

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed:
March 9, 2004
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Americare, Inc.

Serial No. 75861779

Myron Amer of the firm of Myron Amer, P.C., for Americare,
Inc.

David H. Stine, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Seeherman, Bucher and Holtzman, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Americare, Inc. seeks registration on the Principal
Register of the mark shown below:



for "home health care services" in International Class 42.¹

¹ Application serial no. 75861779 was filed on December 2, 1999 based upon applicant's allegation of use in commerce at least as early as May 1, 1989. Applicant's brief refers to an amendment of the recital of services to "healthcare supportive services for elderly persons in assisted living facilities." However, as

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).² The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified services, so resembles two registered trademarks, in typed form, owned by the same entity, as follows:

A TRADITION OF CARING, for "providing home health care services, physical and speech therapy, and housekeeping and psychological counseling services," in International Class 42;³ and

A TRADITION OF CARING, for "newsletters concerning home health care services, physical and speech therapy, and housekeeping and psychological counseling services," in International Class 16,⁴

contended by the Trademark Examining Attorney in his appeal brief, the record does not reflect such an amendment as having been timely proffered by applicant, and hence, it was certainly never considered by the Office.

² Throughout most of the prosecution of this application, the refusal to register had also been based upon likelihood of confusion with a registration for the mark AMERICARE registered in connection with "nursing home services" (Reg. No. 1829672 issued on April 5, 1994). Although the affidavit attesting to the continued use of the mark within the period set forth in Section 8 of the Act should have been filed before or during 2000, this registration was not officially cancelled under Section 8 of the Trademark Act until January 2005. Hence, the majority of applicant's appeal brief of September 2004 focused on the likelihood of confusion issues surrounding this now-cancelled registration.

³ Reg. No. 1806575 issued to Chicago Home for the Friendless DBA Family Care Services of Metropolitan Chicago on November 23, 1993, based upon an allegation of use in commerce at least as early as 1982; section 8 affidavit accepted and section 15 affidavit acknowledged; renewed.

⁴ Reg. No. 1809153 issued to Chicago Home for the Friendless DBA Family Care Services of Metropolitan Chicago on December 7, 1993, based upon an allegation of use in commerce at least as early as June 1992; section 8 affidavit accepted and section 15 affidavit acknowledged; renewed.

as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and applicant have filed appeal briefs. Applicant did not request an oral hearing before the Board.

We affirm the refusal to register in connection with each of the cited registrations.

In arguing for registrability, applicant alleges that the Trademark Examining Attorney has violated the "anti-dissection rule," and that when these respective marks are considered in their entireties, applicant's mark creates a different commercial impression from that of the cited marks.

By contrast, the Trademark Examining Attorney argues that applicant's mark is highly similar to the cited marks, inasmuch as applicant appropriated the phrase in the registered marks, A TRADITION OF CARING, in its entirety; that this term is a salient portion of applicant's mark; that the respective services must be considered to be legally identical and that registrant's identified goods are specifically related to applicant's recited services; and that the respective goods and services must be presumed to move within identical trade channels.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to

the factors bearing upon the issue of likelihood of confusion. 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 relationship of the goods and/or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the relatedness of the services as described in the application and goods and services in the cited registrations, applicant's recital of services is identical to the services in one of the cited registrations and is closely related to the goods in the other cited registration. Both applicant and registrant are providing "home health care services." The content of registrant's newsletters concerns home health care services, so registrant's newsletters must be deemed to be closely related to applicant's recited services. Indeed, in its brief, applicant does not argue to the contrary.

Moreover, turning to the related du Pont factor dealing with the similarity or dissimilarity of established, likely-to-continue trade channels, given that neither applicant nor registrant has placed any restrictions on their respective channels of trade, we must presume that applicant's services and registrants' goods and services will all move through the

normal channels of trade to the usual consumers of goods and services of the type identified. See Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Clearly, identical services and such closely-related goods/services must be presumed to be purchased by the same classes of consumers.

Turning to a consideration of the similarities and/or dissimilarities in the marks, we note at the outset that if the services are identical, as is the case herein with one of the cited registrations, "the degree of similarity [between 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).

Moreover, we agree with the Trademark Examining Attorney that likelihood of confusion is not avoided between otherwise confusingly similar marks merely by adding a house mark to another's mark. See In re Apparel Ventures, Inc., 229 USPQ 225 (TTAB 1986) [SPARKS BY SASSAFRAS for clothing held likely to be confused with SPARKS for footwear]; In re The U.S. Shoe Corp., 229 USPQ 707 (TTAB 1985) [CAREER IMAGE for clothing held likely to be confused with CREST CAREER IMAGES for uniforms]; and In re Riddle, 225 USPQ 630 (TTAB 1985) [RICHARD

PETTY'S ACCU TUNE and design for automotive service stations held likely to be confused with ACCUTUNE for automotive testing equipment].

Applicant, in its amendments and request for reconsideration filed April 26, 2004, offered to disclaim this phrase.⁵ We agree with the Trademark Examining Attorney that the entry of a voluntary disclaimer does *not* render registrable a mark that is otherwise unregistrable under relevant sections of the Trademark Act, including §2(d). See In re MCI Communications Corp., 21 USPQ2d 1534 (Comm'r Pats. 1991). Accordingly, the Trademark Examining Attorney must evaluate the entire mark, including any disclaimed matter, to determine registrability. The marks must be considered in their entireties when determining whether there is likelihood of confusion. As noted by the Trademark Examining Attorney, a voluntary disclaimer does not remove the disclaimed portion from the mark for the purposes of this analysis. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); Specialty Brands, Inc. v. Coffee Bean Distributors,

⁵ "Please enter of record the below disclaimer:
-- Applicant disclaims exclusive use of the slogan "a tradition of caring" separate and apart from the mark as shown -- "
It appears as if this disclaimer was, through inadvertence, not previously entered into the electronic record for this application. The disclaimer has now been entered. As is clear from the discussion herein, the Trademark Examining Attorney did correctly consider the effect of this disclaimer in reaching his position on there being a likelihood of confusion with the cited marks.

Inc., 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); In re Infinity Broadcasting Corp. of Dallas, 60 USPQ2d 1214 (TTAB 2001).

Finally, applicant argues that the differences in the styling of the letters as these phrases are actually used by applicant and by registrant would help to distinguish the respective marks. However, inasmuch as both of the cited registered marks are in typed or standard character form, registrant is free to adopt any style of lettering - including lower-case lettering similar, or even identical, to that used by applicant. See 37 C.F.R. §2.52(a); see also In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); In re Pollio Dairy Prods. Corp., 8 USPQ2d 2012 (TTAB 1988); Sunnen Prods. Co. v. Sunex Int'l Inc., 1 USPQ2d 1744, 1747 (TTAB 1987); United Rum Merchants, Ltd. v. Fregal, Inc., 216 USPQ 217 (TTAB 1982).

In conclusion, given that the services are identical and that applicant's services are otherwise closely related to registrant's goods; that the respective goods and services must be presumed to travel through the same channels of trade to the same classes of consumers; and because applicant appropriated in its entirety the phrase in the registered marks, A TRADITION OF CARING, and then merely added its house mark and a design element thereto, that the marks create a

similar overall commercial impression; and hence, we find a likelihood of confusion herein.

Decision: The refusal to register based upon Section 2(d) of the Trademark Act is hereby affirmed.