

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: June 22, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Averi Skye Enterprise, LLC
—

Serial No. 87830306
—

Rosezena J. Pierce of RJ Pierce Law Group PC,
for Averi Skye Enterprise, LLC.

Karanendra S. Chhina, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

—
Before Cataldo, Wellington, and Johnson,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Averi Skye Enterprise, LLC (“Applicant”) seeks registration on the Principal Register of the mark HONEYCOMB WAXING STUDIO (in standard characters, WAXING STUDIO disclaimed) for “body waxing services; body waxing services for hair removal in humans; body waxing services for the human body; cosmetic hair removal by means of waxing; depilatory waxing” in International Class 44.¹

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¹ Application Serial No. 87830306 filed on March 12, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as January 1, 2018.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the services identified in the application, so resembles the following registered mark on the Principal Register:



(SALON disclaimed) for “hair salon services” in International Class 44,² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed.

We reverse the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all 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) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for

² Registration No. 5007348, issued July 26, 2016. The mark is described in the registration as “consist[ing] of the wording HONEYCOMB SALON in stylized lettering. The letter Y is replaced by a pair of scissors. The word SALON appears written to the lower right corner of HONEYCOMB.”

which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the relatedness of the goods and/or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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/or services] and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods [and/or services].’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity of the marks


Under the first *DuPont* factor, we compare Applicant's mark and the cited registered mark "in their entirety as to appearance, sound, connotation and commercial impression." *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *DuPont*, 177 USPQ at 567); see also *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

Here, both marks begin with the literal term, HONEYCOMB. Although we must consider the marks as a whole, we point out that the additional wording in the marks, WAXING STUDIO in Applicant's mark and SALON in the cited mark, is highly descriptive if not generic and has been disclaimed. See, e.g., *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) ("DELTA," not the disclaimed generic term "CAFE," was the dominant portion of the mark THE DELTA CAFE).

Despite the similarity of the marks based on the common term HONEYCOMB, we note that this same term will likely be perceived differently by consumers when viewed in the entirety of each mark and in the context of the services. That is, when HONEYCOMB WAXING STUDIO is viewed in the context of body waxing services, the term "honeycomb" will be understood as a play on the beeswax in actual honeycombs.³

³ While this may be a matter of public knowledge, Applicant introduced Internet evidence describing the manufacture of beeswax and honeycomb structures. Request for Reconsideration, TSDR pp. 28-31.



The HONEYCOMB in Registrant’s mark, , almost appears as two separate words HONEY and COMB, separated by the scissors (forming the letter “Y”) design. In the context of hair salon services, consumers will likely perceive a double entendre involving the composite words “honey” and “comb” and their individual meanings in the context of hair styling. In this regard, Applicant submitted evidence showing that honey can be used as an ingredient to promote healthier hair, e.g., hair masks, and is found in various hair treatment products.⁴ The word comb and the scissors design are heavily suggestive of Registrant’s hair styling services.

With the aforementioned differences in connotation and commercial impression in mind as well as the fact that HONEYCOMB is the first literal element of both marks, we find the marks are overall slightly more similar than not. In other words, the latter and more general point of similarity outweighs the different suggestive meanings attributed to each mark.

Accordingly, the *DuPont* factor involving the similarity of the marks weighs slightly in favor of finding a likelihood of confusion.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify documents by title and date. Specific citations are to the page number in the .pdf version of the TSDR records. References to the briefs and other materials in the appeal record refer to the Board’s TTABVUE docket system.

⁴ *Id.*, pp. 56-104 (articles describing benefits of honey for healthy hair, recipes for honey hair masks, and advertisements for hair treatment products containing honey).

B. Weakness of Common Element HONEYCOMB

Under the sixth *DuPont* factor, we consider third-party use evidence of the same or similar term in connection with the same or similar services for purposes of determining commercial weakness of that term. *Palm Bay Imps. v. Veuve Clicquot*, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”). “[E]xtensive evidence of third-party use and registrations 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 (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). The purpose of introducing such evidence 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 Imps. v. Veuve Clicquot*, 73 USPQ2d at 1693 (citation omitted).

