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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The Children's Hospital of Philadelphia

v.

The General Hospital Corporation

Opposition No. 91122288
to application Serial No. 75820871
filed on October 12, 1999

John S. Child, Jr. of Dann Dorfman Herrell and Skillman, PC for The Children's Hospital of Philadelphia.

I. Stephen Samuels and Timothy H. Hiebert of Samuels Gauthier & Stevens LLP for The General Hospital Corporation.

Before Seeherman, Hohein and Walters, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

The Children's Hospital of Philadelphia has opposed the application of The General Hospital Corporation to register "MassGeneral Hospital for Children" and design, as shown below, for "hospital and health care services."[1] The words "Hospital for Children" have been disclaimed.

[1] Application Serial No. 75820871, filed October 12, 1999, asserting a bona fide intention to use the mark in commerce.

As ground for opposition, opposer has alleged that it is the owner of three registrations and one application (which has since matured into a registration) for various marks containing "tumbler figures" for medical services; that it has used such marks prior to any date upon which applicant can rely; and that applicant's mark so resembles opposer's marks that, when applied to the services identified in applicant's application, it is likely to cause confusion or mistake or deception within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d).

In its answer, applicant has denied the salient allegations in the notice of opposition.

The opposition has been fully briefed, and both parties were represented at an oral hearing before the Board.

The record includes the pleadings; the file of the opposed application; and the testimony, with exhibits, of opposer's witnesses Terese Vekteris, a marketing director of opposer (who testified in both opposer's main testimony

period and in its rebuttal testimony period), and Sarah J. Fashena, a technical advisor to opposer's law firm, and of applicant's witness, Laura M. Hynes. Opposer has submitted, under a notice of reliance, status and title copies of its pleaded registrations and of the registration which issued from opposer's pleaded application; the discovery deposition, with exhibits, of Laura M. Hynes, Director of Marketing of Massachusetts General Hospital; and applicant's responses to opposer's interrogatories. Opposer also relied on applicant's responses to opposer's request for production of documents. Normally such documents cannot be made of record by notice of reliance, see Trademark Rule 2.120(j)(3)(ii); however, in this case applicant has treated this submission as being of record, and therefore we will deem the submission as being stipulated into the record. Applicant has submitted, under notice of reliance, 92 third-party registrations; opposer's response to applicant's interrogatory No. 4; and status and title copies of applicant's registrations for "MassGeneral" for hospital and health care services and for MASSACHUSETTS GENERAL HOSPITAL for hospital services.[2]

[2] Applicant has also submitted with its notice of reliance statements taken from opposer's memorandum in support of its motion for summary judgment. Such a memorandum may not be made of record by notice of reliance; moreover, a statement made in a memorandum is not proof of the truth of that statement. Accordingly, and because opposer has not treated this excerpt from the document as being of record, we have not considered it.

Applicant has raised a number of objections to opposer's evidence. First, applicant objects to Exhibits 5 and 6 to the testimony deposition of Terese Vekteris, which constitute a declaration made by Ms. Vekteris in support of opposer's motion for summary judgment. (Exhibit 6 is simply a copy of Exhibit 5, submitted because portions of the Exhibit 5 declaration were cut off when the declaration was reproduced.) A declaration made in connection with a summary judgment motion may be made of record if the declarant is called as a witness during the testimony period, and identifies and authenticates the declaration. In this case, applicant asserts that there are questions as to Ms. Vekteris's ability to testify as to the accuracy of the statements which she made in the declaration. These questions go to the weight to be accorded the declaration, but do not affect the admissibility of the document. We also note that during Ms. Vekteris's testimony, applicant stipulated to the accuracy of the statements made in paragraphs 1, 2, 3, 5 and 6 of the declaration. (Vekteris test. dep. p. 27) In addition, Ms. Vekteris testified, during her deposition, as to the basis for the statements made in the remaining paragraphs. As a result, even though she did not actually compose the declaration, we find no reason to doubt her personal knowledge or beliefs as to the statements which were made.

Applicant also has objected to exhibits 23-56 of Ms. Vekteris's deposition, stating that these documents, which constitute examples of opposer's use of its marks, were requested in applicant's first request for production of documents and things. Because opposer did not produce these materials in response to the document production request, applicant asserts that opposer may not rely on them now.

