

**THIS DISPOSITION
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THE TTAB**

Hearing:
February 19, 2002

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CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Leiner Health Services Corp.
v.
Time of Your Life, Inc.

Opposition No. 115,937
to Application No. 75/585,561
filed on November 12, 1998

Michael A. Painter of Isaacman, Kaufman & Painter for
Leiner Health Services Corp.

Richard L. Fortner, President, Time of Your Life, Inc.,
Pro Se

Before Simms, Hairston and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Leiner Health Services Corp. filed its opposition to
the application of Time of Your Life, Inc. to register

the mark shown below for "hair shampoo, skin soap, deodorant soap," in International Class 3, and "herbal supplements, herbal teas for medicinal use and medicated facial and body lotions and oils," in International Class 5.¹ The application includes a disclaimer of NUTRACEUTICALS apart from the mark as a whole.



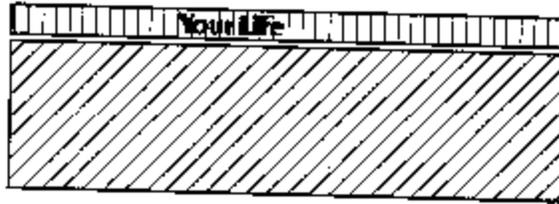
As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered word mark, YOUR LIFE,² and its design marks, shown below, for

¹ Application Serial No. 75/585,561, filed November 12, 1998, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods.

² Registration No. 1,029,138, registered January 6, 1976 (Sections 8 and 15 affidavits accepted and acknowledged, respectively; renewed for a 10 year period as of January 6, 1996), for YOUR LIFE for "vitamins," in International Class 5; Registration No. 1,267,613, registered February 21, 1984 (Sections 8 and 15 affidavits accepted and acknowledged, respectively) for YOUR LIFE for "appetite suppressant," in International Class 5; and Registration No. 2,084,936, registered July 29, 1997, for YOUR LIFE for "providing information regarding vitamins and dietary food supplements by means of a global computer network" in International Class 42.

Opposer's notice of reliance included a certified copy of its Registration No. 2,084,936, noted above, which was not pleaded in the notice of opposition. In view of applicant's lack of objection, we find that the parties have tried, by implied consent, any issues which arise

the goods identified in its respective registrations as to be likely to cause confusion, under Section 2(d) of the Trademark Act.



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Applicant, in its answer, denied the salient allegations of the claim. Applicant admitted that

this additional registration, and we therefore deem the pleadings to be amended to include opposer's claim of ownership of this additional registration. See Fed. R. Civ. P. 15(b); *Hewlett-Packard Co. v. Human Performance Measurement Inc.*, 23 USPQ2d 1390, fn. 7 (TTAB 1991); cf. *Long John Silver's, Inc. v. Lou Scharf Incorporated*, 213 USPQ 263, 266, fn. 6 (TTAB 1982); *Boise Cascade Corp. v. Cascade Coach Company*, 168 USPQ 795, 797 (TTAB 1970).

³ Registration No. 1,402,829, registered July 29, 1986 (Sections 8 and 15 affidavits accepted and acknowledged, respectively), for the design mark shown above for "vitamins and dietary food supplements," in International Class 5.

⁴ Registration No. 1,596,015, registered May 15, 1990 (Sections 8 and 15 affidavits accepted and acknowledged, respectively; renewed for a period of 10 years as of May 15, 2000), for the design shown above for "vitamins and dietary food supplements," in International Class 5.

opposer "has been in the business of manufacturing and selling vitamins and dietary food supplements, over-the-counter pharmaceutical products and skin and hair care products, all of which constitute personal care products which are related to one another"; and that "opposer is the owner of the marks identified in [paragraphs 2(a) through 2(d) of its notice of opposition, *i.e.*, the marks in opposer's claimed registrations]." Applicant asserted, affirmatively, that the parties' trademarks are dissimilar and that opposer's mark YOUR LIFE "is weak in that it is generic."⁵

The Record

The record consists of the pleadings; the file of the involved application; certified status and title copies of opposer's pleaded registrations, made of record by opposer's notice of reliance; the responses of applicant to opposer's interrogatories and requests for admissions, made of record by opposer during its cross examination of applicant's testimony witness, Albert Sousa; the testimony deposition by opposer of Norbert Guziewicz, vice president of opposer's parent

⁵ The allegation that opposer's mark is generic is a collateral attack on opposer's claimed registrations. This allegation has not been considered because applicant did not file a petition to cancel any of opposer's claimed registrations.

corporation, Leiner Health Products, Inc., with accompanying exhibits; and the testimony deposition by applicant of Albert Sousa, with accompanying exhibits. Both parties filed briefs on the case and an oral hearing was held, although applicant did not appear at the oral hearing.

