

This Opinion is Not a
Precedent of the TTAB

Mailed: August 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Evolve Health Group, Inc.

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Serial No. 88030138

A. John P. Mancini and Amy E. Carroll of Mayer Brown LLP, for Evolve Health Group, Inc.

Katherine Stoides, Trademark Examining Attorney, Law Office 101,
Zachary Sparer, Managing Attorney.

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Before Goodman, Thurmon and Stanley, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Evolve Health Group, Inc. (“Applicant”) seeks registration on the Principal Register of the mark OCTAVE, in standard characters for “outpatient mental health services delivered by licensed counselors,” in International Class 44.¹ The Examining

¹ Application Serial No. 88030138 was filed on July 9, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear (e.g., 10 TTABVUE 6). Citations to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office’s Trademark Status & Document Retrieval (“TSDR”) system.

Attorney finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), finding a likelihood of confusion, based on the registered mark OCTAVE for:

Downloadable computer software for use in measuring, monitoring, storing, displaying, reporting on, integrating, visualizing and sharing data with respect to patient medical profiles, diagnoses, tests, histories, conditions, treatments and prognoses, physician visits, RX compliance and responses in the fields of neurology and autoimmune diseases and disorders, in International Class 9; and,

Software as a service (SAAS) featuring software for use as a medical patient care management platform in the fields of neurology and autoimmune diseases and disorders; software as a service (SAAS) featuring software for use in measuring, monitoring, storing, displaying, reporting on, integrating, visualizing and sharing data with respect to patient medical profiles, diagnoses, tests, histories, conditions, treatments and prognoses, physician visits, RX compliance and responses; all of the foregoing in the fields of neurology and autoimmune diseases and disorders; medical laboratory services, in International Class 42.²

Applicant and the Examining Attorney have filed briefs and the appeal is ready for final decision. We reverse the refusal to register.

I. The Record

We begin with a review of the prosecution history to provide context for an objection Applicant made to evidence submitted by the Examining Attorney. A few months after the application was filed, it was suspended, based on two earlier-filed applications that might, if they issued as registrations, support Section 2(d) refusals

² Registration No. 6653959 issued on February 22, 2022.

of the application.³ One of the two cited applications resulted in a registration that issued on February 22, 2022, and on August 6, 2022, the Examining Attorney issued an Office Action citing the OCTAVE mark identified above as the basis for a Section 2(d) refusal.⁴ The Examining Attorney submitted no extrinsic evidence with this Office Action.

On February 6, 2023, Applicant responded to the Office Action, with a proposed amendment to the goods and services, arguments and evidence.⁵ The original application, as filed, included downloadable software goods in International Class 9 and services in International Class 44. The amendment was made to the class 9 software, by adding the following limitation: “all of the foregoing for use by patients accessing mental healthcare services.”⁶ The Examining Attorney accepted the amendment, but maintained the Section 2(d) refusal in a final Office Action.⁷ The Examining Attorney submitted evidence to show that “neurological diseases are often accompanied by mental disorders”⁸ This evidence is not explained and is mentioned in just two sentences in the final Office Action.⁹ Yet this evidence led the

³ Notice of Suspension, dated November 2, 2018, at 2.

⁴ Office Action dated August 6, 2022.

⁵ Response to Office Action dated February 6, 2023.

⁶ *Id.* at 3.

⁷ Final Office Action dated March 9, 2023.

⁸ *Id.* at 3.

⁹ *Id.* Indeed, over half the content of those two sentences are quoted from one of the Internet references.

Examining Attorney to conclude “there is a definite overlap between the two fields [of neurology and mental health].”¹⁰

Applicant requested reconsideration and, in that request, deleted the International Class 9 software goods and amended the International Class 44 services to “outpatient mental health services delivered by licensed counselors,” the services at issue in this appeal.¹¹ Applicant argued that the question was not whether these medical fields have some connection, but whether the goods and services in the cited registration are similar to those identified in the application.¹² Applicant submitted more pages from its own website and additional Internet screenshots.¹³ The Examining Attorney denied the request for reconsideration and provided additional evidence concerning connections between neurology and mental health.¹⁴

Applicant objects to the evidence submitted by the Examining Attorney with the Denial of the Request for Reconsideration.¹⁵ Applicant argues “the evidence does not address any issues raised in the Request for Reconsideration that were not presented previously by Applicant.”¹⁶ There is some merit to Applicant’s point, as some of the evidence submitted with the Denial of the Request for Reconsideration was cumulative to materials the Examining Attorney previously submitted about

¹⁰ *Id.*

¹¹ Request for Reconsideration dated September 11, 2023.

