

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Hearing:
July 23, 2008

Mailed:
October 10, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Catapult Integrated Services Inc.

Serial No. 78736592

Norman H. Zivin and Tonia A. Sayour of Cooper & Dunham LLP
for Catapult Integrated Services Inc.

Angela Micheli, Trademark Examining Attorney, Law Office
101 (Ronald R. Sussman, Managing Attorney).

Before Seeherman, Walters and Taylor, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Catapult Integrated Services Inc. has appealed from
the final refusal of the Trademark Examining Attorney to
register CATAPULT and design, as shown below, for
"advertising, marketing and promotion services, namely,
brand strategy services, national consumer promotion
services, customer marketing services, retail marketing

services, and integrated communication services.”¹ The application includes, as a description of the mark: “The mark consists of a stylized letter A, second occurrence.”



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark CATAPULT DIRECT MARKETING, with DIRECT MARKETING disclaimed, previously registered for the services set forth below,² that when used in connection with applicant's identified services it is likely to cause confusion or mistake or to deceive.

¹ Application Serial No. 78736592, filed October 19, 2007, asserting first use and first use in commerce as of September 28, 2005.

² Registration No. 2552359, issued March 26, 2002; Section 8 affidavit accepted; Section 15 affidavit received.

The Examining Attorney originally refused registration on the basis of Registration No. 2443912 as well. This registration, owned by a third party, is for DIGITAL CATAPULT for, inter alia, "dissemination of advertising for others via a global communications network," and was cancelled on January 19, 2008 for failure to file a Section 8 affidavit of use. The Examining Attorney withdrew the refusal based on that registration in her appeal brief. Further, as a point of clarification, we note that in the first Office action the Examining Attorney listed three registrations as the basis for refusing registration, i.e., Nos. 2552359 and 2443912, referred to above, and No. 2840737. However, the Examining Attorney neither discussed the latter registration in any Office action, nor did she include a copy of the registration in the first Office action, although she did include copies of the two cited registrations. Accordingly, we conclude that the listing of Registration No. 2840737 was in error.

Direct marketing advertising for others, preparation of advertisements for others, advertising services, namely rental of direct marketing mailing and distribution lists, advertising services, namely acquiring advertising space in periodicals for others, agency for advertising time and space, business marketing consulting services.

The appeal has been fully briefed, and an oral hearing was held.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (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).

Turning first to the services, applicant argues that they are dissimilar and do not compete with each other. However, as identified, applicant's services include

"customer marketing services" and "retail marketing services," while the registrant's identified services include "direct marketing advertising for others." These services must be considered to be legally identical, as applicant's marketing services, as identified, would include direct marketing advertising. In re Dixie Restaurants Inc., 41 USPQ2d at 1534, quoting Canadian Imperial Bank v. Wells Fargo Bank, N.A., 811 F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) "Likelihood of confusion must be determined based on an analysis of the mark as applied to the ... services recited in applicant's application vis-a-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be."

