

Hearing:  
March 24, 1999

Paper No. 21  
HRW

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      OCT. 18, 99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re Agri Laboratories, Ltd.

---

Serial No. 75/146,210

---

Brian D. Anderson and Kathleen Cooney-Porter  
Of Oblon, Spivak, McClelland, Maier & Neustadt, P.C.  
for Agri Laboratories, Ltd.

Alec Powers, Trademark Examining Attorney,  
Law Office 105 (Thomas G. Howell, Managing Attorney).

---

Before Hanak, Quinn and Wendel, Administrative Trademark  
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Agri Laboratories, Ltd. has filed an application to  
register the mark FLU-NIX for "analgesic and anti  
inflammatory veterinary preparations for equine animals  
sold by prescription through veterinarians."<sup>1</sup>

Registration has been finally refused under Section  
2(d) of the Trademark Act, on the ground of likelihood of

confusion with the registered mark FLUNIXAMINE for "anti-inflammatory preparations for veterinary use."<sup>2</sup> Applicant and the Examining Attorney have filed briefs and both participated in an oral hearing.

It is well established that any determination of likelihood of confusion must be made on the basis of the goods as identified in the application and in the cited registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ 1813 (Fed. Cir. 1987). There is no question but that the veterinary preparations of applicant are fully encompassed by the veterinary preparations identified in the registration. Even more specifically, applicant has made of record a copy of the file history of the cited registration in which the specimens show that the mark FLUNIXAMINE is being used by registrant for the drug having the generic name Flunixin Meglumine. Applicant asserts that it must assumed that its product would fall under this same generic name. Thus, we are dealing with virtually identical veterinary preparations which would travel through the same channels of trade and be bought, for later resale through prescriptions, by the same veterinarians.

---

<sup>1</sup> Serial No. 75/146,210, filed August 6, 1996, based on the assertion of a bona fide intention to use the mark in commerce.

On this basis, we look to applicant's mark FLU-NIX and registrant's mark FLUNIXAMINE. The Examining Attorney argues that the marks are highly similar because both contain the first two syllables of the generic name, Flunixin Meglumine. He maintains that the suffix -AMINE in the registered mark simply describes the "amines" present in registrant's goods and that FLUNIX is the dominant portion of the mark.

Applicant argues that the cited mark, being an obvious contraction of the generic designation, is only entitled to a narrow scope of protection. Applicant maintains that the proper policy is to allow the coexistence of third-party marks in the pharmaceutical field which are suggestive of the generic designation, rather than permit any one party to appropriate the designation. Applicant further argues that there are significant differences in the two marks FLUNIXAMINE and FLU-NIX, not only in appearance and sound but also in the fact that a second, distinct meaning exists for applicant's mark FLU-NIX, namely, "Nix the Flu."

During the prosecution of this case, applicant made of record a copy of the definitions found in the *USP Dictionary of USAN and International Drug Names* (1996 Ed.)

---

<sup>2</sup> Reg. No. 2,009,008, issued October 15, 1996, with claimed first use dates of November 20, 1995.

for the generic drug names Flunixin and Flunixin Meglumine. In reviewing these definitions, we see that Flunixin is the name for the anti-inflammatory and analgesic drug per se, while Flunixin Meglumine is the name for the same anti-inflammatory and analgesic drug when compounded with Meglumine. In the interests of completeness, we have taken judicial notice of the separate listing of Meglumine as the name for the chemical compound D-Glucitol, 1-deoxy-1-(methylamino)-, a drug used as a diagnostic aid in a radiopaque medium,<sup>3</sup> and of the general definition of an "amine" as "one of a class of organic compounds which can be considered to be derived from ammonia by replacement of one or more hydrogens by organic radicals."<sup>4</sup> Meglumine, accordingly, would be generally classified as an "amine." Furthermore, we note that on the specimen label found in the file history of the cited registration which has been made of record by applicant, the equivalent dosage of Flunixin in each mL of registrant's brand of Flunixin Meglumine is set forth.

