

Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 144

Date of Decision: 2023-08-14

IN THE MATTER OF OPPOSITIONS

Opponent: Chorus Call, Inc.

Applicant: ZoomInfo Converse LLC

Applications: 1,812,745 for CHORUS.AI,
1,812,732 for CHORUS, and
1,812,729 for CHORUS Stylized

OVERVIEW

[1] AffectLayer, Inc. (AffectLayer) filed three applications to register the trademarks CHORUS.AI, CHORUS and CHORUS Stylized, depicted below.



[2] The application for the trademark CHORUS.AI lists the following services:

(1) Networking services, namely, business consulting in the field of business networking; business strategy development services, business management consultation in the field of telecommunications.

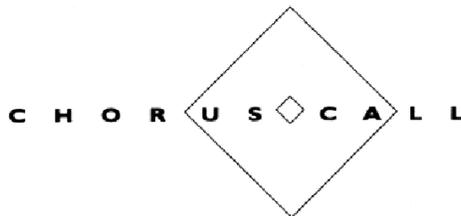
(2) Technical support services, namely troubleshooting in the nature of the repair of computer hardware and computer software.

[3] The applications for the trademarks CHORUS and CHORUS Stylized each list the following services:

(1) Business strategy development services; business management consultation in the field of telecommunications.

[4] The applications were subsequently assigned to the current owner ZoomInfo Converse LLC. As nothing in these oppositions turns on that assignment, for ease of reference, I will refer to the current owner and its predecessor-in-title AffectLayer, collectively, as the “Applicant”, unless it is necessary to distinguish between the two.

[5] Chorus Call, Inc. (the Opponent) has opposed the applications based on an alleged likelihood of confusion with its registered trademark CHORUS CALL & DIAMONDS DESIGN and its trade name CHORUS CALL. The Opponent’s trademark, depicted below, is registered under number TMA699,411 for use in association with “multimedia teleconferencing services including audio, video and data teleconferencing” (the CHORUS CALL Mark).



[6] For the reasons that follow, the applications are refused because the Applicant has failed to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion.

THE RECORD

[7] Applications No. 1,812,745 (the 745 Application), No. 1,812,732 (the 732 Application), and No. 1,812,729 (the 729 Application) were each filed on December 6, 2016, based on proposed use in Canada, and claim priority to corresponding applications filed in the United States on June 12, 2016.

[8] The 745 Application and the 732 Application were advertised for opposition purposes on July 24, 2019. The 729 Application was advertised on January 8, 2020. Pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act), the Opponent filed statements of opposition against the 745 and 732 Applications on September 23, 2019 and against the 729 Application on March 6, 2020. Nothing in these proceedings turns on the differences in the dates of advertisement or opposition.

[9] I note that the Act was amended on June 17, 2019. All three applications were advertised after June 17, 2019, and thus the Act as amended applies in each case (see section 69.1 of the Act).

[10] With respect to each application, the Opponent raises grounds of opposition based on registrability under section 12(1)(d), entitlement under sections 16(1)(a) and 16(1)(c), and distinctiveness under section 2 of the Act.

[11] The Applicant filed counter statements in each proceeding.

[12] Both parties filed evidence and written representations, and were represented at a hearing. Given that the evidence and issues raised in respect of the three applications were essentially identical, the matters were heard together and I will address them in a single decision.

ONUS

[13] The legal onus is on the Applicant to show that the applications comply with the provisions of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once this initial burden is

met, the Applicant must satisfy the Registrar, on a balance of probabilities, that the grounds of opposition pleaded should not prevent the registration of the applied-for trademarks [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA* (2002), 20 CPR (4th) 155 (FCA)].

EVIDENCE

[14] The parties filed essentially identical affidavits in respect of each of the subject applications. None of the affiants were cross-examined. I note that there were slight differences in some of the figures provided in the affidavits based on the different dates on which the affidavits were sworn, but that had no material impact on the analysis. Thus, for ease of reference below I will refer to the affidavits filed in respect of the 745 Application.

