

Hearing:  
May 19, 1998

Paper No. 24  
EWH

THIS DISPOSITION IS  
NOT CITABLE AS PRECEDENT OF THE TTAB APRIL 21,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Rush North Shore Medical Center  
v.  
Advocate Health Care Network

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Opposition No. 102,008  
to application Serial No. 74/684,657  
filed on June 5, 1995

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Gerald T. Shekleton of Welsh & Katz, Ltd. for Rush North  
Shore Medical Center.

Ralph H. Lane of Foley & Lardner for Advocate Health Care  
Network.

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Before Cissel, Hanak and Walters, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Advocate Health Care Network (applicant) seeks to  
register HEALTH CARE WITH A WHOLE NEW ATTITUDE in typed  
drawing form for "health care services and hospital  
services." The application was filed on June 5, 1995 with a  
claimed first use date of April 26, 1995.

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Rush North Shore Medical Center (opposer) filed a notice of opposition alleging that since prior to 1995, it has made continuous use of the mark NEW ATTITUDE "in connection with its publications and health care services." (Notice of Opposition paragraph 3).

Continuing, opposer alleges that "applicant's HEALTH CARE WITH A WHOLE NEW ATTITUDE mark is confusingly similar to opposer's NEW ATTITUDE mark." (Notice of Opposition paragraph 10).

In response, applicant denied the pertinent allegations of the notice of opposition, and in particular, applicant denied the allegations contained in paragraphs 3 and 10 of the notice of opposition.

Both parties filed briefs and were present at a hearing held in May 19, 1998. The record in this case is summarized at pages 2-3 of opposer's brief and at pages 7-9 of applicant's brief.

The parties are in agreement that the sole issue in this proceeding is whether there is a likelihood of confusion resulting from the contemporaneous use of opposer's mark and applicant's mark. (Opposer's brief page 4; applicant's brief page 13). There is no dispute that opposer has made continuous use of its mark NEW ATTITUDE since 1992, and that applicant has made continuous use of its mark HEALTH CARE WITH A WHOLE NEW ATTITUDE since 1995.

In any likelihood of confusion analysis, two key considerations are the similarities of the goods or services and the similarities of the marks. 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 [or services] and differences in the marks.").

Considering first the goods and services, we note that while opposer has alleged that it has used its mark NEW ATTITUDE in connection with publications and health care services, opposer's vice president for marketing (Michael J. Kearns) testified as follows at page 30 of his deposition:

Q. Now, after the premier issue in '92-93 up to today have you used the "New Attitude" phrase in connection with anything other than these pamphlets or brochures?

A. Well, with seminars, with talks.

Q. And these seminars and talks would have all been related to women's health issues?

A. Yes. Now, we may - I should say we may have promoted in a particular issue not necessarily a women's health topic, but if we happened to be doing it at [opposer's] Medical Center during that time period, we may have listed it as a possible topic.

Thus, the record does not show that opposer has used NEW ATTITUDE as a service mark directly in connection with

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the rendering of health care services, as opposer alleges in paragraph 3 of its notice of opposition. Nevertheless, because opposer is a medical center (hospital) and because opposer uses its NEW ATTITUDE pamphlets and seminars to promote its health care services, we find that the public would associate opposer's mark NEW ATTITUDE with health care services, despite the fact that opposer has not made technical service mark use of NEW ATTITUDE in connection with health care services.

In short, we find that opposer's goods and services (pamphlets and seminars designed to promote opposer's health care services) and applicant's services as set forth in the application (health care services and hospital services) are closely related.

Turning to a consideration of the marks, we note at the outset that when the goods or services are closely related, a lesser degree of similarity in the marks is required for a finding of likelihood of confusion. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). However, having said the foregoing, we find that the marks of the parties are dissimilar enough such their use on closely related goods and services is not likely to result in confusion.

Marks are compared in terms of their visual appearance, pronunciation and connotation. In terms of visual

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appearance and pronunciation, opposer's two word mark and applicant's seven word mark are quite dissimilar. See Colgate-Palmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400, 167 USPQ 529, 530 (CCPA 1970) ("The difference in appearance and sound of the marks in issue [PEAK and PEAK PERIOD] is too obvious to render detailed discussion necessary. In their entirety they neither look nor sound alike."); Lever Bros. Co. v. Barcolene Co., 463 F.2d 1107, 174 USPQ 392, 393 (CCPA 1972) ("While appellant points out some similarities between the word ALL as it is used by both parties, inspection of the two marks [ALL CLEAR! and ALL] also shows obvious differences. Considering appellee's mark in its entirety, we are convinced that there is no likelihood of confusion" even when both marks are used on identical products, namely, household cleaners.); In re Hearst Corp., 982 F.2d 493, 25 USPQ2d 1238 (Fed. Cir. 1992) (The Court found no likelihood of confusion resulting from the contemporaneous use of VARGAS and VARGA GIRL on identical goods, namely, calendars.).

Thus, despite the fact that fact that opposer's goods and services and applicant's services are closely related, we find that opposer's mark and applicant's mark are so dissimilar in terms of visual appearance and pronunciation that there simply is no likelihood of confusion. In this regard, we note that in the Lever Bros. and Hearst cases,

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the goods are not merely closely related, they were instead absolutely identical, inexpensive consumer items (household cleaners and calendars).

In terms of connotation, there is some similarity in the marks because both consist of or contain the words NEW ATTITUDE. However, according to the evidence of record, the term "new attitude" is highly suggestive of the goods and services of the parties in that it informs individuals that they should adopt a new attitude about their lifestyles which promotes good health and/or that the health care providers (opposer and applicant) have themselves adopted a new attitude about rendering health care to patients in a more caring fashion. Moreover, Mr. Kearns - opposer's vice president for marketing - testified that previously he had "worked in the advertising agency business for 15 years and [he had] always understood the importance of the word 'new' as a marketing concept to people, however it's used. People are generally - it depends upon the product, but people are generally interested in new things." (Kearns deposition page 12). Moreover, when asked if he had ever heard the phrase "new attitude" prior to this opposition proceeding, Mr. Kearns replied as follows at page 65 of his deposition:

A. Oh, sure.

Q. In what way?

A. Somebody has a "new attitude" about about something.

Q. In a very generic sense, explaining a change of the attitude they had before?

A. Right.

The record establishes that the phrase "new attitude" is a very common phrase which, when used in conjunction with opposer's goods and services and applicant's services, is highly suggestive and indeed laudatory. It has long been held that "the mere presence of a common, highly suggestive portion is usually insufficient to support a finding of likelihood of confusion." Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976). This is particularly true when, as is the case here, the two marks are otherwise so dissimilar in terms of visual appearance and pronunciation.

Decision: The opposition is dismissed.

R. F. Cissel

E. W. Hanak

C. E. Walters  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board