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

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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United States Patent and Trademark Office
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APPLICANT'S REPLY APPEAL BRIEF

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE EXAMINING ATTORNEY'S OBJECTION	2
III. THE EXAMINING ATTORNEY'S ARGUMENTS	3
A. The Examining Attorney's Argument That Applicant's Mark Cannot Depict A <i>Printed</i> Letter "A" Is Irrelevant: Applicant's Mark Is A <i>Script</i> Letter "A"	3
B. The Examining Attorney Improperly Focuses On Individual Features Of Each Mark Rather Than The Overall Impression Each Creates.....	5
C. The Examining Attorney Misconstrues Applicant's Argument As To The Three-Dimensionality Of The Cited Registration.....	7
D. The Examining Attorney Argues An Uncontested Issue: Applicant Never Asserted That The Goods Are Unrelated	7
E. The Examining Attorney Misunderstands Applicant's Argument As To The Appropriate Standard Of Review	8
IV. CONCLUSION.....	10

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Alfacell Corp. v. Anticancer Inc.</i> , 71 U.S.P.Q.2d 1301 (T.T.A.B. 2004)	8
<i>Blansett Pharmacal Co. v. Camrick Labs., Inc.</i> , 25 U.S.P.Q.2d 1473 (T.T.A.B. 1992)	8
<i>In re Burndy Corp.</i> , 133 U.S.P.Q. 196 (C.C.P.A. 1962)	4-5
<i>Glenwood Labs., Inc. v. Am. Home Prods. Corp.</i> , 455 F.2d 1384 (C.C.P.A. 1972)	8

I. INTRODUCTION

The main thrust of the Examining Attorney's opposition boils down to little more than one paragraph, and unfortunately, that paragraph is predicated on a basic misunderstanding of the Applicant's principal argument. While the Examining Attorney asserts that Applicant's mark should be considered simply a design because it "does not contain any of the defining features" of a *printed* letter "A," Applicant thoroughly explained throughout its opening brief how its mark depicts "a stylized *script* letter 'A' (for 'Alvogen')." Based on that improper recasting and casual dismissal of Applicant's position, the Examining Attorney again proceeds to assess likelihood of confusion solely on *visual* similarities divorced from overall connotation and commercial impression. But as Applicant explained in its opening brief, that approach is flawed. While there will inevitably be similarities between certain letters and shapes, the two have clearly different connotations and thus make widely divergent overall impressions. Accordingly, and for the reasons already set forth in its opening brief, Applicant respectfully asserts that there will be no likelihood of confusion between its mark and the cited registration.

II. THE EXAMINING ATTORNEY'S OBJECTION

The Examining Attorney has objected to Fig. 1B on page 6 of Applicant's opening brief. (Opp. Br. 2.) Applicant respectfully submits that the Examining Attorney has misunderstood the purpose of Fig. 1B. To be clear, Fig. 1B has not been offered as evidence of any fact in issue, but rather as a demonstrative to help inform the Examining Attorney and this Board as to how a pertinent three-dimensional Möbius form actually appears. In that regard, Fig. 1B merely depicts an existing Möbius triangle sculpture, and was included next to the cited registration (also a Möbius triangle) to help illustrate what that mark was meant to convey. Nevertheless, the points made with respect to the cited registration's unique three-dimensional Möbius form have been the core issue in dispute since Applicant first responded to the Examining Attorney's refusal. Thus, although the Board should manifestly consider Fig. 1B only for its demonstrative purposes, Applicant respectfully submits that its arguments on appeal stand on their own and should therefore be considered in their entirety in any event.