¹² *Id.* at 8-9.

¹³ *Id.* at 11-30.

¹⁴ Denial of Request for Reconsideration dated October 10, 2023.

¹⁵ 7 TTABVUE 6-8.

¹⁶ *Id.* at 7.

connections between neurology and mental health. The Examining Attorney also submitted eleven third-party registrations

with the same or similar goods and/or services as those of both applicant and registrant in this case. This evidence shows that the goods and/or services listed therein, namely clinical tools for storing patient medical information in the form of software and/or software as a service services and mental health services, are of a kind that may emanate from a single source under a single mark.¹⁷

We agree with Applicant that this evidence could have been submitted earlier. Moreover, we believe earlier submission of evidence key to supporting a refusal provides a better chance for an applicant and the Examining Attorney to resolve differences during prosecution. Nevertheless, our rules expressly allow for submission of evidence with a denial of a request for reconsideration. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1204 (June, 2024) (“the examining attorney may submit therewith new evidence directed to the issue(s) for which reconsideration is sought”). If Applicant felt additional prosecution was warranted based on the new evidence, it should have requested a remand. We overrule Applicant’s objections to the record.¹⁸

II. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont*

¹⁷ Denial of Request for Reconsideration at 2.

¹⁸ Applicant also argues “the evidence should be deemed irrelevant to the issue for which it has been presented ...” 7 TTABVUE 7-8. We reject this challenge, as the evidence is clearly relevant. It is not very probative, as we note below. But we will not strike it.

de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods or services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Shell Oil*, 26 USPQ2d at 1688 (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.

See In re i.am.symbolic, LLC, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *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 differences in the marks.”).

III. Likelihood of Confusion – Analysis

The dispute between Applicant and the Examining Attorney in this appeal focuses on the second, third and fourth *DuPont* factors.¹⁹ The marks are identical, a point Applicant never directly addresses in its brief, but one that weighs heavily in any likelihood of confusion analysis. Even identical marks, however, will not create a likelihood of confusion if other *DuPont* factors weigh heavily against such an outcome. *See, e.g., Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 USPQ 151 (TTAB 1983), *aff'd* 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984) (second *DuPont* factor may outweigh the first); *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS 353, at *11 (TTAB 2023) (identical marks, but two of three services found unrelated). *Cf. Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (“Even where the marks at issue are identical, or nearly identical, the Board has found that

¹⁹ These factors consider the similarity of the goods and services and the similarity of the trade channels.

differences in connotation can outweigh visual and phonetic similarity.”). We will begin with the disputed *DuPont* factors.

A. Relatedness of the Goods and Services and Trade Channels

Our evaluation of the second and third *DuPont* factors is based on the goods and services identified in the Application and the cited Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). A likelihood of confusion may be found if any goods or services recited in the identification of goods or services in a particular class in an application are related to any of the goods identified in a cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *see also Double Coin Holdings Ltd. v. Tru Dev.*, Pro. No. 92063808, 2019 TTAB LEXIS 347, at *18 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015). In addition, the goods or services need only be sufficiently related that a consumer would be likely to assume, upon encountering the goods or services marketed under the marks at issue, that the goods or services originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007).

The Application identifies “outpatient mental health services delivered by licensed counselors,” in International Class 44. The cited Registration identifies “downloadable computer software for use in measuring, monitoring, storing, displaying, reporting on, integrating, visualizing and sharing data with respect to

patient medical profiles, diagnoses, tests, histories, conditions, treatments and prognoses, physician visits, RX compliance and responses in the fields of neurology and autoimmune diseases and disorders,” in International Class 9 and the following services in International Class 42:

Software as a service (SAAS) featuring software for use as a medical patient care management platform in the fields of neurology and autoimmune diseases and disorders; software as a service (SAAS) featuring software for use in measuring, monitoring, storing, displaying, reporting on, integrating, visualizing and sharing data with respect to patient medical profiles, diagnoses, tests, histories, conditions, treatments and prognoses, physician visits, RX compliance and responses; all of the foregoing in the fields of neurology and autoimmune diseases and disorders; medical laboratory services.

