

UNITED STATES PATENT AND TRADEMARK OFFICE

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		Please provide in all correspondence: <ol style="list-style-type: none">1. Filing Date, serial number, mark and Applicant's name.2. Mailing date of this Office action.3. Examining Attorney's name and Law Office number.4. Your telephone number and ZIP code.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Teleflex Incorporated : BEFORE THE
Trademark: EASY CATH : TRADEMARK TRIAL
Serial No: 76/279966 : AND
Attorney: George A. Smith, Jr. : APPEAL BOARD
Address: Howson & Howson : ON APPEAL
 Box 457
 Spring House, PA 19477

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the Trademark Examining Attorney's final refusal to register the trademark "EASY CATH" for "urinary catheters" on the grounds of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

I. FACTS

Applicant applied for registration on the Principal Register of the mark "EASY CATH" for use on "urinary catheters." Registration was refused under Trademark Act Section 2(d) based on a likelihood of confusion, mistake or deception with U.S. Registration No. 850,663 for the mark "E-Z-CATH" for "intravenous cannula placement units." This appeal follows the Examining Attorney's final refusal under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d).

II. ARGUMENT

THE MARKS OF APPLICANT AND REGISTRANT ARE PHONETICALLY EQUIVALENT AND THE GOODS OF THE PARTIES ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

The Court in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d) of the Trademark Act. Any one of the factors listed may be dominant in any given case, depending upon the evidence of record.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods, and similarity of trade channels of the goods. The other factors cannot be considered because no relevant evidence concerning those factors is contained in the record. *See In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984).

Any doubt as to the issue of likelihood of confusion must be resolved in favor of registrant and against an applicant who has a legal duty to select a mark which is totally dissimilar to trademarks already being used. *See In re Hyper Shoppes (OHIO), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

A. **THE MARKS ARE PHONETIC EQUIVALENTS**

The marks must be compared for similarities in sound, appearance, meaning or connotation. *In re E.I. du Pont de Nemours*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Similarity in any one of these elements is sufficient to find a likelihood of confusion. *In re Mack*, 197 USPQ 755 (TTAB 1977). Applicant is seeking to register the mark "EASY CATH." Registrant's mark is "E-Z-CATH." The marks are phonetic equivalents. Similarity in sound alone is sufficient to find a likelihood of confusion. *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975).

Furthermore, when the applicant's mark is compared to a registered mark, "the points of similarity are of greater importance than the points of difference." *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 108 USPQ 161 (D.C. Cir.), *cert. denied*, 351 U.S. 973, 109 USPQ 517 (1956). Both marks are in typed form. Thus, there is no design element to aid in distinguishing the marks. While not identical, these marks are highly similar in sound, appearance and overall commercial impression.

The applicant has conceded that "the marks EASY CATH and E-Z-CATH are similar." (Applicant's Appeal Brief at p. 4). The applicant has also noted an "absence of known instances of actual confusion." (Applicant's Appeal Brief at p. 3). However, the test under Section 2(d) of the Trademark Act is whether there is a likelihood of confusion, and it is unnecessary to show actual confusion in establishing likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), and cases cited therein. Moreover, the applicant's solitary statement does not render this factor persuasive when considered in combination with the high degree of similarity between the marks and the relatedness of the goods.

The fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual

confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. See, e.g., *In re Jeep Corporation*, 222 USPQ 333 (TTAB 1984); *In re Barbizon International, Inc.*, 217 USPQ 735 (TTAB 1983).

In re Opus One Inc., 60 USPQ2d 1812, 1817 (TTAB 2001).

B. THE GOODS AND TRADE CHANNELS ARE CLOSELY RELATED

The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. The goods need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common origin or source. The issue is not likelihood of confusion between particular goods but likelihood of confusion as to the source of those goods. See, e.g., *MSI Data Corp.*, 220 USPQ at 658; *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

Confusion is more likely in cases like the present where related goods would be marketed under nearly identical marks. See, e.g., *In re Tee-Pak, Inc.*, 164 USPQ 88 (TTAB 1969)(likelihood of confusion between substantially identical marks HOSPAC for hospital equipment, including catheters, and HOS-PAK for sterilization tubing, although the purchasers of the goods may be discriminating).

The applicant's goods are "urinary catheters." The registrant's goods are "intravenous cannula placement units."

Applicant argues that although catheters and cannula are related a likelihood of confusion does not exist because there is no relationship between "urinary catheters" and "intravenous cannula placement units." The fact that the applicant has identified the field of use of the goods (i.e. urinary) does not obviate a finding that catheters are related to cannula products because as the evidence of record demonstrates the goods are commonly branded under a single trademark,

marketed in the same manner, distributed through the same channels, and used by the same end-user.

