

This Opinion is not a
Precedent of the TTAB

Mailed: April 23, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Here for the Girls, Inc.
dba Beyond Boobs!, Pink-Link and Pink Link

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Serial No. 87345046
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Duncan G. Byers of Pender & Coward PC,
for Here for the Girls, Inc.

Sandra Snabb, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Cataldo, Shaw, and Heasley,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Here for the Girls, Inc. (Applicant) seeks registration on the Principal Register of the mark HERE FOR THE GIRLS, in standard characters, for “Charitable services, namely, providing emotional support services for improvement of young womens [sic] lives affected by Breast Cancer by means of in-person and online support,” in International Class 45.¹

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¹ Application Serial No. 87345046 was filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1(a), on February 22, 2017 claiming dates of first use anywhere of February 14, 2016 and in commerce of September 17, 2016.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used with the identified services, so resembles the mark FOR THE GIRLS, also in standard characters, for "Promoting public awareness of breast cancer over the Internet," in International Class 35,² as to be likely to cause confusion, mistake or deception. Registration also has been refused under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, on the ground that the specimen fails to show use of Applicant's mark in commerce in connection with the identified services.

When the refusals were made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal resumed. The case is fully briefed. We affirm the refusals to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. With its appeal brief, Applicant submitted a substitute specimen, excerpts purportedly from Registrant's website, and Google search results, none of which were previously introduced into the record during prosecution.³ Because Applicant did not assert otherwise, we assume that the evidence Applicant seeks to introduce with its brief was available during the prosecution of its application.

Relying on Rule 2.142(d), 37 C.F.R. § 2.142(d), the Examining Attorney objects to the attachments submitted by Applicant with its appeal brief. Rule 2.142(d) states:

² Registration No. 4234626, issued October 30, 2012; combined Sections 8 and 15 affidavit accepted and acknowledged.

³ 9 TTABVUE 10-32.

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

As set forth in the Rule, the record should be complete prior to the filing of the appeal. If Applicant desired to introduce additional evidence after the appeal was filed, it should have submitted a request to the Board to suspend the appeal and to remand the application for further examination.

Applicant argues that the substitute specimens are nevertheless timely because the above rule—that the record should be complete prior to the filing of the appeal—applies to evidence, not substitute specimens. We disagree. Specimens are a type of evidence establishing that a mark is in use in connection with the identified services, and therefore they are part of the “record in the application,” which should be complete prior to the filing of an appeal. *See In re Metriplex, Inc.*, 23 USPQ2d 1315, 1316 (TTAB 1992) (“[B]ecause by its very nature a service mark can be used in a wide variety of ways, the types of specimens which may be submitted as evidence of use are varied.”); *In re DSM Pharm., Inc.*, 87 USPQ2d 1623, 1625-26 (TTAB 2008) (finding the submitted specimen unacceptable evidence of use of the mark in connection with services). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 904.07(a) (October 2018) (“[R]egistration is refused because the applicant has not provided evidence of use of the applied-for mark in commerce.”).

Applicant further argues that the substitute specimens are not “new evidence” because they are “exactly the same website, simply showing more of [Applicant’s] webpage.”⁴ But Applicant’s own brief characterized the substitute specimen as a “new specimen.”⁵ Moreover, the original submission of a partial printout of Applicant’s website does not ensure that a later, more-extensive printout of Applicant’s website features all of the same information that was available. Websites are transitory in nature and may be modified or deleted at any time without notification. *See Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010).

Finally, in its reply brief, Applicant requests that, in the event that the Board finds any merit to Examining Attorney’s objection to the specimen submitted with the appeal, the case should be remanded for the Examining Attorney to consider the substitute specimen submitted with Applicant’s appeal brief.⁶ We decline to exercise our discretion to remand the case at this late stage of the proceedings. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1205.01 (2018) (“Remand in an ex parte appeal is a matter of discretion with the Board”). *See In re Big Pig Inc.*, 81 USPQ2d 1436, 1437-38 (TTAB 2006) (applicant’s request for remand after filing of reply brief denied). Additionally, remand of the application for consideration of the substitute specimens would be futile because the declaration accompanying the

⁴ Applicant’s Reply Br., p. 2, 12 TTABVUE 3.