While we have no difficulty understanding the services identified in the Application, it is not entirely clear how the services identified in the cited Registration are provided. Nor is it clear who the intended consumers are for those services. Applicant’s consumers are persons seeking mental health counseling, for themselves or for others (e.g., a parent seeking care for their minor child). Registrant’s consumers are harder to define, but from the identification it appears the customers of the Registrant are medical offices or medical groups that provide services to patients. But do regular patients of these providers also see Registrant’s OCTAVE mark?

There is no evidence in the record showing how the Registered mark is used with the identified goods and services. We are cognizant of our duty to read the cited Registration broadly “to include all goods [and services] . . . of the nature and type described therein,” *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS

353, at *11 (TTAB 2023), and resolve any ambiguities regarding its coverage in favor of Registrant “given the presumptions afforded the registration under Section 7(b)” of the Trademark Act. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015)).

But where, as here, there is ambiguity in the identification, we may consider extrinsic evidence to better understand the nature of the identified services. *See, e.g., In re Thor Tech*, 90 USPQ2d 1634, 1639 n.10 (TTAB 2009) (noting that, although extrinsic evidence may not be used to limit or restrict the identified goods, it is nonetheless proper to consider extrinsic evidence in the nature of dictionary entries to define the terminology used to describe the goods); *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990) (“[W]hen the description of goods for a cited registration is somewhat unclear ... it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade.”).

Without any evidentiary basis showing how the Registered mark is used, the Examining Attorney found the goods and services related “because there is an overlap in the fields of healthcare, specifically mental health and neurology.” 9 TTABVUE 7. The Examining Attorney continues, “the good [sic] and services may be used by the same set of consumers in the course of treatment.” *Id.*

The Examining Attorney’s conclusion is not grounded in the evidence. The Examining Attorney submitted no evidence that patients use or see the cited mark. Given the identification in the cited Registration, we find the identified services are

provided to medical professionals. Whether those services are provided to patients is unclear. And even if those services are ultimately provided to patients, do the patients see the cited mark when that happens? The record contains no evidence to answer these critical questions.

We see at least two likely scenarios for use of the cited mark. First, the mark may be used in the promotion and sale of the identified services to medical professionals, who may then use the services internally within their practice. It is common practice now for medical professionals to enter patient data into some type of software program, but whether that data is also shared with patients using the same branded software is not clear. If the goods and services offered under the cited mark are used only internally by medical professionals, it is unlikely patients will ever see the cited mark.

A second possibility is that the cited mark is used with a type of patient portal software. In this scenario, patients would also use the software to monitor their own care, perhaps using a mobile app or the Internet. If the goods and services are provided by the medical professionals to patients to monitor their own care, what mark or marks are used in the presentation to the patients? Again, we have no evidence in the record to show common practices in this regard. Do the medical professionals use the name or mark of their practice group in the portal as seen by patients, or does the OCTAVE mark still appear on the portal screens seen by patients?

We offer these two possible scenarios not to exhaust the possibilities, but to show that in each of these plausible scenarios we cannot determine whether patients (i.e., the consumers of Applicant's services) will ever see the cited mark when it is used on the identified goods and services. Without at least some patient exposure to the cited OCTAVE mark, there can be no likelihood of confusion as to this group of consumers. The Examining Attorney apparently assumed the cited mark is used in a manner that exposes patients to that mark, but there is no basis in the record for making such a finding.

