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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kid's Choice Dental, Inc.

Serial No. 78717522

Paul Adams of The Adams Law Firm for Kid's Choice Dental, Inc.

S. David Sterkin, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Hairston, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Kid's Choice Dental, Inc. filed an intent-to-use application to register the mark shown below for "dentistry."[1] During the prosecution of the application, applicant filed an amendment to allege use claiming November 1, 2004 as the date of first use anywhere and first use in commerce.

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[1] Application Serial No. 78717522, filed September 21, 2005. Applicant disclaimed the exclusive right to use "Kid's" and "Dental."

Registration No. 2,497,011 for the mark KIDCHOICE for "health care services" was cited as a bar to registration.[2] Registration was refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d). When the refusal was made final, applicant appealed. The refusal has been fully briefed. We affirm.

The record

The examining attorney submitted the following relevant evidence to prove likelihood of confusion:

1. Twenty (20) registrations of marks owned by fourteen (14) third parties for both health care services and dentistry;

2. Excerpts from the web pages of Aetna (aetna.com), U.S. Department of Health and Human Services (http://ask.hrsa.gov/pc/), Cigna (cigna.com), University of Medicine & Dentistry of New Jersey (umdnj.edu) evidencing that these entities treat or cover both health care services and dental services;[3]

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[2] Registration No. 2,497,011, issued October 9, 2001.

[3] The Denplan web page is from a company in the United Kingdom (denplan.co.uk), and the CHP web page is from an organization in Canada (htpp://chp-pcs.gs.ca), and therefore, they have not been given any consideration in our analysis.

We also note that the examining attorney submitted the Aetna and Cigna web pages three times, including twice in response to the applicant's request for reconsideration (perhaps for different reasons, but it is hard to tell because the exhibits are not labeled or discussed in detail).

3. An excerpt from the Medline Plus web page (nlm.nih.gov/directories.html) showing that this directory of health professionals categorizes dentists as a subsection of health professionals; and,

4. "Choosing and Using a Health Plan" from the www.ahrq.gov/consumer/hlthpln1.htm website. The discussion of health plans distinguishes between basic medical coverage and dental services. Nevertheless, the author acknowledges that dental plans may be part of a comprehensive health plan.

In responding to the likelihood of confusion refusal, applicant submitted the declaration of Susie Newman, litigation paralegal for applicant's counsel, authenticating Internet searches she conducted on behalf of applicant. Applicant submitted the following searches through Ms. Newman's declaration:

1. A "Google" search for "define: Health Care";

2. A "Google" search for "define: Health Care Services";

3. A "Google" search for "define: Dentistry";

4. A "Google" search for "Health Care Dental";

5. A "Google" search for "Health Care Services"; and,

6. A "Google" search for "Dentistry".

Evidentiary Matters

At the outset, a discussion of the evidence is necessary. With respect to applicant's "Google" search results for "Health Care Dental," "Health Care Services,"

and "Dentistry," applicant submitted only the "hit list" of results and not relevant excerpts from the underlying websites.[4] In this instance, the "hit list" is of no probative value because there is insufficient content to prove the point for which the search was conducted (*i.e.,* that health care services and dentistry are distinct fields).[5] *See In Remacle,* 66 UPSQ2d 1222, 1223 n.2 (TTAB 2002); *In re Fitch IBCA Inc.,* 64 UPSQ2d 1058, 1060 (TTAB 2002).

The examining attorney submitted third-party registrations as part of his evidentiary showing three times during the course of the prosecution of this application: (i) with the initial refusal; (ii) with the final refusal; and, (iii) with the response to the request for reconsideration. In addition, the examining attorney submitted duplicate and triplicate copies of those registrations. For example, the following registrations were submitted three different times during the prosecution of the application for the same purpose (*i.e.,* to show that health care services and dentistry emanate from the same source):

1. Registration No. 2,943,814 for a design mark;

[4] Ms. Newman summarized the content of the underlying websites.
[5] The "Google" search results that provided definitions of "health care" and "dentistry" were relevant because they provided sufficient text to determine the nature of the information.

2. Registration No. 2,904,357 for the mark MAYO CLINIC and Design; and,

3. Registration No. 2,885,588 for the mark WELLSPAN HEALTH and Design.

Four (4) other registrations were submitted twice.

