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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cordis Corporation

Serial No. 75/850,715

Norm St. Landau and MaryPat A. Weyback of Drinker Biddle & Reath LLP for Cordis Corporation.

Verna Beth Ririe, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Hairston, Chapman and Rogers, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Cordis Corporation has appealed from the final refusal of the Trademark Examining Attorney to register RAPTOR as a trademark for "medical devices, namely, stents and stent delivery systems comprised of catheters used to deliver stents to the site of the lesion for use in the field of

cardiology."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that use of the mark for the identified goods would be likely to cause confusion with the mark RAPTOR which is registered for "instruments for orthopedic surgery."²

The case has been fully briefed and an oral hearing was held.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The key factors in our analysis are the identity of the marks, the relationship between the goods, and the arbitrary nature of the mark in the cited registration.

At the outset, we note that the marks are identical. This fact "weighs heavily against applicant." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). "The greater the similarity in

¹ Application Serial No. 75/850,715, filed November 17, 1999, based on a bona fide intention to use the mark in commerce.

² Registration No. 1,986,107 issued July 9, 1996.

the marks, the lesser the similarity required in the goods or services of the parties to support a finding of likelihood of confusion." 3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §23:20.1 (4th ed. 2000). See also *In re Corcordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

We turn to a consideration of applicant's goods and the goods in the cited registration. Applicant's position is that its goods and the goods in the cited registration are fundamentally different because they are limited to distinct fields of medicine, namely cardiology in the case of applicant's goods, and orthopedics in the case of the goods in the cited registration. In view of these limitations, applicant argues that its goods and the goods in the cited registration would travel in different channels of trade to different purchasers. Further, applicant maintains that its goods and the goods in the cited registration would be purchased by highly discriminating purchasers. Applicant submitted the declarations of four cardiologists, each of whom states that medical instruments intended for use in the field of orthopedic surgery are not marketed to or used by him/her in the practice of cardiology.

The Examining Attorney, in urging affirmance of the refusal to register, argues that applicant's goods and the goods in the cited registration are related because they are all surgical devices. Further, the Examining Attorney argues that the identification of goods in the cited registration (instruments for orthopedic surgery) is broadly worded and may encompass stents for use in orthopedic surgery; and that stents for use in cardiology and stents for use in orthopedic surgery are related goods. The Examining Attorney submitted copies of four use-based third-party registrations of marks which cover stents and/or catheters generally, with no limitations as to types or field of use.

It is well settled that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the actual producers of the respective goods or services. See *In re Melville*

Corp., 18 USPQ2d 1386 (TTAB 1991); and In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Further, it has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, we recognize that applicant's goods are for use in the field of cardiology, whereas registrant's goods are for orthopedic surgery. However, because the identification of goods in the cited registration is not limited as to the types of instruments for orthopedic surgery, we must construe the goods broadly to include all types of instruments for orthopedic surgery, including

stents and stent delivery systems comprised of catheters for orthopedic surgery.³ See Octocom Systems, Inc. and Canadian Imperial Bank of Commerce, *supra*. As indicated, the Examining Attorney has made of record four use-based third-party registrations for marks which, in each instance, are registered for stents and/or catheters, without limitation as to field of use. Although such registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that stents for various types of surgery may emanate from a single source. See e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6.

With regard to applicant's argument that its goods and registrant's goods would be marketed to and purchased by

³ For the first time, at the oral hearing, applicant's counsel argued that stents are not defined as "instruments" by the FDA, and thus registrant's "instruments for orthopedic surgery" could not encompass stents. Of course, applicant did not make of record a copy of the pertinent FDA definitions during prosecution of the application. Even if applicant had made of record a copy of the FDA definitions, we would not be inclined to construe "instruments" in the manner urged by applicant because we cannot say that purchasers of the involved goods would be familiar with such definitions. Moreover, merely because the FDA might have a specific meaning for the term instrument, it does not establish that the term has the same meaning when used in an identification of goods in a trademark registration.

sophisticated purchasers, while it may well be the case that surgeons are discriminating in their selection of surgical devices/instruments, neither applicant's identification of goods nor the identification of goods in the cited registration is restricted to particular classes of purchasers. Thus, the Board must consider that the parties' respective goods could be offered to all normal purchasers of the goods. This would include medical wholesale companies and hospitals and clinics. See *Canadian Imperial Bank v. Wells Fargo Bank*, supra; *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981). There is no evidence of record to establish that, unlike cardiologists, the purchasing agents for these companies would not have both applicant's and registrant's goods marketed to them. Moreover, even assuming that purchasers of applicant's and registrant's goods are sophisticated, when the identical mark is used on related goods, the relevant purchasers are likely to be confused as to the source of the goods, despite the care taken in making purchasing decisions. Some purchasers may believe that registrant has expanded its product line and is now offering stents and stent delivery systems comprised of catheters for use in the field of cardiology. Not all prospective purchasers have

to be subject to confusion to support the finding of likelihood of confusion.

An additional duPont factor, which is relevant in this case, is that the registered mark RAPTOR must be considered a strong mark, since it is an arbitrary term for instruments for orthopedic surgery. We note, in this regard, that applicant proffered no evidence of either third-party use or registrations for such marks in the medical/surgical fields.

For the foregoing reasons, we find that applicant's stents and stent delivery systems comprised of catheters used to deliver stents to the site of the lesion for use in the field of cardiology and registrant's instruments for orthopedic surgery are sufficiently related that confusion as to source would be likely to occur when sold under the identical arbitrary mark.

Decision: The refusal of registration under Trademark Act Section 2(d) is affirmed.