

THIS OPINION  
IS NOT A PRECEDENT OF  
THE T.T.A.B.

Mailed:  
February 28, 2008  
jtw

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re TurningPoint Women's Healthcare, Inc.

---

Serial Nos. 78360812 and 78360815

---

Erinn K. Robinson of Arnall Golden Gregory LLP for  
TurningPoint Women's Healthcare, Inc.

Colleen Dombrow, Trademark Examining Attorney, Law Office  
101 (Ronald R. Sussman, Managing Attorney).

---

Before Quinn, Walters and Walsh, Administrative Trademark  
Judges.

Opinion by Walsh, Administrative Trademark Judge:

The Board is deciding the appeals in the two  
applications at issue here in one opinion because the  
applications involve the same applicant, related marks and  
the same refusal.

TurningPoint Women's Healthcare, Inc. (applicant) has  
filed two applications to register the two related marks,

Serial No. 78360812 and 78360815

TURNINGPOINT WOMEN'S HEALTHCARE in standard characters<sup>1</sup> and in the special form shown here<sup>2</sup>:



In both applications, applicant identifies its services as "medical services, namely, physical therapy, and counseling in the field of health, namely, medical counseling, nutritional counseling, and psychological counseling, related to the support and education of breast cancer" in International Class 44. Both applications also include a disclaimer of "WOMEN'S HEALTHCARE." The application for the special-form version of the mark includes the following statements: (1) "The color(s) pink and black is/are claimed as a feature of the mark."; and (2) "The mark consists of the color black which appears on the wording TURNING, on the letters P, I, N, T in the word point, and on the wording WOMEN'S HEALTHCARE. The color pink appears on the ribbon." Applicant identifies the ribbon design as

---

<sup>1</sup> Application Serial No. 78360815, filed February 2, 2004, claiming both first use of the mark anywhere and first use of the mark in commerce on January 31, 2003.

<sup>2</sup> Application Serial No. 78360812, also filed February 2, 2004, and also claiming both first use of the mark anywhere and first use of the mark in commerce on January 31, 2003.

**Serial No. 78360812 and 78360815**

"the universal symbol of breast cancer awareness."

Applicant's Brief at 5.<sup>3</sup> The Examining Attorney has also submitted examples of several prior registrations owned by different parties which incorporate the ribbon design. See attachments to the Final Office Action in Application Serial No. 78360812.

The Examining Attorney has finally refused registration in both applications under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with two registrations owned by the same party, Registration No. 2924974 for the mark TURNING POINT, which issued on February 8, 2005, and Registration No. 2922634 for the mark TURNING POINT WEIGHT LOSS, which issued on February 1, 2005. Both registrations claim first use of the marks anywhere and first use of the marks in commerce for all classes on July 27, 1996.

The TURNING POINT registration identifies the following goods and services: "aromatherapy oils contained in ampules" in International Class 3, "herbal products, namely, aroma therapy ampules containing herbs used for aroma therapy; dietary, nutritional and vitamin

---

<sup>3</sup> All references in this opinion to Applicant's Brief or the Examining Attorney's Brief relate to the briefs in Application Serial No. 78360812.

**Serial No. 78360812 and 78360815**

supplements; wellness supplements, namely herbal supplements" in International Class 5 and "providing health, nutrition and diet information; health and evilness advisory services, namely advice concerning general health and well being" in International Class 44.

The TURNING POINT WEIGHT LOSS registration identifies only the following services: "providing health, nutrition and diet information; diet planning and supervision; health and wellness advisory services, namely, advise (sic) concerning general health and well being." This registration includes a disclaimer of "WEIGHT LOSS."

Applicant has appealed the refusals in both applications. Applicant and the Examining Attorney have filed well written briefs. We affirm the refusals in both applications.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion..." 15 U.S.C. § 1052(d). The opinion in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors to consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the

similarity of the marks and the similarity of the goods and services of the applicant and registrant. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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."). Below we will consider each of the factors as to which applicant or the Examining Attorney presented arguments or evidence.

Applicant has suggested that the Examining Attorney failed to consider factors other than the similarity of the marks and the relationship between the goods and services. We believe the Examining Attorney did give appropriate consideration to other factors. We too will give appropriate consideration to all relevant factors in these appeals.