Evidentiary Motions by Opposer

In its brief, opposer moved to exclude applicant's exhibits 3 - 9 to Albert Sousa's testimony and Mr. Sousa's testimony relating thereto. Opposer contends that the exhibits are irrelevant and immaterial, lack proper foundation, and that Mr. Sousa's testimony is hearsay. Applicant does not, in its brief, respond to opposer's evidentiary objections. Rather than consider the objections conceded, we address the merits of opposer's objections.

Applicant's testimony witness, Albert Sousa, described himself as a "retired senior health care executive" and a consultant "to national health care companies." Mr. Sousa, as part of his testimony, read portions of exhibits 3 - 9 into the record. On cross examination, Mr. Sousa acknowledged that he has no familiarity with the documents or the statements contained in those documents. As opposer notes, the

exhibits objected to are copies of public records, i.e., printouts from the PTO's U.S. Trademark Electronic Search System (TESS). These documents are amenable to submission with a notice of reliance. It follows that these documents are also amenable to submission in connection with testimony and that what constitutes proper foundation for public records is different from the necessary foundation for applicant's own business records. Because these TESS records include the official website from which they were downloaded and the date, we find these exhibits to be acceptable on their face as copies of third-party registrations and lists of third-party registrations. Third-party registrations are relevant in a case involving likelihood of confusion. Mr. Sousa's reading of the TESS documents is not hearsay. Therefore, these documents are properly of record and we deny applicant's motion to exclude exhibits 3 - 9.

However, applicant's exhibits 3 - 9 are of little, if any, probative value. Exhibits 3 and 9 are merely lists of third-party registrations with no reference to the goods or services or other pertinent registration facts. Such listings do not make the individual registrations of record and give us no information from which we can draw conclusions about other marks

registered in the field of goods involved herein. Mr. Sousa stated, from his personal knowledge, that he was aware of the use of one of the listed marks on supplements sold at a gym where his children exercised. This is insufficient evidence to establish the nature or extent of use of that mark. Similarly, exhibits 4 - 8, copies of five third-party registrations of marks containing the phrase "your life," do not establish the use of those marks. Finally, each case must be decided on its merits and we have no information in this record regarding the facts pertaining to the registration of these five marks.

Regarding Mr. Sousa's testimony, we have not considered any statements made based on speculation or hearsay. Those statements based simply on what Mr. Sousa had been told by Mr. Richard Fortner, applicant's president and representative conducting the testimony deposition, are hearsay.

Finally, in its brief, opposer asks the Board to take judicial notice of prior oppositions that opposer has brought against third parties seeking to register marks, that are referred to for the first time in opposer's brief. The evidence submitted is untimely.

Therefore, this is not proper material for judicial notice and opposer's request is denied.

The Parties

Opposer manufactures vitamins, nutritional supplements and over-the-counter drugs. Opposer is the largest supplier of private label vitamins in the United States; and markets 223 vitamin and nutritional supplement products under its "flagship" brand, YOUR LIFE. Additionally, opposer has two lines of skin care products marketed under the marks BODYCOLOGY and NATURAL LIFE. Opposer's gross sales of its YOUR LIFE products went from approximately \$55 million in 1993 to more than \$100 million in 2000.

Opposer first began using the mark YOUR LIFE in 1972. It markets and sells its YOUR LIFE products to food, drug and mass retailers, selling to over 23,000 stores throughout the United States. Opposer advertises nationally both to the trade in numerous trade journals and to consumers through television and print media, including a substantial amount of cooperative advertising with retailers. Opposer's advertising costs ranged from more than \$4 million in 1993 to approximately \$11 million in 2000.

Opposer was a licensee of the U.S. Olympic Committee for its YOUR LIFE nutritional supplements between, at least, 1992 and 1996. YOUR LIFE vitamins are part of a 100-brand market segment called "broadline brands" and the YOUR LIFE brand ranks third nationally in this category (which translates to a 1.9% share of the entire vitamin market). Opposer also sells vitamin daily packs and has been a leader in this category since the 1970's, with a 53% market share. Opposer participates in market and brand awareness research and studies. A 1999 Gallup study of vitamin use in the United States concluded that 11% of all regular vitamin users in the United States are aware of the YOUR LIFE line of vitamins.

