

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re The Chiro Place, Inc.
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Serial No. 90119392
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for The Chiro Place, Inc.

María del C. Sánchez Rivera, Trademark Examining Attorney, Law Office 112,
Matthew Cuccias, Managing Attorney.

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Before Bergsman, Goodman and Coggins,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

The Chiro Place, Inc. (“Applicant”) seeks registration on the Principal Register of the mark THE CHIRO PLACE (in standard characters, CHIRO disclaimed) for “Chiropractic services; Chiropractics; Providing information relating to chiropractics,” in International Class 44.¹

¹ Application Serial No. 90119392 was filed on August 17, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s allegation of first use anywhere as of December 5, 2015, and first use in commerce at least as early as March 1, 2016.

Page references to the application record refer to the online database pages of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal

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), on the ground that Applicant's mark so resembles the Principal Register mark THE CHIRO SPOT (standard characters, CHIRO disclaimed) for "Chiropractic services," in International Class 44, as to be likely, when used in connection with these services, to cause confusion, to cause mistake, or to deceive.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.³ We affirm the refusal to register.

I. Evidentiary objection

The Examining Attorney objects to website links embedded in Applicant's appeal brief.⁴ The objection is sustained. The Board has "made clear that providing hyperlinks to Internet materials is insufficient to make such materials of record." *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (citing *In re HSB Solomon*

refer to the Board's TTABVUE docket system. Applicant's brief is at 6 TTABVUE and its reply brief is at 9 TTABVUE. The Examining Attorney's brief is at 8 TTABVUE.

² Registration No. 5680880 issued February 19, 2019.

³ Applicant attached evidence to its appeal brief and reply brief that is already of record (submitted on reconsideration) and, thus, its submission with the appeal brief and reply brief was unnecessary. *See ITC Ent. Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and is a burden on the Board). The Examining Attorney objects to some of this evidence as incomplete printouts from TESS (Trademark Electronic Search System). However, because this objection was not raised in the denial of reconsideration, and the Examining Attorney generally discussed the evidence, any objection has been waived.

⁴ The Examining Attorney made this same objection to the links provided in Applicant's request for reconsideration. Feb. 7, 2022 Denial of Reconsideration at TSDR 3.

Assocs. LLC, 102 USPQ2d 1269, 1274 (TTAB 2012) (“[A] reference to a website’s internet address is not sufficient to make the content of that website or any pages from that website of record.”)).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We 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).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *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.”). These factors, and the others, are discussed below.

A. Similarity of the Services

We first consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.”⁵ *DuPont*, 177 USPQ at 567. Our comparison is based on the services as identified in Applicant’s application and the cited registration. See *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 8 USPQ2d 1944, 1947 (Fed. Cir. 2006) (In reviewing the second *DuPont* factor, “we consider the applicant’s goods as set forth in its application, and the opposer’s goods as set forth in its registration.”).

The services need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that the goods emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified services within that class in the application or cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Applicant’s services are “Chiropractic services; Chiropractics; Providing information relating to chiropractics.” Registrant’s services are “Chiropractic

⁵ Applicant did not address the relatedness of the services in its appeal brief.

services.” The “chiropractic services” listed in the Application and Registration are identical.

In addition, the Examining submitted third-party website evidence to show that chiropractic information services are related to chiropractic services in that businesses that offer chiropractic services also provide information on their websites related to chiropractic care.⁶ *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *6 (TTAB 2020) (website evidence showing how consumers may expect to find both Applicant’s and Registrant’s goods as emanating from a common source is evidence of relatedness). We find Applicant’s services of providing information relating to chiropractics closely related to Registrant’s chiropractic services.

The second *DuPont* factor favors a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Channels of Trade

The third *DuPont* factor requires us to consider “the similarity or dissimilarity of established, likely-to-continue trade channels.”⁷ *DuPont*, 177 USPQ at 567. We will “also discuss the portion of the fourth *DuPont* factor that addresses the ‘buyers to whom sales are made.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (quoting *DuPont*, 177 USPQ at 567).

As to the channels of trade and classes of purchasers, the basis for our analysis is the identification of goods or services set forth in the application and cited registration “regardless of what the record may reveal as to the particular nature of

⁶ Jul. 12, 2021 Office Action at TSDR 2-13.

⁷ Applicant did not address trade channels in its appeal brief.

an applicant's [or registrant's] goods [or services, or] the particular channels of trade or the class of purchasers to which sales of the goods [or services] are directed." *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The consumers here are those individuals interested in chiropractic services. The "chiropractic services" listed in the application and registration are identical and unrestricted as to trade channels. Therefore, we must presume that these particular services travel in the same ordinary trade channels and will be marketed to the same potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

We find the trade channels and classes of consumers overlap.

C. Strength of the Mark

Because the strength or weakness of the cited mark informs our comparison of the marks, we address Applicant's arguments that because "there is major dilution of the term 'CHIRO' [in the first position] in the relevant international class (IC 044), the

additional terms [of the marks] will be readily identifiable, have more significance and should be given appropriate weight.” 6 TTABVUE 8.

