

5/31/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 15
EWH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Osmond Foundation, for the Children of the World, a Utah
Nonprofit Corporation, doing business as Children's Miracle
Network

v.

Maria Perez

Opposition No. 114,496 to Application
Serial No. 75/509,751 filed June 29, 1998

John A. Beckstead of Snell & Wilmer for Osmond Foundation,
for the Children of the World, a Utah Nonprofit
Corporation, doing business as Children's Miracle Network.

Robert Denbia for Maria Perez.

Before Hanak, Quinn and Bottorff, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Maria Perez (applicant) seeks to register the mark
shown below for "nursing case management services." The
application was filed on June 29, 1998 with a claimed first
use date of January 1, 1995. At the request of the
Examining Attorney, applicant disclaimed the exclusive
right to use CASE MANAGEMENT and INC. apart from the mark
in its entirety.

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On June 9, 1999 Osmond Foundation, for the Children of the World, a Utah Nonprofit Corporation, doing business as Children's Miracle Network (opposer) filed a Notice of Opposition alleging that long prior to January 1, 1995 it had used the mark CMN and later obtained registrations for said mark for the following services:

<u>Registration No.</u>	<u>Services</u>
1,992,891	Charitable fund raising services and monetary donations (Class 36)
1,992,889	Radio and television broadcasting (Class 38)
1,994,973	Radio and television programming and broadcasting, and production of radio and television programs, in the field of children and children's issues (Class 41)

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1,994,976

Providing health care
information (Class 42)

Continuing, opposer alleged that it would be damaged by the registration of applicant's mark in that applicant's mark "is likely to be confused with the mark CMN, considering the services in connection with which each is used." (Notice of Opposition paragraph 11).

Applicant filed an answer which denied the pertinent allegations of the Notice of Opposition. Opposer and applicant filed briefs. Neither party requested an oral hearing.

The voluminous record in this case is summarized at pages 4 to 10 of opposer's brief. In her brief, applicant has not challenged the accuracy of this summarization.

Because opposer has properly made of record certified copies of its four registrations of the mark CMN, priority is not an issue in this proceeding; it rests with opposer. King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). As applicant acknowledges at page 1 of her brief, the only issue in this case is that

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of likelihood of confusion.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and in this case the similarities of the services. 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 the differences in the essential characteristics of the goods [or services] and differences in the marks.")

Considering first the marks, one point needs to be clarified. As just noted, in the Notice of Opposition opposer claimed ownership of just one mark, namely, CMN. However, during the course of its testimony period, opposer made of record, without objection by applicant, not only its four registrations for the mark CMN, but also its seven additional registrations for the marks CMN CHAMPIONS in typed drawing form (four registrations) and CMN CHAMPIONS CHILDREN'S MIRACLE NETWORK and design in the form shown below (three registrations). The four CMN CHAMPIONS registrations cover the same four types of services as do the CMN registrations, and the three CMN CHAMPIONS

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CHILDREN'S MIRACLE NETWORK and design registrations cover the same services with the exception of "providing health care information."

Because applicant did not object to the introduction into evidence of copies of the seven registrations for CMN CHAMPIONS and CMN CHAMPIONS CHILDREN'S MIRACLE NETWORK and design, they are of record. However, as a practical matter, their presence in the record is of no consequence in our likelihood of confusion analysis. This is because that in considering all three of opposer's registered marks, opposer's mark CMN per se is clearly the closest to applicant's mark. Obviously, the addition of the word CHAMPIONS to form the mark CMN CHAMPIONS causes this mark in its entirety to be more dissimilar from applicant's

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mark. Likewise, the mark CMN CHAMPIONS CHILDREN'S MIRACLE NETWORK and design is, of all three of opposer's marks, the least similar to applicant's mark.

Hence, we turn now to a comparison of opposer's mark CMN per se and applicant's mark. Obviously, applicant's mark includes the letters CMN. However, these letters do not stand out in applicant's mark for at least two reasons. First, the letters are presented in a vertical as opposed to a horizontal format. Obviously, consumers are accustomed to reading letters presented in a horizontal, as opposed to, a vertical fashion. Second, the letters CMN in applicant's mark are enclosed within a dark rectangle.

We recognize that in any likelihood of confusion analysis the "marks must be compared in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985). However, "on the other hand, in articulating reasons for reaching a conclusion on the issue of likelihood 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 a consideration of the marks

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in their entirety.” National Data Corporation, 224 USPQ at 751. For rational reasons, we find that the most prominent feature of applicant’s mark is CASE MANAGEMENT NETWORK, INC. Because these words are considerably larger than the vertically stacked letters CMN, they are far easier to read. Thus, in terms of visual appearance, opposer’s mark CMN per se and applicant’s mark in its entirety are only marginally similar.

Likewise, in terms of pronunciation, we find that most consumers would pronounce applicant’s mark as CASE MANAGEMENT NETWORK, INC., or perhaps as CMN CASE MANAGEMENT NETWORK, INC. Either way, the pronunciation of applicant’s mark is decidedly different than the pronunciation of opposer’s mark CMN per se.

Finally, in terms of connotation, the two marks are very different. Applicant’s mark in its entirety, conjures up the image of a group (network) that manages cases. On the other hand, opposer’s mark, CMN per se, would be viewed as arbitrary, or to persons in the know, would be viewed as an initialism for CHILDREN’S MIRACLE

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NETWORK. Obviously, the terms CASE MANAGEMENT NETWORK, INC. and CHILDREN'S MIRACLE NETWORK have entirely different meanings.

