

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Hearing:
August 12, 2010

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January 3, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Cardinal Health 303, Inc.

v.

The Alaris Group, Inc.

Opposition No. 91177234
to application Serial No. 78744914
for ALARIS Select filed on November 1, 2005

Opposition No. 91177365
to application Serial No. 78945025
for ALARIS Advantage filed on August 4, 2006

Opposition No. 91177366
to application Serial No. 78937067
for ALARISware filed on July 25, 2006

Opposition No. 91177367
to application Serial No. 78945352
for ALARIS filed on August 4, 2006

Cancellation No. 92048172

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for Cardinal Health 303, Inc.

Kristine M. Boylan and Elizabeth A. Zidones of Merchant &
Gould P.C. for The Alaris Group, Inc.

Opposition Nos. 91177234, 91177365, 91177366, 91177367
Cancellation No. 92048172

Before Seeherman, Grendel and Mermelstein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

The Alaris Group (hereafter "applicant") has filed four
applications to register ALARIS marks, and owns a
registration for a fifth mark, as set forth below:

Alaris Select in standard character format for
"medical consulting services in the field of
medical and vocational rehabilitation primarily
responding to the needs of the workers
compensation industry";¹

ALARIS Advantage in standard character format,
with "Advantage" disclaimed, for "franchise
services, namely, offering technical and business
management assistance in the establishment and
operation of medical consulting primarily for the
workers compensation industry" and "medical
consulting services in the field of medical and
vocational rehabilitation primarily responding to
the needs of the workers compensation industry";²

ALARIS *ware*

for "computer software for
the collection, editing, organizing, modifying,
book marking, transmission, storage, reporting and
sharing of data and information namely in the
field of medical consulting";³

ALARIS in standard character format for "franchise
services, namely, offering technical and business
management assistance in the establishment and

¹ Application Serial No. 78744914, filed November 1, 2005, based
on Section 1(a) of the Trademark Act, asserting first use on
April 1, 2003 and first use in commerce on April 15, 2004.

² Application Serial No. 78945025, August 4, 2006, based on
Section 1(b) of the Trademark Act (intent-to-use).

³ Application Serial No. 78937067, filed July 25, 2006, based on
Section 1(b) of the Trademark Act.

operation of medical consulting primarily for the workers compensation industry";⁴ and

ALARIS (typed drawing) for "medical consulting services in the fields of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry."⁵

Cardinal Health 303, Inc. (hereafter "opposer") has opposed the registration of the four applied-four marks, and has petitioned to cancel the already existing registration, on the ground of likelihood of confusion.⁶ Specifically, opposer has alleged that since prior to the filing of applicant's applications and the claimed dates of first use of the mark in its registration, opposer has been engaged in the manufacture, distribution and sale of, inter alia, medical instruments and equipment, and the service, repair, leasing and rental of medical instruments, equipment and accessories, with such goods bearing and services rendered under the mark ALARIS alone and in connection with other marks; that it owns registrations for ALARIS for various

⁴ Application Serial No. 78945352, filed August 4, 2006, based on Section 1(b) of the Trademark Act.

⁵ Registration No. 2930177, issued March 8, 2005 from an application filed July 3, 2003 and claiming first use on December 14, 1999 and first use in commerce on January 1, 2000. At the time the underlying application was filed, the term "typed drawing" was used to indicate a mark that was not in special form; subsequently the rules were amended and the term "standard character format" is now used for such a mark.

⁶ The initial pleadings also included a claim of dilution. With applicant's consent, opposer amended its pleadings to delete this ground, and to include an allegation of ownership of Registration No. 2371410 in connection with its likelihood of confusion ground.

medical instruments and equipment, and for the service, repair, leasing and rental of medical instruments, equipment and accessories⁷ and for ALARIS for certain electronic equipment and accessories;⁸ that applicant's marks are confusingly similar to opposer's ALARIS mark and applicant's services are related to the goods and services provided by opposer under its ALARIS mark or represent a natural zone of expansion for opposer.

