

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Human Genome Sciences, Inc.

Serial No. 75/792,421

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for Human Genome Sciences, Inc.

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(Thomas Howell, Managing Attorney)

Before Seeherman, Hairston and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Human Genome Sciences, Inc. (applicant) has appealed from
the final refusal of the Trademark Examining Attorney to register
the mark FAS TR for goods which were amended to read,

Genetically engineered reagents for scientific and research
use, namely, nucleic acids and proteins for use in diagnosis
and development of pharmaceutical preparations for the
treatment of diseases (in Class 1); and

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Pharmaceutical preparations containing proteins and nucleic acids for the treatment of diseases (in Class 5).¹

Registration has been refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with FASTRNA, the mark in two registrations owned by Qbiogene Inc., one for "diagnostic and process reagent kits and components for rapid isolation and purification of nucleic acid for scientific or research use"² and the other for "medical diagnostic and process reagent kits and components for rapid isolation and purification of nucleic acid for medical laboratory use."³

When the refusal was made final, applicant appealed. Both applicant and the Examining Attorney filed briefs. The request for an oral hearing was later withdrawn.

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 and those of

¹ Serial No. 75/792,421 filed September 3, 1999 alleging a bona fide intention to use the mark in commerce.

² Registration No. 1,991,859 issued August 6, 1996; combined Sections 8 and 15 affidavits accepted and acknowledged, respectively.

³ Registration No. 2,010,660 issued October 22, 1996; combined Sections 8 and 15 affidavits accepted and acknowledged, respectively.

record, including the similarity of the marks and the relatedness of the goods or services.

The Examining Attorney argues that the goods are related in that they both involve diagnostic genetic reagents for scientific and research use. In support of her position, the Examining Attorney has made of record a number of third-party registrations, excerpts of articles from the NEXIS database, and a printout from registrant's web site, all purporting to show that applicant's goods are "used in the same field" as those of registrant and are "within the registrant's logical zone of expansion." In addition, the Examining Attorney submitted a dictionary listing defining "nucleic acid" as RNA and indicating that RNA is an acronym for "ribo-nucleic acid."⁴ While not disputing that the purchasers for the respective goods are sophisticated or knowledgeable, the Examining Attorney maintains that even such purchasers would not be immune from confusion in this case.

Applicant, in an effort to distinguish the purpose and function of the respective goods, argues that whereas applicant provides customers with the actual nucleic acids to administer to patients or to conduct research, registrant only provides the testing kits to isolate and purify those nucleic acids. While

⁴ *The American Heritage Dictionary of the English Language* (Third Edition 1992).

admitting that "both marks may be used in connection with medical and scientific research" applicant concludes, based on information obtained from registrant's web site, that registrant's mark is only used in connection with testing kits to isolate and purify RNA "from bacteria, yeast, fungi, algae and plant and animal tissue and cells" and that such uses "do not include pharmaceuticals or medicinal reagents." (Req. for Recon., p.8). Applicant further contends that those involved in purchasing both applicant's and registrant's goods, including medical laboratories and other medical research facilities, are highly skilled, sophisticated customers who are not likely to be confused.

Applicant's goods are identified as "genetically engineered reagents for scientific and research use, namely, nucleic acids and proteins for use in diagnosis and development of pharmaceutical preparations for the treatment of diseases." The cited registrations are for "diagnostic and process reagent kits and components for rapid isolation and purification of nucleic acid for scientific or research use" and "medical diagnostic and process reagent kits and components for rapid isolation and purification of nucleic acid for medical laboratory use." While the respective goods are different, they are nonetheless closely related. In effect, applicant's goods provide a medical laboratory with RNA to be used in medical research and

registrant's goods provide the laboratory with the chemicals for isolating and purifying the RNA so that it can be used in such research. The NEXIS evidence submitted by the Examining Attorney and registrant's web site information indicate generally that RNA must be properly isolated from a sample and purified before it can be properly used in certain research applications. Since applicant's goods, as described, are deemed to encompass isolated and purified RNA, the end product created from registrant's chemical reagents is identical to applicant's RNA product. Therefore, both products would have the same ultimate function and purpose in the medical research field.⁵

While applicant admits that "both marks may be used in connection with medical and scientific research," applicant at the same time appears to argue, based on information obtained from registrant's web site, that registrant's products would not be used for medical research on human subjects or relating to human diseases. However, the determination of likelihood of confusion must be based on the goods as identified in the application and registrations rather than on what any extrinsic

⁵ The third-party registrations submitted by the Examining Attorney were not helpful in evaluating the relatedness of the goods because, for the most part, they are not based on use in commerce and they otherwise do not cover both applicant's and registrant's goods. Moreover, contrary to the Examining Attorney's claim, it is not clear from the printout from registrant's website that registrant offers the RNA product itself as well as the kits for purifying those products.

