

THIS DISPOSITION IS NOT CITABLE AS  
PRECEDENT OF THE TTAB

MARCH 16, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Hurley Medical Center

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Serial No. 74/736,849

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Joseph P. Carrier of Weiner, Carrier, Burt & Esser, P.C.  
for Hurley Medical Center

Jessie W. Billings, Trademark Examining Attorney, Law  
Office 103 (Michael Szoke, Managing Attorney)

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Before Quinn, Chapman and Bucher, Administrative Trademark  
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Hurley Medical Center (a corporation of Michigan,  
located in Flint, Michigan) has filed an application to  
register the mark BODY FLEX for "prerecorded videotapes

featuring exercising instructions involving use of power bands and dumbbells (sic)."<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used on its identified goods, so resembles the registered mark BODYFLEX for "exercising equipment, namely jump ropes and weights<sup>2</sup>," as to be likely to cause confusion, mistake or deception.<sup>3</sup>

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested. We affirm.

Turning to a consideration of the marks, applicant's argument that it uses the mark BODY FLEX in conjunction with applicant's house marks, HURLEY MEDICAL CENTER or HURLEY HEALTH & FITNESS CENTER, is not persuasive.

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<sup>1</sup> Application Serial No. 74/736,849, filed September 29, 1995. The claimed dates of first use and first use in commerce are December 1993.

<sup>2</sup> Reg. No. 1,429,380, issued February 17, 1987, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The cited registration includes goods in Classes 25 (for various clothing items) and Class 28 (the exercise equipment identified above). The claimed dates of first use and first use in commerce for the exercise equipment are 1983. (We note that the cited registration issued to Bodyflex, Inc., a corporation of Michigan located in Grand Rapids, Michigan.)

<sup>3</sup> Although the Examining Attorney did not specifically state whether the refusal to register under Section 2(d) related to both classes of goods in the cited registration, the arguments and evidence submitted by the Examining Attorney relate only to the Class 28 exercise equipment. Therefore, the Board construes the refusal to register to be based only on the Class 28 goods in the cited registration.

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Applicant applied to register only the mark BODY FLEX, not including any other word or house mark. It need hardly be said that in determining an applicant's right to registration, only the mark as set forth in the drawing may be considered. Whether or not the applied for mark is actually used with a house mark is not controlling. See *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233, 1236 (TTAB 1992); and *Blue Cross and Blue Shield Association v. Harvard Community Health Plan Inc.*, 17 USPQ2d 1075, 1077 (TTAB 1990).

In the application, applicant stated that it had adopted and was using the mark shown in the drawing "for prerecorded videotapes featuring exercising instructions involving use of power bands and dumbbells (sic) in International Class 9 (electrical and scientific goods), the mark being used in conjunction with other house marks of applicant on the identified goods"; and applicant argues therefrom that applicant expressly uses its mark only in conjunction with the house marks, thus negating any likelihood of confusion. This argument has no merit. First, applicant's identification of goods does not include the restrictive wording. As can be seen from the above quote from the application, applicant inserted the international class by number and title between the

recitation of goods and the statement regarding use with a house mark, thus separating the statement about house marks from the identification of goods. Second, even if the wording had been included within the identification of goods, it would be inappropriate as it does not relate to the goods, but rather to the mark. See *Ultracashmere House, Ltd. v. Springs Mills, Inc.*, 828 F.2d 1580, 4 USPQ2d 1252 (Fed. Cir. 1987).

The marks BODY FLEX and BODYFLEX are legally identical. Applicant's use of a space between the two words is insignificant. The marks are the same in appearance, pronunciation, connotation and commercial impression.

Turning to a consideration of the goods, applicant argues that the respective goods, videotapes and exercise equipment, are "quite distinct," and "applicant's goods are sold in an exclusive channel of trade" (applicant's brief, p. 4); thus, applicant asserts "there is de minimus (sic) or no likelihood of confusion as to the source" of the goods (applicant's brief, p. 10).

In this case applicant's exercise instruction tape specifically involves the use of "dumbbells" and the cited registrant's exercise equipment specifically includes "weights." The Examining Attorney submitted the Webster's

II New Riverside University Dictionary definition of

"dumbbell" as "1. a weight consisting of a short bar with a metal ball or disk at each end that is lifted for exercise and muscular development...."

In further support of her position as to the relatedness of the respective goods, the Examining Attorney submitted several third-party registrations, each of which issued on the basis of use in commerce, to demonstrate the close relationship between exercise equipment and videotapes featuring exercise instruction, by showing that a single entity has adopted a single mark for both videotapes featuring exercise instruction and various exercise equipment.<sup>4</sup>

While third-party registrations are not evidence of commercial use of the marks shown therein, or that the public is familiar with them, nonetheless, third-party

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<sup>4</sup> Some of the third-party registrations submitted by the Examining Attorney include the following: (1) Reg. No. 1,895,931 for, inter alia, "prerecorded video tapes for exercise," and "exercise equipment, namely, dumbbells, plate weight barbells, ankle weights, step up stools, and exercise mats in the field of exercise and fitness products"; (2) Reg. No. 2,003,922 for, inter alia, "prerecorded video cassettes featuring exercise and general physical fitness instruction," and "exercise equipment in the nature of stationary bicycles and weight training machines"; and (3) Reg. No. 1,847,987 for, inter alia, "pre-recorded audio and video tapes featuring health, fitness and wellness information...", and "exercise equipment, namely, ..., manual hand exercisers, jump ropes, dumbbells, abdominal boards, trampolines, barbells, weights for aquatic use,...".

registrations which individually cover a number of different items and which are based on use in commerce have some probative value to the extent they suggest that the listed goods emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, footnote 6 (TTAB 1988).

Moreover, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion; it being sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 596 (TTAB 1978); and *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992).

In this case, applicant's "prerecorded videotapes featuring exercising instructions involving use of power bands and dumbbells (sic)" and registrant's "exercising equipment, namely jump ropes and weights" clearly are complementary, closely related products. Exercise instruction videotapes would be used in conjunction with the exercise equipment featured in the videotapes. That

is, consumers intending to start exercise programs might well purchase a video instruction tape along with the equipment featured therein.

Regarding the respective trade channels and purchasers, applicant's assertion, through the declaration of applicant's president, Phillip C. Dutcher, that its exercise instruction videotapes are sold "exclusively through applicant's 'Hurley Health & Fitness Center,'" (Dutcher declaration, paragraph 3) is not persuasive.

The Board must determine the issue of likelihood of confusion on the basis of the goods as identified in the application and the registration. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Applicant has included no restriction to trade channels or purchasers in its identification of goods.<sup>5</sup> Thus, the Board must consider that the parties' respective goods could be offered and sold to the same class of purchasers through all normal channels of trade. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Based on the identity of the marks, the relatedness of

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<sup>5</sup> In fact, applicant stated in the method of use clause that "the mark is used by applying it to the goods, in advertising and

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the parties' respective goods, and the similarity of the trade channels, we find that there is a likelihood that the purchasing public would be confused when applicant uses BODY FLEX as a mark for videotapes featuring exercise instruction.

According to applicant, there have been no instances of actual confusion. However, the test is likelihood of confusion, not actual confusion. See *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984).

Decision: The refusal under Section 2(d) is affirmed.

T. J. Quinn

B. A. Chapman

D. E. Bucher  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board

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promoting the goods, and in other ways customary in the trade...".