Opposer does not contend that these materials need not have been produced. "Many of the documents identified in Vekteris Testimonial Exhibits 34-56 appear at first blush to be responsive to Request No. 7 in Applicant's First Request for Production of Documents and Things, served on May 15, 2002, which called for documents relating to Opposer's use of Opposer's marks in 1002 [sic, should be 2002]." Reply brief, p. 19. Opposer's only response is that the documents were produced "when they came to light only during Opposer's Testimony Period." Id. Opposer does not explain why the documents were not found until its testimony period. Although opposer's attorney states that the documents were not given him until the day of Ms. Vekteris's testimony deposition, with the exception of one exhibit (No. 55), there is no indication that the materials were not previously available to the witness, and it would appear that such materials should have been readily available to opposer at the time the discovery requests were made. For

example, one of the exhibits is opposer's 2001 annual stock report. As for Exhibits 23-32, opposer states that applicant did not object to the introduction of these until after the completion of testimony authenticating such exhibits, and therefore the objection is not timely. In fact, applicant made its objection seasonably, during the testimony deposition of Ms. Vekteris, and immediately after opposer's attorney stated that he wanted to introduce the exhibits (see page 59). Opposer also states that applicant has itself introduced eight of the exhibits to which it has objected; the record shows that such exhibits were indeed submitted during the testimony of applicant's witness, Laura M. Hynes. In view thereof, applicant's objections to exhibits 34, 39, 43, 44, 45, 46 and 52 are deemed waived. The waiver of its objections to these exhibits, however, does not constitute a waiver of applicant's objections to the remaining exhibits. Accordingly, applicant's objections to Exhibits Nos. 23-33, 35-38, 40-42, 47-51 and 53-56 are sustained. The objection to Exhibit 55, however, is overruled; this exhibit consists of a memo from Lands End Business Outfitters which includes attachments showing opposer's logos which Lands End has in its files for use on shirts and the like. Because the attachments merely show logos which Lands End has on file, rather than use of the

logo on goods, the memo and the attachments do not fall within applicant's document production requests.

Finally, applicant has objected to pages 12 through 54 of Ms. Vekteris's rebuttal testimony deposition on the ground that it is not proper rebuttal testimony. Opposer asserts, in response, that the testimony on pages 12 through 48 was to rebut applicant's evidence regarding the lack of strength of opposer's stick figure marks relative to its other marks, and to the seriousness of opposer's marks, and the testimony on pages 48-54 was to rebut applicant's evidence as to circumstances relating to likelihood of confusion.

The testimony of Laura Hynes at pages 113 to 129 of her deposition, which opposer contends Ms. Vekteris's testimony at pages 12 to 28 was to rebut, consists for the most part of Ms. Hynes reading excerpts from Exhibit 57 of the Vekteris testimony deposition (an article about opposer's branding policies). She testified about whether her experience regarding self-referrals at applicant's hospital was similar to that reported in that exhibit regarding opposer's experience. Ms. Hynes was also asked whether she agreed with the article's characterization of the connotation of the stick figures in opposer's marks. Ms. Hynes did respond to one question that, in her opinion, plaintiff's primary service mark was the "CH" logo, and

there were perhaps two pages of testimony regarding the stick figures in which she stated that the stick figures in certain of opposer's exhibits did not appear to be an indication of source, that they "aren't a primary identifier of the site." p. 126.[3]

Opposer seeks to introduce, in rebuttal, testimony regarding when the marks which are the subject of its registrations were first used, the publications in which they were used, the distribution of those publications, etc. This testimony goes to opposer's case-in-chief, and therefore is improper rebuttal. In fact, the testimony which opposer claims to need to rebut, e.g., that plaintiff's primary service mark is the "CH" logo, was previously testified to by opposer's own witness Terese Vekteris during opposer's opening testimony period: "We don't consider the tumbler the primary logo for the hospital. The 'ch' is the logo that has been used for many, many years.... ...we use [the tumbler] as a sort of secondary logo." p. 81.

