

This Opinion is not a
Precedent of the TTAB

Mailed: December 29, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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*In re Cardiac Science Corporation*¹
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Serial No. 86410313
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Patchen M. Haggerty of Perkins Coie LLP,
for Cardiac Science Corporation.

Linda Lavache, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

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Before Wellington, Shaw, and Hightower,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Cardiac Science Corporation seeks registration on the Principal Register of the mark INTELLISENSE, in standard characters, for the following goods (as amended) in International Class 10:

Electrodes for external defibrillators, namely, defibrillation pads, stored pre-connected to an AED device comprised of embedded circuitry, software, a voice prompter and a medical grade battery sold through authorized AED distributors; none of the foregoing

¹ Card-Sci Inc. changed its name to Cardiac Science Corporation, as recorded with the U.S. Patent and Trademark Office Assignment Recordation Branch on February 23, 2016 at Reel/Frame 5737/0791.

including CPR resuscitation masks, blood pressure monitors or cuffs for blood pressure monitors.²

Applicant defines “AED” as “external defibrillator.”³

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the goods identified in the application, so resembles three marks previously registered on the Principal Register to the same owner as to be likely to cause confusion, to cause mistake, or to deceive. The cited marks, all for goods in International Class 10, are:

- INTELLISENSE, in typeset form and with “sense” disclaimed, for “blood pressure monitors”;⁴



-  for “blood pressure monitors”;⁵ and

-  for “blood pressure monitors and cuffs for blood pressure monitors.”⁶

² Application Serial No. 86410313 was filed on September 30, 2014, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

³ Appeal Brief at 6, 6 TTABVUE 12.

⁴ Registration No. 2302442, issued December 21, 1999; renewed December 7, 2009. Before November 2, 2003, standard character drawings were known as typed drawings. A typed mark is the legal equivalent of a standard character mark. Trademark Manual of Examining Procedure (TMEP) § 807.03(i) (October 2016).

⁵ Registration No. 2217779, issued January 12, 1999; renewed January 12, 2009.

⁶ Registration No. 3864463, issued October 19, 2010; combined §§ 71 & 15 declaration filed October 14, 2016. The description of the mark states: “The mark consists of a heart with a zig zag line resembling the beat on a heart monitor, which dissects the center. To the right is the term ‘INTELLI’ with the term SENSE beneath.”

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Subsequently, after both Applicant and the Examining Attorney filed appeal briefs, Applicant requested remand of the application for consideration of its proposed amendment to the description of goods.⁷ The application was remanded and the Examining Attorney submitted a supplemental appeal brief (as permitted by the Board's order of August 26, 2016) in which she accepted the amendment to the current goods description, but maintained the refusal.⁸ The appeal then resumed.

We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all 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, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

We focus on cited Registration No. 2302442 for the typeset mark INTELLISENSE, which we find to be the most relevant cited mark for our likelihood of confusion

⁷ 9 TTABVUE.

⁸ *See* 11 TTABVUE (Board order), 12-13 TTABVUE (Examining Attorney's supplemental brief). Applicant was allowed 20 days in which to file a reply brief, but did not.

analysis. Accordingly, if we find a likelihood of confusion as to this mark, we need not find it as to Registrant's composite marks incorporating the word INTELLISENSE and designs. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We note that the goods identified in each of the three cited registrations are "blood pressure monitors," while Registration No. 3864463 for the composite mark



also covers "cuffs for blood pressure monitors." The Examining Attorney introduced evidence pertaining to the related nature of Applicant's goods and cuffs for blood pressure monitors. Because the typeset mark in Registration No. 2302442 does not identify cuffs for blood pressure monitors, however, we have not relied on this evidence to reach our decision.

We first address the *du Pont* likelihood of confusion factor focusing on "the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567).

Applicant's mark and the cited typeset mark consist entirely of the identical term INTELLISENSE. The first *du Pont* factor thus weighs strongly in favor of a finding that confusion is likely.

We next consider the second and third *du Pont* factors, the similarity of the goods and channels of trade. The test is not whether consumers would be likely to confuse the goods, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding

of likelihood of confusion, it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). Thus, Applicant's attempts to distinguish its goods from those of the registrant by adding the language "none of the foregoing including CPR resuscitation masks, blood pressure monitors or cuffs for blood pressure monitors" to the identification of goods does not necessarily obviate a finding that the respective goods are related. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1410 (TTAB 2015) (noting that the limiting language "does not, in any meaningful way, alter the nature of the goods identified").

We must make our determination regarding the similarities between the goods and channels of trade based on the goods as they are identified in the involved application and cited registration, respectively, not on any extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). In other words, an applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence. *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013); *see also In re Thor Tech*, 90 USPQ2d at 1638 ("We have no

authority to read any restrictions or limitations into the registrant's description of goods."); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986).

Where, as here, the involved marks are identical, the degree of similarity between the goods required to support a finding that confusion is likely declines. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is necessary only that there be a viable relationship between the two to support a finding of likelihood of confusion. *In re i.am.symbolic*, 116 USPQ2d at 1411.