Applicant essentially denied all the allegations in the pleadings. It also asserted the affirmative defenses of laches, acquiescence and estoppel.⁹

Because the opposition and cancellation proceedings present common questions of law and fact, the Board consolidated the proceedings, on opposer's motion, shortly after answers were filed.

By operation of the rules, the record includes the pleadings and the files of the opposed applications and the registration sought to be cancelled. The parties stipulated that testimony could be submitted by affidavit or declaration, and pursuant to that stipulation opposer submitted, under a notice of reliance, the declarations,

⁷ Registration No. 2279724, issued September 21, 1999.

⁸ Registration No. 2371410, issued July 25, 2000.

⁹ Applicant also asserted as an affirmative defense that the complaints failed to state a claim. However, applicant did not file a motion to dismiss, and we have not given this defense any consideration.

with exhibits, of Eric Gilmore, Patricia West, Gary Jollon, Jason Woodbury, B. Michael Betz, Larry E. Boggs, Erin N. Waltz, Richard Giometti, Cindy J. Burns and Timothy Vanderveen, while applicant submitted, under notice of reliance, the declarations of Kelly Flanagan, Shelley Hawthorne and Nancy Caven.¹⁰ Opposer has also submitted, under notice of reliance, status and title copies of its pleaded registrations for ALARIS, namely Registration No. 2279724 for:

medical instruments and equipment, namely, infusion pumps and controllers, including volumetric infusion pumps, syringe pumps, programmable infusion pumps, programmable syringe pumps and the resident control programs; clinical vital signs measurement instruments, namely, thermometers for medical use, disposable thermometer covers, blood pressure measurement instruments, pulse rate measurement instruments, blood pressure cuffs, pulse oximetry instruments, namely, sensors and monitors, respiration measurement instruments, and ECG instruments; medical fluid administration sets for the delivery of medical fluids, namely, drug delivery tubing, clamps, flow control devices, drug infusion connectors, adapters, injection sites, needleless connectors, needleless ports, needleless injection sites, and medical valves; medical devices for the delivery of medical fluids, namely, drug delivery tubing, clamps, flow control devices, drug infusion connectors, adapters, injection sites,

¹⁰ In its listing of the evidence of record, at pages 1-4 of its trial brief, applicant also referenced two declarations, of Scott Oslick and Kristine Boylan, that had been submitted in connection with its motion for summary judgment. Evidence submitted in connection with a summary judgment motion is not of record unless appropriately submitted during a party's testimony period. Because applicant did not submit these declarations during its testimony period, or file a notice of reliance thereon, they have not been considered.

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needleless connectors, needleless ports, needleless injection sites, and medical valves; intravenous fluid containers, monitors, alarms, rate meters; sphygmomanometers; enteric infusion pumps and bags therefor; medical instrument and intravenous fluid container stands and hanger devices; gastrointestinal feeding tubes; needle catheter jejunostomy kits, namely, tubing and needles; multiple specimen holders for medical use; cold and hot packs for chemically producing and absorbing heat for use in medical treatment and therapy; (Class 10)

service and repair of medical instruments, equipment and accessories (Class 37) and

leasing and rental of medical instruments, equipment, and accessories (Class 42);¹¹ and

Registration No. 2371410 for

electronic equipment and accessories, namely, fluid monitors; fluid flow rate meters; metered infusion pumps; ammeters; computer programs for controlling and monitoring fluid flows and detecting obstructions to fluid flows; and computer programs for capturing, storing, integrating, and presenting data in patient care management systems (Class 9)¹²

and, by stipulation of the parties, the discovery deposition, with exhibits, of Nancy Caven. Applicant has submitted under notice of reliance files of its applications

¹¹ Issued September 21, 1999; Section 8 & 15 affidavits accepted and acknowledged. The status and title copy was prepared in April 2009, before the due date for the renewal of the registration. In accordance with Board policy, we have ascertained that the registration has been renewed.

