

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
September 8, 2009  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ImClone Systems Incorporated

Serial No. 76659576

Robert E. Lee, Jr., of Eli Lilly and Company for ImClone  
Systems Incorporated.

Fred Carl, III, Trademark Examining Attorney, Law Office 108  
(Andrew Lawrence, Managing Attorney).

Before Bucher, Holtzman and Taylor, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

ImClone Systems Incorporated seeks registration on the  
Principal Register of the mark **STRENGTH IN DATA** (*in standard  
character format*) for goods recited in the application as:

"printed matter, namely, advertising and  
promotional information materials in the  
nature of newsletters, pamphlets and  
brochures in the field of health care and  
pharmaceuticals" in International Class 16.<sup>1</sup>

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<sup>1</sup> Application Serial No. 76659576 was filed on May 1, 2006 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. In addition to the above-listed goods in Class 16, the initial application included goods in Class 5 and services in Class 42. All the items in Classes 5 and 42 were dropped from the application when applicant filed a Statement of Use on July 6, 2007, submitting a single specimen for the goods listed in International Class 16.

The Trademark Examining Attorney refuses registration of the proposed trademark on the Principal Register, pursuant to Sections 1, 2 and 45 of the Trademark Act.

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board.

We affirm the refusal to register.

Applicant submitted a specimen with its Statement of Use on July 6, 2007. The Trademark Examining Attorney refused the specimen as unacceptable, finding it to be an advertisement for one of applicant's branded pharmaceutical products, ERBITUX. Applicant filed additional substitute specimens on January 18, 2008 and again on August 21, 2008. It is the position of the Trademark Examining Attorney that none of these specimens is acceptable. He concluded that the specimens do not show the applied-for-trademark used in connection with the goods identified in the application (e.g., newsletters, pamphlets and brochures). 15 U.S.C. §§ 1051 - 1052, 1127; 37 C.F.R. §§ 2.34(a)(1)(iv) and 2.56.

By contrast, applicant argues that these are informational brochures identified prominently by the applied-for mark and containing useful medical information for office-based medical oncology specialists and their

patients concerning the best options in treatment of head and neck cancer.

**Preliminary matters**

In its November 13, 2008 petition for remand to the Trademark Examining Attorney, applicant pointed out that each of the three times it submitted specimens, only a few pages of each specimen had been properly scanned into the electronic records of the U. S. Patent and Trademark Office. The Office's electronic records show a six-page specimen on July 6, 2007 [since-assigned<sup>2</sup> BATES Nos. 000069-000074]. According to applicant, the actual alleged submission, supported by later declarations, included these same six pages [Nos. 000009-000014] plus a package insert of an additional six pages [Nos. 000015-000020].

Similarly, the Office records show a two-page specimen on January 17, 2008 [Nos. 000075 & 000076]. According to applicant, the actual alleged submission, supported by later declarations, included these same two pages [Nos. 000033 and 000027] plus another six pages of this eight page brochure [Nos. 000027-000034].

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<sup>2</sup> All of these page numbers were assigned for the first time with the exhibits submitted on November 13, 2008, but will serve as our identifiers herein.

Finally, the Office records show a three-page specimen on August 21, 2008 [Nos. 000085-000087]. According to applicant, the actual alleged submission, supported by later declarations, included these same three pages [Nos. 000049, 000057 and 000060] plus another nine pages of this twelve page brochure [Nos. 000049-000060], plus a package insert of an additional six pages [Nos. 000061-000066, identical to Nos. 000015-000020].

We presume that the Trademark Examining Attorney had before him this complete submission on December 16, 2008, at the time he considered but then denied applicant's request for reconsideration. Hence, we also consider the more complete versions of these specimens as having been properly made of record.

Brochures of the general construction of those at issue herein are acceptable specimens to show use of a trademark in International Class 16. Additionally, under trademark law, it is not material to our determination herein that these goods, clearly distributed in commerce, are not themselves sold. Rather, our decision turns on the content and presentation of the brochures.

***Content: the focus of the informational brochures:***

Applicant is clearly involved in a marketing campaign to promote its oncology pharmaceuticals to cancer

specialists. Applicant's approach to this marketing challenge is essentially to make "data" the focal point of the entire campaign. These various informational brochures each present evidence of significant improvement in overall survival rates, leading to an "extended" life for its patients. In addition, a Kaplan-Meier (K-M) curve with double lines drifting downward over time represents how many patients were still alive as the study continued. The tagline for this campaign is "Strength in Data."

The Examining Attorney contends that all of these specimens are "merely advertising for applicant's pharmaceutical products." By contrast, applicant argues that they are printed brochures containing useful medical information about possible treatments that have nothing to do with applicant's pharmaceutical product, ERBITUX:

Head and neck cancer is a composite term that encompasses tumors arising in multiple primary sites, including the oropharynx hypopharynx, and several locations in the larynx. Given the anatomic complexity of the primary sites that may be involved and the numerous factors that shape treatment decisions for the patients, the management of carcinomas of the head and neck poses a difficult clinical challenge.