In this regard, Applicant argues:⁵

There is a significant number of entities that have sought to adopt or use the term “honeycomb” in their business names in connection with salon services. Applicant submitted evidence in the record of such third-party uses to show that consumers have become so conditioned by the plethora of HONEYCOMB marks that consumers have been educated to distinguish between different such HONEYCOMB marks on the bases of minute distinctions.

Specifically, Applicant asserts that it “submitted evidence in the record of screenshot[s] of at least thirty-five third-party websites using the term

HONEYCOMB in connection with salon services,” as well as “several registrations for HONEY-formative marks in view of the use in connection with the third-party websites, to show that the term HONEYCOMB, with its association to ‘honey’ generally, is highly suggestive of salon services.”⁶ Applicant thus contends that “the scope of protection afforded to Registrant’s HONEYCOMB Salon and design mark, a highly suggestive mark, is necessarily narrow and confusion is not likely to result from the use of Applicant’s mark, especially due to the difference in services.”⁷

The Examining Attorney acknowledges that Applicant “did submit 35 printouts of websites in its Request for Reconsideration where the provider of the ‘salon’ services apparently used HONEYCOMB in its mark for such services to evidence weakness of this wording for the registrant’s ‘salon’ services.”⁸ The Examining Attorney further notes that “[t]aking this at face value, this at most proves that HONEYCOMB is arguably diluted in the marketplace for ‘salon services’ and should, therefore, be entitled to narrower protection vis-à-vis other marks containing same for such ‘salon’ services. A standard and reasonable dilution argument.”⁹ However, the Examining Attorney takes issue with any attempt to link the evidence with a showing of weakness of the term

⁵ 7 TTABVUE 18.

⁶ *Id.*

⁷ *Id.*

⁸ 9 TTABVUE 15.

⁹ *Id.*

HONEYCOMB in connection with waxing services, like those described in the application. “Even if HONEYCOMB is weak for ‘salon’ services there is nothing in the record that it is also so for ‘waxing’ services and should also be afforded narrower analysis for marks containing same.”¹⁰

We further note that the Examining Attorney provides the following thoughts in a footnote:¹¹

Perhaps if the applicant’s argument would have been ‘that while the applicant’s and registrant’s services are indeed provided by the same source, HONEYCOMB is weak in the marketplace for both such services (as supported by the evidence) and should, therefore, should be construed narrowly in regards to use on both,’ then the analysis may have been different, but that is not the case here.

We have reviewed the record and indeed, as Applicant and the Examining agree, it includes printouts from over 35 different third-party websites showing the term HONEYCOMB used in connection with hair salons.¹² These hair salons are located in various parts of the country.

The following is a sampling of excerpted images from 10 of the websites:

1. HONEYCOMB Salon “full service hair & beauty salon in Weatherford [Oklahoma] Area” (www.honeycomb.salon).¹³

¹⁰ *Id.* at 15-16.

¹¹ *Id.* at 16, FN. 4.

¹² Internet printouts attached to Applicant’s Request for Reconsideration, filed August 27, 2019. We note that a few of the websites show use of the term HONEYCOMB on hair-related goods or advertise hair salons located outside the United States, e.g., in Edmonton. These were not considered for purposes of showing weakness in the United States of the term in connection with hair salon services.

¹³ *Id.*, TSDR p. 107.

