U.S. Trademark Application Serial No. 86510378 or SYNCHRONY

The Examining Attorney states that a likelihood of confusion exists between Applicant's mark and the SYNCHRONY mark shown in Registration No. 2971323, owned by Visiogen, Inc. The Examining Attorney also states that the SYNCHRONY mark shown in Application Serial No. 86021949, owned by MED-EL Elektromedizinische Geräte Ges.m.b.H., may bar registration of Applicant's mark if it proceeds to registration.

Applicant submits that no likelihood of confusion exists between Applicant's mark and either of the above marks given the differences between the parties' goods. Applicant has amended its identification of goods to cover "spinal implants consisting primarily of artificial materials and also including biological materials." The identification "implants consisting primarily of artificial materials and also including biological material" was added to the ID Manual on January 29, 2015, and Applicant has added the term "spinal" to this wording to indicate that its implants are used in spinal surgery. The amended identification is acceptable because it is narrower than the original identification.

In contrast to Applicant's implants, Visiogen's implants are "ocular implants used in the field of ophthalmology," which clearly indicates that its products are used for the purpose of eye surgery, not spinal surgery. Thus, Applicant's and Visiogen's products are very different in nature.

Similarly, MED-EL's products are "audio processors and microprocessors adapted for use with hearing implants; hearing prostheses; [and] hearing implants comprising artificial materials." This shows that MED-EL's products are used in the field of hearing surgery and/or enhancement, not spinal surgery. Thus, as with Visiogen's identification, MED-EL's identification clearly indicates that its products are unrelated to Applicant's products.

The fact that all of the above products are described as "implants" is not determinative. The precise uses of the parties' products must be taken into consideration, and as the Trademark Trial and Appeal Board has held, even identical marks can coexist for medical devices in different fields. *See In re TriVascular, Inc.*, TTAB, Nov. 27, 2012, a copy of which is attached for the Examining Attorney's convenience. The TriVascular case is not precedential, but is highly probative of whether a likelihood of confusion exists in medical device cases. In the TriVascular case, the Board found no likelihood of confusion between identical marks covering vascular implants and related devices, on the one hand, and hip prostheses "designed to be implanted into a patient's body," on the other hand, because the parties' goods were considered "relatively unrelated." Specifically, the Board found that the parties' products were technologically distinct, could not be substituted for one another, and could not be used in a single medical procedure. The Board also found that "any reasonable decision to purchase goods of applicant or registrant would in all likelihood involve a person having specialized expertise in orthopedic or vascular medicine, as appropriate."

The same is true here. Spinal, ocular, and hearing implants are used for completely different purposes and are therefore technologically distinct; they cannot be substituted for one another; and they cannot be used in a single medical procedure. Further, the parties' products are likely to be purchased by sophisticated medical device purchasers having specialized expertise in spinal,

ocular, and hearing surgery and/or enhancement. In view of the above, there is no likelihood of confusion between Applicant's mark and the cited marks, and Applicant respectfully requests that its application be approved for publication.

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Mailed:
November 27, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re TriVascular, Inc.

Serial No. 77941535

Carole F. Barrett of Arnold & Porter LLP for TriVascular, Inc.

Andrea Koyner Nadelman, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Zervas, Bergsman, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

TriVascular, Inc. has applied to register on the Principal Register the mark OVATION in standard character form for the following goods, as amended[1]:

> Medical devices, all for the treatment of vascular disease, namely; stents, synthetic endovascular grafts, vascular prostheses, synthetic thoracic stent grafts, synthetic abdominal stent grafts, vascular implants comprising artificial material; vascular implant delivery systems comprised of catheters, valves, sheaths, handles and chassis; and accessories for the aforesaid goods, namely,

[1] Application Serial No. 77941535, filed on February 22, 2010 on the basis of applicant's bona fide intention to use the mark in commerce, under Trademark Act § 1(b), 15 U.S.C. §1051(b).

> introducer sheaths, curable polymeric implant fill material, implant fill material mixing devices, implant fill material injectors and implant fill material syringes, in International Class 10.

The trademark examining attorney issued a final refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark OVATION, which is registered on the Principal Register in standard character form for "Orthopedic implants and prosthesis, namely, hip prosthesis, used in joint reconstruction surgery,"[2] as to be likely to cause confusion, or to cause mistake, or to deceive. We reverse.