Each primary site requires specific staging procedures and local (surgical and radiotherapeutic) management approaches. In general, multimodality treatment is the cornerstone of therapy for early and locally advanced disease, often requiring the coordination of complicated treatment regimens. In addition, the combined effect of tumor and treatment on basic functions (i.e., swallowing, breathing) and personal characteristics (i.e., appearance and voice) requires the involvement of a multidisciplinary team in order to provide optimal care.

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<sup>3</sup> No. 000030.

Applicant argues that the specimens explain how head and neck cancer can be treated, identifying indicia to ascertain the appropriate treatment such as surgery, radiation and/or chemotherapy. Applicant repeatedly points out that the possible treatments identified include ones that have nothing to do with applicant's branded oncology therapies:

### Locally or Regionally Advanced Disease

#### **Initial resectability and operability are based on:**

- Objective (or anatomic) factors, such as regional or nodal involvement and the probability of full tumor removal
- Nonobjective factors, such as the surgeon's experience or a patient's circumstances

#### **For patients who undergo surgery:**

- Patients with adverse features, mainly positive margins and extra-nodal involvement, benefited from the addition of cisplatin to postoperative radiotherapy
- Patients without adverse features do not benefit from additional therapy

**Definitive radiation-based therapy** is recommended for inoperable patients or those with postsurgical adverse features:

- Use of neoadjuvant/induction chemotherapy may substantially reduce local and distant disease burden before definitive treatment
- Platinum therapy may be administered concurrently with radiation therapy (RT), a strategy that has shown efficacy in clinical trials, but also has been shown to increase toxicity and morbidity'

**The decision regarding the type of RT regimen (alone or with chemotherapy)** depends on tolerability and rehabilitation concerns:

- General performance status and co-morbidities such as cardiovascular risk and respiratory conditions
- Lifestyle issues, such as alcohol consumption, smoking habits, presence of caregiver support
- Evaluation of patient's willingness to accept aggressive treatment, and of potential problems in treatment delivery and compliance issues

### Metastatic Disease

**Recurrent/metastatic disease** is managed with systematic therapy (radiotherapy is a possibility for cases of focal recurrence).

- Front-line therapy is usually platinum based

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<sup>4</sup> *Id.*

Applicant goes on to point out the published references range from peer-reviewed articles in medical journals to practice guidelines, and on varying treatments available in the field of head and neck cancer. Applicant argues that the materials are by no means limited to applicant's products, and they do convey objective scientific data of value to medical practitioners.<sup>5</sup>

As to their contents, it is incontrovertible that applicant's specimens of record do contain scientific information such as that excerpted above. Furthermore, if applicant's publications were strictly a summary of all the latest medical information on the treatment of head and neck cancer, they would, without doubt, have a functionality as a publication. Even if it were primarily a medical treatise having separate sidebar advertisements for **ERBITUX** brand medications, the name of the publication would likely be considered a publication mark. In such a case, it would be acceptable to consider these as separable goods in trade despite the fact that applicant always intended for the informational publication to serve as a promotional device for applicant's pharmaceutical product. Like any other

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<sup>5</sup> No. 000029.

collateral products (e.g., calendars,<sup>6</sup> pens<sup>7</sup> or T-shirts<sup>8</sup>), these would be considered goods in trade that are transported in commerce and possess a utilitarian purpose.

However, upon reviewing the overall contents of these brochures, we are compelled to agree with the Trademark Examining Attorney that the primary focus of these publications is to promote applicant's pharmaceutical product. Whether **ERBITUX** brand medications are touted for their efficacy as a single agent, or in combination with other therapies such as radiation therapy, the entire thrust of the brochures is promoting the value of **ERBITUX** brand medications. Rather than conveying a neutral presentation of scientific data, they have the look and feel of any other persuasion piece marketing the benefits of a single branded product.<sup>9</sup> Accordingly, in spite of the

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<sup>6</sup> In re *United Merchants & Manufacturers, Inc.*, 154 USPQ 625 (TTAB 1967) [although used as an advertising device to promote applicant's plastic film, applicant's calendar possesses a utilitarian function and has been regularly distributed in commerce for years therefore constitutes goods in trade].

<sup>7</sup> In re *Snap-On Tools Corp.*, 159 USPQ 254 (TTAB 1968) [promotional ball point pens which possess utilitarian function and have been transported in commerce under mark, constitute goods in trade].

<sup>8</sup> In re *Olin Corporation*, 181 USPQ 182 (TTAB 1973) [Olin's corporate logo (a stylized letter "O") applied to T-shirts will be perceived as a secondary source of origin, clearly sponsored or authorized by the Olin brand ski manufacturer].

<sup>9</sup> In re *Douglas Aircraft Company, Inc.*, 123 USPQ 271 (TTAB 1959) [materials used only to advertise, explain and publicize the goods in which applicant deals will not constitute "goods"]



admitted value of some scientific data for medical practitioners, these are primarily advertisements. As promotional materials being distributed incidentally to the pharmaceutical product, they possess little utilitarian function other than promoting applicant's goods.

