

**This Opinion is Not a  
Precedent of the TTAB**

Hearing Date: January 19, 2021

Mailed: February 26, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Spark Therapeutics, Inc.*  
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Serial Nos. 87614019 and 87614036  
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Edward F. Behm, Jr. of Armstrong Teasdale LLP,  
for Spark Therapeutics, Inc.

Josette M. Beverly, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Kuhlke, Lynch and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Spark Therapeutics, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark SPARK THERAPEUTICS GENERATION PATIENT SERVICES, and the following composite mark:



(with the terms THERAPEUTICS and PATIENT SERVICES disclaimed in each application), both for the following services:<sup>1</sup>

Providing information for patients, families and health care providers about healthcare insurance coverage, insurance reimbursement programs, insurance payer policies and patient financial assistance programs; claims and billing processing services involving processing and obtaining approval from insurance companies and government agencies for the payment of gene therapies, in International Class 36;

Providing health care information in connection with patient and family support programs, in International Class 44; and

Patient and family health care coordination services for use in case management, namely, providing health care advisory and management services for coordinating educational, medical, social, and claims processing services for patients and their families relating to the treatment of gene-based diseases; providing patient advocate services for patients and their families regarding the coordination of medical services and related travel for patients and their families relating to the treatment of gene-based diseases; health care case management advice and consultation services, namely, care coordination for patients and families and coordinating medical, physical, personal care, and claims processing and services for patients and their families in dealing with medical service providers, hospitals, insurance companies, and others involved in patient care, in International Class 45.

The Trademark Examining Attorney refused registration of both marks pursuant to Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the following composite mark:

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<sup>1</sup> Application Serial Nos. 87614019 and 87614036 were filed on September 19, 2017, both based upon Applicant's allegation of a bona fide intention to use the marks in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The mark of Application Serial No. 87614036 is described as follows: "Color is not claimed as a feature of the mark. The mark consists of a helix 'DNA' design with the wording 'SPARK THERAPEUTICS GENERATION PATIENT SERVICES' appearing next to it. The words 'SPARK THERAPEUTICS' appear in the first line in all upper case lettering; The word generation appears on the second line in lower case lettering. The wording 'PATIENT SERVICES' appears on the third line in all upper case lettering."



registered on the Principal Register for “Providing health information services, namely, providing information relating to medical healthcare plans” in International Class 44.<sup>2</sup>

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed. The appeals are fully briefed. Applicant and the Examining Attorney participated in an oral hearing before a Panel of the Board. We affirm the refusals to register.

### **I. Separate Appeals, Single Opinion**

Because these appeals present similar issues, we issue a single opinion for both. *In re Vertex Grp. LLC*, 89 USPQ2d 1694, 1695 (TTAB 2009) (“In view of the virtually identical issues presented, the Board has chosen to issue this single decision.”). However, each proceeding retains its separate character and will result in the entry of a separate judgment for each appealed application; a copy of this decision shall be placed in each proceeding file. *In re Hudson News Co.*, 39 USPQ2d 1915, 1916 n.5

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<sup>2</sup> Registration No. 4126694 issued on April 10, 2012; Affidavit of Use pursuant to Trademark Act Section 8, 15 U.S.C. § 1058, accepted, Declaration of Incontestability pursuant to Trademark Act Section 15, 15 U.S.C. § 1065, acknowledged. The mark of Registration No. 4126694 is described as follows: “Color is not claimed as a feature of the mark. The mark consists of the word mark ‘SPARQ’ with an arch above composed of larger dots on the left and getting smaller as it moves to the right and ending with a sun burst.”

(TTAB 1996) (Board issued a single opinion in the interest of judicial economy, but each appeal stands on its own merits), *aff'd mem.*, 114 F.3d 1207 (Fed. Cir. 1997).