As for the evidence purportedly designed to rebut what opposer characterized as "circumstances relating to the likelihood of confusion" between the design components of

[3] Opposer claims that Ms. Hynes also implied that opposer's stick figure marks are not serious trademarks, but her actual testimony was that their connotation is whimsical and playful, something that opposer's witness had previously also stated.

the parties' marks, opposer claims that this testimony is to rebut Ms. Hynes's testimony at pages 129-137. However, Ms. Hynes's testimony at these pages discusses the fame of applicant's hospital, the importance of the words MASSGENERAL HOSPITAL FOR CHILDREN within its mark, how consumers refer to applicant's mark, the connotation of the design element in its mark, the similarities and differences between the design elements and, at pages 136 and 137, the witness's statements that she was unaware of any instances of actual confusion. Ms. Vekteris's testimony regarding her view of confusion is not proper rebuttal but, to the extent such opinion testimony has any probative value, it should have been submitted as part of opposer's case-in-chief. The testimony regarding opposer's use of stick figures on lamps and counters, or its general branding practices, is clearly improper rebuttal.

Accordingly, the portions of Ms. Vekteris's rebuttal testimony to which applicant has objected will not be considered.

Opposer is the largest pediatric medical center in the Greater Philadelphia area, and received the second highest ranking among pediatric hospitals in "U.S. News and World Report's" 2001 Annual Guide to America's best hospitals. Opposer's medical facilities include a pediatric healthcare network with approximately forty separate in-patient primary

care, specialty care and hospital facilities located in a tri-state region of Pennsylvania, New Jersey and Delaware.

In 1992 a decision was made to incorporate a tumbler figure into opposer's publications for outpatient services. Previously tumbler figures had been used in opposer's hospital not as trademarks, but as directional signs. In 1993 the use of tumbler figures was expanded to publications relating to clinical and inpatient services.

Opposer's various tumbler marks are reproduced at p. 13 and 14 of this opinion. The single tumbler and the four-tumbler design marks were first used in 1992; the CHOP CONNECTION mark and the tumbler/globe design mark were first used in 1997. The CHOP CONNECTION mark was developed to indicate the hospitals in the region that have a relationship with opposer, i.e., their pediatric units are supervised by opposer's physicians. The name CHOP CONNECTION was chosen because the CHOP acronym was well recognized, and the tumbler figures were used because of their recognition as a symbol at opposer's hospital.

Opposer has promoted its tumbler design marks through their use on brochures, which are distributed through various outlets, including at health fairs and in press kits and recruitment packages. They are also used on directions sheets, on signage at the hospital facilities, on opposer's website, on decals, on promotional items such as message

boards and bags of popcorn, and even scattered across exterior walls at the hospital. In many of these items, we note that the single tumbler figure appears multiple times, and in different positions (e.g., upside down, sideways), as opposed to the four-figure design mark which is the subject of Registration No. 2,254,940.

Opposer's advertising has been modest, compared to that of other health care providers in opposer's area. Opposer has not done any television advertising since 1987, although at the time the CHOP CONNECTION units were introduced opposer sponsored some PBS children's programs, in which the tumblers appeared. Opposer has also done radio advertising (obviously the tumbler figures would not appear in such advertising) and some newspaper ads.

Applicant, although its legal title is General Hospital Corporation, does business under the name Massachusetts General Hospital. Many people shorten this name to "Mass General Hospital" or "Mass General." The hospital has been in existence since 1811, and is the oldest and largest hospital in New England, and the largest and oldest Harvard teaching hospital. It is ranked third overall by "U.S. News and World Report." It attracts researchers and physicians from all over the country and the world, and it has the largest hospital-based research program in this country.

In 1999, in order to make referring physicians and parents more aware of its pediatric medical services, applicant decided to develop a new name and mark. It applied for the subject mark on October 12, 1999 as an intent-to-use application, and in January 2000, the mark was launched in a public campaign, which included a party to which the press, physicians, parents, donors, and others were invited, and a brochure, Introducing MassGeneral Hospital for Children," that was distributed to physicians, parents and others.

Applicant has two primary audiences for its services and its marketing: referring physicians and parents. Patients come as a result of three main sources: the doctors who practice at its hospital, and whose reputation draws patients; referrals by physicians who are not connected with the hospital; and, in an increasing trend, patients and their parents who self-refer, with the parents hearing about the hospital through friends, relatives, and general publicity. Most of the patients come from the greater metropolitan Boston area.

