

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Mailed: January 3, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Snelling and Snelling, Inc.

Serial No. 76431612

Stanley B. Kita of Howson and Howson for applicant.

Verna Beth Ririe, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hairston, Chapman, and Bucher, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Snelling and Snelling, Inc. filed on July 17, 2002, an
application to register on the Principal Register the mark
shown below



for services which were ultimately identified as "payroll
preparation and preparing payroll related business reports
for others." The application was originally based on
applicant's assertion of a bona fide intention to use the

mark in commerce. Applicant filed an amendment to allege use, which was accepted by the USPTO, with claimed dates of first use and first use in commerce of May 10, 2002 and September 30, 2002, respectively.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the previously registered mark shown below



("paychecks" disclaimed) for "payroll services, namely, providing clients with payroll returns such as Form 941 and 940, Form W-2 and other state forms."¹

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.

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. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

¹ Registration No. 2289797, issued November 2, 1999.

(Fed. Cir. 2003). 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). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of applicant's services and the cited registrant's services. It is well settled that goods and/or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and/or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods and/or services. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Of course, it has been repeatedly held that in determining the registrability of a mark, this Board is

constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration(s). See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, applicant identified its services as "payroll preparation and preparing payroll related business reports for others." The cited registrant's services are identified as "payroll services, namely, providing clients with payroll returns such as Form 941 and 940, Form W-2 and other state forms."

It is clear that, as identified, applicant's service of preparing payroll related business reports for others is included within the scope of registrant's services of providing payroll returns (such as Form 940 and 941) and other state forms. These are closely related, if not legally identical, services. Indeed, applicant does not argue that the services differ, or that they are unrelated within the meaning of the Trademark Act.

Likewise, we do not find any differences in the channels of trade or purchasers for these services. We must presume, given the identifications (neither of which

is limited), that the services are offered through the same channels of trade, and are purchased by the same classes of purchasers. See *Canadian Imperial Bank v. Wells Fargo Bank*, supra.

Turning to the marks, our primary reviewing Court has stated the following: "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant argues that in view of registrant's disclaimer of the word "paychecks," the Examining Attorney ascribes too much weight to the suggestive word "plus" as determined by the TTAB in the case of *Plus Products v. Medical Modalities Associates, Inc.*, 211 USPQ 1199 (TTAB 1981), and she ascribes too little weight to the differences in the designs in each mark when properly considered as set forth by the Court in the case of *In re Electrolyte Laboratories Inc.*, 913 F.2d 930, 16 USPQ2d 1239 (Fed. Cir. 1990); and that the cited registration issued over a previous registration (No. 1922387 for the mark CHECK\$ and design for "payroll preparation," cancelled under Section 8 of the Trademark Act in 2002), and if those

registrations could co-exist, then applicant's and the cited registrant's marks should be able to co-exist without a likelihood of confusion.

It is well settled that marks must be considered in their entireties because the commercial impression of a mark on an ordinary consumer is created by the mark as a whole, not by its component parts. This principle is based on the common sense observation that the overall impression is created by the purchaser's cursory reaction to a mark in the marketplace, not from a meticulous comparison of it to others to assess possible legal differences or similarities. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §23:41 (4th ed. 2001). See also, *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980). The proper test in determining likelihood of confusion does not involve a side-by-side comparison of the marks, but rather must be based on the similarity of the general overall commercial impressions engendered by the involved marks.

In this case, applicant's mark is CHECKSPLUS and design and registrant's mark is PAYCHECK\$ PLUS and design. The design feature in applicant's mark is simply a check mark starting inside a square and continuing until its ends outside of the square, while registrant's mark includes a

dollar sign as the first letter "S," and the words "PAYCHECKS PLUS" are on two separate lines and they appear within a simple rectangular outline. The marks are highly similar in sound, and it is the words or literal portions of the marks (CHECKSPLUS and PAYCHECKS PLUS) that would be utilized in calling for the respective services.

In connotation, both marks suggest that there is something better or additional in their respective services relating to payroll preparation. Also, the Examining Attorney made of record an on-line dictionary definition of the word "paycheck" as "1. A check issued to an employee in payment of salary or wages." Clearly, the term "paycheck" is a particular type of "check."

The marks are similar in appearance, particularly keeping in mind, as stated previously, that the proper test in determining likelihood of confusion is not on a side-by-side comparison of the marks. Rather, the determination must be based on the recollection of the purchasers, who normally retain a general rather than specific impression of the many trademarks encountered; that is, a purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison, Inc.*, 23 USPQ2d 1735

(TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992). The minor differences identified above are not sufficient to obviate a likelihood of confusion between these marks. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

When considered in their entirety, we find that applicant's mark and registrant's mark are similar in overall commercial impression such that, when used on the closely related, if not legally identical, services involved herein, confusion as to source is likely. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Applicant's reliance on the cases of *Plus Products v. Medical Modalities*, supra, and *In re Electrolyte Industries*, supra, is not persuasive of a different result herein, as those cases are readily distinguished from the facts before us in this case.

Applicant's argument about the previous co-existence (for a short time) of one third-party registration with the cited registration is unpersuasive. While the USPTO strives for consistency of examination, as often noted by the Court and the Board, each case must be decided on its own merits. We are not privy to the records of the third-party

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registration file, and moreover, the determination of registrability of that particular mark by a Trademark Examining Attorney cannot control the merits in the case now before us. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). See also, *In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); and *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.