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Paper No.
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Healthcare Management Advisors, Inc.

Serial No. 74/268,570
Serial No. 74/542,523
Serial No. 74/542,378
Serial No. 74,542,379
Serial No. 74/551,280

L. Lamar Blount for Healthcare Management Advisors.

Gerald C. Seegars, Trademark Examining Attorney, on Serial Nos. 74/268,570 and 74/551,280, Law Office 106 (Mary I. Sparrow, Managing Attorney); and Irene Williams, Trademark Examining Attorney, on Serial Nos. 74/542,378, 74/542,379 and 74/542,523; Law Office 107 (Thomas Lamone, Managing Attorney).

Before Quinn, Walters and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

The above consolidated applications have been filed by Healthcare Management Advisors, Inc. to register the following marks:

HMA

for "financial consulting services in the healthcare field related to coding medical diagnoses and procedures, coding accuracy, coding optimization, coding validation, claim submissions, medical records documentation, financial management, placement and recruiting, utilization management, quality assurance, reimbursement and billing."¹ Class 36.

HMA PROFIT

for "newsletter in the fields of healthcare financial management and reimbursement."² Class 16.

HMA REMEDY

for "newsletter in the fields of healthcare information management, medical records, quality assurance and utilization."³ Class 16.

HMA NEWSFAX

for "newsletter transmitted directly to healthcare professionals in the fields of financial management and medical records, namely coding medical diagnoses and procedures, coding accuracy, coding optimization, coding validation, claim submissions, medical records documentation, financial management, placement and recruiting, utilization management, quality assurance, reimbursement and billing."⁴ Class 16.

¹ Serial No. 74/268,570, filed April 23, 1992, alleging dates of first use on July 1, 1990.

² Serial No. 74/542,523, filed June 27, 1994, alleging dates of first use of November 1990.

³ Serial No. 74/542,378, filed June 27, 1994, alleging dates of first use of September 1990.

⁴ Serial No. 74/542,379, filed June 27, 1994, alleging dates of first use on May 15, 1994. The word NEWSFAX has been disclaimed.



for "prerecorded videotapes in the field of healthcare management and medical records and instructional manuals sold together as a unit." Class 9;

for "consulting services in the healthcare field related to coding medical diagnoses and procedures, coding accuracy, coding optimization, coding validation, claim submissions, medical records documentation, financial management, placement and recruiting, utilization management, quality assurance, reimbursement and billing." Class 36;

for "educational seminars in the field of healthcare management and medical records."⁵ Class 41.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's marks, when used in connection with applicant's goods and services, so resemble the mark in Registration No. 1,776,718 shown below as to be likely to cause confusion. The registration includes a statement that the mark consists of a stylized version of the letters "HMA."

⁵ Serial No. 74/551,280, filed July 20, 1994 alleging dates of first use on Class 9 goods on April 15, 1992; first use in connection with Class 36 services in September 1990; and first use in connection with Class 41 services in May 1993. There is no lining statement in the file.



for "management and business consulting services and processing services rendered to the health care industry, focusing on benefits, health care providers, managed health care plans and self-funded health and welfare plans."⁶
Class 35.

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

In any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. *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 the differences in the marks."].

Turning first to the marks, the Examining Attorney argues that the letters HMA are the dominant features of the respective marks and that aside from the stylization and/or additional

⁶ Issued June 15, 1993; Section 8 affidavit accepted.

wording in its marks, applicant's marks are "nearly identical to the registrant's mark...in both sound and appearance" and the respective marks create the same commercial impression. The Examining Attorney maintains that purchasers are likely to believe that registrant's HMA is a "house mark" and that applicant's HMA marks with additional matter are part of the "family" of HMA marks.

Applicant, on the other hand, argues that the respective marks, when considered in their entirety, are sufficiently different in appearance and commercial impression to avoid confusion, particularly in view of the highly stylized display of the registered mark and the design element appearing therein. Contending that HMA in the cited mark is weak and entitled to only a narrow scope of protection, applicant has relied on the results of an on-line search which applicant claims "reveals that the formative 'hma' appears in 1,389 citations." Applicant has also submitted lists of third-party federal and state registrations as well as lists of purported "trade names" and "common law" marks containing the words "healthcare" or "management" and/or the letters "HM" claiming that these terms "are...frequently used and... prominent feature[s] in numerous other marks." (Brief, p. 15). Applicant maintains that the "extensive third party uses" as well as the federal and state

registrations confirm "the 'suggestive' significance of the 'HM' letters." (Brief, p. 20).