Opponent's Evidence

[15] As its evidence-in-chief, the Opponent filed the affidavit of Claudia Gruppioni, sworn on August 25, 2020 (the Gruppioni Affidavit).

[16] The Opponent also filed, as reply evidence, the affidavit of Suzy Torres, sworn on November 5, 2021 (the Torres Affidavit), and the affidavit of Amy M. Williams, sworn on November 16, 2021 (the Williams Affidavit).

Gruppioni Affidavit

[17] Ms. Gruppioni states that the Opponent is headquartered in Monroeville, Pennsylvania, and provides teleconferencing services through subsidiaries in offices located around the world [para 6]. Ms. Gruppioni is the General Manager of Chorus Call Canada Corp. (Chorus Call Canada), the Opponent's wholly-owned Canadian subsidiary having an office in Vancouver, British Columbia. She describes that the Opponent provides a variety of multimedia communication services to business and non-profit organizations, including audio teleconferencing, web conferencing, audio and video streaming, and video conferencing, as well as related training and support services [paras 3 and 4]. She states that the Opponent also provides consulting

services in the field of telecommunications to assist clients to address their business communications needs [para 5]. The related exhibits to her affidavit indicate that the Opponent's services are directed to assisting members of an organization to collaborate via audio or video conferencing, either internally or with customers [Exhibits B and C].

[18] Ms. Gruppioni explains that the range of the Opponent's services is relevant to any business, or community and non-profit organization that requires communications services, and the Opponent operates in a wide range of market sectors and industries [para 10]. In Canada, the Opponent had approximately 277 active clients as of the date of filing the subject applications in December 2016, and approximately 350 active clients in August 2020, when the Gruppioni Affidavit was sworn [para 13].

[19] Since October 7, 2005, the Opponent has been providing teleconferencing services in Canada through its subsidiary Chorus Call Canada [paras 6 to 9]. The Opponent closely oversees Chorus Call Canada's business operations, including its use of the CHORUS CALL Mark pursuant to a license agreement between the Opponent and Chorus Call Canada [paras 17 to 26, Exhibit J].

[20] In addition to the CHORUS CALL Mark, the Opponent carries on business under the trade name "Chorus Call". In Canada, that trade name has been used in association with the Opponent's multimedia communications and teleconferencing services since at least as early as September 2004 [paras 28 and 29].

[21] Based on the annual sales figures provided by Ms. Gruppioni, the sales of the Opponent's services in Canada increased from around \$400 in 2005 to in excess of \$1.3 million in 2019, totaling sales of more than \$9.7 million over that period [para 58]. Ms. Gruppioni also attaches representative invoices of sales made by Chorus Call Canada in Canada, dated between 2007 and 2016 [Exhibit FF].

[22] With respect to advertising, Ms. Gruppioni states that the Opponent has promoted the CHORUS CALL Mark in Canada in association with the Opponent's services since at least as early as June 17, 2007 [para 27]. She attests that the

CHORUS CALL Mark is displayed on Chorus Call Canada's marketing materials in both print media and electronically [para 24].

[23] Ms. Gruppioni provides annual expenditures for "advertising, promotional, and marketing efforts... in association with the [CHORUS CALL Mark]" in Canada between 2007 and 2019. The expenditures are in excess of \$270,000 over the course of that period [para 57].

[24] Ms. Gruppioni describes multiple means of advertising such as the Opponent's website, tutorials posted on YouTube, social networking on LinkedIn, advertising in industry trade publications, as well as at meetings, presentations, conventions and trade shows [paras 30 to 47, 54 and 55]. She provides documentary evidence of the Opponent's promotional activities, including print outs from the Opponent's website, screenshots of tutorial videos, and copies of printed materials such as information sheets and presentation materials [Exhibits K to Y, and DD]. The CHORUS CALL Mark is displayed throughout these materials.