In determining the strength of the cited mark, we consider inherent strength, based on the nature of the mark itself. *New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011). In tandem, if there is evidence in the record, we consider whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567 (The sixth *DuPont* factor considers “the number and nature of similar marks in use on similar goods.”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016) (We may consider whether an inherently distinctive mark is “weak as a source indicator” in the course of a *DuPont* analysis.). If sufficient evidence of third-party use is provided, it can “show that customers ... ‘have been educated to distinguish between different ... marks on the basis of minute distinctions.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (citations omitted).

The commercial strength based on the marketplace recognition of the mark also is a consideration, *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)”). But “[i]n an ex parte analysis of the *du Pont* factors for determining likelihood of confusion ..., the ‘[commercial strength] of the mark’ ... is normally treated as neutral when no

evidence as to [marketplace recognition] ... has been provided.” Trademark Manual of Examining Procedure (TMEP) § 1207.01(d)(ix) (July 2022).

Applicant has argued that the cited mark THE CHIRO SPOT is not famous. However, because there is no evidence of record regarding the marketplace strength of the cited mark, this consideration is neutral.

In this case, in support of its argument that CHIRO is diluted, Applicant references twelve third-party registrations that contain CHIRO, along with other words or designs, all of which cover chiropractic and related services.⁸ Four of these registrations show disclaimers of CHIRO and two registrations issued on the Supplemental Register.⁹ CHIRO is the lead term in eleven of them. The Examining Attorney also submitted a definition of “Chiro” as chiropractic with an Office Action.¹⁰

This third-party registration evidence and dictionary evidence bears on conceptual weakness. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-695 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”)). Although the Examining Attorney points out that Applicant submitted no evidence of third-party use of CHIRO, the Examining Attorney did submit with her Office Action third-party

⁸ Jan. 12, 2022 Request for Reconsideration at TSDR 8-19.

⁹ The remainder of the third-party registrations are compound word marks that are combined as a single word or the term CHIRO is integrated with a design element.

¹⁰ Dec. 17, 2020 Office Action at TSDR 15, definitions.net.

website evidence showing use of CHIRO by third-parties in connection with chiropractic services.¹¹ This third-party use evidence is reflective of commercial or marketplace weakness of the term CHIRO. *Tao Licensing*, 125 USPQ2d at 1057.

In addition, some of this website evidence provided by the Examining Attorney also shows use of “chiro” or “chiropractic” with terms referencing a location or place for chiropractic services:

ChiroCenter Chiropractic¹²

Crosstown Clinic of Chiropractic¹³

Albuquerque Chiropractic Services mentions its Albuquerque Chiropractic Location.¹⁴

The definition of CHIRO is evidence of the descriptiveness of the term, and the third-party registrations, some of which include disclaimers, or issued on the Supplemental Register, show the Office’s treatment of CHIRO as a descriptive or generic term, allowing for registration of CHIRO marks if there are sufficient differences.¹⁵ *See In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012) (seven registrations incorporating Grand Hotel show that the Patent Office views the marks “as being sufficiently different from the cited registrant’s mark, and

¹¹ *Id.* at TSDR 6-14.

¹² *Id.* at TSDR 6-7.

¹³ *Id.* at TSDR 10.

¹⁴ *Id.* at TSDR 14.

¹⁵ In addition, we note the disclaimer of the term CHIRO by both Applicant and Registrant is a concession that the term is at best merely descriptive. *See In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 n.4 (TTAB 1988) (“By its disclaimer of the word LITE, applicant has conceded that the term is merely descriptive as used in connection with applicant’s goods.”).

from each other, such as not to cause confusion” and “we presume that the owner of the cited registration did not have a problem with the registration of these third-party marks, as they all issued after the registration of the cited registrant's registration without challenge by the registrant”). We also note that the definite article “THE” in Registrant’s mark is nondistinctive. *See In re The Place, Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (“the” is not distinctive).

However, there is no third-party use or third-party registration evidence relating to the use of the term “spot” in connection with chiropractic services. Nor is there evidence of third-party registration or third-party use of the terms THE CHIRO, THE CHIRO SPOT or CHIRO SPOT in connection with chiropractic services. As to the terms “spot” and “place” in Registrant’s and Applicant’s marks respectively, the Examining Attorney provided dictionary definitions. “Spot” is defined as: “the particular place where someone or something is”¹⁶ and “a particular place, area or part.”¹⁷ “Place” is defined as: “a space, area or spot set apart or used for a particular purpose”¹⁸ or “a position, area, spot or a space.”¹⁹

We find that SPOT is a highly suggestive reference to the place, location, or area where Registrant’s services are performed. Therefore, the mark THE CHIRO SPOT

¹⁶ MacMillan Dictionary (macmillandictionary.com), Dec. 17, 2020 Office Action at TSDR 4.

¹⁷ Merriam-Webster Dictionary (merriam-webster.com), Jul. 12, 2021 Office Action at TSDR 16 and Feb. 7, 2022 Office Action at TSDR 2. It was unnecessary for the Examining Attorney to resubmit dictionary definitions already in the record from the same source.