III. THE EXAMINING ATTORNEY'S ARGUMENTS

A. The Examining Attorney's Argument That Applicant's Mark Cannot Depict A Printed Letter "A" Is Irrelevant: Applicant's Mark Is A Script Letter "A"

The lynchpin of the Examining Attorney's argument is her conclusion that Applicant's mark "should be considered a design mark because the triangle shape does not contain any of the defining features of the letter 'A,' either as a capital or lowercase letter." (Opp. Br. 5.) The Examining Attorney goes on to state that a "capital letter 'A' is formed by two lines that meet at a center top angle and a horizontal cross bar at the midpoint of the two lines," and that a "lowercase letter 'a' is formed by either a curved top extending over a rounded bottom joined by a straight vertical line (as an 'a'), or a rounded shape with a straight side (as an 'a')." (*Id.*) While that may be true with respect to *printed* letter "A's", these statements illustrate a clear misunderstanding of Applicant's position. As repeatedly stated throughout its opening brief, "Applicant's mark is a stylized *script* letter 'A' (for 'Alvogen')." (Opening Br. 4 (emphasis added); *see also id.* at 2, 7, 9.)

Indeed, Applicant explained in detail how the applied-for mark's variations in line width help create "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." (*Id.* at 7-8.) In addition, Applicant explained how the gap in the applied-for mark both differentiates it from a mere shape, and "creates a distinctive leaf-like or 'p'-shaped negative space, which helps cue the mind to recognize the mark as a script letter 'A.'" (*Id.* at 9.) Notably, the Examining Attorney does not address any of these points, choosing instead to recast Applicant's argument (as one directed to a printed letter "A") and then conclude, based on that, that "applicant has not provided

any evidence or explanation of how the design could be perceived as a letter 'A' in any form." (Opp. Br. 5.) In light of the above, Applicant respectfully disagrees.

The Examining Attorney then further concludes — without evidence, and wrongly — that "no form of the letter 'A' includes the gap that is featured in the applied-for triangle design." (*Id.* (emphasis added).) This too appears to be a statement predicated on the Examining Attorney's misreading of Applicant's Office Action response and opening brief, as the Examining Attorney's assertion clearly does not hold true with respect to script lettering. Indeed, as shown below in Fig. 5 (and more fully in Exh. A), even a cursory review of computer fonts illustrates that there are numerous examples of the script letter "A" (both in lowercase and uppercase) which not only resemble the Applicant's mark in many respects, but also include such a gap. Moreover, as demonstrated by Fig. 5, while there are many ways to render a script letter "A," they are all nevertheless recognizable as the letter "A."



Fig. 5: Excerpts from Exhibit A

Finally, the Examining Attorney relies on *In re Burndy Corp.*, 300 F.2d 938, 133 U.S.P.Q. 196 (C.C.P.A. 1962) to assert that "letter marks that are presented in highly stylized form are essentially design marks incapable of being pronounced or conveying any inherent meaning." (Opp. Br. 5.) This reliance is misplaced. Unlike the present case, the *Burndy* court was not comparing a letter and a mere shape, but rather two stylized letter "B" marks. 133 U.S.P.Q. at 197. Thus, the C.C.P.A. could not possibly have differentiated the two marks based

on overall connotation, as both marks depicted the same letter. 133 U.S.P.Q. at 197. It was in that context that the court concluded that "this case must be decided primarily on the basis of visual similarity of the marks." *Id.* Nowhere in the opinion did the court suggest any *per se* rule regarding stylized letter marks, nor did the court hold that highly stylized marks were somehow "incapable of being pronounced or conveying any inherent meaning" as the Examining Attorney suggests. (Opp. Br. 5.) On the contrary, the court explicitly stated (unsurprisingly) that "[t]he letter 'B' can be spoken." *Burndy*, 133 U.S.P.Q. at 197 (emphasis added).

Ultimately, the *Burndy* court held that the two marks were not confusingly similar. *Id.* Thus, if applicable to the present case at all, *Burndy* merely stands for the well-established and lauded proposition that there are no *per se* rules in a likelihood of confusion analysis, and thus neither similarities in connotation nor appearance are necessarily dispositive. *Id.* In any event, *Burndy* clearly does not dictate that the Board must treat the applied-for mark as a meaningless design, or suggest that it would be proper to ignore the pervading perceptual differences that exist between the Applicant's mark and the cited registration. *Id.*

B. The Examining Attorney Improperly Focuses On Individual Features Of Each Mark Rather Than The Overall Impression Each Creates

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." (Opp. Br. 4.) Yet, inexplicably, the Examining Attorney rests her determination of likelihood of confusion on just such a side-by-side comparison. (*Id.* at 4-7.) Indeed, rather than crediting the differing overall impressions created by the Applicant's letter mark and the cited design registration, the Examining Attorney instead focuses her attention solely on transitions in line thickness, and rounded versus sharp angles. (*Id.* at 4.)