[25] Ms. Gruppioni also provides information about specific trade shows and conferences in Canada attended by Chorus Call Canada between 2006 and 2019 to promote the Opponent's services [paras 48 to 52, Exhibits Z to CC].

Torres Affidavit

[26] Ms. Torres is a research analyst at CompuMark, an intellectual property research firm. Her affidavit includes the results of her search of the Canadian Intellectual Property Office trademark database for active trademarks including the term CHORUS or alternative spellings, in association with goods and services relating to "telecommunications" in any class.

Williams Affidavit

[27] Ms. Williams is a paraprofessional with the Opponent's agent firm. Her affidavit includes a certified copy of the examination history of the subject applications, as well as print outs from the websites located at *www.chorus.ai* and *www.zoominfo.com*.

Applicant's Evidence

[28] The Applicant's evidence consists of the affidavit of Karen Chow, sworn on April 23, 2021.

Chow Affidavit

[29] Ms. Chow is a lawyer with the Applicant's previous agent firm. She provides evidence relating to AffectLayer and its business, as well as printouts of pages from the website located at *www.chorus.ai*.

[30] In addition, the Chow Affidavit provides state of the Register and state of the marketplace evidence, namely search results from Canadian Intellectual Property Office trademark database and from the search engine Google, for the terms CHORUS and CORUS.

[31] I note that the Opponent objects to the admissibility of the Chow Affidavit. In particular, the Opponent argues that this affidavit constitutes inadmissible hearsay and opinion evidence regarding the scope of the Applicant's business and the nature of the services that it provides. The Opponent also contests the admissibility of the state of the Register and marketplace evidence because the search strategy was designed, performed, and analyzed by a lawyer for the Applicant's agent firm. I will address these points in the analysis of the grounds of opposition, below.

ANALYSIS

[32] I will begin by considering the 745 Application for the trademark CHORUS.AI (the Mark). I do this for two reasons. First, the 745 Application includes the broader scope of services than the other two applications (*i.e.* the 732 Application and 729 Application contain essentially a subset of the services in the 745 Application). Second, in my view, the 745 Application constitutes the Applicant's best chance of success on the issue of confusion. That is to say, if the Applicant cannot succeed on the issue of confusion with respect to the Mark, it will not succeed with respect to the trademarks that are the subject of the 732 Application and 729 Application, which bear at least as high a degree of resemblance to the Opponent's CHORUS CALL Mark.

The 745 Application for CHORUS.AI

Non-registrability ground based on section 12(1)(d)

[33] The Opponent pleads that the Mark is not registrable because it is confusing with its registered CHORUS CALL Mark (TMA699,411), depicted above.

[34] The material date for the section 12(1)(d) ground of opposition is the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[35] I have exercised my discretion to check the Register and confirm that the Opponent's registration remains extant [see *Quaker Oats Co Ltd of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden with respect to this ground of opposition. As a result, the Applicant bears the legal onus of demonstrating on a balance of probabilities that there is no likelihood of confusion between the Mark and the Opponent's registered mark.

Test for confusion

[36] The test for confusion is set out in section 6(2) of the Act which provides that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. Therefore, section 6(2) of the Act does not deal with confusion between trademarks themselves, but with the likelihood that the goods or services from one source will be perceived as being from another source.

[37] In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time the trademarks have been in use; (c) the nature of the goods and services or business; (d) the nature of the trade; and (e) the degree of

resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them.

[38] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[39] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when they have no more than an imperfect recollection of the opponent's trademark, and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

[40] Also, where it is likely the public will assume an applicant's goods or services are approved, licensed, or sponsored by the opponent so that a state of doubt and uncertainty exists in the minds of the purchasing public, it follows that the trademarks are confusing [see *Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 (FCTD) at para 21].

