

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 17, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Parker

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Serial No. 85671566

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Matthew H. Swyers of The Trademark Company for Dr. Stanley Parker, BS, MS,
DMB, JD.

Sally Shih, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow,
Managing Attorney).

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Before Bucher, Bergsman and Adlin, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Dr. Stanley Parker (“applicant”) filed a use-based application on the Principal Register, under the provisions of Section 2(f) of the Trademark Act of 1946, 15 U.S.C. § 1052(f), to register the mark AFFORDABLE ORTHODONTICS, in standard character form, for “dentist services,” in Class 44.¹

The Trademark Examining Attorney refused to register applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground

¹ The Trademark Examining Attorney also issued a final requirement that applicant disclaim the exclusive right to use “Orthodontics.” However, applicant never addressed the requirement and the Trademark Examining Attorney did not pursue it in her appeal brief. Accordingly, we consider the requirement that applicant disclaim the exclusive right to use the word “Orthodontics” to be withdrawn.

that applicant's mark so resembles the previously registered mark AFFORDABLE DENTURES, in typed drawing form, for "dental services," in Class 42, as to be likely to cause confusion.² The mark is registered on the Principal Register under the provisions of Section 2(f), and registrant disclaimed the exclusive right to use the word "Dentures."

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 issue of 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, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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"). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

² Registration No. 2546707, registered March 12, 2002; renewed.

Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A mark depicted as a typed drawing is the legal equivalent of a standard character mark.

A. The similarity or dissimilarity and nature of the services, the established, likely-to-continue channels of trade and classes of consumers.

Applicant is seeking to register its mark for “dentist services” and the recitation of services in the cited registration is “dental services.” Because dentists provide dental services, these services are legally identical.

Because the services described in the application and the cited registration are legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and 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.”). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Applicant argues that his dentist services are orthodontic services rendered exclusively in Ashland, Kentucky, whereas registrant’s dental services relate to the service of providing dentures offered to patients in 38 states, but not Kentucky.³ There are problems with applicant’s argument. First, because the scope of the registration applicant seeks is defined by the identification of service in his application and not by its actual use, it is the application and not actual use that we must look to in determining applicant’s right to register:

³ Applicant’s Brief, pp. 10-11.

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Syst. Inc. v. Houston Computers Svcs. Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Likewise, in considering the scope of the cited registration, we look to the registration itself, and not to extrinsic evidence about the registrant's actual goods, customers, or channels of trade. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958).

Second, because applicant is seeking a geographically unrestricted registration, the Board is constrained to evaluate the nature of the services in terms of nationwide markets. Applicant's arguments regarding market segmentation is not material to the question of applicant's right to a geographically unrestricted registration. *See In re Integrity Mutual Insurance Company, Inc.*, 216 USPQ 895, 896 (TTAB 1982); *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 77 (TTAB 1981).

In view of the foregoing, we find that the services are legally identical and there is a presumption that they move in the same channels of trade and are rendered to the same classes of consumers.

B. The strength of the registered mark, including the number and nature of similar marks in use in connection with similar services.

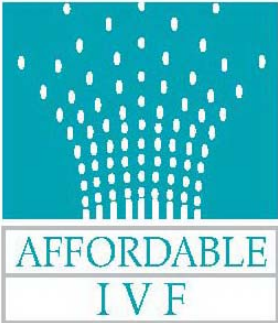
The sixth *du Pont* factor requires us to consider evidence pertaining to the number and nature of similar marks in use on similar goods. “The purpose of a defendant introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005), *quoting Veuve Clicquot Ponsardin v. Palm Bay Imports, Inc.*, Opp’n No. 115,438, 2000 WL 21953664 (TTAB Aug. 4, 2003).

Although not repeated in its brief, applicant argued during prosecution that because the mark in the cited registration is diluted and entitled to only a narrow scope of protection or exclusivity of use, consumers can distinguish the marks and, therefore, applicant’s mark is not likely to cause confusion with the mark in the cited registration.⁴ To support his argument, applicant submitted copies of ten registrations consisting of some variation of the word “Affordable.” The registrations are set forth in the table below.

Mark	Reg. No.	Services
WE MAKE BEAUTIFUL RESTORATIONS AFFORDABLE	3787267	Dental laboratories Registrant disclaimed the exclusive right to use the word “Restorations.”

⁴ April 30, 2013 response to Office action.