¹² Issued July 25, 2000; Section 8 & 15 affidavits accepted and acknowledged. As with Registration No. 2279724, the status and title copy was prepared in April 2009, before the due date for the renewal of the registration. In accordance with Board policy, we have ascertained that the registration has been renewed.

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and registrations¹³ and, by stipulation, documents that it produced during discovery.

In view of opposer's registrations that are of record, opposer has demonstrated its standing. See Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

With respect to the four opposition proceedings, because of opposer's ownership of its pleaded registrations, priority is not in issue. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). As for the cancellation proceeding, because both parties own registrations, priority is in issue. Brewski Beer Co. v. Brewski Brothers, Inc., 47 USPQ2d 1281, 1284 (TTAB 1998). Applicant's registration for ALARIS for "medical consulting services in the fields of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry" issued March 8, 2005 from an application filed July 3, 2003 and claiming first use on December 14, 1999 and first use in commerce on January 1, 2000. Opposer's registration No. 2279724 issued September 21, 1999, before the claimed use date in applicant's registration, while the filing date of the

¹³ It was not necessary for applicant to submit the files for the applications and registration that are the subject of this consolidated proceeding; these files are of record by operation of the rules.

intent-to-use-based application which matured as opposer's registration No. 2371410 is January 10, 1997, again before the date of first use claimed in applicant's registration. Therefore, based just on these dates, opposer has demonstrated its priority. In addition, the testimony declaration of Timothy Vanderveen, a vice president of opposer, states that opposer began using the mark ALARIS in July 1997 for all the medical products and services it was then selling, and which included all the goods and services listed in its pleaded registrations. Dec. ¶¶ 8, 20, 22.

With respect to the issue of likelihood of confusion, our determination 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, 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). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the marks, two of applicant's marks are identical to opposer's mark ALARIS, while the three

others—"ALARISware," "ALARIS Select" and "ALARIS Advantage"—are nearly identical. In the latter marks the initial element, ALARIS, is identical to opposer's mark, and the additional wording, which is descriptive or highly suggestive, does not serve to distinguish the marks. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this connection, we note that applicant disclaimed the word ADVANTAGE, presumably because it is laudatorily descriptive, that WARE in the mark ALARISware describes the goods identified in the application, software, and that SELECT in ALARIS Select is highly suggestive. Both parties' witnesses testified that the name ALARIS is derived from the Latin word for wing. Accordingly, we find that the marks are similar in appearance, sound, connotation and commercial impression due to the presence of the dominant term ALARIS in the parties' marks. This du Pont factor favors a finding of likelihood of confusion.

In addition, opposer has submitted evidence that ALARIS does not have a dictionary meaning, Waltz decl., and we view ALARIS as an arbitrary term for opposer's goods and services. Further, opposer has used the mark since 1997, and its sales of medical devices, and in particular, infusion pumps, are significant. However, despite opposer's assertion in its brief that its mark is famous within the healthcare industry, we cannot find, on this record, that opposer has a famous mark. "Raw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading... Consequently, some context in which to place raw statistics is reasonable." *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002). In fact, in its amended notices of opposition and petition to cancel (in which it deleted the ground of dilution), opposer did not even plead that its mark is famous. Although in its brief opposer has cited cases standing for the proposition that fame, when it exists, plays a dominant role, even opposer does not claim that its mark is generally famous, as the marks in the cited cases were famous, only that its mark has achieved fame in the healthcare industry. Certainly opposer has not demonstrated that its mark is famous in the eyes of the patients on whom its medical devices are actually used,

although in asserting likelihood of confusion opposer has claimed that patients are likely to be confused. See Vanderveen decl. ¶ 41. Nor has it demonstrated that the mark is famous in the eyes of insurance companies that would be purchasers or users of applicant's services. On the contrary, applicant's witness, Shelley K. Hawthorne, whose company has worked with applicant for six years, testified that she has worked in the insurance industry for eleven years and is not familiar with opposer's use of ALARIS for medical devices.

