

ESTTA Tracking number: **ESTTA406302**

Filing date: **04/29/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77939659
Applicant	Alvogen IP Co S.a.r.l.
Applied for Mark	A
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Submission	Appeal Brief
Attachments	1395802_1.pdf (15 pages)(110362 bytes)
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Date	04/29/2011

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In re Alvogen IP Co S.a.r.l.	:	
	:	Law Office: 115
Serial No. 77/939,659	:	
	:	Examining Attorney:
Filed: February 19, 2010	:	April K. Roach
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Mark: A Logo	:	
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Trademark Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1451
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APPLICANT'S APPEAL BRIEF

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I. DESCRIPTION OF THE RECORD AND RECITATION OF THE FACTS

Applicant Alvogen IP Co S.a.r.l seeks registration on the Principal Register of its stylized "A" mark, for pharmaceutical research services; 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. The subject application was filed on February 19, 2010, and received U.S. Trademark Application Serial No. 77/939,659.

The Examining Attorney initially refused registration of Applicant's mark under Lanham Act § 2(d), 15 U.S.C. § 1052(d) in a Non-final Office Action dated March 2, 2010, contending that there was a likelihood of confusion between Applicant's mark and U.S. Registration No. 3,127,143. Applicant responded on August 10, 2010, and identified key differences between the appearance, connotation, and commercial impression of its stylized "A" logo and the cited mark for a multi-colored, shaded "mobius triangle shape."

The Examining Attorney issued a Final Office Action on August 31, 2010, again refusing to register the mark based on a likelihood of confusion with U.S. Registration No. 3,127,143. In response to the Final Action, on February 28, 2011, Applicant filed a Notice of Appeal. Thus, Applicant hereby submits its Appeal Brief pursuant to 37 C.F.R. § 2.142(b)(1).

II. STATEMENT OF THE ISSUES

The issue on appeal is whether there would be a likelihood of confusion between Applicant's stylized "A" mark and the cited multi-colored, shaded "mobius triangle shape" mark, U.S. Registration No. 3,127,143.

III. INTRODUCTION

There are numerous key differences between the Applicant's mark and the cited registration. And while Applicant respectfully asserts that the number and significance of those differences should be enough to obviate any refusal for likelihood of confusion, this is truly a case where the whole is greater than the sum of its parts. Indeed, while the Applicant's mark is an open, two-dimensional, color-neutral, script letter "A," and the cited registration is a fully enclosed, three-dimensional, multi-colored and shaded Möbius triangle shape, the devil is not in those details alone, but in the net effect that those distinguishing features will have on the way both marks will be perceived in the mind of the consumer. In short, all of those individual distinctions add up to one overwhelming difference: while the cited registration is merely a shape, the Applicant's mark will be perceived and recalled as a letter "A." Applicant thus respectfully asserts that there will be no likelihood of confusion between its mark and the cited registration.

IV. ARGUMENT

It is well settled that a likelihood of confusion analysis requires consideration of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). For the reasons that follow, Applicant submits that the applied-for-mark and the cited registration are materially different in appearance, connotation, and commercial impression. Therefore, Applicant respectfully requests that the decision of the Examining Attorney be reversed.

A. **There Is No Likelihood Of Confusion: Applicant's Mark And The Cited Registration Are Materially Different In Appearance, Connotation, And Commercial Impression**

1. **Applicant's Mark Is A Letter; The Cited Registration Is A Geometric Shape**

The Examining Attorney correctly notes that "the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison," but rather "whether the marks create the same *overall impression*." (Office Action 2, Aug. 31, 2010 (citations omitted; emphasis added).) Thus, 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 letter, and the other as a shape.

While it goes without saying that letters can resemble shapes, and vice versa, it is likewise beyond dispute that letters and shapes are nevertheless perceived entirely differently, and thus make widely divergent overall impressions. Indeed, though differences between letters and shapes may be subtle or "minor" to the *eye* (as the Examining Attorney asserts), those same differences will literally dictate how the *mind* both perceives and recalls a given symbol. Thus, for the very same reason that a side-by-side comparison of two arbitrary arrangements of letters (*e.g.*, FDC and FDS) may unjustifiably emphasize *differences*, which nevertheless are unlikely to make a lasting impression on an average consumer, a side-by-side comparison of a letter and a

