

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 Bald Eagle Health Group, LLC

Serial No. 86393524

Brian M. Taillon of McHale & Slavin PA for Bald Eagle Health Group, LLC.

Odessa Bibbins, Trademark Examining Attorney, Law Office 118 (Thomas G. Howell, Managing Attorney).

Before Quinn, Cataldo and Ritchie,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Bald Eagle Health Group, LLC, seeks registration on the Principal Register of SUNRISE DETOX (in standard characters) as a mark for the following services, as amended: "Addiction treatment services: Alternative medicine services, namely, detoxification services; Drug and alcohol testing for substance and alcohol abuse; Rehabilitation of alcohol and drug and narcotic addicted patients; Rehabilitation patient care services which includes inpatient and outpatient care

and counseling” in International Class 44.¹ In response to the Trademark Examining Attorney’s requirement, Applicant disclaimed “DETOX” apart from the mark as shown.

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based upon Registration No. 3346110 for the mark SUNRISE RECOVERY RANCH (in standard characters, “RECOVERY RANCH” disclaimed), in connection with “addiction treatment services” in International Class 44.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney filed briefs.³

Likelihood of Confusion

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). We discuss the *du Pont* factors for which Applicant or the Examining Attorney have presented evidence or arguments.

¹ Application Serial No. 86393524 was filed on September 12, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s allegation of June 1, 2004 as a date of first use of the mark anywhere and in commerce.

² Registered on the Principal Register on November 27, 2007. Section 8 affidavit accepted.

³ As we noted in our April 21, 2016 order (12 TTABVUE 1-2), the Trademark Operation considered Applicant’s Request for Consistency Review regarding the examination of this application and its co-pending applications and determined that no action regarding consistency need be taken. Inasmuch as Applicant’s co-pending applications are not subject to this appeal, we will not consider them herein.

Relationship of the Goods, Trade Channels and Classes of Purchasers

We first turn to the *du Pont* factors involving the similarity or dissimilarity of Applicant's services and Registrant's services, and their channels of trade and purchasers. It is settled that in making our determination, we must look to the services as identified in the application vis-à-vis those recited in the cited registration. See *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

Applicant's "addiction treatment services" are identical to the services in the cited registration. As a result, Applicant's services encompass and are in part legally identical to those identified in the cited registration. It is not necessary that the Examining Attorney prove likelihood of confusion with respect to all of the services set forth in Applicant's application. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983); *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981). The identity in part of the recited services is sufficient for purposes of our determination.⁴

Because Applicant's services are identical, in part, to Registrant's services, we presume that such services of Applicant and Registrant move in the same channels of trade and are offered to the same classes of consumers. See *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no

⁴ Nonetheless, with her July 11, 2015 Office action at 8-11, the Examining Attorney introduced evidence from three third-party Internet websites showing that addiction treatment centers also provide detoxification and rehabilitation services for drug and alcohol addicted patients, thus suggesting that these other services offered by Applicant are related to Registrant's services.

evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also 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). Accordingly, the *du Pont* factors relating to the similarity or dissimilarity of the services and the similarity or dissimilarity of their trade channels and purchasers heavily favor a finding of likelihood of confusion.

Similarities and Dissimilarities of the Marks

We next consider Applicant's SUNRISE DETOX mark and Registrant's SUNRISE RECOVERY RANCH mark, comparing them for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). The similarity or dissimilarity of the marks is determined based on the marks in their entireties, and the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion").

Consumers may not necessarily encounter the marks at issue in close proximity and must rely upon their general recollections thereof. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Furthermore, “[w]hen marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). *See also ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

In this case, the marks are similar to the extent that SUNRISE, the first word of Registrant’s mark, is identical to the first word in Applicant’s mark in appearance and sound. The significance of SUNRISE is reinforced by its location as the first word in both marks. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“...[it is] a matter of some importance since it 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 Maison Fondée En 1772*, 73 USPQ2d at 1692 (“The presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE.”). There is no evidence of record to indicate that SUNRISE has any meaning as applied to either mark, and thus the term appears to be, at worst, slightly suggestive of the services at issue. Furthermore, consumers are often known to use shortened forms of names, and it is highly likely

that both Applicant and Registrant and their services are referred to as SUNRISE. *Cf. In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring: “the users of language have a universal habit of shortening full names – from haste or laziness or just economy of words”).

In both marks, the term SUNRISE is followed by terms, respectively, DETOX and RECOVERY RANCH, which are, at best, descriptive of the services identified thereby. Thus, the dominant portion of these marks, SUNRISE, is identical. Respectively, the marks connote the beginning of a new day, or sunrise, after detox and the beginning of a new day at a location for recovery from addiction. These connotations are similar, both suggesting new beginnings for recovering addicts. Viewed as a whole, the marks are more similar than dissimilar in appearance, sounds, meaning and overall connotation than dissimilar, and the *du Pont* factor relating to the similarity or dissimilarity of the marks also favors a finding of likelihood of confusion.

Sophistication of Purchasers

Applicant argues that

the marks are both used for addiction treatment services. Applicant respectfully submits that consumers making the significant, personal decision to send either themselves or a loved one for such treatment would not do so lightly. Addiction treatment services are not an impulse purchase akin to chewing gum. Relevant consumers would not be confused even where the marks were less dissimilar than Applicant’s mark and the cited mark.⁵

Applicant relies upon *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) in support of its argument that its services and

⁵ 4 TTABVUE 10-11.

those of Registrant are the subject of careful purchase. However, in that case, the Court based its determination on evidence that the goods and services at issue were “purchased *only* by experienced corporate officials after significant study and contractual negotiation.” *Id.* (emphasis in original). In this case, we acknowledge that addiction treatment services, by their very nature, may be presumed to be subject to a greater than ordinary degree of care, despite the lack of evidence in the record to support such a finding. Even assuming, *arguendo*, that selection of Applicant’s and Registrant’s services would involve a deliberate decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective services rendered under similar marks, especially when the services are, in part, legally identical.

In this case, the legal identity in part of the services and similarity of the marks outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff’d*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods.). *See also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”).

Actual Confusion

Applicant argues that there is no evidence of any actual confusion and that there has been concurrent use for four years at the time of briefing. We do not accord significant weight to Applicant's contention, unsupported by any evidence, that there have been no instances of actual confusion despite contemporaneous use of the respective marks. The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an *ex parte* proceeding:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant'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). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an *ex parte* context.

Majestic Distilling, 65 USPQ2d at 1205.

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

Conclusion

We have considered all of the *du Pont* factors for which Applicant or the Examining Attorney have introduced evidence or arguments. The rest we treat as

neutral. After considering all of the evidence of record, including any evidence not specifically discussed herein, and arguments pertaining to the *du Pont* likelihood of confusion factors, we find the services are legally identical in part, as are their channels of trade and classes of consumers, and that as used in connection with such services, the marks are similar in appearance and sound, and convey a similar connotation and overall commercial impression. We find the lack of actual confusion to be neutral. The sophistication of consumers we view as neutral, and that the legal identity of the services and the similarity between the marks outweigh any sophisticated purchasing decision. In view thereof, we find that Applicant's mark, if used in association with the services identified in the application, is likely to cause confusion with the registered mark used in connection with the services recited in the registration.

Decision: The refusal to register Applicant's mark is affirmed.