Applicant has publicized its mark through brochures directed to both physicians and to the general public; radio (which obviously would feature only the word portion of the mark); advertisements in such publications as the "Boston Globe" newspaper and "Boston Magazine;" its website which is

accessible to everyone; and conferences. Applicant holds approximately five consumer-oriented events per year, which draw thousands of people. Applicant's public advertising materials, other than its website, are primarily directed to people in eastern Massachusetts. Applicant also distributes advertising materials to physicians throughout New England and western New York, as well as to alumni who were trained at its hospital.

Applicant's marketing expenditures in connection with the applied-for mark were $300,000 in 1999; $516,2007 in 2000; $458,260 in 2001; and $542,328 in 2002.

Opposer has submitted certified status and title copies of its pleaded registrations showing that the registrations are subsisting and owned by opposer. These registrations are as follows:

Mark	Services
	medical services, namely, providing pediatric medical services[4]

[4] Registration No. 2,254,940, issued June 22, 1999.

Medical services, namely, providing twenty-four hour in-patient community-based pediatric and neonatal care through a network of community-based providers[5]

Medical services, namely, providing pediatric medical services[6]

Hospital; medical services; health care; medical assistance; medical laboratory; medical research and medical testing; providing medical and health information ; medical consulting; medical clinics and nutritional counseling[7]

Accordingly, priority is not in issue. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, the evidence shows that opposer

[5] Registration No. 2,215,229, issued December 29, 1998.
[6] Registration No. 2,310,288, issued January 25, 2000.
[7] Registration No. 2,506,480, issued November 13, 2001.

began using its marks prior to applicant's first use of its mark.

This brings us to the issue of likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are 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 Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

As more particularly discussed below in connection with each of the relevant duPont factors, we find that opposer has failed to establish that applicant's use of its mark for its identified services is likely to cause confusion with opposer's four registered marks.

Applicant has conceded that the parties' services and trade channels are similar. We concur. Accordingly, these factors favor opposer.

With respect to the marks, we note that, in discussing the duPont factor of "the variety of goods on which a mark is used (house mark, family mark, product mark)," opposer asserts that it has a family of stick-like human figure design marks. Opposer never pleaded that it had a family of marks, nor do we find that this issue was tried.[8]

[8] In any event, opposer has not proved it has a family of marks. Simply using a series of similar marks does not of itself establish the existence of a family. J & J Snack Foods Corp. v.

Accordingly, we must consider the issue of likelihood of confusion with respect to each of the individual marks pleaded by opposer, registrations for which it has made of record.[9]

McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991).

[9] We have a somewhat unusual situation here in terms of what registrations and marks of opposer should be considered in our analysis. Opposer pleaded ownership of four registrations (one of which was an application at the time the opposition was filed), submitted status and title copies of those registrations (which are listed above), and stated, in its main brief, that the issue to be decided in this proceeding is whether applicant's mark should be refused registration in view of opposer's "three preexisting registered marks or the single human figure mark covered in Children's Hospital's pending application and registration." Brief, p. 4. (The words "pending application and registration" refer to the fact that the application was pending at the time the opposition was filed, but since issued into a registration. Opposer submitted a certified copy of both the application and the resulting registration.) Applicant, in its brief, referred to two additional registrations owned by opposer, Nos. 2,288,465 and 2,487,619, which applicant had introduced as exhibits to the rebuttal deposition of Ms. Vekteris. In its reply brief opposer refers to its four registrations in terms of its claim of priority, but in its discussion of the similarity of the marks, it refers to its six registered marks, reproducing a chart of the marks which applicant had included in its brief. Thus, we essentially have opposer asserting likelihood of confusion based on four registered marks, and applicant indicating that opposer has six registered marks.

Given that the additional two registrations of opposer were introduced by applicant in connection with the cross-examination of opposer's rebuttal witness, we do not consider the issue of likelihood of confusion with respect to these marks to have been tried, such that we should deem the pleadings amended to include such a claim. Certainly opposer did not think so, since it never mentioned its two additional registrations in its main brief. In any event, there are greater differences between the design marks which are the subject of these registrations and applicant's mark than there are between the marks which are the subject of opposer's pleaded registrations and applicant's mark and therefore, because we have found no likelihood of confusion vis-à-vis the pleaded marks, we would find no likelihood of confusion with respect to the additional marks.

