

Hearing:
June 8, 2010

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

Mailed:
August 10, 2010
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Takano Co., Ltd.

Serial No. 77412149

James M. Slattery of Birch Stewart Kolasch & Birch LLP for
Takano Co., Ltd.

Evelyn Bradley, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Hairston, Bucher and Cataldo, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Takano Co., Ltd. seeks registration on the Principal
Register of the mark **HeartWorks** (*in standard character
format*) for goods identified in the application, as amended,
as follows:

"apparatus for measuring weight, namely,
scales" in International Class 9;

"apparatus for measuring blood pressure, body
fat, weight and pulse, namely, body and
health monitoring machine for standard
measurements, namely, weight, body mass
index, body fat content, heart rate and blood
pressure, to be operated by an individual in
public indoor locations; mattress, cushions
and supporting devices for medical purposes"
in International Class 10;

"wheelchairs; convertible wheel chairs" in International Class 12; and

"furniture; seats being furniture; chairs; beds; tables; mattresses; cushions" in International Class 20.¹

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has taken the position that applicant's mark, when used in connection with the following subset of enumerated goods in International Classes 10 and 12:

"apparatus for measuring blood pressure, body fat, weight and pulse, namely, body and health monitoring machine for standard measurements, namely, weight, body mass index, body fat content, heart rate and blood pressure, to be operated by an individual in public indoor locations," and "wheelchairs; convertible wheel chairs,"

so resembles the mark, **HEARTWORKS** registered for "medical equipment, namely, diagnostic workstations in the field of cardiology diagnostics, comprised of computer hardware and monitors, associated graphical user interface, and instruction manual sold in conjunction therewith" in

¹ Application Serial No. 77412149 was filed on March 4, 2008 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

International Class 10,² as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and applicant have fully briefed the issues involved in this appeal and appeared at an oral hearing held before this panel of the Board. We reverse the refusal to register.

The Trademark Examining Attorney argues that these respective goods "could travel in the same channels of trade" and "could potentially be sold to the same class of customers." Trademark Examining Attorney's brief at unnumbered 6 and 7.

By contrast, in support of registrability, applicant contends that equipment such as registrant's in the field of diagnostic cardiology are operated by doctors and/or hospital specialists who are, by definition, dealing with patients having cardiac problems. By contrast, applicant's machines are located in health promotion facilities, such as sports gyms, where healthy persons want to use the measurement machine to enhance and maintain their health. The difference in the function and nature of these respective machines dictates that there will be different demographics between the ultimate users of each system,

² Registration No. 3286859 issued to Cardiac Science Corporation on August 28, 2007.

distinct trade channels, and that the target audiences of potential purchasers are totally different.

Likelihood of Confusion

We turn then to a consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on this issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the *du Pont* factor focusing on the similarities or dissimilarities in the appearance, sound, connotation and commercial impression of the respective marks. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The two marks are identical as to sound, connotation and commercial impression, differing only to the extent that applicant's standard character drawing shows a mixture of upper- and lower-case letters (e.g., **HeartWorks**) while registrant's is all upper-case letters (e.g., **HEARTWORKS**). This slight difference in appearance is inconsequential, and hence, this *du Pont* factor favors the position of likelihood of confusion taken by the Trademark Examining Attorney.

We turn then to the *du Pont* factor focused on the relationship of the goods. The evidence and arguments of the Trademark Examining Attorney as to the relationship of the goods is conflated with a discussion of trade channels and classes of purchasers. For example, the Trademark Examining Attorney argues that the goods are related because applicant's and registrant's goods could potentially be sold through the same trade channels to the same classes of customers. She supports this contention by pointing to companies that allegedly sell health monitoring equipment for use in public places as well as in doctors' offices and hospital settings, and that goods such as diagnostic workstations for cardiovascular purposes and wheel chairs travel through the same channels of trade.

In turn, much of applicant's brief and substantially all of applicant's counsel's time at oral argument was

devoted to the argument that these goods are dissimilar, that the channels of trade have minimal overlap, at worst, and that the Trademark Examining Attorney has failed to make a *prima facie* case that these goods are related.

