

2/27/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
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Paper No. 10  
JQ

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re **Senior Technologies, Inc.**

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Serial No. 75/508,524

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Vincent L. Carney for applicant.

Susan C. Hayash, Trademark Examining Attorney, Law Office  
110 (Chris A.F. Pedersen, Managing Attorney).

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Before Quinn, Wendel and Drost, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Senior Technologies,  
Inc. to register the mark TABS SELECT for "remote patient  
position monitors."<sup>1</sup>

The Trademark Examining Attorney has refused  
registration under Section 2(d) of the Trademark Act on the  
ground that applicant's mark, when applied to applicant's

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<sup>1</sup> Application Serial No. 75/508,524, filed June 24, 1998,  
alleging first use on January 5, 1997, and first use in  
interstate commerce on October 6, 1997. Applicant owns  
Registration No. 1,785,403 for the mark TABS for the same goods  
as those identified herein.

goods, so resembles the previously registered mark SELECT for "patient monitors"<sup>2</sup> as to be likely to cause confusion.

When the refusal to register was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

Applicant contends that the marks, when considered in their entireties, are not similar. Applicant asserts that the term "select" is weak, and requests that the Board take judicial notice of the dictionary definition of the term, as well as of third-party registrations which include "SELECT" as a feature thereof. Applicant also contends that the goods are different, principally relying on a specimen retrieved from the file of the cited registration. Applicant further argues that the goods move through different channels of trade (applicant's to nursing homes and registrant's to clinicians in hospitals) and are the subjects of a sophisticated purchasing decision.<sup>3</sup>

The Examining Attorney maintains that the marks are similar and that the goods are related. The Examining Attorney has requested that the Board take judicial notice of the dictionary listings of the terms "select," "patient"

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<sup>2</sup> Registration No. 2,169,658, issued June 30, 1998.

<sup>3</sup> Applicant's remarks bearing on its purported priority over the cited mark are irrelevant in the context of this ex parte appeal.

and "monitor."

Before turning to the merits of the likelihood of confusion refusal, we must focus our attention on some evidentiary matters raised by the actions of both applicant and the Examining Attorney after the appeal was filed.

At the outset, we grant applicant's and the Examining Attorney's requests to take judicial notice of the dictionary listings. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Applicant filed, for the first time with its appeal brief, the declaration of Jolene Ryan, a legal assistant for applicant's attorney. The declaration is accompanied by a Thompson & Thompson trademark search report (Attachment A), a specimen from the file of the cited registration (Attachment B), and an excerpt about registrant's goods which was retrieved off the Internet (Attachment C). Applicant essentially asks the Board to take judicial notice of these materials. In response, the Examining Attorney objected to the search report because its source is a private database. The Examining Attorney made no direct objections to the other evidence, but did

not directly refer to the evidence in her brief either.<sup>4</sup> Accompanying applicant's reply brief is a list of seventeen third-party registrations which, applicant asserts, was gathered from a TRADEMARKSCAN search report.

As a general rule, evidence submitted with an appeal brief is untimely. Trademark Rule 2.142(d). In the present case, as noted above, the Examining Attorney objected to the search report on other grounds, made no formal objection to the rest of the untimely submission, but, in any case, did not discuss the untimely evidence or otherwise affirmatively treat it as being of record. See: *Trademark Trial and Appeal Board Manual of Procedure*, §1207.03.

The entirety of applicant's submission obviously is untimely, and the evidence may be disregarded on this basis alone. Further, a private search report is insufficient to make the registrations listed therein of record, and the Board does not take judicial notice of third-party registrations. See: *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290 (TTAB 1986). Lastly, the mere listing of third-party registrations, as was done in

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<sup>4</sup> The only remark that touches on this is the Examining Attorney's statement that "an applicant may not restrict the scope of its goods and/or the scope of the goods covered in the registration by extrinsic argument or evidence, for example, as to the nature or marketing of the goods." (brief, p. 7)

applicant's reply brief, is insufficient to make such registrations of record. See: In re Consolidated Cigar Corp., 35 USPQ2d 1290 (TTAB 1995).

In view thereof, outside of the dictionary evidence, we have not considered any of the materials submitted for the first time by applicant after the appeal.

With regard to the Examining Attorney's actions, the Board initially notes that the case was reassigned to her, and that her first involvement herein was the writing of the appeal brief. In her brief, the Examining Attorney referred to searches made of the NEXIS database relating to patient monitors and their use by both hospitals and nursing homes. The Examining Attorney also cited to the results of a trademark search she apparently conducted of the Office's database ("X-Search") which, according to the Examining Attorney, shows the absence of third-party marks featuring the term "SELECT" for patient monitors. Applicant, in its reply brief, made no reference to any of these matters.

While the Board certainly appreciates the Examining Attorney's desire to supplement the perceived shortcomings of the record compiled by her predecessor, the NEXIS and X-Search materials, upon which the Examining Attorney's remarks are based, were not properly made of record.

Accordingly, any references thereto have not been considered in making our decision.

We now turn to a determination of the merits of the appeal which, as a result of our evidentiary rulings above, is based on a relatively sparse record. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the goods, it should be noted that it is not necessary that the goods be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods originate from or are in some way associated with the same source. In re International Telephone and

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Telegraph Corp., 197 USPQ 910 (TTAB 1978). Further, in cases such as this, we must compare the goods as "recited in applicant's application vis-à-vis the goods...recited in [the cited] registration, rather than what the evidence shows the goods...to be." Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also: In re Elbaum, 211 USPQ 639 (TTAB 1981).

When the goods are compared within the legal constraints cited above, we find that the goods are related in that both are used to observe or monitor patients. Registrant's "patient monitors," as broadly identified in the cited registration, would encompass remote patient position monitors. Even if, in actuality, the monitors are specifically different, both are medical devices which would in all likelihood be encountered by the same classes of purchasers, including those in hospitals and nursing homes. In any event the distinctions in trade channels relied upon by applicant are not reflected in the respective identifications of goods and, further, are not borne out by the record. See: In re Trackmobile Inc., 15 USPQ2d 1152 (TTAB 1990).

Insofar as the marks are concerned, we recognize that the term "select" is a laudatory term signifying a special

quality. Although the marks are specifically different, with applicant's mark also including applicant's previously registered mark TABS, the marks both convey the idea of a superior quality.<sup>5</sup> The addition of the suggestive term "TABS" in applicant's mark is insufficient to distinguish the marks as used in connection with the closely related patient monitoring products. The marks are sufficiently similar in terms of appearance, sound and meaning that, as used on closely related products, confusion among purchasers is likely to occur.

Although we find it reasonable for applicant to assert that medical professionals are prone to be sophisticated purchasers of medical equipment, that sophistication would not ensure against confusion here given the similarity of the marks and the closeness of the goods.

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc.,

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<sup>5</sup> We also note the meaning of the term "tabs," as in "keep tabs on:" "to keep an account of; check on; observe." *The Random House College Dictionary* (1980).

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748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We conclude that purchasers familiar with registrant's "patient monitors" sold under the mark SELECT would be likely to believe, upon encountering applicant's mark TABS SELECT for "remote patient position monitors," that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

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