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August 20, 2009

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September 22, 2009
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Gilbert Hospital, LLC

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Serial No. 77070847

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Sean K. Enos of Schmeiser, Olsen & Watts LLP for Gilbert Hospital, LLC.

John C. Boone, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

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Before Holtzman, Walsh and Mermelstein, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Gilbert Hospital, LLC (applicant) has applied to register the mark DOOR TO DOC IN 31 MINUTES in standard characters on the Principal Register for services identified as "hospital services, namely, emergency services and acute care services" in International Class 44.[1]

[1] Application Serial No. 77070847, filed December 22, 2006, based on a claim of first use of the mark anywhere and first use of the mark in commerce on February 2, 2006.

The Examining Attorney has issued a final refusal under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion between applicant's DOOR TO DOC IN 31 MINUTES mark and the marks in the following three active registrations owned by the same party:

> **Registration No. 3155358** on the Supplemental Register, issued on October 10, 2006, for the mark DOOR TO DOC in standard characters for services identified as "consultation services in the field of health care, namely, providing assistance to health care facilities by improving the flow and overall care quality of patients in emergency room and ambulatory care facilities" in International Class 44, claiming first use anywhere and first use of the mark in commerce on February 28, 2005;
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> **Registration No. 3288783** on the Principal Register, issued on September 4, 2007, for the mark 60 TO 0 DOOR TO DOC in standard characters for services identified as "consultation services in the field of health care, namely, providing assistance to health care facilities by improving the flow and overall quality of care of patients in emergency room and ambulatory care facilities" in International Class 44, claiming first use anywhere and first use of the mark in commerce on February 28, 2005; and
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> **Registration No. 3294991** on the Principal Register, issued on September 18, 2007, for the mark shown below for services identified as "consultation services in the field of health care, namely, providing assistance to health care facilities by improving the flow and quality of overall care of patients in emergency room and ambulatory care facilities" in International Class 44, claiming first use anywhere and first use of the mark in commerce on February 28, 2005.

Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We reverse.

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 [or services] 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 services identified in the application and the cited registrations. *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.").

The Services and Channels of Trade

In this case the services and the channels of trade for those services are the dominant factors. Accordingly, we consider those factors first. In general, the services of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). We may find the services to be related if the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the services originate from or are associated with the same source. *See In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Furthermore, in comparing the services we must consider the services as identified in the application and cited registrations. *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].").

The Examining Attorney argues that the services identified in the application and the cited registrations are related. The Examining Attorney states, "The examiner does not argue that the services are identical or necessarily competing. Rather, the examiner merely

maintains that the services are related because they serve the same very specific field of emergency health care. The parties' services could be encountered by the same consumers in the field, who would confuse the marks and the source of the services." Examining Attorney's Brief at 10.

The Examining Attorney argues further, "The parties' services are closely related because the applicant and the registrant both operate in the same field and provide complementary services. … Moreover, given that the registrant provides consultation services about emergency room and ambulatory care facilities, hospitals and their administrators are the most likely audience for registrant's services. The registrant thus directly services entities like the applicant." *Id.* at 11.

The Examining Attorney also posits a number of "imagined" scenarios wherein hospitals and their administrators would allegedly be confused. The only evidence the Examining Attorney offers to support the position that the services are related are two third-party registrations which cover health care services, on the one hand, and administrative support services, such as, medical call center services and retail pharmacy services, on the other hand.

The Examining Attorney also argues that an individual in need of the medical services applicant provides might mistakenly contact registrant, and consequently, possibly suffer a delay in locating necessary medical services.

Applicant argues, "Applicant's services are neither similar nor related or indeed encompassed by or legally identical to, the services recited in the cited registration." Applicant's Brief at 3. Applicant continues, "Registrant's services are described as merely consulting with a facility providing the emergency services, while Applicant's services are providing the emergency services." *Id.*

Applicant also argues that the services identified in the cited registrations would be marketed to and provided to health care facilities and that individuals who use those health care facilities would not encounter the registrant's mark or services. In the converse situation, applicant argues that its services are marketed to the general public, that is, potential patients, and these individuals are not potential customers for the health care facility consultation services identified in the cited registrations.

We find applicant's arguments highly persuasive. The channels of trade and the class of purchasers for the

respective services are distinct. The Examining Attorney strains to posit a circumstance where the trade channels might overlap or intersect, but he fails in this effort. Furthermore, we find the third-party registrations not probative of the issue at hand. Neither of the registrations includes services of the type identified in the cited registrations. Also, we have no other evidence that the trade channels for the respective services overlap in any way. Under the circumstances present here, we find it unlikely that the potential customers for the health care facility consultation services identified in the cited registrations, that is, health care professionals, are likely to associate the healthcare services applicant provides with the registrant. *In re Shipp*, 4 USPQ2d 1174, 1176 (TTAB 1987).

Lastly, we have no evidence that a potential patient might somehow mistakenly contact the registrant instead of applicant in attempting to access health care services. Even if such a mistake were to occur, we question whether the mistake would be the result of trademark confusion. Such a mistake would not necessarily indicate that the individual believed that either applicant or registrant was the source of both types of services. Therefore, we reject this argument.

Accordingly, we conclude that the services identified in the application and the cited registration move through distinct trade channels to distinct classes of consumers, and therefore, that they are not related. Furthermore, we find that the distinction between the respective services is such that confusion would be unlikely even if similar marks were used with the respective services. Nonetheless, for completeness, we will proceed to consider the marks briefly.

The Marks

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

Also, "… 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." *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (internal citations omitted).

Applicant's mark is DOOR TO DOC IN 31 MINUTES in standard characters. The cited marks are DOOR TO DOC in standard characters, 60 TO 0 DOOR TO DOC in standard characters, and 60 TO 0 DOOR TO DOC and design.

The first cited mark, DOOR TO DOC. is arguably the mark most similar to applicant's mark. The registration for DOOR TO DOC is on the Supplemental Register, which indicates that the mark is not inherently distinctive, and presumably somewhat weak. Under the circumstances of this case, we conclude that applicant's mark and the cited DOOR TO DOC mark would not be confused, due to the apparent weakness of the cited mark and the additional element, IN 31 MINUTES, in applicant's mark. In reaching this conclusion, we admittedly find it difficult to assess the similarity of the marks apart from the distinctions we have found between the respective services – the overriding factor in our analysis.

Likewise, when we compare applicant's mark to each of the cited 60 TO 0 DOOR TO DOC marks, we conclude that they are not similar. In the case of these registrations, 60 TO 0 serves to distinguish the marks still further from

applicant's mark. Here again, the distinction between the respective services is overriding.

Conclusion

Finally, after considering all evidence and arguments bearing on the *du Pont* factors, including any we have not specifically discussed here, we conclude that there is not a likelihood of confusion between applicant's DOOR TO DOC IN 31 MINUTES mark when used in connection with "hospital services, namely, emergency services and acute care services" and the registered DOOR TO DOC, 60 TO 0 DOOR TO DOC, and 60 TO 0 DOOR TO DOC and design marks when used in connection with "consultation services in the field of health care, namely, providing assistance to health care facilities by improving the flow and overall quality of care of patients in emergency room and ambulatory care facilities."

Decision: We reverse the refusal to register applicant's mark under Trademark Act Section 2(d).