The Goods and Services and Channels of Trade

The goods and services of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods or services originate from or are associated with the same source. *See On-Line*

**Serial No. 78360812 and 78360815**

*Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Furthermore, in comparing the goods and services we must consider the goods and services as identified in the application and cited registrations. See *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 [or services] set forth in the application [and registration] regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] 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 [or services].").

In our analysis of the goods and services we will restrict our discussion to the services, not the goods, identified in the cited registrations because we find the services most relevant for purposes of the comparison.

**Serial No. 78360812 and 78360815**

Applicant's services are identified as "medical services, namely, physical therapy, and counseling in the field of health, namely, medical counseling, nutritional counseling, and psychological counseling, related to the support and education of breast cancer." The services in the cited registrations are identified as "providing health, nutrition and diet information; health and evilness advisory services, namely advice concerning general health and well being" in the TURNING POINT registration and "providing health, nutrition and diet information; diet planning and supervision; health and wellness advisory services, namely, advise (sic) concerning general health and well being" in the TURNING POINT WEIGHT LOSS registration.

We note at the outset that the cited registrations separately identify certain services which relate specifically to diet and nutrition and certain services which relate to "general health and well being." To state the obvious, the latter category of services is very broad.

In its arguments applicant attempts to draw a stark contrast between the services identified in the application and the cited registrations by characterizing its services and the registrant's services in ways not specified in the actual identifications.

For example, applicant argues, "There is no evidence that trained health professionals who provide medical care to breast cancer patients also routinely distribute weight loss supplements, and no reason to presume that consumers would believe that such goods and services emanate from a single source." Applicant's Brief at 11. Applicant argues further that the fact that the identifications in both its application and the cited registrations include a "reference to nutrition" is not sufficient to find the marks confusingly similar. *Id.* at 13. Applicant also asserts that any overlap between the goods and services of applicant and registrant is "de minimis." *Id.* at 11.

In stating these arguments, applicant characterizes its services as "medical services offered to breast cancer patients," on the one hand, versus the registrant's "weight loss counseling and supplements," on the other hand. *Id.* at 12. Applicant argues further, "... the owner of these [cited] registrations, Panda Herbal International, Inc., d/b/a Viable Herbal Solutions, is a developer, manufacturer, and primary supplier of alternative and complementary medicine herbal supplements. Further, Viable Herbal Solutions, uses its TURNING POINT marks solely in connection with weight loss supplements." *Id.*

**Serial No. 78360812 and 78360815**

Applicant also implies that the individuals who render its services are trained and licensed medical professionals while the individuals who render the services identified in the cited registrations are not.

The Examining Attorney argues that applicant's services and those identified in the cited registrations are closely related. The Examining Attorney quite properly emphasizes that the registrant's services are identified quite broadly and that we must compare the goods and services as identified in the application and cited registrations.

To support her argument the Examining Attorney also provided examples from web sites of twenty or more cancer centers to show that those centers offer a full range of services to breast cancer patients, including dietary information and nutritional counseling, as well as services related to general health and well being. The centers include Johns Hopkins, the University of Pennsylvania, The John Wayne Cancer Center, the Mayo Clinic, Cancer Treatment Centers of America, the Lombardi Comprehensive Cancer Center at Georgetown University and the Memorial Sloan-Kettering Cancer Center. See attachments to Final Office Actions in both applications. This evidence does show that both general counseling services and dietary

**Serial No. 78360812 and 78360815**

and nutritional counseling are integral parts of breast cancer treatment programs.

We agree with the Examining Attorney and conclude that applicant's services and the services identified in the cited registrations are closely related, and even overlapping.

To the extent applicant argues that its services are rendered in a particular setting and by individuals possessing certain qualifications, and those circumstances are not specified in applicant's identification of services, we cannot consider them. Likewise, to the extent applicant argues that the registrant's use of its mark is restricted in some manner, including to certain trade channels, and those limitations are not specified in the registrations, we cannot consider those restrictions. *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764 (TTAB 1986). As we indicated, we must confine our consideration to the goods and services identified in the application and the cited registrations. *See, e.g., Octocom Systems, Inc. v. Houston Computers Services Inc.*, 16 USPQ2d at 1787.