8/20/2019

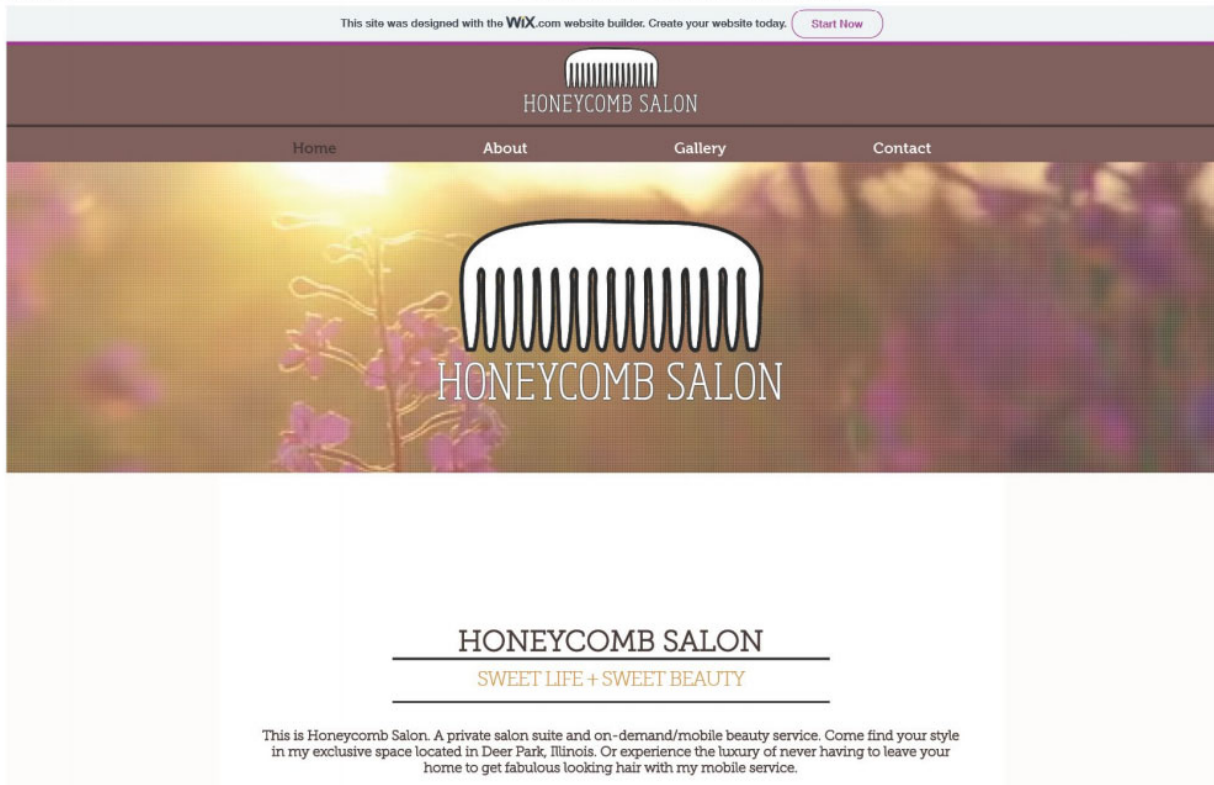
Full Service Hair & Beauty Salon in Weatherford Area - Honeycomb Salon



2. "HONEYCOMB SALON ... a private salon . . . in Deer Park, Illinois" offering "haircuts/ hairstyling/ custom haircolor/ makeup application . . . waxing" (www.honeycombsalonsuite.wixsite.com).¹⁴

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Hair | Deer Park | Honeycomb Salon | Makeup

