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EWH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re SciMed Life Systems, Inc.

Serial No. 75/650,280

Wayne A. Sivertston for SciMed Life Systems, Inc.

Toni Y. Hickey, Trademark Examining Attorney, Law Office 115, (Tomas Vlcek, Managing Attorney).

Before Simms, Cissel and Hanak, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

SciMed Life Systems, Inc. (applicant) seeks to register in typed drawing form OVATION for “cardiac balloon catheter inflation devices.” The intent-to-use application was filed on February 26, 1999.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant’s mark, as applied to applicant’s goods, would be likely to cause confusion with the identical mark OVATION, previously registered in typed drawing form for a

wide array of “obstetrics and gynecology apparatus,” including specifically “catheters.”

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Considering first the marks, they are identical. Thus, the first Dupont “factor weighs heavily against applicant” because applicant’s mark is identical to the registered mark. In re Martin’s Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Not only are the marks identical, but in addition they are totally arbitrary which only enhances the likelihood of confusion. In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1469 (TTAB 1988), aff’d 88-1444 (Fed. Cir. 1988).

Turning to a consideration of applicant's goods and registrant's goods, we note that because the marks are identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

However, in this case applicant's goods (cardiac balloon catheter inflation devices) and certain of registrant's goods (namely, catheters for use in obstetrics and gynecology) are clearly related. The Examining Attorney has made of record evidence showing that the same companies market under the same marks catheters for use in connection with various medical specialties, including in particular, cardiology, on the one hand, and obstetrics and gynecology on the other hand. For example, an advertisement for the AXIOM catheter states that the catheter "has been used in various fields of medical research including the following: Urology … Obstetrics & Gynecology … Cardiology … "

Given the fact that the marks in question are absolutely identical, and given the fact that it is common for companies to manufacture and sell under the same marks catheters for use in cardiology and obstetrics and

gynecology, we find that there would exist a likelihood of confusion resulting from the contemporaneous use of applicant's mark on its goods and registrant's mark on catheters for use in obstetrics and gynecology.

Two final comments are in order. First, at pages 15 to 17 of its brief, applicant places a great deal of reliance upon Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983). However, the facts of Astra are vastly different than are the facts of the present case. To begin with, in Astra the products were extremely different, namely, anesthetic preparations as opposed to computerized blood analyzer machines. In stark contrast, in the present case both products are catheters, albeit applicant's catheters are used in the field of cardiology whereas registrant's catheters are used in the field of obstetrics and gynecology. Another distinguishing factor is that in Astra the Court found that the computerized blood analyzer machines were very expensive ($35,000 to $60,000) and were purchased with great care. Again, in clear contrast, there is no evidence that catheters are likewise expensive items which are purchased with great care.

Second, in an order dated April 10, 2002 this Board vacated its order of February 19, 2002 which remanded the

file to the Examining Attorney to consider additional evidence attached for the first time to applicant's brief. We have examined the material attached to applicant's brief, and find that this Board's order of April 10, 2002 was correct. In any event, the evidence attached to applicant's brief for the first time would not have changed the outcome of this decision.

Decision: The refusal to register is affirmed.