Finally, some of the registrations submitted by the examining attorney were not relevant to show that health care services and dentistry emanate from the same source. For example, Registration No. 2,904,810 for a design mark is registered for "charitable and eleemosynary services for children, namely, to solicit and provide nutritional counseling, dental care, health care, medicine, psychological evaluation and family counseling for orphaned, disadvantaged, neglected and abandoned children (in other words, charitable fundraising services, not dental or health care services); and Registration No. 2,906,656 for the mark AFFILIATED MONITORS, LLC INTEGRITY THROUGH COMPLIANCE for "compliance monitoring services, namely, reviewing standards and practices to assure compliance with laws and regulations in the fields of . . . medicine . . . dentistry . . . home health care" (in other words, monitoring services, not dental or health care services).

Suffice it to say that the better practice would have been for the examining attorney to have submitted a truly representative sample of the third-party registrations with his initial refusal, and not to add cumulative registrations with each additional office action. In addition, the examining attorney should have reviewed his evidentiary showing to ensure relevancy and to eliminate redundancy.

Likelihood of confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.,* 315 F.3d 1311, 65 UPSQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *Han Beauty Inc. v. Alberto-Culver Co.,* 236 F.3d 1333, 57 UPSQ2d 1557, 1559 (Fed. Cir. 2001); *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

A. The similarity or dissimilarity of the marks.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. *In re E.I. du Pont de Nemours & Co., supra*. While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corp.*, 753 F.2d 1056, 224 UPSQ 749, 751 (Fed. Cir. 1983). That a particular feature of a mark is descriptive with respect to the goods and services at issue (*i.e.*, the word "Dental" in connection with dentistry) is one reason for giving less weight to that portion of the mark. *Id.*

Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to source of the goods and services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975); *Winnebago Industries, Inc. v. Oliver &*

Winston, Inc., 207 USPQ 335, 344 (TTAB 1980). In this regard, it is not unusual for consumers to shorten or abbreviate marks. *In re Abcor Development Corp.,* 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978)(Rich, J., concurring)("the users of language have a universal habit of shortening full name – from haste or laziness or just economy of words"); *Marshall Field & Co. v. Mrs. Fields Cookies,* 12 UPSQ2d 1321, 1333 (TTAB 1992) ("companies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward's for Montgomery Ward's, and Bloomies for Bloomingdale's). We regard it as inevitable that applicant's patients and prospective patients will refer to KID'S CHOICE DENTAL as "Kid's Choice."

With respect to the design portion of applicant's mark, in analyzing a composite mark comprising words and a design, the word portion of the mark (*i.e.,* KID'S CHOICE DENTAL) is usually considered the dominant part of a mark because it is more easily remembered and used in communications. Consumers will not reference the toothpaste tube when asking for or discussing applicant's dental services. *CBS Inc. v. Morrow,* 708 F.2d 157 9, 218

USPQ 198, 200 (Fed. Cir. 1983); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

In view of the foregoing, we find that applicant's mark KID'S CHOICE DENTAL and Design and the registrant's mark KIDSCHOICE are highly similar. Although there are clearly some visual differences in the marks, including the design portion of applicant's mark, the dominant portion of the marks KID'S CHOICE and KIDSCHOICE are virtually identical. Thus, the overall similarities in appearance outweigh any the dissimilarities.

As for the sound of the marks, clients or patients will refer to both marks as "Kid's Choice, therefore the overall sound of the marks will be the same.

Both marks have the same connotation. "Kid's Choice" means that children prefer either applicant or registrant. As a result, both marks engender the same commercial impression: children will choose applicant and registrant.

We find, therefore, that the marks are similar.

B. <u>The similarity or dissimilarity of the services</u>.

In analyzing the similarity or dissimilarity of the services, we start with the well-settled proposition that it is not necessary that the services of the parties be identical or even competitive to support a finding of likelihood of confusion. Likelihood of confusion may be

found if the respective services are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they emanate from the same source. *In re Mucky Duck Mustard Co.,* 6 USPQ2d 1467, 1469 (TTAB 1988); *Monsanto Co. v. Enviro-Chem Corp.,* 199 USPQ 590, 595-596 (TTAB 1978).

As discussed previously, the examining attorney has made of record a number of use-based third-party registrations that show that various entities have adopted a single mark for services that are identified in both applicant's application and the cited registration. Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods or services are of a type that may emanate from a single source. *In re Mucky Duck Mustard Co., supra* at 1470 n.6; *In re Albert Trostel & Sons Co.,* 29 UPSQ2d 1783, 1786 (TTAB 1993). See for example:

1. Registration No. 2,943,814 for a design mark for *inter alia* dentistry, wellness and home health care services, and medical services, namely, treating and managing illness;

2. Registration No. 2,838,475 for the mark DKH for *inter alia* comprehensive health care services,

namely inpatient, outpatient, and emergency medical services; physician services and physician managed health care services; and "dental medicine services"; and,

3. Registration No. 2,723,499 for the mark HEALTH IS OUR MIDDLE NAME for *inter alia* health care services and dental health care services.

