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05-16-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #76

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

03 JUN -6 AM 9:30

Applicant: Teleflex Incorporated  
Serial No. 76/279,966  
Filing Date: July 3, 2001  
Subject: EASY CATH

: Trademark Attorney:  
: Toni Hickey  
: Law Office: 115  
:

NOTICE OF APPEAL

CERTIFICATE OF MAILING UNDER 37 CFR 1.8(a) (1)(ii)

(Trademark)

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail on the date indicated below in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513

BOX TTAB FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

Signed George A Smith  
Date May 14, 2003

Sir:

The Applicant hereby appeals from the final refusal of registration, dated November 15, 2002.

Our check in the amount of \$100, for the appeal fee is enclosed along with the brief on appeal.

Please charge any deficiency in the appeal fee to our deposit account 08-3040.

Respectfully submitted,

By George A Smith  
George A. Smith, Jr.  
Attorney for Applicant  
HOWSON & HOWSON  
Box 457  
Spring House, PA 19477

Telephone: 215 540 9200  
Facsimile: 215 540 5818

Enclosures:  
(a) check for \$100



05-16-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #76

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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BRIEF ON APPEAL

BOX TTAB FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

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UNDER 37 C.F.R. §1.8(a)(1)(ii)  
(TRADEMARK)

I certify that this paper is being deposited on the date shown below with the United States Postal Service, with sufficient postage, as first class mail and is addressed to "Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513"

Signed  
Date

*George A. Smith*  
May 14, 2003

Sir:

By the accompanying Notice of Appeal, the applicant, Teleflex Incorporated, appeals from the final refusal to register the mark EASY CATH for urinary catheters.

SUMMARY OF PROCEDURAL HISTORY OF THE APPLICATION

This application was filed on July 3, 2001 under section 1(a). The applicant asserted a first use of the mark, by its predecessor in title on October 30, 1992.

On August 27, 2001, the PTO refused registration under section 2(d), citing Registration 850,663. The applicant responded on February 27, 2002. On November 15, 2002, the PTO issued a final refusal, on the same ground.

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## THE RECORD

The first Office action was accompanied by a printout of data on the cited registration, showing that the registration was issued in 1968 on the mark E-Z-CATH for intravenous cannula placement units. The printout shows that the registration is currently owned by Becton, Dickinson and Company, of Franklin Lakes, New Jersey.

The applicant's response was accompanied by copies of literature on its urinary catheters and Becton-Dickinson's intravenous cannulae, and a declaration, signed by John Randall Golden, the Director of Marketing of Urology at Inmed Corporation, a subsidiary of the applicant, Teleflex Incorporated. Mr. Golden distinguished urinary catheters from intravenous cannulae, pointing out that the catheters are inserted into the urethra for the purpose of draining urine from the bladder, whereas intravenous cannulae are inserted through the skin, with the aid of a needle, for the purpose of intravenous fluid administration. He pointed out that urinary catheters are sold to the general public via doctor's prescription, as well as to hospitals and other healthcare providers, but intravenous cannulae and intravenous cannula placement units are not sold to the general public.

Mr. Golden's declaration stated that approximately three million EASY CATH urinary catheters had been sold by the

applicant and its predecessor, openly and continuously over a period of nearly ten years. Mr. Golden states that to the best of his knowledge no objection to the use of EASY CATH had ever been made by the owners of the cited registration on E-Z-CATH, and to the absence of known instances of actual confusion.

In the initial refusal of registration, the Examining Attorney cited dictionary definitions of "cannula" and "catheter" to show that the Applicant's goods and the goods in the cited registration are "almost identical."

In the final refusal of registration, the Examining Attorney cited additional evidence. This evidence included records of registrations of the marks JOMED, EMBOL--X, KHYPHOPAK, CORVASCULAR (and design), CARDIONURAL, SEMLER TECHNOLOGIES, KYPHX, ENDOAVR, SERVOX SMT SERVOX MEDIZINTECHNIK, and VAS-CATH. In each of these registrations, the identification of goods includes both "catheters" and "cannulae". In addition, the Examining Attorney cited articles from the World Wide Web entitled "Cannulation of Blood Vessels," "Vygon PIC Catheters," "Cannulation of Blood Vessels- Cannula & Catheters," "Medozons," "ECMO Catheters," "Delivery and Sampling Cannulae and Catheters," and "Wisdomking.com." These articles also use both words, "catheter" and "cannula." According to the Examining Attorney's final Office action, they show that catheters and cannulas are

related products because they are advertised and sold by the same entity, and distributed through the same channels of trade.

