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Paper No. 12  
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Xomed Surgical Products, Inc.**

Serial No. 75/512,827

**Andrew J. Aldag** of Epstein, Edell, Shapiro & Finnan, LLC  
for Xomed Surgical Products, Inc.

**Jeffrey S. DeFord**, Trademark Examining Attorney, Law Office  
115 (Tomas V. Vlcek, Managing Attorney).

Before Seeherman, Quinn and Drost, Administrative Trademark  
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Xomed Surgical Products, Inc. has appealed from the  
final refusal of the Trademark Examining Attorney to  
register P.C.S. as a trademark for "suction cutting  
instruments for use in head and neck surgery and  
accessories and parts therefor." The application was filed  
on June 30, 1998, based on an asserted intention to use the  
mark in commerce. Registration has been refused pursuant  
to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on

the ground that applicant's mark so resembles the mark PCS, registered for "automated blood collection and separation units for a wide variety of medical uses,"<sup>1</sup> that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs.<sup>2</sup> An oral hearing was not requested.

We affirm the refusal of registration.

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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the marks, they are virtually identical. The cited mark is PCS. Applicant's mark is for the same letters in the same order; the only difference is that applicant's mark contains periods between the letters.

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<sup>1</sup> Registration No. 1,505,712, issued September 27, 1988; Section 8 affidavit accepted; Section 15 affidavit filed.

<sup>2</sup> With its brief applicant submitted copies of pages from the registrant's website. Although the Examining Attorney pointed out that this evidence is untimely, he specifically waived any objection to it. Accordingly, we have considered this material as being stipulated into the record.

Accordingly, the marks are identical in pronunciation, and virtually identical in appearance. The fact that applicant's mark contains periods and the cited mark does not is not likely to be noticed by consumers. Moreover, even if consumers did notice this very minor difference, they are more likely to assume that the two versions are different presentations of the same mark, rather than that they are different marks indicating origin of the goods in different sources.

Applicant also contends that the marks have different connotations, with applicant's mark, because of the periods, being seen as initials, while the cited mark would be viewed as an acronym for "plasma collection system." We are not persuaded by this argument. The cited mark may just as easily be viewed as initials or a monogram despite the absence of periods between the letters. Further, although the Examining Attorney has characterized both marks as acronyms, there is no evidence to show that PCS is an acronym for anything. While a close reading of the registrant's website reveals the statement, in the last paragraph on the page, that its PCS machine is an automated plasma collection system, we cannot conclude from this that consumers would view the mark PCS as an acronym for "plasma collection system." Applicant has not submitted any

dictionary evidence or literature which shows that PCS has such a recognized meaning. Accordingly, we find that applicant's mark and the cited mark to have the same connotation, that of the letters P-C-S per se.

This brings us to a consideration of the goods. It is well established that it is not necessary that the goods of the parties be similar or 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 goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same person 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 International Telephone & Telephone Corp.**, 197 USPQ 910, 911 (TTAB 1978).

In this case, we acknowledge that applicant's and the registrant's goods are specifically different. However, we do not agree with applicant's assertion that the only similarity in the goods is that they are both in the medical or health care industry. They are, in addition, both used in hospital operating rooms, and both are used in connection with surgical procedures. The registrant's

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website materials submitted by applicant show that registrant's automated blood collection units can be used for surgical blood salvage. Other materials made of record by the Examining Attorney discuss products which are used to salvage blood shed before, during or after surgery.

("In the operating room the Cell Saver Autologous Blood Recovery System salvages shed blood suctioned from the surgical wound.") Further, applicant's identified suction cutting instruments could be used to suction blood during operations. Blood would be collected as part of the suctioning, thus reinforcing the similarity of applicant's product to the identified blood collection units.

Applicant has asserted, based on the registrant's website materials, that the registrant "only appears to use the PCS mark in relation to plasma collection systems, and not blood recovery systems." Brief, p. 6. However, as the Examining Attorney has pointed out, in determining the issue of likelihood of confusion we must consider the goods as they are identified in the respective registration and application, and not on what the evidence may show the goods to be. **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

As we said above, we recognize that the goods themselves are different. However, both are used in performing operations, and both have the similar characteristic of collecting blood, albeit the collecting of the blood is more a by-product of the use of applicant's suction cutting instruments while it is a primary purpose of the registrant's. In view of these similarities, we find that the goods are sufficiently related that, if sold under the virtually identical marks at issue herein, confusion is likely to result.

The Examining Attorney has also submitted evidence that blood collection units and surgical instruments are sold by the same companies. Applicant points out that the companies listed in the Examining Attorney's materials are suppliers of a wide range of medical products, and are not the manufacturers of them. We agree with applicant that this evidence does not prove that companies manufacture both blood collection units and surgical instruments. However, it is sufficient to show that the goods are sold by the same companies, such that a hospital purchasing a blood collection unit would also see surgical instruments in the same catalog or website, and might purchase both at the same time.

Applicant also points to the duPont factor of "the variety of goods on which a mark is or is not used," and asserts, based on the information in the registrant's website, that registrant uses PCS only as a product mark for a single product. We, of course, have limited information about the registrant and its uses of its PCS mark in this ex parte proceeding. Moreover, the registrant's registration is not limited to a single product; rather, the identification is for "automated blood collection and separation units for a wide variety of medical uses." As explained previously, applicant cannot restrict a registrant's identification even if it has concrete evidence of the registrant's actual use.

We should also point out that the fact that a registrant or opposer may use a mark as a house mark rather than a product mark serves to broaden its scope of protection, such that likelihood of confusion may be found even if the applicant's goods are only tangentially related to the registrant's/opposer's goods, on the theory that consumers will be likely to assume, because of the variety of goods on which the registrant/opposer uses its mark, that the registrant/opposer has expanded the use of its mark to the applicant's identified goods. In this case, however, the blood collection units identified in the cited

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registration are sufficiently related to applicant's identified goods that confusion is likely even if the registrant's mark is used only as a product mark. We would also point out that the cited mark appears to be a strong mark; there is no evidence in this record of third-party registration or use of PCS marks in the medical field.

In reaching our conclusion that confusion is likely, we have given due weight to the fact that these are medical products which would be purchased with care by sophisticated purchasers. Again, however, because of the near identity of the marks, and the related nature of the goods, as discussed above, we think that even careful and sophisticated purchasers are likely to be confused.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is well settled that such doubt must be resolved against the newcomer or in favor of the prior user or registrant. **In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes**, 487 F.2d 918, 179 USPQ 729 (CCPA 1973). Here, applicant, with its intent-to-use-based application, is obviously the newcomer.

Decision: The refusal of registration is affirmed.