark red, with light red dots on the edges of the petals; the word 'Love' is outlined in dark red and filled in with light red; below 'Love' is a banner outlined in light blue with the word 'AND' in all caps in light blue inside the banner, below the banner is the word 'JUICE' in all capital letters, with a wave design inside the letters, the top half of the wave design in the word 'JUICE' is light green and the bottom is dark green. The color(s) Dark Blue, Light Blue, Dark Red, Light Red, Light Green, Dark Green is/are claimed as a feature of the mark."

Opposition No. 91206450

Opposer pleaded ownership of four registrations. The record shows that Opposer owns these valid and subsisting registrations, all for “restaurant services” in International Class 43, as follows:

Reg. No.	Mark	Issued
3291917		Sept. 11, 2007 ²
3291918	ALL YOU NEED IS PEACE & LOVE (standard characters)	Sept. 11, 2007 ³
3713785	PEACE & LOVE (standard characters)	Nov. 24, 2009
3885867		Dec. 7, 2010 ⁴

² Combined Sections 8 and 15 affidavit accepted and acknowledged. The registration includes the following statements: “The mark consists of a red peace sign with an orange colored heart located in the upper right section with the letters ‘P & L’ in the color white located inside of the heart and the letters ‘PEACE & LOVE’ in the color red to the right side of the red peace sign. In addition, the color white appears inside the peace sign and around an outline of the heart. The color black appears in the outline of the peace sign. The colors red, white, black and orange are claimed as a feature of the mark.”

³ Combined Sections 8 and 15 affidavit accepted and acknowledged.

⁴ The word “NEW YORK” is disclaimed. The registration includes the following statements: “The mark consists of a stylized peace symbol design in red and containing a heart design outlined in red and containing the symbols ‘P & L’ in red stylized font located in the upper right portion of the peace symbol design, said design is located directly above the terms ‘PEACE & LOVE’ in red stylized font, with a banner design outlined in red located underneath the terms ‘PEACE & LOVE’ which contains the terms ‘NEW YORK’ in red stylized font. The color white is intended to indicate background, outlining, shading or transparent areas and are not part of the mark. The color(s) red is/are claimed as a feature of the mark.”

Opposition No. 91206450

Opposer has established its standing to oppose registration of the involved application by properly making of record its pleaded registrations of its PEACE & LOVE marks. Thus, Opposer has shown that it is not a mere intermeddler. 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); *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 of its PEACE & LOVE marks, Opposer's priority is not at issue with respect to the "restaurant services" identified in those registrations. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/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 in the proceeding now before us, are discussed below.

We focus our likelihood of confusion analysis on Opposer's Registration No. 3713785 for the mark PEACE & LOVE in standard characters because when that mark is considered vis-à-vis the applied-for mark and identified services, it is that mark that is most likely to support a finding of likelihood of confusion. That is, if

Opposition No. 91206450

confusion is likely between those marks, there is no need for us to consider the likelihood of confusion with Opposer's other marks, and if there is no likelihood of confusion between Applicant's mark and Opposer's mark PEACE & LOVE, then there would be no likelihood of confusion with Opposer's other pleaded marks. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We first consider the second *du Pont* factor regarding the similarity/dissimilarity between the services. It is well settled that the services of the parties need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective services of Opposer and Applicant are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue here, of course, is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant, in its brief, concedes that the services are "related" (Brief, p. 10), and "does not dispute that its services are related to Opposer's services (both sell

Opposition No. 91206450

juices and food)” (Brief, p. 20). It is settled that in making our determination regarding the relatedness of the services, we must look to the services as identified in the application and Opposer’s registration. *See Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant’s services are identified as “juice bar services”; Opposer’s services are identified as “restaurant services.” Opposer’s services are broadly identified and are construed to encompass restaurant services of all types, including juice bars. Thus, for purposes of our likelihood of confusion analysis, the services are considered to be legally identical. However, even if “juice bar services” were found not to be encompassed by “restaurant services,” we still find that such services are closely related. Opposer submitted numerous use-based third-party registrations which individually cover both restaurant services and juice bar services under the same mark. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Opposition No. 91206450

Because the services are legally identical, or otherwise are very closely related, we presume that the channels of trade for those services are identical or otherwise related, and that there is an overlap in purchasers. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”). *See also American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.”).

As to the conditions under which and buyers to whom sales are made, neither recitation of service includes any limitations, such as price points. We must assume, therefore, that the restaurant and juice bar services would be rendered at all prices, including at a relatively inexpensive price point. Accordingly, the class of purchasers comprises the general public, which includes ordinary consumers who would not exercise a high degree of care when purchasing these services. Further, under such circumstances, the purchasers may be subject to impulse purchase. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of

Opposition No. 91206450

likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”).

The *du Pont* factors relating to the services, namely the similarity between the services, trade channels and purchasers, weigh heavily in Opposer’s favor.

