

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: August 14, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Atrium Medical Corporation
v.
Atrium Biotechnologies, Inc.

Opposition No. 91157453
to application Serial No. 76155687
filed on October 27, 2000

Thomas V. Smurzynski of Lahive & Cockfield, LLP for Atrium
Medical Corporation.

Thomas W. Brooke of Holland & Knight LLP for Atrium
Biotechnologies Inc.

Before Quinn, Kuhlke and Walsh, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Atrium Biotechnologies Inc., seeks
registration of the mark ATRIUM BIOTECHNOLOGIES (in standard
character form, BIOTECHNOLOGIES disclaimed) for goods
ultimately identified in the application as "active
ingredients for use in the manufacture of cosmetics and skin
care products, namely, natural matrix metalloprotease
inhibitors, natural protein extracts and natural protein

Opposition No. 91157453

concentrates; active ingredients for use in the manufacture of nutritional supplements, namely, liquid cartilage extracts" in International Class 1 and "nutritional supplements made from shark cartilage extracts, animal extracts and plant extracts, not for medical use" in International Class 5.¹

Opposer, Atrium Medical Corporation, opposed registration of applicant's mark, on the grounds that, as applied to applicant's goods, the mark so resembles opposer's previously used and registered mark ATRIUM for "a wide range of medical products, biomaterials and devices, including products and devices that are used in cardiology, general and cardiovascular surgery, and cosmetic surgery and biomaterials of polytetrafluoroethylene (PFTE)" as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S.C. §1052(d).²

¹ Serial No. 76155687, filed October 27, 2000, originally filed under Sections 1(b) and 44 of the Trademark Act alleging a bona fide intention to use the mark and a claim of priority of October 10, 2000 under Section 44(d). Trademark Act Sections 1(b) and 44 15 U.S.C. §1051(b) and §1126(d). The application was subsequently amended to allege use under Section 1(c) with January 1, 2000 as the date of first use and first use in commerce. Trademark Act Sections 1(a) and 1(c), 15 U.S.C. §1051(a) and §1051(c).

² The notice of opposition also references a possible claim of dilution under Section 43(c) of the Trademark Act. However, this claim was not sufficiently pleaded. Opposer, inter alia, did not plead that its mark is famous. Moreover, opposer did not pursue this claim in its brief. In view thereof, the Board considers any possible dilution claim to have been waived.

Applicant filed an answer by which it denied the salient allegations of the notice of opposition.

The evidence of record consists of the pleadings herein and the file of the opposed application. In addition, opposer submitted, under a notice of reliance, a status and title copy of opposer's pleaded registration and applicant's responses to opposer's first set of interrogatories, including documents referred to in responses under Rule 33(d).³ Applicant did not take any testimony, submit evidence, or file a brief.

The pleaded registration, in full force and effect and owned by opposer, is summarized as follows:

Registration No. 2629732 for the mark ATRIUM (in standard character form) for "medical devices, namely thoracic drainage collection and autotransfusion devices and tubing apparatus; anticoagulant solutions; thoracic and mediastinal catheters; blood bags; IV pole attachments for chest drains; vascular grafts; vascular graft tunnelers, tips and extension rods, and graft insertion devices; surgical mesh; facial prosthetic implants; and closed wound drainage apparatus" in International Class 10, filed January 10, 1999, issued October 8, 2002.

Because opposer has made its pleaded registration of record by way of notice of reliance, opposer has established

³ In addition to its registration opposer pleaded two applications; however, these applications were not made of record. Although applicant admitted in its answer that opposer is the record owner of the applications, these admissions have little probative value. See *Lasek & Miller Ass. v. Rubin*, 201 USPQ 831, 833 n. 3 (TTAB 1978) (petitioner's application file is proof only of filing, not of any facts alleged in the application).

Opposition No. 91157453

its standing to oppose registration of applicant's mark and its priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our likelihood of confusion determination under Section 2(d) 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first note that opposer did not present any evidence regarding its alleged common law rights in the mark ATRIUM and our determination here is made only as to the mark and goods listed in the pleaded registration.

We begin our analysis with the first du Pont factor, i.e., whether applicant's mark and opposer's mark are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial

impression. We make this determination in accordance with the following principles. The test, under this du Pont factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result.

Applicant's mark, ATRIUM BIOTECHNOLOGIES, and opposer's mark, ATRIUM are depicted in standard character form. The marks are similar in sound and appearance in that the first word in applicant's mark is identical to and incorporates the whole of opposer's mark. Moreover, we find that the word ATRIUM is the dominant part of applicant's mark. We take judicial notice of the following definition of the word BIOTECHNOLOGY:⁴

1. The use of microorganisms, such as bacteria or yeasts, or biological substances, such as enzymes, to perform specific industrial or manufacturing processes. Applications include the production of certain drugs, synthetic hormones, and bulk foodstuffs as well as the bioconversion of organic waste and the use of genetically altered bacteria in the cleanup of oil spills.
2. The application of the principles of engineering and technology to the life sciences. The American Heritage Dictionary of the English Language (4th ed. 2000).

⁴ University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (Board may take judicial notice of dictionary definitions).

We note that the term BIOTECHNOLOGIES has been disclaimed and this definition further supports a finding that the dominant part of applicant's mark is the term ATRIUM.

As to connotation, we take further judicial notice of the following definition of the word ATRIUM:

Anatomy. A body cavity or chamber, especially either of the upper chambers of the heart that receives blood from the veins and forces it into a ventricle. The American Heritage Dictionary of the English Language (4th ed. 200).