similar shape may just as unfairly emphasize *similarities* between two marks, which nevertheless are likely to be perceived and recalled *entirely differently*. Compare *Alberto-Culver Co. v. F.D.C. Wholesale Corp.*, 16 U.S.P.Q.2d 1597, 1602 (T.T.A.B. 1990), *overruled in part by Eurostar v. "Euro-Star" Reitmoden GmbH & Co. KG*, 34 U.S.P.Q.2d 1266 (T.T.A.B. 1994) (holding that confusion was likely between "FDC" and "FDS" despite differing third letter because, *inter alia*, being "unpronounceable letter combinations . . . they may be inherently difficult to remember and thus more susceptible of confusion or mistake than are word marks, particularly where, as here, the marks consist of three letters and only the last letters are different"); *In re Warner Commc'ns Inc.*, 189 U.S.P.Q. 157, 158 (T.T.A.B. 1975) (holding that confusion was not likely between cited bulls-eye design and Applicant's stylized "Q" mark which incorporated three concentric rings because the marks "create[d] individual and separate and distinct impressions").

Notably, the Examining Attorney appears to have largely ignored Applicant's extensive prior remarks regarding the reasons why its mark will be perceived as a letter "A," and instead, based her final rejection solely on "visual" similarities divorced from overall connotation and commercial impression. (Office Action 2.) As explained, that approach unfairly emphasizes similarities that are unlikely to confuse the average consumer, and Applicant respectfully submits that the Examining Attorney should have taken into account the pervading perceptual differences that exist between the Applicant's mark and the cited registration.

Approached from the proper perspective, it is highly unlikely that consumers would fail to appreciate the differences between the Applicant's letter mark and the cited design registration. Applicant's mark is a stylized script letter "A" (for "Alvogen"), and will be perceived as such for several reasons (to be discussed further below), including the gap in its right side, and the

thickening and thinning of the line which evokes the stroke of a writing implement. The cited mark, on the other hand, is described as a multi-colored, shaded "mobius triangle shape." Due to its closed circumference, inclined orientation, three-dimensional shading, and multiple colors, the cited mark will overwhelmingly be perceived as a design rather than a letter. In the mind of the average purchaser, who normally retains a general rather than specific impression of trademarks, the significant conceptual difference between Applicant's *letter* and the cited *shape* will dominate over any visual similarities that might otherwise exist. *See, e.g., Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 U.S.P.Q. 537, 540-41 (T.T.A.B. 1979) (holding that despite differences between a "tt" and "TT" logo, "it is the letters 'TT' which form the salient feature of the mark, and it is this feature which creates the commercial impression of the mark which the ordinary purchaser is likely to remember and rely upon as an indication of origin" (emphasis added)). Thus, given the markedly different overall impressions created by the Applicant's mark and the cited registration, it is highly unlikely that consumers will be confused into believing that they identify a common source.

**2. Applicant's Mark Is Two-Dimensional;
The Cited Registration Is Three-Dimensional**

Just as the mind places significance on the differences that distinguish letters from mere shapes, it also seizes on cues that indicate dimensionality. While the Applicant's mark is rendered in two dimensions, the cited registration clearly depicts a three-dimensional shape. This dimensional difference between the cited registration and the Applicant's mark dramatically changes the way both will be perceived, and will cause the marks to have very different connotations and commercial impressions in the mind of the average consumer. Again, though the Applicant specifically discussed these substantial *perceptual* differences in its original

remarks, the Examining Attorney did not address dimensionality at all in her final rejection, instead resting solely on what she asserts is a "general" overall similarity between the marks.

The cited registration is for a Möbius triangle shape (Fig. 1A), and is depicted below next to a similar Möbius triangle sculpture by the Swiss artist Max Bill (Fig. 1B) (albeit turned upside down relative to the cited mark). As can readily be appreciated, the cited mark's claimed use of shading and color is essential to convey the three-dimensional nature of the object it is depicting. When the eye traces the cited mark or the sculpture, the curious properties of the Möbius strip become apparent: were an ant to walk the cited mark counterclockwise from the bottom point, it would cross over (out of sight) to the back surface of the shape at the first turn; only upon reaching the bottom point again and starting a second lap would the ant come back into sight as it traversed the top right corner and proceeded along the yellow surface of the mark. Thus, as with any Möbius strip, three-dimensionality is a defining characteristic of the mark.¹