In our analysis of the identifications, we first note that applicant's identification includes "nutritional counseling." Applicant argues that its "nutritional counseling" differs from that of the registrant because its

**Serial No. 78360812 and 78360815**

services are "medical" and rendered to breast cancer patients. We reject applicant's argument that its use of "medical" in its identification effectively distinguishes its nutritional services from those identified in the registrations. This is a distinction without a difference. We also reject the implication that the qualifications of those who render applicant's services differ significantly from those identified in the registrations. There is simply no basis in the wording of the respective identifications to conclude that such a distinction exists. Also, because there is no restriction in the cited registrations as to the class of individuals the registrant services, we conclude that the services identified in the cited registrations could also be rendered for the benefit of cancer patients, including breast cancer patients.

In fact, we can conclude from the wording of the identifications alone that the services identified in the application and cited registrations are closely related, and even overlapping. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Both the application and the cited registrations include virtually identical services related to nutrition: in the application "nutritional counseling" and in the cited registrations "providing health, nutrition and diet

**Serial No. 78360812 and 78360815**

information" and "diet planning and supervision." Both the application and the cited registrations include counseling services: in the application "counseling in the field of health, namely, medical counseling, nutritional counseling, and psychological counseling" and in the cited registrations "health and evilness advisory services, namely advice concerning general health and well being" and "health and wellness advisory services, namely, advise (sic) concerning general health and well being."

Furthermore, the Examining Attorney's evidence related to the cancer centers further confirms the relationship between the services identified in the application and the cited registrations.

Accordingly, we conclude that the services identified in the application and both cited registrations are closely related, and even overlapping.

Also, in view of the fact that the services, as identified, are, at least in part, overlapping, we also conclude that the channels of trade for the services are necessarily overlapping. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

The Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

While we must also consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. As the Court of Appeals for the Federal Circuit observed, "... in articulating reasons for reaching a conclusion on the issue of confusion, 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).

Furthermore, "... it is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of

memory over a period of time. That is to say, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks."

We first compare the TURNINGPOINT WOMEN'S HEALTHCARE mark in standard characters with the cited TURNING POINT mark. Applicant argues that the inclusion of WOMEN'S HEALTHCARE in its mark distinguishes its mark from the cited mark. To support this argument, applicant relies on a definition of "healthcare" which it had made of record: "the prevention, treatment and management of illness and preservation of mental and physical wellbeing through the services offered by the medical and allied health professionals." Applicant's Brief at 5. Applicant then argues:

The term "HEALTHCARE" has a very specific connotation and is an immediate indication to the relevant consumer that Applicant is not offering services that it could get at a health food store. Rather, the term "HEALTHCARE" generally is an indication that the consumer will have access to services offered by licensed and trained professionals that will help them maintain or restore their health specifically as it relates to breast cancer. The inclusion of the "WOMEN'S HEALTHCARE" term in Applicant's mark differentiates the marks such that confusion is unlikely.

*Id.* at 5-6.

**Serial No. 78360812 and 78360815**

Here again, in its attempt to distinguish the marks, applicant resorts to characterizations of its services versus those of the registrant, characterizations not reflected in the application and cited registration, most importantly the assertion that the registrant merely operates a health food store. Based on these mischaracterizations applicant posits that the respective marks will be perceived differently. We find these arguments unpersuasive.

When we compare applicant's TURNINGPOINT WOMEN'S HEALTHCARE mark with the cited TURNING POINT mark, we find the marks highly similar. The only distinctive element and the dominant element in both marks is the term TURNING POINT. We note that TURNING POINT is also the first element in both marks. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("... [it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). The nondistinctive term WOMEN'S HEALTHCARE, which is disclaimed, is insufficient to distinguish the marks. Applicant's argument that the marks are distinguishable is based essentially in its entirety on applicant's mischaracterization of the respective goods and services

**Serial No. 78360812 and 78360815**

identified in the application and the cited registration. In fact, WOMEN'S HEALTHCARE could just as easily describe the services identified in the cited registration, as it does applicant's services.

Applicant has also argued that TURNING POINT is suggestive, and therefore weak. To support this contention applicant provided a definition of "turning point" as "the point at which a very significant change occurs; a decisive moment." *Id.* at 8.

We concede for purposes of our analysis that TURNING POINT is suggestive. However, TURNING POINT would convey the same suggestive significance as applied to both applicant's services and those services identified in the cited registration. More importantly, we do not have any basis to conclude that TURNING POINT is a term which is so commonly used in marks for the types of services at issue here that consumers would look to other elements in the marks to determine the source of the services. *Cf. Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005). Therefore, we conclude on this record that TURNING POINT, though suggestive, is not weak and that it is entitled to the protection afforded all registered marks.

