

7/31/01

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Paper No. 15
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Advanced Cardiovascular Systems, Inc.

Serial No. 75/568,548

Lori Boatright and Anthony V. Mercaldi of Blakely Sokoloff
Taylor & Zafman for Advanced Cardiovascular Systems, Inc.

Andrea P. Hammond, Trademark Examining Attorney, Law Office
115 (Tomas Vlcek, Managing Attorney).

Before Cissel, Quinn and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Advanced Cardiovascular Systems, Inc. has appealed
from the refusal of the Trademark Examining Attorney to
register RX GEMINI for "medical catheters"¹ in International
Class 10.

Registration has been refused pursuant to Section 2(d)
of the Trademark Act, 15 U.S.C. 1052(d), on the ground that

¹ Application Serial Number 75/568,548 was filed on October
13, 1998. The application was based upon an allegation of a *bona
fide* intention to use the mark in commerce. The designation "RX"
has been disclaimed apart from the mark as shown.

applicant's mark so resembles the mark GEMINI for "cardiac pacers," also in International Class 10, that, as used on applicant's identified goods, it is likely to cause confusion, to cause mistake or to deceive.

The appeal has been fully briefed but applicant did not request an oral hearing before the Board.

Upon careful consideration of this record and the arguments of the attorneys, we believe that confusion is likely, and so we affirm the refusal of registration.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. 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).

We turn first to the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. Applicant essentially contends that the Trademark Examining Attorney erred by dissecting the marks. Applicant contends that

when considered in their entirety, the two marks are not confusingly similar; that the marks RX GEMINI and GEMINI are different in sound, appearance, meaning, and overall commercial impression, and that the term GEMINI is entitled to only a narrow scope of protection because the term is commonly used in the medical field.

Applicant's mark RX GEMINI and registrant's mark GEMINI have obvious similarities in sound, appearance and meaning, applicant's mark only adding the descriptive or even generic designation "RX,"² which has been properly disclaimed. In this case, this difference cannot serve to distinguish the marks. While we compare the marks in their entirety, our primary reviewing court has held that in articulating reasons for reaching a conclusion on the question 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 or portion of a mark. That is, one feature of a mark may have more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798

² There is no disagreement between applicant and the Trademark Examining Attorney that the term "RX" (or "R_x") in this context means "a prescription for medicine or a medical appliance." See e.g., The American Heritage Dictionary of the English Language, electronic version (3rd ed. 1992).

(Fed. Cir. 1987), and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

Moreover, under actual market conditions, consumers generally do not have the luxury of making side-by-side comparisons. The proper test in determining likelihood of confusion is not a side-by-side comparison of the marks, but rather, the decision must be based on the similarity of the general overall commercial impressions engendered by the involved marks. See Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980).

As to the strength of registrant's mark, there is no evidence in this case that the term GEMINI is anything other than arbitrary when applied to medical devices and products. GEMINI is a word that has long evoked a constellation in the Northern Hemisphere or a sign of the zodiac.³ We take judicial notice of the fact that in the mid-1960's, NASA assigned this name to a series of launch vehicles used in the space program.⁴ Since that time, the term GEMINI has become suggestive of space-age devices.

³ The American Heritage Dictionary of the English Language (1975).

⁴ The Random House Dictionary of the English Language (3rd ed. 1983).

Whether arbitrary or suggestive as applied to registrant's goods, we do not find it to be an inherently weak mark. Accordingly, this common term plays a major role in forming the overall commercial impression of both marks, and we find that the commercial impressions created by the marks involved herein are substantially the same. See The Wella Corporation v. California Concept Corporation, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977); and Gruen Industries, Inc. v. Ray Curran & Co., 152 USPQ 778 (TTAB 1967).

As to the du Pont factor dealing with the number and nature of similar marks in use on similar goods, applicant has pointed to a number of third-party registrations as proof that the word "Gemini" is "diluted" and "weak" among goods in International Class 10, and hence that the cited registration should be given a very narrow scope of protection. However, we do not find applicant's submission of third-party applications and registrations to be persuasive of such a conclusion. Third-party registrations are given little weight in determining likelihood of confusion as they are not evidence of use of the marks shown therein and they are not proof that consumers are familiar with them so as to be accustomed to the existence of similar marks in the marketplace. See Helene Curtis

Industries Inc. v. Suave Shoe Corp. 13 USPQ2d 1618 (TTAB 1989). Moreover, upon reviewing the dozen registered marks (made a part of the record by applicant) containing the word GEMINI in some form, it is noted that five are owned by the same party for pumps for infusing medical solutions into patients. Other marks containing the word GEMINI are registered for a variety of medical supplies, devices and services, such as fiber optic devices, prosthetic devices, laboratory chemicals, cameras, consultation services, hearing aids and medical gloves. Thus, it is clear that when exploring the channels of trade of specific medical products and/or services in making a determination as to likelihood of confusion, the U.S. Patent and Trademark Office (entirely consistent with the position espoused by applicant) does not follow a "per se" rule that all medical devices are related. To the contrary, even when evaluating an arbitrary or suggestive mark such as GEMINI, the hospital community cannot be treated as a homogeneous whole.⁵ Arguably, each of the goods in International Class

⁵ Hewlett-Packard Co. v. Human Performance Measurements, Inc., 23 USPQ2d 1390, 1395 (TTAB 1991), quoting Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 220 USPQ 786, 791 (1st Cir. 1983): "The 'hospital community' is not a homogeneous whole, but is composed of separate departments with diverse purchasing requirements, which, in effect, constitute different markets for the parties' respective products."