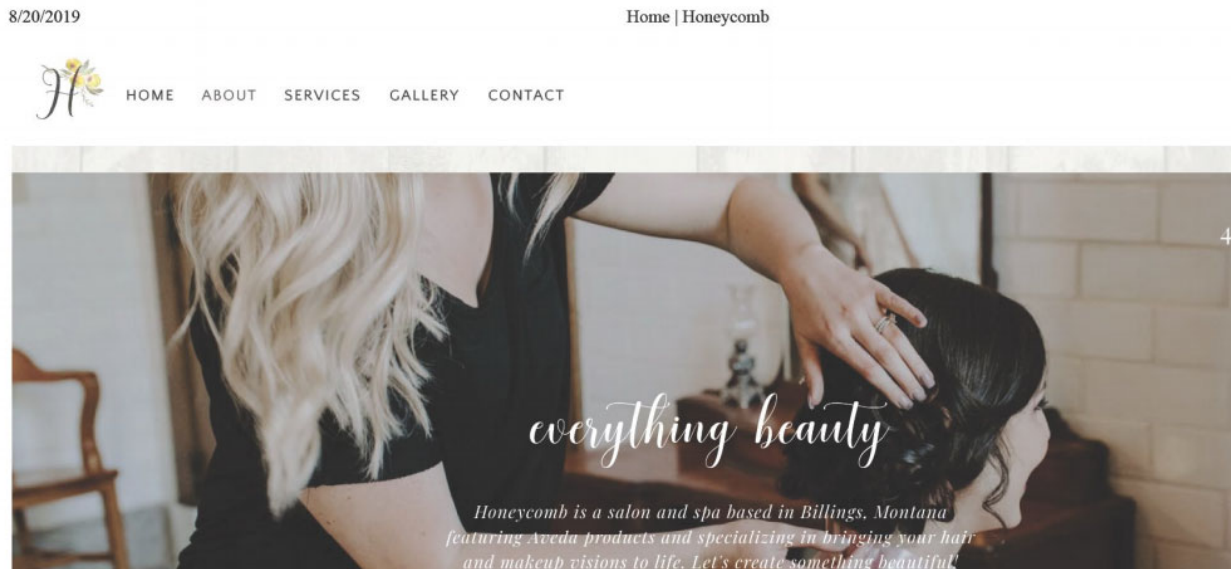


¹⁴ *Id.* at 115.

3. “HONEYCOMB SALON” in Louisville, Kentucky. Offering hair services “from color to cut” (www.honeycombsalonlou.com).¹⁵



4. Honeycomb offering “salon services . . . hair, makeup + waxing” in Billings, Montana (www.honeycombmt.com).¹⁶



5. HONEYCOMB HAIR ARTISTRY offering hair “styling and creating coloring” in Catonsville, Maryland (www.honeycombhairartistry).¹⁷

¹⁵ *Id.* at 117.


¹⁶ *Id.* at 121.

¹⁷ *Id.* at 132.

8/20/2019

Honeycomb Hair Artistry

Enjoy \$10 off your next service when your referred friend books an experience!



410.719.6999

WELCOME TO HONEYCOMB HAIR ARTISTRY

Please see our Beauty Menu for services offered and message us with any questions!

BOOK NOW AT PRIMP SALON

6. “HONEYCOMB Hair Design” offering “health/beauty ... hair salon ... barber shop” services in Milton, Florida (www.facebook.com/honeycombhairdesign).¹⁸

8/20/2019

Honeycomb Hair Design - 127 Photos - 26 Reviews - Health/Beauty - 5242 Willing Street, Milton, Florida 32570

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 **Honeycomb Hair Design** added 15 new photos to the album: Meet the Stylists of Honeycomb Hair Design — at Honeycomb Hair Design.
March 2, 2017 · 🌐

Honeycomb Hair Design
Health/Beauty in Milton, Florida
5 ★★★★★
[Open Now](#)

¹⁸ *Id.* at 135.