We turn first to an evidentiary objection raised by the examining attorney in her brief. Applicant submitted with its brief, for the first time, a Declaration of Meredith Huetter, applicant's Senior Director, Global Marketing and Education. The examining attorney objected to this evidence on the ground that it is untimely; the examining attorney declined to address the contents of the declaration in her brief.[3]

"The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.01. In accordance with this general rule, the Board has not considered the Huetter declaration. The

[2] Reg. No. 3,886,524, issued on December 7, 2010.

[3] Examining Attorney's brief, unnumbered p. 3.

applicant has the responsibility to make sure that the record is complete prior to filing a notice of appeal. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n. 32, 1769 (TTAB 2011).

We turn next to the merits of the refusal. Our determination under Section 2(d) is based on an analysis of all of the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The record contains evidence relevant to the similarity of the marks, the nature of the goods at issue, the trade channels through which the goods are offered and, most importantly, the customers to whom the respective goods are directed.

Applicant's mark is identical to the mark in the cited registration, and applicant does not dispute this fact. To mitigate this factor, applicant submitted Trademark Office records regarding registrations and applications relating to marks that include the designation OVATION,[4] apparently to show that the mark OVATION is used by others in the marketplace. Such evidence does not effectively demonstrate that the marks shown in the registrations and applications are actually in use. We see no reason to believe that the mark OVATION is weakened by dilution. Rather, considering that the mark is arbitrary with respect to the all of the goods at issue, it is an inherently strong mark entitled to a broad scope of

[4] Applicant's Exhibit E, U.S. registrations of marks that consist of or include the designation OVATION; and Applicant's Exhibit F, information relating to the application underlying the cited registration (Serial No. 77024607) and a third-party application (Serial No. 77886794), from the online records of the U.S. Patent and Trademark Office.

protection. Accordingly, the factor regarding the identity of the marks weighs heavily against the applicant.

We next consider the similarity or dissimilarity of the goods at issue. For purposes of determining the full scope of the parties' goods, we look only to the goods as they are identified in the applicant's application and the cited registration. *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958). The applicant has offered significant evidence relating to the nature of the goods at issue. We consider it to the extent that it elucidates and is not inconsistent with the respective identifications of goods.

The evidence shows that the goods of both applicant and registrant are medical devices in the nature of prosthetics, designed to be implanted into a patient's body through complex surgery. In the case of applicant, the goods are stents, grafts, prostheses and implants "all for the treatment of vascular disease," and devices for use in implanting such goods in patients. To explain the nature of the goods, applicant has supplied dictionary evidence indicating that "vascular" means "Of, relating to or containing blood vessels" and "Having to do with blood vessels."[5] As an example of the purpose of the goods, applicant has supplied information regarding the procedure of endovascular repair, whereby a surgeon

[5] Applicant's Exhibit A, definition of "vascular" from the online reference THE FREE DICTIONARY, accessed on November 24, 2010 at http://medical-dictionary.thefreedictionary.com/vascular.

makes small incisions in the patient's groin area to access the femoral arteries and places an endovascular stent graft in the diseased section of the aorta in order to create a new path for blood flow.[6] Applicant has also supplied technical marketing materials relating to its TriVascular Ovation™ Abdominal Stent Graft System, indicating that the system "is indicated in subjects diagnosed with an aneurysm in the abdominal aorta having vascular morphology suitable for endovascular repair…."[7]

The registrant's goods are a hip prosthesis for use in joint reconstruction surgery. The identification of goods also characterizes the goods as "orthopedic" in nature. Applicant has submitted dictionary evidence indicating that "orthopedic," means "pertaining to the correction of abnormal form or relationship of bone structures."[8] Applicant has also submitted information regarding types of orthopedic surgery from the website of The American Board of Orthopedic Surgery,[9]

[6] Applicant's Exhibit B, excerpt of applicant's website, entitled "What is endovascular repair?" See also Applicant's Exhibit 4, information regarding vascular surgery, accessed at <wikipedia.org> on June 17, 2011.