The Examining Attorney introduced evidence that third parties offer both defibrillator pads and blood pressure monitors under a single mark. Philips displays its non-invasive blood pressure monitor and defibrillator pads on its own website.⁹ The website Medline.com offers both defibrillator pads and blood pressure monitors by third party Welch-Allyn.¹⁰ This evidence shows that the kinds of goods identified in the application and cited registration may emanate from a single source under the same mark.

In addition, the Examining Attorney submitted at least four existing use-based, third-party registrations covering goods of the type identified in both the subject application and the cited registration (among other goods not listed here), including:

- PHYSIO-CONTROL: noninvasive blood pressure monitors and disposable defibrillation electrodes¹¹

⁹ August 14, 2015 Final Office Action, Attachment 7, 29-32.

¹⁰ Supplemental Brief, Attachment 7, 13 TTABVUE 39-45.

¹¹ Registration No. 1414815, January 24, 2015 Office Action, Attachment 2, 11-12.

- BENEHEART: blood pressure monitors and cardiac defibrillation electrodes¹²
- ADVANCING RESUSCITATION. TODAY.: “defibrillators having ECG, pulse oximetry, CO2 monitors, blood pressure monitors and temperature monitors” and “electrodes for use with defibrillators”¹³
- AT THE HEART OF SAVING LIVES: “therapeutic and diagnostic equipment-namely, [] cardiac monitors, defibrillators, and synchronizers for use with defibrillators, and parts thereof and accessories therefore” and “patient monitors for monitoring cardiac, pulse and blood pressure functions”¹⁴

The latter registration is owned by Applicant, indicating that Applicant itself markets blood pressure monitors under the same mark with defibrillator accessories.

While these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value, suggesting that the identified goods are of a kind which may emanate from a single source under a single mark. *In re Anderson*, 101 USPQ2d at 1919; *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

We reiterate that because the involved marks are identical, there need be only a viable relationship between the identified goods to support a finding of likelihood of confusion. Based on the record evidence discussed *supra*, we find that the types of goods identified in the application and cited registration are related. In our likelihood of confusion analysis, this finding under the second *du Pont* factor supports a finding that confusion is likely.

¹² Registration No. 3767961, *id.* at 16-17.

¹³ Registration No. 3353622, *id.* at 22-24.

¹⁴ Registration No. 3464181, *id.* at 25-27.

Considering the third *du Pont* factor, the channels of trade, the record demonstrates that blood pressure monitors and defibrillator pads are offered by the same medical equipment suppliers. The Examining Attorney submitted evidence that Applicant's defibrillator pads have been offered, without the INTELLISENSE mark, through the same third-party website as Registrant's INTELLISENSE blood pressure monitors.¹⁵ The School Kids Healthcare website also offers blood pressure monitors and defibrillator pads, including Applicant's pads.¹⁶ While Applicant's goods are limited to those "sold through authorized AED distributors," this evidence indicates that such distributors comprise medical supply distributors selling other types of medical equipment, including blood pressure monitors. Because the respective goods are offered through the same retail sources, the third *du Pont* factor also supports a finding that confusion is likely.

Applicant argues that several *du Pont* factors favor registration. First, Applicant argues that the fourth factor, the "conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing," *du Pont*, 177 USPQ at 567, weighs against a likelihood of confusion. Applicant's goods identification specifies that its defibrillation pads are stored pre-connected to a defibrillator ("Electrodes for external defibrillators, namely, defibrillation pads, stored pre-connected to an AED device comprised of embedded circuitry, software, a voice prompter and a medical grade battery"). In support of its argument, Applicant

¹⁵ Supplemental Brief, Attachment 6, 13 TTABVUE 33-38 (from medline.com).

¹⁶ August 14, 2015 Final Office Action, Attachment 8, 33-43; Supplemental Brief, Attachment 9, 13 TTABVUE 51-52 (both from schoolkidshealthcare.com).

submitted evidence that its defibrillator, to which its pads are stored attached, is priced at \$1,543 on the AED Superstore website.¹⁷

It is Applicant's defibrillation pads, not its AED device, however, that are at issue here. Defibrillator electrodes offered by third parties Philips and Physio-Control are sold separately and marketed for preconnection.¹⁸ Similarly, record evidence shows that Applicant's goods are offered for sale separately from its defibrillator, for \$69.¹⁹ Registrant's blood pressure monitor is offered for \$59.99 on the Walgreens website and \$49.91 through Amazon.com.²⁰ These goods are relatively inexpensive and not limited to specific customers or markets. Precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 110 USPQ2d at 1163.

We do not find the record evidence sufficient to establish that all of the goods identified in the subject application and cited registration are expensive and sold only to discriminating customers. Even assuming that some consumers of the identified goods are sophisticated, moreover, it is well-settled that even careful or sophisticated purchasers are not immune from source confusion, especially in cases involving identical marks:

That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar

¹⁷ July 24, 2015 Response to Office Action, Exhibit B, 16-22 (from the AED Superstore website, URL not displayed); *see also* Appeal Brief at 10, 6 TTABVUE 16.