As these two appeals involve common issues of law and fact, unsurprisingly the prosecution histories on appeal are nearly identical. For judicial economy, in this opinion unless otherwise indicated, we cite to the prosecution history and appellate briefs concerning Applicant's standard character mark (of Application Serial No. 87614019, or the "019 Application"); where additional issues pertain to Applicant's composite mark (of Application Serial No. 87614036, or the "036 Application"), we cite to those briefs.<sup>3</sup>

## **II. Evidentiary Issue**

Before proceeding to the merits of the refusals, we address an evidentiary matter. Embedded within its Request for Reconsideration, Applicant provided the marks, registration numbers, goods or services and owners of third-party SPARQ[K] marks (i.e., marks comprising or including the term SPARQ or SPARK).<sup>4</sup> Applicant also attached to its Request for Reconsideration lists of third-party SPARQ[C][K] marks (i.e., marks comprising or including the term SPARQ, SPARC or SPARK), providing only the marks and registration numbers.<sup>5</sup>

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<sup>3</sup> Page references herein to the application records refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board's TTABVUE docket system. The number before the designation TTABVUE is the docket entry number; the numbers after this designation are the page references, if applicable.

<sup>4</sup> Request for Reconsideration of May 19, 2020 at TSDR 10-11.

<sup>5</sup> *Id.* at 14-17.

In the denial of Applicant's Request for Reconsideration, the Examining Attorney objected that "the mere submission of a list of registrations ... does not make such registrations part of the record. ... To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems, **prior to appeal**."<sup>6</sup> (emphasis original). The Examining Attorney repeated this objection in her Brief on Appeal.<sup>7</sup>

The Examining Attorney's objection is well taken. Third-party registrations may not be made of record by merely listing them in response to an Office Action. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 1207.03 and 1208.02 (2020) and cases cited therein. The proper way to submit third-party registrations into the record is to submit copies of the registrations themselves, or the electronic equivalent thereof from the USPTO's electronic databases. Such submissions should be made prior to appeal or, if after appeal, pursuant to a remand to the Examining Attorney for further examination. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see also In re City of Houston*, 101 USPQ2d 1534, 1536 n.5 (TTAB 2012) (quoting *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996)). We therefore give no further consideration to the third-party registration information embedded within Applicant's Request for Reconsideration or the lists of third-party registrations that Applicant attached thereto.

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<sup>6</sup> Denial of Request for Reconsideration of June 19, 2020 at TSDR 2.

<sup>7</sup> Examining Attorney's Brief, 10 TTABVUE 5-6.

### III. Likelihood of Confusion - Applicable Law

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont 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). However, “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).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

Varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of the 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) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the ... [services].”))).

#### **IV. Likelihood of Confusion - Analysis**

We now consider the arguments of Applicant and the Examining Attorney, the applicable law and the evidence of record. The likelihood of confusion factors Applicant and the Examining Attorney discussed are the scope of protection to be afforded Registrant’s SPARQ and Design mark, the similarity or dissimilarity of Applicant’s and Registrant’s marks, the relatedness of the services associated with the respective marks, the channels of trade in which the services under the marks travel, consumer sophistication, the absence of actual confusion, and the existence of Applicant’s extant registration for the mark SPARK. We discuss these factors below.

##### **A. The Similarity or Dissimilarity of the Services**

We first address the “similarity or dissimilarity and nature of the ... services as described in an application or registration....” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 and 1162 (Fed. Cir. 2014). 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. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

When we consider the relatedness of the services, our analysis is premised on a comparison of the services as they are set out in the application and the cited registration. *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”). *See also In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (quoting *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) (“Likelihood of confusion must be determined based on an analysis of the mark applied to the ... services recited in applicant’s application vis-à-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be”)).

The broadly-worded identification of services in the cited SPARQ and Design registration is “providing information relating to medical healthcare plans” in International Class 44. The recited services encompass providing information about all aspects of medical healthcare plans. *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (“Registrant’s goods are broadly identified as computer programs recorded on magnetic disks, without any limitation as to the kind of programs or the field of use. Therefore, we must assume that registrant’s goods encompass all such computer programs including those which are for data integration and transfer.”). Applicant’s



identification of services includes “providing information for patients, families and health care providers about healthcare insurance coverage, insurance reimbursement programs, insurance payer policies and patient financial assistance programs” in International Class 36, and “providing health care information in connection with patient and family support programs” in International Class 44. We find these healthcare information services to be legally identical.

Applicant’s identification of services also includes “health care case management advice and consultation services, namely, care coordination for patients and families and coordinating medical, physical, personal care, and claims processing and services for patients and their families in dealing with medical service providers, hospitals, insurance companies, and others involved in patient care” in International Class 45. These services are not identical to Registrant’s identified services of “providing information relating to medical healthcare plans.”