The sole basis for the Examining Attorney's conclusion that the goods and services are related is the fact that some mental health conditions are linked to neurological conditions.²⁰ The Examining Attorney submitted evidence to show this relationship between medical conditions, but that does not mean the cited mark will be used in a manner that could lead to confusion. It shows there is a possibility of confusion, but one that depends on several facts that are not established by the record. Consider the following sequence, which is one path that could lead to the type of confusion the Examining Attorney apparently has in mind:

- First, a patient seeks medical care from a neurologist, whose practice uses the OCTAVE software provided by Registrant;

²⁰ The Examining Attorney argues that Applicant's initial inclusion of International Class downloadable software goods is evidence the goods and services are related. 9 TTABVUE 10-11. We disagree for two reasons. First, as we noted above, the International Class 9 goods were deleted prior to this appeal, and are therefore, not before us. Second, the question is not whether some providers of mental health counseling also offer some type of downloadable software, but rather whether the specific goods and services identified in the cited Registration are related to the mental health counseling services in the Application.

- Second, the practice uses the OCTAVE mark when it provides information to the patient (i.e., the patient sees the cited OCTAVE mark); and
- Third, the patient later seeks mental health counseling from Applicant under the OCTAVE mark, recalls the cited OCTAVE mark, and is then confused.

This sequence might be possible, and it might not be. The only evidence supporting the Examining Attorney’s analysis are documents showing a connection between neurology and mental health. Some of these records show that medical practice groups may include both neurology and mental health counseling services, under a single mark.²¹ This evidence comes closer to supporting the Examining Attorney’s conclusions, but it, too falls short. This evidence does not resolve the ambiguities we noted above.

Consider a large medical practice group that includes a neurology practice group and mental health counseling, these and other medical services are provided under a single mark. Assume the neurology group within this practice buys and uses OCTAVE software goods and SAAS from the owner of the cited Registration. Note the cited Registration is expressly limited to the “the fields of neurology and autoimmune diseases and disorders.” The evidence supports our hypothetical to this point. But we are now confronted by the ambiguities explained above. Will the goods

²¹ Final Office Action dated March 9, 2023 at 6-9. This evidence consists of excerpts from Internet site of Providence.org, which discusses Covenant Health, which appears to be a large, integrated healthcare provider. This is the sole evidence of an integrated practice that includes both neurology services and mental health counseling.

and services be used only by the neurology group? Will the goods and services be used only internally? There are many more questions than answers given the record in this appeal.

The Examining Attorney skipped too many steps. The possibility of some patients receiving neurological and mental health care is not enough to show that the goods and services are related, because we cannot determine whether the cited mark is ever used in a manner that could lead to confusion of Applicant's patients. Moreover, the evidence submitted by the Examining Attorney shows that neurology and mental health are distinct services typically provided by different health care professionals, as the following excerpt illustrates.

When it comes to neurologic conditions that can mimic mental health conditions, a neurologist may recommend a psychiatric assessment for co-management. If the patient is struggling with depression or other mood issues – even with a neurologic condition – neurologists will likely refer them to a psychiatrist or psychologist for an evaluation and treatment plan.

In cases when a patient receives a correct diagnosis, the neurologist may still refer them to a psychiatrist for ongoing mental health support.

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This evidence shows that neurologists and mental health counselors may sometimes work together on the care of a single patient. But that just brings us back, yet again, to the questions about how the cited mark is used. Without any evidence on that point, it is rank speculation to contend that the cited mark will be seen by patients who receive such care. Even if the neurology practice group that posted the excerpt above uses the cited OCTAVE software, we cannot say that mark will be seen by the patients.

²² Denial of Request for Reconsideration, dated October 10, 2023, at 7.

While the Examining Attorney has established that some neurological conditions are related to mental health conditions, that does not establish the same relationship between the goods and services identified in the cited Registration and the services identified in the Application. By way of example, if exercise is also linked to some mental health conditions, that link would not make health club services related to mental health counseling. The mere fact that consumers might use two types of services in a complementary manner does not mean consumers expect both services to be offered under a single mark.

The Examining Attorney also submitted eleven third-party registrations showing that software somewhat similar to that identified in the cited Registration is also used by mental health care providers.²³ None of these third-party registrations identify both neurological services and mental health counseling services, so the evidence does not show that these two types of services are often offered under the same mark.²⁴ Instead, this evidence suggests that some mental health groups use software to manage patient care.

Some of the third-party registrations appear to be medical practice groups that provide information to patients using software somewhat similar to that identified in

²³ *Id.* at 27-50.

