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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AccuraScience LLC

Serial Nos. 86158955 and 86158968

Christopher A. Proskey of Zarley Law Firm PLC,
for AccuraScience LLC.

N. Gretchen Ulrich, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

Before Bucher, Cataldo and Zervas,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

AccuraScience LLC ("Applicant") seeks registration on the Principal Register of the marks

[1]

[1] "Color is not claimed as a feature of the mark." "The mark consists of a thick line forming a U shape with the same shape repeated and flipped having both ends touch, design is

and ACCURASCIENCE (in standard characters) both for the following services, as amended: "DNA analysis services for scientific research purposes" in International Class 42.[2]

The Trademark Examining Attorney has refused registration of Applicant's marks on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of Registration No. 3114970 for the mark ACURA PHARMACEUTICALS (in standard characters, with a disclaimer of "PHARMACEUTICALS" apart from the mark as shown), for "pharmaceutical research and development services" in International Class 42.[3]

In both cases, Applicant filed a request for reconsideration and appealed the final refusals. The Examining Attorney denied the requests for reconsideration. The refusals have been fully briefed by Applicant and the Examining Attorney.[4]

Proceedings Consolidated

When, as here, an applicant has filed *ex parte* appeals to the Board in two or more co-pending applications, and the cases involve common issues of law or fact, the Board, upon request by the applicant or examining attorney or upon its own

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centered above the word AccuraScience in the font candara with the first 'A' and 'S' capitalized and all other letters lowercase."

[2] Application Serial Nos. 86158955 and 86158968 were filed on January 7, 2014, based upon Applicant's assertion of December 12, 2013 as a date of first use of the mark anywhere and in commerce.

[3] Issued on the Principal Register on July 11, 2006. Section 8 affidavit accepted; Section 15 affidavit acknowledged. The registration recites additional goods in International Class 5.

[4] Applicant submitted 10 pages of exhibits with its main brief. We will not undertake a separate review of the exhibits. To the extent that they were previously made of record, their attachment to Applicant's brief is duplicative and unnecessary. To the extent that any papers were not previously made of record, they will not be considered.

initiative, may order the consolidation of the appeals for purposes of briefing, oral hearing, or final decision. TBMP § 1214 (2014). *See also, e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board *sua sponte* consolidated two appeals); *In re America Online Inc.*, 77 USPQ2d 1618, 1618 (TTAB 2006) (Board consolidated appeals in four applications upon applicant's motion). Accordingly, the Board consolidates these appeals. References to the record refer to Application Serial No. 86158955 unless otherwise indicated.[5]

Likelihood of Confusion

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).

Strength of Registrant's Marks

We first consider Applicant's argument that Registrant's mark is commercially weak as a result of third-party registration of similar marks for related goods or services. In support of its argument, Applicant introduced into the record with its October 15, 2014 Request for Reconsideration of the Examining Attorney's final refusal of registration copies of four third-party registrations, all owned by different entities, for the following marks and goods:

[5] Record citations are to TTABVUE, the Trademark Trial and Appeal Board's publicly available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Citations to the prosecution history are displayed by date and page number.

> Registration No. 2100327 for the mark ACURA for "pipettes, adjustable micropipettes, multichannel pipettes, syringes and parts of these products, all for laboratory use";
>
> Registration No. 4592827 for the mark ACCURA for "Assays and reagents for use in genetic research; Chemical solutions and preparations consisting of pre-mixed reactants and reagents for scientific and research use in connection with amplification, analysis or labeling of nucleic acid; Reagents for scientific or medical research use";
>
> Registration No. 4544712 for the mark ACCURA-C for "Sharp side port needles with a sealed tip and multiple perforations for medical use"; and
>
> Registration No. 3780126 for the mark ACCURA for "localization markers, namely, breast localization wires for surgical use; stiffening cannulas for use with breast localization wires; and kits containing each of the foregoing goods."

With regard to these third-party registrations, we first note that such registrations are not evidence of use of the marks shown therein and, therefore, are not proof that consumers are familiar with said marks so as to be accustomed to the existence of similar marks in the marketplace. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Second, the marks in these registrations identify goods that are not closely related to the services identified in the cited registration. As such, these third-party registrations have limited probative value for purposes of demonstrating the asserted weakness of Registrant's ACURA PHARMACEUTICALS mark for the services recited therein. Therefore, on the record in this case, we find insufficient support for Applicant's argument that "ACURA" or "ACCURA" is weak in the field of DNA analysis and that the

registration is entitled to only a narrow scope of protection. *See Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). *Cf. In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996) (evidence of record established that a significant number of third parties used trade names or service marks that include the term "BROADWAY" for restaurant-related goods and services).