In this context, we examine the evidence that the Trademark Examining Attorney points to in her brief supporting a relationship of the goods along with her discussion of that evidence, followed by applicant's arguments about the weakness of the evidence in supporting the conclusions the Trademark Examining Attorney has drawn from the respective websites.

The Trademark Examining Attorney argues from registrant's website that



in addition to diagnostic workstations, the registrant also sells products such as blood pressure monitoring equipment, defibrillators, and pulse oximeters.³ She argues that while many of these items will be used in hospitals, medical facilities and doctor's offices, we must presume they will also be available in public settings such as sports gyms.

Applicant counters that the Trademark Examining Attorney's screen-prints emphasize that registrant is "a global leader in the development, manufacture, and marketing of diagnostic and therapeutic, cardiology products and


³ <http://www.cardiacscience.com/cardiology-products/>

services." Registrant's listed goods comprise a sophisticated computer workstation. The related monitoring and emergency equipment (not included in the registration) would presumably also be used for the diagnosis and treatment of heart disease. Furthermore, the Trademark Examining Attorney did not show that registrant even sells blood pressure monitoring equipment to the general public such as government agencies, sports gyms, schools, pharmacies, retail grocery markets, etc. Certainly there is no evidence in the file to demonstrate that registrant has used its **HEARTWORKS** mark for those other goods.

We agree with applicant that the record supports the conclusion that registrant's **HEARTWORKS** products identified herein are sold only to entities in the business of diagnostic cardiology (e.g., doctors, hospitals and other medical facilities). Furthermore, inasmuch as priority of use is not an issue in *ex parte* cases, "the concept of expansion of trade raised by the Trademark Examining Attorney is generally addressed in the context of the issue of priority in an *inter partes* proceeding" [*In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581 (TTAB 2007)]. Rather, in the *ex parte* context, we apply the traditional analysis of the relatedness of the involved goods, and

hence, have not considered the Trademark Examining Attorney's arguments as to "normal fields of expansion."

The Trademark Examining Attorney has placed into the record third-party web pages to demonstrate the relationship of monitoring machines designed for public places to more sophisticated equipment designed for diagnostic cardiology:

 CBS Outernet Partners With Lifeclinic International to Bring Interactive Health Programming and Advertising to Pharmacy Locations Nationwide Posted on: Wednesday, 27 February 2008, 15:00 CST
NEW YORK, Feb. 27 /PRNewswire-FirstCall/ -- CBS Outernet, a leading provider of customized digital media networks to retail locations; and Lifeclinic International, Inc., the world's leading supplier of freestanding, automated vital signs monitoring equipment, today announced a definitive partnership to bring interactive health programming and advertising to pharmacy locations nationwide. The partnership will dramatically expand both companies' host of offerings to the retail pharmacy marketplace. Working together with CBS Outernet, Lifeclinic is introducing digitally connected "health stations" to selected pharmacies nationwide, providing customers with a wide range of routine tests (such as <u>blood pressure, cholesterol, pulse and weight measurements</u>), centralized Web-enabled storage of test results, educational content and online disease management programs... ⁴

As noted by applicant, LifeClinic's health monitoring stations provide routine tests in retail pharmacy locations, but there is no mention of cardiology diagnostics equipment. Similarly, StayHealthy is another manufacturer of machines similar to those of applicant and of LifeClinic, but was not shown to manufacture or sell equipment for diagnostic cardiology.⁵

⁴ http://www.redorbit.com/news/health/1272468/cbs_outernet_partners_with_lifeclinic_international_to_bring_interactive_health/index.html and <http://www.lifeclinic.com/products.aspx>.

⁵ http://www.stayhealthy.com/en_us/main/healthcenter_kiosk.