Although the evidence is not sufficient to show that opposer's mark ALARIS is a famous mark, as an arbitrary mark with no evidence of third-party use, we deem it to be a strong mark that is entitled to a broader scope of protection.

Opposer relies on these two factors—the similarity of the marks and the strength of its mark—to claim that judgment should be entered in its favor:

[Applicant] does not contest any of the following facts: the parties' respective ALARIS Marks are identical in sound, sight and overall commercial impression; [opposer's] ALARIS Marks are strong and well-known, and there are no other registrations of the term ALARIS for goods or services in the medical or healthcare industry. On these bases alone, [opposer's] cancellation/opposition should be sustained.

Reply brief, p.1. In fact, opposer goes so far as to say that it should prevail even if we were to conclude that the

factors of the relatedness of the goods and services and the channels of trade are neutral. However, this does not accurately reflect the principles of trademark law. Even when a mark has been shown to be famous, more is required to demonstrate likelihood of confusion. As the Court said in *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983):

The fame of the University's name is insufficient in itself to establish likelihood of confusion under § 2(d). "Likely * * * to cause confusion" means more than the likelihood that the public will recall a famous mark on seeing the same mark used by another. It must also be established that there is a reasonable basis for the public to attribute the particular product or service of another to the source of the goods or services associated with the famous mark. To hold otherwise would result in recognizing a right in gross, which is contrary to principles of trademark law and to concepts embodied in 15 USC § 1052(d).

See also, *Coach Services Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1607 (TTAB 2010) ("Based on this record, we find that opposer's COACH mark is famous for purposes of likelihood of confusion. However, this factor alone is not sufficient to establish likelihood of confusion. If that were the case, having a famous mark would entitle the owner to a right in gross, and that is against the principles of trademark law").

We must therefore consider whether opposer has met its burden of showing that its goods and services and those of applicant are related.

In considering the relatedness of the goods and services, we look at the arguments that opposer has made in its briefs, as presumably opposer considers these the strongest points in its favor. Opposer's arguments regarding the relatedness of the parties' goods and services are set forth at pages 27-29 of its main brief. Aside from general statements of trademark law, e.g., strong marks are given a broader scope of protection, and goods and services do not have to be identical in order to support a finding of likelihood of confusion, opposer's position that its goods and services and those of applicant are related is as follows:

[Opposer] has presented ample evidence of the possibility for source confusion between [opposer's] ALARIS-branded products and [applicant's] medical consulting services and software. [Opposer] markets several of its ALARIS-branded products directly to the home healthcare market, and has significant sales in that market. [Applicant's] medical consulting services are provided to patients in a home healthcare setting. ... In this case, it is clear that [applicant's] medical consulting services and software, as set forth in its applications and registration might likely be associated by purchaser with [opposer's] ALARIS medical equipment and computer software and be assumed to originate from a common source.

Brief, pp. 28-29.¹⁴

Thus, the basis for opposer's claim that the parties' goods and services are related, as made in its main brief, stems from the potential for confusion in the home healthcare area, with patients that are using opposer's medical devices such as infusion pumps also having their medical cases managed by applicant. In its reply brief, opposer states that "both parties' goods and services are related to the medical field, have the potential to be used by the same personnel, and are likely to be used by and for the same patients." p. 4.

The "evidence of the possibility" of confusion referenced in opposer's main brief is discussed primarily at pages 20-22 of the brief, and essentially consists of quoting the testimony of its Vice President Timothy Vanderveen and of Patricia West, its Director of Clinical Marketing, Clinical Technologies and Services. In order to clearly convey the evidence that opposer believes supports its position that the parties' goods and services are related, we repeat the testimony which was extensively quoted by opposer in its brief.

Timothy Vanderveen testified (decl ¶¶41 and 42):

¹⁴ The statements omitted from the quote are general principles of trademark law that likelihood of confusion is determined based on the goods and services as they are identified in the applications and registrations.

