

10/30/98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Wright Medical Technology, Inc.

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Serial No. 75/024,024

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Russell H. Walker of Walker McKenzie & Walker, P.C. for  
Applicant.

Tina L. Snapp, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).

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Before Hohein, Chapman and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant, Wright Medical Technology, Inc., has filed  
an application for registration of the mark "EXTEND" for  
"medical apparatus, namely, orthopedic hip implants."<sup>1</sup>

The Trademark Examining Attorney issued a final  
refusal to register based upon Section 2(d) of the

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<sup>1</sup> Serial No. 75/024024, in International Class 10, filed  
November 17, 1995, based on an allegation of a *bona fide*  
intention to use the mark in commerce.

Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's proposed mark, "EXTEND," when used on orthopedic hip implants, so resembles the registered mark, "X-TEND" for "carpal tunnel supports, elbow supports, thumb/wrist supports, back braces, all for medical or therapeutic use,"<sup>2</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed the final refusal to register. Briefs have been filed but applicant did not request an oral hearing. We reverse the refusal to register.

With respect to the refusal on the ground of likelihood of confusion, applicant asserts that the chances for confusion are remote because the respective goods are used in different medical specialties; that those who prescribe these goods are extremely sophisticated; and, that, in reality, the products are so very different that one can conclude there is no overlap in the channels of trade for these respective goods. Furthermore, applicant notes that the trademarks are different as to spelling and appearance.

The Trademark Examining Attorney contends that the goods of both parties are medical devices in the nature of

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<sup>2</sup> Reg. No. 1,707,740, issued August 18, 1992; §8 affidavit accepted & §15 affidavit received.

orthopedic products. The Examining Attorney concedes that applicant's target audience may be narrower than that of registrant. However, according to the Examining Attorney, there is a strong presumption that applicant's goods will be marketed, for example, to purchasing agents in hospitals, as would registrant's goods. Such a medical professional might reasonably believe that a manufacturer offering a product like orthopedic hip implants might also sell back braces and external support devices for the extremities. Finally, the Trademark Examining Attorney points out that even sophisticated purchasers can be confused by identical or highly similar trademarks. Consequently, the Examining Attorney finds that hip implants are so closely related to back braces and external medical/therapeutical support devices that confusion as to the origin or affiliation of the respective goods is likely to occur.

In the course of rendering this decision, we have followed the guidance of *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.<sup>3</sup>

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<sup>3</sup> We have not considered the declaration of Mr. Thomas M. Patton, applicant's President and Chief Executive Officer, filed

As has often been stated, it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed thereon, to the mistaken belief that they originate from or are in some way associated with the same producer. See, e.g., *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-96 (TTAB 1978) and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). Here, however, the precision medical apparatus manufactured and sold by applicant is a very specialized device. Orthopedic surgeons comprise applicant's target audience. Even if hospital purchasing agents and administrators are the professionals placing the order in a given medical facility, they would do so only as directed by the attending orthopedic implant surgeon.

According to applicant, registrant designs, manufactures and markets medical and therapeutical devices. This type of product is prescribed by physicians, fitted by

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with the reply brief, since the Patton declaration is untimely under Trademark Rule 2.142(d).

therapists specializing in rehabilitation, and should be available at retail to members of the general public (e.g., in one's local pharmacy). Registrant's listed items tend to be less expensive than applicant's goods, as manufactured they are fungible, they are intended for external support only, and according to applicant, would not be prescribed by an orthopedic surgeon. Conversely, applicant points out the obvious -- that physicians or therapists who specialize in occupational medicine and use registrant's therapeutic products would not be involved in the decisions surrounding hip replacement surgery.

(Applicant's brief, pp. 3-4)

The record includes printouts of seven federal trademark registrations where goods resembling those of applicant and registrant are listed on the same certificate. These third-party registrations are submitted as evidence of the asserted relatedness of the respective parties' goods involved herein. While we have considered the evidence of these third-party registrations, its probative value is limited.

On the one hand, these registrations do show that seven entities have registered their marks for goods of the type recited by applicant and for goods listed by registrant. Registrations which individually cover a

number of different items and which are based on use in commerce may have some probative value. Their value is the suggestion that the listed goods are of a type that may well emanate from a single source.