⁵ Applicant’s Br., p. 1, 9 TTABVUE 2.

⁶ Applicant’s Reply Br., p. 2, 12 TTABVUE 3.

specimens did not include the language required under 37 C.F.R. § 2.20. *See* TMEP § 904.05.

We sustain the Examining Attorney's objection. The exhibits submitted with Applicant's appeal brief will not be considered. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); TBMP § 1207.01.

II. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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 services and the similarities between the marks. *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 [or services] and differences in the marks.").

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

First, we consider the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation, and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. Although we consider the marks as a whole, "in

articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s mark is HERE FOR THE GIRLS in standard characters. Registrant’s mark is FOR THE GIRLS, also in standard characters. We find that Applicant’s mark incorporates Registrant’s mark in its entirety and merely adds the word HERE. Incorporating the entirety of one mark within another and simply adding a term typically does not obviate the similarity between the marks, nor does it overcome a likelihood of confusion under Section 2(d). *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (“[T]he presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.”); *see also China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123 (Fed. Cir. 2007) (The common word in CHI and CHI PLUS is likely to cause confusion despite differences in the marks’ designs).

In this case, the addition of the word HERE does not distinguish Applicant’s mark from Registrant’s. Both marks convey the same connotation or commercial impression, i.e., support “for the girls.” The marks also are similar in appearance and sound, inasmuch as both marks are in standard characters and share the dominant wording FOR THE GIRLS. The addition of the word HERE merely modifies the phrase FOR THE GIRLS so as to provide additional detail without significantly changing the sound of the words.

This *du Pont* factor weighs in favor of a finding of a likelihood of confusion with respect to the cited registration.

B. The nature and similarity or dissimilarity of the services

We next consider the similarity of the services. It is well 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. *Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“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 [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services]”).

Both Applicant and Registrant are providing services related to combating breast cancer. Applicant is providing “Charitable services, namely, providing emotional support services for improvement of young womens [sic] lives affected by Breast Cancer by means of in-person and online support.” Registrant is “Promoting public awareness of breast cancer over the Internet.”

The Examining Attorney has introduced seven third-party registrations establishing that Applicant’s cancer-survivor support services and Registrant’s cancer-awareness promotion services are commonly provided by the same entity under the same mark. The following five registrations are the most relevant:⁷

- Registration No. 3312296 for the mark LINKS FOR LIFE for, inter alia, “Promoting public awareness of breast cancer” and “Organizing and

⁷ Office Action of May 22, 2017, pp. 43-60.

conducting support groups in the field of breast cancer awareness for breast cancer patients and members of their family”;

- Registration No. 4236888 for the mark SINGLETON for, inter alia, “Promoting public awareness of the needs of cancer patients and their families” and “Providing personal support services for patients and families of patients with cancer, namely, emotional counseling and emotional support”;
- Registration No. 4608189 for the mark SISTERS BY CHOICE for, inter alia, “Promoting public awareness of breast cancer for women” and “Organizing and conducting support groups in the field of breast cancer”;
- Registration No. 4613176 for the mark FORCE for, inter alia, “Promoting public awareness of the need for breast and ovarian cancer awareness, education, and research” and “Providing peer-to-peer emotional counseling and emotional support services for people affected by hereditary and breast and ovarian cancer”; and
- Registration No. 4882495 for a word and design mark for, inter alia, “Promoting public awareness about cancer and cancer research, prevention, diagnosis, treatment, the cure of cancer” and “Providing personal support services for patients and families of patients with cancer, namely, emotional counseling and emotional support”.