Given the widespread use of [opposer's] products in all health care settings, including home health care settings, I see a potential for confusion with the services provided by [applicant] in several areas: a) a patient who has been assigned to [applicant] for case management could be using an ALARIS product in the home and may think there is a connection between the case manager and the Company; b) hospital personnel who may have had a bad experience with a case manager from [applicant] may not want to use products from my Company; c) patients working with [applicant] may try to reach their case manager and contact my Company by mistake; d) a patient who is using an ALARIS product in the home and who is working with The Alaris Group may have a question or problem with their ALARIS product and contact [applicant] by mistake. This last issue could have life-threatening consequences.

The potential for confusion is further demonstrated by doing a simple search on Google for "Alaris + nursing homes". As the attached printout shows (Exhibit F), the first five entries relate to [opposer's] products, followed by several entries referencing [applicant], which include links that take the viewer directly to the home page of [applicant]. In my opinion, this type of listing could be confusing for a home health care patient, and could cause them to think there was a connection between my Company's Alaris products and the services provided by [applicant].

Patricia West testified (decl ¶¶ 7, 8, 11, 12, 13):

I note that one of the services [applicant] provides is "Catastrophic Case Management" ... which is described on their website as follows:

Extreme injuries require meticulous handling right from the start. ALARIS Catastrophic Case Managers are exceptionally qualified to assess the injury, clarify the diagnosis, define the treatment plan and coordinate all necessary services to stabilize the patient. Their timely involvement can expedite the transition from acute care

to optimal functioning--and lessen the
cost of the loss.
[http://www.alarisgroup.com/catastrophic/
index.html](http://www.alarisgroup.com/catastrophic/index.html)

The type of care described above--particularly the
idea of transitioning a patient from acute care to
an out-of-hospital setting--is precisely the type
of care that would require a nurse case manager
who is familiar with and conversant in (among
other things) infusion therapies.

I also reviewed the qualifications of several of
the case managers listed on [applicant's]
website.... In my opinion, based on their
qualifications, the medical case managers listed
who have RN and/or BSN degrees should be likely to
be familiar with and conversant in infusion
therapies, and should be likely to be familiar
with my Company's infusion therapy products.

Given that some of my Company's Alaris infusion
pumps can be used in a home care setting for
patients, there is a likelihood that my Company's
products and services could be used on the same
patients who are being treated by employees of
[applicant].

Based on my understanding of the types of services
[applicant] provides under the name The Alaris
Group, inc. it is very possible that its employees
could use my Company's Alaris infusion pumps and
other Alaris products.¹⁵

In its reply brief, opposer again refers to this
testimony, stating that Mr. Vanderveen "testified that there
is a potential for confusion in several areas by patients
and hospital personnel due to the overlap between the

¹⁵ As an aside, we find it interesting that in declaration
testimony, which is obviously thought out and in which the
sentences are carefully crafted, the witness would refer to the
applicant's services as being provided under the name "The Alaris
Group, Inc." when none of the marks at issue in this consolidated
proceeding is for that name.

services provided by the parties, including confusion leading to potentially life-threatening consequences," and that "the prominent online use of the identical term ALARIS by both parties in the field of nursing homes further supports the potential for confusion by patients." p. 4. Opposer also repeats statements from the last two paragraphs of Ms. West's testimony that we have quoted above.

Opposer has not specifically discussed the goods and services set out in applicant's applications and registration in order to explain how each is related to opposer's goods and services. Rather, it has concentrated on the consumers that might be confused by the use of applicant's marks, namely, patients and nurses. In the context of patients, opposer's witness Mr. Vanderveen, as quoted above, asserts that opposer's products might be used for a patient, and that this same patient might also work with a case manager from applicant. He has provided no evidence whatsoever of the relatedness of applicant's franchise services and software and opposer's goods or repair and leasing services for such goods, and certainly we see no support for a conclusion that patients would be potential consumers of applicant's franchise services, or purchasers or users of opposer's software.