We next turn to the first *du Pont* factor focusing on the similarity between the marks. We must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1960 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but 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 parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Moreover, in comparing the marks, we are mindful that where, as here, Applicant’s services are legally identical to Opposer’s services, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises*

Opposition No. 91206450

Inc. v. Rind, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

We now turn to consider the similarity or dissimilarity between Applicant's mark PEACE LOVE AND JUICE and design and Opposer's mark PEACE & LOVE. It is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.").

Where both words and a design comprise the mark (as in Applicant's mark), then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the services. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012), citing *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430-31 (TTAB 2013); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). See also *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). In Applicant's mark, the literal

Opposition No. 91206450

portion, PEACE LOVE AND JUICE, is the dominant portion and must be accorded greater weight over the design features when comparing this mark to Opposer's mark; these words would be used by consumers when referring to Applicant's services. Further, with respect to the literal portion of Applicant's mark, we give less weight to the generic word "JUICE" (informing consumers of the principal product served in Applicant's establishment) that has been properly disclaimed. *In re Chatam Int'l. Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). Accordingly, we view the words "PEACE LOVE" as the dominant portion of Applicant's mark.

The dominant portion of Applicant's mark, PEACE LOVE, and the entirety of Opposer's mark PEACE & LOVE are virtually identical in appearance and sound, differing only in the presence of the non-distinctive ampersand in Opposer's mark (which would be pronounced as "and"). The marks also convey the same meaning, that is, a message of peace and love, perhaps suggesting the "hippie culture." (Helms dep., p. 37).

We recognize that in comparing the marks, we must consider Applicant's mark in its entirety, not merely the dominant portion. Thus, we have taken into account the presence of the word JUICE and design features (including colors) in Applicant's mark. We find that the additional disclaimed word "JUICE" and non-distinctive design features do not serve to sufficiently distinguish Applicant's mark from Opposer's standard character mark PEACE & LOVE. Because Opposer's mark is presented in standard characters, Opposer is not limited to any particular

Opposition No. 91206450

depiction of its mark. Thus, Opposer is entitled to all depictions of its standard character mark regardless of the font style, size, or color; Opposer's mark could at any time in the future be displayed in a manner similar to Applicant's mark, that is, the words displayed vertically, and in the same style and colors. *See In re Vitterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011).

In sum, given the similarities between the marks in sound, appearance and meaning, the marks engender similar overall commercial impressions. The similarity between the marks PEACE & LOVE and PEACE LOVE AND JUICE and design is a factor that also weighs in Opposer's favor.

Applicant's principal argument centers on the sixth *du Pont* factor, namely the nature and number of similar marks in use for similar services. According to Applicant, Opposer is "one of over hundred [sic] entities using the ubiquitous words 'peace' and 'love' in connection with restaurant-related services" (Brief, p. 1), and "Opposer from the beginning plainly understood that its marks coexist in a crowded field of other marks having the words 'peace' and 'love' and that no single applicant or entity had exclusive rights to the words 'peace' and 'love' in connection with restaurant services." (Brief, p. 2).

The record includes the testimony of Eric Helms, Applicant's founder and CEO. Mr. Helms testified that the food industry is "saturated" with use of the phrase "peace and love." (Helms dep., p. 8). Accompanying Mr. Helms' testimony is

Opposition No. 91206450

a Thomson Compumark search report which, according to Mr. Helms, identifies “hundreds” of third-party uses of the phrase “peace and love.” (Helms dep., p, 35; Ex. A).⁵ Mr. Helms specifically identified eight third-party uses of which he is personally familiar for restaurant services and/or food products. The uses are as follows: “Peace Love and Pizza”; “Peace Love and Popcorn”; “Peace Love and Yogurt”; “Peace Love and Ice Cream”; “Peace Love and Little Donuts”; “Peace Love and Noodles”; “Peace, Love, Doner [kabob]”; and “Peace, Love and Beer.” (Exs. B-I). Mr. Helms states that each phrase is currently in use based on his check of each user’s website, as well as the user’s activity on social media. The record includes excerpts from the websites. Other third-party uses include use of the phrase “Peace Love” or “Peace and Love” in connection with oats, French fries, cupcakes, burritos, and chocolate (as in “Peace Love & Chocolate”).

We have considered this evidence showing third-party uses of various PEACE AND LOVE marks in the restaurant field, but it has limited probative value. The weight is limited given the absence of any corroborating facts bearing on the extent of these uses. That is to say, there are no specifics regarding the extent of sales or promotional efforts surrounding the third-party marks and, thus, what impact, if any, these uses have made in the minds of the purchasing public. Accordingly, we are unable to find that customers have become conditioned to recognize that other entities use PEACE AND LOVE marks for similar services. *See Anthony’s Pizza & Pasta Int’l, Inc. v. Anthonys Pizza Holding Co.*, 95 USPQ2d 1271, 1276-78 (TTAB

⁵ The search report actually lists 53 designations (17 of which are shown as “cancelled” or “abandoned”) that include both the words “peace” and “love.” The remaining 61 listings include only one of the words.

