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Sent: 8/28/2008 11:15:37 AM

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Subject: TRADEMARK APPLICATION NO. 77357357 - APERTURE HEALTH -
FLEXS-019T

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/357357

MARK: APERTURE HEALTH



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APPLICANT: flexSCAN, Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO:

FLEXS-019T

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant appeals the examining attorney's final refusal to register the mark "APERTURE HEALTH" for "providing health care services, namely, wellness programs; providing personal medical information to individuals and organizations." The examining attorney refused registration on the Principal Register pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052 (d), because applicant's mark is likely to cause confusion with a registered mark. It is respectfully requested that the refusal be affirmed.

STATEMENT OF THE CASE

On December 20, 2007, the applicant filed the application at issue. Registration was refused, under Trademark Act Section 2(d), in an initial action dated March 26, 2008. The first Office action also contained a disclaimer requirement, identification of services requirements and an advisory regarding prior pending applications. The

applicant filed a response on May 6, 2008, containing arguments in support of registration and complied with the disclaimer and identification of services requirements. The prior pending applications were never referenced in a refusal under Section 2(d) of the Trademark Act. However, the refusal pursuant to Trademark Act Section 2(d) as it pertained to Registration No. 2551971, was made final on June 2, 2008. The applicant filed the instant appeal on June 19, 2008.

ISSUE

The issue on appeal is whether the mark “APERTURE HEALTH” for “providing health care services, namely, wellness programs; providing personal medical information to individuals and organizations” is likely to be confused with the mark “APERTURE” for “computerized health care provider data management and health care provider information management, in the fields of health care and insurance; physician credential verification services.”

ARGUMENT

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). The court in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. In

re Majestic Distilling Co., 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see In re E. I. du Pont, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. See In re Opus One, Inc., 60 USPQ2d 1812 (TTAB 2001); In re Dakin's Miniatures Inc., 59 USPQ2d 1593 (TTAB 1999); In re Azteca Rest. Enters., Inc., 50 USPQ2d 1209 (TTAB 1999).

I. The mark "APERTURE HEALTH" is highly similar in connotation and commercial impression to the mark "APERTURE."

The marks are compared in their entireties under a Trademark Act Section 2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. In re Nat'l Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); In re J.M. Originals Inc., 6 USPQ2d 1393 (TTAB 1987).

Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. See In re Dixie Rests. Inc., 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); In re Nat'l Data Corp., 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985).

The applicant is applying for the mark “APERTURE HEALTH.” The mark in the referenced registration is “APERTURE.” The word “aperture” is the dominant portion of applicant’s mark and is identical to registrant’s mark. “Aperture” creates the more significant commercial impression because it is more arbitrary than the word “health,” which is descriptive of applicant’s services and has been disclaimed. “Aperture” is defined as “1. an opening, such as a hole, gap, or slit; 2a. a usually adjustable opening in an optical instrument, such as a camera or telescope, that limits the amount of light passing through a lens or onto a mirror; b. the diameter of such an opening, often expressed as an f-number; c. the diameter of the objective of a telescope¹” and is arbitrary because it does not describe any characteristic of the services at issue.

Contrary to applicant’s contention, the addition of the descriptive word “health” to “aperture” does not result in a different meaning or commercial impression. The applicant argues that the word “aperture” alone connotes “an opening, as a hole, slit, crack, gap, etc.,” and that the meaning of “aperture” changes to “a device that controls the amount of light admitted” when combined with the word “health.” The applicant offers no logical reason for the proposition that the meaning of “aperture” changes when combined with “health.” The words “aperture” and “health” are both nouns. According to ordinary rules of grammar, the word “aperture” does not modify “health.” As a result, the meaning of the word “aperture” is the same in both marks. In conclusion, the

¹ The Trademark Trial and Appeal Board may take judicial notice of definitions obtained from dictionaries in printed format. In addition, the Board can also take judicial notice of online dictionaries available in printed format or online dictionaries that are readily available and capable of being verified, e.g., dictionaries that are available in specifically denoted editions via the Internet and CD-ROM. See Fed. R. Evid. 201; 37 C.F.R. §2.122(a); In re Bayer AG, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007); In re Red Bull GmbH, 78 USPQ2d 1375, 1378 (TTAB 2006); TBMP §1208.04.

applicant and registrant's marks create a highly similar connotation and commercial impression.

