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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Alvogen IP Co. S.a.r.l.

Serial No. 77939659

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Lerner David Littenberg Krumholz & Mentlik, LLP for Alvogen
IP Co. S.a.r.l.

April Roach, Examining Attorney, Law Office 115 (John
Lincoski, Managing Attorney).

Before Rogers, Chief Administrative Trademark Judge, and
Zervas and Lykos, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On February 19, 2010, Alvogen IP Co. S.a.r.l.
("applicant") filed an application pursuant to Section 1(b)
of the Trademark Act, 15 U.S.C. § 1051(b), for registration
on the Principal Register of the following mark,



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for International Class 5 goods identified as,

pharmaceutical preparations, namely, antibiotics, antidiabetics, antihypertensives, antidepressants, analgesics, anti-inflammatories, antivirals, and antiepileptics; transdermal patches for use in the treatment of infections, diabetes, hypertension, depression, pain, inflammation, and epilepsy; and contraceptive sponges,

and International Class 42 services identified as

"pharmaceutical research services." Applicant entered the following description of the mark into the record: "The mark consists of a stylized A in a triangular-like shape."

The examining attorney finally refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of Registration No. 3127143 for the following mark,



for International Class 5 goods identified as,

pharmaceutical preparations, namely, medicines for the treatment of obesity, tobacco withdrawal, and for prevention of cardiovascular diseases; dietetic foods adapted for medical use; beverages for medical use, namely, nutritionally fortified beverages and vitamin fortified beverages;

medicinal infusions in the nature of medicinal herbs.¹

Applicant appealed the final refusal of its application. Both applicant and the examining attorney filed briefs. The refusal to register is affirmed.

Evidentiary Issues

Applicant has included an image of a mobius triangle in its brief, which was not made of record prior to the filing of the appeal. The examining attorney's objection to the image is well taken - the record should be complete prior to the filing of an appeal. Trademark Rule 2.142(d). We have not considered the image of the mobius triangle in applicant's brief or the discussion regarding the image.

In addition, even though the examining attorney objected to the inclusion of the image of the mobius triangle in applicant's brief, applicant included pages from www.new.myfonts.com with its reply brief. As these

¹ The registration includes the following description of the mark, "the mark comprises a mobius triangle shape"; the following color claim, "the color(s) yellow, orange and red is/are claimed as a feature of the mark"; and the following color location statement, "different shades of the color yellow appear mostly in the upper portion of the triangle design, different shades of the color orange appear mostly on the left portion of the triangle design, and different shades of the color red appear mostly on the right portion of the triangle design."

Applicant states that the cited registration is a three-dimensional mark. The Office, however, does not consider the cited mark to be in three dimensions. See TMEP § 807.10 (8th ed. 2011).

pages too were not of record prior to the filing of applicant's appeal, their submission is untimely and they have not been given any further consideration. *Id.* The "excerpts" from these webpages duplicated in the reply brief also have not been given any further consideration.

Likelihood of Confusion

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. 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). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to applicant's and registrant's goods, we find applicant's goods to be identical-in-part to registrant's goods. Specifically, registrant's identification of goods includes pharmaceutical preparations, namely, medicines for the prevention of

cardiovascular diseases; and applicant's identification of goods includes pharmaceutical preparations, namely, antihypertensives and anti-inflammatories.

As for the remaining goods and services, the evidence submitted by the examining attorney establishes that (i) registrant's and applicant's goods, and (ii) registrant's goods and applicant's services, are commercially related to one another. The examining attorney submitted numerous third-party registrations which support her contention that, on the one hand, the involved goods, and, on the other hand, the registrant's goods and applicant's services, are of a kind that may emanate from a single source under a single mark. Third-party registrations which individually cover a number of different items and which are based on use in commerce are not evidence of commercial use of the marks shown therein, or that the public is familiar with them, but have some probative value to the extent they suggest that the listed goods emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). In addition, the examining attorney submitted printouts from the websites of five pharmaceutical manufacturers (for example, Pfizer, Lilly) that offer (i) one or more of

applicant's and registrant's goods, and (ii) one or more of registrant's goods and research services. The probative value of the examining attorney's Internet evidence is reduced, however, because the common marks for the goods, and the goods and research services, are house marks. See *In re HerbalScience Group LLC*, 96 USPQ2d 1321, 1324 n.3 (TTAB 2010).

It has not escaped our attention that applicant has not contested the examining attorney's assertion that the International Class 5 goods of the application are related to the goods of the cited registration, and in fact did not even address the issue of the similarity of the goods in its main brief. In its reply, applicant stated, "[t]o be clear, Applicant does not assert that confusion is unlikely due to the marks being directed to different goods or consumers, but rather, because the overall connotations and commercial impression of the applied-for mark and the [mark in the] cited registration are truly distinct." Reply at 7. With regard to the similarity of registrant's goods and applicant's services, applicant has not discussed the issue in its briefs, effectively conceding the issue.

Thus, based on the record before us, and applicant's concession of the issue, we conclude that applicant's goods and services are closely related in a commercial sense to

the cited registrant's goods. We therefore find the *du Pont* factor regarding the similarity of the goods, and the goods and services, to weigh in favor of a finding of likelihood of confusion.