[7] Declaration of William C. Revelos, Exhibits A, B and C. A somewhat less technical description of applicant's goods is also set forth in Applicant's Exhibit D, excerpt of applicant's website, entitled "What is the Ovation Thoracic Graft System?"

[8] Applicant's Exhibit C, definition of "orthopedic" from the online reference THE FREE DICTIONARY, accessed on November 24, 2010 at http://medical-dictionary.thefreedictionary.com/orthopedic.

[9] Applicant's Exhibit 2, excerpt of the website of The American Board of Orthopaedic Surgery, accessed at <abos.org> on June 20, 2011.

and Wikipedia entries relating to "hip replacement" and "orthopedic surgery."[10, 11]

Applicant's Exhibit 1 indicates:

> Hip replacement is a surgical procedure in which the hip joint is replaced by a prosthetic implant. Hip replacement can be performed as a total replacement or a hemi (half) replacement. Such joint replacement orthopaedic surgery generally is conducted to relieve arthritis pain or fix severe physical joint damage as part of hip fracture treatment. A total hip replacement (total hip arthroplasty) consists of replacing both the acetabulum and the femoral head while hemiarthroplasty generally only replaces the femoral head.
>
> …
>
> Total hip replacement is most commonly used to treat joint failure caused by osteoarthritis.
>
> …
>
> The prosthetic implant used in hip replacement consist [*sic*] of different parts, the acetabular cup, the femoral component and the articular interface. Options exist for different patients and indications.

WIKIPEDIA, entry for "Hip replacement." *See* Exhibit 1.

Applicant's Exhibit 5 states:

> Orthopedic surgery or orthopedics… is the branch of surgery concerned with conditions involving the musculoskeletal system. Orthopedic surgeons use both surgical and nonsurgical means to treat musculoskeletal

[10] Applicant's Exhibits 1 and 5, entries for "hip replacement" and "orthopedic surgery" from <wikipedia.org>, accessed on June 17, 2011.

[11] The Board will consider evidence from Wikipedia so long as the nonoffering party has an opportunity to rebut that evidence; it is preferred that such evidence be corroborated with other reliable sources. *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 n.4, 6, 7 (TTAB 2009); TBMP § 1208.03. Inasmuch as applicant's Wikipedia evidence was submitted prior to issuance of the examiner's final refusal and is corroborated by other evidence of record, we have considered it.

> trauma, sports injuries, degenerative diseases, infections, tumors, and congenital disorders.

WIKIPEDIA, entry for "Orthopedic Surgery." *See* Exhibit 5.

The same entry sets forth the 25 most common procedures performed by orthopedic surgeons. These include a variety of procedures upon the knee, shoulder, carpal tunnel, leg bones, hip, tendons, ankle, and spine. *Id*. We find the evidence quoted above germane to an understanding of the nature of registrant's goods and the potential scope of the identification of goods in the registration.

The examining attorney argues "that the goods are highly related, and that they travel in the same channels of trade," and that "[b]usinesses provide medical products used in both vascular and orthopedic procedures."[12] To demonstrate the degree of relatedness among the goods, the examining attorney has submitted eight third-party registrations purporting to demonstrate instances wherein a single mark was registered by its owner both for stents (similar to those of applicant) and orthopedic implants (similar to those of registrant). Such registrations, if they are based on use in commerce, may have some probative value to the extent that they serve to suggest that the listed goods are types that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Applicant has objected that the goods covered by these third-party registrations are broadly identified and that it is not possible to tell from the face of the registrations whether the identified goods are, in fact, stents "*for the treatment of vascular disease*" and

[12] Examining Attorney's brief at unnumbered pp. 7-8.

implants that are "*orthopedic* and *used in joint reconstruction surgery,*" as opposed to other types of stents and implants.[13] With respect to most of the third-party registrations, the applicant's objection is well taken. We have given due consideration to all eight of the third-party registrations proffered by the examining attorney. Those which do not clearly indicate the specific types of stents and implants are, at best, evidence of the possibility that goods similar to those of applicant and registrant may emanate from a single entity. However, they are not highly probative and we have accordingly given them limited weight. We do note, in particular, the following third-party registrations:

> Reg. No. 2813488 (INSIGHTRA) covering "stents, balloons…, intra-aortic balloons, prosthetic implants, orthopedic implants…."
>
> Reg. No. 3004736 (I.C.) covering "stents…, cardiovascular devices, namely, pacemakers,… heart valves…, orthopedic devices, namely, joint implants…."
>
> Reg. No. 3780186 (TELEFLEX) covering "intra-aortic balloon pumps…, artificial orthopedic joint implants…, stents, flushing and balloon catheter test chamber…."