Conversely, various manufacturers of very sophisticated diagnostic cardiology equipment designed for use in a doctor's office or hospital are not making health apparatus for access in public places:



Patient Monitoring

We manufacture and market a broad line of physiological monitors designed to provide for patient safety and management of patient care. Our monitors are capable of continuous and simultaneous measurement of many different vital signs. Our monitors are used in operating rooms, emergency rooms, critical care units, post-anesthesia care units and recovery rooms, intensive care units, labor and delivery rooms and magnetic resonance imaging, or MRI units.

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Again, as noted by applicant, there is no mention that Datascope's monitors would be available in a public place.



Who We Are

Charter Kontron is an innovative provider of a comprehensive range of medical devices and solutions such as patient monitoring, clinical information and cardiology related systems, including haemodynamic, electrophysiology and telemetry systems. We offer wide-ranging sales, service and after-sales support for professional health care organizations and hospitals in the UK and worldwide. With a broad product range and unsurpassed service, Charter Kontron is positioned as a leading international player, offering cutting-edge, comprehensive solutions for clients tailored to meet their specific needs.

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⁶ <http://www.hospital-technology.com/contractors/Datascope/datascope.html>

⁷ <http://www.hospital-technology.com/contractors/Charter/Charter1.html>

The sophisticated medical devices sold by Charter Kontron, a UK company, are quite different from applicant's machines designed to measure public health in public places.



GE Medical Systems Information Technology is a global leader in providing solutions for the reliable and efficient acquisition, analysis and management of patient data in healthcare facilities around the world. The company's offering includes cardiology, patient monitoring, image management, clinical information systems and consultative services...

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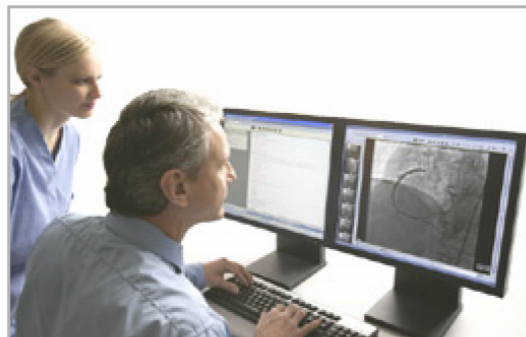
GE Healthcare

Centricity Cardiology CA1000

Enterprise-Wide, Multi-Modality Diagnostic Workstation

Overview

Centricity® Cardiology CA1000 is GE's next generation PC-based cardiology image review and analysis workstation, which brings enterprise scalability and workflow enhancing integration to cardiovascular imaging. Centricity Cardiology CA1000 is a primary diagnostic image review and analysis workstation, with many advanced image display and analysis tools. In addition, Centricity Cardiology CA1000 includes support for seamless integration with GE's Cardiovascular Information Systems (CVIS) to improve departmental workflow and reporting efficiency. Centricity Cardiology CA1000 can also be used for clinical or secondary review throughout the healthcare facility, including review of multi-modality images generated in other departments such as Radiology or an Outpatient Imaging/Screening Center.



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GE Healthcare is a UK-based unit of General Electric's worldwide family of technology companies. GE Healthcare's

⁸ <http://www.hospital-technology.com/contractors/GE/GEmedical.html>

⁹ <http://www.lychron.com/downloads/CA1000%20Brochure.pdf>

high-tech diagnostic cardiology equipment is used by doctors and hospitals. As noted by applicant, there is no mention of anything similar to the applicant's monitoring machines, and these sophisticated, computerized workstations would not be placed, for example, in the local pharmacy or sports gym.



As noted by applicant, this GE Advantage workstation helps combine data from a variety of disciplines drawn from virtually any care area. These computerized workstations do not include systems similar to the applicant's apparatus for healthy persons, designed for use in public locations.



GE also touts the LOGIQ E9 as the ultrasound platform of the future. This state-of-the-art diagnostic equipment has little in common with applicant's measuring machines for normal body metrics.¹¹

¹⁰ <https://www2.gehealthcare.com/portal/site/usen/ProductLineDetail?vgnextoid=6d100eb653530210VgnVCM10000024dd1403RDRD>

¹¹ <http://www.gehealthcare.com/usen/ultrasound/>

GE also sells quite sophisticated maternal-fetal monitors to hospitals and medical clinicians for the late stages of pregnancy, labor and delivery. This is a far



cry from applicant's monitoring machines in public places.