We observe nonetheless that the term "ACURA" in Registrant's ACURA PHARMACEUTICALS mark is suggestive of the term "accurate," defined as "free from error especially as the result of care <an *accurate* diagnosis>".[6] This definition suggests that ACURA PHARMACEUTICALS, when used in connection with "pharmaceutical research and development services" suggests a desired characteristic of the services, namely, that they produce accurate results. However, because Registrant's mark is registered it is entitled to the presumptions accorded by Section 7(c) of the Trademark Act, 15 U.S.C. § 1057(c) (*i.e., prima facie* evidence of the validity of the registration mark and of the registration of the mark, of the ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration). Thus, even if we agreed that Registrant's mark is inherently somewhat weak, that would not be fatal to finding likelihood of confusion because even weak marks are entitled to protection against confusion, *King Candy Co. v. Eunice King's Kitchen, Inc.,* 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

[6] Applicant introduced this definition into the record as an exhibit to its October 15, 2014 Request for Reconsideration.

Relationship of the Services

We turn now to the *du Pont* factor involving the similarity or dissimilarity of Applicant's "DNA analysis services for scientific research purposes" and Registrant's "pharmaceutical research and development services." It is settled that in making our determination, we must look to the services as identified in the applications vis-à-vis those recited in the cited registration. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). It is not necessary that the respective services be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective services are related in some manner, or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant introduced into the record with its October 15, 2014 Request for Reconsideration copies of pages from its Internet website, describing Applicant's services as follows:

> We offer our customers – including academic research laboratories, medical facilities and third-party biotech companies – NGS [next generation DNA sequencing] data processing, analysis and interpretation services. We perform both routine and customized data analysis tasks that involve NGS data.[7]

[7] October 15, 2014 Request for Reconsideration at 20.

> We perform all types of data processing, analysis and interpretation tasks – routine or customized – that involve NGS data.[8]

In support of the refusal to register, the Examining Attorney introduced into the record with her May 31, 2014 Office Action the following Internet entry from Genetics Home Reference for "pharmacogenomics:"

> Pharmacogenomics is the study of how genes affect a person's response to drugs. This relatively new field combines pharmacology the science of drugs) and genomics (the study of genes and their functions) to develop effective, safe medications and doses that will be tailored to a person's genetic makeup.
>
> Many drugs that are currently available are "one size fits all," but they don't work the same way for everyone. It can be difficult to predict who will benefit from a medication, who will not respond at all, and who will experience negative side effects (called adverse drug reactions). Adverse drug reactions are a significant cause of hospitalizations and deaths in the United States. With the knowledge gained from the Human Genome Project, researchers are learning how inherited differences in genes affect the body's response to medications. These genetic differences will be used to predict whether a medication will be effective for a particular person and to help prevent adverse drug reactions.
>
> The field of pharmacogenomics is still in its infancy. Its use is currently quite limited, but new approaches are under study in clinical trials. In the future, pharmacogenomics will allow the development of tailored drugs to treat a wide range of health problems, including cardiovascular disease, Alzheimer disease, cancer, HIV/AIDS, and asthma.[9]

In the same Office Action, the Examining Attorney made of record the following entry from the Internet reference Wikipedia.org for "pharmacogenomics:"

> Pharmacogenomics (a portmanteau of pharmacology and genomics) is the technology that analyzes how genetic makeup affects an individual's response to drugs. It deals with the influence of genetic

[8] *Id.* at 22.

[9] May 31, 2014 Office Action at 113.

> variation on drug response in patients by correlating gene expression or single-nucleotide polymorphisms with a drug's efficacy or toxicity. By doing so, pharmacogenomics aims to develop rational means to optimize drug therapy, with respect to the patients' genotype, to ensure maximum efficacy with minimal adverse affects [sic].[10]

In addition, the Examining Attorney introduced into the record with her May 31, 2014 Office Action evidence from informational and commercial Internet websites suggesting that the same entities provide both Applicant's services and Registrant's services under the same marks. The following is illustrative:

> AIBioTech is a unique combination of diagnostic laboratory and comprehensive contract research organization. Based on over 20 years of experience with DNA sequencing, assay development and practical research applications, AIBioTech provides medical testing services to physicians as well as research and development services to physicians and life science investigators in clinical practices; biotechnology and pharmaceutical companies; academic institutions and in several different government agencies.
>
> Our scientists are serious researchers who work with top pharmaceutical; biotechnology; and research and development companies to help bring their products from discovery to market. They also develop innovative clinical assays using the latest DNA sequencing technologies to provide medical testing to physicians and patients. (aibiotech.com);[11]

The evidence of record demonstrates that "Pharmacogenomics" (a blending of pharmacology and genomics) is the study of the role of genetics in drug response. It