On the other hand, no third-party registration demonstrates that the marks shown therein are in commercial use. Federal trademark registrations do not prove that members of the relevant public are familiar with the marks.

Furthermore, third-party registrations that issued under Section 44(e) of the Act, 15 U.S.C. §1126(e), without any use in commerce basis, have almost no persuasive value. In the instant case, three of the seven third-party registrations made of record by the Trademark Examining Attorney issued under the provisions of Section 44(e) of the Act, based only upon ownership of a foreign registration. Such registrations have very little, if any, persuasive value on the point for which they were offered. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993), and cases cited therein.

The Trademark Examining Attorney is correct that both parties' products are medical devices in the field of orthopedics. Otherwise, applicant's goods are significantly different from registrant's goods. They are

quite different in the manner in which they function and the ways in which they are intended to be utilized.

That both parties are marketing orthopedic devices does not mandate a finding that the products are related or that confusion is likely. After all, the medical community is not a homogeneous whole. Rather, hospitals and other medical facilities comprise separate departments having diverse purchasing requirements. As noted in Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 220 USPQ 786, 791 (1st Cir. 1983), these departments constitute different markets for the parties' respective products.

We find that this case does not reflect any meaningful overlap in the channels of trade. The Examining Attorney's conclusions seem at odds with the real-world purchasing decisions as outlined by applicant. We conclude that the parties' respective products are different, with distinct channels of trade.

Unlike registrant's products, applicant's products are "fitted" by a specialized surgeon in hospital operating rooms or other in-patient critical care settings. Registrant's goods are functionally quite different. They would almost always be fitted in an outpatient setting. They are used primarily in the field of occupational

medicine, by medical doctors specializing in rehabilitation medicine and by other clinicians in related fields.

The Board is convinced that orthopedic hip implantation is a highly specialized medical area. The applicant and the Trademark Examining Attorney agree that the purchaser<sup>4</sup> for the purposes of trademark analysis comprises a most sophisticated market. There may be nuances of difference in their conclusions as to which professional on the hospital team chooses among competing vendors of this type of medical apparatus. In any event, a small and select group of medical professionals -- the orthopedic surgeon, operating room nurse supervisors and hospital administrators or purchasing agents or committees -- decides which firm or firms will be supplying the implants. As applicant has pointed out, ultimately the critical recommendation, if not the final decision, is made by the surgeon.

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<sup>4</sup> The ultimate "consumer" of applicant's device is hoping to get a working hip -- she/he is not buying a medical apparatus. *Cf. Continental Plastic Containers Inc. v. Owens-Brockway Plastic Products Inc.*, 141 F.3d 1073, 46 USPQ2d 1277 (Fed. Cir. 1998). The hip implant patient is technically the end-user of these sophisticated medical devices and related healthcare services. In most cases, the patient will have chosen a medical facility or surgeon based upon the reputation of the unit, or even the renown of a particular orthopedic surgeon. It would stretch credulity to believe that patients fitting the general profile of candidates for hip replacement surgery are involved in comparison shopping among manufacturers of such specialized medical apparatus.

Orthopedic surgeons are well informed and discriminating -- a most sophisticated group of consumers who use great care in deciding the source of such an item.<sup>5</sup> It seems to go without need for citation that surgeons would not purchase EXTEND brand hip replacement implants on an impulse, but only after deliberate and careful consideration, knowing exactly with whom they are dealing. Conversely, applicant argues that orthopedic surgeons would not prescribe registrant's therapeutic devices.

While the record is less clear about the exact type of professionals making the purchasing decisions involving registrant's goods, buyers of registrant's goods are also highly educated, sophisticated purchasers who know their equipment needs and would be expected to exercise a great deal of care in its selection.

Applicant argues that it sells and advertises its products only to the narrowest of markets. As far as the instant products are concerned, applicant has a niche market and targets orthopedic surgeons through professional magazines, medical conferences, etc. Since as discussed

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<sup>5</sup> Our principal reviewing court has held that when the goods of both parties are sophisticated medical equipment, they would be selected with great care by purchasers familiar with the source or origin of the products. *See In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985).

earlier, registrant has quite a different market, we conclude that the parties have disparate channels of trade.