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evidence might show the actual nature or function of the goods to be. See *J & J Snack Foods Corp. v. McDonalds' Corp.*, 932 F.2d 1460, 1464, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). Here, there is no language in the identification of goods in Registration No. 1,991,859 restricting the use of the product to a particular type of research and, furthermore, the identification of goods in Registration No. 2,010,660 expressly provides for use of the product in medical diagnostics and medical research. Moreover, both applicant's and registrant's products would be offered to the same customers at the same medical laboratories or other medical research facilities.

Turning to the marks, the Examining Attorney contends that applicant's mark FAS TR and registrant's mark FASTRNA create similar commercial impressions in that they share the same "fastr" letter string. The Examining Attorney maintains that the omission of the letters NA in applicant's mark and the insertion of a space between the two terms does not overcome similarity between the two marks.

Applicant, on the other hand, argues that the marks are dissimilar in sound, appearance, meaning and commercial impression. In support of its position, applicant has submitted copies of a number of third-party registrations incorporating the term "fast" for goods in related fields to show that the term

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"fast" is highly suggestive of the goods and therefore entitled to a narrower scope of protection.

Both FAS TR and FASTRNA may contain the same letter string but those shared letters are not significant when we consider the differences in the marks as a whole. In terms of appearance, neither mark would be viewed merely as one long string of letters. In applicant's mark, the space between FAS and TR interrupts the visual flow of the letters and registrant's mark is more likely to be visualized as a combination of words, not individual letters. As a result, the marks, when viewed in their entireties, have different meanings and create different commercial impressions.

Registrant's mark is highly suggestive of its goods and would be perceived by prospective purchasers as a combination of the two recognized terms, FAST and RNA. As described in the cited registrations, registrant's product is used for "rapid isolation and purification of nucleic acid," thereby suggesting to purchasers that the RNA separation process can be performed quickly. The suggestive meaning of "fast" is also shown by applicant's third-party registrations incorporating the term "fast," including the marks "FASTAG" "FASTPHORAMIDITE"

"FASTSTART" "FASTTRACK" and FASTDNA (another registration owned by registrant herein), all for goods in related fields.⁶

Applicant's mark FAS TR, considered as a whole, is capable of several different meanings and commercial impressions, none of which is similar to FASTRNA. Applicant has explained that TR is a coined acronym (for "tumor neurosis factor and receptor protein) having no recognized meaning in the trade. The If the term FAS is not recognized as a phonetic variation of "fast," the mark as a whole may be perceived as a coined term with no clear meaning in relation to applicant's goods. However, even if FAS is recognized as a variation of "fast," the mark as a whole would still appear, at least on this record, to be completely arbitrary. Moreover, in view of the highly suggestive nature of "fast," the remaining completely dissimilar portions of the marks, RNA and TR, would certainly be sufficient to distinguish the one "fast" mark from the other. Finally, if FAS TR is viewed as a phonetic equivalent of "faster," the mark would appear to have only some vaguely suggestive meaning which, in any event, would differ from the meaning associated with "fast rna."

⁶ While not evidence of use of the marks therein, the third-party registrations are relevant to show that a term has a particular significance in an industry. See *Conde Nast Publications Inc. v. Miss Quality, Inc.*, 180 USPQ 149 (TTAB 1973), *aff'd.* 184 USPQ 422 (CCPA 1975) and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991).

When spoken, any reasonable pronunciation of the two marks would be quite distinct. Purchasers are not likely to call for either applicant's or registrant's goods by pronouncing the individual letters comprising the marks. Instead, the word FAST in FASTRNA would be pronounced separately from the letter group RNA. Applicant's mark, FAS TR, would either be pronounced as the term "FAS" followed by the letters "T-R" spoken individually, or as the single word "faster." Either way, the two marks when spoken would not have a similar sound.

We also must consider that the purchasers for both applicant's and registrant's goods would be highly skilled professionals who would be knowledgeable about the products they are purchasing and who would exercise a high degree of care in their purchasing decisions. See *Electronic Design & Sales v. Electronic Data Systems*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992).

Notwithstanding the relatedness of the goods, when we consider the differences in the marks and the sophistication of the respective purchasers, we find that confusion is not likely.

Decision: The refusal to register is reversed.