However, the respective services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)). They 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 services] 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)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of use based registrations of the same mark for both the applicant's services and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014).

Here, the Examining Attorney provided captured portions of the following third-party websites showing that providing information relating to medical healthcare plans and health care case management services are provided by the same entity under the same trade name or mark:

- Child Welfare Information Gateway website – discussing casework relating to family caregiver support services as well as research-based information to families in factsheets and newsletters connecting parents to age-appropriate resources and expert advice (January 8, 2018 Office Action at TSDR 44-45).
- Dana-Farber Cancer Institute website – discussing one-to-one support for cancer patients, patient and family resource centers and patient financial assistance (*Id.* at 46-52).
- HSC Health Care System website – discussing family support services, information on health providers, home lead assessments and coordination services and health plan information (*Id.* at 53-55).
- Family Connection South Carolina website – Sponsored by a nonprofit, family-led organization promoting providing parent-to-parent mentor support regarding health care for children and youth, particularly those with special health care needs; also helps navigate the system of medical care and insurance coverage for those with disabilities or special health care needs (*Id.* at 56-60).
- NEJM Catalyst website – Discussing health care coordination services inclusive of a variety of healthcare information (November 19, 2019 Office Action at TSDR 7-18).

- Patient Care-VA website – Showing healthcare services provided under the umbrella of patient care services including case management services and health information services (*Id.* at 19-21).
- Health Alliance website – Showing that Health Alliance provides care coordination services that includes providing healthcare information services, disease management and healthcare coaching (*Id.* at 22-24).
- Blue Cross Blue Shield Illinois website – Providing information on care coordination services including healthcare information services on health conditions, medications and treatment options (*Id.* at 25-26).
- Patient Support Services USA website – Showing that this entity provides case management services for Medicare insurance providers for healthcare providers including healthcare plan information services about costs of care (*Id.* at 27-30).
- Sanofi Genzyme website – Showing that the website sponsor provides patient care services including assistance and information on insurance plans, treatment options and educational resources on disease and treatment management (*Id.* at 31-37).

We find the above evidence demonstrates that Registrant’s information services relating to medical healthcare plans and Applicant’s health care case management services are related. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). We do not give credence to Applicant’s attempt to limit the scope of Registrant’s services or its own services to avoid a finding of likely confusion by resort to extrinsic evidence

of how Registrant's or Applicant's marks are actually used in the marketplace.<sup>8</sup> As already noted, it is well settled that in making our determination, we must look to the services as identified in the application vis-à-vis those recited in the cited registration. We cannot consider extrinsic evidence regarding the similarities between Applicant's services and Registrant's services. *See Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The relatedness of the services weighs in favor of finding that confusion is likely.

### **B. Similarity in Channels of Trade**

We now turn to the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567; *Stone Lion*, 110 USPQ2d at 1159 and 1161. Where, as discussed above, we find Registrant's and Applicant's services to be legally identical, "absent restrictions in the application and registration [and here there are none], ... services are presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard*, 62 USPQ2d at 1005).

Where we find Registrant's and Applicant's services to be related (but not identical), again neither the cited Registration nor the Applications at issue contain any restriction on the channels of trade or classes of purchasers. We therefore presume that the cited Registration and involved Applications encompass all services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers – members of the general public who are

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<sup>8</sup> Applicant's Brief, 6 TTABVUE 11-12.

consumers of information relating to medical healthcare plans and health care case management services, *see Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013), on the basis of all normal and usual methods of distribution. *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). We also note, once more, the 10 third-party websites made of record by the Examining Attorney through which Registrant's and Applicant's types of services are provided – online direct-to-consumer websites – demonstrating an overlap of trade channels. The channels of trade weigh in favor of finding that confusion is likely.

### **C. The Strength of Registrant's Mark**

In determining the strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *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).”); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014). We consider the strength of Registrant's SPARQ and Design mark so that we may evaluate the scope of protection to afford the mark.

