

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

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EWH

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Johnson & Johnson

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Serial No. 75/252,479

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Norm D. St. Landau of Drinker Biddle & Reath.

Brian B. Brown, Trademark Examining Attorney, Law Office  
105 (Thomas G. Howell, Managing Attorney).

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Before Hanak, Wendel and Drost, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Johnson & Johnson (applicant) seeks to register in  
typed drawing form EPIC MICROVISION for "endoscopic fiber  
optic viewing system, namely, endoscopes and accessories  
therefore." The intent-to-use application was filed on  
March 5, 1997.

The Examining Attorney has refused registration  
pursuant to Section 2(d) of the Trademark Act on the basis  
that applicant's mark, as applied to applicant's goods, is

likely to cause confusion with the mark EPIC, previously registered in typed drawing form for "digital, Ser. No. 75/252,479

electrophysiology imaging processing computer and work station product for use in catheter positioning and electrophysiology imaging event recording and instruction manuals provided in connection therewith." Registration No. 2,057,665 issued April 29, 1997.

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.

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 marks, we note at the outset that the Examining Attorney has never contended that the

MICROVISION portion of applicant's mark EPIC MICROVISION is descriptive of applicant's goods. At page 4 of his brief,

2

Ser. No. 75/252,479

the Examining Attorney merely argues that both marks are similar because they contain the term EPIC. Obviously, the presence of the term EPIC in both marks does cause them to be somewhat similar. However, the presence of the much longer word MICROVISION in applicant's mark serves to distinguish the two marks, especially when one considers that, as will be discussed at greater length later, the purchasers and users of applicant's goods and registrant's goods are very sophisticated professionals.

Turning to a consideration of the goods, applicant's goods are endoscopes. An "endoscope" is defined as "an instrument for examining visually the inside of a hollow organ, as the rectum." Webster's New World Dictionary (1996). Registrant's goods are decidedly more complex. Essentially they are computers and work stations for use in electrophysiology imaging event recording and catheter positioning. The term "electrophysiology" is defined as "a field of study that deals with the relationships of body

functions to electrical phenomenon (e.g., the effects of electrical stimulation on tissues, the production of

Ser. No. 75/252,479

electric currents by organs and tissues, and the therapeutic use of electric currents)." Taber's Cyclopedic Medical Dictionary (18<sup>th</sup> ed. 1997).

In a further effort to clarify the nature of registrant's EPIC computer and work station product for use in electrophysiology imaging event recording and catheter positioning, applicant retained the services of a private investigator, James Moy. In a declaration dated May 5, 1999, Mr. Moy states that on that day he spoke with Dennis Clouse, the Original Equipment Manufacturer Manager at Fisher Imaging Corporation (registrant). Mr. Moy declares that Mr. Clouse stated to him that registrant's EPIC product is essentially a computer system. Mr. Moy also obtained literature regarding registrant's EPIC product. This literature demonstrates that registrant's computer systems are designed specifically for electrophysiology and that they range in price from \$350,000 to \$1,175,000.

At this juncture, one point merits clarification. In Board proceedings, the question of likelihood of confusion is determined based upon a consideration of the goods described in applicant's application and the goods

4

Ser. No. 75/252,479

described in registrant's registration, and not on what applicant's actual goods and registrant's actual goods may be. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1838, 1815 (Fed. Cir. 1987). In most cases, the descriptions of goods in the application and registration are clear. Thus, by way of example, if a prior registration utilizes the unambiguous term "vegetables" as its description of goods, it would be improper for the applicant to make of record extrinsic evidence showing that currently registrant makes use of its mark only on "peas." However, when the description of goods in the cited registration is somewhat unclear, as is the case here, it is entirely proper for applicant to make of record extrinsic evidence explaining what the description of goods in the cited registration means. Such extrinsic evidence does not limit the description of goods of the cited registration, but merely explains the

description of goods of the cited registration. In re Trackmobile Inc., 15 USPQ2d 1152, 1153-54 (TTAB 1990).

Moreover, even without applicant's extrinsic evidence explaining the description of goods set forth in the cited

5

Ser. No. 75/252,479

registration, it is obvious that both endoscopes (applicant's goods) and computers and work stations for use in electrophysiology imaging event recording and catheter positioning are distinctly different types of medical devices. The fact situation in this case is very similar to that in the case of Astra Pharmaceutical Products v. Beckman Instruments, 718 F.2d 1201, 220 USPQ 786 (1<sup>st</sup> Cir. 1983) which was cited with approval by our primary reviewing Court in Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1390 (Fed. Cir. 1992). In Astra Pharmaceutical, the First Circuit found no likelihood of confusion resulting from the use of the identical mark ASTRA on different medical products sold to the very same hospitals. Plaintiff's ASTRA medical products included syringes, which like applicant's endoscopes, penetrate the body, albeit for different purposes. On the other hand, the defendant's medical

devices were analyzers used in hospitals which cost between \$35,000 and \$60,000. Compared to the analyzers in the Astra Pharmaceutical case, registrant's computers and work

6

Ser. No. 75/252,479

stations for electrophysiology imaging event recording and catheter positioning are even more complex and costly devices.

In similar fashion, our primary reviewing Court in Electronic Design & Sales found no likelihood of confusion when virtually identical marks (EDS and E.D.S.) were used on goods and services marketed not only in the medical field, but also to the very same companies in the medical field. Electronic Design & Sales, 21 USPQ2d at 1391.

Finally, if there was any lingering question as to whether there exists a likelihood of confusion in this case, said question must be answered in the negative when one takes into account that both applicant's goods and registrant's goods are sold to and used by only highly sophisticated individuals, namely, physicians. In this regard, we note that the predecessor to our primary reviewing Court has held that physicians are "a highly

intelligent and discriminating public." Warner Hudnut, Inc. v. Wander Co., 280 F.2d 435, 126 USPQ 411, 412 (CCPA 1960). As our primary reviewing Court has made abundantly clear, purchaser "sophistication is important and often

7

Ser. No. 75/252,479

dispositive because sophisticated consumers may be expected to exercise greater care." Electronic Design & Sales, 21 USPQ2d at 1392. We do not understand the statement at page 6 of the Examining Attorney's brief that "the applicant's and registrant's identifications of goods are broadly written so they encompass use by everyday consumers." Of course, the Examining Attorney could present no evidence in support of this untenable position. Everyday consumers do not use endoscopes, and they certainly do not use computers and work stations for electrophysiology imaging event recording and catheter positioning.

In short, because unlike the identical or virtually identical marks in Astra Pharmaceutical and Electronic Design & Sales, the marks in question here are not remotely identical but instead are distinguishable (i.e. EPIC v. EPIC MICROVISION); the goods of the parties are decidedly different; registrant's goods, as described in its

registration, are inherently very expensive; and both applicant's goods and registrant's goods would be purchased only by sophisticated and discriminating individuals, we find that there exists no likelihood of confusion.

8

Ser. No. 75/252,479

Decision: The refusal to register is reversed.

