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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Matrix Operations Company, LLC

Serial No. 78533102

Jennifer L. Cerce of Maiello Brungo & Maiello, LLP for
Matrix Operations Company, LLC.

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(K. Margaret Le, Managing Attorney).

Before Hohein, Bucher and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Matrix Operations Company, LLC filed a use based application, on December 15, 2004, to register the mark shown below for "computer software for use by the media industry encompassing television, cable, print, online and radio media sources for the development, execution and monitoring of successful sales strategies which permit the user to download historical and prospective sales data directly from traffic systems thereby providing up-to-date sales information," as amended (Serial No. 78533102).

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Applicant disclaimed the exclusive right to use the word "plus."

Matrix  Plus

Registration was refused because applicant's mark, as applied to the applicant's computer software, so resembles the mark MATRIX (typed drawing format) for "computer program and software, all of which is used in the marketing/marketing research environment to facilitate understanding, analysis and implementation of sales and marketing data,"¹ as to be likely to cause confusion pursuant to Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d).

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 the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the

¹ Registration No. 1725130, issued October 20, 1992; Sections 8 and 15 affidavits accepted and acknowledged; renewed.

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similarities between the marks and the similarities between the goods. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

A. The similarity or dissimilarity and nature of the goods.

It is well settled that likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 UPSQ2d 1001, 1004 (Fed. Cir. 2002); *In re Elbaum*, 211 UPSQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 UPSQ 47, 48 (TTAB 1976).

Applicant's products are identified as follows:

Computer software for use by the media industry encompassing television, cable, print, online and radio media sources for the development, execution and monitoring of successful sales strategies which permit the user to download historical and prospective sales data directly from traffic systems thereby providing up-to-date sales information.

Registrant's products are identified as follows:

Computer program and software, all of which is used in the marketing/marketing research environment to facilitate understanding, analysis and

implementation of sales and marketing data.

Applicant's software is identified as an application program used in connection with analyzing sales information, albeit restricted to the media industry. Registrant's software is also identified as an application program used in connection with analyzing sales (and marketing) information. Based on the descriptions of their goods, the software of the applicant and that of registrant are similar because both are used in connection with analyzing sales information.

Despite the apparent similarity of the software, applicant argues that the products "are not identical or directly competitive and do not overlap or move in common trade channels."² Relying on excerpts from registrant's website made of record during the prosecution of the application at issue, applicant contends that registrant's software is specifically used for analyzing consumer attitudes and behavior in connection with marketing products. On the other hand, applicant asserts that its software, as evidenced by applicant's website made of record during the prosecution of the application at issue,

² Applicant's Brief, p. 9.

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is used in connection with account management, not marketing:

Applicant's services allows media outlets to track and organize the amount of television ad time for a customer; the number of ads placed in a magazine; billing ramifications, grouping of advertisers. Applicant's services are not related to promoting products.³

Although applicant points to registrant's website for the proposition that registrant's software is specifically used for analyzing consumer attitudes and behavior in connection with marketing products, we cannot resort to such extrinsic evidence in order to restrict registrant's goods. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Furthermore, registrant's website evidences that registrant's MATRIX software is also used to develop marketing strategies for growth and profitability. Although applicant contends that its software is an account management tool, its website likewise evidences that

³ Applicant's Brief, p. 9.

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applicant's software is used for developing sales strategies, clearly a marketing function.

The description of goods in the application and registration demonstrate that the products at issue are commercially related. The websites of the applicant and registrant provide support for the examining attorney's position that these goods are related.

B. The similarity or dissimilarity of likely-to-continue trade channels and the buyers to whom sales are made.

While applicant has restricted its description of goods to the media industry, there is no restriction or limitation in the registrant's description of goods. Absent such restriction or limitation, we must assume that registrant's software travels in "the normal and usual channels of trade and methods of distribution." *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). See also *Venture Out Properties LLC v. Wynn Resorts holding LLC*, 81 USPQ2d 1887, 1894 (TTAB 2007); *In re Elbaum, supra*. Accordingly, we must presume that registrant's software may move in all normal channels of trade and be available to all classes of potential consumers, including the media industry.