#### APPLICABLE LAW

In determining registrability of an applicant's mark over a cited registration, it is necessary to take into account the relationship between the applicant's goods *as described in its application* and the registrant's goods *as described in the registration*. In re Trackmobile Inc., 15 USPQ 2d 1152 (TTAB 1990), In re Linkvest S.A., 24 USPQ 2d 1716 (TTAB 1992), In re N.A.D. Inc., 57 USPQ 2d 1872 (TTAB 2001).

#### ARGUMENT

The applicant does not dispute the Examining Attorney's position that the marks EASY CATH and E-Z-CATH are similar, or that the terms "catheter" and "cannula" are related. The evidence relied upon by the Examining Attorney, however, does not establishing that the goods, *as recited in the application and in the cited registration*, are related. In short, the refusal of registration is not supported by substantial evidence, and must be reversed.

Each of the registrations and web articles cited by the Examining Attorney uses the terms "catheter" and "cannula" in the identification of goods. However, on close analysis, it becomes

clear that the Examining Attorney's evidence neither contradicts the Applicant's evidence, nor establishes a relationship between "urinary catheters" on the one hand, and "intravenous cannula placement units" on the other hand.

The Examining Attorney's dictionary definitions are as follows:

Cannula is defined as a "flexible tube, usually containing a trocar at one end, that is inserted into a bodily cavity, duct or vessel to drain fluid or administer a substance such as a medication." Catheter is defined as "a hollow, flexible tube for insertion into a body cavity, duct, or vessel to allow the passage of fluids or distend a passageway. Its uses include the drainage of urine from the bladder through the urethra or insertion through a blood vessel into the heart for diagnostic purposes." Nowhere in either of these definitions is there a suggestion of a relationship between a urinary catheter and an intravenous cannula. The most that can be derived from the definitions is that a urinary catheter and an intravenous catheter are both species of catheters. To say that urinary catheters and intravenous catheters are commercially related because they are both species of catheters is like saying that a bicycle and a locomotive are commercially related because both are vehicles.

The further evidence cited in the final Office action, if anything, weakens the Examining Attorney's case because it fails to show a connection between "urinary catheters" and "intravenous catheters." In none of the seventeen documents cited is there even a hint that urinary catheters and intravenous cannulae are available from a common source.

In the registration on JOMED, the identification of goods lists a range of products, for example "blood flow monitors," "balloon-catheters," "diagnostic catheters," and "guidewires for catheters." "Catheters" are also listed as a separate item, along with "stents," without qualification other than that they are a "medical apparatus." However, it can be inferred from the context of the identification of goods, that all of the "catheters" and "cannulae" recited in the registration are for use in vascular and coronary medicine, and in any event there is no mention of urinary catheters the registration, and therefore nothing to show that urinary catheters and intravenous cannulae are available from a common source, or otherwise related.

The same is true of the EMBOL-X registration. The mark itself is suggestive of the avoidance of emboli, which occur in blood vessels, but, so far as we are aware, never in the urethra. Thus, it can be inferred that both the cannulae and the catheters recited in the EMBOL-X registration are for vascular use. There is no suggestion that the catheters are for urinary drainage.

All of the goods in the CORVASCULAR registration are qualified by the introductory terminology, "medical devices for use in cardiac surgery."

In the CARDIONEURAL registration, the listed goods are in three categories: "cardiothoracic surgery devices," "neurology and neurosurgery devices," and "cardiopulmonary support and perfusion devices and instruments."

In the SEMLER TECHNOLOGIES registration, the goods are qualified by the introduction "surgical instruments and tools for medical use." This is not the kind of introduction one would use where the goods include urinary catheters. The terms "instruments" or "tools" would not be apt descriptions of urinary catheters.

