

THIS DECISION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: September 3, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re flexSCAN, Inc.

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Serial No. 77018182

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Kit M. Stetina of Stetina Brunda Garred & Brucker for  
flexSCAN, Inc.

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101, Ronald R. Sussman, Managing Attorney.

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**Before Seeherman, Holtzman, and Mermelstein, Administrative  
Trademark Judges.**

**Opinion by Mermelstein, Administrative Trademark Judge:**

flexSCAN, Inc. seeks registration of the following  
mark



for

Providing temporary use of on-line non-downloadable  
software for medical records, prescription tracking  
and management, insurance tracking and management,  
diet management and planning, fitness management and  
planning, disease detection and prevention, health and

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wellness education, and lifestyle tracking and modification. International Class 42.<sup>1</sup>

Registration has been finally refused pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark in Registration No. 3047615<sup>2</sup> (shown below), as to be likely, if used in connection with the identified services, to cause confusion, to cause mistake, or to deceive.



for

Providing temporary use of on-line non-downloadable software to healthcare providers for use in maintaining and accessing patient medical records, assessing workflow and managing patient accounts. International Class 42; and

Medical services and medical information services, namely, providing clinical diagnostic laboratory testing ordering, results reporting and related healthcare information and medical insights electronically over the Internet, or by other electronic means, to clients, such as health care consumers, physicians or hospitals. International Class 44.

Applicant and the examining attorney filed briefs.

After careful consideration of the record, we reverse.

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<sup>1</sup> Filed August 10, 2006, based on the allegation of a *bona fide* intent to use the mark in commerce.

<sup>2</sup> Registered January 24, 2006.

**I. Applicable Law**

Our determination under Trademark Act § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999).

**II. Discussion**

At the outset, we note that the examining attorney makes no mention in his brief of the registrant's International Class 44 medical services. See Ex. Att. Br. at 1-2 (describing registrant's Class 42 services as

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registrant's services "in relevant part.") We accordingly presume that the registration of registrant's mark for such services is not considered a bar to registration of applicant's mark.

**A. The Similarity Or Dissimilarity of the Marks in Their Entireties as to Appearance, Sound, Connotation and Commercial Impression.**

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, meaning and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). As has often been stated, when a mark consists of words and a design, the word portion is likely to make the greatest impression on the mind of the consumer. *E.g., In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Further, the first word of a compound mark is often more likely to make a stronger impact on consumers and the way they remember the mark. *E.g. Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1639 (TTAB 2007).

The examining attorney argues that "the marks are similar because each mark is comprised of a single word

followed immediately by the identical number together with a circular design element that create [sic] the same commercial impression of complete health." Ex. Att. Br. at 2. On the other hand, applicant contends that the marks "are different in relation to their appearance, connotation and sound...." App. Br. at 7.

We begin by noting the obvious: both marks contain the number "360." As the examining attorney notes, "the term 360 is identical in both marks and means 360° or 360 degrees, suggesting full circle or complete." Ex. Att. Br. at 3. In the context of the applicant's services and the registrant's International Class 42 services, "360" implies that the offered services are comprehensive.<sup>3</sup> While this element is common to both marks - and carries with it the same connotation - we also find that the term is suggestive of the identified services, and is thus not highly distinctive.

But beyond sharing the number "360," the two marks have nothing else in common. The first words of the marks are WELLNESS and CARE, respectively. Although the

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<sup>3</sup> We do not find applicant's submission of three pages of search engine results for the term "360" to be helpful. Such material has little or no probative value. *In re Bayer Aktiengesellschaft*, 82 USPQ2d 1828, 1933 (Fed. Cir. 2007). Nonetheless, the examining attorney's statements regarding the meaning of the term are consistent with applicant's argument, and we have accepted them at face value.

examining attorney argues that "both share the same meaning because both terms connote a sense of overall health and well being," Ex. Att. Br. at 3, the actual meaning of the words is so different that consumers are not likely to view them as having a similar connotation, despite the fact that they may abstractly reference the concept of health.

As shown by the examining attorney's dictionary evidence, "wellness" is "[t]he condition of good physical and mental health, especially when maintained by proper diet, exercise, and habits," THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> ed. 2000) (online), while "care" means a "burdened state of mind," "upkeep or maintenance," "to be concerned or interested," or "to provide needed assistance...." *Id.* While "wellness" may result from "care," these words clearly do not mean or imply the same thing. Moreover, as applicant points out, these words lend a different appearance and pronunciation to their respective marks.

Finally, the examining attorney argues that the "design elements" in the marks are similar and - because both are circular - they "reinforce[] the full circle impression." Ex. Att. Br. at 3. We disagree. While the design element in the registration (an arrow forming the zero in the number 360) does echo the 360° theme, the

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design element which appears on the opposite side of applicant's mark appears to be a stylized flower or pinwheel design, not a circle or reference to all-around wellness.

Considered in their entirety, we find these marks to be largely dissimilar. The visual and conceptual focus of the marks are the first word "WELLNESS" in applicant's mark and "CARE" in opposer's. These elements look and sound different, and carry different meanings. The design elements in both marks further distinguish them. In all, the differences in the marks outweigh the presence in each of the suggestive term "360," and strongly support reversal.

**B. The Conditions Under Which and Buyers to Whom Sales are Made.**

The services recited in both the application and in the cited registration relate to the keeping and dissemination of medical data. Because, as discussed *infra*, applicant's recitation of services is not limited, we must construe applicant's customers to include both patients and health care professionals, although the registrant's services are limited to health care professionals. As a result, the only consumers likely to

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be exposed to both marks and services - and to be potentially confused - are health care professionals.

Given the importance of medical record-keeping and the associated concerns and laws respecting patient privacy, we think the health-care professionals who encounter both applicant's and the registrant's services in the marketplace are likely to exercise care in selecting them. Such customers are clearly not immune from source confusion. However, confusion tends to be somewhat less likely under such conditions than when goods or services are purchased on impulse or without careful thought.

Accordingly, this factor favors reversal.

**C. The Similarity Or Dissimilarity And Nature Of The Services; Channels of Trade and Potential Purchasers**

In determining registrability, we must limit our consideration to the services, channels of trade, and potential purchasers as set out in the application and the cited registration. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Regardless of the consumers to whom applicant actually renders its services, we may not read limitations into the services as set out in the application. We must accordingly construe applicant's services as being offered to both patients and healthcare providers. *Octocom Systems*

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*Inc. v. Houston Computers Services Inc.*, 16 USPQ2d 1783, 1786-87 (Fed. Cir. 1990).

We agree with the examining attorney that applicant's services are legally identical or highly similar to the extent that they both include providing the use of software for managing medical records. We likewise find that applicant's potential purchasers are not limited to patients, but include those services provided to doctors, nurses, and the like.

### **III. Conclusion**

In weighing the relevant considerations, "one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998); *citing Kellogg Co. v. Pack'em Enters.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991).

Although we recognize that applicant's services are in part identical or closely related to those recited in the prior registration and that the potential purchasers of the goods overlap, we find that the differences in the marks, considered in their entirety, outweigh these factors. Further, although not dispositive, the fact that the only

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consumers likely to be exposed to both marks are also likely to exercise care in purchasing further supports our conclusion.

***Decision:*** The refusal to register under Trademark Act § 2(d) is accordingly reversed.