As for applicant's medical consulting services in the field of medical and vocational rehabilitation primarily

responding to the needs of the workers compensation industry, although the purpose of these services is to help the insurance company in limiting costs, patients may encounter applicant's services and its marks in the context of case managers who might, for example, make visits to the patient in the context of monitoring or assessing their progress and needs. However, opposer has not shown that patients will be aware of opposer's trademarks. On the contrary, "[Opposer's] products and services are not promoted and marketed via the same channels as more consumer-oriented products,"... but are "promoted to professionals within the healthcare community." Burns decl ¶ 6. Although products such as infusion kits and IV disposables may be used in connection with a patient's care, there is no evidence that patients purchase these products directly or otherwise are involved in the decision to purchase a particular brand, nor has opposer provided evidence that patients actually note the brands for such products.¹⁶

¹⁶ Opposer has not argued nor submitted any evidence that any of its products would be purchased directly by patients. Although we note that the identification of goods in opposer's Registration No. 2279724 includes "clinical vital signs measurement instruments, namely, thermometers for medical use," the fact that the thermometers are qualified as being "clinical vital signs measurement instruments," as well as the other items listed in this category, e.g., blood pressure measurement instruments, pulse rate measurement instruments and blood pressure cuffs, indicates that the thermometers are not the home use type of thermometers that an ordinary person would buy. In

As for the nurses whom opposer also identifies as a group that is likely to be confused, the evidence shows that nurses use opposer's products, and may well be aware of the brand name ALARIS. See, for example, an entry from the blog allnurses.com, in which a writer states that her hospital needs to order new IV pumps and says they are considering, inter alia, ALARIS brand products. Exhibit D to Vanderveen decl. The normal situation in which a nurse may encounter both opposer's goods and applicant's services is as a home healthcare nurse, who could be using opposer's infusion pump or other medical devices on a patient and also have contact with a nurse or other personnel sent by applicant to help manage the patient's case for an insurance company. It is also possible that applicant could send a case manager to visit a patient while he or she is still in a hospital or acute care setting, although applicant's evidence shows that this is less likely. In either situation, it is not the nurse that is sent by applicant to manage the patient's case that could be confused by applicant's use of the ALARIS marks; that nurse is an employee or agent of applicant.

any event, there is no evidence that patients would be aware that companies that make home use thermometers also render "medical consulting services in the field of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry," such that they would assume that a thermometer that can be bought in a drugstore would emanate from the same source as the medical consulting services identified in applicant's applications and registration.

Thus, Ms. West's testimony, which is concerned with applicant's own employees/case managers, is not persuasive: it is essentially testimony that applicant would be confused by its own use of its mark.

With respect to the nurse who has been hired to care for the patient and may be using opposer's goods in connection with the patient and who may also have contact with applicant's case managers, we agree that he or she would be aware that the mark ALARIS is used for both opposer's goods and applicant's services. However, other than the fact that the marks are the same, there is no evidence as to why such third-party nurses would assume that the goods and services originate from the same source. For example, there is nothing in the record to show that companies that make infusion pumps and other medical devices also provide the services identified in applicant's applications and registration. Moreover, it is not clear to us how the nurses who provide healthcare services to patients and use opposer's medical devices would be purchasers or consumers of applicant's identified medical consulting services, franchise services and computer software, as those goods and services are identified in applicant's applications and registration. The customers for applicant's services and goods are essentially insurance

companies who are attempting to keep insurance costs down through the appropriate management of a patient's care. Its customers are not the nurses who actually care for patients nor, as discussed above, are its customers the nurse/employees of applicant's who do the case management. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992) ("the Board's finding that the goods 'would likely be encountered by some of the same [relevant] persons,' while true, does not establish that the actual and potential purchasers from each party would be the same, due to specialization among their corporate customers' departments").

It is well settled that it is not a sufficient basis for demonstrating that goods and services are related simply because a single term can be used to describe them all:

It is, however, not enough to find one term that may generically describe the goods. More must be shown: that is, a commercial or technological relationship must exist between the goods such that the use of the trademark in commercial transactions on the goods is likely to produce opportunities for purchasers or users of the goods to be misled about their source or sponsorship.