The Examining Attorney did not object to the form of this evidence, but nonetheless maintains that the evidence fails to show that the registered mark is weak or suggestive or that HM is an acronym for "healthcare management" and points out that, in any event, the mark herein is not HM but HMA. The Examining Attorney has made of record the relevant page from an acronym dictionary showing that there is no recognized meaning of HMA in the healthcare field.

Applicant's marks all encompass the letters HMA, but the mark of applicant which can be considered closest to the cited mark consists solely of the typed letters HMA. Registrant's mark, however, is a composite consisting of highly stylized letters, described in the registration as HMA, and several design elements, including the design of an EKG tracer, which form an integral part of those letters. The Examining Attorney contends that the literal portion of the marks, that is, the letter combination HMA, is the dominant feature of each mark.

It is well settled that marks must be compared in their entireties and that there is nothing improper in giving more weight to certain features of the marks as being more dominant or otherwise significant. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). However, as stated by the

Court in *In re Electrolyte Labs, Inc.*, 929 F.2d 645, 646, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990), "[t]here is no general rule as to whether letters or design will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue." The visual elements of registrant's mark, that is, the highly stylized display of the letters and the design elements incorporated therein, are at least as significant as the verbal portion of registrant's mark. The Court noted in *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 760, 204 USPQ 697, 699 (CCPA 1980) that a mark consisting of highly stylized letters is "in the gray region between pure design marks which cannot be vocalized and word marks which are clearly intended to be." This is particularly relevant in this case where, although registrant may have intended that the mark depict the letters HMA, the mark is not clearly recognizable as those letters.⁷

Thus, even if we assume that registrant's mark would be perceived as the letters HMA and that the respective marks would then be pronounced the same, the marks when viewed as a whole, and giving the stylization and design features in registrant's mark appropriate consideration, differ substantially in

⁷ We also note that a typed drawing registration for HMA would only afford protection for all *reasonable* manners of presentation, not all *possible* forms no matter how extensively stylized. See *INB National bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992) and *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992). See also *Polaroid Corp. v. C & E Vision Services Inc.*, 52 USPQ2d 1954 (TTAB 1999).

appearance and create distinctly different commercial impressions.

Applicant's lists of asserted third-party names and marks have not been useful to our analysis. This evidence, which ordinarily would not even be considered properly of record,⁸ is insufficient to show that the listed marks or names are in use or that the public is familiar with them. See *In re E. I. du Pont de Nemours & Co.*, *supra* [the factor to be considered in determining likelihood of confusion under *du Pont* is the number and nature of similar marks "in use on similar goods."].⁹ (Emphasis added). Nor does this evidence show any suggestive or commonly understood meaning of HMA in the health care field, and it certainly fails to establish that the term is highly suggestive or weak in relation to the recited services.

We turn then to the goods and services. Based on the three declarations of applicant's chief operating officer, Steve Garrison, and Mr. Garrison's "investigation" of the services offered by registrant, applicant contends that its own goods and services are "very different" from the services of registrant.

⁸ See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Inasmuch as the Examining Attorney did not object to the form of this evidence, we have considered the evidence as properly of record for whatever probative value, if any, it may have.

⁹ Thus, applicant's contention that HMA "appears in 1389 citations" is irrelevant to the question of whether the marks applied to the goods and/or services herein are likely to cause confusion.

Specifically, applicant argues that the respective services are "mutually exclusive" in that "an entity using Registrant's 'management' service is not a candidate for applicant's services" (brief, p. 10). While, according to applicant, registrant "manages health care entities" applicant claims that its own services "are not management services" (brief, p. 11) but instead provide "limited, specifically targeted services (e.g., coding, documentation, ... etc.) to physicians, hospital administrators, and other similarly situated professionals." In his third declaration, Mr. Garrison states that:

...Registrant's officers...confirmed the nature of Registrant's services and channels of trade, and the fact that those services and trade channels are different than Applicant's.