The realities of the relevant marketplace make confusion of the marks for these dissimilar goods decidedly unlikely. The potential number of customers who would be dealing with both companies in two separate, specialized medical areas is minuscule or even non-existent. We find that any overlap in customers is too small to be significant. Inasmuch as this small population consists entirely of highly educated, sophisticated, health-care professionals any potential overlap is not dispositive in this case.

This brings us to consideration of the parties' marks. The applicant and the Trademark Examining Attorney also disagree over just how significant are the similarities or differences in the two marks.

Registrant's mark is "X-TEND." Arguably, registrant's mark would be pronounced the same as if it comprised the word "extend." Applicant has adopted the mark "EXTEND," an ordinary word in the English language, used here in a somewhat suggestive manner for hip implants. Considering the marks in their entirety, applicant's mark and registrant's mark are identical phonetically but different in appearance. As noted above, even if there should be a

remote chance of some overlapping of ordering personnel in the hospital setting, these are not items where the purchasing transactions would be completed orally.

The target audience for applicant's medical appliances comprises sophisticated medical professionals. Hence, the fact that the marks "EXTEND" and "X-TEND" differ in appearance mitigates against a finding of likelihood of confusion. The sophisticated buyers -- physicians and/or hospital purchasing agents -- would readily recognize the difference in the appearance of the marks if she or he is acquainted with one mark and subsequently sees the other.

A decade ago, the Board had occasion to decide another case where the first syllable of the two-syllable marks differed visually in a remarkably similar way to these two marks. In Information Resources Inc. v. X\*Press Information Services, 6 USPQ2d 1034 (TTAB 1988), the Board held that the simultaneous use of the mark "EXPRESS" on information software and the mark "X\*PRESS" for service comprising the transmittal of information to computers -- *expensive items purchased with care and thought* -- is not likely to result in confusion, since *inter alia*, the marks *differ significantly in appearance* (emphasis supplied). More recently, the Board found that two marks of quite similar appearances -- "DIGIRAD" and "DIGIRAY" -- would not

result in a likelihood of confusion although both were being used on medical equipment sharing many of the same characteristics.<sup>6</sup> In the intervening decade, our principal reviewing court reached a consistent result in an *inter partes* contest, also in the medical field (E.D.S. v. EDS).<sup>7</sup>

Given the differences in the nature of the respective goods; the differing marketing and trade channels involved; the sophistication of the medical professionals -- especially physicians; the narrow scope of applicant's goods; and the *de minimus* chance of any potential overlap in the respective customers, we find that the respective marks are not so similar that confusion as to the origin or

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<sup>6</sup> The Board found no likelihood of confusion between applicant's DIGIRAD mark intended to be used on nuclear imaging equipment, and registrant's DIGIRAY and design mark, used on x-ray imaging equipment. These goods were found not to be closely related given the differences in relevant purchasers of these goods, the sophistication of those purchasers, the care with which such products are purchased, and the relative expense of both products. The Board reached this conclusion even though both x-ray imaging and nuclear imaging are medical diagnostic technologies, both technologies involve use of a form of radiation, and both types of imaging may be performed on patients during diagnosis and/or treatment of an illness or injury. *In re Digirad Corp.*, 45 USPQ2d 1841 (TTAB 1998).

<sup>7</sup> The Court found no likelihood of confusion between "E.D.S.," for battery chargers and power supplies incorporated into medical instruments, and "EDS," for computer services sold to customers, *inter alia*, in the medical field, noting that the purchasers are substantially different and are usually sophisticated. *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 21 USPQ2d 1388 (Fed. Cir. 1992).

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affiliation of applicant's and registrant's medical equipment would be likely to occur.

Accordingly, we find no likelihood of confusion between applicant's mark "EXTEND," for orthopedic hip implants and registrant's mark "X-TEND" for carpal tunnel supports, thumb/wrist supports, and back braces for medical and therapeutical use.

*Decision:* The refusal to register is reversed.

G. D. Hohein

B. A. Chapman

D. E. Bucher  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board