In the context of the other goods listed in these registrations, one may reasonably conclude that the identified "stents" are vascular stents. Moreover, the implants are clearly identified as orthopedic implants for use in orthopedic surgery. Hence, these registrations do suggest that products similar to the goods of both applicant and registrant may emanate from a single source.

Considering this evidence together with the evidence submitted by applicant to demonstrate the nature of the goods, we find the goods of applicant and

[13] Applicant's brief at 7-8.

registrant to be relatively unrelated. It is true that all of the goods are implantable medical devices. However, registrant's goods are artificial bones and joints intended to replace the rigid structures of the skeleton while applicant's goods are artificial blood vessels intended to replace portions of the soft tissues of the circulatory system. Such goods cannot substitute for each other or be used together in a single medical procedure. There can be no doubt that the respective goods are technologically quite distinct, and we expect the processes and methods of manufacturing the two types of goods to be substantially different. We can appreciate that a medical products company might find it efficient to produce diverse types of medical goods. However, nothing in the record indicates that the parties' respective goods are more closely related to each other than they would be to other medical products. Neither does the evidence suggest that the fields of vascular medicine and orthopedics are more closely related to each other than to other medical specialties. Accordingly, we find that the factor of the similarity or dissimilarity of the goods favors the applicant.

A critical question in this analysis under Section 2(d) is *whose* confusion should trigger a refusal of registration. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1412 (TTAB 2010). Applicant argues that the relevant customers for the goods are two separate and distinct classes of surgeons – vascular surgeons and orthopedic surgeons – who neither do each other's work nor purchase

each other's goods. Applicant has submitted a legal consultant's declaration[14] stating as follows:

> 7. Given the division of medicine into areas of specialization, physicians only purchase and use medical devices particular to their respective fields. Orthopedic devices are sold to physicians who specialize in orthopedics and orthopedic surgery. Vascular devices are sold to physicians who specialize in cardiovascular disease and/or vascular surgery.
>
> 8. Since vascular devices and orthopedic devices are specialized medical products, they cannot be purchased from retail store shelves – they must be purchased through the manufacturer via sales representatives. Further, they are only purchased after careful study and consideration. To aid physicians in the purchasing process, Applicant supplies detailed, highly technical marketing materials. These are generally given to physicians and other medical professionals in the context of an in-person office visit by one of the Applicant's representatives, or at a conference or event aimed specifically at cardiovascular disease specialists.

Revelos Declaration, ¶¶ 7-8.

To indicate the highly specific – and distinct – expertise of the surgeons who purchase the goods, applicant has submitted information from the websites of The American Board of Orthopaedic Surgery and the American Board of Vascular Medicine relating to certification by these boards of practitioners of orthopedic medicine and vascular medicine, respectively.[15] The implication of the evidence is

[14] The declarant states that he is a legal consultant to applicant, that he has bachelor's and master's degrees in engineering mechanics and mechanical engineering, respectively, that he has been in-house counsel to several medical device companies, and that he counsels medical and healthcare companies regarding the "development, manufacture, and marketing of medical devices." Revelos Declaration, ¶¶ 1-3 and 5.

[15] Applicant's Exhibit 2; and Applicant's Exhibit 3, excerpt from the website of American Board of Vascular Medicine, accessed at <vascularboard.org> on June 20, 2011.

that a physician who meets the requirements of both disciplines would be an extremely rare individual. The applicant urges that the sophistication of the respective purchasers of applicant's goods and registrant's goods would render confusion unlikely.

