

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Performance Labs, Inc.

Serial No. 75/302,426

Thomas I. Rozsa of Rozsa & Chen for Performance Labs, Inc.

Jon Schiffrin, Trademark Examining Attorney, Law Office 115
(Tom Vlcek, Managing Attorney).

Before Hohein, Hairston and McLeod, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Performance Labs,
Inc. to register the mark CARDIOMAX as shown below for
nutritional supplements.¹

¹ Application Serial No. 75/302,426 filed June 3, 1997, alleging
a bona fide intention to use the mark in commerce.

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, if applied to the identified goods, so resembles the mark CARDIO-MAXIM, which is registered for a dietary supplement,² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but no oral hearing was requested.

Turning first to a consideration of the respective goods, we note that applicant does not dispute that nutritional supplements and dietary supplements are virtually identical goods. These goods would be sold in the same channels of trade, namely, health food stores and drug stores, to the same class of purchasers, namely, ordinary consumers. Consequently, if applicant's and registrant's goods were to be sold under the same or substantially similar marks, confusion as to the source or sponsorship of such products would be likely to occur.

We turn then to a consideration of the respective marks.

It is the Examining Attorney's position that applicant's mark and the cited mark look and sound alike.

² Registration No. 1,572,811 issued December 26, 1989; Sections 8 & 15 affidavit filed.

Also, the Examining Attorney argues that the marks create similar commercial impressions, "beginning with the word 'cardio' and ending with [the] similar terms, 'max' and maxim.'" According to the Examining Attorney, "since 'max' and 'maxim' essentially mean 'maximum,' they connote products that have maximum effectiveness."

Applicant, on the other hand, contends that its one-word mark CARDIOMAX in stylized lettering is "totally different in commercial appearance and pronunciation" from the cited mark CARDIO-MAXIM which is hyphenated. Also, applicant maintains that the terms "max" and "maxim" have very different meanings, the first being an abbreviation of "maximum" and the latter meaning a fundamental principal. These differences in meaning, argues applicant, would not be lost on prospective purchasers of the respective goods. Also, applicant argues that marks consisting of the terms "cardio," "max," or "maxim" are weak marks which are therefore entitled to only a limited scope of protection. In support of its claim, applicant submitted the results of a search of the Westlaw data base of applications and registrations for marks which include

the terms "cardio," "max," or "maxim" for dietary and/or nutritional supplements and pharmaceutical preparations.³

In this case, while we agree with applicant that the terms "max" and "maxim" have different meanings, we nonetheless find that applicant's mark CARDIOMAX in stylized lettering so substantially resembles registrant's mark CARDIO-MAXIM that, if the marks were to be used on virtually identical products, confusion as to origin or sponsorship is likely to occur. The similarities in sound and appearance are obvious. With respect to the lettering in applicant's mark, it is only slightly stylized and is insufficient to avoid confusion. More importantly, inasmuch as the cited mark is registered in typed capital letters, the registrant would be free to depict its mark in

³ The search results consist of printouts of information from 141 applications/registrations for marks which include the term "cardio;" a printout of information from an application for the mark MAXXIS along with an indication that there were 849 applications/registrations for marks which include the term "max;" and a printout of information from an application for the mark MAXIMUM BALANCE along with an indication that there were 89 applications/registrations for marks which include the term "maxim." The submission of printouts of information taken from a private company's data base is not the proper way to make applications/registrations of record. The proper way to make applications/registrations of record, instead, is to submit copies of the actual applications/registrations or the electronic equivalent thereof, i.e., printouts of the applications/registrations taken from the Patent and Trademark Office's own computerized data base. See *In re Melville Corp.*, 18 USPQ2d 1386, 1388-89 (TTAB 1991) at n. 2. However, inasmuch as the Examining Attorney originally assigned to this case did not timely object to applicant's submission, we have considered the information therein.

lettering similar or even identical to that of applicant. Further, it is a well established principle that likelihood of confusion may not be determined upon a side-by-side comparison of the marks. Such a comparison is not the ordinary way a prospective purchaser would be exposed to the marks. Rather, it is the similarity of the general overall commercial impression engendered by the marks which must be considered. This test requires us to consider that the average purchaser normally retains a general rather than a specific impression of trademarks. We note, in this regard, that applicant's mark gives the commercial impression of two terms "Cardio" and "Max," just as registrant's mark does in view of the hyphen between "Cardio" and "Maxim."

In reaching our decision, we have not overlooked the descriptive nature of the term "cardio" and the suggestive significance of the terms "max," and "maxim." However, even weak marks are entitled to protection against the registration by a subsequent user of a substantially similar mark for virtually identical goods. We should add that none of the marks in the third-party registrations is as similar to the cited mark as is applicant's mark.

Accordingly, we conclude that purchasers and prospective customers familiar with registrant's dietary

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supplements sold under the mark CARDIO-MAXIM would be likely to believe, upon encountering applicant's mark CARDIOMAX in slightly stylized lettering for nutritional supplements, that these virtually identical goods originated with or were somehow sponsored by the same source.

Decision: The refusal to register is affirmed.

G. D. Hohein

P. T. Hairston

L. K. McLeod
Administrative Trademark Judges
Trademark Trial and Appeal Board