Taking all of this information into consideration, we believe that the marks FLUNIXAMINE and FLU-NIX would be

---

<sup>3</sup> *USAN and the USP Dictionary of Drug Names* (1992 Ed.).

<sup>4</sup> *McGraw-Hill Dictionary of Scientific and Technical Terms* (3<sup>rd</sup> Ed. 1984).

likely to be viewed by the relevant purchasers as comparable contractions of the two generic designations Flunixin Meglumine and Flunixin, respectively, and as being used for veterinary preparations originating from the same source. Since both Flunixin and Flunixin Meglumine function as anti-inflammatory and analgesic drugs, the preparations identified in applicant's application, we are not required to make the assumption argued by applicant that its preparations also fall under the generic designation Flunixin Meglumine. Instead, applicant's preparations could well be the uncompounded drug Flunixin. As such, FLUNIX (or FLU-NIX) would be the predictable variation of the registered mark. The commercial impression remains the same, the use of FLUNIX or FLU-NIX as a shortened version of the generic name Flunixin. There is no additional word of non-generic significance in applicant's mark which might serve to distinguish its mark from the registered mark. Cf. American Cyanamid Corp. v. Connaught Laboratories, Inc., 800 F.2d 306, 231 USPQ 128 (2<sup>nd</sup> Cir. 1986)[since "Hib" is generic as used in marks HibVAX and HIB-IMUNE for influenza vaccines, suffixes are sufficiently different to obviate likelihood of confusion]. The second meaning asserted by applicant for its mark,

i.e., Nix the Flu, is not only unsupported by any evidence of the use of the preparation for this particular illness,<sup>5</sup> but would also appear to be equally applicable to the registered mark.

We acknowledge that the persons who would purchase and prescribe these preparations are veterinarians and thus professionals with sophistication in the field, as argued by applicant and strongly relied upon in the dissent. We also agree that this sophistication may result in the veterinarians' making a more careful perusal of the marks than would the average layman. Nonetheless, we think the more advanced level of knowledge possessed by these veterinarians, which would certainly include some familiarity with the general class of compounds known as "amines," would be likely to lead to the mistaken belief that the anti-inflammatory preparations being sold under the marks FLUNIXAMINE and FLU-NIX are companion products from a single source, one the compounded form with the amine Meglumine, the other Flunixin alone. The connotation of the suffix -AMINE must be considered as viewed by the relevant class of purchasers, which in this case consists of professionals having a scientific background. Cf. Magic

**Ser No.** 75/146,210

Wand Inc. v. RDB Inc., 940 F.2 638, 19 USPQ2d 1551 (Fed. Cir. 1991)[although the term TOUCHLESS was used generically by car wash manufacturers and dealers, it was not shown to be understood in this manner by the relevant purchasing public for automobile washing services]. Applicant's arguments for the co-existence of marks suggestive of the generic designation cannot be stretched so far as to lead purchasers to believe that they are obtaining companion products from a single source, when this is not the case.

While applicant argues that since there is no evidence of record with respect to several other of the du Pont factors, and thus they must be weighed in applicant's factor, we do not find any of these factors of sufficient import to counterbalance the virtually identical goods and the channels of trade involved here, and the high degree of similarity of the marks used on these goods. If any doubt remains, we follow the well-established principle that any doubts regarding likelihood of confusion must be resolved against applicant, as the newcomer in the field. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

---

<sup>5</sup> We note that in the Nexis excerpts made of record by applicant to demonstrate use of the generic term Flunixin Meglumine, use of the drug for horses for the treatment of colic is described.

**Ser No.** 75/146,210

Decision: The refusal under Section 2(d) is affirmed.

T. J. Quinn

H. R. Wendel  
Trademark Administrative Judges,  
Trademark Trial and Appeal Board

**Ser No.** 75/146,210