Applicant's mark, of course, contains the word element "MassGeneral Hospital for Children." This is the dominant part of applicant's mark, as it is the portion by which consumers (whether physicians and medical personnel, or patients and parents of patients) will refer to and call for applicant's services. See In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). In this connection, the testimony of Ms. Hynes confirms that when she has heard physicians and parents refer to the mark, they do it by the words "Mass General Hospital for Children." Further, because of the renown of Mass General Hospital, consumers are even more likely to remember this portion of the mark. Opposer has shown two instances in which applicant uses the design portion of its mark alone; specifically, the design appears on a T-shirt worn by a teddy bear figure on two pages of applicant's website. However, the entire logo also appears on these pages. These two limited instances are not sufficient to show that the design portion of applicant's mark is dominant, or that the relevant class of consumers, including physicians and parents, will pay particular note to the design feature instead of the word portion.

Opposer would have us ignore the word portion of applicant's mark, citing the principle that a party may not add its house mark to another's mark and thereby avoid confusion. Although the principle is correct, there are

problems with applying it in this case. First, turning to Registration No. 2,215,229 for CHOP CONNECTION and design, it is clear that there are significant additional elements in opposer's mark than just its figure designs, most notably the words, such that one cannot seriously contend that applicant has added its trade name "Mass General Hospital for Children" to opposer's mark. For the same reasons that MassGeneral Hospital for Children is the dominant portion of applicant's mark, the words CHOP CONNECTION must be viewed as the dominant part of opposer's mark, i.e., it is by this part of the mark that people will refer to and call for opposer's services, and the CHOP portion of the mark is an alternate name for the well known Children's Hospital of Philadelphia. Needless to say, applicant's mark is very different from this mark of opposer's in appearance, pronunciation, connotation and commercial impression.

Turning next to Registration No. 2,310,288 for the design of figures circling a globe, again we find significant differences between the design portion of applicant's mark, and this mark, such that we find that applicant has not merely added its trade name to opposer's mark. The globe design, of course, is a prominent element of opposer's mark, and the figures, some right-side up and some upside down, all of which are circling the globe, give the impression of paper doll cut-outs in a paper chain. In

applicant's mark, on the other hand, the design is of three separate figures of different heights, encircled by a larger figure or object. Applicant has presented testimony that its design is intended to connote three children of different ages and ethnic identities, with the concept of "approachable authority," i.e., the hospital, signified by the larger figure. Before adopting the logo, applicant tested it in mall intercept surveys, and therefore we can conclude that the design does convey this connotation to some people.

Thus, although both opposer's mark and applicant's mark contain what might be described as stick figures, there are significant differences in the appearance and connotations of the designs, and additional differences in sound and commercial impression of the marks.

The next mark we consider is that in Registration No. 2,254,940, consisting of four stick figures in different positions, including one which is upside down, and might be perceived to be doing a cartwheel or a handstand. This mark perhaps best exemplifies why opposer refers to its figures as tumblers. Again, although opposer and applicant both use stick figures in their marks, there are such significant differences between the designs that we find that applicant has not merely added its trade name to applicant's mark. Opposer's mark is of four separate figures shown in active

positions of dance or gymnastics, while the design in applicant's mark emphasizes a circle, with a coming together of the three figures under the "protection" of the fourth, larger figure which is above them. Because we find that applicant has not merely added its trade name to opposer's design mark, we must also give full weight to the effect of the word portion of applicant's mark which, as we have said, in dominant. Comparing the marks in their entireties, we find that they are significantly different in appearance, pronunciation (since the word portion of applicant's mark is capable of being pronounced), connotation and commercial impressions.

As for opposer's fourth mark, the single stick figure of Registration No. 2,506,480, again we find significant differences between this mark and the design portion of applicant's mark, such that applicant's mark cannot be viewed as merely adding applicant's trade name to opposer's mark. A single stick figure is very different from the four figures in applicant's mark, with the one figure encircling the three smaller figures. Therefore, again comparing the marks in their entireties, they differ in appearance, pronunciation, connotation and commercial impression.

