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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vertelink Corporation

Serial No. 78304641

Steven J. Nataupsky of Knobbe, Martens, Olson & Bear, LLP
for Vertelink Corporation.

David Collier, Trademark Examining Attorney, Law Office 104
(Chris Doninger, Managing Attorney).

Before Holtzman, Drost, and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

An application has been filed by Vertelink Corporation to register the mark VECTOR ACCESS TECHNOLOGY for "medical devices, namely, portable alignment devices that hook onto screws implanted into spines for subcutaneously positioning guidewires through bone anchors, hooks, guidewires, screws, anchors, implants, and surgical instruments."¹

¹ Application Serial No. 78304641, filed on September 24, 2003, based on a *bona fide* intention to use the mark in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).² The Examining Attorney contends that applicant's mark, if applied to applicant's goods, so closely resembles the previously registered mark VECTOR for "orthopedic implants and prosthesis; namely, a fracture fixation device" as to be likely to cause confusion.³

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs.

We affirm.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods.

² During the prosecution of the application, the Examining Attorney required applicant to disclaim the exclusive right to use "Access Technology." The Examining Attorney argued that the term "Access Technology" is merely descriptive when used in connection with applicant's products. Applicant disclaimed the exclusive right to use "Access Technology" in its appellate brief.

³ Registration No. 2,611,339, issued on August 27, 2002.

1. Registrant's Identification Of Goods Encompass Products Listed In Applicant's Identification Of Goods.

We turn first to a consideration of the similarity or dissimilarity of the goods. Applicant's goods are

"medical devices, namely, portable alignment devices that hook onto screws implanted into spines for subcutaneously positioning guidewires through bone anchors, hooks, guidewires, screws, anchors, implants, and surgical instruments."

Registrant's goods are

"orthopedic implants and prosthesis; namely, a fracture fixation device."

At the outset, we note that the evidentiary record in this case is surprisingly sparse for an application and registration involving complex surgical products. Neither the Examining Attorney nor the applicant provided an evidentiary record explaining the exact nature of applicant's products and/or registrant's products or describing the marketing environment. For example, there is no evidence regarding to whom or how the products are (or would be) sold and the distinction between orthopedic surgery and spinal surgery. In other words, the briefs were long on argument and short on facts. Accordingly, our analysis rests upon the following facts that we were able to glean from the record:

1. A Website discussing spinal surgery attached to the Trademark Office Action dated August 1, 2005 from *Health Industry Today*, July, 1999:

Fusion cages adding backbone to spinal fixation device sales

In the spinal fixation segment of the orthopedic implant market - a section of the industry that is high growth, high potential, and poised for another round of explosive expansion. . . In fact, **the overall market for orthopedic fixation devices - spinal fixation, external fixation, and internal fixation devices, basically pieces of equipment used to stabilize and fixate fractured bones and soft tissue** - is poised for growth. . . In 1998, 31 companies fought for market share in the fixation devices arena, **a roster that includes all the large, general orthopedic companies with comprehensive product lines**, and a number of smaller firms focused on individual facets of the market, primarily spinal fixation and fusion cage applications. Among them, **the orthopedic fixation devices market** generated \$1.02 billion in revenues in 1990. . . In fact, in testimony before the FDA's Orthopedic and Rehabilitation Devices Advisory Panel, Dr. Hansen Yuan of the State University of New York - Syracuse reported a 98.1% fusion success rate for anterior procedures involving two vertebrae. . . (Emphasis added).

2. News articles from a LexisNexis search (emphasis added):

- a. *The Business Times* Singapore, February 4, 2006
- Go the minimally invasive way:

"The surgical work on the spine is still the same, but now we can have less collateral damage on the way to the spine,"

says Dr. Yue Wai Mun, **spine service consultant from the department of orthopaedic surgery.**"

- b. *Seattle Times*, January 19, 2006 - \$35 million raised, key partnership of Archus:

"Dr. Jens Chapman, **professor of orthopedic surgery at the University of Washington and a spine surgeon at Harborview Medical Center**, described a spinal motion segment as a tripod, with the disc and the facets forming legs."

- c. *The Washington Post*, December 3, 2005 - The Boy Wonder Works With Grown-Up Grit:

"Dr. Laurel Blakemore, chief of orthopedic surgery at Children's Hospital, inserted two titanium rods into Chris's back. Roughly 11/2 (sic) feet long and running from the base of Chris's neck to his pelvis, the rods are hitched to his spine by more than 20 screws."

- d. *The New York Times*, November 18, 2005 - an obituary. The deceased was "Certified by the American Board of Orthopaedic Surgery and American Board of Spine Surgeons."

- e. *Charlotte Observer*, July 24, 2005 - Groups Merge Into OrthoCarolina:

"Dr. Alden Milam specializes in spine surgery. . . **He served a fellowship with Case Western Reserve University Department of Orthopedic Surgery, Spine Surgery.**"

- f. *Dallas Morning News*, January 7, 2005 - Congratulations:

"**Dr. Timon will specialize in orthopedic surgery with an emphasis in spine surgery.**"

- g. *The Washington Post*, December 18, 2004 - Dr. Peter T. Singleton Jr.:

"Dr. Peter T. Singleton, Jr. . . was an associate professor of orthopedic surgery at the Stanford International Spine Center."

