

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
27 September 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leiner Health Services Corp.

Serial No. 76633657

Michael A. Painter, Esq. of Isaacman, Kaufman & Painter for
Leiner Health Services Corp.

Renee McCray, Trademark Examining Attorney, Law Office 111
(Craig D. Taylor, Managing Attorney).

Before Holtzman, Drost, and Cataldo, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 18, 2005, Leiner Health Services Corp.
(applicant) applied to register the mark OPTIMAL HEALTH
MAKEOVER on the Principal Register for goods identified as
"vitamins and dietary food supplements" in Class 5. The
mark is in standard characters, and the application is
based on applicant's allegation that it has a bona fide
intent to use the mark in commerce. Applicant entered a
disclaimer of the term "HEALTH" during prosecution of the
application.

The examining attorney has refused to register the mark under Section 2(d) of the Trademark Act because of a prior registration for the mark OPTIMAL HEALTH FORMULA (in typed or standard character form) for "vitamins and dietary food supplements" in Class 5.¹ 15 U.S.C. § 1052(d).

After the examining attorney made the refusal final, this appeal followed.

The examining attorney argues that applicant's and registrant's marks "convey similar overall suggestive meanings and that the additional words FORMULA and MAKEOVER do not significantly alter the overall similar meaning and commercial impression created by OPTIMAL HEALTH alone." Brief at unnumbered p. 4. The examining attorney also points out that the goods as described in the application and cited registration are legally identical with no restrictions as to channels of trade. Applicant does not dispute the identity of the goods, and instead focuses entirely on the marks. Applicant argues that the examining attorney failed to consider the marks in their entireties and "in light of the weakness of the common segment." Brief at 5. According to applicant, "[b]ased upon the

¹ Registration No. 2195515, issued October 13, 1998; "HEALTH FORMULA" disclaimed; affidavits under Sections 8 and 15 accepted and acknowledged.

differences between the non-common portions and the inherent weakness of the common portion of the marks, no likelihood of confusion exists." Brief at 7.

When there is an issue of likelihood of confusion, we consider the evidence in light of the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We now consider whether applicant's and registrant's goods are related. We must determine the question of the relatedness of the goods as they are identified in applicant's application and the cited registration. Both the cited registration's and the application's identifications of goods are identical: "vitamins and dietary food supplements." Thus, this factor strongly favors a conclusion of likelihood of confusion.

Also, inasmuch as the goods are identical and there are no restrictions on the goods, we must assume that the goods move in the same channels of trade to the same customers.² *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“[S]ince there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those [products]”).

In addition, the factor of the conditions of purchase was discussed by the examining attorney, and we agree that this factor also favors a finding of likelihood of confusion. The goods are sold to members of the general public, which would include purchasers who are not particularly sophisticated about the goods. Moreover, vitamins and dietary supplements can be inexpensive and, even purchasers who may be somewhat careful about the ingredients in their vitamins and dietary supplements might not necessarily be “expert in trademark evaluation or immune from source confusion.” *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983).

² With her final Office action, the examining attorney also submitted Lexis-Nexis and internet evidence to show that vitamins and dietary food supplements travel in the same trade channels and are marketed under the same conditions.

We now consider whether applicant's mark, OPTIMAL HEALTH MAKEOVER and the mark in the cited registration, OPTIMAL HEALTH FORMULA, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. In making this determination we recognize that "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992). We further recognize that we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Moreover, in making this determination, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Examining the marks in their entireties in terms of their appearance, sound, meaning and commercial impression,

we find the marks to be similar. The marks share a similar structure and cadence in that both marks are comprised of three words with the first two words - OPTIMAL HEALTH - being identical followed by a three-syllable word - MAKEOVER in applicant's mark and FORMULA in the registered mark. Neither the suggestive term "Makeover"³ nor the disclaimed and descriptive word "Formula" are likely to be used by consumers to distinguish the source of the goods. They are more likely to be perceived as slightly different products from the same source. Therefore, while the last word in each mark is different, this does not overcome the fact that the marks are both dominated by the initial wording "OPTIMAL HEALTH." Because they are both dominated by the wording "OPTIMAL HEALTH," the marks' similarities in appearance, sound, meaning, and connotation overcome their differences. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir. 2000) ("[B]ecause both marks begin with "laser," they have

³ A "Makeover" is defined as "a thorough course of beauty and cosmetic treatment." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

consequent similarities in appearance and pronunciation") (quotation marks in original omitted); *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ 1531, 1534 (Fed. Cir. 1997) (more weight given to common dominant word DELTA).