Applicant further argues that the respective services are directed to different customers through different channels of trade in that registrant's services are targeted to HMOs; that the customers for the respective services are sophisticated and discriminating purchasers; that applicant's services involve decisions "in the range of tens of thousands of dollars, if not millions of dollars"; and that its newsletters are "not complementary or companion items" to registrant's services and are targeted only to a specific, professional audience and cover "a discrete range of very narrow topics." (Brief, p. 9, 13).

The Examining Attorney, however, maintains that the respective goods and/or services, as identified, are "closely related." Specifically, the Examining Attorney argues that registrant's services would encompass "all types of management and business consulting and processing services related to the healthcare industry." (Brief, p. 6). The Examining Attorney notes that there are no limitations in the registration as to the types of management, business consulting or processing services provided by registrant nor as to the types of health care institutions to which applicant's and registrant's services are provided. In addition, the Examining Attorney contends that "consultants often send newsletters to their clients or potential clients"; that registrant's services "may be rendered to the entities who get the applicant's newsletter"; and that applicant's newsletters may address the same topics that registrant's services provide and go to the same customers." (Brief, p. 5).

We disagree with applicant's overly restrictive interpretation of its own goods and services as well as registrant's recited services, and we find that applicant's reliance on extrinsic evidence to limit the channels of trade and scope of the respective goods and services is improper. It is well settled that a determination of likelihood of confusion must be based on a comparison of the goods and/or services as set

forth in the application and registration, rather than on the basis of what the evidence might show the actual goods or services to be. See *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990). Registrant's services are broadly identified in part as management services for healthcare providers and applicant's services are, in a similar manner, broadly identified in part as financial management consulting services in the healthcare field. Registrant provides "processing services" for healthcare providers and applicant consults in claim submissions, clearly a processing activity, for healthcare providers. In addition, the topics of applicant's newsletters include healthcare financial management and information management, and applicant's videotapes and management seminars could relate to any aspect of healthcare management, including the type of management services provided by registrant. However, while applicant's services appear to be broadly related to those of registrant, the respective services are nevertheless specifically different. Moreover, the Examining Attorney has not established that applicant's seminars, newsletters and video products on the one hand and registrant's management and business consulting services on the other are so closely related that purchasers would naturally expect these products and services to emanate from the same source.

In addition, the record shows that applicant's services are expensive, and that the overlapping customers for the respective

goods and services are sophisticated professionals who would be expected to exercise greater care in making purchasing decisions. See *Electronic Design & Sales v. Electronic Data Systems*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992), citing *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786 (CA 1 1983) ["There is always less likelihood of confusion where goods are expensive and purchased after careful consideration."].

On the other hand, applicant's claim of no actual confusion is not persuasive.¹⁰ Applicant has relied on the three declarations, with exhibits, of Mr. Garrison. Mr. Garrison has provided sales and advertising figures for goods and services under applicant's HMA marks and states that applicant's and registrant's marks have been concurrently used for five years "in all fifty states"; that applicant has advertised in nationally-recognized magazines directed toward medical administrators and other professionals and industry-specific newsletters; that applicant is not aware of a single instance of actual confusion during this time; and that during a "series of phone calls" registrant's (unnamed) officers "confirmed the absence of any instances of confusion."

¹⁰ Contrary to applicant's contentions, neither applicant's asserted good-faith adoption of its mark nor the absence of evidence of fame of registrant's mark are relevant factors on this ex parte record.

While the absence of actual confusion is a factor indicative of no likelihood of confusion it is meaningful only where the record demonstrates appreciable and continuous use by applicant of its mark in the same markets as those served by registrant under its mark. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992). In this case, it is unclear whether the respective goods and services have been offered in geographic markets which significantly overlap or whether the length of time and the extent of any such overlapping use has been substantial. Cf. *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992). Thus, there is insufficient evidence in this record from which we can determine that a meaningful opportunity for actual confusion ever existed.

We conclude that the sophisticated nature of the purchasers and the cumulative differences in the respective marks and the goods and services offered thereunder make confusion unlikely.

Decision: The refusal to register in each case is reversed.