As noted, to demonstrate the inherent or conceptual weakness of Registrant's SPARQ and Design mark, Applicant submitted TESS database information and lists records of third-party registered marks comprising or including the term SPARQ[C][K]. However, as we discussed above, Applicant did not properly introduce the third-party registrations on which it relies into the record during the prosecution

of its Applications. We therefore find that Applicant's mere lists of third-party registrations are insufficient to show that the term SPARQ[C][K] is inherently or conceptually weak for Registrant's services. We further find Registrant's SPARQ and Design mark to be inherently distinctive inasmuch as it is registered on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

We turn now to the commercial strength of Registrant's SPARQ and Design mark. In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). Moreover, Applicant has not made of record any third-party uses of marks comprising or including the term SPARQ[C][K]. "The purpose of a defendant introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers 'have been educated to distinguish between different such marks on the bases of minute distinctions.'" *Primrose Retirement Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (quoting *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). Here, in the absence of such evidence, we find no proof of commercial weakness of Registrant's SPARQ and Design mark.

From a conceptual standpoint, we afford Registrant's SPARQ and Design mark the ordinary scope of protection given a registered, inherently distinctive mark, as

opposed to a limited scope of protection that would be accorded a conceptually weaker mark. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109-110 (CCPA 1974); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982). Applicant, moreover, did not submit any evidence to limit the commercial strength of Registrant's SPARQ and Design mark in connection with Registrant's services.

#### **D. The Similarity or Dissimilarity of the Marks**

We determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic*, 128 USPQ2d at 1048. "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) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019). Where the services are legally identical, as they are in this case (at least in part), the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse services. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Coach Servs.*, 101 USPQ2d at 1721).

Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must instead rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). "The proper test[, therefore,] 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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quotation omitted).

The parties’ 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) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). Therefore, the focus is on the recollection of the average purchaser, here, a member of the general public who is a consumer of information relating to medical healthcare plans and health care case management services, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, 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.”). Further, “[n]o element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir.



1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)).

Nonetheless, 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 a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161. For instance, merely descriptive matter that is disclaimed has been accorded subordinate status relative to the more distinctive portions of a mark. *Nat'l Data*, 224 USPQ at 751 (“That a particular feature is descriptive ... with respect to the relevant goods or services is one commonly accepted rationale for giving less weight to a portion of the mark.”).

We find the phonetically identical and visually similar terms SPARQ and SPARK to be the dominant portions of the marks. SPARQ is the only term comprising Registrant’s mark, and SPARK is the first term of Applicant’s marks. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word). We further find SPARQ and SPARK to be arbitrary, having no definitional or descriptive significance with respect to Registrant’s and Applicant’s respective services. *The Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (“An arbitrary mark is a known word used in an unexpected or uncommon way.”).

On the other hand, while we do not disregard them, the remainder of the terms in Applicant's marks are diminished because consumers are not inclined to rely on descriptive or generic terms to indicate source. *See In re Dixie Rests.*, 41 USPQ2d at 1533-34; *In re Nat'l Data*, 224 USPQ at 752. The descriptive, and disclaimed, term THERAPEUTICS and phrase PATIENT SERVICES merely describe the type of services provided as well as the entity providing Applicant's services. As such, these elements of Applicant's marks are not source-identifying. *See, e.g., In re Dixie Rests.*, 41 USPQ2d at 1533-34 ("DELTA," not the disclaimed generic term "CAFE," was the dominant portion of the mark THE DELTA CAFE).

The remaining term of Applicant's marks that we have not yet discussed is GENERATION. In the healthcare field, the term GENERATION means "a stage or period of sequential technological development and innovation."<sup>9</sup> In the context of Applicant's services, therefore, the term GENERATION at best is suggestive of gene therapies and treatment of gene-based diseases that are the subjects of Applicant's services in Classes 36 and 44 – and consumers therefore are unlikely to rely on this term as source identifying in connection with any of Applicant's services identified in the three classes of its Applications. Moreover, despite appearing in large font in Applicant's composite mark of the '036 Application, we find that GENERATION is not the dominant element.

