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EJS

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Center for Medical Surgical Hair Restoration P.C.

Serial No. 74/606,674

Mark A. Cantor of Brooks & Kushman P.C. for Center for Medical Surgical Hair Restoration P.C.

David H. Stine, Trademark Examining Attorney, Law Office 103 (Kathryn Erskine, Managing Attorney)

Before Seeherman, Hanak and Hohein, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Center for medical Surgical Hair Restoration P.C. has appealed from the Trademark Examining Attorney's final refusal to register the mark LASER MICROGRAPH for "surgical hair transplantation services."[1] Registration has been refused pursuant to Sections 2(e)(1) and 2(d) of the Trademark Act, 15 U.S.C. §§1052(e)(1) and 1052(d), on the grounds that applicant's mark is merely descriptive of its identified services, and that it so resembles the mark

[1] Application Serial No. 74/606,674, filed December 5, 1994, and asserting a bona fide intention to use the mark in commerce.

MICROGRAFT, previously registered for hair transplantation services,[2] that, if used in connection with applicant's identified services, is likely to cause confusion or mistake or to deceive.

The case has been fully briefed, but an oral hearing was not requested.

We turn first to the refusal that LASER MICROGRAPH is merely descriptive of surgical hair transplantation services. Applicant contends that MICROGRAPH has no relationship whatsoever to applicant's services, citing the following definition of "micrograph" taken from Webster's Third New International Dictionary (© 1976):

> 1. an instrument for executing minute writing or engraving;
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> 2. a graphic reproduction of the image of an object or part of an object formed by a microscope;
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> 3. an instrument for measuring minute movements by the magnified record of movements of a diaphragm

The Examining Attorney, on the other hand, argues that when the mark is viewed in the context of applicant's services, it is merely descriptive because it directly describes the method or technique used in performing hair transplantation services. In support of this position, the Examining Attorney has submitted two abstracts taken from the MEDLINE database in the NEXIS system. The first

[2] Registration No. 1,137,700, issued July 8, 1980; Section

abstract, which describes an article in the "Singapore Medical Journal," (Aug. 1990), is quoted in full below:

> Dermatologic surgery is of increasing interest to both dermatologists and other medical practitioners. It includes procedure [sic] like biopsy, excisional surgery, laser surgery, electrosurgery, curettage surgery, nail surgery, cryosurgery, minigrafting, sclerotherapy, collagen implant, punch grafting, Moh's micrographic surgery, dermabrasion and hair transplant. This article highlights the important aspects of the various procedures and some of the more important practical points.

The second abstract, also quoted in full, refers to an article in the "Journal of Dermatology Surgery Oncology," (Mar. 1990):

> Representations of the anatomic surface location of cutaneous lesions and the surgical procedures performed on these lesions can be transferred to the medical charts using simple anatomic rubber stamps (ARS) of the body. The technique is exemplified with symbols to represent surgical excision, chemical face peel, dermabrasion, micrographic surgery, and the harvesting of flaps and grafts. ARS are also useful in liposuction surgery, punch grafts for pitted facial scars, hair transplantation, sclerotherapy, laser surgery, and other cosmetic dermatologic procedures. ARS are particularly valuable in micrographic surgery for skin cancer because they help document the depth and breadth of cancer invasion and aid in the follow-up of recurrent skin cancer, especially when defects are reconstructed.

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affidavit accepted.

After carefully reviewing this evidence, we find that the Office has not met its burden of demonstrating that the term LASER MICROGRAPH is merely descriptive of surgical hair transplantation services. Although the abstracts indicate that dermatologic surgery includes micrographic surgery and that hair transplantation is one kind of cosmetic dermatologic procedure, there is nothing in these abstracts which show that micrographic surgery is used in hair transplantation. On the contrary, both abstracts list hair transplantation as a separate procedure from micrographic surgery.

Thus, because MICROGRAPH has not been shown to describe services involved in surgical hair transplantation, we find that LASER MICROGRAPH is not merely descriptive of such services, and reverse the refusal to register on this ground.

This brings us to the refusal on the ground that LASER MICROGRAPH for surgical hair transplantation surgery is likely to cause confusion with MICROGRAFT for hair transplantation services. Applicant's identified services are encompassed within the registrant's hair transplantation services, and the services must therefore be considered legally identical. As such, they must be deemed to be offered in the same channels of trade to the same classes of consumers.

Turning to a consideration of the marks, we begin with the principle that when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Applicant's mark contains the word MICROGRAPH, which is very similar in appearance to MICROGRAFT, and is almost identical in pronunciation. Applicant's mark does, of course, begin with the word LASER, which is totally absent from the cited mark. However, because lasers are used in a variety of medical and surgical procedures, consumers are not as likely to regard this portion of applicant's mark as a source-identifying feature. Thus, while we have compared the marks in their entireties, we believe it appropriate to give more weight to the word MICROGRAPH in applicant's mark. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("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 in their entireties.")

Applicant argues that the marks differ in connotation, and that because of this difference confusion is not likely.

Applicant bases this position on the dictionary definition for "micrograph" recited above, and the definition, taken from the same dictionary, of "micrograft" as "a composite plant produced by micrografting," which is further defined as "the operation of engrafting a weak plant (as a hybrid embryo) on a related but more vigorous stock."

We are not persuaded by this argument. We think that the majority of consumers of applicant's and the registrant's services (presumably those members of the general public who have suffered hair loss) are not likely to be aware of these definitions, and therefore will not distinguish the marks based on these meanings. Moreover, any differences in connotation are far outweighed by the similarities in appearance and pronunciation.

Applicant also appears to argue that the registered mark is weak, and entitled to a limited scope of protection. Applicant bases this argument on a dictionary definition of "graft" which it has submitted with its appeal brief.[3] Applicant cites specifically the definition "to join or to fasten as if by grafting so as to bring about a close union." We also note an additional definition of graft: "to implant (living tissue) so as to form an organic union (as in a lesion) <were able to graft new skin over the badly

[3] Although this dictionary evidence was not properly made of record prior to the filing of the appeal, as required by Trademark Rule 2.142(d), the Board may take judicial notice of

burned area of the arm> <grafted a new piece of artery into the ruptured portion of the old artery>."

These definitions show that MICROGRAFT is highly suggestive of hair transplantation services. However, even highly suggestive marks are entitled to protection. Thus, even though the registrant's mark may have a limited ambit of protection, in this case we find that applicant's mark LASER MICROGRAPH, when used on the legally identical services, falls with the scope of protection to be accorded the registrant's mark. In saying this, we are also mindful of the well-established principle that, if there be doubt on the issue of likelihood of confusion, it must be resolved against the newcomer or in favor of the prior user or registrant. **In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes**, 487 F.2d 918, 179 USPQ 729 (CCPA 1973). In this case, the registrant obtained its registration in 1980, based on a claimed first use in 1978, while applicant's application does not indicate that it has yet begun to use its mark.

Decision: The refusal on the ground of mere descriptiveness is reversed; the refusal on the ground of likelihood of confusion is affirmed.

E. J. Seeherman

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dictionary definitions. See **Marcal Paper Mills, Inc. v.**

E. W. Hanak

G. D. Hohein
Administrative Trademark Judges
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American Can Co., 212 USPQ 852 (TTAB 1981).