²⁴ Other evidence in the record shows that such practices exist, and Applicant has conceded this point. Request for Reconsideration dated September 11, 2023 at 9 (acknowledging that one article excerpt submitted by the Examining Attorney “suggests that in some cases patients may encounter health care in different fields provided under the umbrella trademarks of integrated healthcare providers. However, that is not the situation here.”). But, as we explained above, even in such an integrated practice group, it does not follow that patients will see the cited mark, as such a group might use its own branding on any patient portal services it offers.

the cited Registration.²⁵ This evidence is somewhat probative because it shows that some mental health care providers offer both counseling and patient portal software (i.e., a portal into the patient’s own medical records) under the same mark. But there are too few registrations to indicate whether this is a common practice, and even if it is, this practice does not resolve the ambiguity we noted above. Indeed, this evidence suggests that when a medical group offers portal services of this type, they may use their own trademark with the service, rather than the mark of a third-party supplier of the software. The point is simply that this evidence does not clarify the critical point of whether the cited mark is likely to be seen by Applicant’s consumers.

There is insufficient evidence to show that the goods and services are related in a manner that would lead to consumer confusion. Nor is there evidence that the trade channels overlap. If the cited OCTAVE mark is used with software that is marketed to and used internally by a neurological medical group, that is a wholly distinct trade channel from the one through which Applicant’s mental health counseling services are provided. We find the second and third *DuPont* factors weigh heavily against a likelihood of confusion.

²⁵ Denial of Request for Reconsideration, dated October 10, 2023, at 27-50. For example, the registration of the mark MINDWORX identifies software services that provide “information for patients” in International Class 42 and also “psychotherapy services and psychotherapy counseling” in International Class 44. This registration does not identify neurology or autoimmune disease services, as the cited Registration does. The same is true of the other registrations the Examining Attorney submitted. None show use of patient portal services in the fields of neurology and autoimmune diseases and also mental health counseling services. At most, this evidence shows that mental health medical practices sometimes register marks both for their counseling services and for providing information to patients. It does not follow from this evidence that a mark used with specialized patient portal software—one designed for use with neurology and autoimmune diseases—would also be used in connection with mental health counseling services.

B. Customer Care

Applicant argues that the nature of the services it provides means its customers will exercise more care than in a typical consumer purchase. 7 TTABVUE 17-19. The Examining Attorney rejected this argument “as it is unsubstantiated.” 9 TTABVUE 13. While it is true Applicant did not present evidence to show the level of customer care, the Board has found a higher degree of care in prior cases based on the identification of goods and services. *See, e.g., Elec. Design & Sales Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) (finding purchasers sophisticated based on identification of opposer’s and applicant’s goods); *Illumina, Inc. v. Meridian Bioscience, Inc.*, Opp. No. 91194218, 2016 TTAB LEXIS 111, *94 (TTAB Mar. 14, 2016) (“Just based on the products involved in these proceedings, one would expect that all of the purchasers would exercise a high degree of care when making their purchasing decision.”) (nonprecedential); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1413 (TTAB 2010) (“opposer’s heart monitors and applicant’s computer system [monitoring for adverse drug effects] are purchased and licensed only after careful consideration by persons who are highly knowledgeable about the products.”).

We agree with Applicant that persons seeking mental health counseling are likely to exercise care in selecting a provider and in managing the healthcare they receive. The same is likely true of parties purchasing the software goods and services offered under the cited mark, but as we noted above, these are likely medical professionals, not patients. There is no evidence that Applicant’s patients are likely to see the cited

mark, so we will not speculate about how careful they might be if they did see the cited mark. The fact that Applicant's consumers are likely to exercise care is enough to reduce the likelihood of confusion.

C. Conclusion: Weighing the Factors

The marks are identical and that increases the risk of confusion. But the evidence fails to show the goods and services are related in a manner that would increase the likelihood of confusion or that the trade channels overlap. In addition, we find the relevant consumers would exercise greater care than in a typical consumer purchase. When we balance the *DuPont* factors, it is clear the evidence of record does not support the refusal.

Decision: The Section 2(d) refusal is **reversed**, and the Application shall proceed to publication.