The Examining Attorney also introduced excerpts from third-party Internet web sites establishing that a number of organizations provide both Applicant’s and Registrant’s services. The following examples are representative:

- Excerpts from youngsurvival.org showing the mark, “Young Survival Coalition,” used in connection with offering links to “Find Support Online” and promoting public awareness of breast cancer via articles, email, and online tools and forums;⁸
- Excerpts from komen.org which show the same mark, “Susan G. Komen,” used in connection with offering links to “Support Groups” and promoting public awareness of breast cancer via online information;⁹
- Excerpts from cancerhopenetwork.org which show the same mark, “Cancer Hope Network,” used in connection with a service matching cancer patients

⁸ Office Action of May 22, 2017, pp. 4-16.

⁹ *Id.* at 17-24.

and their families with volunteer cancer survivors for emotional support, as well as with materials about breast cancer;¹⁰

- Excerpts from stupidcancer.org which show the same mark, “Stupid Cancer,” used in connection with links to support for cancer patients, family, and caregivers, as well as with promoting public awareness of cancer via online information;¹¹
- Excerpts from dana-farber.org which show the same mark, “Dana-Farber,” used in connection with “offering comprehensive care, support, and education” tailored for breast cancer patients;¹² and
- Excerpts from lbbc.org which show the same mark, “Living Beyond Breast Cancer,” used in connection with breast cancer services, include help telephone lines and links to support, and stating: “Connecting you to information you can trust and support you can count on.”¹³

The foregoing evidence establishes that Applicant’s cancer-survivor support services and Registrant’s cancer-awareness promotion services are related. The respective services are commonly offered under the same mark by the same entity to the same consumers, namely, patients, family members, and caregivers.

This *du Pont* factor weighs in favor of a finding of a likelihood of confusion with respect to the cited registration.

C. Strength of the marks

Applicant argues that the term “the girls” is commonly used, weak, entitled to narrow protection, and is therefore unlikely to cause confusion.¹⁴ Inasmuch as we

¹⁰ *Id.* at 25-31.

¹¹ *Id.* at 32-34.

¹² December 13, 2017 Final Office Action, pp. 4-19.

¹³ *Id.* at pp. 20-28.

¹⁴ Applicant’s Br., p. 5, 9 TTABVue 6.

have not considered Applicant's untimely Google search results, there is no evidence to support this argument.¹⁵ This *du Pont* factor is neutral.

D. Conclusion

Because the marks are similar and the services are related, there is a likelihood of confusion between Applicant's mark, HERE FOR THE GIRLS, and the mark FOR THE GIRLS in the cited registration.