Applicant argues that the registered mark is weak and entitled to only a narrow scope of protection because the term OPTIMAL is laudatory⁴ and the subject of the following third-party registrations for goods in Class 5:⁵ NATURE'S OPTIMAL NUTRITION for dietary supplements (Reg. No. 3078505); OPTIMAL LIFE FACTORS for nutritional supplements (Reg. No. 2644134); and OPTIMAL RESULTS for nutritional supplements (Reg. No. 2236726).⁶ Regarding these three registrations, they are of limited probative value for

⁴ "Optimal" is defined as "most favorable or desirable; optimum." See Final Office Action, attachment.

⁵ We note that a fourth registration (No. 1773370 for OPTIMAL NUTRIENTS) was cancelled in 2004. "[A] canceled registration does not provide constructive notice of anything." *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989).

⁶ We point out that this evidence consists only of a list of information from the registrations without actual copies of the registrations. This list was originally submitted with applicant's first response. While this is not the proper way to make such registrations of record, *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1456 n.2 (TTAB 1998), the examining attorney has discussed this information without objection and she has not advised applicant of the correct way to make this evidence properly of record. Therefore, we will consider this information to have been stipulated into the record. TBMP §§ 1207.03, 1208.02 (2d ed. rev. 2004).

several reasons. First, unlike applicant's mark and registrant's mark, none contain the phrase OPTIMAL HEALTH. Second, while third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, they are not "evidence of what happens in the marketplace or that consumers are familiar with them." *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Third, the existence of third-party registrations "cannot justify the registration of another confusingly similar mark." *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987), quoting *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). Moreover, it is well settled that each case must be decided on its own facts and the board is not bound by prior decisions involving different records. See *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We add that even if the registered mark was considered to be weak for vitamins and dietary food supplements, it nonetheless is entitled to protection from the use of a very similar mark on the same products. "[E]ven weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services." *In re Colonial Stores*, 216 USPQ 793, 795 (TTAB

1982); *In re The Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

Moreover, even if the cited mark is laudatory and weak, we do not agree with applicant's argument that the difference in the last word in the marks is sufficient to distinguish them. As stated by our principal reviewing court:

To illustrate, assume the following pairs of hypothetical marks for identical financial services: ACCOUNT and EXCHANGE; CASH ACCOUNT and CASH EXCHANGE or MANAGEMENT ACCOUNT and MANAGEMENT EXCHANGE; CASH MANAGEMENT ACCOUNT and CASH MANAGEMENT EXCHANGE; and, finally, CASH MANAGEMENT ACCOUNT BANK and CASH MANAGEMENT EXCHANGE BANK. That these pairs are of progressively greater similarity is readily apparent, with the result that likelihood of confusion of the public becomes a closer question at each step of the progression, until it becomes virtually undeniable even though only a "generic" word, "BANK," has been added to the final stage. The differing portions of each pair of marks, ACCOUNT and EXCHANGE, are as similar or dissimilar in the last pair as in the first, but the marks in their entireties are not. The addition of a string of descriptive and even generic words has altered the mental impression made by the marks until it can only be concluded that the dissimilar part has been submerged. Thus, one cannot, as urged by appellant, focus primarily on the noncommon features, here, ACCOUNT and EXCHANGE, to determine likelihood of confusion. The marks must be considered as the public views them, that is, in their entireties.

National Data, 224 USPQ at 752.

Applicant relies on *In re Phillip Morris, Inc.*, 179 USPQ 60 (TTAB 1973), in support of its argument that the marks are weak such that the differences between the non-common portions of the marks should be sufficient to distinguish them. The marks involved in *Phillip Morris* were the applied-for mark RICHMOND PREFERRED and the registered mark RICHMOND BEST, registered under Section 2(f), both for tobacco products. The board held that "the prior registration of 'RICHMOND BEST' cannot preclude the registration by others of similar suggestive but otherwise distinguishable notations or trademarks for tobacco products." Even if we agree with applicant that the marks at issue here are suggestive, we do not find they are otherwise distinguishable. Rather, the marks convey the same suggestive meaning to prospective purchasers, namely, that the products will improve the user's health. Further, it is quite plausible that consumers encountering OPTIMAL HEALTH MAKEOVER products would view them as a specific formulation of registrant's OPTIMAL HEALTH FORMULA products.

When we consider the record, we conclude that there is a likelihood of confusion here. The goods of applicant and registrant are identical. The marks are both dominated by the same phrase OPTIMAL HEALTH. As discussed previously,

Ser. No. 76633657

the differences in the last term in each mark do not outweigh the similarity in overall commercial impression the marks convey. Therefore, we conclude that there is a likelihood of confusion.

Decision: The refusal to register is affirmed.