[10] The Board gives guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007). In the case before us, the Wikipedia evidence was submitted with the Examining Attorney's Final Office Action, and Applicant had an opportunity to rebut it with its Request for Reconsideration. We have considered this Wikipedia evidence because it essentially is cumulative of and is corroborated by the other evidence of record, and because it was made of record early enough to give Applicant the opportunity to challenge or rebut it. *See Id.*

[11] May 31, 2014 Office Action at 88.

aims to develop means to optimize drug therapy, with respect to the patient's DNA, to ensure maximum efficacy with minimal adverse effects. Rather than the older "one-dose-fits-all" approach, applying the latest genomic technologies to drug development will allow drugs and drug combinations to be optimized for each individual's unique genetic makeup.[12] Applicant's services involve next generation DNA sequencing (NGS). The record shows, for example, that third party Illumina's NGS systems[13] "have been broadly accepted by cancer researchers and clinical laboratories throughout the world … Illumina's … Universal Oncology Test System will be used investigationally by pharmaceutical companies to test targeted cancer therapies in clinical trials. …"[14] Hence, in the age of biopharma, Applicant's DNA analysis services for scientific research purposes (or NGS systems) are related to "pharmaceutical research and development services." This critical relationship between genomic science and the broader pharmaceutical industry are made clear with the Internet information the Trademark Examining Attorney placed into the record about Illumina,[15] AiBioTech,[16] Roche[17] and Merck.[18]

In addition, the Examining Attorney made of record with her April 16, 2014 Office action copies of third-party, use-based registrations reciting the services

[12] May 31, 2014 Office Action at 107-10.

[13] *Id*. at 94-95, 114.

[14] *Id*. at 114.

[15] *Id*. at 94-95, 114.

[16] *Id*. at 88-89.

[17] *Id*. at 90-91.

[18] *Id*. at 92-93.

identified both in the involved application and cited registration. The following examples are illustrative:

> Registration Nos. 4175331 and 4178746, issued to the same entity for services including "pharmaceutical research and development and genetic science; DNA analysis services; research and development in the pharmaceutical and biotechnology fields"
>
> Registration No. 4420529 for services including "DNA analysis services; DNA screening for scientific research purposes; research and development in the pharmaceutical and biotechnology fields"
>
> Registration No. 4330339 for services including "DNA analysis services; DNA screening for scientific research purposes; providing medical and scientific research information in the fields of pharmaceuticals and genetics" and
>
> Registration No. 3274871 for services including "performing scientific research or providing scientific research services to identify the most innovative, effective and efficient panels of biomarkers to aid in the new drug development and clinical trial process; providing technical consulting and scientific research services to identify and use a full range of germline and tissue-specific DNA, RNA and protein- based molecular biomarkers."

These registrations further suggest the relationship of DNA sequencing and analysis to pharmaceutical research and development services. *See In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001) ("The registrations show that entities have registered their marks for both television and radio broadcasting services. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the services listed therein, including television and radio broadcasting, are of a kind which may emanate from a single source.). *See, also e.g., In re Mighty Leaf Tea*, 601

F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The evidence of record establishes that Applicant's services are related to the services identified in cited registration. As such, this *du Pont* factor favors a finding of likelihood of confusion.

Similarity of purchasers

Furthermore, as to the similarity of purchasers, the Internet evidence suggests that genetic research centers, pharmaceutical companies, and others within the biotechnology and biopharma fields would be common customers for the services of Applicant and of Registrant.

As such, this *du Pont* factor also favors a finding of likelihood of confusion.

Similarities and Dissimilarities of the Marks

We now turn to the *du Pont* factor of the similarity or dissimilarity of the marks at issue as to appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). As noted above, these are the involved marks:

ACCURASCIENCE 	**ACURA PHARMACEUTICALS**
Applicant's applied-for marks	*Registrant's mark*

The mark in Applicant's application Serial No. 86158968 is ACCURASCIENCE in standard characters and the mark in the cited registration is ACURA PHARMACEUTICALS in standard characters. To state the obvious, the marks are similar to the extent that "ACURA," the first portion of Registrant's mark, is highly similar to "ACCURA," the first term in Applicant's mark, in appearance and sound. It is settled that there is no correct pronunciation of a trademark. *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) ("as we have said many times, there is no 'correct' pronunciation of a trademark"). In this case, there is no evidence that the terms "ACURA" and "ACCURA" in the respective marks would be pronounced differently. To the contrary, the terms appear to be highly similar, if not identical, in pronunciation. As to meaning, both "ACURA" and "ACCURA" evoke accuracy or accurate results. In its brief, Applicant argues that

> The Examining Attorney provides no support or assertions as to how the two marks share a similar meaning other than a mere conclusory statement. The meaning of the two marks is vital as the only terms even considered by the Examining Attorney relate to the nonsensical terms "ACURA" and "ACCURA." Even comparing these two elements reveals distinct meanings. Applicant's "ACCURA" suggests the term accurate which means "free from mistakes or errors" according to Merriam Webster Dictionary (internal citations omitted). In contrast, the term "ACURA" is most readily associated with the vehicles manufactured by the Honda Motor Company.[19]

However, Applicant provides no support for its conclusory assertion that "ACURA" in Registrant's mark would be associated with Honda motor vehicles.