7. HONEYCOMB Organic Hair Studio in Phoenix, Arizona (www.honeycombhair.com).¹⁹

8/20/2019

Honeycomb Organic Hair Studio

HONEYCOMB
— organic hair studio —

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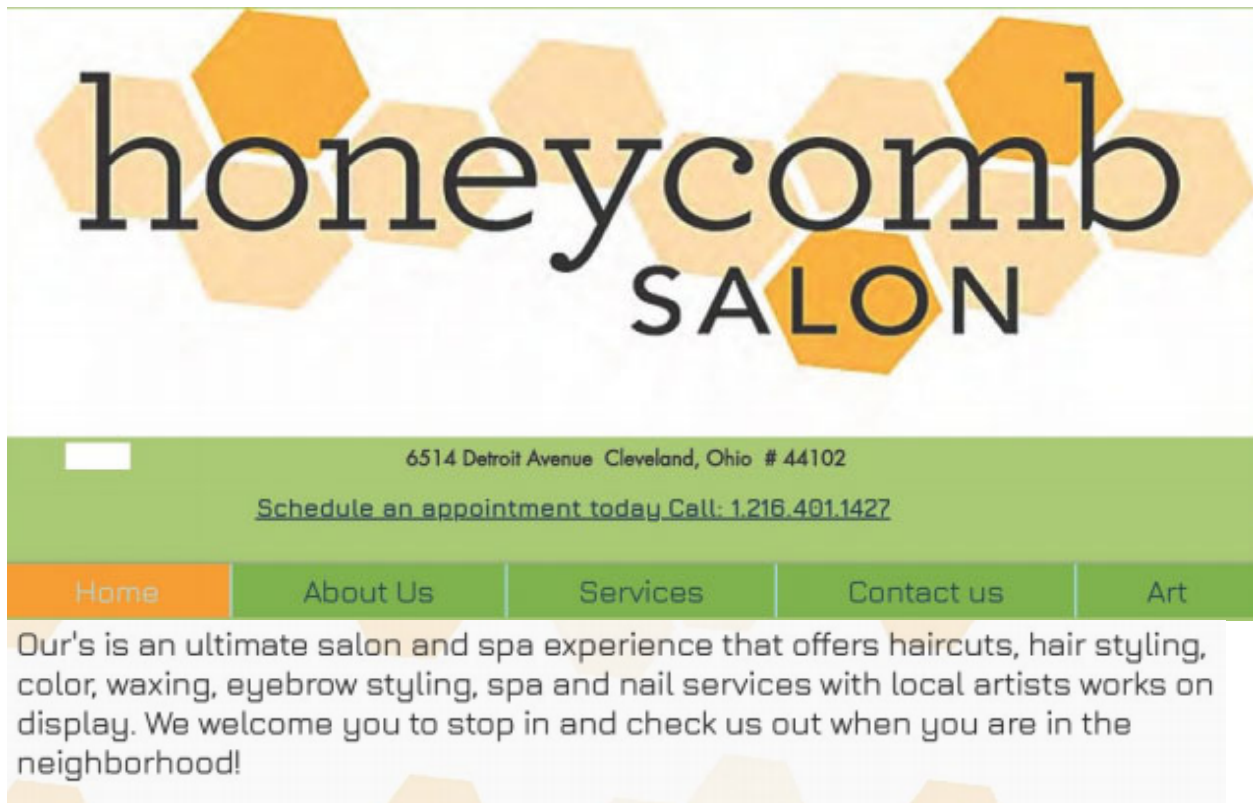
HONEYCOMB ORGANIC
HAIR STUDIO

Opened in 2009 to provide creative and healthy hair services in
Phoenix, Arizona.

8. “Honeycomb Salon” offering hair salon and waxing services in Cleveland, Ohio (www.honeycombcle.com).²⁰

¹⁹ *Id.* at 142.

²⁰ *Id.* at 149.



9. “Honey Comb Salon & Spa” featuring “Hair-Nails-Waxing ...” in Eugene, Oregon (www.honeycombsalonandspa.com).²¹



²¹ *Id.* at 152.

10. “THE HONEYCOMB SALON” in San Diego, California
(www.lovelyhoneycomb.com).²²

8/20/2019

The Honeycomb Salon – A Busy Little Hair Salon in University Heights San Diego

THE HONEYCOMB SALON



WELCOME TO THE HONEYCOMB



The honeycomb is a busy little salon is the heart of San Diego's University Height's neighborhood.

While we cannot discount the possibility that some of these third-party uses of HONEYCOMB in connection with hair salons may be related, there is no evidence to

²² *Id.* at 190.

suggest this is the case for any of them. To the contrary, the printouts derive from different website addresses and the term HONEYCOMB appears in different stylizations and frequently alongside various logos. Thus, we conclude that it is the more likely scenario that each third-party use of HONEYCOMB is being used to identify a separate and unrelated source for services.