Against this, the examining attorney argues that "It is entirely feasible that someone other than a physician, such as a hospital administrator or a medical office manager, would purchase medical devices used by physicians."[16] The examining attorney also argues that entities such as "medical wholesale companies, hospitals and clinics" should be considered relevant customers for the goods, that "purchasing agents for any of these companies" might be offered the goods,[17] and that the Board has so presumed with respect to medical goods when channels of trade were not limited, citing *In re Cordis Corporation*, Serial No. 75850715 (non-precedential) (TTAB 2002). The examining attorney also criticizes the Revelos Declaration on the ground that the declarant is not a "consumer who utilizes the goods."[18]

While the Revelos Declaration does not provide the purchaser's perspective, it does competently provide the seller's perspective. We take at face value the declarant's assertion that physicians participate in purchasing the goods at issue, although we tend to doubt that they are the only ones involved in purchasing the goods and that no other types of personnel would be involved in the purchase process. We find plausible the examining attorney's suggestion that hospital

[16] Examining Attorney's brief at p. 9.

[17] Examining Attorney's brief at p. 10.

[18] Examining Attorney's brief at p. 9.

administrators, medical office managers, purchasing agents, and other personnel of hospitals, clinics, and medical wholesale companies might be involved in the purchase of the goods and thereby encounter the goods and the marks of applicant and registrant.

In our analysis of this question, we find useful guidance in *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983). In that case, which addressed goods sold to hospitals, the Court readily perceived the separate departments of hospitals as "different markets for the parties' respective products." *Astra* at 791. The Board's reviewing Court, in *Electronic Design & Sales Inc. v. Electronic Data Systems Corp*., 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992), cited *Astra* with approval and followed its logic, stating:

> [I]t is error to deny registration simply because 'applicant sells some of its goods in some of the same fields in which opposer provides its services,' without determining who are the 'relevant persons' within each corporate customer.
>
> …
>
> [T]he mere purchase of the goods and services of both parties by the same institution does not, by itself, establish similarity of trade channels or overlap of customers.

Electronic Design at 1391 (internal citations omitted).

Considering the prospect that a common purchasing agent might be involved in the selection of disparate goods for use in different departments, both Courts concluded that the purchasing agent would not be the "relevant person" whose potential confusion should be considered:

> Because a common purchasing agent for several autonomous departments 'merely fills out the necessary forms and arranges the shipping details,' even when there is an overlap in purchasing persons due to a common purchasing agent, such an agent is not necessarily a 'relevant person' for determining likelihood of confusion.

Id. (internal citation of *Astra* omitted).

The *Astra* and *Electronic Desig*n Courts both found that the relevant persons whose potential confusion should be considered were those medical personnel having specialized knowledge with respect to the goods, and found that the sophistication of such personnel would be sufficient to render confusion unlikely.[19]

Considering the highly specialized and technological nature of the goods in the case before us, we expect that any reasonable decision to purchase goods of applicant or registrant would in all likelihood involve the advice of a person having specialized expertise in orthopedics or vascular medicine, as appropriate, even if the formalities of purchase are ultimately undertaken by a business administrator or purchasing agent. A decision made without consideration of the technical needs and preferences of the surgeons who will ultimately use the products would not, in our view, be a reasonable one. Even a wholesaler would need to consider the needs and preferences of the ultimate users in order to make a rational purchasing decision. Accordingly, we find the "relevant persons" in the present case are the orthopedic specialists and vascular medicine specialists (most likely surgeons) who would actually use the goods. The evidence indicates that orthopedic specialists

[19] We have considered the non-precedential case of *In re Cordis*, in which the goods were cardiology stents versus "instruments for orthopedic surgery." As "instruments" could cover almost any kind of surgical device, that case dealt with goods that were less clearly different in nature than prosthetic hips and artificial blood vessels.

and vascular medicine specialists are likely to be separate classes of customers, so that neither class is likely to have exposure to the products of interest to the other. Considering the nature of the goods, one would expect both classes of purchasers to exercise a high degree of care when making purchasing decisions. Those decisions would be informed not only by the purchasers' technical understanding of the goods, but also by their exposure to the sellers' marketing and outreach efforts which, according to the evidence, are directed specifically to them, sometimes in person. Revelos Declaration ¶ 8. In sum, these are two separate classes of highly informed, careful, and sophisticated purchasers whose selection of the goods would be based on very many factors of critical importance. Even if such a purchaser were to know that the same trademark appears on different products used in a different medical field, it would not likely have an untoward impact on the decision to purchase or not purchase the goods.

Decision: The refusal to register is reversed and this application will be forwarded to publication in due course.