Opposition No. 91206450

2009), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1112 (TTAB 2007); *Carl Karcher Enterprises Inc. v. Stars Restaurant Corp.*, 35 USPQ2d 1125, 1130-31 (TTAB 1995).

We likewise have considered Applicant's evidence of twelve third-party registrations, but it also is of limited probative value to support Applicant's position because "[t]he existence of [third-party] registrations is not evidence of what happens in the market place or that consumers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive." *AMF, Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Max Capital Group Ltd.*, 93 USPQ2d at 1248.

In sum, the sixth *du Pont* factor is neutral or, at best, slightly favors applicant's position.

Applicant also relies upon Opposer's statements while prosecuting its underlying applications, now matured into the pleaded registrations. Applicant essentially contends that Opposer made arguments based on the differences between its mark and prior, cited third-party registered marks, as well as the lack of distinctiveness of the words "peace" and "love." Although we may consider these comments as facts "illuminative of shade and tone in the total picture confronting the decision maker," they cannot substitute for reaching our own conclusion based on the evidentiary record. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978); *see also Anthony's Pizza & Pasta Int'l*,

Opposition No. 91206450

Inc. v. Anthonys Pizza Holding Co., 95 USPQ2d at 1281. A prior, contrary statement of opinion, made on a legal issue in an unrelated matter, does not result in any sort of estoppel in the present proceeding. The statements are not treated as admissions that the parties' marks herein are not similar; they certainly do not show that Opposer in any way has waived objecting to the registration now sought by Applicant. Also, what Opposer argued to the USPTO to overcome a Section 2(d) refusal to register is of little value because the issue before us is the likelihood of confusion between Opposer's mark and Applicant's mark, not any third-party's mark. See *Stock Pot Restaurant, Inc. v. Stockpot, Inc.*, 737 F.2d 1576, 222 USPQ 665, 669 (Fed. Cir. 1984), quoting *Krug Vins Fins de Champagne v. Rutman Wine Co.*, 197 USPQ 572, 574-75 (TTAB 1977) ("The conflict here is between petitioner [appellee] and respondent [appellant] and not between petitioner and the world."). Simply put, Opposer is entitled to prevail in this proceeding if it can show that the marks now involved are likely to be confused.

Applicant also argues that the absence of any evidence of actual confusion weighs in its favor. Although the involved application is based on an intention to use the mark in commerce, Mr. Helms testified that Applicant's mark has been in use for four years. The absence of evidence of actual confusion is not dispositive in this case. The record is devoid of evidence to establish that the parties' use of their respective marks has been at such a level that there have been meaningful opportunities for actual confusion to have occurred among purchasers. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1202 (TTAB 2007). Thus, we are unable to

Opposition No. 91206450

effectively gauge this factor. A showing of actual confusion would of course be highly probative, if not conclusive, 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). Furthermore, proof of actual confusion is not necessary to establish likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983).

Accordingly, the eighth *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is neutral.

Applicant further argues that Opposer's "activities have been limited," that "Opposer has provided no evidence in the record that it still uses the mark," and that "Opposer had one restaurant location and that one location appears to now closed [sic]." (Brief, p. 9). Applicant adds that it determined that the restaurant was closed after the discovery period, and that "Applicant's counsel reminded Opposer of its duty to supplement it [sic] discovery requests, and Opposer did not respond to Applicant's request." *Id.*

As Applicant has not filed a counterclaim to cancel any of Opposer's registrations, any attempt to attack the validity of Opposer's registrations, such as asserting nonuse and possible abandonment of Opposer's registered marks, or mere descriptiveness, constitutes an impermissible collateral attack on the validity of the registrations and has not been considered. *See In re Dixie Restaurants Inc.*, 105 F.3d

Opposition No. 91206450

1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1549 n.6 (TTAB 2012). *See also* Trademark Rule 2.106(b)(2)(ii), and TBMP § 313 (3d ed. rev.2 2013).

We have carefully considered all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion. We find that the *du Pont* factors, on balance, weigh in favor of a finding of likelihood of confusion. The similarities between the marks and the services sold thereunder, and the presumed overlap in trade channels, purchasers and conditions of sale, cumulatively outweigh the other factors in play.

We conclude that consumers familiar with Opposer's "restaurant services" rendered under the mark PEACE & LOVE would be likely to mistakenly believe, upon encountering Applicant's mark PEACE LOVE AND JUICE and design for "juice bar services," that the services originated from or are associated with or sponsored by the same entity.

Decision: The opposition is sustained, and registration to applicant is refused.