Opposer has also argued that, because its tumbler design marks are used by hospitals with which it is associated, but which operate under their own names, the

presence of "MassGeneral Hospital for Children" is not a distinguishing element in applicant's mark, but will be regarded by consumers as merely identifying the name of one of opposer's affiliated hospitals. If, in fact, the design feature in applicant's mark were truly similar to opposer's design marks, that argument might be persuasive. However, because of the significant differences in the design elements of the parties' marks, consumers would not assume an affiliation or connection between them.

The factor of the similarity or dissimilarity of the marks favors applicant.

We recognize that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980). However, this does not mean that consumers would view all marks containing stick figures as being the same, or that opposer is entitled to exclusive use of stick figures in the health care field.

On the contrary, applicant has submitted substantial evidence, in the form of 92 third-party registrations, to show that stick figures in this field have a suggestive meaning. Third-party registrations are not, of course, evidence that the marks shown therein are in use or that the public is familiar with them, but they can be used in the

same manner as dictionary definitions, to show that a term or, in this case, a design, has a certain significance in a particular industry. Mead Johnson & Company v. Peter Eckes, 195 USPQ 187 (TTAB 177). In this case, the registrations reaffirm something that is intuitively obvious: stick figures, because they are associated with children's drawings, have a significance in connection with children's hospitals. Of more importance than the registrations is the evidence of third-party use submitted by applicant. Applicant's witness, writing from her home address, requested informational material from a large number of providers of healthcare services. Forty-seven of the responses have been made of record. Although some of the businesses/organizations appear to be more tangentially related to the healthcare field, e.g., adoption organizations, there are many brochures and letters from hospitals and, in particular, children's hospitals. For example, Loma Linda University Children's Hospital (California) has a logo with a taller stick figure appearing to hold the hand of a smaller stick figure (Exhibit 108); Miami Children's Hospital has a stick figure superimposed on a globe (Exhibit 110); Mount Clemens General Hospital (Mississippi) has a logo with four stick figures forming a diamond shape (Exhibit 111); North Texas Hospital for Children uses two stick figures holding hands (Exhibit 113);

St. Luke's Rehabilitation Institute (Washington) contains a stick figure reaching toward the sun in its logo (Exhibit 119); and the logo of Vanderbilt Children's Hospital (Tennessee) has two stick figures that give the appearance of cut-out paper dolls (exhibit 123). Although we do not have evidence of the extent of the use of such marks by the individual institutions, the evidence which has been submitted is sufficient to show public exposure to various stick-figure marks in the health care field. In addition, applicant has made of record pages from 36 websites of institutions and organizations in the healthcare field which also show use of stick figures in their logos. Again, not all of these entities are hospitals or health care providers, but a significant number are. See, for example, exhibit 135 for The Children's Hospital (University of Colorado), showing a single stick figure with one leg raised in a dancing position; exhibit 136 for Children's Hospital (Oakland), showing a "paper-cut-out chain" of five stick figures; and exhibit 158 for Pediatric Health Care Alliance, PA, showing three "smiling" stick figures with arms and legs outstretched.

This evidence demonstrates that the duPont factor of "the number and nature of similar marks in use on similar goods" strongly favors applicant.

With respect to the factor of the conditions under which, and buyers to whom sales are made, there is no dispute that the "buyers" of both parties' services are the same. They are, for the most part, referring physicians and parents who self-refer. However, there is a dispute about the care taken in making the decision to obtain the parties' services. Although both parties accept that physicians and parents of ill children who are deciding on a place for treatment will regard it as a serious decision and will exercise care in making it (and in the case of referring physicians, will be sophisticated purchasers), opposer contends that in an emergency or urgent care situation the "purchase" decision will be more impulsive. In particular, opposer argues that such decisions are made based on the location of the facility, that is, the ambulance or parent will take a child to the closest hospital that provides such care.

We agree that in an emergency situation it is location that is the determinative factor in choosing a hospital. However, for that reason, the trademark of that hospital is irrelevant—it is not a consideration in making the "purchasing" decision. Thus, we find that this factor favors applicant.

The next duPont factor is the fame of the prior mark. Applicant makes an interesting argument in this connection,

essentially turning the analysis of this factor on its head. Even though it is clear that applicant's mark was not used until after opposer had made use of its marks, applicant contends that because the words MASS GENERAL in its mark was used much earlier, we should treat applicant's mark as the prior mark and accord it the status of a famous mark. In making this argument, applicant appears to ignore the fact that it is the design portion of its mark that opposer objects to.