II. The applicant and registrant's services are closely related, travel in the same channels of trade and are marketed to the same class of purchasers

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. See Safety-Kleen Corp. v. Dresser Indus., Inc., 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975). Rather, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. In re Total Quality Group, Inc., 51 USPQ2d 1474, 1476 (TTAB 1999); see, e.g., On-line Careline Inc. v. Am. Online Inc., 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Likelihood of confusion is determined on the basis of the goods and/or services as they are identified in the application and registration. Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 1267-68, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); In re Shell Oil Co., 992 F.2d 1204, 1207 n.4, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993).

When the application describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the application encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. See In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991) (“With reference to the channels of trade, applicant’s argument that its goods are sold

only in its own retail stores is not persuasive There is no restriction [in its identification of goods] as to the channels of trade in which the goods are sold.”).

The applicant’s services are “providing health care services, namely, wellness programs; providing personal medical information to individuals and organizations.” The services listed for the mark “APERTURE (Reg. No. 2551971)” are “computerized health care provider data management and health care provider information management, in the fields of health care and insurance; physician credential verification services.”

The circumstances in the present instance would be likely to give rise to a mistaken belief by purchasers that the services originate from the same source. As discussed in detail above, the applicant and registrant’s marks are highly similar in connotation and commercial impression. In addition, the relevant classes of consumers are also the same. Individual consumers would be the relevant class for wellness programs as well as physician verification services. Individuals who are shopping for wellness programs would want to verify the credentials of physicians who are in the program. The websites attached to the final office action show that providers of wellness programs also provide verification services. For example, the website of “Maine Network for Health” (p.20 of final office action) states that their services include physician credentialing as well as wellness programs for employees. Another example is shown at pages twelve and thirteen of the final office action. The website of “Southwest Medical Center” evidences that their services include medical services as well as responding to inquiries regarding a physician’s credentials. A second class of consumers for applicant and registrant’s services would be health care organizations and health care providers. Health care organizations and providers would be in the market for ways to

manage patient data and services for accessing patient data and records. The registrant's services are a way to organize health care information and the applicant's services feature access to patient medical information. Both services are marketed to health care organizations or providers. The third party registrations of record are evidence that the types of services at issue, namely, the management of healthcare provider information and the provision of the personal medical information may emanate from the same source. Please refer to the third party registrations located at pages eleven through fifteen of the Office action of March 26, 2008. Registration number 2969871 includes the services of "providing healthcare business information management services to healthcare providers and healthcare insurers, namely, providing patient satisfaction information and clinical outcome reports, providing information concerning clinical treatment protocols, providing data, reports and interpretations concerning utilization of healthcare services" and "provision of healthcare information to patients, physicians, nurse practitioners, physician's assistants, case managers and payers in the healthcare field," as well as registration number 3034336 that includes services for "computerized database management in the healthcare field" and "providing an on-line computer database featuring information in the healthcare field." Additionally, the websites of record are evidence that the types of services offered by the applicant and registrant are marketed to the same classes of consumers under circumstances that would give rise to confusion as to their source. The following are examples:

- 1) HMS website (p. 8 of final action of 5/30/08)- "The Health Information Management (HIM) solution provides the ability to input, retain and report inpatient and/or outpatient visits [...]."

- 2) Wellogic website (p. 10 of final action of 5/30/08)- "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.”

The applicant’s arguments regarding the relatedness of the services are all premised on the proposition that applicant’s services are solely provided to employers and not to providers of health care services. The applicant’s identification of services is not limited to employers. Therefore, there exists a presumption that the services move in all normal channels of trade and are available to all potential customers. Health care providers are within the scope of the “organizations” specified in a portion of the applicant’s identification. In conclusion, the relevant classes of consumers for applicant and registrant’s services are the same and are not mutually exclusive.

The applicant also argues that employers and health care providers are sophisticated. The general public is also part of the relevant class of consumers in the present case. When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated purchaser. Alfacell Corp. v. Anticancer, Inc., 71 USPQ2d 1301, 1306 (TTAB 2004).

CONCLUSION

The applicant’s mark is highly similar in appearance, sound, connotation and commercial impression, to the registrant’s mark and the services are closely related. Accordingly, the examining attorney respectfully requests that the Board affirm the refusal to register, under Trademark Act Section 2(d), since the marks are likely to cause confusion, or to cause mistake, or to deceive.

Respectfully submitted,

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