Inherent distinctiveness of the trademarks and the extent to which they have become known

[41] The overall consideration of this factor involves a combination of inherent and acquired distinctiveness of the trademarks.

[42] The inherent distinctiveness of a trademark refers to its originality. Trademarks consisting wholly or in part of words descriptive of the articles to be sold or of the services to be rendered attract a more limited range of protection than does an invented, unique, or non-descriptive word or an original design [see *General Motors Corp v Bellows*, [1949] SCR 678, 1949 CanLII 47 (SCC), citing *Office Cleaning Services*

Ltd v Westminster Window & General Cleaners, Ltd (1946), 63 RPC 39 at 41 (HL); and *Fairmont Resort Properties Ltd v Fairmont Management LP*, 2008 FC 876].

[43] With respect to the Opponent's CHORUS CALL Mark, the Applicant submits that the term CHORUS, when used in association with the Opponent's teleconferencing services, "clearly suggests" the idea of "a group of people participating in a teleconference" and that the CHORUS CALL Mark's distinctiveness is therefore limited to the particular design elements of the registration [Applicant's written representations at paras 45-50].

[44] I note that the definition of "chorus" in the Canadian Oxford Dictionary, 2nd Ed. includes the following: "1. a group (esp. a large one) of singers; a choir. 2. a piece of music composed for a choir. 3. the refrain or the recurring part of a popular song, sometimes sung by more than one voice. 4. any simultaneous utterance by many persons etc." [see *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29 which provides that the Registrar can take judicial notice of dictionary definitions].

[45] While CHORUS is an English dictionary word, in my view, the expression "CHORUS CALL" does not directly describe the Opponent's teleconferencing services. The term CHORUS in the Opponent's trademark is at most suggestive, alluding to the notion of multiple simultaneous voices. I am therefore not persuaded by the Applicant's submission that the distinctiveness of the Opponent's trademark is limited to the design elements. The Opponent's CHORUS CALL Mark possesses at least some inherent distinctiveness by virtue of its word elements as well.

[46] As for the Mark, the Applicant submits that CHORUS.AI is a coined term which, when used in association with the applied-for services, evokes the idea of services provided through artificial intelligence. I note that "AI" is defined in the above-referenced dictionary as "artificial intelligence" and thus I expect that component would be perceived by consumers as descriptive in the context of the Applicant's services. Thus, the inherent distinctiveness of the Applicant's Mark is derived principally from the word "CHORUS".

[47] Having regard to the above, I find that both trademarks possess a similar level of inherent distinctiveness.

[48] Next, I turn to the extent to which the trademarks have become known. The Gruppioni Affidavit indicates that the Opponent has been providing its services in Canada in association with the CHORUS CALL Mark since October 2005 and, as of August 2020, had approximately 350 active clients. The sales figures provided by Ms. Gruppioni reveal that sales of the Opponent's services are in excess of \$9.7 million since 2005, and that the Opponent has promoted the CHORUS CALL Mark through various channels including through its website, industry publications, conferences and trade shows, since at least as early as 2007. Overall, the Opponent's evidence indicates that the CHORUS CALL Mark has become known to at least some extent in Canada in the field of teleconferencing.

[49] In contrast, the 745 Application is based on proposed use of the Mark in Canada, and there is no evidence of record from which to conclude that the Mark has become known at all in Canada.

[50] Given the equivalent inherent distinctiveness of the parties' trademarks, I find that the extent to which the Opponent's trademark has become known tips the balance of this factor in favour of the Opponent.

Length of time the trademarks have been in use

[51] The Opponent's CHORUS CALL Mark was registered in 2007, and the Gruppioni Affidavit indicates that the Opponent has continuously used the CHORUS CALL Mark in Canada since at least as early as October 2005.

[52] As noted above, the 745 Application is based on proposed use in Canada, and there is no evidence that the Mark has been used at all in Canada.

[53] Accordingly, this factor also favours the Opponent.