10 enumerated above would go to different specialists and departments within hospitals or other medical facilities.

Moreover, while the U.S. Patent and Trademark Office strives for consistency, each case must be decided on its own facts and record. Of course, we do not have before us any information from the third-party registration or application files. Finally, we note that pending, third-party trademark applications are of virtually no evidentiary value on this point.

With that background, we turn next to the similarity or dissimilarity and nature of the goods as described in the application and the cited registration. Applicant argues throughout the prosecution of this application that the respective products "... are sold and marketed through different channels of trade to mutually exclusive and sophisticated medical professionals."⁶ By contrast, the Trademark Examining Attorney argues as follows:

... The goods of the applicant and the registrant are highly related as they are both used in correcting ailments of the heart. Medical professionals who treat "CAD" (coronary artery disease) are most likely cardiologists or cardio-thoracic surgeons who have specialized in diseases and illnesses related to the heart. The examining attorney previously attached evidence indicating that a cardiologist may

⁶ Applicant's response of November 10, 1999, p. 3.

perform both the cardiac angioplasty and the pacemaker insertion, illustrating that the same end user may encounter both the goods of applicant and the registrant.

(Trademark Examining Attorney's brief, unnumbered pp. 6-7)

Interestingly, among the eight current federal registrations of specialized medical devices (placed into the record by the Trademark Examining Attorney) where the same mark was applied to both medical catheters and cardiac pacers, was the mark GUIDANT, owned by Guidant Corporation, the holding company of which applicant is a wholly-owned subsidiary. Hence, while it may well be true, as applicant argues, that the specialized sales force working for applicant (Advanced Cardiovascular Systems, Inc.) does not market cardiac pacers, the record suggests that applicant's own parent corporation (Guidant Corporation) applies its house mark to both types of goods.

Moreover, to argue, as applicant does, that medical professionals who treat cardiac arrhythmia are not the same medical professionals who would be treating coronary artery disease is supported neither by logic nor by the evidence placed in the record by the Trademark Examining Attorney. Cardiac pacers, or pacemakers, are designed to deal with heart arrhythmias, and we can agree with applicant that irregular heart rates or arrhythmias grow out of a

malfunction in the heart's electrical system. Also, we understand that coronary artery disease is tied to problems with the proper circulation of blood through the coronary arteries. However, the record confirms that a single cardiac patient suffering from diseases and illnesses related to the heart may well suffer from both "electrical" and "plumbing" problems. Similarly, heart specialists do not work exclusively on one genre of heart problem or the other. Hence, both devices or instruments will be used by physicians who are heart specialists, and this general category of medical doctors includes, but is not limited to specialists known as cardiologists or cardio-thoracic surgeons, as argued by the Trademark Examining Attorney.

Furthermore, because applicant's catheters as identified in the application are in no way limited to procedures such as angiography or angioplasty, we have to assume these goods include all kinds of medical catheters, including those catheters used for the introduction of pacemaker leads. In such a case, we must presume that the same medical professional, during a single procedure, could well use one or more of applicant's catheters in conjunction with the implantation of one of registrant's pacemakers.

Accordingly, based on the entire record before us, we find that applicant's medical catheters are closely related to registrant's cardiac pacers.

As to the specific channels of trade of these respective goods, if indeed the same heart specialist operating in a large medical center may be the end user of both of these medical devices or instruments, then we must assume the established, likely-to-continue trade channels for these respective products are identical.

Turning to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, obviously, neither of these products could be considered to be "impulse" purchases. We agree with applicant that this factor (i.e., that we are dealing with careful, sophisticated purchasers) does favor applicant in the instant case. However, as pointed out by the Trademark Examining Attorney, when marks are quite similar, even sophisticated consumers can be confused. Even the most sophisticated of purchasers, automatically tending to discount the source-indicating significance of the term "RX" (or "R_x"), may well assume that RX GEMINI is simply a variant of registrant's GEMINI marks, used to identify another of registrant's cardiac products. That is,

purchasers are likely to assume that applicant's goods come from the same source as registrant's goods or are in some way sponsored by or associated with registrant. See In re Imperial Jade Mining, Inc., 193 USPQ 725 (TTAB 1976).

Accordingly, given that GEMINI and RX GEMINI for closely-related medical devices or instruments have as their sole source-indicating component the identical term, GEMINI, we find that the extent of potential confusion is substantial, even for sophisticated purchasers.

Decision: The refusal to register is affirmed.