¹⁸ *See* Supplemental Brief, Attachment 2, 13 TTABVUE 10-11 (from aedsuperstore.com); *id.*, Attachment 4, 13 TTABVUE 18-19 (from Enerspect Medical Solutions website, enerspect.com), 24 (from mooremedical.com).

¹⁹ Supplemental Brief, Attachment 3, 13 TTABVUE 12-15 (from enerspect.com).

²⁰ July 24, 2015 Response to Office Action, Exhibit D, 28-33.

goods. “Human memories even of discriminating purchasers . . . are not infallible.” Sophistication of buyers and purchaser care are relevant considerations, but are not controlling on this factual record.

In re Research & Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986).
(citation omitted).

For all of these reasons, we find the fourth *du Pont* factor to be neutral.

Applicant next argues that the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods, limits the scope of protection for Registrant’s mark.²¹ Applicant submitted printouts of INTELLI and SENSE formative marks from the USPTO TSDR database. The following four are for the same mark at issue here, INTELLISENSE:

- Reg. No. 2235237 for “battery packs” in International Class 9.²² As discussed *infra*, this registration is owned by Applicant
- Reg. No. 3979658 for “air purifiers” in International Class 11²³
- Reg. No. 3514303 for “software and computer hardware for use with robotic surgical instruments in the human body” in International Class 9²⁴
- Reg. No. 1755084 for “infrared motion sensors, electronic glass break detector and temperature sensors” in International Class 9²⁵

Even if the record contained evidence concerning public awareness of use of the mark INTELLISENSE for these goods, this evidence would be of limited probative value because the registrations identify goods different than those at issue. Such

²¹ Applicant’s Appeal Brief at 12, 6 TTABVUE 18.

²² July 24, 2015 Response to Office Action, Exhibits E and F, 34-47.

²³ *Id.* at 48-49.

²⁴ *Id.* at 50-51.

²⁵ *Id.* at 52-54.

registrations do not establish that consumers of blood pressure monitors and defibrillation pads have become conditioned by a plethora of similar marks for similar goods, resulting in a narrow scope of protection for the cited mark. *Palm Bay*, 73 USPQ2d at 1694.

We find the sixth *du Pont* factor to be neutral.

Finally, Applicant argues that the nature and extent of actual confusion (*du Pont* factor 7), length of time during and conditions under which there has been concurrent use without evidence of actual confusion (factor 8), and extent of potential confusion (factor 12) all weigh against a likelihood of confusion.²⁶

As noted *supra*, Applicant submitted a printout of its registration for the INTELLISENSE mark for “battery packs,” which issued in 1999. Applicant also submitted what appears to be a printout from its website showing that it offers batteries for its defibrillator under the INTELLISENSE mark.²⁷ Applicant argues that it “has been using its ‘INTELLISENSE’ mark in commerce since July 1997 in connection with ‘battery packs’, and no instance of actual confusion has arisen.”²⁸ Applicant submitted no evidence concerning the extent of its use of the mark, such as the volume of sales of its battery packs or conditions under which they are sold, including whether they are marketed for use with defibrillators made by others.

²⁶ *Id.* at 13, 6 TTABVUE 19.

²⁷ July 24, 2015 Response to Office Action, Exhibit G, 121-23.

²⁸ Appeal Brief at 13, 6 TTABVUE 19.

A showing of actual confusion of course would be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however:

The fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.

In re Opus One, 60 USPQ2d at 1817; *see also In re Cook Med. Techs. LLC*, 105 USPQ2d 1377, 1383-84 (TTAB 2012) (“Applicant’s assertion, in an *ex parte* proceeding, of the contemporaneous use of applicant’s and registrant’s marks for a period of over 18 years without actual confusion is entitled to little weight.”); *In re General Motors Corp.*, 23 USPQ2d 1465, 1470 (TTAB 1992) (stating that normally, “the registrant has no opportunity to be heard in an *ex parte* proceeding of this type and the Board, therefore, is not in a position to meaningfully assess whether the claimed period of contemporaneous use had provided ample opportunity for confusion to have arisen”).

The record here is devoid of probative evidence relating to the extent of use of Applicant’s mark for battery packs and Registrant’s mark for blood pressure monitors and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992); *In re Kangaroos U.S.A.*, 223 USPQ 1025,

1026-27 (TTAB 1984); *see also In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“The Board must decide each case on its own merits.”).

Accordingly, on the record before us, we find the seventh, eighth, and twelfth *du Pont* factors to be neutral.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, as they pertain to the relevant *du Pont* likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Examining Attorney may nonetheless be applicable, we treat them as neutral. We have found that Applicant’s mark is identical to the cited mark; the goods identified in the subject application and cited registration are related and travel through the same channels of trade; and the remaining *du Pont* factors are neutral.

We find that Applicant’s mark is likely to cause confusion with the mark in cited Registration No. 2302442 when used in association with the goods identified in the application.

Decision: The refusal to register Applicant’s mark is affirmed.