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Hearing:
October 24, 1995

Paper No. 18
PTH/SMD

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Warner-Lambert Company
v.
Richwood Pharmaceutical Company, Inc.

Opposition No. 91,722
to application Serial No. 74/305,412
filed on August 17, 1992

Richard Lehv of Weiss Dawid Fross Zelnick & Lehrman PC for
Warner-Lambert Company.

Kurt A. Summe of Wood, Herron & Evans for Richwood
Pharmaceutical Company, Inc.

Before Rice, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Richwood Pharmaceutical Company, Inc. seeks
registration of the mark ACUPRIN in the form below,

ACUPRIN

for "low dosage aspirin."¹

Registration has been opposed by Warner-Lambert Company on the ground that applicant's mark, when applied to its goods, so resembles opposer's previously used and registered mark ACCUPRIL for coronary preparations,² as to be likely to cause confusion.

Applicant, in its answer, denied the allegations in the notice of opposition.

The record includes the pleadings; the file of the opposed application; the testimony deposition of opposer's witness, Michael Morales; and notices of reliance filed by both parties. The parties filed briefs on the case and were represented at the oral hearing.

Michael Morales, a marketing director with opposer's Parke-Davis division, testified that its ACCUPRIL product was approved by the Food and Drug Administration in November 1991 for the treatment of congestive heart failure, and introduced to physicians shortly thereafter. It was subsequently approved by the F.D.A. for the treatment of hypertension or high blood pressure. ACCUPRIL is known as an "ACE inhibitor." "ACE" stands for angiotensin converting enzyme. ACE inhibitors lower blood pressure by inhibiting the formation in the body of the vasoconstrictor called angiotensin. ACE inhibitors, such as ACCUPRIL, dilate or

¹Application Serial No. 74/305,412 filed on August 17, 1992, and alleging a bona fide intention to use the mark in commerce.

²Registration No. 1,521,489 issued January 24, 1989; Sections 8 & 15 affidavit filed.

relax blood vessels, thereby reducing blood pressure. Because congestive heart failure is partially due to vasoconstriction, ACE inhibitors are effective in controlling congestive heart failure as well as hypertension. The generic name for ACCUPRIL is Quinapril.

Opposer's ACCUPRIL product is sold to drug wholesalers who in turn sell to retail pharmacies. ACCUPRIL is sold only by prescription, although Mr. Morales indicated that opposer plans "to take ACCUPRIL over-the-counter."

(Deposition, p. 57).³ Opposer's ACCUPRIL is dispensed in tablet form and is available in 5, 10, 20 or 40 milligram size tablets. Because of size limitations, ACCUPRIL is not imprinted on the tablets, but appears on sample boxes, product information literature, and advertising.

Opposer advertises ACCUPRIL in approximately thirty medical journals, and through sales representatives who call on physicians. In addition, opposer conducts educational programs for physicians at various locations throughout the United States. According to Mr. Morales, opposer plans to exhibit at shopping malls in connection with blood pressure testing.

Mr. Morales testified that ACCUPRIL is the fifth (out of eight) most prescribed ACE inhibitors currently sold in

³We should note that Mr. Morales was unable to provide any specific information about opposer's plans in this regard on cross-examination.

the United States, and that 3.2 million prescriptions were written for ACCUPRIL in 1993.

Mr. Morales testified that the mistaken use of ACCUPRIL by a woman in the second or third trimester of pregnancy could result in injury, and possibly death to the fetus.

The only information we have about applicant's ACUPRIN product comes from a patient information sheet. Applicant's product contains 81 mg of aspirin and is available over-the-counter at pharmacies.⁴

There is no issue with respect to opposer's priority as regards its ACCUPRIL mark. Opposer submitted under notice of reliance a status and title copy of its pleaded registration. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).⁵

Thus, the sole issue in this case is likelihood of confusion. Turning first to the goods, it is not necessary

⁴Although this is an intent-to-use application, it appears that applicant has begun use of the mark. In particular, we note the following statement on the patient information sheet for applicant's ACUPRIN product - "Richwood Pharmaceuticals has recently introduced an adult low-dose aspirin."

⁵Applicant, in its brief on the case, argues that opposer did not establish use of the ACCUPRIL mark as of December 1991, the date of first use alleged in opposer's registration. However, in view of opposer's ownership of a valid and subsisting registration for the mark ACCUPRIL, the issue of priority of use does not arise. Moreover, opposer's registration is prima facie evidence of opposer's continuous use of its mark for the goods specified in the application since April 4, 1988, the filing date of opposer's application. To the extent that applicant is seeking to assert priority, it cannot do so in the absence of a counterclaim.

that the goods be identical or competitive to support a likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions surrounding the marketing of the goods are such that they would be encountered by the same persons under circumstances that could, because of the similarities of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. See *Hercules Inc. v. National Starch and Chemical Corp.*, 223 USPQ 1244, 1247 (TTAB 1984). In the present case, we find that the goods are sufficiently related that, when sold under identical or substantially similar marks, confusion in the marketplace is likely.

Opposer's ACCUPRIL is a coronary medication for the treatment of hypertension (high blood pressure) and congestive heart failure. Applicant's ACUPRIN is a low dose aspirin. The patient information sheet accompanying applicant's product contains the following statement:

Recent studies have indicated that the incidence of Myocardial Infarction (heart attack), Stroke and Colon Cancer may be reduced by daily administration of aspirin. For this reason, your physician may recommend you regularly take aspirin. Once a day aspirin therapy should *not* be initiated without a doctors recommendation. Only your physician knows if once a day low dose aspirin therapy is appropriate for you.

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