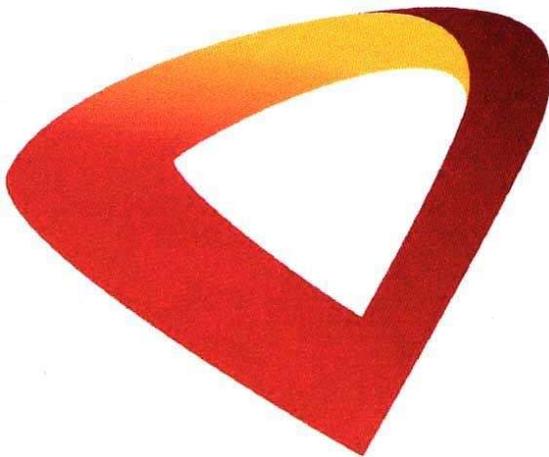


Fig. 1A: Cited Registration



Fig. 1B: Sculpture by Max Bill

¹ Though the uninitiated may not be familiar with a Möbius triangle, and may thus mistake the cited mark for a stylized shield, something akin to the St. Louis arch, or even an uppercase block letter "D" (tipped skyward), Applicant respectfully asserts that, due to its shading and orientation, the one symbol the cited mark will not evoke is that of a letter "A."

In stark contrast to the cited registration, the Applicant's mark is a two-dimensional logo, and is dependent neither upon color nor shading to convey its message. Applicant's mark simply depicts a two-dimensional stroke across a page, and in so doing, conveys a script letter "A." This is a substantial and significant difference, in that the Applicant's mark is thus capable of conveying its meaning in *any* color. The cited registration, on the other hand, *must* be rendered in specific colors with careful attention to shading, and therefore creates a very distinct impression that will cause consumers to readily differentiate it from the Applicant's mark.

**3. Applicant's Mark Has Varying Line Widths;
The Cited Registration Has Uniform Line Widths**

A further critical distinction between the Applicant's logo and the cited mark is their respective uses of line width. The cited mark relies on substantially uniform line width to convey the constant thickness and twisting nature of the Möbius shape. In contrast, the Applicant's mark relies upon dramatic variations in its line width to convey the swooping nature of a handwritten, script letter "A." Notably, the Examining Attorney casually dismissed these substantial differences, and asserted that "[t]he marks are visually similar . . . with a thicker line on the left bottom side" and "a thinner left top line." (Office Action 2.) But the Examining Attorneys' position is clearly contradicted by the pictures themselves: in fact, none of the transitions in line thickness match up between the two marks, with the cited registration's thickest point being the left-most corner and the applied-for-mark's thickest point being the right-most "tail" of the script letter "A."

More specifically, as can be seen below (Fig. 2), the Applicant's mark depicts a fat upstroke, which quickly diminishes to a thin and slanting downstroke, which then transitions back into a thick and substantially horizontal finishing stroke. By varying the line widths in this manner, the mark gives the impression of a handwritten script letter "A": (1) the fat beginning to

the upstroke conveys the welling of ink as the writing implement first touches the paper and begins moving; (2) the thin downstroke conveys the fastest movement of the implement; and (3) the fat finishing stroke again conveys the deceleration and pressure applied in finishing the letter. While the Examining Attorney characterized such differences as "minor," Applicant again respectfully submits that in discerning between writing and mere shapes or designs, these differences carry heavy weight in the mind of the viewer. (*Id.*) For example, consider how simple variations in line thickness change the shape of the negative space and allow an observer to easily differentiate between the letter "O" and a normal circle (Fig. 3).



Fig. 2: Applicant's Mark

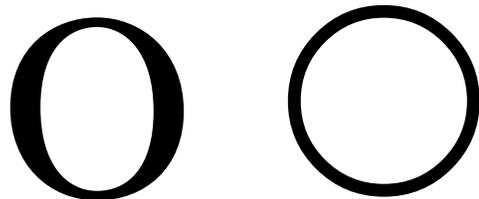


Fig. 3: Letter "O" vs. Circle

4. Applicant's Mark Has A Gap; The Cited Registration Is Fully Enclosed

As can be seen from the above (Fig. 2), the Applicant's mark also has a gap in its circumference which is missing from the cited registration. Though perhaps "small" (as the Examining Attorney asserted), this gap makes a monumental difference in how the Applicant's mark is perceived. (*Id.*) Upon viewing the Applicant's mark, the eye immediately registers the broken circumference as a signal to recognize a *line* rather than a *shape*. Moreover, by virtue of the gap being small rather than large, the Applicant's mark registers in the mind as an "A" rather than a "C." In stark contrast, by virtue of its closed circumference and inclined orientation, the cited mark will instead register simply as a shape of some kind.

