

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Colorbar Cosmetics Private Limited

Serial No. 86323815

Maria A. Scungio and H. Straat Tenney of Locke Lord LLP,
for Colorbar Cosmetics Private Limited.

Gayne G. Zimmerman, Trademark Examining Attorney, Law Office 120,
Michael W. Baird, Managing Attorney.

Before Bucher, Adlin and Masiello,
Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Colorbar Cosmetics Private Limited (“Applicant”) seeks registration on the
Principal Register of the mark COLORBAR USA in standard characters for the
goods set forth below:¹

After shave lotions; aromatic essential oils; artificial
eyelashes; baby oil; baby powder; bath oil; bath oils for
cosmetic purposes; bath powder; beauty creams; beauty
serums; bleaching preparations for cosmetic purposes;
body lotion; body powder; body scrub; concealers; cosmetic

¹ Application Serial No. 86323815 was filed on June 30, 2014, under Sections 1(b) and 44(e) of the Trademark Act, 15 U.S.C. §§ 1051(b) and 1126(e). The application is currently based only on Section 44(e). No claim is made to the exclusive right to use the term “USA” apart from the mark as shown.

creams for skin care; cosmetic oils; cosmetic olive oil for the face and body; cosmetic preparations; cosmetic preparations for removing gel nails, acrylic nails, and nail polish; cosmetic preparations for skin care; cosmetic soaps; cosmetics, namely, compacts; cosmetics, namely, lip primer; creamy face powder; dentifrices; deodorant for personal use; deodorants and antiperspirants; essential oils; essential oils for personal use; eye liner; eye make-up; eye pencils; eye shadow; face powder; face powder paste; facial oils; facial washes; fair complexion cream; foot powder; fragrances and perfumery; lip gloss; lip liner; lipstick; make up removing preparations; make-up preparations; mascara; mask pack for cosmetic purposes; nail care preparations; nail enamels; nail polish; nail polish remover; nail polishing powder; nail-polish removers; non-medicated skin creams; perfume; perfumed powder; perfumed powders; perfumed soaps; perfumed talcum powder; perfumes, eaux de cologne and aftershaves; polishing, scouring and abrasive preparations; powder for make-up; skin cleansers; skin moisturizer; skin toners; sun screen; sun screen preparations; talcum powders; tooth bleaching preparations, in International Class 3.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with Applicant's goods, so resembles the registered marks shown below as to be likely to cause confusion, or to cause mistake, or to deceive. The cited marks are registered to two different entities for the services set forth below.

THE COLOR BAR	Hairdressing services and counseling namely, offering advise [<i>sic</i>] regarding hair color in salons, in International Class 44. ²
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² Reg. No. 2991424, issued September 6, 2005. Renewed.



Beauty salon services; Beauty salons; Hair color salon services; Hair salon services; Hair salon services, namely, hair cutting, styling, coloring, and hair extension services, in International Class 44.³

After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration, which the Examining Attorney denied. Applicant then appealed to this Board.

I. Evidentiary objection.

Applicant submitted within its brief a chart purporting to contain information about fifteen third-party businesses whose names include the term COLOR BAR.⁴ The chart sets forth the name, city, and URL of the indicated businesses. No evidence relating to these businesses was made of record during the prosecution of the application. Applicant's brief also cited Internet evidence, identified only by the URL of a website, purporting to show another third-party business that uses the term COLOR BAR.⁵ No evidence relating to this website was made of record during the prosecution of the application. Finally, Applicant's brief makes reference to an online dictionary definition of the term "color bar."⁶ Applicant did not attach a copy of the definition to its brief; rather Applicant provided only the URL. The

³ Reg. No. 4186201, issued August 7, 2012.

⁴ Applicant's brief at 4-5, 7 TTABVUE 9-10.

⁵ *Id.* at 8 and fn.4, 7 TTABVUE 13.

⁶ *Id.* at 9, fn.5, 7 TTABVUE 14.

Examining Attorney objected to all of this evidence on the ground that it is untimely.⁷

“The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.” 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.01. In accordance with this general rule, the Board has not considered the information, discussed above, relating to third-party businesses using the term COLOR BAR.

Regarding the dictionary definition, when a party requests that the Board take judicial notice of appropriate matter, it should provide a copy of the matter in question. TBMP § 704.12(b). In this case, Applicant supplied only the URL for the dictionary definition. The Board will not utilize a link to a website’s Internet address to access the site to consider whatever content may appear therein. *In re Future Ads LLC*, 103 USPQ2d 1571, 1572 (TTAB 2012); *In re HSB Solomon Associates, LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012). In any event, the dictionary to which Applicant refers appears to be of German origin and it apparently is intended to familiarize speakers of German with “Amerikanisches Englisch.” Without more, it does not appear to be appropriate matter for judicial notice, because in our view such a dictionary is not a “source whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Accordingly, we have not considered it.