It is well established that third-party registrations which show the adoption of the same mark for different goods or services constitutes evidence that the goods or services are related. *In re Perez*, 21 USPQ2d 1075, 1076 (TTAB 1991). Such third-party registrations have probative value to the extent that they serve to suggest that certain goods or services are of a type which can emanate from a single source. *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

The third party registrations made of record amply demonstrate that various types of catheters and cannula and related cannula goods are commonly offered by the same source under the same mark. In a Final Office Action dated November 12, 2002 the Examining Attorney enclosed a representative sample of ten current registrations wherein registrants utilize the same mark in connection with these types of goods. Therefore, catheters and cannula products are sold by the same entities, under the same mark, in overlapping channels of trade. A sampling of the previously identified registrations is outlined below:

JOMED	2,619,737	medical apparatus, namely, stents, <i>catheters</i> , <i>imaging catheters</i> , <i>balloon-catheters</i> , <i>diagnostic catheters</i> ; suture materials, connectors for coronary bypasses; guidewires for catheters; heart support systems, namely, ventricular assist device system comprised of a prosthetic ventricular blood pump, <i>cannulae</i> and a blood flow regulator and medical implants, namely, stent grafts, graft connectors and heart valves
EMBOL--X	2,610,323	medical devices, namely, <i>cannulas</i> , blood filters and blood filter apparatus, <i>catheters</i> , introducers for use in medical procedures

SEMLER TECHNOLOGIES	2,517,890	surgical instruments and tools for medical use, namely, <i>catheters, cannulae</i> , sheaths, needles, cutlery, hand-held and structurally supported clamps such as artery clamps, and attachments for all of the above items
KYPHX	2,454,085	Medical and surgical instruments, namely, balloon <i>catheters</i> , drills, tools used for filling voids and tools used for filling bones; surgical access devices, namely, needles, <i>cannulas</i> and trocars
ENDOAVR	2,292,582	Medical devices, namely, <i>catheters and cannulae</i> for cardiovascular treatment

In a Final Office Action dated November 15, 2002 evidence was attached demonstrating that various types catheters are related to cannula and cannula sets because they follow the same trade channels. For example, Vygon Corporation, a privately owned company markets various types of catheters and also markets cannula introduction sets. (<http://www.vygonusa.com>). Medozons, a private company markets and sells together as a kit catheters and cannula. (<http://www.medozons.com>). Large-scale retail medical goods providers, like Medozons, offer medical goods via one central web site, enabling persons to purchase various types of medical products offered by different manufacturers. Since the type of goods sold by applicant and registrant emanate from common sources, it would be reasonable and therefore likely for the relevant purchasing public to believe that applicant's goods and registrant's goods, even though they may have a different intended use, can and do emanate from the same source.

As seen above, the channels of trade are closely related and in fact are overlapping. From the submitted representative registrations and Internet evidence, it is clear that medical suppliers offer a wide variety of medical goods, including both cannulas and catheters. The presumption

under Trademark Act Section 7(b), 15 U.S.C. Section 1057(b), implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960 (TTAB 1980). Therefore, the Examining Attorney must assume that the registrant's goods and the applicant's goods are offered everywhere that it is normal for such goods and the same purchaser may encounter the goods. Since manufacturers routinely sell various types of medical goods including cannula and catheters, the relevant purchasing public would assume, when exposed to both the registered mark and the applicant's mark that the goods sold under these marks emanate from or are otherwise associated with a common source. The Examining Attorney also notes that the goods of the applicant and the goods of the registrant are likely to be purchased by the same hospital-purchasing department. Therefore, contrary to the applicant's conclusion, it is likely that the goods will be purchased by the same individuals and purchasing departments within hospitals.

C. **THE END USERS ARE IDENTICAL**

The applicant argues that their goods are sold to the general public for self-catherization, as well as to hospitals and other healthcare providers, whereas the registrant's goods are for intravenous use and are therefore only sold to medical personnel sufficiently knowledgeable, attentive and thereby capable of distinguishing the goods. The applicant's argument that the purchasers of the goods in question are different does nothing to obviate a finding of a likelihood of confusion.

First, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). Therefore, although nurses, physicians and hospital equipment purchasers would be exposed to both products,

this does not mean that these individuals would be capable of distinguishing the source of these goods, or that they would be immune from confusion.

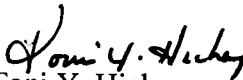
Second, the applicant's goods and registrant's goods would be utilized by the same individuals. The applicant's assertion that the goods are sold to the public for "self catherization" is not supported by the record. The identification of goods is not limited to urine catheters for self-catherization, and thus it is presumed and supported by the evidence of record that the applicant's goods will follow the same trade channels as those of the registrant. The record is absolutely devoid of any evidence indicating that the applicant's goods and the registrant's goods cannot, or will not, be encountered by the same end user, for example a doctor performing a surgical or medical procedure.

The evidence in the record shows that the goods of the applicant and registrant are sufficiently related under Section 2(d) of the Trademark Act such that purchasers are likely to confuse the source of these goods, especially in view of the phonetically equivalent nature of the marks.

III. CONCLUSION

For the foregoing reasons, the refusal to register the mark under Section 2(d) of the Trademark Act should be affirmed.

Respectfully submitted,


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