In doing so, the Examining Attorney not only ignores her own statement that "[m]arks should not be dissected into component parts and minute details of each part should not be compared with other parts," she also mischaracterizes the alleged visual similarity between the marks by suggesting that the transitions in line-thickness match up between the two. (Opp. Br. 4.) In fact, as Applicant pointed out in its opening brief, it is evident from the pictures that *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." (Opening Br. 7.) Moreover, whereas the applied-for mark employs dramatic variations in line thickness in order to convey the swooping nature of a handwritten, script letter "A," the cited registration relies on substantially uniform line-width to convey the constant thickness and twisting nature of the Möbius shape. (*Id.*)

But most notably, while the Examining Attorney goes to great lengths to ferret out individual similarities between both marks, she then incongruously dismisses the cited registration's three-dimensionality and lack of any gap as mere "inconsequential" and "minor differences." (Opp. Br. 6-7.) This is a prime example of the pervasive flaw in the Examining Attorney's overall approach. In focusing solely on individual similarities between the two marks, and dismissing all else as minor details, the Examining Attorney misses the forest for the trees. Indeed, as Applicant repeatedly pointed out in its opening brief, 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 and recalled in the mind of the consumer; namely, one as letter, and the other as a shape. (Opening Br. 2-3.) It is that net effect which the Examining Attorney has wholly refused to consider by reducing the inquiry to a simple side-by-side visual comparison.

C. The Examining Attorney Misconstrues Applicant's Argument As To The Three-Dimensionality Of The Cited Registration

In an attempt to discount the significance of the three-dimensionality of the cited registration, the Examining Attorney misconstrues Applicant's argument altogether. (Opp. Br. 6.) Applicant does not dispute that its mark may be rendered in the same colors as the cited registration. (*See* Opening Br. 7.) On the contrary, it is not the color and shading which differentiate the two marks, but how color and shading affect what each mark will ultimately convey. Due to the fact that the cited registration depicts a unique Möbius form for which three-dimensionality is a defining characteristic, it *must* employ variations in color and/or shading. Indeed, were the cited registration to be rendered in any solid color, it would utterly fail to convey the distinctive three-dimensional form it is meant to convey. In stark contrast, due to the dramatic transitions in line thickness, broken circumference, and distinct negative-space of the applied-for mark, it will read as a two-dimensional object in *any* color or colors (namely, as a script letter "A"). Thus, Applicant's argument is not that its mark will never be rendered in shades of red, orange, and yellow, but that *even* if it were, the differences in its overall form would nevertheless still cause it to convey a stylized script letter "A."

D. The Examining Attorney Argues An Uncontested Issue: Applicant Never Asserted That The Goods Are Unrelated

Starting at page 7 of her opposition brief, the Examining Attorney spends six pages discussing the similarity of the goods identified in the subject application and the cited registration. (Opp. Br. 7-13.) While Applicant understands the basic relevance of this point, it nevertheless bears mentioning that Applicant never contested this issue. To 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 impressions of the applied-for mark and the cited registration are truly distinct.

E. The Examining Attorney Misunderstands Applicant's Argument As To The Appropriate Standard Of Review

Finally, the Examining Attorney attempts to address Applicant's points regarding the appropriate standard of review, but again misunderstands Applicant's arguments. (Opp. Br. 13-15.)

To be clear, Applicant's position is simply that the cases relied upon by the Examining Attorney — all of which pertain to marks for individual drug names — do not justify a heightened standard in the present case where the applied-for mark and the cited registration are merely logos. *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). As Applicant stated, since its mark and the cited registration are generalized logos rather than specific drug names, no physician or pharmacist will ever write or fill prescriptions based on Applicant's mark or the cited registration, and no average consumer will ever select products based solely on the marks in question. (Opening Br. 9-10.) Based on that reality, Applicant respectfully asserts that the applied-for mark and the cited registration do not pose any special dangers warranting a heightened standard.