There is no “magic number” of third-party uses or type of evidence required to prove weakness. Weakness of term or mark is not a binary question; rather the degree of weakness can vary across a spectrum. We hasten to add, however, that the number of third-party uses in this case is in line with what has been relied upon by our primary reviewing court in previously finding weakness based on extensive third-party use of the same or similar term. Indeed, the Federal Circuit has twice characterized evidence of third-party use as “powerful on its face,” for purposes of demonstrating weakness, based on fewer third-party uses than what we have before us in this case. *See Jack Wolfskin*, 116 USPQ2d at 1136 (paw print found weak in connection with clothing based on a record comprising 14 third-party registrations and uses of paw print marks); and *Juice Generation*, 115 USPQ2d at 1674 (26 third-party registrations and uses of marks containing the words “Peace” and “Love”).

Thus, on this record, we find that the term HONEYCOMB is weak for salon services, including hair salons. The significant number of unrelated hair salons, including those that provide other salon-type services, like waxing, using the term HONEYCOMB to identify their services persuades us this term is prevalent and consumers are likely to distinguish marks with this term based on other elements

that would otherwise have less source-identifying significance. In other words, and put into context here, consumers viewing the two marks can rely upon subtle differences between the marks, such as Registrant's scissors design element that separates the words HONEY and COMB, as well as the term SALON, and Applicant's addition of the wording WAXING STUDIO for purposes of distinguishing the marks and perceiving that the two marks are identifying two unrelated businesses.

We further take note that several of the above commercial entities advertise additional services other than hair styling, including "waxing" and skin care from the same location. This brings into relevance the statement made by the Examining Attorney that the "analysis may have been different" if Applicant had argued that HONEYCOMB was weak in the marketplace for both body waxing and hair salon services. Although Applicant may not specifically have argued that HONEYCOMB was not necessarily commercially weak for body waxing services, in addition to hair salon services, the evidence indicates that this is the case and this is relevant in our analysis.

Finally, in addition to this commercial weakness of HONEYCOMB, we keep in mind, as discussed above, the different suggestive meanings that can be attributed to Applicant's use of the term versus Registrant's use of the term. Specifically,

Registrant's use of the scissors design in its mark



emphasizes the two separate words, HONEY and COMB, and is suggestive of honey

and combing for hair styling. Applicant's mark, on the other hand, HONEYCOMB WAXING STUDIO, evokes beeswax used in honeycombs.

In view of the commercial weakness of the term HONEYCOMB in connection with salon services, including hair styling, and the overall slightly different suggestive meanings of this term in one mark versus the other, we find that the sixth *DuPont* factor weighs in favor of not finding confusion likely.

C. Relatedness of the Services, Their Trade Channels and Classes of Purchasers

We now consider the relatedness of the services, their trade channels and the classes of purchasers. In doing so, we make our determination based on the services as they are identified in the application and cited registration. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The evidence adduced by the Examining Attorney and Applicant demonstrates a close relationship between body waxing and hair salon services. Particularly, the Examining Attorney attached Internet printouts showing 7 different third parties advertising hair styling and waxing services from the same location.²³ As illustrated above, Applicant's own Internet evidence reveals at least 4 additional businesses

²³ Attached to Office Actions issued on June 30, 2018 and February 27, 2019.


offering the same services from the same location. The evidence also shows that these services can be advertised in the same trade channels and will target the same class of consumers, mainly female.

Accordingly, the *DuPont* factors involving relatedness of the services, their trade channels, and classes of purchasers, all favor finding confusion likely.

II. Conclusion

Notwithstanding the close relationship between Applicant's body waxing services and Registrant's hair salon services, and our finding that they may be offered in the same trade channels to the same classes of consumers, we ultimately do not find a likelihood of confusion between Applicant's mark, HONEYCOMB WAXING STUDIO



and the registered mark, . We make this decision despite finding the marks are slightly more similar than not because the evidence also demonstrates that many other businesses use that same term for the same services. Consumers are thus able to distinguish the two marks based on their differences and confusion is not likely to result when both marks are used in connection with the involved services.

Decision: The refusal to register Applicant's HONEYCOMB WAXING STUDIO mark under Section 2(d) of the Trademark Act is reversed.