In the KYPHX registration, the only "catheters" are "balloon catheters," which are clearly vascular devices.

In the ENDOAVR registration, there being no comma following "catheters," it appears that both the catheters and the cannulae are "for cardiovascular treatment."

In the SERVOX SMT SERVOX MEDIZINTECHNIK registration, the goods in the class in which "catheters" appear along with cannula-related products, are all qualified by the introduction "medical apparatus for laryngectomies and tracheotomies."

In the VAS-CATH registration, "catheters and cannulae" are listed together with "trays for use with such catheters and



cannulae." Trays are unnecessary in the case of urinary catheters. This, and the suggestive nature of the "VAS" portion of the mark, indicate that the VAS-CATH catheters are vascular catheters.

The title of the first article from the World Wide Web, "Cannulation of Blood Vessels," speaks for itself. Moreover, the catheter mentioned in the article is referred to as an "I.V. catheter," i.e. an intravenous catheter.

In the article on Vygon PIC Catheters, "PIC" refers to Peripherally Inserted Catheters. Cannulae are used for introduction of the catheters. The reference to flow rates of saline, dextrose and intralipid solutions, needles, guidewires, and dressing change kits, all indicate that the products are vascular-related and not urinary.

The title of the article "Cannulation of Blood Vessels-Cannula & Catheters" also speaks for itself; both the cannulae and catheters referred to in the article are vascular. There is no mention of urinary use.

The ozonotherapy catheters mentioned in the Medozons Web article are "designed for insufflation of ozone-oxygen mixture and instillations of ozonized liquids," clearly not a urinary application.

The article on ECMO Catheters refers to a "blunt introducer in the venous lumen," and to "percutaneous introduction." The

third page shows a heart and refers to arterial and venous flow tests. All of this clearly indicates that the catheters are vascular catheters, not urinary catheters.

The article, "Delivery and Sampling Cannulae and Catheters," describes an "intrathecal" catheter used for delivery of anesthetic, and also to a "micro-"cannula" for insertion into arteries and veins. Neither instrument has a urinary application.

Wisdomking.com appears to relate to a line of tracheal devices for use by tracheostomy patients, and again not to urinary products.

In summary, although the cited registrations and Web articles use the terms "cannulae" and "catheter," none of them demonstrates a sufficient relationship between a urinary catheter and an intravenous cannula to make out a case of likelihood of confusion.

The applicant's evidence on the other hand is persuasive that the goods are not so related as to give rise to a likelihood of confusion. First, and most importantly, Mr. Golden's declaration points out that, while urinary catheters are sold to the general public, for self-catheterization, to the best of his knowledge, intravenous cannulae and intravenous cannula placement units are not sold to the general public. Cannulation is carried out by qualified medical personnel; a patient would never have


occasion to cannulate himself. Thus, although an intravenous cannulation patient might be familiar with "EASY CATH" urinary catheters, especially if he has used the same for self catheterization, it is unlikely that he would ever even see the E-Z-CATH trademark, or pay any attention to it if he did happen to see it. Medical personnel, such as nurses, physicians, and hospital equipment purchasers, would probably be exposed to both products, but would recognize the distinction between them, and be sufficiently knowledgeable and attentive that they would not be confused into thinking that the products came from the same source simply because they bore similar-sounding trademarks. Note that there is no evidence on the record that any single entity produces or sells both intravenous catheters and urinary catheters. There is no reason to think that a nurse, physician, or hospital equipment purchaser would think otherwise.

The absence of evidence of a relationship between the respective goods, urinary catheters and intravenous cannula placement units, is itself sufficient to warrant reversal of the final refusal of registration.

CONCLUSION

The Applicant respectfully requests that the Board reverse the refusal of registration for the reason that the record fails to show that there is a relationship, between the goods of the applicant and those recited in the registration relied upon, sufficient to give rise to a likelihood of confusion.

Respectfully submitted  
HOWSON & HOWSON

By   
George A. Smith, Jr.  
Howson & Howson  
Box 457  
Spring House, PA 19477  
215 540 9204