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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Accordia of Cincinnati, Inc.

Serial No. 76/103,514

Laura L. Beoglos of Sand & Sebolt for Accordia of Cincinnati, Inc.

James Arthur Bruno, Jr., Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Hanak, Hairston and Drost, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge.

Accordia of Cincinnati, Inc. (applicant) seeks to register SCRIPTSMART in typed drawing form for "promoting the goods and services of others through the distribution of discount cards to customers used for purchasing prescription drugs at participating pharmacies; pharmacy benefit management services; administration of discount program for enabling participants to obtain discounts on prescription drugs through use of a discount membership card; mail-order services featuring pharmaceutical

products." The intent-to-use application was filed on August 7, 2000.

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 services, is likely to cause confusion with the mark SMARTSCRIPTS previously registered in typed drawing form for "software supporting the medical industry, namely interactive prescription management software for providing patient-specific therapeutic information at the point of care via a network connected to a database, for providing past patient drug dosage and other therapeutic information on patients from a database and for updating patient records on said database, and for providing disease-specific treatment information to doctors and other health care professions at the point of care." Registration No. 2,037,390. When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the goods or services and the similarities of the marks. 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 [or services] and differences in the marks.").

Considering first the services, there is no question that they both relate to prescription drugs. However, the record reveals that that is the only similarity between applicant's services and registrant's services.

Registrant's services are directed to doctors and other health care professionals. They assist doctors and other health care professionals in tracking a patient's past drug usage and in obtaining disease-specific treatment information. Moreover, registrant's services are used by doctors and other health care professionals "at the point of care." Indeed, this phrase "at the point of care" appears twice in registrant's identification of services.

In stark contrast, applicant's services are directed to consumers and companies to assist them in obtaining discounts on prescription drugs. In sum, the purchasers of registrant's services (doctors and other health care professionals) are quite distinct from the purchasers of applicant's services (consumers and companies). Moreover, registrant's services are directed toward monitoring drug usage and providing disease-specific treatment information, whereas applicant's services are directed solely to

obtaining discounts on prescription drugs. This case is somewhat similar to the situation in Electronic Design & Sales where the Court found no likelihood of confusion when the virtually identical marks EDS and E.D.S. were used on goods which were "not only in the same fields but also [directed to] some of the same companies." Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992). Indeed, in the present case, there is a more compelling reason for finding no likelihood of confusion given the fact that there is no proof that applicant's services and registrant's services are even directed to the same institutions or individuals.

In an effort to show that registrant's services and applicant's services are related, the Examining Attorney has made of record third-party registrations as well as print outs of registrant's and applicant's web sites.

With regard to the third-party registrations, we have one problem with them. The particular third-party registrations made of record by the Examining Attorney simply do not cover both registrant's services and applicant's services. For example, the first third-party registration made of record by the Examining Attorney (Registration No. 2,423,719) covers simply "computer software for use in pharmacy management and consulting, and

instruction manuals provided therewith." We fail to see how this third-party registration covers registrant's services, or indeed even applicant's discount services involving prescription drugs.

As for the web site printouts made of record by the Examining Attorney, the problem that we have with the applicant's web site is that it lists numerous service marks besides the mark it seeks to register, namely, SCRIPTSMART. While there is on applicant's web site a reference to "pharmacy benefit managers," these pharmacy benefit managers are not linked to applicant's SMARTSCRIPT mark, but instead are linked to another mark of applicant, namely, WHINS.

Turning to a consideration of the marks, the Examining Attorney argues at page 5 of his brief that they are "substantially similar" because they are a mere "transposition." However, this Board has held that there is no per se rule that transpositions result in marks which are confusingly similar. In re Nationwide Industries Inc., 6 USPQ2d 1882, 1884 (TTAB 1988) and cases cited therein. Given the significant differences in registrant's services and applicant's services, we find that the marks are dissimilar enough such that there is no likelihood of confusion. This is particularly true when one realizes

that registrant's services are directed only to doctors and other health care professionals. These are individuals who are highly skilled and discriminating, especially when it comes to patient drug information and disease-specific treatment information. In this regard, we note that the predecessor to our primary reviewing Court has held that health care providers are "a highly intelligent and discriminating public." Warner Hudnut, Inc. v. Wander Co., 280 F.2d 435, 129 USPQ 411, 412 (CCPA 1960). Our primary reviewing Court has made it clear that purchaser "sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care." Electronic Design & Sales, 21 USPQ2d at 1392 (Fed. Cir. 1992).

In sum, given the fact that registrant's services and applicant's services are related only to the extent that they involve prescription drugs; the fact that the marks in question are by no means identical; and the fact that the users of registrant's services are highly sophisticated and discriminating, we find that there exists no likelihood of confusion.

Decision: The refusal to register is reversed.