ACUSON KinetDx[®] Solutions WS3000[™] Diagnostic Workstation for cardiology

The WS3000[™] diagnostic workstation is your point of knowledge - having the total exam at your fingertips. This visionary approach to enhanced patient care was designed with an intuitive user interface that anticipates the way you like to work - no more fast forwarding, clicking through endless thumbnails or being restricted to a set number of display windows. This pioneering foundation, based on superior diagnostic reviewing technologies and exceptional reporting capabilities, allows you to quickly review an entire study at once, while critical information, such as patient demographics and measurements, from qualified ultrasound systems, auto populate the worksheets and reports - delivering a simplified and accelerated approach to synchronized patient care and optimized workflow.

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As seen in this brochure, Siemens Medical Solutions, USA offers a computerized workstation able to display ultrasound, secondary capture, computed tomography, magnetic resonance, and x-ray angiographic images from a variety of sources and media. This sophisticated equipment is for medical specialists involved in diagnostic cardiology.

Finally, the Trademark Examining Attorney points out in her brief that Siemens Medical also lists in its web pages as an accessory to its cardiac diagnostic equipment, a

¹² http://www.medical.siemens.com/siemens/sv_SE/gg_us_FBAs/files/brochures/Acuson/90202-SS.pdf

foldable, non-magnetic wheelchair for transporting patients into the magnetic resonance room. However, it is advertised and sold under the **MEYRA**[®] brand-name - marketed by a third-party supplier unrelated to Siemens Medical. See attachments to the Trademark Examining Attorney Office action of August 4, 2009. We also find no probative value in the fact that a price comparison shopping website (www.mySimon.com) listed registrant's diagnostic computerized workstation among 264 other "Health Aids" advertisements (with the listed products available through eBay, Amazon.com, etc.), along with items distantly related to wheelchairs, namely, a dental chair, a surgery chair, and a vertical platform wheelchair lift.

We find ourselves in agreement with applicant that these reviews of the marketplace undertaken by the Trademark Examining Attorney (and many more websites and studies she placed into the record that we have not mentioned herein) fail to show that there would be a likelihood of confusion as to the source of the respective goods herein. The evidence fails to show that companies that make sophisticated medical devices for hospitals or doctors' offices also make health monitoring machines for use in public places such as pharmacies, sports gyms and health clubs. Not only do we find on this record a failure to

demonstrate a close relationship between these respective goods, but we find that the respective goods will move through distinct channels of trade to substantially different classes of purchasers.

As to the many third-party registrations placed into the record by the Trademark Examining Attorney with the first Office action, we were able to find nothing probative on the question of the relationship of these goods among those interminably long listings of medical products in International Classes 9 and 10. Presumably, at the time she prepared her brief, the Trademark Examining Attorney did not find them especially compelling either inasmuch as there was no mention of them anywhere in her appeal brief.

As to the cost of the respective types of goods of registrant (diagnostic equipment for cardiology patients) and of applicant (monitoring machines or kiosks for public facilities) - the goods on which the majority of the Trademark Examining Attorney's Internet evidence and briefing were focused - both of these sets of goods are relatively expensive, and would be bought with care, either by medical practitioners or those who manage sports gyms, health clubs, schools, government agencies, pharmacies, grocery stores, or other public places. All of the persons charged with decision making at these various enterprises would be fairly

sophisticated purchasers. Accordingly, these two related *du Pont* factors also support applicant's position herein that there is not a likelihood of confusion.

In conclusion, while the marks are substantially identical, this is outweighed by the fact that there is no apparent relationship between the respective goods, there are distinct channels of trade, the salient goods are expensive and will be marketed to distinct groups of fairly sophisticated persons.

Decision: The refusal to register under Section 2(d) of the Lanham Act is hereby reversed, and this application will be published in all four classes of goods.