

THIS OPINION IS NOT A  
PRECEDENT OF THE  
TTAB

Mailed:  
7 November 2008  
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re flexSCAN, Inc.

---

Serial No. 77357357

---

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

Khanh M. Le, Trademark Examining Attorney, Law Office 113  
(Odette Bonnet, Managing Attorney).

---

Before Grendel, Drost, and Zervas, Administrative Trademark  
Judges.

Opinion by Drost, Administrative Trademark Judge:

On December 20, 2007, applicant flexSCAN, Inc. applied  
to register the mark APERTURE HEALTH (in standard character  
form) on the Principal Register for services ultimately  
identified as: "providing health care services, namely,  
wellness programs; providing personal medical information

to individuals and organizations" in Class 44.<sup>1</sup> Applicant has disclaimed the term "Health."

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a registration for the mark APERTURE (in typed or standard character form) for:

Computerized health care provider data management and health care provider information management in the fields of health care and insurance in Class 35

Physician credential verification services in Class 42.<sup>2</sup>

When the refusal was made final, applicant filed this appeal.

When there is a question of likelihood of confusion, we analyze the facts as they relate to 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) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We begin by considering the similarities and dissimilarities of the marks in the application and registration. Applicant's mark is APERTURE HEALTH.

---

<sup>1</sup> Serial No. 77357357 is based on applicant's allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> Registration No. 2551971 issued March 26, 2002, affidavits under Sections 8 and 15 accepted or acknowledged.

Registrant's mark is simply the single word APERTURE. Both marks are in typed or standard character form so the only difference between the marks is the fact that applicant has taken the entire registered mark and added the term "Health" to registrant's mark.

The added word "health" has been disclaimed in applicant's mark and disclaimed matter is often "less significant in creating the mark's commercial impression." *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). Inasmuch as applicant's services are identified as "health care services," the term "health" is at least highly descriptive. "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). Because registrant's services are also health-related services, "health care provider data management and health care provider information management services," the term "health," would not have much significance in distinguishing the marks. *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (citations omitted) ("With respect to

GOLD, the Board determined that the term denotes a premium quality, a descriptive term offering little to alter the commercial impression of the mark. Indeed, GOLD, in the context of tequila, describes either a characteristic of the good - its color - or a quality of the good commensurate with great value or merit. In sum, the Board had good reason to discount ALE, JOSE, and GOLD as significant differences between the marks").

When we compare the marks APERTURE and APERTURE HEALTH, we find that they are both dominated by the common term APERTURE. Furthermore, there is no evidence that the term "Aperture" is a weak or highly suggestive term for registrant's or applicant's services. Also, contrary to applicant's argument (Brief at 8) that the term "Health" creates a different commercial impression, it is unlikely that many purchasers would view applicant's mark as "meaning a shedding of light on your health," while viewing registrant's mark as meaning simply "an opening." Brief at 9. Many if not most consumers would ascribe the same meaning to the identical word APERTURE. The slight difference in the marks that results from the addition of the highly descriptive word "health" does not significantly change their sound, appearance, meaning, or commercial

impression. Therefore, we find that the marks, in their entirety, APERTURE and APERTURE HEALTH are very similar.

The next factor that we consider is whether applicant's and registrant's services are related.

Applicant's services are:

Providing health care services, namely, wellness programs; providing personal medical information to individuals and organizations" in Class 44.

Registrant's services are:

Computerized health care provider data management and health care provider information management in the fields of health care and insurance in Class 35

Physician credential verification services in Class 42.

We begin by noting that:

[It] has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services.

*In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

*See also Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

Here, applicant's services include providing personal medical information to individuals and organizations and registrant's services include data management and health care provider information management in the fields of health care. Providing personal medical information would involve data management and information management. The examining attorney has submitted internet printouts and registrations to show that applicant's and registrant's services are related. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001). See Registration No. 3034336 (providing an on-line computer database featuring information in the healthcare field, computerized database management in the healthcare field, and electronic processing of healthcare information); No. 3334545 (providing medical information to allow members to update their medical and personal files and data and information management, namely, management of computerized

files containing personal and/or medical information); and No. 3401473<sup>3</sup> (electronic processing of health care information, wellness programs, and providing health care information by telephone and the Internet). See also [www.mainenetwork.com](http://www.mainenetwork.com) ("Services included in network [MNH - Maine Network for Health] membership are: participation in MNH payor contracts, credentialing for MNH payout contracts, information services... Health & Wellness Services programs") and [www.wellogic.com](http://www.wellogic.com) ("Initiate Systems, Inc., a leading provider of master data management solutions (MDM), and Wellogic, a leading health information exchange provider, today announced a combined solution that delivers accurate health information to clinicians and patients, enabling better decision making through reliable and meaningful data exchange").

We find that the services of applicant and registrant are related. Health care providers would be purchasers of services that provide access to personal medical

---

<sup>3</sup> We disagree with applicant's assertion that this two-class registration for several health care-related services is somehow the equivalent of the multi-class house mark registrations discussed in the *Mucky Duck* case for the Saks & Co. and Knott's Berry Farm marks. A registration is not a house mark because it contains several goods or services. Furthermore, while applicant directs our attention to the website of this registrant (Brief at 13), its attempt to supplement the record is not only untimely (37 CFR § 2.142(d)) but ineffective. *In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004) ("A mere reference to a website does not make the information of record").

information as well as health care provider data management and information management services. Similarly, individuals are likely to use services that provide access to their personal medical information as well as services that verify their potential physician's credentials. Therefore, we find that the purchasers of applicant's and registrant's services would overlap. Furthermore, these services are likely to be marketed through the same channels of trade to organizations such as health care providers who need access to personal medical information and health care provider information management services and individuals who need access to their personal medical information and physician verifications services.

We add that we do not read limitations into the identification of services as applicant argues (Brief at 10) and, therefore registrant's physician credential verification services would include services marketed to employers and individuals. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods,

the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also *Paula Payne Products v. Johnson Publishing 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").

Another point applicant argues is that "employers do not impulsively enroll their employees in health plans." Brief at 15. As we discussed previously, potential purchasers of applicant's and registrant's services would include ordinary purchasers who may not necessarily be sophisticated purchasers, even though they may exercise care before using the identified services. We add that even if the purchasers are careful or sophisticated, they "are not immune from source confusion." *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999). See also *In re Hester Industries, Inc.*, 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products"). In this case, even sophisticated purchasers would likely assume that there is an association between APERTURE health care

provider data management and information management services and APERTURE HEALTH services of providing medical information to organizations.

Finally, applicant argues that the "marks have coexisted without any hint of actual confusion." The Federal Circuit has held that the "lack of evidence of actual confusion carries little weight." *Majestic Distilling*, 65 USPQ2d at 1205. The absence of actual confusion does not mean there is no likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). The assertion of a lack of actual confusion is particularly ineffective when the application is based on an intent to use, there is no evidence of the extent of applicant's actual use, and the assertion of no actual confusion is simply argument of counsel.

When we consider the relevant *du Pont* factors and the evidence of record, we are persuaded that there is a likelihood of confusion if the marks APERTURE and APERTURE HEALTH were used on the identified services.

**Ser. No.** 77357357

Decision: The examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act is affirmed.