Accordingly, we conclude that applicant's TURNINGPOINT WOMEN'S HEALTHCARE mark is highly similar to the cited TURNING POINT mark.

We conclude likewise that applicant's TURNINGPOINT WOMEN'S HEALTHCARE mark is similar to the cited TURNING POINT WEIGHT LOSS mark. While it is a somewhat closer question, we conclude that the nondistinctive term WEIGHT LOSS, which is also disclaimed, is insufficient to distinguish the marks.

We now turn to the comparison of applicant's special-form version of TURNINGPOINT WOMEN'S HEALTHCARE to the cited TURNING POINT mark. Applicant makes the same arguments here with regard to the word elements; we have discussed those arguments above. Applicant also argues that the inclusion in its mark of the ribbon design, signifying that its services relate to breast cancer, effectively distinguishes the marks. Applicant goes so far as to argue that the ribbon design is the dominant element in its mark. We find this argument unpersuasive.

For purposes of our comparison of the marks we note that here, as is generally the case, the word elements in the respective marks are dominant because potential purchasers commonly use word marks in requesting goods or

**Serial No. 78360812 and 78360815**

services. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

Furthermore, applicant readily acknowledges that the ribbon design is the universal symbol of breast cancer awareness. As such, it cannot function as a source identifier as a general proposition. Nor can it serve to distinguish the services here. The foundation underlying all of applicant's arguments in this regard is that applicant's services relate to breast cancer and registrant's services do not. The identifications in the cited registrations belie this premise. There is no restriction in the cited registrations so limiting registrant's services. Therefore, there is likewise no basis to conclude that the perception of the marks must differ due to the inclusion of the ribbon design.

Accordingly, based on our determinations regarding the ribbon design and our analysis above regarding the comparison of the word elements in the marks, we conclude that applicant's special-form version of TURNINGPOINT WOMEN'S HEALTHCARE is highly similar to the cited TURNING POINT mark.

Finally we compare applicant's special-form version of TURNINGPOINT WOMEN'S HEALTHCARE to the cited TURNING POINT WEIGHT LOSS mark. Here too, while it is again a somewhat

closer question, we also conclude here that the nondistinctive term WEIGHT LOSS, which is also disclaimed, is insufficient to distinguish the marks. Therefore, we conclude that applicant's special-form version of the TURNINGPOINT WOMEN'S HEALTHCARE mark is similar to the cited TURNING POINT WEIGHT LOSS mark.

Other Arguments/Factors

Applicant also argues that there is no likelihood of confusion in this case because the registrant offers its services through a single studio in Pennsylvania while applicant offers its services exclusively in Georgia. We reject this argument also. Again, we cannot consider this extraneous evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ2d at 764. Furthermore, the cited registrations are prima facie evidence of, among other things, the registrant's exclusive right to use the registered marks in connection with the identified goods and services nationwide. Trademark Act Section 7, 15 U.S.C. § 1057. Applicant's suggestion that the registrant's rights are limited geographically represents an impermissible collateral attack on the validity of the registrations which we cannot consider in this ex parte appeal proceeding. *In re Dixie Restaurants Inc.*, 41 USPQ2d at 1534-35.

Finally, applicant argues that there is no likelihood of confusion because patients select its services, not on impulse, but with care due to the nature of the services. While we generally agree that the services at issue here would be selected with a certain degree of care, we conclude that the level of care, when considered in view of all relevant circumstances, would not diminish the likelihood of confusion. Members of the general public are potential users of the services of both applicant and registrant. More importantly, here too applicant's arguments assume distinctions between the services of applicant and registrant based on extraneous evidence and assumptions, rather than on the services as identified in the application and the cited registrations. As we have stated repeatedly, we must confine our consideration to the identified goods and services.

Conclusion

Finally, based on all evidence of record in this case related to the *du Pont* factors, we conclude that there would be a likelihood of confusion between applicant's TURNINGPOINT HEALTHCARE mark, both in standard characters and in special form, and the cited TURNING POINT and TURNING POINT WEIGHT LOSS marks when used in connection with the respective identified goods and services. We

**Serial No. 78360812 and 78360815**

conclude so principally because the marks are similar and the respective services are, at least in part, overlapping and otherwise closely related.

**Decision:** We affirm the refusals to register the marks under Trademark Act Section 2(d) in both applications based on both cited registrations.