The Examining Attorney, however, incorrectly recasts this argument as an attempt by Applicant to distinguish its mark based on "additional matter that is not a part of the drawing or mark." (Opp. Br. 14.) To be clear, Applicant does not argue that a consumer or pharmacist will "connect" its A-logo with additional matter as the Examining Attorney suggests. Rather, Applicant argues that there is no need for a heightened standard in the present case because the marks in question will not be used to differentiate particular drugs, but rather to identify the

source of those drugs. Accordingly, there is no more danger that the asserted similarity between Applicant's A-logo and the cited registration would lead to the selection of the wrong drug than there is that one might confuse two drugs offered under the same house mark. Applicant thus again respectfully contends that the Board should weigh the present appeal under the normal standard for likelihood of confusion.

IV. CONCLUSION

Regrettably, the posture of this reply brief is remarkably similar to the posture of this appeal in general. While Applicant has repeatedly stressed and explained the many reasons why its letter mark will create a substantially different overall connotation and commercial impression from the cited design registration, the Examining Attorney has again failed to meaningfully address any of those arguments. Nevertheless, while the Examining Attorney's opposition brief does little to explain her positions, it is clear that she would have this Board make its determination based on nothing more than a side-by-side visual comparison of the marks. Put simply, that approach would be improper. As stated in Applicant's opening brief, the true focus of the likelihood of confusion inquiry is whether the average consumer will perceive and recall the differences between two marks, and thus the proper test takes into account not only appearance, but also connotation and commercial impression. And as already explained, due to the inherent conceptual differences between letters and mere shapes, Applicant respectfully submits that the perception and lasting impression of the applied-for mark and the cited registration in the average consumer's mind will be unquestionably distinct. For these reasons, and as set forth in its opening brief, Applicant respectfully submits that there will be no likelihood of confusion between its mark and the cited registration.

Accordingly, 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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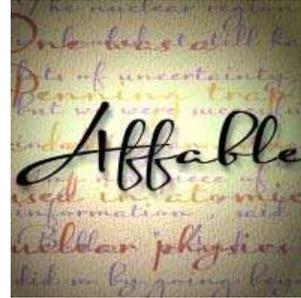
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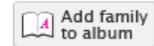


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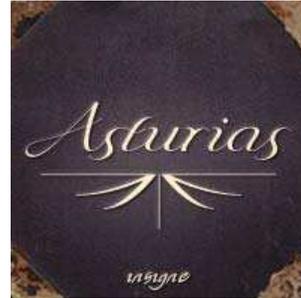
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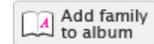


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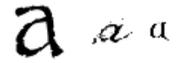
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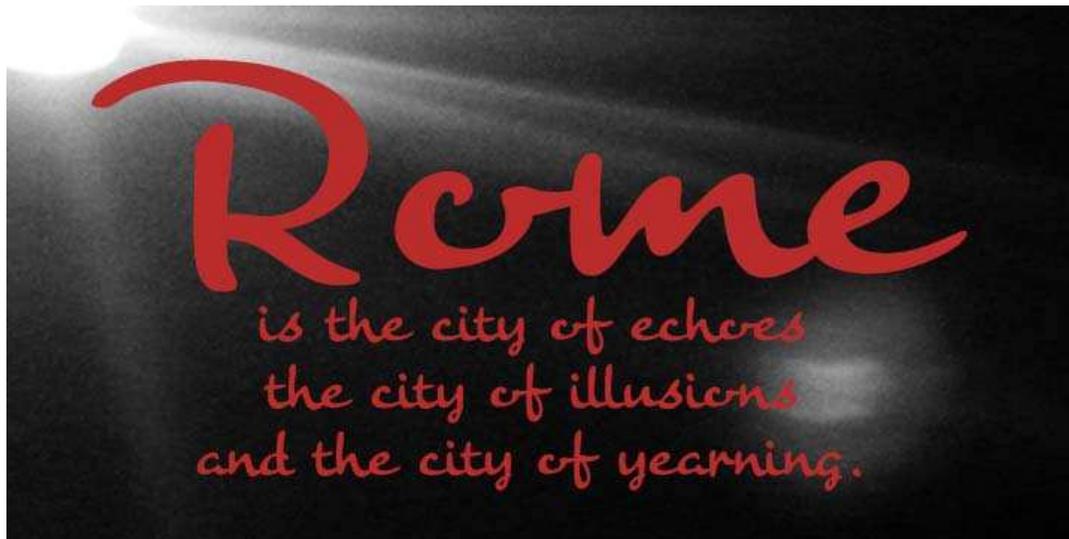
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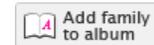