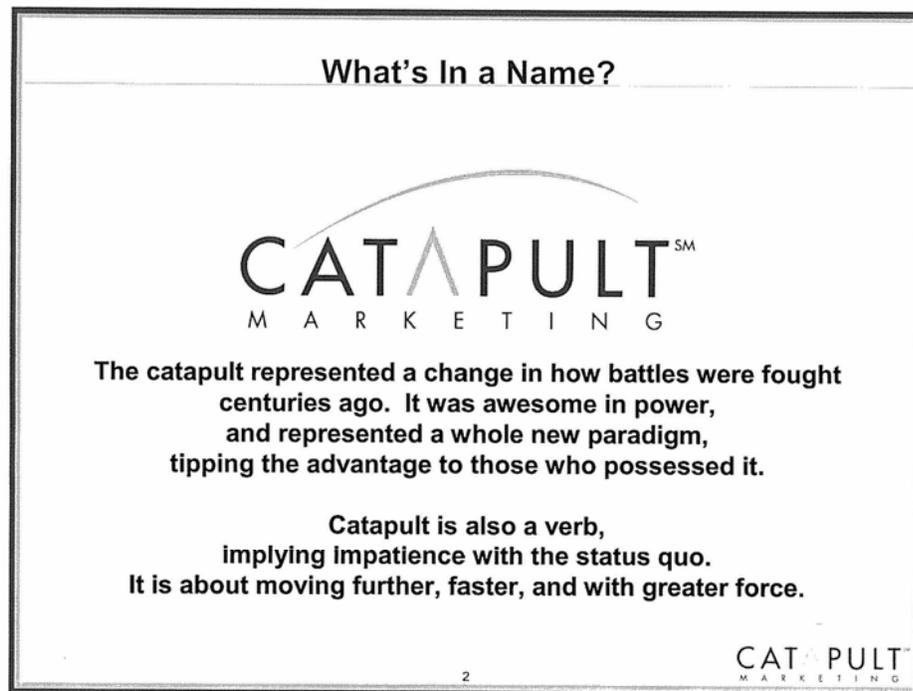
Further, because the services must be considered legally identical in part, to this extent they must be deemed to be offered in the same channels of trade.

With respect to the marks, applicant argues that the marks are different because the cited mark includes the words DIRECT MARKETING and has no design element, while its mark has a design element and a "stylized 'A' appearing as a second occurrence in the mark that does not include the usual horizontal line (so that it appears to be the Greek letter lambda)." Brief, p. 6. We agree with applicant

that the marks have these differences. However, they are not sufficient to distinguish them. The question is not whether the marks can be distinguished when they are compared side-by-side, but whether the marks convey the same commercial impression, such that consumers will view the marks as indicating services emanating from the same source.

In making this determination, it is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, 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 a consideration of the marks in their entireties. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Applying this principle to the case at hand, we think it appropriate to give less weight to the words DIRECT MARKETING in the cited registration. These words, which have been disclaimed, are descriptive or generic for the registrant's services. Accordingly, they have little or no source-identifying significance. It is to the word CATAPULT that consumers will look to identify the source of the services. As for applicant's mark, although it contains a stylized "A," the letter will clearly be

understood to be an "A" rather than the Greek letter lambda. Applicant itself stated in its application that "the literal element of the mark consists of CATAPULT." Further, the specimen it submitted with its application devotes the second page to the import of its name, and shows that there is no question that the mark will be perceived as the word CATAPULT.



Further, the line design element in the mark will be viewed either as suggesting the action of a catapult, and thereby reinforcing the meaning of the word, or it will be seen as merely a curved line that has no source-indicating significance. In either case, it does not make a separate

commercial impression in terms of conveying an idea different from that of the word CATAPULT.

Accordingly, when the marks are compared in their entireties, and giving appropriate weight to the dominant elements in each, we find that the marks are highly similar in appearance, virtually the same in pronunciation and connotation, and that they convey the same commercial impression.

Applicant has argued that the term CATAPULT has a suggestive significance, and is therefore not entitled to a broad scope of protection. In support of this argument, applicant points to five third-party registrations, owned by different entities, for marks which contain the word CATAPULT or a variation thereof, namely:

MARK	SERVICES	REGISTRATION NUMBER
CATAPULT	Educational services, namely, providing training in the interpretation of statistical market analysis, market research and business consultation in the field of improving quality of customer services, business operations and workplace satisfaction using online interactive business services via a Web site	2870924

CATAPULT	Business consulting services, namely a software development methodology targeted to information technology professionals to assist them in defining business requirements and translating those requirements into a computer software/technology solution	2922364
CATAPULT THINKING	New retail product, industrial and packaging design for others; and website design and development for others	2538822
CATAPULT CONSULTANTS	Providing web development services, namely website design, development and maintenance to nonprofit organizations and small to medium size businesses	2870808
CATAPULTA	Business consultation; business planning, namely, development of business plans and business strategies, including plans and strategies for enhancing and supporting operational and employee efficiency and productivity and for business development; and personnel placement and recruitment for businesses	2665191