***Presentation: perceptions of cancer specialists***

As seen in our discussion of the content of these brochures, having a utilitarian function is necessary for these publications to be considered goods in trade separable from an advertising campaign for applicant's primary goods. While this proper content is *necessary*, absent a proper presentation, that is not *sufficient* to find the alleged source indicating matter to be a registrable trademark. That is, in the event that the promotional aspect appeared secondary to providing objective scientific data for medical practitioners, permitting the subdivision of these "goods" apart from pharmaceuticals, it would also still matter how the alleged mark is presented.

The specimens of ① July 6, 2007, ② January 17, 2008 and ③ August 21, 2008 show the following presentations:

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themselves within the meaning contemplated by the Statute]; and *In re Radio Corp. of Am.*, 205 F.2d 180, 98 USPQ 157 (CCPA 1953) [the slogan was used by appellant in the advertising or sale of its goods].



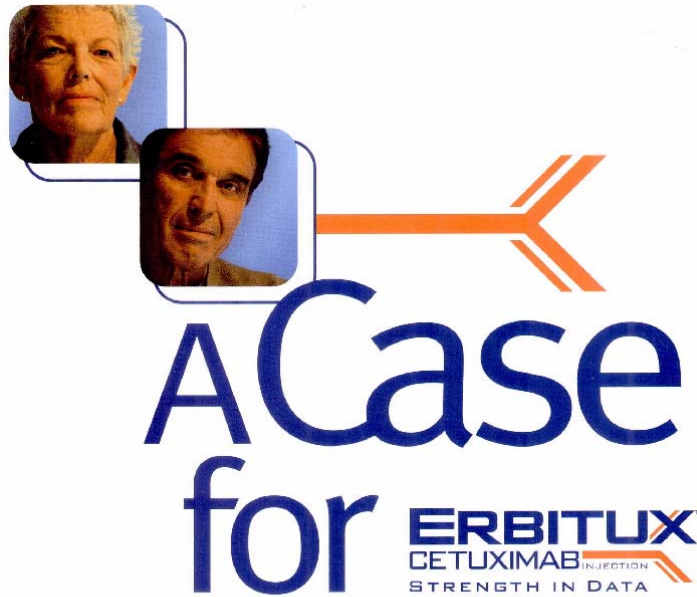
1



*Weigh the Evidence That Supports*



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3 **Appropriate Candidates for Therapy**

As noted years ago by the Court of Customs and Patent Appeals, "[t]he important question is not how readily the mark will be noticed, but whether, when it is noticed, it will be understood as indicating origin of the goods. *In re Singer Mfg.*, 255 F.2d 939, 118 USPQ 310, 312 (CCPA 1958).

Prospective consumers, including oncologists, will be accustomed to deciphering readily the name of a publication. For example, in the event this were indeed a publication providing scientific information, and if the term "**STRENGTH IN DATA**" were emblazoned across a masthead, this case would likely not be in front of the Board. The essential question facing the Trademark Examining Attorney was whether this designation, as used, would be recognized/perceived in and of itself, by the cancer specialists, as an indication of origin for these brochures/informational newsletters. See *Textron Inc. v. Cardinal Engineering Corp.*, 164 USPQ 397, 399 (TTAB 1969).

Analogizing to the use of ornamental trademarks emblazoned across the front of T-shirts, whether something serves as an indication of origin in that context may well turn on something as prosaic as "the size, location, dominance, and significance of the alleged mark." See *In re Astro-Gods Inc.*, 223 USPQ 621, 623 (TTAB 1984) [The Board held that "... the size, location, dominance, and significance of the alleged mark as applied to the goods are all factors which figure prominently in the determination of whether it also serves as an indication of origin"].

As to the criterion focusing on the "significance" of the term, the applied-for mark is a different designation

than the name applicant adopted and uses in connection with its primary pharmaceutical product. The term "Strength In Data" has a definite, if nuanced, reference to the scientific information or data in the brochure. Hence, the nature and significance of the applied-for matter is clearly such that it could well serve as a mark for International Class 16 publications if it were being used in a more traditional, dominant location and presented with banner-headline-sized lettering.

However, as to the criteria of "size, location and dominance" of the term as used on the brochures, we find that it is simply not sufficiently prominent that consumers would recognize it as a trademark for the brochure. *Contra In re Dell Inc.*, 71 USPQ2d 1725 (TTAB 2004). In fact, it is so incorporated with the "ERBITUX CENTUXIMAB INJECTION" wording and design that it could likely be considered part of a single composite mark for pharmaceuticals. Putting ourselves in the position of these brochures' targeted oncologists, we find that visually these brochures uniformly present a nearly imperceptible usage of this tagline, and are clearly not a readily perceived source-indicator for these promotional brochures touting **ERBITUX** medications.

*Decision:* We hereby affirm the refusal to register under Sections 1, 2 and 45 of the Lanham Act.