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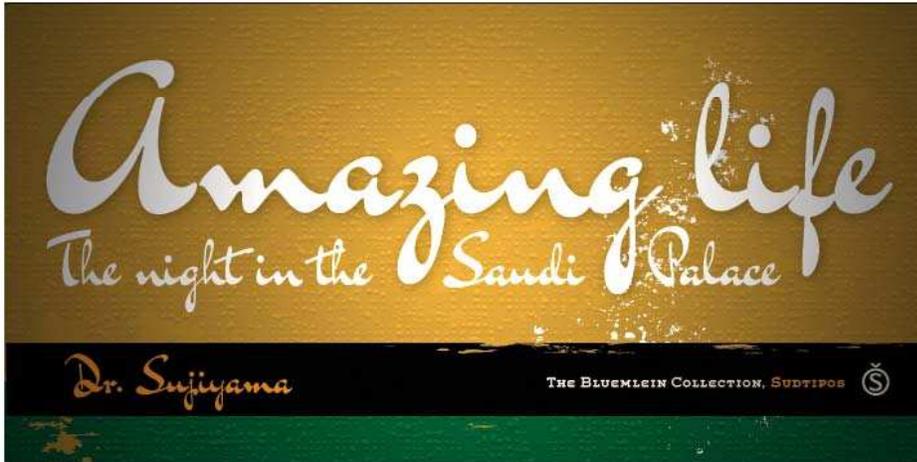
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The Charles Bluemlein Script Collection is an intriguing reminder of the heady days of hand lettering and calligraphy in the United States. From the early 1930s through World War II, there were about 200 professional hand letterers working in New York City alone. This occupation saw its demise with the advent of photo lettering, and after digital typography, became virtually extinct. The odd way in which the Bluemlein scripts were assembled and created – by collecting different signatures and then building complete alphabets from them – is a fascinating calligraphic adventure. Because the set of constructed designs looked nothing like the original signatures, fictitious names were assigned to the new script typefaces. The typeface styles were then showcased in Higgins Ink catalogs. [More...](#)

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Designers: Alejandro Paul, Charles P Bluemlein ☆☆☆☆☆ Average of 5 ratings: 4.8/5
Publisher: Sudtipos
MyFonts debut: Jul 24, 2009

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Dr Sugiyama +WEB \$45

AaBbCcDdEeFfGgHhIiJjKkLl

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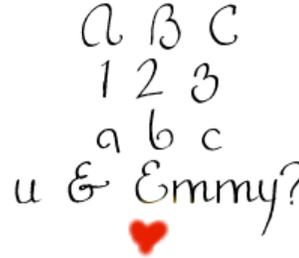
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FG Emmy works great for both small and large text pieces and headings. I like the way the font bends in different directions.

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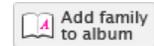


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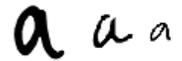
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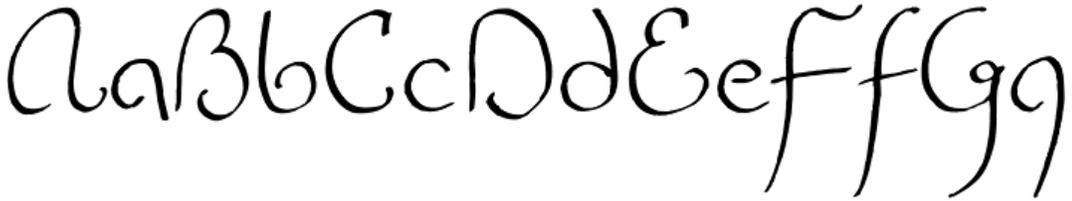
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