

This Opinion is not a
Precedent of the TTAB

Mailed: January 22, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Druz
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Serial No. 86614598

Harold L. Novick and Angela Y. Dai, of Novick, Kim & Lee, PLLC
for Regina Shmulker Druz.

Paul Fahrenkopf, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

—
Before Kuczma, Gorowitz and Coggins,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Regina Shmulker Druz (“Applicant”) seeks registration on the Principal Register
of the mark FIT IN YOUR GENES (in standard characters) for:

Medical services, namely, providing a program for achieving weight loss; providing a weight loss program involving detox, genetically guided evaluation for optimal macronutrients and micronutrients balance, exercise type and duration, and supplement optimization; providing integrative, holistic care to patients involving genetics, environmental, nutritional, and exercise evaluation, and nutritional supplements for prevention and treatment of chronic conditions; providing medical advice to patients

involving genetics, environmental, nutritional, and exercise evaluation, and nutritional supplements for prevention and treatment of chronic conditions, in International Class 44.¹

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 it so resembles the registered mark "fitgenes" with a design consisting of two interlocking chevrons, a depiction of which is set forth below:



for the services set forth below as to be likely to cause confusion, mistake or deception:

Training and education services, namely, providing live and on-line courses, classes, seminars and workshops in the fields of genetic profiling, health, diet, weight loss, weight control, nutrition, physical activity, fitness, medical conditions, general well-being and wellness, and dissemination of educational materials in connection therewith in printed or electronic format; education services, namely, providing non-downloadable webinars in the fields of genetic profiling, health, diet, weight loss, weight control, nutrition, physical activity, fitness, medical conditions, general well-being and wellness; education services, namely, providing web-based and classroom training for certification of practitioners and continuing education for practitioners, and dissemination of educational materials in connection therewith in printed or electronic format; arranging and conducting seminars, lectures, training workshops, educational conferences, educational exhibitions for training and educational

¹ Application Serial No. 86614598 was filed on April 29, 2015, based upon Applicant's allegation of first use anywhere and use in commerce on June 14, 2014 under Section 1(a) of the Trademark Act.

² Registration No. 4843387, registered November 3, 2015. The registration includes the following description of the mark: The mark consists of two interlocking chevrons next to the word "FITGENES."

purposes in the fields of genetic profiling, health, diet, weight loss, weight control, nutrition, physical activity, fitness, medical conditions, general well-being and wellness, and dissemination of educational materials in connection therewith in printed or electronic format; lifestyle counselling and consultancy, namely, training in the fields of lifestyle counselling and consulting; educational examination and assessment services; occupational health and safety services, namely, education and training services in the form of courses, classes, seminars and workshops in the field of occupational health and safety; physical health education, namely, classes, seminars and workshops in the field of physical health; providing personalised exercise and fitness programs based on a person's DNA profile; provision of information relating to training and education, namely, information on training and education opportunities; providing online, not downloadable, electronic publications in the fields of genetic profiling, health, diet, weight loss, weight control, nutrition, physical activity, fitness, medical conditions, general well-being and wellness; electronic publication of information on a wide range of topics, including online and over a global computer network, namely, publication of articles, brochures, e-books, magazines, newsletters in the fields of genetic profiling, health, diet, weight loss, weight control, nutrition, physical activity, fitness, medical conditions, general well-being and wellness; publication of educational materials, educational texts, books, journals, electronic books and journals online, magazines, manuals, videos, posters, texts other than publicity texts; online publication of journals or diaries, namely, weblogs in the fields of genetic profiling, health, diet, weight loss, weight control, nutrition, physical activity, fitness, medical conditions, general well-being and wellness in International Class 41; and

Genetic testing for medical purposes; medical advisory services relating to genetic profiling, health, diet, weight loss, weight control, nutrition, physical, fitness, medical conditions, general well-being and wellness; providing medical information including online, about genetic profiling, health, diet, weight loss, weight control, nutrition, physical, fitness, medical conditions, general well-being and wellness; providing a website featuring medical information and medical advice in the fields of

health, diet, weight loss, nutrition, diet planning and lifestyle wellness; personalized dietary and weight management services, namely, providing weight loss and/or weight maintenance programs; personalized dietary and weight management services, namely, providing personalized genomics-based programs to effectively manage a patient's diet and weight; health risk assessment surveys, namely, providing a series of health related questions for response from the user that result in a report that provides health-related information in the form of recommended educational resources and treatment information; medical screening; medical advisory services in International Class 44.

When the refusal was made final, Applicant appealed. We reverse the refusal to register.

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.*, 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).

A. Similarity of services, channels of trade and class of customers.

We start our analysis with the second and third *du Pont* factors, the similarity of the services, the channels of trade, and the class of customers. When determining the relationship between the services,

[i]t is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the [services] as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the [services], their channels of trade and/or classes of purchasers.

In re Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014). “In comparing the . . . [services], [t]he issue to be determined . . . is not whether the [services] . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Anheuser-Busch, LLC v. Innvopak Sys. Pty. Ltd.*, 115 USPQ2d 1816, 1825 (TTAB 2015) (quoting *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989)).

The services in both the application and cited registration relate to medical care, in particular weight loss programs, and the use of genetic information in performing the same. Applicant’s services, identified as “medical services, namely, providing a program for achieving weight loss; providing a weight loss program involving detox, genetically guided evaluation for optimal macronutrients and micronutrients balance, exercise type and duration, and supplement optimization” are in-part

identical and otherwise closely related to the services in the cited registration identified as “personalized dietary and weight management services, namely, providing weight loss and/or weight maintenance programs; personalized dietary and weight management services, namely, providing personalized genomics-based programs to effectively manage a patient's diet and weight.” Moreover, Applicant does not contest the relationship between the services.