⁷ Examining Attorney’s brief, 9 TTABVUE 5.

II. The refusal under Section 2(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 issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case Applicant and the Examining Attorney have also submitted arguments and evidence relating to the trade channels, similar marks in use, sophistication of relevant customers and the care with which they select the goods and services.

A. The marks.

We first consider the similarity or dissimilarity of the marks in their entirety 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 (Fed. Cir. 2005). “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 three marks are set forth below:

COLORBAR USA

THE COLOR BAR



Applicant correctly urges that we must avoid “dissection” of the marks and must consider the marks at issue in their entireties in reaching our ultimate conclusion. However, there is nothing improper in giving more or less weight to a particular feature of a mark, for rational reasons. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). “Indeed, this type of analysis appears to be unavoidable.” *Id.*

In appearance and sound, the three marks are similar in that each includes the term COLOR BAR or COLORBAR. However, the marks have certain distinguishing features: USA in the case of Applicant’s mark; THE in the case of one cited mark; and in the second cited mark the stylized CB design and the wording THE SALON, all of which affect the appearance and sound of the marks.

Regarding the marks’ meaning, Applicant and the Examining Attorney disagree as to the meaning of the element COLOR BAR. The Examining Attorney argues that in the context of the respective goods and services, it means “the vast palette of colors and treatments that can help consumers achieve their desired beauty

results.”⁸ Applicant contends that COLOR BAR means, in the context of Registrants’ services, “a salon where customers receive hair care services in the form of hair dye treatments.”⁹ Applicant contends that in the context of its own goods, which are cosmetics, the term COLORBAR “is neutral and has no known meaning to consumers. ... Instead of conjuring up images of hair styling services in a color bar or salon, consumers are more likely to think that the wide spectrum of hues of Applicant’s COLORBAR USA cosmetics is evocative of the color bar observed in a rainbow and employed in fine art and photography.”¹⁰ Applicant points out that “The Examining Attorney cites no evidence that COLORBAR or COLOR BAR have the same meaning for cosmetics.”¹¹ When we consider that the services identified in the registrations refer to “hair color” and the “coloring” of hair, it is clear that in the context of those services the term COLOR is likely to refer to the color of hair or hair coloring. By contrast, in the context of Applicant’s cosmetics, which make no reference to hair products, the word COLOR is more likely to refer to the colors of cosmetics, such as make-up, lipstick or nail polish.

With respect to the meaning of BAR in the context of Registrants’ services, we take judicial notice¹² of the following dictionary definitions:

⁸ Examining Attorney’s brief, 9 TTABVUE 7.

⁹ Applicant’s reply brief at 6, 11 TTABVUE 8.

¹⁰ Applicant’s brief at 9, 7 TTABVUE 14.

¹¹ Applicant’s reply brief at 7, 11 TTABVUE 9.

¹² 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), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

5 a : a counter at which food or esp. alcoholic beverages are served <had a cocktail at the ~ > <snack ~> <milk ~>
... **d** : *a counter or section of a store where a particular item or items of merchandise are featured* <hat ~> <gift ~>
<slipper ~>

174 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (emphasis added).

This definition supports Applicant's suggestion that COLOR BAR may be perceived to mean a commercial location at which customers can receive services relating to hair coloring. This suggestion is further supported by evidence showing that a number of hair salons refer to themselves as "salon and color bar," indicating that both terms, "salon" and "color bar," indicate types of hair salons.¹³

There is no evidence of record to show the meaning of BAR in the context of Applicant's goods; however, the dictionary definition set forth above suggests that it may be taken to mean "a counter or section of a store" where cosmetics may be purchased. Nothing in the record suggests that it would refer to a palette of colors, a rainbow, or a display used in "fine art and photography."

Thus, we find that the marks at issue have some similarity in meaning to the extent that they all include the term COLOR BAR or COLORBAR, which have related, but not identical, meanings as used in the marks of Applicant and Registrants. However, the distinguishing terms USA, CB and THE SALON convey meanings absent from the other marks, creating some distinction in meaning.

¹³ See, e.g., Applicant's response of March 5, 2015 at 19 ("Color Bar & Salon"); 20 ("Salon and Color Bar"); 21 ("Salon and Color Bar"); 23 ("Salon One21 has incorporated the European concept of the Color Bar, an interactive experience where you can create your own signature hair color or highlights. In the Salon One21 Color Bar, you'll enjoy an intimate, thorough color consultation with your stylist in a bright, contemporary setting.")