Third-party registrations are not evidence that the marks are in use, but they can be used in the manner of dictionary definitions, to show that a term has a significance in a particular industry. See Mead Johnson &

Company v. Peter Eckes, 195 USPQ 187 (TTAB 1977). First, we note that the services recited in the third-party registrations are only tangential to applicant's and the registrant's services, so that it is not clear that they show that the term has a particular significance in the advertising industry. Even if we accept that the registrations are for services in the same industry, they show that "catapult" has a somewhat laudatory suggestion based on the dictionary meaning of "to become catapulted; spring up abruptly,"³ a suggestion referenced by applicant itself in its "What's in a Name" page, reproduced above. However, we cannot conclude that the term CATAPULT is so highly suggestive that the addition of the descriptive or generic wording DIRECT MARKETING in the registrant's mark, or the stylized "A" and curved line in applicant's mark, are sufficient to distinguish these marks when they are used in connection with services that are, in part, identical.

Applicant has also made of record evidence of third-party use of CATAPULT marks. The Examining Attorney has characterized this evidence as consisting of pages from

³ The American Heritage Dictionary of the English Language © 1970. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

only two third-party websites, the third website being that of the owner of the cited registration. Further, the Examining Attorney has stated that one of these websites is for a retail automation system, while the other is for an advertising and marketing company. Although applicant does not dispute these characterizations, it appears to us that the webpages show four third-party uses. One is for CATAPULT MAKETING GROUP, LLC and design, for a company which is described as doing qualitative research ("Whether you want to learn about the behaviors, motivations, or perceptions of customers, patients, physicians, executives, customers, or B2B decision-makers, Calpult [sic] delivers a customized solution to meet your needs"), <http://catapultmarketinggroup.com>; the second is for CATAPULT and design for promotional products ("Catapult Sales & Marketing Inc. is dedicated to offering our customers the highest standard of service in the sourcing, pricing and fulfillment of their promotional needs"), <http://www.catapultsales.com>; the third is for CATAPULT DATA SERVICES for data processing services, <http://www.edatadirect.com>; and the fourth is for CATAPULT Retail Enterprise Automation and Catapult University for retail automation systems, <http://www.ecrsoftware.com>. Three of these third-party uses are unrelated to the

services identified in applicant's application and the cited registration. We cannot conclude from the limited evidence of third-party use, and particularly the lack of evidence of third-party use for services that are the same or closely related to those at issue herein, that consumers would distinguish between applicant's mark CATAPULT and design and the registrant's mark CATAPULT DIRECT MARKETING, when used for identical services, based on the non-distinctive other elements in the marks. Compare *In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, in which there were more than 500 company names containing the term "Broadway" listed in the Dun & Bradstreet database for restaurants or related services; there were 80 listings for "Broadway" marks for food or restaurant places in telephone directories; and there were more than 575 listings of "Broadway" company names in the American Business Directory for restaurants or related goods and services.

Finally, applicant has argued that the customers of its services and those of the registrant are sophisticated purchasers who would choose the services with care. We do not dispute this contention, but because the marks are so similar, and the services are in part legally identical, even sophisticated and careful purchasers are not likely to distinguish the marks based on the slight differences

between them. As we stated previously, even if consumers note the differences in the marks, they are likely to believe that the marks identify services emanating from a single source.

Both applicant and the Examining Attorney have limited their arguments to the du Pont factors discussed above. Because of this, and because no evidence has been submitted on other factors, we, too, have limited our discussion to these factors. To the extent that any other factors are applicable, we treat them as neutral.

After considering all the relevant du Pont factors, we find that applicant's use of its mark for its identified services is likely to cause confusion with the cited registration.

Decision: The refusal of registration is affirmed.