

Mailed: 2/11/03

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re National Health Information Network, Inc.

Serial No. 75/602,760

Clark R. Cowley for National Health Information Network,
Inc.

Kathleen M. Vanston, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Hanak, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

National Health Information Network, Inc. (applicant)
seeks to register in typed drawing form CARE RX for
"computer software for use in disease management and
prescription management." The application was filed on
December 2, 1998 with a claimed first use date of February
14, 1997.

Citing Section 2(d) of the Trademark Act, the
Examining Attorney refused registration on the basis that
applicant's mark, as applied to applicant's goods, is
likely to cause confusion with the mark RXCARE, previously
registered in typed drawing form for "electrical and

scientific apparatus; namely, pharmacy management software applications." Registration No. 2,404,562.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

Before turning to the issue of likelihood of confusion, one matter should be clarified at the outset. At page 10 of its brief, applicant argues that as between applicant and registrant, priority rests with applicant because applicant allegedly first used its mark on February 14, 1997 and registrant did not file its intent-to-use application which matured into Registration No. 2,404,562 until March 19, 1998. Applicant's argument is legally insufficient. Section 2(d) of the Trademark Act prohibits the registration of a mark "which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." Cf. In re Calgon Corp., 435 F.2d 596, 168 USPQ 278 (CCPA 1971) (An applicant cannot collaterally attack the validity of a registration cited by the Examining Attorney.).

We turn now to the issue of likelihood of confusion. In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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.").

Considering first the goods, we note that registrant's goods are software for pharmacy management. Certain of applicant's goods are software for prescription management. Obviously, pharmacies fill prescriptions. Thus, registrant's goods are broad enough to include certain of applicant's goods. That is to say, software for pharmacy management is broad enough to encompass software for prescription management. Hence, the goods are in part legally identical.

Considering next the marks, we note at the outset that when the goods are in part legally identical, as is the case here, "the degree of similarity [of the marks] 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 CARE RX is but a mere transposition of registrant's mark RXCARE. It is true that the registered mark is depicted as one word, whereas applicant's mark is depicted as two words. However, we find this to be a very minor difference which could be easily overlooked by purchasers of software for pharmacy and prescription management. Indeed, in this regard we note that at page 10 of its brief, applicant's counsel overlooked this difference when in the second line he depicted registrant's mark not as one word, but rather as two words, that is, as RX CARE.

Of course, not all transpositions of words will result in marks which are confusingly similar. However, in this particular instance, the marks RXCARE and CARE RX convey the identical connotation. Moreover, the two marks are quite similar in pronunciation, and are at least somewhat similar in terms of visual appearance.

Given the similarities of the two marks and the fact that registrant's identification of goods (software for pharmacy management) encompasses certain of applicant's identification of goods (software for prescription management), we find that there exists a likelihood of

confusion. Of course, it need hardly be said that to the extent that there are doubts on the issue of likelihood of confusion, said doubts must be resolved in favor of the registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

One final comment is in order. Applicant argues at great lengths that the purchasers of pharmacy management and prescription management software are sophisticated and exercise care in making their purchases. Applicant has also argued that the relevant goods are expensive. However, applicant has offered no evidence whatsoever in support of these contentions. A pharmacist who owns but a single pharmacy is not necessarily sophisticated when it comes to the purchase of software for pharmacy and/or prescription management. Moreover, this solo pharmacist may or may not exercise care in the purchase of such software. Likewise, such software may or may not be expensive. If applicant wished to show that the software in question was expensive and was purchased only by sophisticated individuals exercising great care, then applicant should have made of record evidence to establish these facts.

Decision: The refusal to register is affirmed.