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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Radius Health, Inc.

Serial No. 78797031

Rachelle A. Kagan of Bingham McCutchen LLP for Radius Health, Inc.

Matt Einstein, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

Before Hairston, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Radius Health, Inc. filed an application to register the mark RADIUS and design, as shown below, for services ultimately identified as "research services in the fields of pharmaceuticals and medicines" in International Class 42.¹

¹ Application Serial No. 78797031, filed January 23, 2009, based on a bona fide intention to use the mark in commerce. The application contains the statement that: "The mark consists of the word RADIUS and a stylized circle with a line drawn in the center."



The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, if used in connection with applicant's services, would so resemble the previously registered mark RADIUS for "product design and development services for others" in International Class 42,² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

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,

² Registration No. 2576476, issued June 4, 2002. Affidavits under Sections 8 and 15 accepted and acknowledged.

however, two key 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).

We first turn to a consideration of the similarity or dissimilarity of the services identified in applicant's application, "research services in the fields of pharmaceuticals and medicines," and the services identified in the cited registration, "product design and development services for others." It is not necessary that the respective services be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods or services. See *In re International*

Telephone & Telegraph Corp., 197 USPQ 2d 910 (TTAB 1978).

Furthermore, it is well settled that the issue of likelihood of confusion must be determined on the basis of the services as they are set forth in the involved application and the cited registration. See *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

The examining attorney contends that in the absence of any limitations, registrant's identification of services must be presumed to encompass the design and development of pharmaceuticals for others, and that the design and development of pharmaceuticals for others is related to applicant's research services in the fields of pharmaceuticals and medicines. The examining attorney relies on evidence from various websites to support his position that the design and development of pharmaceuticals for others, on the one hand, and research services in the fields of pharmaceuticals and medicines, on the other hand, are related. The following are excerpts from some of the websites:

- (1) The more than 6,000 people in our AstraZeneca Development organization guide potential new medicines through the

pharmaceutical development process.
www.astrazeneca-us.com

(2) Ception Therapeutics is a biopharmaceutical company focused on the discovery and development of novel products to address areas of unmet medical need. www.ceptiontx.com

(3) PPD is a leading global contract research organization (CRO) providing discovery, development and post-approval services as well as compound partnering programs. www.ppd.com

(4) BASi is a drug development firm providing firm contract research services and unique products for the pharmaceutical, biotechnology and medical device industries.
www.biocrossroadslinx.com

(5) Johnson & Johnson Pharmaceutical Research and Development LLC ... "[p]erforming innovative, quality research and development is key to our future. www.jnjpharmarnd.com

(6) The Bristol-Myers Squibb Research and Development team has been helping patients prevail against serious disease for the past 150 years. www.bms.com

(7) Sucampo's research and development principles target diseases affecting an aging population. www.sucampo.com

(8) Capsugel's state-of-the-art Pharmaceutical Research and Development Center for lipid-based and powder-fill systems www.capsugel.com

(9) Takeda Global Research & Development Center, Inc. (TGRD) dedicates its resources to the Takeda product pipeline in an effort to deliver innovative medicines to patients. www.tpna.com

(10) Avena Drug Delivery Systems is a Nitto Denko company, with revenues of over \$4.5 billion, which is one of the world's largest manufacturers of and a pioneer in transdermal drug delivery systems. Nitto Denko has a 20-year history of

providing pharmaceutical partners with fully integrated, controlled-release transdermal products that fulfill unmet market needs or are high-quality, low-cost brand equivalents.
www.pharmaceutical-technology.com

In urging reversal of the refusal to register, applicant contends that its identified services and registrant's identified services are readily distinguishable, and that registrant's identification of services does not encompass the design and development of pharmaceuticals for others, as the examining attorney maintains. Specifically, applicant argues that:

The Applicant is in the business of conducting pharmaceutical research and development for its customers. The phrase "research and development" has a commonly understood meaning when used in the context of commerce. It typically refers to "future oriented, longer-term activities in science or technology, using similar techniques to scientific research without predetermined outcomes and with broad forecasts of commercial yield." See *Research and Development*, Wikipedia attached hereto as Exhibit B.

...

The Registrant's services, on the other hand, do not include - or in any way relate to - the research and development of potentially life saving pharmaceuticals, consumed or injected by humans. Rather, the Registrant is in the business of designing and developing tangible products. Product design has been defined as "the idea, generation, concept development, testing and manufacturing of a physical object or service." See *Product Design*, Wikipedia, attached hereto as Exhibit D. (italics and underlining in original).

Applicant's Request For Reconsideration, pp. 10-11.

To support its position, applicant has submitted the Wikipedia excerpts for "Product design" and "Research and development" referenced above; and excerpts from registrant's website showing some of the products registrant has designed, e.g., a gaming headset, paper shredder, air freshener, mobile phone, and air purifier. In addition, we note that the Wikipedia excerpt for "Product Design" further states that:

[Product design] covers more than the discipline name - Industrial Design. Product Designers conceptualize and evaluate ideas, making them tangible through products in a more systematic approach.

...