Nature of the services or business; and nature of the trade

[54] When considering the nature of the services, it is the statement of services in the parties' application and registration that govern the analysis [*Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)]. Those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties can be useful, particularly where there is an ambiguity as to the goods or services covered in the application or registration at issue [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB)].

[55] The Opponent's CHORUS CALL Mark is registered in association with "multimedia teleconferencing services including audio, video and data teleconferencing". The Opponent's evidenced use of the trademark is consistent with that description of services. As discussed above with respect to the Gruppioni Affidavit, the Opponent provides a variety of teleconferencing services including audio teleconferencing services, web and video conferencing services, audio and video streaming services, and related training and support services. The Opponent provides these services to a variety of customers including businesses and non-profit organizations, and will provide such entities with custom designed conferencing services based on the Opponent's consultation with the customer.

[56] The services in the 745 Application are, on their face, broadly described. Take, for example, the services described as "business strategy development services, business management consultation in the field of telecommunications". Given the breadth of that description, I consider there to be overlap (or at least the potential for overlap) with the services described in the Opponent's registration. A party providing business management consultation in the field of telecommunications could well, as part of that service, provide teleconferencing services (or recommendations regarding teleconferencing services) of a nature similar or identical to that of the Opponent. The technical support services described in the 745 Application similarly appear to be of a

nature that would be provided in the normal course of teleconferencing services such as those of the Opponent.

[57] The Applicant has sought to distinguish the nature of its services from those of the Opponent by filing evidence, namely the Chow Affidavit, purporting to speak to the Applicant's actual use of the Mark in the marketplace. In particular, the Chow Affidavit includes what purport to be printouts from the Applicant's website discussing its services and business. However, I agree with the Opponent that the Chow Affidavit is inadmissible when it comes to the issue of the nature of the Applicant's services. Ms. Chow is lawyer with the Applicant's previous agent firm, and not someone with first-hand knowledge of the Applicant's activities. The evidence relating to the nature of the Applicant's activities contained in the Chow Affidavit is hearsay, as the Applicant is seeking to rely on the website printouts for the truth of their contents. I do not consider this evidence to be admissible as it does not meet the standard of necessity given that the Applicant could have put forward an affiant with first-hand knowledge of the Applicant's business [see *R v Starr*, 2000 SCC 40 at paras 33-34].

[58] In addition, I consider the evidence in the Chow Affidavit relating to the nature of the Applicant's business to also be inadmissible in view of the principles expressed in *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133, 53 CPR (4th) 286. The Chow Affidavit is the only evidence from the Applicant purporting to speak to the nature of the Applicant's services and trade for the purpose of the confusion analysis, and is therefore important and potentially contentious evidence that in my view is not suitable to come from an employee of a party's agent firm.

[59] In any event, even if I were to consider the evidence of the Applicant's website for the purpose of assessing the nature of its services, a review of the more fulsome reproduction of that website, provided by the Opponent as reply evidence, suggests that the Applicant's services overlap at least to some degree with the Opponent's teleconferencing services. In particular, exhibited webpages in the Williams Affidavit appear to describe the Applicant's technology as AI-powered analysis of automatically recorded client calls. As pointed out by the Opponent, the implementation of the

Applicant's services seemingly requires the integration of the Applicant's technology with a customer's existing telecommunication and teleconferencing systems [Opponent's written representations at paras 42, and 72 to 76, citing Williams Affidavit, Exhibits D, R and Z].

[60] In the absence of admissible evidence relating to the Applicant's channels of trade, I find it reasonable to infer that the applied-for services are relevant to various businesses in a wide range of market sectors and industries, as is the case with the Opponent's services.

[61] In sum, I consider the nature of the services and trade factors to slightly favour the Opponent, or at best for the Applicant these factors are essentially neutral.