General Electric Company v. Graham Magnetics Incorporated, 197 USPQ 690, 694 (TTAB 1977). In the case at hand, nurses must be viewed as sophisticated about their field, and would

not assume, without anything more, that all goods and services having anything to do with the medical profession would emanate from a single source simply because they were offered under the identical mark.

Similarly, Mr. Vanderveen's supposition that "hospital personnel who may have had a bad experience with a case manager from applicant may not want to use products from my Company" has no support in the record, in terms of showing why hospital personnel would assume that the same company that uses case managers for "medical consulting services in the field of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry" would also make, repair and lease medical devices such as infusion pumps. As for Mr. Vanderveen's testimony that a Google search for "Alaris + nursing homes" retrieved entries for opposer's products and applicant's services (although references to both parties were not found in the same entry), we do not find this evidence persuasive that the parties' goods and services are related. The fact that a Google search can be devised that can retrieve hits that separately reference the parties' goods and services does not mean that patients or nurses are likely to do such a search. Opposer has not provided any reason why a patient or nurse would search "ALARIS + nursing homes."

"We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." *Witco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969). However, the potential situations for confusion advanced by Mr. Vanderveen (and listed as examples by opposer in its brief) appear to us to be mere theoretical possibilities, without evidentiary support.

In determining the issue of likelihood of confusion, although all du Pont factors on which there is evidence must be considered, different weight can be accorded to different factors in a particular case. "Each may from case to case play a dominant role." *In re E.I. du Pont de Nemours & Co.*, 476 F.2d at 1362, 177 USPQ at 567. In this case, we find that, with respect to the "medical consulting services in the field of medical and vocational rehabilitation primarily responding to the needs of the workers compensation industry" and "franchise services, namely, offering technical and business management assistance in the establishment and operation of medical consulting primarily for the workers compensation industry" identified in applicant's applications and registration, the factors of the relatedness of the goods and services (and more

particularly, the lack of evidence of such relatedness), and the sophistication of the users, which favor applicant, far outweigh the factors of the similarity of the marks and the strength of opposer's mark, which favor opposer. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, supra. However, although not argued or even discussed by opposer, we note that applicant's identified goods in its ALARISware application, "computer software for the collection, editing, organizing, modifying, book marking, transmission, storage, reporting and sharing of data and information namely in the field of medical consulting," is very similar or encompasses the "computer programs for capturing, storing, integrating, and presenting data in patient care management systems" identified in opposer's Registration No. 2371410. That is, they are both computer software that collects/captures and stores data, and the data in the field of medical consulting referenced in applicant's identification can include data in patient care management systems referenced in opposer's registration. When the similarity of these goods is considered along with the similarity of the marks and the strength of opposer's mark, even sophisticated purchasers are likely to assume that these goods emanate from a single source.

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Accordingly, we find that applicant's mark ALARISware for its identified computer software is likely to cause confusion with opposer's Registration No. 2371410. However, opposer has failed to demonstrate that confusion is likely to occur from applicant's use of its marks for the services identified in its applications and registration and opposer's use of its mark for its goods and services. In view of this finding, we need not address applicant's affirmative defense of laches, which applicant has argued only with respect to the cancellation proceeding.¹⁷

Decision: The oppositions to the marks ALARIS Select (No. 91177234), ALARIS Advantage (No. 91177365) and ALARIS (No. 91177367) and the petition to cancel are dismissed. The opposition to the mark ALARISware (No. 91177366) is sustained.

¹⁷ Although applicant included the general statement in its answer to the notices of opposition that "the Opposition should be denied based on the doctrines of laches, acquiescence and estoppel," it did not argue these defenses in connection with the oppositions, and we therefore deem them waived. In any event, because laches does not begin to run until a mark has been published for opposition, and opposer brought this proceeding during the opposition period, applicant cannot show the requisite element of delay. See *National Cable Television Association Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991).