Needless to say, we are not persuaded by this argument. It is the mark for which applicant has applied that we must consider; this mark is not the prior mark, nor do we find, on this record, that it is famous.

As for opposer's marks, we do find that opposer has not established that any of them are famous marks. In fact, it is not clear that even opposer contends that they are nationally famous, but only that they have fame in the tri-state area from which opposer's patients primarily come.[10] Although opposer's name and mark "Children's Hospital of Philadelphia" may be considered to be famous (applicant acknowledges that opposer is a "famous, internationally known hospital," brief, p. 8), opposer has not shown that

[10] In opposer's discussion of the lack of evidence of actual confusion, opposer states that it uses its mark in a territory separate and distinct from applicant's.

any of its design marks have national, let alone international fame.

Opposer cites Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995), in connection with its statement that its design marks are famous in the Greater Philadelphia area. Presumably it is opposer's position that it need only show fame in this geographic area for the design marks to be considered famous. This is not correct. In that case, the Board stated that the evidence showed that the opposer's marks were well known in its specific area of operation, and that it had established local notoriety in its trading area. The Board did not find that the opposer's marks were famous marks, nor did it accord them the expanded scope of protection to which famous marks are entitled.

Thus, on this basis alone, we do find that the factor of fame does not favor opposer.

Moreover, even on a regional level, opposer has not demonstrated the fame of any or all of its design marks. Opposer's advertising, by the testimony of its own witness, Terese Vekteris, has been modest compared to that of other healthcare providers in its marketing area; opposer has not provided any information on its advertising expenditures, or the amount of advertising it does in terms of numbers of

newspapers advertisement placed, printed material distributed, etc.

Opposer asserts, in connection with its claim of fame, information as to the number of facilities in its healthcare network, the number of outpatient visits it receives, the amount of its research awards and the amount of its revenues.[11] However, with the exception of the number of facilities in its network and the number of outpatient visits, the evidence opposer relies on as support for these numbers is Vekteris exhibit 57. This exhibit is an article written by a former employee of opposer, and obviously the statements made in the article are hearsay. Although Ms. Vekteris testified as to the accuracy of many of the comments made in the article, she did not testify as to the numbers set forth by opposer in its brief. In any event, the question is not whether the mark CHILDREN'S HOSPITAL OF PHILADELPHIA is famous, but whether any or all of the pleaded tumbler figure marks are. Thus, opposer's receiving research awards of $75 million in 2001 is largely irrelevant to whether the various design marks have recognition among the relevant consumers.

[11] Opposer also discusses statements made in portions of the rebuttal testimony of Ms. Vekteris but, as we have previously ruled, these portions of the testimony have not been considered because they are improper rebuttal.

As we stated, there is testimony that opposer receives 750,000 outpatient visits a year. However, this is not sufficient to demonstrate fame of the marks. There is no clear evidence as to the extent of usage of the globe design mark, such that we can conclude patients have been exposed to the mark simply by visiting the hospital. Similarly, we cannot ascertain the extent of usage of the four-figure mark. The CHOP CONNECTION and design mark does not appear to be used at opposer's own facilities, but only in connection with the services rendered by hospitals in its network. There is evidence that the single tumbler figure, and multiple images of that figure, are shown throughout the hospital facilities, including on exterior walls, signage, lamps and the like. Although we accept that these tumbler figures are noticeable, we cannot conclude from the mere fact that they appear in the hospital that they have been promoted in such a way that the single tumbler figure can be considered a famous mark. In this connection, we note that there is no evidence as to the number of brochures or other printed matter bearing the tumbler mark which have been distributed to patients within the hospital. And, as we stated previously, there is no evidence about the numbers of brochures or other printed matter bearing the mark which have been distributed to potential patients and referring physicians. Nor is there any evidence about the extent of

any newspaper advertisements directed to potential consumers.