Nonetheless, the similarity or dissimilarity of the marks is determined based on the marks in their entireties, and the analysis cannot be predicated on dissecting

[19] 4 TTABVUE 10, 17.

the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.,* 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. V. Master Mfg. Co.,* 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion").

The term ACCURASCIENCE comprising the wording in both of Applicant's mark is far less similar to ACURA PHARMACEUTICALS in appearance when the terms are viewed as a whole. The marks are further dissimilar when pronounced. In addition, ACCURASCIENCE connotes accurate science or accuracy in scientific results whereas ACURA PHARMACEUTICALS connotes accurate pharmaceutical research or formulation. These connotations, while similar, nonetheless suggest different results.

In view of the foregoing, we find that when viewed in their entireties, ACCURASCIENCE and ACURA PHARMACEUTICALS are only somewhat more similar than dissimilar in appearance, sound, meaning and overall commercial impression.

With regard to Registrant's ACURA PHARMACEUTICALS mark and Applicant's mark

we find that, as discussed above, the word portions of the marks are only somewhat more similar than dissimilar. Applicant describes its design as "a thick line forming a U shape with the same shape repeated and flipped having both ends touch." In its brief on appeal, Applicant argues that the interplay between the wording and

> the helix design of Applicant's mark that suggests the interplay of nucleic acids in the sequencing of DNA. As such, the design of Applicant's mark uniquely relates to the DNA analysis service that Applicant's mark is used in conjunction with, as identified in the description of goods and services, thereby providing a markedly different appearance and commercial impression.[20]

Whether viewed as a thick line or a helix, the design in Applicant's mark is prominent in size and thus lends to the visual impression created thereby, although the design cannot be articulated. To the extent the design would be perceived as a helix as Applicant argues, the composite mark relates to Applicant's recited DNA services and adds a connotation to this mark absent from the mark in the cited registration. We note nonetheless that there is no evidence of the extent to which consumers would perceive it as such. Furthermore, we recognize the line of cases stating the principle that if a mark comprises both wording and a design, the wording is normally accorded greater weight because it would be used by purchasers to request the goods or services. *See, e.g., In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *Kabushiki Kaisha Hattori Tokeiten v. Scuotto,* 228 USPQ 461, 462 (TTAB 1985).

Nonetheless, we find that, when viewed in its entirety, Applicant's mark,

[20] 4 TTABVUE 13.

differs more strongly from the mark in the cited registration in appearance and also more strongly connotes accurate science. As a result, this mark also is only somewhat more similar to Registrant's ACURA PHARMACEUTICALS mark than dissimilar.

In view thereof, we find that the *du Pont* factor of the similarity of the marks weighs only somewhat in favor of a finding of likelihood of confusion.

Conditions of Sale and Sophistication of Purchasers

As discussed above, the evidence of record indicates that the consumers of Applicant's services and Registrant's services clearly are not ordinary consumers. By contrast, the record shows that these services would be targeted to medical research laboratories and pharmaceutical companies. The record shows that the primary purchasers of both of the recited services involved herein are companies involved in the pharmaceutical and biotech industries. By definition, all of these customers would be quite sophisticated. *See, e.g., Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992) (record confirms that opposer's services are expensive and are purchased only by experienced corporate officials after significant study and contractual negotiation and that the evaluation process used in selecting applicant's products requires significant knowledge and scrutiny).

We acknowledge the line of cases supporting the proposition that even if customers are knowledgeable in a particular field that does not necessarily mean that they are immune from source confusion. *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). In this case, however, given the highly technical and sophisticated nature of the involved services, we find that purchasers of these services would exercise a high degree of care and be likely to notice the differences between Applicant's marks and the mark in the cited registration.

As a result, this *du Pont* factor strongly favors a finding of no likelihood of confusion.

Conclusion

After considering all of the evidence properly of record and arguments pertaining to the *du Pont* likelihood of confusion factors, we find that while the services are related and appear to be offered in the same channels of trade, the purchasers of these services are highly sophisticated and, as a result, will distinguish the marks which, as discussed above, are only somewhat similar. In view thereof, we find that Applicant's marks, if used in association with the services identified in the applications, are not likely to cause confusion with the registered mark in connection with the services recited in the registration.

Decision: The likelihood of confusion refusal to register Applicant's marks is reversed.