

"TAKETEN" and "TAKE 10!" Trademarks Not Confusingly Similar

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In *In re St. Helena Hosp.* (Fed. Cir. Dec. 16, 2014), the **Federal Circuit held that St. Helena Hospital should have been allowed to register its TAKETEN mark**, finding that it was **not likely to cause confusion with the mark TAKE 10!**, owned by the ILSI Foundation. St. Helena used its TAKETEN mark in connection with its ten-day residential health improvement program at its facility in St. Helena, California. The TAKE 10! mark was used in connection with programs aimed at encouraging children to exercise at least 10 minutes per day. The Trial Trademark and Appeal Board (the "Board") upheld the examiner's rejection of the TAKETEN mark on the grounds that it was likely to cause confusion with Take 10!. While the Federal Circuit essentially agreed with the Board that the two marks are substantially similar, the Court reversed the Board's decision because there was not substantial evidence overall to support a finding of likelihood of confusion.

The court reviewed each of the other relevant factors relied on by the Board, including (1) the similarity or dissimilarity and nature of the goods and services; (2) the similarity or dissimilarity of established, likely-to-continue channels of trade; and (3) the conditions under which and buyers to whom sales are made. In each case, the court found insufficient evidence to support the Board's findings. Of interest on the channels of trade factor, the court rejected the argument that the channels of trade for the respective goods and services were similar because they were advertised on the internet. Quoting a popular trademark treatise, the court held that "Advertising on the Internet is ubiquitous and 'proves little, if anything, about the likelihood that consumers will confuse similar marks used on such goods or services.'"

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