Applicant also argues that the customer base for both the applicant and the registrant comprise careful and

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sophisticated purchasers. However, applicant does not explain how careful and sophisticated purchasers minimize likelihood of confusion when the marks are similar and they are used on commercially related products in the same general field. Applicant does not provide any evidence regarding the decision process used by these careful and sophisticated consumers when software products are licensed, what role trademarks play in that process, if any, how they react to trademarks, or how observant and discriminating they are in practice. Without such evidence, it is well settled that even successful executives who are sophisticated about the structure, business methods and technology of their industries are not necessarily observant or knowledgeable about other people's trademarks to the extent necessary to distinguish between similar trademarks. *Medtronic, Inc. v. Medical Devices, Inc.*, 204 USPQ 317, 326 (TTAB 1979); *Refreshment Machinery Incorporated v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977); *Educational Development Corporation v. Dimensions Corporation* 183 USPQ 492, 496 (TTAB 1974).

In view of the foregoing, we find that the same consumers would license both applicant's and registrant's software and that they would be licensed in the same channels of trade.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). 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 that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004).

In this case, we find that the marks are similar in appearance. While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corp.*, 753 F.2d 1056, 24 USPQ2d 749, 751 (Fed. Cir. 1983). Here, the word "Matrix" is the dominant portion of applicant's mark because the word "Plus" is a descriptive

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term meaning "added to; along with," "positive or on the positive side of the scale," "added or extra," or "a favorable condition or factor."⁴ When used as part of a trademark, "plus" is a laudatory word connoting a higher quality product or indicating that the product adds an additional value or quality. This has been recognized in numerous likelihood of confusion cases. *Plus Products v. Natural Organics, Inc.*, 204 USPQ 773 (TTAB 1979); *Plus Products v. Redken Laboratories*, 199 UPSQ 111 (TTAB 1978); *Plus Products v. Sterling Food Company, Inc.*, 188 USPQ 586 (TTAB 1975); *Plus Products v. General Mills, Inc.*, 188 USPQ 520 (TTAB 1975).

Applicant acknowledges the descriptive nature of the word "plus" by disclaiming the exclusive right to use it. Case law recognizes that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), *quoting, In re National Data Corp.*, 24 USPQ2d at 752 ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight

⁴ The American Heritage Dictionary of the English Language (4th ed. 2006). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed Cir. 1983).

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in reaching a conclusion on the likelihood of confusion"). See also *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). In this case, the descriptive word "plus" is unlikely to be used to distinguish the marks.

The significance of the word "matrix" is further reinforced by its location as the first word in applicant's mark. Because it is the first word consumers will see when encountering applicant's mark (and software), it is more likely to have a greater impact on purchasers and be remembered by them. *Presto Products Inc. v. Nice-Pak Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed on the mind of a purchaser and remembered). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin, supra* at 1692 ("Veuve" is the most prominent part of the mark VUEVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Finally, we find that the design element of applicant's mark is not so distinctive as to form a viable basis for distinguishing the marks. Because the design element is not so distinctive, the dominant portion of applicant's mark is the literal portion of the mark. It is the words "Matrix Plus," not the design, which consumers will recognize and use to refer to applicant's software. *See In re Appetito Provisions Co.*, 3 UPSQ2d 1553, 1554 (TTAB 1987). As discussed above, because the word "matrix" is the dominant feature of applicant's mark, it is accorded more weight in our comparison of the marks.

In comparing the registered mark and applicant's mark, we note that applicant's mark contains the entire literal portion of the registered mark. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner). In its application, applicant's additions of the descriptive word "plus" and the design element do not suffice to distinguish applicant's mark from the registered mark. *In re Xerox Corp.*, 194 USPQ 449 (TTAB 1977) ("6500" and "6500 LINE" are basically the same because the addition of the descriptive word "line" does not distinguish the

marks). See also, *The Wella Corp, v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (the inclusion of a suggestive or descriptive word to an otherwise arbitrary term will not preclude a finding of likelihood of confusion).

We also find that the marks are aurally similar because applicant's mark is dominated by the word "matrix," which is the first word in the marks.

The word "matrix" means "something within or from which something else originates, develops, or takes form."⁵ Accordingly, applicant contends that "the connotation and commercial impression arrived at by Applicant's mark is that the goods identified by the mark provide an additional layer of elements to an already existing framework which enhances the overall system."⁶ However, applicant's proposed connotation and commercial impression applies equally to the registered mark. In fact, consumers familiar with the registrant's MATRIX software may believe, upon encountering applicant's MATRIX PLUS software, that because of the similarity of the marks that applicant's

⁵ Merriam-Webster Online Dictionary (www.m-w.com), attached to applicant's January 23, 2006 Response.