Degree of resemblance

[62] The degree of resemblance between two trademarks must be assessed by considering each trademark in its totality, with a consideration of whether there is an aspect of the marks that is particularly striking or unique [see *Masterpiece*, *supra*, at para 64].

[63] In its submissions, the Applicant emphasizes the aspects which differ between the parties' marks, namely the terms .AI and CALL, and the presence of the diamond design element in the Opponent's trademark. The Applicant also contends that, when considered in relation to the parties' respective services, the ideas presented by the marks are different. In particular, the Applicant argues that the term CHORUS has no connection with business strategy and business management, whereas the CHORUS CALL Mark is "highly suggestive" of a group of people participating in a teleconference.

[64] While the Opponent's trademark evokes the notion of multiple simultaneous voices, I agree with the Opponent's submission that its trademark presents a non-descriptive, unique and unusual use of the term CHORUS providing the "content and punch of the trade-mark" [Opponent's written representations at para 52].

[65] In this regard, I consider that the first term CHORUS is the most striking element of both parties' trademarks. Indeed, the second terms CALL and AI, respectively, are not only suggestive (if not descriptive) of the parties' services, but also less dominant visually and phonetically. Given the shared striking element CHORUS, followed by a suggestive or descriptive element, I consider the trademarks to have a similar construction and a meaningful degree of resemblance in terms of appearance and sound.

[66] It is not clear that either trademark suggests a specific idea. For example, the CHORUS CALL Mark could suggest the idea of simultaneous voices on a telephone call, or the exclamation of a group of people in unison, whereas the trademark CHORUS.AI could be perceived as suggesting simultaneous voices interacting with artificial intelligence, or perhaps artificial intelligence technology operating in harmony, or unison. These ideas are different, but related insofar as they share the meaning conveyed by the word CHORUS. Otherwise, I do not consider that the design element of the Opponent's trademark would distinguish the ideas suggested by the marks, as the design is not likely to be perceived as conveying any meaning.

[67] On balance, I consider the parties' trademarks to be more similar than they are different. Thus, I find that this factor favours the Opponent.

Additional surrounding circumstance – state of the Register and marketplace

[68] The Applicant relies on the state of the Register and state of the marketplace evidence tendered in the Chow Affidavit [Applicant's written representations at paras 97 to 99, citing Chow Affidavit, Exhibits S to TTTTT] to argue that trademarks with the element CHORUS (or CORUS) are common and thus that the Opponent's CHORUS CALL Mark is entitled to only a narrow scope of protection.

[69] Evidence concerning the state of the Register is relevant to the extent that inferences may be drawn regarding the state of the marketplace [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Del Monte Corporation v Welch Foods Inc* (1992), 44 CPR (3d) 205 (FC)]. Such inferences may be drawn only if a large

number of relevant registered trademarks are located [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA); *McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at paras 41-46]. Relevant trademarks include those that (i) are registered or are allowed and based on use; (ii) are for similar goods and services as the marks at issue, and (iii) include the component at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197 at para 38].

[70] The Chow Affidavit attaches particulars of almost 50 trademarks on the Register which include the term CHORUS or a phonetic equivalent [Exhibits S to LLL], and print outs of various webpages for “businesses, organizations, and products” identified through an online search for the keywords CHORUS and CORUS [Exhibits OOO to TTTTT].

[71] The Applicant’s written representations do not provide much assistance in parsing the relevance of this evidence. However, at the hearing, the Applicant identified the following trademark registrations which it considered the most relevant:

- registration No. TMA732,051 for the trademark CORUS in the name of Corus Entertainment Inc., registered for use in association services generally related to radio and television broadcasting and programming [Chow Affidavit, Exhibit XX]; and
- registration No. TMA903,864 for the trademark SOCIALCHORUS in the name of Firstup, Inc., registered for use in association with a number of services in the field of advertising and marketing for others [Chow Affidavit, Exhibit ZZ].