Overall, as discussed, we find the marks to be similar in appearance, sound, and meaning.

B. Similar marks in use in the marketplace.

As part of a *du Pont* analysis, we must consider “[t]he number and nature of similar marks in use on similar goods [or services].” 177 USPQ at 567. Applicant contends that the term COLOR BAR is commercially weak because of third-party use of the term in the marketplace and argues that the cited marks are therefore entitled to a narrow scope of protection.¹⁴ Applicant made of record a substantial number of hair and beauty salon websites showing use of the terms COLOR BAR, COLORBAR, and COLOUR BAR as components of their trade names.¹⁵

Representative trade names of this type include:

Shades Hair Color Bar & Salon	The Color Bar Salon
Fringe Salon and Color Bar	Vanity Salon & Color Bar
Sano Salon & Color Bar	Color Bar Hair Studio
Fusion Color Bar	Salon One21 & Colorbar
The Color Bar ... hair salon	Chroma Color Bar
BrynK Salon & Color Bar	Tresses Color Bar Salon
Tom’s Color Bar	Colorbar Salon
Kolorbar NYC	Color Bar Salon
The Hair and Color Bar	Colourbar
Colour Bar Studio	Color Bar Salon & Spa

¹⁴ Applicant’s brief at 2-7, 7 TTABVUE 7-12.

¹⁵ Applicant’s response of March 5, 2015 at 20-29; and response of April 7, 2015 at 19-29.

The Color Bar	THECOLOR BARSALON
The Color Bar Hair Studio	The Color Bar
Glam Colour Bar Salon & Supply	Red Salon & Color Bar
The Color Bar Modern Hair Salon	Tanglz Color Bar and Salon
Chromatics Salon & Color Bar	Lush a Color Bar and Hair Salon
Posh Salon & Color Bar	Beauty for Ashes Salon and Color Bar

Given that these are trade names, it should not be surprising that the websites have other indicia of belonging to different businesses, and the Examining Attorney has not argued that any of them are duplicative examples of a single business. They represent businesses located in approximately 20 states, with more than one such business in each of New York, North Carolina, Alabama, Florida, Texas, Illinois, and California.

The Federal Circuit has stated that “evidence of third-party use of similar marks on similar goods ‘can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.’” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), *quoting Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). Such evidence is “powerful on its face, even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin v. New Millennium Sports*, 116 USPQ2d at 1136 (internal quotes omitted). “The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and

thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation v. GS Enters.*, 115 USPQ2d at 1674.

We find the evidence of widespread third-party use powerful and more than sufficient to show that the terms COLOR BAR and COLORBAR are weak as source indicators for services such as those of Registrants. Accordingly, we agree with Applicant that, to the extent that Applicant’s mark resembles the cited marks because it includes the term COLORBAR, Registrants’ marks are entitled to a “comparatively narrower range of protection.”

C. The goods and services.

We next consider the similarity or dissimilarity of the goods and services as identified in the application and the cited registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014); *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Because Applicant’s goods and Registrants’ services are not the same, we ask whether the goods and services are related in some manner or whether the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source. *Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Applicant’s goods encompass a wide range of cosmetics, such as bath oils, beauty creams, nail polish, perfume, make-up, and skin cleansers, but not goods that are specifically for hair care. Registrants do not offer goods, but hair services: the mark

THE COLOR BAR is registered for hairdressing and advice regarding hair color in salons; the stylized mark CB COLORBAR THE SALON is registered for hair salons and beauty salons. The Examining Attorney has shown that a “beauty salon” is “an establishment providing women with services to improve their beauty, such as hairdressing, manicuring, facial treatment, and massage.”¹⁶

The Examining Attorney has submitted nine third-party registrations that cover, on the one hand, goods such as make-up, skin care preparations, and nail care preparations and, on the other hand, “hair salon” or “beauty salon” services.¹⁷ Third-party registrations that are based on use in commerce and which individually cover a number of different goods and services may have some probative value to the extent that they serve to suggest that the listed goods and services are of types which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In addition, the Examining Attorney made of record advertisements, found on the Internet, showing that there are three brands that are associated with

¹⁶ Definition from <thefreedictionary.com>, Office Action of March 22, 2015 at 61.