In sum, we find that the two marks, considered in their entireties, are only very slightly similar in terms of visual appearance, and are quite distinct in terms of pronunciation and connotation.

Turning to a consideration of opposer's services and applicant's services, opposer has quite candidly stated at page 33 of its brief that its services and applicant's services "are not similar." The only way that certain of opposer's services and applicant's services are even remotely related is that both are in the "field of health care," and in four instances, the services of the two parties have involved the same hospitals. (Opposer's brief page 33). Opposer essentially "raises money for children's hospitals throughout the United States and Canada, creates awareness for children's health care issues, and educates the public about the need for children's health care, the shortage of available resources, and about good health care practices to prevent accidents and disease." (Opposer's

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brief page 15). There are approximately 170 Children's Miracle Network Hospitals, although it is unclear as to precisely how many of these 170 hospitals are in the United States as opposed to Canada. (Burt deposition page 12). A particular hospital applies to opposer to become a Children's Miracle Network Hospital, and if accepted, it becomes the only Children's Miracle Network Hospital in a "defined market." (Opposer's brief page 21). Depending upon its size, a hospital pays opposer fees ranging from \$15,000 to \$50,000 per year to be a Children's Miracle Network Hospital. In turn, opposer engages in a number of fund raising activities including telethons, radiothons and soliciting contributions from corporations and individuals, to name but a few of opposer's fund raising activities. After deducting expenses, opposer returns the funds it has received to its member hospitals.

As previously noted, applicant seeks to register its mark for "nursing case management services." Applicant's customers are insurance companies and self-insured corporations. When a worker is injured, applicant is retained by an insurance company or a self-insured

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corporation to make certain that the worker receives the proper care that will enable him or her to return to work in the most expeditious manner. Applicant is not retained by the patient, namely, the injured worker. When applicant is retained by an insurance company or a self-insured corporation, applicant assigns a nurse to work with the injured worker to ensure that he or she is receiving the appropriate care. In practice, none of the patients which applicant interfaces with are children. All are injured workers who are at least 18 years of age or older.

However, because applicant's identification of services reads simply "nursing case management services," this could encompass children as well as adults. Hence, we have not considered applicant's services as being limited to providing nursing case management for adults only.

Given the significant differences in applicant's mark and opposer's mark CMN (not to mention opposer's two other marks) and given the fact that the services of the parties are only very marginally related in that they both fall into the broad area of health care, we find that there exists no likelihood of confusion, and accordingly dismiss

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the opposition. See Astra Pharmaceutical Products v. Beckman Instruments, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983)(No confusion was found when the identical mark ASTRA was used on different medical devices found in the very same hospitals despite the fact that opposer even proved that there had existed some actual confusion).

Two final comments are in order. First, opposer's real concern with regard to possible likelihood of confusion is best articulated at pages 36 and 37 of its brief: "In the charitable fund raising business, the image and reputation of the charity is critical. Case Management [applicant] deals with people in situations where it is difficult to generate goodwill. These people have very serious medical problems and, despite its protestations, the evidence is obvious that patients and their families will view Case Management [applicant] like an insurance company or HMO ... The slightest negative connotations will impact the fund raising efforts of [opposer] ... " To begin with, applicant's services of providing nursing case management are simply not the same services as provided by an insurance company or HMO. One critical difference is

that the injured worker (patient) can refuse to have applicant monitor his or her medical care. (Parez deposition page 39). Once injured, a patient can hardly "fire" his or her insurance company or HMO. Moreover, as of the close of the testimony period in this case, applicant and opposer had coexisted for over five years and, indeed, as previously noted, had been involved in four instances with the very same hospitals. However, during all of this time, neither applicant nor opposer was aware of any single instance of actual confusion. While proof of actual confusion is not a prerequisite to a finding of likelihood of confusion, we find that if patients truly viewed applicant's services in a negative fashion, like those of an insurance company or HMO, and if these patients truly believed that there was an affiliation between applicant and opposer, then these patients would have made known their concerns to either opposer or applicant or both.

Second, at page 35 of its brief opposer contends that its mark CMN is famous. In this regard, opposer has established that in its twenty year history it has raised

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approximately \$1.5 billion for Children's Miracle Network Hospitals, and that in the year 2000 alone, it raised \$208 million.

However, on this record we find that opposer has simply not proven that its particular mark CMN per se is famous. To elaborate, opposer took the deposition of its executive vice-president and chief operating officer, Scott J. Burt. Mr. Burt is the employee of opposer who is most knowledgeable about its trademarks. Mr. Burt testified that opposer has "a number of trademarks." (Burt deposition page 28). Throughout his deposition, Mr. Burt referred to "the CMN trademark." However, on cross-examination, Mr. Burt conceded that when he used the expression "the CMN trademark" he was referring to five or six or seven or even eight different trademarks, only one of which consisted solely of the letters CMN. (Burt deposition page 100). Moreover, Mr. Burt conceded that in the massive amount of documents which opposer made of record, he could find not one instance where the trademark CMN per se was used in connection with the trademark registration symbol, namely, "the little R in a circle next to it." (Burt deposition

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page 103).

Whether opposer's mark CHILDREN'S MIRACLE NETWORK may be famous is not the issue. The issue is whether the mark CMN per se is famous. Based on this record, opposer has simply failed to prove that the mark CMN per se is famous. For that matter, opposer has failed to prove that the marks CMN CHAMPIONS and CMN CHAMPIONS CHILDREN'S MIRACLE NETWORK and logo are famous.

Decision: The opposition is dismissed.