[72] I do not consider the state of the Register evidence to assist the Applicant to any meaningful degree. To begin, some of the references included in the evidence relate to trademark applications that are neither registered nor allowed based on use (e.g., applications No. 2,067,757 for Chorus, and No. 2,002,015 for KHOROS), or that have been abandoned (e.g., application No. 1,867,241 for THE CHORUS LES CHORISTES THE MUSICAL design mark, abandoned in July 2021).

[73] Otherwise, the vast majority of the registered trademarks pertain to very different goods and services from those in issue in this case, such as aircraft leasing services (TMA,998,512), wine (TMA829,844), and bicycles (TMA467,231). On this point, the above-identified SOCIALCHORUS trademark (TMA903,864) does not cover services in a sufficiently related field to impact the confusion assessment in this case. Further, I consider the trademark SOCIALCHORUS to convey a quite different overall impression from the trademarks in issue in the present case where the word CHORUS is the first and most striking element.

[74] With respect to the registered trademarks which include the term CORUS (e.g., TMA732,051), owned by Corus Entertainment Inc., these cover services generally related to radio and television broadcasting and programming, which in my view is different from the teleconferencing services offered by the Opponent.

[75] The state of the marketplace evidence does little more to support the Applicant's position that CHORUS has been commonly adopted in the marketplace in association with relevant goods or services. In this respect, I note that aside from the Corus Entertainment Inc. webpages [Exhibit NNNNN], none of the third-party references appear to relate to telecommunications, business management or business consulting [para 22]. Indeed, as was the case for the state of the Register evidence, the vast majority of the third party webpages pertain to unrelated goods and services, such as musical choirs or musical performances (e.g., Lions Gate Chorus at Exhibit QQQ; Chorus Studio at Exhibit PPP; Festival Chorus at Exhibit TTT; Toronto's Children Chorus at Exhibit VVV), music classes (e.g., Chorus & Clouds at Exhibit OOO), online music news and commentary (e.g., Chorus.fm at Exhibit RRR), a video game (Chorus at Exhibit SSS), a chorus management software (e.g., Chorus Connection at Exhibit ZZZ), a rental apartment building (Chorus at Exhibit AAAAA), a hearing implant product (Chorus Sound Processor at Exhibit BBBB), and a dentistry practice (Corus at Exhibit QQQQQ).

[76] In my view, the Applicant's state of the Register and state of the marketplace evidence falls short of what is required to show common adoption and use of similar

marks by third parties in a relevant field. Accordingly, I do not consider it to be a significant surrounding circumstance in the present case.

Conclusion regarding the section 12(1)(d) ground

[77] Having regard to all of the surrounding circumstances discussed above, and in particular the degree of resemblance, the greater extent to which the Opponent's trademark has been used and become known, and the relatedness of the services, I conclude the Applicant has not met its legal burden of demonstrating no likelihood of confusion.

[78] Consequently, the section 12(1)(d) ground of opposition succeeds.

Non-entitlement ground based on section 16(1)(a)

[79] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because it was confusing with the CHORUS CALL Mark which had been previously used and made known in Canada by the Opponent, or its predecessors-in-title and licensees.

[80] The material date for the section 16(1)(a) ground of opposition is the priority filing date of the application, namely, June 12, 2016 [*Earthrise Farms v Saretzky* (1997), 85 CPR (3d) 368 (TMOB) at paras 17-18].

[81] The Opponent has met its initial evidential burden under this ground of opposition by virtue of its evidence of use of its CHORUS CALL Mark in Canada since at least 2005. Further, there is no evidence to suggest that the Opponent had abandoned its trademark as of the date the 745 Application was advertised, namely July 24, 2019.

[82] In these circumstances, the analysis of the likelihood of confusion under this ground is essentially the same as for the section 12(1)(d) registrability ground. The earlier material date for the section 16(1)(a) ground of opposition does not alter to any meaningful degree the confusion analysis set out above for the registrability ground of opposition.