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<sup>9</sup> Definition of GENERATION from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (<https://www.ahdictionary.com/word/search.html?q=generation>, last visited February 24, 2021). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) *aff'd* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016)

With the dominant terms of the respective marks, SPARQ and SPARK, being phonetically identical and visually similar, and the remaining terms of Applicant's marks having little to no source-identifying significance, we find Registrant's and Applicant's marks to be more similar than they are different in overall commercial impression. Relevant consumers of the parties' services could view Applicant's marks as a new variation of Registrant's SPARQ and Design mark, referring to a more specialized subset of Registrant's broadly worded services. *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL v. BENGAL LANCER: "When one incorporates the entire arbitrary registered mark of another into a composite mark, inclusion in the composite mark of ... non[-source identifying] element[s] do[] not necessarily preclude the marks from being so similar as to cause a likelihood of confusion.").

We further find that the ARCH and SUNBURST Design forming a part of Registrant's mark, and the DNA HELIX Design forming a part of Applicant's mark shown in the '036 Application, do not sufficiently distinguish the marks for likelihood of confusion purposes. With respect to composite word-and-design marks, "the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the ... [services]." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908). An underlying rationale for this general principle is "that the literal component of brand names likely will appear

alone when used in text and will be spoken when requested by consumers.” *Viterra*, 101 USPQ2d at 1911.

The similarities of the marks support the conclusion that confusion is likely.

### **E. Customer Sophistication**

Next we consider “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *Stone Lion*, 110 USPQ2d at 1159 and 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant argues “that the life-altering and necessary nature of Applicant’s services coupled with the highly informed nature of the relevant consumers leads to a highly sophisticated consumer that will carefully scrutinize the service and give considerable thought before purchasing the Applicant’s services which will avoid any likelihood of confusion with the Cited Mark.”<sup>10</sup> Applicant does not point us to any part of the evidentiary record to support this contention.

Focusing on the least sophisticated potential customers for Applicant’s services, we find this consideration does not weigh in favor of or against likely confusion. *See Stone Lion*, 110 USPQ2d at 1163 (“Although the services recited in the application also encompass sophisticated investors, Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’”). Moreover, even were we to consider customer care with respect to Applicant’s services, particularly in the context of similar marks and identical or related services, this would not render the consumers “immune from trademark confusion.” *Harry Winston, Inc. v. Bruce*

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<sup>10</sup> Applicant’s Brief, 6 TTABVUE 10.

*Winston Gem Corp.*, 111 USPQ2d 1419, 1442 (TTAB 2014); *see also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar ... [services].”).

**F. Lack of Actual Confusion, and the Relevance of Applicant’s Extant SPARK Registration**

We finally consider “[t]he nature and extent of any actual confusion” and “[t]he length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. We do so in the context of Applicant’s assertion that its previously registered SPARK mark has co-existed in the marketplace for a period of time with Registrant’s SPARQ and Design mark. Applicant asserts:

The Cited Mark [SPARQ and Design] was allowed registration on April 10, 2012. The Applicant applied for registration of the mark “SPARK” for biologic preparations for use in the diagnosis and treatment of retinal degenerative and hematologic disorders and diseases in Class 005 on September 19, 2013 and [the] registration [Registration No. 5068997] was allowed on May 6, 2014. The allowance of Applicant’s mark “SPARK” was allowed over the Cited Mark. Applicant has used the “SPARK” mark in connection with its goods and/or services continuously since registration in 2014. During this 5 year period, neither party has challenged the other’s use. Moreover, Applicant is unaware of any actual consumer confusion during this time period.

Given the allowed registration of “SPARK” over the Cited Mark and [the] period of time which the Cited Mark has co-existed with Applicant’s registered mark “SPARK”, the PTO has already determined that consumers are capable of distinguishing between the marks “SPARK” and “SPARQ” and it is highly unlikely that confusion would arise between the Cited Mark and the applied-for mark “SPARK THERAPEUTICS GENERATION PATIENT SERVICES”. The period of

co-existence between “SPARK” and “SPARQ” provides the “confluence of facts” necessary to persuasively point to confusion being unlikely.<sup>11</sup>

Simply, “[a]ttorney argument is no substitute for evidence.” *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). Thus, given the record in this case, we have no evidence to evaluate whether Applicant’s assertion that there have been no instances of actual confusion between its previously registered SPARK mark and Registrant’s SPARQ and Design mark is meaningful. “The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks.” *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011).

More particularly, “there is a lack of evidence that in the actual marketplace, the same consumers have been exposed to both marks for the respective [goods and] services, such that we could make a finding as to the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279 \*25 (TTAB 2020). We also note that “in this ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion.” *Id.* at \*23. We therefore find the alleged absence of actual to be a neutral consideration.