There is no evidence of actual confusion. However, because it is notoriously difficult to obtain evidence of actual confusion, we consider this factor to favor applicant only slightly. As for the length of time during which there has been concurrent use without evidence of actual confusion, applicant had used its mark for a little over three years at the time trial ended. However, the two hospitals are geographically separate, with opposer's hospital network and primary customer base in the tri-state region of southeastern Pennsylvania, southern New Jersey and Delaware, while applicant's hospital (and affiliated hospitals) are in Massachusetts, and its primary customer base is Massachusetts and other parts of New England. Although these facts indicate that there has been no real opportunity for confusion to occur, opposer has stated in its brief that separate hospitals in different geographic locations can be affiliated through a network. To this extent, even consumers in diverse geographic areas could assume a connection between hospitals in Massachusetts and Pennsylvania. Further, opposer's patients are not limited to the Philadelphia region. Opposer's witness Terese Vekteris testified that opposer receives patients from across the nation and the world. p. 77. Thus, the fact

that no instances of actual confusion have been reported slightly favors applicant.

Opposer uses its various design marks as secondary marks for its various healthcare services and, in particular, uses its CHOP CONNECTION and design mark to indicate separate hospitals are affiliated with it. Although none of opposer's four marks would be considered "product" marks, the testimony of opposer's witness Terese Vekteris shows that the tumbler figures in general are secondary logos. (Ms. Vekteris basically viewed the tumbler figure, in whatever combination or state it was portrayed, as a single logo, rather than testifying about the individual marks.) It is clear to us that the name CHILDREN'S HOSPITAL OF PHILADELPHIA and the "ch" logo are opposer's house marks. Applicant uses its mark as a house mark for its children's medical services. We consider this factor to be neutral.

There is no market evidence as to any interface between opposer and applicant, so this duPont factor is inapplicable.

Applicant has the right to exclude others from use of the MASS GENERAL portion of its mark, applicant having used this mark for many years, and owning registrations for MASS GENERAL and MASSACHUSETTS GENERAL HOSPITAL. However, the design portion of applicant's mark is entitled to a limited

scope of protection in view of the numerous third-party uses and registrations for stick figures in the healthcare field. Because opposer's objection is to the design portion of applicant's mark, we find that this factor is neutral.

In terms of the extent of potential confusion, opposer points to the numbers of patients to whom both opposer and applicant provide services as indicating that many people can be confused, while applicant points to the inclusion in its mark of its separately registered and long-used house mark to show that confusion is unlikely. Although applicant's argument relates to some degree to the factor of the similarity of the marks, we think it is also relevant to this factor. Moreover, we think the factor of the care which is exercised in deciding what hospital to use is also relevant to the extent of potential confusion. Because of these countervailing reasons, we find that this factor favors neither party, or it slightly favors applicant.

With respect to the factor of "any other established fact probative of the effect of use, applicant asserts that it adopted its mark in good faith. Opposer, on the other hand, contends that:

> in an obvious effort to ride upon the wave of good will generated by [opposer] for its stick-like human figure designs in the field of pediatric medicine, along comes [applicant] and belatedly adopts a confusingly similar stick-like human figure design to help promote [applicant] as a "hospital for

> children." Not leaving the misappropriation of the good will of [opposer] in the stick-like human figure designs to chance, Applicant simply tacks on the trade name "Mass General ***Hospital for*** Children" to ensure that Applicant's mark is focused and directed to medical services for children, *i.e.*, the primary focus of [opposer's] goodwill.

Brief, p. 21 (emphasis added).

There is no evidence that applicant misappropriated or otherwise attempted to ride on opposer's goodwill through the adoption of its mark. On the contrary, the evidence is clear that applicant was unaware of opposer's tumbler marks at the time it adopted its mark. The testimony and exhibits relating to the creation of the mark indicates that the design was independently developed. Moreover, when applicant's counsel conducted a trademark search, opposer's marks were not among those that were were reported to applicant as being similar. Thus, the factor of bad faith adoption does not favor opposer. On the other hand, the fact that a mark is adopted in good faith does not necessarily mean that it is not likely to cause confusion. This factor is therefore neutral.

After considering all of the relevant duPont factors we find that confusion is not likely. In particular, the differences in the marks, the plethora of third-party marks containing stick figures, and the care that is exercised in making a decision to obtain hospital and health care

services outweigh the factors favoring opposer, those factors being, in particular, the similarities in the parties' services, channels of trade and customers.

Decision: The opposition is dismissed.