¹⁷ Office Action of March 22, 2015 at 13-65. The Examining Attorney also submitted one registration covering goods similar to Applicant’s on the one hand and “providing information” about beauty salons and beauty treatments on the other (Reg. No. 4250528). While this registration may be relevant to show a commercial relationship between Applicant’s goods and the “advise [sic] regarding hair color” set forth in one of the cited registrations, a single registration does little to prove that point. Accordingly, we will not focus on a comparison of Applicant’s goods with the Registrant’s “advise” services.

cosmetics as well as hair or beauty salons: AVEDA, ELIZABETH ARDEN, and ULTA.¹⁸

Applicant argues that it

provided evidence of websites for over thirty salons, each of which provides hair and beauty salon services. None of the over thirty salons ... sell any goods whatsoever under the same brand that also identifies their services. For example, The Color Bar in Lexington, KY uses KEUNE, KERASTASE, COLORPROOF and BABOR, among other brands [citation omitted], The ColorBar Salon in Lafayette, LA offers branded goods under third-party marks MOROCCANOIL, KERATIN COMPLEX, and KEVIN MURPHY, and not the house mark [citation omitted], and Fringe Salon and Color Bar in Houston, TX carries EUFORA, NO. 4, and ALOXXI and JANE IREDALE [citation omitted]. This alone is compelling evidence that consumers expect that salons will offer to the consumer their respective goods and services under separate marks – assuming that hair and beauty salons sell goods at all.¹⁹

Applicant's evidence does indeed support the suggestion that the more common practice of hair and beauty salons is to use, in providing their services, beauty products marked with third-party brands. However, we find the Examining Attorney's evidence sufficient to indicate that there is a relationship between cosmetics and beauty salon services such that, if both were offered under a single distinctive mark, customers would likely perceive a connection between them.

¹⁸ Office Action of March 22, 2015 at 43-58; Office Action of October 16, 2014 at 23-37. The Examining Attorney has also shown that the PAUL MITCHELL brand is associated with hair salons and hair care products (Office Action of October 16, 2014 at 17-22). However, this evidence is of limited persuasive value, because Applicant's identification of goods does not specifically include hair care products.

¹⁹ Applicant's reply brief at 3, 11 TTABVUE 5.

D. Trade channels.

Although the Examining Attorney mentions the similarity of trade channels as one of the most relevant *du Pont* factors, she does not argue the point in her brief. The evidence of record relates only obliquely to this point. While it seems likely that some cosmetics are used in the course of providing beauty salon services, there is extremely little evidence showing that salons are a channel through which cosmetics are actually sold. The Examining Attorney does not point to any specific evidence of this type. We therefore find that the evidence on this point is too scant for us to make a finding as to this *du Pont* factor.

E. Care and sophistication of customers.

Applicant argues that Registrants' customers are sophisticated and careful in the selection of the relevant services:

Consumers of salon services subject themselves to painful (waxing and threading), somewhat permanent (perms) and image-changing (hair coloring) procedures. Consumers of such services have to be discerning, because the products are applied directly to the skin and hair, and could have disastrous – and embarrassing – results if the services are substandard. Accordingly, the respective consumers exercise extreme caution when purchasing salon services.²⁰

Applicant claims that certain hair treatments are “not inexpensive,” pointing to evidence of record showing services priced at \$325, \$300, and “\$220+.” “But, even if the costs for these services were low, consumers are still discerning, because consumers of hair coloring services are particularly demanding about the outcome

²⁰ Applicant's brief at 14, 7 TTABVue 19.

after receiving hair coloring services. Thus, this factor is not measured by cost alone.”²¹

The Examining Attorney points out that “Applicant’s goods can be relatively inexpensive and easy to purchase.”²² The record shows “lip saver” offered at \$8.50; lipstick at \$16; and foundation make-up at \$24.²³ The Examining Attorney points out evidence of haircuts offered at \$18, \$25 and \$35, and she observes, “Even if there were negative consequences to these purchases, hair grows back; in the interim it can be redyed, recut, and restyled relatively easily.”²⁴

Applicant’s argument that the relevant customers are sophisticated or careful is not supported by evidence of record. Rather, the evidence indicates that the relevant customers are ordinary consumers and that the prices of some of the goods and services at issue are relatively moderate. There is no reason on this record to perceive the relevant customers as particularly sophisticated or as exercising more than a moderate degree of care.

F. Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. The evidence shows that the common element appearing in Applicant’s mark and the cited registered marks, *i.e.*, COLOR BAR or COLORBAR, is quite weak in the field of

²¹ Applicant’s reply brief at 7, 11 TTABVUE 9.

²² Examining Attorney’s brief, 9 TTABVUE 14.

²³ Office Action of October 16, 2014 at 29-30.

²⁴ Examining Attorney’s brief, 9 TTABVUE 14.

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Registrants' services and should, therefore, be accorded a relatively narrow scope of protection. Applicant's mark is sufficiently different from the cited marks under the circumstances that, despite the relationship between the goods and services, customers would not be likely to believe that Applicant's goods, offered under Applicant's mark, emanate from the same source as Registrants' services offered under such a commonly used term in the hair salon field.

Decision: The refusal to register is reversed.