Certainly, this meaning would not be lost on potential purchasers of opposer's goods. Moreover, rather than serving to distinguish the marks, the connotation of the term BIOTECHNOLOGIES relates to the relevant definition of ATRIUM in opposer's mark in that both words have meanings pertinent to the medical or health fields.

Therefore, despite the addition of BIOTECHNOLOGIES to applicant's mark, the commercial impression and general connotation of these marks create confusingly similar marks such that the similarities outweigh the differences. We conclude that the parties' marks are substantially similar.

Next we consider the second, third and fourth du Pont factors, i.e., the similarities between opposer's and applicant's goods and the similarities between opposer's and applicant's trade channels and classes of purchasers of these goods. We must make our determinations under these

Opposition No. 91157453

factors based on the goods as they are recited in the application and registration, respectively. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

The goods need not be identical or directly competitive in order for there to be a likelihood of confusion. Rather, the respective goods need only be related in some manner or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. In *re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). However, if the goods are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *Shen Mfg Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004).

The parties' goods are obviously different and opposer does not argue to the contrary. In addition, there is no evidence or argument to support a finding that they would be competitive or even complementary. The crux of opposer's argument is that the word BIOTECHNOLOGIES in applicant's mark implies the goods come from "a sophisticated manufacturer and researcher that did serious work on the

Opposition No. 91157453

effect on the human body or substances, that could be incorporated into cosmetics and skin care products and into nutritional supplements," and that the products travel in the same channels of trade and there is an overlap in the customer base. More specifically, opposer argues that the evidence shows that applicant "is applying the mark [ATRIUM BIOTECHNOLOGIES] to products that are directed to, among others, the 'pharmaceutical' industry [and] [t]he class of customers for its nutritional supplements it describes as 'healthcare practitioners.'" Br. p. 6. Opposer points to applicant's responses to opposer's interrogatories wherein applicant described the nature of its business in the following manner:

The atrium group is a fully integrated value-added developer and supplier of specialty chemicals and active ingredients to the cosmetic, fine chemicals, pharmaceuticals and nutrition industries.

In response to another interrogatory, applicant identified its class of customers as:

For cosmetic ingredients: cosmetic product manufacturers.

For nutritional supplements: healthcare practitioners.

Opposer argues that "This reference again to 'health care professionals' makes it clear that the products listed in Applicant's identification of goods are not routine consumer products," thus "The similarity of marketing

channels is apparent since Applicant's products are provided to, inter alia, the pharmaceutical industry and to health care professionals." Br. p. 7. Opposer further states that:

Registrant's goods are medical devices. The pharmaceutical industry is a part of the medical world, and so are health care professionals. While the products have different physical characteristics, the market for all of them includes the medical world. It would not be out of place for a provider of anticoagulant solutions, surgical mesh, and facial prosthetic implants (all listed in Opposer's registration) to be also a source of nutritional and personal care products with active ingredients based on biotechnology. Br. p. 7.

Opposer concludes that the additional word BIOTECHNOLOGIES in applicant's mark "emphasizes the nature of Applicant's goods as pharmaceutically oriented and health care professional oriented, making them close to the medical products listed by Opposer in its registration of ATRIUM." Id.

The goods in opposer's registration are highly specialized products for use in medical/surgical procedures. By contrast, applicant's goods in International Class 1 are ingredients sold to manufacturers of cosmetics, skin care products and nutritional supplements. While the nutritional supplements are apparently sold to healthcare practitioners, the nature of these goods are so vastly different from opposer's goods, more would be needed in the record to establish that use of similar marks on these goods could

Opposition No. 91157453

give rise to the mistaken belief that the goods come from a common source. Moreover, opposer has not established by a preponderance of the evidence that conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances to create a likelihood of confusion. Opposer has not shown that the parties' respective goods travel in the same channels of trade. Specifically, opposer has not shown or argued that its goods are sold to healthcare practitioners or the pharmaceutical industry. Opposer merely states that its goods are medical devices and both parties sell their goods in "the medical world." That is simply too broad of a characterization to be meaningful for purposes of our analysis. Nor is there evidence to support opposer's statement that it "would not be out of place for a provider of anticoagulant solutions, surgical mesh, and facial prosthetic implants (all listed in Opposer's registration) to be also a source of nutritional and personal care products with active ingredients based on biotechnology." We further note that opposer's goods are not ordinary consumer items which would be purchased without a great deal of care, by ordinary consumers. Rather, these goods would be purchased with a higher degree of care by somewhat sophisticated purchasers. Similarly, at least as to the purchasers of applicant's goods as identified in

Opposition No. 91157453

International Class 1 and the healthcare providers that would be included in the class of purchasers of applicant's nutritional supplements, the purchase would be made with some care. In view thereof, and notwithstanding the similarity of the marks, the differences in these goods, as identified in the application and registration, are too great to find a likelihood of confusion without evidence to support such a conclusion.

Thus, in view of our finding that opposer has not shown by a preponderance of the evidence that the goods are related or that the channels of trade and customer base overlap, we conclude that the evidence of record as it pertains to the relevant du Pont factors does not support a finding of likelihood of confusion as to the mark in opposer's Registration No. 2629732. See *Shen Mfg Co. v. Ritz Hotel Ltd.*, supra; *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (any single factor may play a dominant role in a confusion analysis).

Decision: The opposition is dismissed.