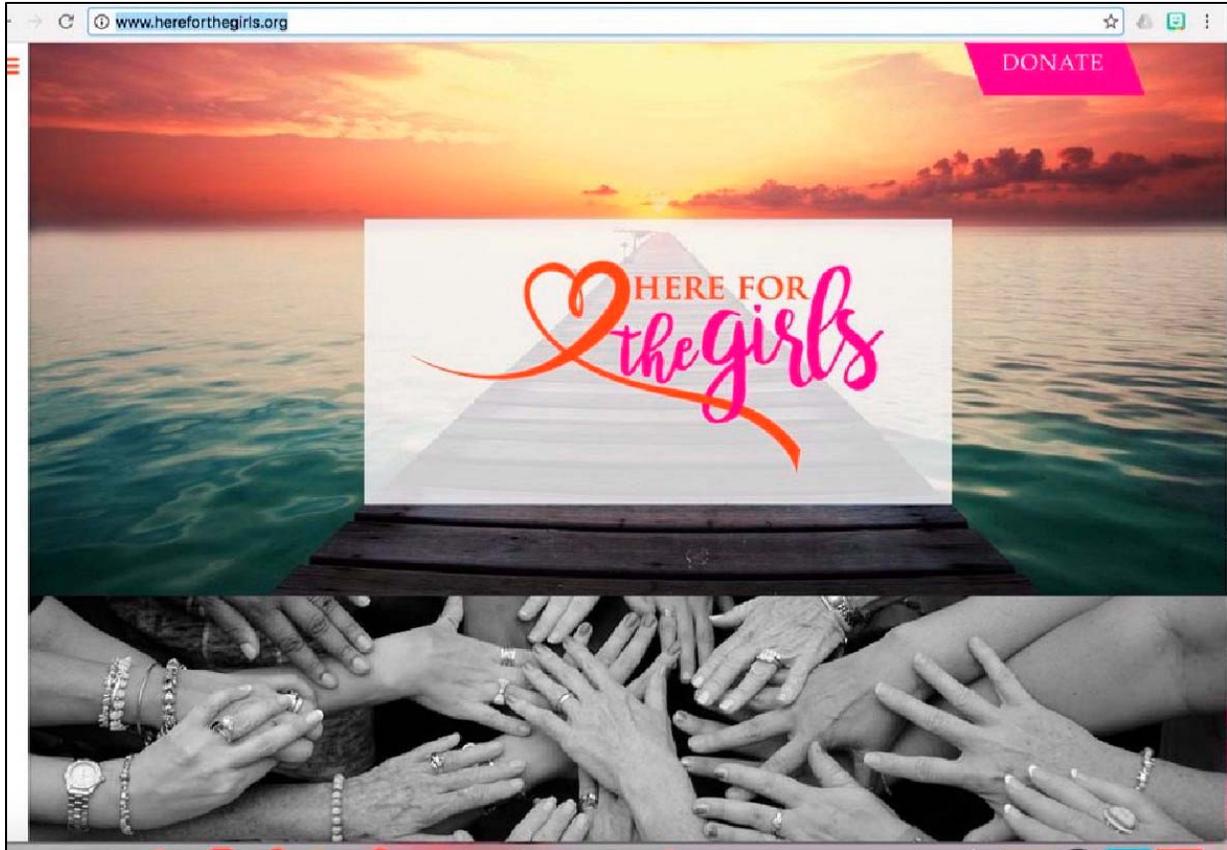
III. Specimens

Under Section 45 of the Trademark Act, a service mark is used in commerce "when it is used or displayed in the sale or advertising of services" "[A]n acceptable specimen must show 'some direct association between the offer of services and the mark sought to be registered therefor.'" *In re Pitney Bowes, Inc.*, 125 USPQ2d 1417, 1419 (TTAB 2018) (quoting *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973)). In determining "whether a mark is used in connection with the services described in the [application], a key consideration is the perception of the user." *In re JobDiva, Inc.*, 843 F.3d 936, 121 USPQ2d 1122, 1126 (Fed. Cir. 2016).

Applicant submitted the following specimen, which is described as "the support webpage showing a white box in the center of the page displaying the words 'Here for the Girls.'"¹⁶

¹⁵ In any event, Google Search results such as those submitted by Applicant are of limited value. See *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Because the GOOGLE search report provides very little context of the use of ASPIRINA on the webpages linked to the search report, it is of little value in assessing the consumer public perception of the ASPIRINA mark.").

¹⁶ Application of February 22, 2017.



The mark HERE FOR THE GIRLS appears in the URL of the web page and in a white box in the middle of the page. The page includes a tab at the top of the page with the word “DONATE” in a pink box. However, there is no mention of any services Applicant is providing. That is, prospective consumers may donate, but they will have no idea to whom they are donating or why. Absent any references to Applicant’s charitable services, the mark HERE FOR THE GIRLS is not associated with the services. *See, e.g., In re Keep A Breast Found.*, 123 USPQ2d 1869, 1876-1879 (TTAB 2017). As such, applicant’s specimen fails to show use of Applicant’s mark in commerce in connection with the identified services.

Decision: The refusal to register Applicant’s mark is affirmed under Section 2(d) and under Sections 1 and 45 of the Lanham Act, 15 U.S.C. §§ 1051, 1052(d), and 1127.