Mark	Reg. No.	Services
	3529559	Providing rebates to participating establishments through the use of membership cards including optical and dental benefits Section 2(f) as to “For Affordable Services.”
ASSURANT AFFORDABLE HEALTH ACCESS	4215843	Health, life, dental, vision, and cancer insurance underwriting Registrant disclaimed the exclusive right to use “Affordable Health”
AFFORDENT	3490424	Dental services
	3442054	Health spa services
REDICLINIC HIGH- QUALITY, AFFORDABLE, AND CONVENIENT HEALTHCARE	3632274	Medical clinic services; medical testing; health screening, health maintenance and health improvement progress, and health risk appraisal, namely, health care Registrant disclaimed the exclusive right to use “High-quality, affordable, and convenient healthcare.”
YOUR PARTNER IN AFFORDABLE INMATE HEALTHCARE	3284380	Providing medical, dentist, and mental health services to inmates in county jail facilities
AFFORDABLE SMILES	4150198	Dentist services; dentistry Registrant disclaimed the exclusive right to use “Affordable.”
	3580375	Medical clinic offering affordable, non-invasive skin procedures to remove hair and improve skin appearance Registrant disclaims the exclusive right to use “Skin clinic.”

Mark	Reg. No.	Services
	3403555	<p>Medical services, namely, in vitro fertilization</p> <p>Registrant disclaims the exclusive right to use “Affordable IVF.”</p>

The problem with applicant’s evidence and argument is that absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). *See also In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983).

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third[-]party registrations are still in use. Because of this doubt, third[-]party registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as to their weakness in distinguishing source.

Id. at 286. *See also Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“As to strength of a mark, however, registration evidence may not be given *any* weight”).⁵

On this record, we cannot conclude that the use of the term “Affordable” in connection with dental services has been so widespread that consumers will be able to distinguish among the different “Affordable” marks. Third-party registrations, as discussed above, are not evidence that the registered marks actually have been used in commerce.

Nevertheless, the third-party registrations are probative to show that the word “Affordable” in the registrations engenders a commercial impression consistent with its meaning: “that can be afforded; believed to be within one’s

⁵ Also, with the exception of the mark AFFORDABLE SMILES for “dentist services; dentistry,” none of the third-party registrations are as close to registrant’s mark as is applicant’s mark. With respect to the registration for the mark AFFORDABLE SMILES, it is well-settled that the existence of a third-party registration cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion. *See In re Max Capital Group, Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010). As the Board stated in *In re Chica Inc.*, 84 USPQ2d 1845, 1849 (TTAB 2007):

[A]n applicant does not overcome a likelihood of confusion refusal by pointing to other registrations and arguing that they are as similar to the cited registration as applicant’s mark. While third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, they “cannot justify the registration of another confusingly similar mark.” *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987), *quoting Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983).

See also, AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967); *In re Helene Curtis Indus., Inc.*, 305 F.2d 492, 134 USPQ 501, 503 (CCPA 1962).

financial means.”⁶ In this regard, we note that the mark AFFORDABLE DENTURES is registered on the Principal Register under the provisions of Section 2(f) of the Trademark Act. Although by seeking registration pursuant to Section 2(f), registrant admitted that its mark is not inherently distinctive, registration under this section means that the mark has acquired distinctiveness. Because applicant has not petitioned to cancel the cited registration, the registration is entitled to the presumptions granted a registration on the Principal Register under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (*i.e.*, *prima facie* evidence of the validity of the registered mark, opposer’s ownership of the mark, and opposer’s exclusive right to use the mark in commerce on or in connection with the services specified in the certificate of registration). Thus, the registered mark AFFORDABLE DENTURES cannot be treated as merely descriptive. While the mark in the cited registration may be suggestive, registrant is still entitled to a measure of protection against the registration of another mark likely to cause confusion no matter how limited registrant’s rights may be.

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

We turn now to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 177

⁶ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged), p. 34 (2nd ed. 1987). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

USPQ at 567. In comparing the marks, we are mindful that where, as here, the services are identical, 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. *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Further, 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 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). Since the services at issue are dental services without any limitations or restrictions, the average customer is any person who goes to a dentist.

Applicant's mark is AFFORDABLE ORTHODONTICS and the mark in the cited registration is AFFORDABLE DENTURES. The marks are similar because

“Affordable” is the first word of both marks followed by the descriptive dental terms “Orthodontics” or “Dentures.” “Orthodontics” is defined as “the branch of dentistry that deals with the correct alignment an [sic] position of teeth.”⁷ “Dentures” is the plural form of the word “denture” which is defined as “1. an artificial replacement of one or several of the teeth (**partial denture**), or all of the teeth (**full denture**) of either or both jaws; dental prosthesis. 2. set of teeth.”⁸

Descriptive matter, such as the words “Orthodontics” and “Dentures,” 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.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1983) (“Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (the word “Dixie” is the dominant element in the mark THE DIXIE CAFE and design because the word “cafe” is generic); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (the letters CCI are the dominant element of the mark CCI CODE CONSULTANTS, INC. because the name CODE CONSULTANTS INC. is highly descriptive). Accordingly, it is the word “Affordable” that is the dominant portion of both applicant’s and registrant’s marks.