These circumferential differences likewise create very different *negative* spaces. While the cited mark has an obvious dome-shaped interior space, the gap in the Applicant's mark creates a distinctive leaf-like or "p"-shaped negative space, which helps cue the mind to recognize the mark as script letter "A" rather than a shape. The Ninth Circuit has recently credited the significance of differing negative spaces in finding no likelihood of confusion between two marks. *See One Indus., LLC v. Jim O'Neal Distrib., Inc.*, 578 F.3d 1154, 1163 (9th Cir. 2009) ("The One Icon consists of 'two angular symbols . . . placed in such a way that a 'Z'-shaped space appears between the two,' while the 'Rounded O is clearly a letter 'O' with a prominent apostrophe and is slightly angled."). Notably, while the Ninth Circuit was considering two marks that were intended to convey the *same* letter "O" (*see* below Figs. 4A, 4B), in the present case, the differing negative spaces are even more significant in that they signify differences between both the appearance of the marks *and* what each is intended to convey.



Fig. 4A



Fig. 4B

5. The Heightened Standard For Pharmaceutical Products Is Applied Only To Drug Names, Not Logos

Finally, though the Examining Attorney notes that many courts have applied a higher standard in likelihood of confusion cases involving medicinal and pharmaceutical products, Applicant respectfully submits that the reasons supporting the cited decisions do not justify a similarly heightened standard in the present case. (Office Action 3.)

All of the decisions cited by the Examining Attorney considered confusingly similar individual drug names, which unquestionably do warrant careful attention as any mistake could

result in the wrong drug being dispensed and consumed. See *Glenwood Labs., Inc. v. Am. Home Prods. Corp.*, 455 F.2d 1384 (C.C.P.A. 1972) (comparing MYOCHOLINE with MYSOLINE); *Alfacell Corp. v. Anticancer Inc.*, 71 U.S.P.Q.2d 1301 (T.T.A.B. 2004) (comparing ONCASE with ONCONASE); *Blansett Pharmacal Co. v. Camrick Labs., Inc.*, 25 U.S.P.Q.2d 1473 (T.T.A.B. 1992) (comparing NOLEX and NALEX). In stark contrast, the Applicant's mark and the cited mark are merely *logos*, and will thus never be used by themselves to identify a particular drug, dosage form, or any other critically important detail.² Accordingly, no physician or pharmacist will ever write or fill prescriptions based on the Applicant's mark or the cited registration, and no average consumer will ever select products based solely on the marks in question. Thus, as the Applicant's mark and the cited registration carry with them no special dangers warranting a heightened standard, Applicant respectfully submits that the Board weigh the present appeal under the normal standard for likelihood of confusion.

V. SUMMARY

In sum, this appeal brings to light an obvious truism: three-sided marks will all bear at least some resemblance. However, trademark law, and the likelihood of confusion analysis in particular, is not so formalistic as to grant a virtual monopoly to the first user of any generic shape. Indeed, the very law cited by the Examining Attorney confirms that the proper test for considering whether a likelihood of confusion exists takes into account not only appearance, but also connotation and commercial impression. And further reasoned opinions of this Board confirm that the true focus of the likelihood of confusion inquiry is whether the average

² This fact is further evident from the broad and varied scopes of use claimed for both marks. For example, the cited registration applies to a number of classes of pharmaceutical preparations, as well as dietetic foods, nutritionally fortified beverages, and various medicinal and herbal infusions. The Applicant's mark also applies to a number of classes of pharmaceuticals, as well as nondrug items such as pharmaceutical research services and even contraceptive sponges.

consumer will perceive and recall the differences between two marks. Approached from that perspective, a likelihood of confusion cannot exist between the Applicant's mark and the cited registration. The visual differences between the Applicant's mark and the cited registration are many: (a) the cited registration is three-dimensional, whereas the Applicant's mark is only two-dimensional; (b) the cited registration both claims and necessarily relies on color and shading to convey its meaning, whereas the Applicant's mark is color-neutral; (c) the cited registration is nearly uniform in thickness, whereas the Applicant's mark both employs and relies upon dramatic variations in line thickness to convey its meaning; and (d) the cited registration is a fully enclosed triangle, whereas the Applicant's mark is simply a line evocative of handwriting. But most importantly, these are not merely differences of form, but differences of substance. The Applicant's mark — a letter "A" — and the cited registration — a pictorial, triangular design — are truly different in connotation and commercial impression, and that dominant conceptual difference ensures that the perception and lasting impression of both marks in the average consumer's mind will be unquestionably distinct.

Thus, in light of all of the foregoing, Applicant respectfully requests that the decision of the Examining Attorney regarding her position with respect to the pending application be reversed, and that the application be allowed.

Respectfully submitted,

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Dated: April 29, 2011

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