Aesthetics is considered important in *Product Design* but designers also deal with important aspects including technology, ergonomics, usability, human factors and material technology. (italics in original)

Also, we judicially notice that the McGraw-Hill Dictionary of Scientific and Technical Terms (6th ed. 2003) defines "product design" as: "[DES ENG] The determination and specification of the parts of a product and their interrelationship so that they become a unified whole."

Based on the record herein, we conclude that the examining attorney's construction of the registrant's identification of services is overly broad and not supported by any evidence. The services in the cited registration are identified as "product design and

development services for others." The Board has stated that "when the description of goods for a cited registration is somewhat unclear, as in the case herein, it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade." *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990). In other words, when the nature of the goods or services is unclear, extrinsic evidence may be used to demonstrate what a specific term means in an industry. In this case, the nature of "product design and development services for others" is unclear. The definitions of "product design" per se suggest that it is an industry term that refers to the design of an engineered or manufactured device or apparatus; not a pharmaceutical drug or medicine. Moreover, based on the definitions of "product design," it appears that "product design and development" is a unitary phrase meaning the design and development of an engineered or manufactured device or apparatus. The phrase certainly does not appear to include the design and development of pharmaceuticals for others, as the examining attorney argues. So as to be perfectly clear, we have considered the evidence of record to shed light on the significance of

the identification of services in the cited registration; not to improperly limit the scope thereof. When we do so, we find that the identification of services does not encompass the design and development of pharmaceuticals for others.

The burden is on the examining attorney to establish that the respective services are related, and he has not met that burden on the record before us. The examining attorney has failed to rebut applicant's evidence that registrant's identification of services does not encompass the design and development of pharmaceuticals for others. Furthermore, there is no evidence that applicant's identified services, research services in the fields of pharmaceuticals and medicines, are related to registrant's identified services, product design and development services for others. Rather, the examining attorney's evidence shows that it is common for a single entity to be engaged in research and/or development in the field of pharmaceuticals and medicines.

Insofar as the trade channels and classes of purchasers are concerned, inasmuch as the services identified in the application and the cited registration are unrelated, we conclude that the respective services

travel through distinct trade channels to different classes of potential purchasers.

There is no specific evidence which establishes, one way or the other, whether the involved services are purchased by knowledgeable and sophisticated purchasers, and/or are purchased with a higher than normal degree of care. At the very least, however, we believe it is reasonable to assume from the applicant's identification of services itself that such services are of a type which are or would be purchased by professionals in the pharmaceutical and medical fields who would be knowledgeable about the services.

As previously mentioned, applicant has submitted third-party registrations for RADIUS marks to support its position that registrant's mark is a weak mark. However, the third-party registrations are not evidence that the marks which are the subject thereof are in use and that the relevant purchasing public, having become conditioned to encountering certain goods and services under marks which consist of or include the word RADIUS, is familiar therewith and is therefore able to distinguish the sources thereof based upon differences in the marks. See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268; and *In re Hub Distributing, Inc.*, 218 USPQ

284 (TTAB 1983). In addition, none of the registrations cover services which are even arguably related to the services at issue in this case.³ Thus, the number and nature of any similar mark(s) in use on the same or similar services is not a relevant *du Pont* factor in this appeal.

As to the marks generally, we find that applicant's mark RADIUS and design is highly similar to the cited mark RADIUS. The term RADIUS is the entirety of the registrant's mark, and it is the dominant portion of applicant's mark. While the design in applicant's mark is visually prominent, it is well settled that if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Moreover, the radius of a circle design in applicant's mark, reinforces the term RADIUS. For these reasons, we consider the word RADIUS to be the dominant feature of applicant's mark. The dominant feature of applicant's mark

³ For example, among the goods and services covered by the third-party registrations are jewelry (Registration No. 2482436); snow skis (Registration No. 2150872); fishing reels (Registration No. 2734913); and advertising agencies (Registration No. 2863422). We note that applicant also submitted copies of several third-party applications for RADIUS marks. Third-party applications have "no probative value other than as evidence that the application was filed." *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002).

is identical to registrant's mark, and we find that the respective marks are identical in sound and quite similar in appearance.

Insofar as meaning is concerned, the term RADIUS in applicant's mark appears to be arbitrary. In the cited mark, the term RADIUS may be somewhat suggestive of product design and development services.⁴ However, the similarities in sound and appearance outweigh any differences in connotation. Further, when the applicant's mark and registrant's mark are considered in their entirety, the marks engender similar commercial impressions in that they both evoke the idea of a "radius."

Nonetheless, we find that confusion is not likely in this case, even though the marks are highly similar, due to the differences between the respective services and trade channels and the sophistication of the purchasers of applicant's services.

In sum, we conclude that there is not a likelihood of confusion between applicant's mark RADIUS and design when used in connection with research services in the fields of pharmaceuticals and medicines and the cited mark RADIUS

⁴ We judicially notice that The American Heritage Dictionary of the English Language (4th ed. 2009) defines "**radius**" as, inter alia: "A line segment that joins the center of a circle with any point on its circumference."

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used in connection with product design and development services for others.

Decision: The refusal to register under Section 2(d) is reversed.