¹⁸ Collins Dictionary (collinsdictionary.com), Feb. 7, 2022 Office Action at TSDR 3. “The examining Attorney submitted additional pages from Collins dictionary for “place” and “spot.” Jul. 12, 2021 Office Action at TSDR 14-15.

¹⁹ Vocabulary.com Dec. 17, 2020 Office Action at TSDR 5.

as a whole is highly suggestive of the place or area where chiropractic services are performed, is conceptually weak, and is entitled to a narrower scope of protection. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (In the likelihood of confusion analysis, marks vary along a spectrum from very strong to very weak).

Nevertheless, we must accept that even weak marks are entitled to protection, and confusion must be avoided amongst weak marks as well as strong marks. *See In re Chica Inc.*, 84 USPQ2d 1845, 1850 (TTAB 2007) (“[E]ven weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services.”) (*quoting In re Colonial Stores*, 216 USPQ 793, 795 (TTAB 1982)).

D. Similarity or Dissimilarity of the Marks

We now turn to the first *DuPont* factor. This factor requires us to determine the similarity or dissimilarity of the marks in terms of appearance, sound, connotation, and overall commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“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*, 101 USPQ2d at 1721.

Further, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). *See also Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004). (“The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.”). “Similarity is not a binary factor but is a matter of degree.” *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Our 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 Nat’l 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.”). “On the other hand, 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, provided the

ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.” *Nat’l Data Corp.*, 224 USPQ at 751.

Applicant’s mark is THE CHIRO PLACE and Registrant’s mark is THE CHIRO SPOT.

The dominant portion of Applicant’s and Registrant’s marks are the terms “place” and “spot” because THE CHIRO in both marks lack source indicating significance, with “chiro” as a descriptive or generic term, disclaimed by both Applicant and the Registrant, and the definite article “the” being non-distinctive.

Although the terms PLACE and SPOT are not similar in appearance and sound, they appear in the same position in each mark (i.e., as the third and final term after THE CHIRO) and are highly similar in connotation. “Place” is defined as “a space, area or spot set apart or used for a particular purpose” while “spot” is defined as “the particular place where someone or something is.”²⁰ Each term is used to define the other. Due to the similar connotations of PLACE and SPOT, the marks THE CHIRO PLACE and THE CHIRO SPOT in their entireties have similar commercial impressions. We find the marks in their entireties are more similar than dissimilar.

Therefore, the *DuPont* factor of the similarity of the marks favors a finding of likelihood of confusion.

²⁰ Merriam-Webster Dictionary, Jul. 12, 2021 Office Action at TSDR 16 and Feb. 7, 2022 Office Action at TSDR 2; Collins Dictionary, Feb. 7, 2022 Office Action at TSDR 3.

E. Actual Confusion

We consider next the seventh *DuPont* factor (“the nature and extent of any actual confusion”) and the related eighth *DuPont* factor (“the length of time during and conditions under which there has been concurrent use without evidence of actual confusion”). *DuPont*, 177 USPQ at 567.

Applicant argues that “the two businesses are not in competition with each other, are separated by thousands of miles, and operate in two entirely different markets,” and “[b]oth businesses have been in operation since approximately 2015, with no reported actual confusion.” 6 TTABVUE 10.

However, “[t]he lack of evidence of actual confusion carries little weight, especially in an ex parte context.” *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (internal citations omitted). Further, “the absence of evidence of actual confusion, under the seventh *DuPont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *DuPont* factor, that there has been a significant opportunity for actual confusion to have occurred.” See *In re Ass’n of the U.S. Army*, 85 USPQ2d 1264, 1273 (TTAB 2007) (citations omitted). See also *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020) (“The eighth *du Pont* factor, by contrast . . . requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.”).

Applicant argues that that the cited mark is primarily in use by a single chiropractic business in and around Castle Rock and Southern Denver, but that

Applicant operates four distinct offices in and around the Memphis metropolitan area in Tennessee and Mississippi. 6 TTABVue 10.

The printout of Registrant's registration lists a Denver address, and Applicant's specimen does indicate locations in Memphis, Tennessee. But none of this evidence or argument indicates that Applicant and Registrant operate in geographic areas that overlap, which suggests that Applicant's consumers have not had an opportunity to encounter Registrant's services and vice versa. Because the record before us is devoid of any specifics regarding the geographic extent or overlap of Applicant's or Registrant's services, Applicant's argument regarding actual confusion is unpersuasive.

Accordingly, the *DuPont* factors regarding actual confusion are neutral.

III. Conclusion

Inasmuch as the services are in-part identical, and otherwise closely related, the trade channels overlap, the marks are similar, and the fame of the mark and actual confusion are neutral, we find confusion likely. We make this ultimate finding with the understanding that the cited mark is inherently weak and thus has a limited scope of protection, but also bearing in mind that even weak marks are entitled to protection against confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993). ("Doubt is resolved against the newcomer") citing *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464–65, 6 USPQ2d 1025, 1026 (Fed.Cir.1988).

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