In addition, there were a number of third-party registrations where dental services were treated as a subsection of health care services. See for example:

1. Registration No. 2,904,357 for the mark MAYO CLINIC and Design for "medical and health care services, namely, clinical services, physician services, dentistry services, medical testing services, and nursing care services";

2. Registration No. 3,028,333 for the mark DEDICATED DENTAL THE DEDICATED DIFFERENCE! For "dentistry and health care services in the nature of dental health maintenance organizations";

3. Registration No. 2,690,049 for a design mark for "healthcare services, namely, hospital care, nursing services . . . providing medical information and medical counseling in the fields of wellness and healthy lifestyles . . . dentistry . . . home health care."

The foregoing evidence demonstrates the existence of at least a viable relationship between the services at issue.

Contrary to the examining attorney's contention that registrant's "health care services" encompass applicant's "dentistry," there is no evidence that "health care" and "dentistry" are synonymous or that dentistry is encompassed

by the term "health care."[6] However, the web pages from the insurance companies evidence that the insurance companies cover both general health care and dentistry. Although general health care and dentistry are treated separately, the fact that the same companies will insure both specialties under the rubric of "health insurance," lends some support to the contention that the general public will perceive health care and dentistry as related enough to cause confusion as to the source of the services.

We conclude the similarity or dissimilarity of the services is a factor that favors finding that there is a likelihood of confusion.

C. Channels of trade.

Applicant is seeking to register its mark for "dentistry," and registrant's mark is registered for "health care services." There are no limitations or restrictions in either description of services. Our determination of likelihood of confusion is based on the description of services as they are recited in the application and registration, and we do not read

[6] None of the definitions for "health care" submitted by either applicant or the examining attorney reference or mention dentistry, and none of the definitions for dentistry mention health care. We note that there are some references to dental health care, but those references are directed specifically to oral health, and not to health care in general. In other words, dentistry is treated as a separate and distinct field.

limitations into those descriptions. If there are no limitations to the nature of the services, channels of trade, or classes of purchasers in the registration or application, we must presume that the services described therein move in all channels of trade normal for the services, and that they are readily available to all classes of purchasers. *Octocom Systems Inc. v. Houston Computer Services Inc.,* 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1987); *CBS Inc. v. Morrow,* 780 F.2d 1579, 218 UPSQ 198, 199 (Fed. Cir. 1983); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981). Thus, for purposes of our analysis, registrant's health care services and applicant's dentistry services are rendered to all consumers, including ordinary consumers. Since the third-party registrations serve to suggest that health care services and dentistry services may emanate from the same source, they also serve to suggest that those services move in the same channels of trade (*i.e.,* the services are rendered by the same sources and they are offered to ordinary consumers). After considering all the evidence, we conclude that the channels of trade are a factor that favors finding that there is a likelihood of confusion.

D. The degree of consumer care.

Applicant contends that degree of consumer care is a factor that favors finding no likelihood of confusion because medical and dental services are expensive and consumers exercise a high degree of care in choosing health care professionals.

Even though we can make certain suppositions about the degree of care consumers exercise when selecting health care and dental providers, as with the other *du Pont* factors, the degree of care cannot be "supposed," it must be supported by evidence. The issue of care includes the degree to which consumers consider the marks and the process by which consumers select health care providers. Unfortunately, there is no such evidence, and consequently, there is no evidence regarding the degree of care exercised by relevant consumers.

As we indicated previously, since there are no limitations on either the registrant's services or the applicant's services, these services are rendered to all consumers, including ordinary consumers. That means that there are both careful, discerning consumers and consumers who are not so careful and discerning.

Nevertheless, we agree with applicant that in view of the cost and importance of health care and dental care,

consumers will exercise a relatively high degree of care in selecting their health care and dental provider.

E. Balancing the factors.

The close similarity of the marks, the services, and the channels of trade far outweigh the degree of care in which consumers may choose their health care and dental providers. Because the marks are substantially similar, we believe that consumers may believe that KID'S CHOICE DENTAL services are related to, sponsored by, or affiliated with KIDSCHOICE health care services. In view thereof, KID'S CHOICE DENTAL and Design used in connection with "dentistry" so closely resembles KIDSCHOICE for "health care services" as to be likely to cause confusion.

Decision: The refusal to register is affirmed.