

September 2, 2020

Tejbir Singh
Trademark Examining Attorney
Law Office 106
United States Patent and Trademark Office

RE: Serial No: 88780809
Mark: VAPOR
Applicant: Cruze Distribution, LLC
Office Action Of: March 2, 2020

APPLICANT'S RESPONSE TO OFFICE ACTION

The following is the response of Applicant to the Office Action sent via email on March 2, 2020, by Examining Attorney Tejbir Singh.

Cruze Distribution, LLC respectfully requests a reconsideration of the Examiner's refusal of the above-referenced trademark application.

Search of USPTO Database of Marks - Prior Pending Application--


Based on the factors established in re E. I. DuPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), we respectfully disagree with the likelihood of confusion findings for the following reasons.

The Applicant's company sells medical grade orthopedic braces worn on the outside of the body such as ankle braces, knee braces and ankle braces. Whereas the cited company, and owner of the 79265992 mark is the leading developer and marketer of complete surgical systems for endoscopic minimally invasive spinal surgery. (*see Image 1 and Image 3 below for reference*).

The buyers of the goods are sophisticated buyers that are extremely knowledgeable and would know the difference between the marks and purpose of the goods. The goods related to the opposing marks are purchased through different trade channels. The Applicant's mark can be purchased through an e-commerce site as well as through direct medical sales to medical professionals and DME clinics providing educational information to buyers. The cited company does not sell the goods associated with mark 79265992 through an e-commerce platform. If the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that create the incorrect assumption that they originate from the same source, then even if the marks are identical, confusion is not likely. When researching evidence that determines use for both products, it is apparent that there are distinct differences in the goods that these marks market (*see Image 2 and Image 3 below for reference*).

As Trademark Examining Attorney mentioned, “the registration uses broad wording to describe the goods, which presumably encompasses all goods of the type described, including Applicant’s more narrow goods.” If it pleases the Examiner, Applicant would be willing to narrow the original application to apply specifically to orthopedic braces for the knee.

Table 1: Relevant Marks and Goods

Applicant’s Mark	Cited Mark
<p style="text-align: center; font-size: 24pt;">VAPOR</p>	
<p>Class 10: Orthopedic braces; Orthopedic supports</p>	<p>Class 10: Surgical and medical apparatus and instruments, including high-frequency apparatus and high-frequency probes; parts and accessories of the aforesaid goods</p>

Here, Applicant seeks registration of the standard character mark, VAPOR, for “orthopedic braces; orthopedic supports” in International Class 10. The Examining Attorney refused this trademark based on an alleged likelihood of confusion with registered standard character mark, “Vaporflex”, for “surgical and medical apparatus and instruments, including high-frequency apparatus and high-frequency probes; parts and accessories of the aforesaid goods” (see *Table 1, above*).

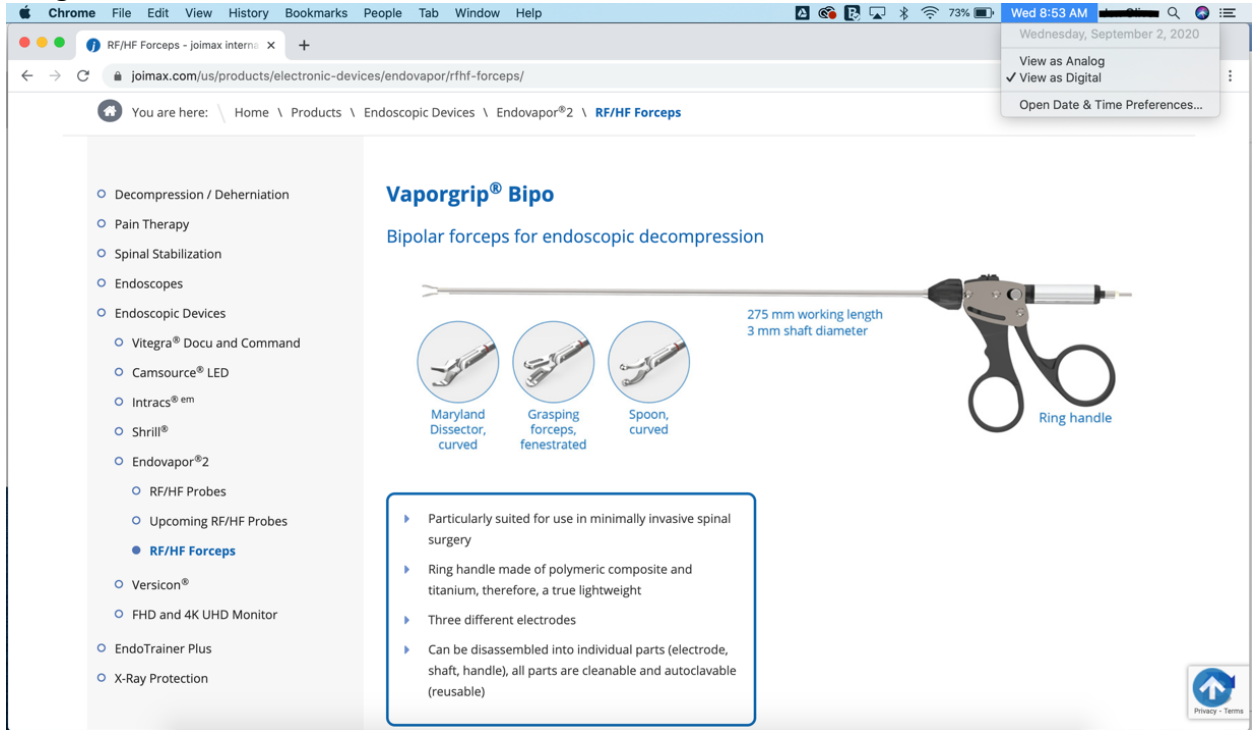
As for the registered mark and the Applicant’s mark for VAPOR, although similar, differ significantly in appearance and sound. While both marks are for orthopedic devices, the type and use of the devices differ significantly.

The goods used in connection with Applicant’s mark and the registered mark are different, non-competitive, and are sold and marketed through different trade channels.

Lastly, the variety of goods on which the mark is used and has been allowed by the USPTO is extensive, and as a result specific. When doing a search for VAPOR on the USPTO TESS search engine 781 records were found in class 10 alone. In consideration of the number or registrations allowed, we request that based on the differences illustrated between the marks, this registration for VAPOR in Class 10, Orthopedic Braces, be allowed.

Applicant respectfully requests the Examining Attorney to withdraw the refusal and permit Applicant’s mark to be published. We can be reached at (402) 310-0179 for further comments or clarifications.

Image 1: Relevant Website Reference



Vaporgrip excerpt taken from <https://www.joimax.com/us/products/electronic-devices/endovapor/rfhf-forceps/>.

Image 2: Relevant Website Reference



Vaporflex excerpt taken from <https://www.joimax.com/us/products/electronic-devices/endovapor/rfhf-forceps/vaporflex-bipolar-forceps-endoscopy-spine-surgery-joimax/>

Image 3: Relevant Product Reference



VAPOR orthopedic brace