[83] Thus, the Applicant has not met its legal burden to demonstrate no likelihood of confusion as of the material date for this non-entitlement ground, and the section 16(1)(a) ground of opposition is also successful.

Remaining grounds of opposition

[84] As I have already found in the Opponent's favour in respect of the section 12(1)(d) and 16(1)(a) grounds of opposition against the 745 Application, it is not necessary to address the remaining grounds of opposition under sections 16(1)(c) and 2.

The 732 Application for CHORUS

[85] With the application for the trademark CHORUS, the grounds of opposition, material dates, issues and evidence are the same as those discussed above with respect to the application for the trademark CHORUS.AI.

[86] As noted above, the statement of services in the 732 Application is "Business strategy development services; business management consultation in the field of telecommunications". This is essentially a subset of the services in the 745 Application, and that difference has no impact on the outcome of the confusion analysis.

[87] Consequently, for the same reasons discussed above, the grounds of opposition under sections 12(1)(d) and 16(1)(a) are also successful against the 732 Application.

[88] I also note that the Opponent's position is stronger in respect of this application, given that the degree of resemblance between the CHORUS CALL Mark and the applied-for trademark CHORUS is greater in the absence of the ".AI" element.

The 729 Application for CHORUS Stylized

[89] In the case of the application for the design trademark CHORUS Stylized, the grounds of opposition, issues and evidence are the same as those discussed above with respect to the applications for the word marks CHORUS.AI and CHORUS.

[90] The material date is also identical in respect of the registrability ground, *i.e.* the date of my decision. The material dates for the non-entitlement ground, however, is identical with respect to the priority filing date, but different in respect of the advertisement date. As I am satisfied that the Opponent had not abandoned its CHORUS CALL Mark when the 729 Application was advertised on January 8, 2020, the difference in the advertisement date is inconsequential.

[91] With the 729 Application, one must consider the impact of the design element and colour claim that is part of the trademark CHORUS Stylized. The colour claim in the 729 Application is as follows:

Colour is claimed as a feature of the trade-mark. The colors teal (PANTONE 17-4919)* and white are claimed as a feature of the mark. The mark consists of the word CHORUS, with a stylized 'O', written in white, all against a teal background. *PANTONE is a registered trademark.

[92] The Applicant submits that the different appearances of the parties' marks, including different colours and design elements, lead to "a different overall idea and commercial impression" which "should not be discounted in the confusion analysis" [Applicant's written representations at para 91].

[93] As indicated above, the appropriate test must be assessed from the perspective of a consumer with an imperfect recollection of an opponent's trademark. While the ordinary consumer is owed a certain amount of credit, the test is not a side-by-side comparison and, if ordinary casual consumers somewhat in a hurry are likely to be deceived about the origin of the goods or services, then the statutory test is met [*Mattel, supra*, at paras 57 and 58; *Veuve Clicquot, supra*, at para 20].

[94] Having regard to those principles, I am not persuaded that the design elements in the trademark CHORUS Stylized are sufficient to shift the balance of probabilities regarding confusion in favour of the Applicant. First, the vertical lines of the design element form the shape of the letter "O" such that the subject trademark would likely be sounded as "chorus", and viewed as a stylized version of the word CHORUS. Second, regarding the idea conveyed, I tend to agree with the Opponent that the design element is suggestive of a sound recording and, as a result, does little to differentiate the

applied-for trademark from the Opponent's CHORUS CALL Mark. Finally, the Applicant's colour claim does not serve to distinguish the applied-for trademark from the Opponent's mark, as the Opponent's registration does not include a colour claim, and thus covers depictions in any colour.

[95] Consequently, the grounds of opposition under sections 12(1)(d) and 16(1)(a) are also successful against the 729 Application for the trademark CHORUS Stylized.

DISPOSITION

[96] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the three subject applications pursuant to section 38(12) of the Act.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2023-04-18

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