⁶ Applicant's Brief, pp. 5-6. While applicant set forth the meaning and commercial impression for its mark, it did not propose an alternative meaning and/or commercial impression for the registrant's mark in order to distinguish the two marks.

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software is an updated version of registrant's MATRIX software.

Based on our review of the marks, we find that applicant's **Matrix****Plus** mark and registrant's mark MATRIX are more similar than dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression.

D. The number and nature of similar marks in use on similar goods.

Finally, applicant argues that MATRIX is a weak mark entitled to only a narrow scope of protection.⁷ In support of this argument, applicant has submitted the following five registrations:

Mark	Reg. No.	Goods
MATRIX	3039818	Computer hardware including parts associated with housing the processor, motherboard/main board and associated processing hardware
MATRIX MANAGER	3016307	Computer programs to negotiate and manage employee tasks, projects, and performance appraisals for small, medium, and large corporations
TARASOFT MATRIX	2869688	Computer software, namely custom application and web browser based software for use in updating and accessing real estate listing information

⁷ Applicant's Brief, p. 4.

Mark	Reg. No.	Goods
MATRIX EXPLORER	291814	Computer software used in conjunction with other database software programs to allow a user to gain simultaneous access to multiple databases, database objects and data while maintaining concurrent connections; compute software in the nature of graphic user interface for database access, database management, database administration, data manipulation and for testing and debugging procedures
SCT MATRIX	2826040	Computer software for use in the field of education to manage financial, academic and administrative records

We note that the factor to be considered in connection with third-party use is the "number and nature of similar marks in use on similar goods." (Emphasis added). *In re E. I. du Pont de Nemours & Co., supra.* In this regard, the third-party registrations submitted by applicant are not evidence of use of the marks shown therein or that the public is aware of them. *See AMF Inc. v. American Leisure Products, Inc.,* 474 F.2d 1403, 177 UPSQ 268, 269 (CCPA 1973); *Charette Corp. v. Bowater Communication Papers Inc.,* 13 UPSQ2d 2040, 2043 (TTAB 1989). As far as this record is concerned, there is no evidence of third-party use of any "MATRIX" trademarks. Moreover, third-party registrations, without more, cannot aid an applicant in registering another confusingly similar mark. *AMF Inc. v. American*

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Leisure Products, Inc., supra; Medtronic, Inc. v. Medical Devices, Inc., supra at 327.

In the absence of any evidence that any of the third-party marks is in commercial use, the third-party registrations show only that the word "matrix" and variations thereof have been adopted by five other entities for use as, or inclusion in, trademarks for various computer hardware and software products (none of which is for application programs for analyzing sales and marketing data), presumably to exploit a favorable or attractive connotation of the word. In other words, the third-party registrations may be used like a dictionary to show the meaning of the word "matrix" and that the inclusion of that word as a common feature of the marks does not support a holding of likelihood of confusion. *Medtronic, Inc. v. Medical Devices, Inc., supra* at 327; *Chicken Delight, Inc. v. Delight Wholesale Co.*, 196 USPQ 136, 139 (TTAB 1977). However, it is not clear from the third-party registrations, the application, or the cited registration what the meaning of "matrix" is or what commercial impression is being sought. Based on the third-party registrations, we can infer only that the Trademark Office will register "MATRIX" marks to different entities so long as there is some difference between the marks and/or the

goods. However, five third-party registrations do not persuade us that registrant's MATRIX mark is a weak mark entitled to only a narrow scope of protection or exclusivity of use. In any event, even if the registered mark is a weak mark, it is still entitled to protection against the registration of the same or similar mark for closely related goods or services. See *Matsushita Electric Co. v. National Steel Co.*, 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971) ("Even though a mark may be 'weak' in the sense of being a common word in common use as a trademark, it is entitled to be protected sufficiently to prevent confusion from source from arising"); *King-Kup Candies, Inc. v. King Candy Co.*, 288 F.2d 944, 129 USPQ 272, 272 (CCPA 1961) (although opposer's mark is as weak as can be found, it is still entitled to protection).

E. Balancing the factors.

The *du Pont* factors require to us to consider the thirteen factors made of record in likelihood of confusion cases. The CCPA has also observed that "[t]he fundamental inquiry mandated by §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.*, *supra* 192 USPQ at 29. When we

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compare the marks MATRIX and **Matrix**, the similarity of the goods identified by each mark, and the identity of trade channels, we conclude that there is a likelihood of confusion.

Decision: The refusal to register applicant's mark under Section 2(d) is affirmed.