⁷ Wordsmyth (wordsmyth.net) attached to the October 30, 2012 Office action.

⁸ **The Random House Dictionary of the English Language** (Unabridged), p. 533 (2nd ed. 1987).

Further reinforcing the significance of the word “Affordable” as the dominant element of the marks is its location as the first part of the marks. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE 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*, 23 USPQ2d at 1700 (upon encountering the marks, consumers will first notice the identical lead word). Therefore, consumers will view the marks as AFFORDABLE brand dentures and AFFORDABLE brand orthodontics and they are likely to believe that AFFORDABLE ORTHODONTICS is a variation of registrant’s mark, identifying a new line of dental services.

The marks AFFORDABLE DENTURES and AFFORDABLE ORTHODONTICS have similar meanings and engender similar commercial impressions. AFFORDABLE DENTURES connotes financially available or reasonably priced artificial teeth. AFFORDABLE ORTHODONTICS connotes financially available or reasonably priced alignment of teeth.

Applicant argues that because the suggestive term “Affordable” modifies the words “Orthodontics” and “Dentures,” it is those words which are the dominant elements of the marks.⁹ We disagree. Under the circumstances in this case, the

⁹ Applicant’s Brief, p. 9.

“suggestive” term “Affordable” serves to identify the source of the “dentist services” (ORTHODONTICS) and the “dental services” (DENTURES) while the descriptive words “Orthodontics” and “Dentures” describe dental specialties. As indicated above, consumers familiar with registrant’s AFFORDABLE DENTURES are likely to believe that applicant’s AFFORDABLE ORTHODONTICS are a new line of registrant’s dental services.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

D. The degree of consumer care.

Applicant argues that he renders its services to “parents of children who are seeking a practice ... that provides braces or other orthodontic services for their children, or adults who need braces or other orthodontic services ... available only by check or cash.”¹⁰ “In contrast, [registrant renders its services to] individuals seeking dentures at reduced rates available on a payment plan or payable by cash, check or credit cards.”¹¹ Accordingly, applicant concludes that the relevant consumers exercise a high level of care in choosing dental services.¹²

However, the services at issue are broadly described as dentist and dental services, not the more specific orthodontist services and providing dentures. We cannot resort to extrinsic evidence to restrict the nature and prices of applicant’s or registrant’s services. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764

¹⁰ Applicant’s Brief, p. 12.

¹¹ Applicant’s Brief, p. 12.

¹² Applicant’s Brief, p. 13.

(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).

Even assuming that purchasers exercise a high degree care when it comes to their dental health, we note that with legally identical services and similar marks, even careful, sophisticated consumers may not note the differences in the marks. *Cunningham v. Laser Golf*, 55 USPQ2d at 1846 (“The alleged sophistication of golfers is outweighed by the Board’s findings of strong similarity of the marks and identify of goods, both of which we uphold.”); *HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff’d*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). Furthermore, careful purchasers who do notice the difference in the marks will not necessarily conclude that there are different sources for the goods, but will see the marks as variations of each other, pointing to a single source. *See, e.g., Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992) (“What is important is not whether people will necessarily confuse the marks, but whether the marks will be likely to confuse people into believing that the goods they are purchasing emanate from the same source.”) (citations omitted). Accordingly, we deem this *du Pont* factor to be neutral.

E. Instances of actual confusion.

Applicant argues that there have been no reported instances of confusion even though applicant and registrant have been rendering their respective services since 2003.¹³ However, under the circumstances of this case, the contemporaneous use of applicant's and registrant's marks without actual confusion is entitled to little weight. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). 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), especially in an *ex parte* context. In any event, the record is devoid of probative evidence relating to the extent of use of applicant's and registrant's marks and, thus, whether there have been meaningful opportunities for actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1847; and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In this regard, we note that in his brief, applicant argues that he renders his services in Kentucky while registrant does not render its services in

¹³ Applicant's Brief, p. 14.

Kentucky.¹⁴ Where applicant and registrant render their services in disparate geographic trading areas, there has not been a meaningful opportunity for confusion to have occurred. Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without any evidence of actual confusion is neutral.

F. Balancing the factors.

Because the marks are similar, the services are legally identical and there is a presumption that the channels of trade and classes of consumers are the same, we find that applicant's mark AFFORDABLE ORTHODONTICS for "dentist services" is likely to cause confusion with the mark AFFORDABLE DENTURES for "dental services," even assuming that the relevant customers are sophisticated and careful.

Decision: The refusal to register is affirmed.

¹⁴ Applicant's Brief, p. 11.