We start with the well-settled proposition that it is not necessary that the goods of the parties be similar or even competitive to support a finding of likelihood of confusion. Likelihood of confusion may be found if the goods are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they emanate from the same source. *In re Pollio Dairy Products Corporation*, 8 USPQ2d 2012, 2015 (TTAB 1988); *Seaguard Corporation v. Seaward International, Inc.*, 223 USPQ 48, 51 (TTAB 1984).

It is also settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods or services as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the products, their channels of trade and/or classes of purchasers. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639 (TTAB 1981). We must, therefore, consider the registrant's

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products as if they were being rendered in all of the normal channels of trade to all of the normal purchasers for such products. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, supra; Toys R Us, Inc. v. Lamps R Us*, 219 USPQ 340, 343 (TTAB 1983).

In the present case, we find that the registrant's orthopedic fracture fixation device and registrant's medical devices used in spinal surgery are related because there is a substantial overlap between orthopedic and spinal surgery. Orthopedics is "the medical specialty concerned with correction of deformities or functional impairments of the skeletal system, esp. the extremities and the spine, and associated structures, as muscles and ligaments." *Dictionary.com* based on the Random House Unabridged Dictionary (2006).⁴

According to the evidence, spinal fixation is a segment of the orthopedic implant market,⁵ many spinal surgeons have trained in orthopedics,⁶ and the same companies make both orthopedic products and spinal

⁴ The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Styleclick.com*, 58 USPQ2d 1523, 1525 (TTAB 2001).

⁵ *Health Industry Today* website, July, 1999.

⁶ News articles from newspapers found through LexisNexis.

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products.⁷ The subject of one news article was an orthopedic surgeon who performed back surgery:

Dr. Laurel Blakemore, chief of orthopedic surgery at Children's Hospital, inserted two titanium rods into Chris's back. Roughly 11/2 (sic) feet long and running from the base of Chris's neck to his pelvis, the rods are hitched to his spine by more than 20 screws.⁸

Thus, spinal surgery is a subspecialty of orthopedics.

Absent any limitation in the cited registration as to whether registrant's fracture fixation device excludes a subcutaneous spinal positioning device, we cannot infer that such a limitation exists. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985). Registrant's fracture fixation device, as identified, is broad enough to encompass a subcutaneous spinal positioning device.

Moreover, because large general orthopedic companies make surgical equipment for spinal surgery⁹ and because spinal surgeons have trained in orthopedics, the use of similar marks in connection with a subcutaneous spinal positioning device and a fracture fixation device may be sold to the same surgeons under circumstances likely to

⁷ *Health Industry Today* website, July, 1999..

⁸ The Washington Post, December 3, 2005 (The Boy Wonder Works With Grown-Up Grit).

⁹ *Health Industry Today*, July, 1999.

give rise to the mistaken belief that the products emanate from the same source.

We find, therefore, that there is a sufficient relationship between applicant's and registrant's products as to be likely to cause confusion if they are intended to be sold under the same or a similar mark.

2. The Marks Are Similar.

Applicant argued that VECTOR ACCESS TECHNOLOGY is not similar to VECTOR because VECTOR is a weak mark entitled to only a narrow scope of protection and, therefore, the addition of the term "Access Technology" to applicant's mark is sufficient to distinguish it from registrant's mark. Applicant asserted that because the definition of "vector" means "[a] quantity, such as a velocity, completely specified by a magnitude and a direction" and because "registrant's fracture fixation device performs its function by exerting forces in a particular direction to immobilize a fracture", the registrant's VECTOR mark is suggestive.¹⁰

¹⁰ Presumably, the source of this information is registrant's website. (Applicant's Response to Office Action No. 1, Exhibit B). As noted by applicant, registrant's website does not reference the VECTOR trademark. Therefore, applicant's reliance on the website information to conclude that the VECTOR product is a femoral nail used in orthopedic surgery and, thus, performs as described by applicant is speculation.

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In support of its argument, applicant submitted the following third-party registrations, owned by different entities, comprising the word "vector," in whole or in part, for medical devices to show the suggestive nature of the word "vector":

Reg. No.	Mark	Goods
2,443,209	VECTOR	Dental equipment, namely, ultrasonic abrasion and scaling apparatus
2,220,942	VECTOR III	Orthodontic devices, namely orthodontic springs, ligatures and arch wires
2,669,387	VECTOR	Medical guiding catheters
1,742,216	VECTOR	Medical ultrasound equipment for use in diagnosis and monitoring soft tissue conditions
1,412,167	VECTOR BAR	Orthopedic surgical traction device (canceled)
1,426,450	VEKTOR	Cardiac pacers (canceled)

The Examining Attorney cited Registration No. 2,014,731 for the mark VECTOR for "arthroscopy drill guide system comprising drill bits, probes, wire and drill guides, aligners, shaping tools, plugs, and sterilization trays" as a bar to registration. During the prosecution of the application, the Examining Attorney withdrew this reference. Because the Examining Attorney cited

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Registration No. 2,014,731 as a bar to registration, applicant did not include it in its list of third-party registrations. Nevertheless, we will consider this registration as if applicant had submitted it.¹¹

In addition, the applicant relied on dictionary definitions for the word "vector" from "Dictionary.com" and the "On-line Medical Dictionary". "Dictionary.com" provided definitions from several sources such as the American Heritage Dictionary of the English Language (4th Ed. 2000) and Merriam-Webster Medical Dictionary (2002). One definition representative of the definition from the American Heritage Dictionary of the English Language referenced by applicant is set forth below:

Mathematics.