It is well established that absent restrictions in the application and registration, [identical] goods and services are presumed to travel in the same channels of trade to the same class of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Therefore, because the services are in part legally identical, they are presumed to travel in the same channels of trade to the same classes of purchasers. Accordingly, the second and third *du Pont* factors favor a finding of likelihood of confusion.

B. Similarity of the marks.

We next consider the first *du Pont* factor, the similarity or dissimilarity of the marks in their entirety. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (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).

Applicant argues the the design element in the cited mark creates “a distinct, significant commercial impression[s] in the purchaser’s mind such that this element alone should dictate no likelihood of confusion. We disagree. While “the similarity or dissimilarity of the marks is determined based on the marks in their entiretyies ... 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 entiretyies.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In this case, the cited mark is a composite mark consisting of a verbal or literal portion and a design. When evaluating a composite mark containing both words and designs, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed because it is the portion of the mark that consumers would use to refer to or request the services. *In re Viterra Inc.*, 101 USPQ2d at 1908, 1911. Although the design in the cited mark is not insubstantial, it is the literal portion of the mark that dominates.

While the appearance of the marks is somewhat similar since both encompass the word “FIT” and “GENES,”³ the meanings and commercial impressions are not.

³ In the cited mark, the literal portion of the mark consists entirely of these two words.

To determine the meanings of the marks, we first look at the word “fit.” There are numerous definitions of the word which differ based on usage. Among the numerous definitions are the following for “fit” used as a verb and for “fit” used as an adjective:⁴

Fit (verb)

- 1 : to be the right shape or size
 - This shirt doesn’t *fit* any more.
- 2 : to bring to the right shape or size
 - I had the suit *fitted*.
- 3 : to find room or time for
 - Can you *fit* this in your suitcase?
 - The doctor can *fit* you in tomorrow.
- 4 : to go into a particular place
 - Will we all *fit* in your car?
- 5 : to be suitable for or to
 - I dressed to *fit* the occasion.
- 6 : Equip
 - They *fitted* the ship with new engines.

Fit (adjective)

1. : proper or acceptable : morally or socially correct.
2. : suitable for a specified purpose.
3. : physically healthy and strong.

⁴ We take judicial notice of the definition of “fit” from the Merriam-Webster On-line Dictionary. www.merriam-webster.com/dictionary/fit (last visited January 19, 2018) © 2018 Merriam-Webster, Incorporated.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

Next, we look at the word, “gene,” which is defined as “a specific sequence of nucleotides in DNA or RNA that is located usually on a chromosome and that is the functional unit of inheritance controlling the transmission and expression of one or more traits by specifying the structure of a particular polypeptide and especially a protein or controlling the function of other genetic material.”⁵

When we look at the marks in their entirety, the differences in meanings and commercial impressions are clearly apparent.

In Applicant’s mark, “FIT” is used as a verb, which means “be the right shape or size” and “GENES” is a play on the word, “jeans,” which is an article of clothing. As a whole the phrase “FIT IN YOUR GENES” when used in connection with weight loss programs (Applicant’s services) connotes the goal of the programs.

To the contrary, in the cited mark, “FIT” is used as an adjective and means “physically healthy and strong.” As a phrase, the term FITGENES connotes genetic characteristics of physical health and strength. The mark is suggestive of the registrant’s services of genetic testing and medical advisory services relating to genetic profiling, including weight management services such as personalized genomics-based programs to effectively manage a patient's diet and weight profiling.

⁵ We take judicial notice of the definition of “gene” from the online version of the Merriam-Webster dictionary. www.merriam-webster.com/dictionary/gene (last visited January 19, 2018).

The facts in this case are similar to those in *Approved Pharm. Corp. v. P. Leiner Nutritional Prods. Inc.*, 5 USPQ2d 1219 (TTAB 1987) wherein the Board found that confusion as to source or sponsorship arising from the contemporaneous use of the marks HEALTHY LIFE and HEALTH FOR LIFE for goods including vitamins and dietary food supplements, “while possible, is not likely.”⁶ *Approved Pharm. Corp.* at 1221. The Board noted “that while the respective marks are somewhat similar in appearance, we think HEALTH[Y] LIFE and HEALTH FOR LIFE do not have the same meaning or connotation and engender different commercial impressions.” *Id.* Similarly, in the current case, the marks FIT IN YOUR GENES and FITGENES do not have the same meaning or connotation and also engender different commercial impressions.

While not the dominante element in the mark, the design element, consisting of the interlocking chevron device set forth below



further differentiates the marks in their entireties.

Accordingly, we find that the first *du Pont* factor weighs against a finding of likelihood of confusion.

⁶ The difference between the *Approved Pharm.* case and this one is that in the *Approved Pharm.* case, Petitioner had obtained a letter of consent from Respondent to its registration of HEALTH FOR LIFE, which the PTO rejected. In this case, there is no indication that Applicant sought a consent to her use and registration from the Registrant.

C. Conclusion.

We have considered all of the evidence relating to the *du Pont* factors, including those that have not been discussed, and conclude that notwithstanding that the services are, in part, legally identical, and the channels of trade and purchasers overlap, the marks are too dissimilar to warrant a determination of likely confusion. We consider the first *du Pont* factor dispositive in this case. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (holding that Board did not err in deciding likelihood of confusion based solely on dissimilarity of marks regardless of other *du Pont* factors, that favored a likelihood of confusion, noting that “we have previously upheld Board determinations that one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Kellogg Co. v. Pack'em Ent.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (upholding Board decision that “a single *duPont* factor – the dissimilarity of the marks – was dispositive of the likelihood of confusion issue,” observing “we know of no reason why, in a particular case, a single *duPont* factor may not be dispositive”).

Decision: The refusal to register Applicant’s mark is reversed.