Next, we consider the trade channels and classes of consumers, and begin with those trade channels and classes of consumers for applicant's and registrant's respective goods. Because the goods are in part identical, and because the identifications of goods lack any restrictions as to channels of trade and classes of consumers, we must presume that the channels of trade and classes of purchasers for the goods overlap with one another. *Hewlett Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) ("[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.").

There is no information in the record regarding the trade channels and classes of purchasers for registrant's goods and applicant's services. The *du Pont* factor

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regarding trade channels and classes of purchasers for registrant's goods and applicant's services is therefore neutral.

We now turn to the *du Pont* factor regarding the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005), quoting *du Pont*, 177 USPQ at 567). In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041 (TTAB 1988). In addition, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). Further, because the goods are in part identical, the

degree of similarity necessary to find a likelihood of confusion for the goods need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216 (TTAB 2008).

Applicant states that "the question on appeal is not merely how the marks appear, but how they will be *perceived* and *recalled* in the mind of the average consumer; namely, one as [a] letter, and the other as a shape." Brief at 3 (emphasis in original). According to applicant, consumers will perceive its mark as the letter "A" because of "the gap in its right side, [and] the thickening and thinning of the line which evokes the stroke of a writing implement." Brief at 4-5. Registrant's mark, however, "[d]ue to its closed circumference, inclined orientation, three-dimensional shading, and multiple colors ... will overwhelmingly be perceived as a design rather than a letter." Brief at 5.

Applicant's mark is so highly stylized that it cannot be presumed that it would be perceived as a letter "A"; it would take some study to discern a lower-case letter "A" in applicant's mark. At best, applicant's mark is in the grey area between a pure design mark which cannot be vocalized

and a mark which would readily be identified as a letter. Cf., *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 204 USPQ 697, 699 (CCPA 1980) ("It must be remembered that [the] trademark consists of highly stylized letters and is therefore in the gray region between pure design marks which cannot be vocalized and word marks which are clearly intended to be."). Because applicant has not introduced any evidence at all into the record, we do not have the benefit of any information that would bear on how applicant promotes recognition of its mark or on consumer perceptions of the mark, and applicant's contention that its mark would be perceived as a lower case "A" is mere argument. Hence, as was the case in *In re Burndy Corp.*, 300 F.2d 938, 133 USPQ 196, 197 (CCPA 1962), we must decide this case based on the visual similarity of the marks. *Id.* ("In our view, this case must be decided primarily on the basis of visual similarity of the marks. The marks are not word marks and are not capable of being spoken. They are design marks ... although each is based on a capital letter 'B'..."). We consider applicant's mark as a pure design mark rather than simply a stylized display of a letter mark.

When we visually compare the marks, there are, of course, certain specific differences between applicant's

and registrant's marks which are clearly discernible upon a side-by-side comparison of the marks. However, purchasers do not always have the opportunity to compare marks on a side-by-side basis, and thus the test which we must apply in determining likelihood of confusion is not whether the marks are distinguishable when compared side-by-side, but rather whether they so resemble one another as to be likely to cause confusion. On balance, we find the marks to be more similar than dissimilar. This, of course is a subjective determination, and hence we need not comment on the specific similarities and differences between the marks asserted in the briefs. See *id.* at 197 ("Since this is, of necessity, a subjective opinion, no amount of discussion of the matter can add to the statement of our conclusion which is predicated on the apparent visual differences in the marks."). See also, *The American Sunbathing Ass'n, Inc. v. American Health Alliance*, 157 USPQ 586, 589 (TTAB 1968) ("Each of the parties has made a side-by-side analysis of the marks in question listing, in support of its position, features of similarity or features of dissimilarity. This method of analysis or dissection of marks is improper in trademark proceedings because the commercial impression of a mark is generally created or engendered by the mark as a whole ..."). We therefore resolve the *du Pont* factor

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regarding the similarity of the marks against applicant, in the context of the goods, and the goods and services.

We have found applicant's and registrant's goods, trade channels and classes of purchasers to be in part identical, and applicant's services and registrant's goods to be related. In addition, we have found the marks to be similar. There is no evidence of any uses of marks similar to registrant's mark, thus we consider registrant's mark to be a strong design mark. We therefore find that applicant's mark for the goods and services recited in its application is likely to cause confusion with registrant's mark for the goods recited in its registration. Our conclusion is consistent with prior decisions which state that, where the marks are used on pharmaceuticals and confusion as to source can lead to serious consequences, it is extremely important to avoid that which will cause confusion. See *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301 (TTAB 2004), citing *Glenwood Laboratories, Inc. v. American Home Products Corp.*, 455 F.2d 1384, 173 USPQ 19 (CCPA 1972); *Blansett Pharmacal Co. Inc. v. Carmrick Laboratories Inc.*, 25 USPQ2d 1473 (TTAB 1992); *Schering Corp. v. Alza Corp.*, 207 USPQ 504 (TTAB 1980); and *American Home Products Corp. v. USV Pharmaceutical Corp.*, 190 USPQ 357 (TTAB 1976).

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DECISION: The refusal to register under Section 2(d) of the Trademark Act both the International Class 5 goods and the International Class 42 services is affirmed.