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<sup>11</sup> Applicant’s Brief, 6 TTABVUE 14.

Even if we consider Applicant's previously registered SPARK mark under the rubric of "[a]ny other established fact probative of the effect of use[.]" *DuPont*, 177 USPQ at 567, the fact of this prior registration still does not help Applicant's position. In *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012), the Board reversed a refusal to register the mark ANYWEAR (Stylized), for "footwear," finding no likelihood of confusion with the registered mark ANYWEAR BY JOSIE NATORI and Design for "jackets, shirts, pants, stretch T-tops and stoles." Given the similarity in the marks and the relatedness of the goods, the Board stated that "under usual circumstances" it would conclude that confusion is likely to occur; however, an "unusual situation" compelled the Board "to balance the similarities between the marks and goods against the facts that applicant already owns a registration for a substantially similar mark for the identical goods, and that applicant's registration and the cited registration have coexisted for over five years." *Id.* at 1399. Applicant's prior registration of the mark ANYWEARS for goods including footwear was found substantially similar to the applied-for mark ANYWEAR for the same goods, and the registration had achieved incontestable status. *Id.* Basing its decision "any other established fact probative of the effect of use," the Board determined that this factor outweighed the others and confusion was unlikely. *Id.* at 1399-1400 (quoting *DuPont*, 177 USPQ at 567).

In view of *Strategic Partners*, when determining whether the co-existence of an applicant's prior registration with another party's registration weighs against citing

the latter registration in a Section 2(d) refusal of the applicant's applied-for mark, the USPTO considers:

(1) whether the applicant's prior registered mark is the same as the applied-for mark or is otherwise not meaningfully different; (2) whether the identifications of goods/services in the application and the applicant's prior registration are identical or identical in relevant part; and (3) the length of time the applicant's prior registration has co-existed with the registration being considered as the basis for the Section 2(d) refusal.

TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01 (2018) (citing *Strategic Partners*, 102 USPQ2d at 1400)).

The duration of co-existence, however, is not dispositive as to whether a Section 2(d) refusal is appropriate; instead, this factor should be considered together with all the other relevant *DuPont* factors. *Strategic Partners*, 102 USPQ2d at 1400; *cf. In re Inn at St. John's*, 126 USPQ2d at 1748 (finding that applicant's earlier registration of a partially similar mark was a neutral factor in the Section 2(d) analysis, because the applied-for mark was more similar to the cited registered mark than applicant's previously registered mark); *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 (TTAB 2017) (distinguishing *Strategic Partners* and finding that the 3½-year co-existence of applicant's prior registration and the cited registration was a relevant consideration but did not outweigh the other relevant *DuPont* factors).

Here, (1) Applicant's prior registered SPARK mark is not the same as its presently applied-for marks and they otherwise are meaningfully different; (2) the identifications of services in the applications now on appeal and the identification of goods of Applicant's prior SPARK registration are not identical in whole or in relevant




part; even though (3) Applicant's previously registered SPARK mark purportedly has co-existed with Registrant's SPARQ and Design mark for five years. We therefore do not consider the extant SPARK registration to be relevant in the instant appeals.

## **V. Conclusion on Likelihood of Confusion**

On balance, the *DuPont* factors favor finding a likelihood of confusion. The marks at issue are more similar than dissimilar; the services are identical and otherwise related. We also presume the trade channels and classes of purchasers are identical, and proof has been submitted that they otherwise are related. Moreover, the record does not show customer sophistication sufficient to outweigh these factors. Additionally, the alleged absence of actual confusion between Registrant's SPARQ and Design mark and Applicant's previously registered SPARK mark is neutral. We therefore find that Applicant's marks, used in connection with Applicant's services, so closely resemble Registrant's mark as to be likely to cause confusion, mistake or deception as to the source of Applicant's services.

### **Decision:**

The refusals to register Applicant's marks SPARK THERAPEUTICS GENERATION PATIENT SERVICES (in standard characters) and the composite mark  on the ground of likelihood of confusion under Trademark Act Section 2(d) are affirmed as to all three classes in each Application (Classes 36, 44 and 45).