Applicant manufactures, distributes and retails dietary supplements and has been in this business since 1996 or 1997.⁶

Analysis

Inasmuch as certified copies of opposer's pleaded registrations are of record, there is no issue with respect to opposer's priority. *King Candy Co., Inc. v.*

⁶ In applicant's answers to opposer's interrogatories there are several apparent discrepancies regarding the dates applicant commenced its business and its use, if any, of its mark. Thus, no conclusions can be drawn in this regard.

Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative 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 considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

With respect to the goods of the parties, we observe that there is a substantial overlap in the goods identified in the application and in the pleaded registrations and with opposer's established use. Applicant's "herbal supplements" are subsumed within opposer's "dietary food supplements" and "appetite suppressants," which encompasses herbal supplements to suppress appetite. Opposer's evidence establishes that

its YOUR LIFE mark is used in connection with herbal supplements; and that its herbal supplements are advertised together with its "vitamins." Thus, applicant's goods in International Class 5 are identical, and closely related, to opposer's goods identified in its registrations.

Applicant's goods in International Class 3, hair shampoo, skin soap and deodorant soap, are personal care products. The evidence indicates that opposer also produces and sells skin care products, but under different marks. The evidence shows that opposer's NATURAL LIFE skin care products are advertised in print media as containing vitamin E and are shown in advertisements beside its dietary supplements. Applicant's shampoo and soaps encompass herbal and vitamin-enriched shampoo and soaps. Thus, we find that applicant's identified shampoo and soaps are sufficiently related to opposer's goods identified by its YOUR LIFE marks that confusion is likely if both parties' goods are identified by substantially similar marks. Further, in its answer, applicant admitted that opposer's goods are personal care products that are related to one another.

Both opposer's and applicant's identifications of goods are broadly worded, without any limitations as to

channels of trade or classes of purchasers. We must presume that the goods of applicant and opposer will be sold in all of the normal channels of trade to all of the usual purchasers for goods of the type identified. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In other words, we conclude that the channels of trade and class of purchasers of the parties' goods will be the same.

Turning to the marks, we note that while we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue 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 consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Opposer contends that its mark is a strong and well known mark that is entitled to a broad scope of protection; that applicant's mark appropriates opposer's mark YOUR LIFE in its entirety; and that YOUR LIFE is the dominant portion of applicant's mark.

Applicant contends that opposer's mark is weak; that the design element of applicant's mark is significant and distinguishes the parties' marks; and that the parties' marks are significantly different when compared in their entireties.

Based on the evidence in this record we cannot agree with applicant that opposer's YOUR LIFE mark is weak. There is no credible evidence of third-party use or registration of similar marks and there is no evidence suggesting that YOUR LIFE is even minimally suggestive in connection with the goods identified in opposer's registrations. Rather, the evidence establishes that opposer's YOUR LIFE mark has been in use for almost 30 years; that significant sums of money have been spent over the years on advertising; that opposer's sales under the mark are substantial; and that the mark enjoys considerable renown in connection with the identified goods. Thus, opposer's YOUR LIFE mark is entitled to a broad scope of protection in this field of goods.

Although applicant's mark includes a design, the word portion, TIME OF YOUR LIFE NUTRACEUTICALS, is likely to be perceived as the dominant portion. The word portion of a mark comprised of both a word and a design is normally accorded greater weight because it would be

used by purchasers to request the goods. *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192 (TTAB 1994); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985).

As an admittedly descriptive, if not generic, term, NUTRACEUTICALS does not add any distinguishing feature to applicant's mark. The phrase TIME OF YOUR LIFE in applicant's mark incorporates opposer's YOUR LIFE mark in its entirety. While the additional words lend a different connotation to "your life," it is a derivative connotation that still pertains to "your life," and, if used on identical or closely related goods in the same field, is likely to be perceived as a derivative line of products related to opposer's YOUR LIFE products and originating from the same source.

Therefore, we conclude that in view of the similarity in the commercial impressions of applicant's mark and registrant's marks, their contemporaneous use on the same and closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

It is well established that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and to the extent that we have any doubt as to likelihood of confusion, we must resolve that doubt against the newcomer and in favor of the prior user or registrant.

See J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed Cir. 1988); and *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308 (TTAB 1976).

Decision: The opposition is sustained.