- a. A quantity, such as velocity, completely specified by a magnitude and a direction.
- b. A one-dimensional array.
- c. An element of vector space.

The definition from the Merriam-Webster Medical Dictionary provides the following definition:

A quantity that has magnitude and direction and that is usually

¹¹ Applicant also included canceled Registration No. 1,785,404 for the mark VECTOR for "orthopedic implants and prosthesis; namely, a fracture fixation device." The registrant owned this registration.

represented by part of a straight line with the given direction and with a length representing the magnitude.

"On-Line Medical Dictionary" provides the following definition:

<mathematics> A term used to describe something that has both direction and magnitude.

Applicant's mark VECTOR ACCESS TECHNOLOGY and registrant's mark VECTOR differ only by the descriptive and disclaimed term "Access Technology."¹² Applicant posits that the addition of this term is a meaningful distinction. We disagree.

A. The similarity of the marks.

The similarity or dissimilarity of the marks are analyzed in their entireties as to appearance, sound, connotation and commercial impression. *In re E.I. du Pont de Nemours & Co., supra*. While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corporation*, 753 F.2d 1056, 24 USPQ 749, 751 (Fed. Cir. 1983). That a particular feature of a mark is descriptive with respect to the products at issue justifies giving less weight to that portion of the mark. *In re*

¹² The Examining Attorney submitted two articles using "access technology" to describe surgical entry into the patient's body.

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National Data Corporation, supra. The record shows that "Access Technology" is descriptive when used in connection with subcutaneous spinal positioning medical devices. Thus, the word "Vector" is the dominant portion of applicant's mark.

The dominance of the word "Vector" in applicant's mark is reinforced by its location as the first word in the mark. The Board has found a likelihood of confusion in the case of marks with identical initial terms to which the applicant has added a suffix. *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered"). Thus, VECTOR ACCESS TECHNOLOGY suggests that applicant's products are a specific line of VECTOR products.

Applicant's mark incorporates the entirety of registrant's mark. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S

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for restaurant and bar services); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

In analyzing the marks in their entireties, the relevant consumers are likely to find the marks VECTOR ACCESS TECHNOLOGY and VECTOR similar because the dominant portions of both marks are identical and the addition of the descriptive term "Access Technology" is not a significant distinguishing element of applicant's mark. Thus, VECTOR and VECTOR ACCESS TECHNOLOGY are similar in appearance, sound, meaning, and commercial impression.

B. The third-party registrations and dictionary definitions.

Applicant argues that "registrant's fracture fixation device performs its function by exerting forces in particular directions to immobilize a fracture" and, therefore, "Vector" is suggestive and entitled to only a narrow scope of protection such that the addition of the term "Access Technology" is sufficient to distinguish applicant's mark from the mark in the cited registration.

(Applicant's Brief, pp. 5-6).¹³ According to applicant, the

¹³ As indicated in footnote 10, applicant's description of registrant's VECTOR fracture fixation device is not supported by the record.

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dictionary definitions and the third-party registrations show that "Vector" has a well-understood meaning and that registrant's mark has been chosen to convey that meaning. In the case *sub judice*, we do not consider the dictionary definitions and the third-party registrations significantly probative in ascertaining the meaning of the word "vector" or the strength to be accorded registrant's mark.

First, the record in this case is not so strong as to persuade us that the suggestive connotation between "vector" and medical products, specifically orthopedic and spinal equipment, is so common or obvious so as to restrict the scope of protection accorded the cited registration. In our opinion, VECTOR, while arguably suggestive, is not so highly suggestive as to border on descriptive and thereby preclude a finding of likelihood of confusion. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) ("The likelihood of confusion is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and a 'strong' mark."). Moreover, the existence of other confusingly similar marks already on the register will not aid an applicant to register another confusingly similar mark. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *Lilly Pulitzer,*

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Inc. v. Lilli Ann Corporation, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967); *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

Second, as we indicated previously, VECTOR and VECTOR ACCESS TECHNOLOGY when used in connection with a fracture fixation device and a subcutaneous spinal positioning device are similar marks. Thus, even assuming that marks consisting of the word "vector" may be weak marks, this does not aid applicant because the commercial impression created by both marks is the same. *In re Pollio Corporation*, 8 USPQ2d 2012, 2015 (TTAB 1988); *Hollister Incorporated v. Indent A Pet, Inc.*, 193 USPQ 439, 442 (TTAB 1977) ("even highly suggestive or 'weak' marks are entitled to be protected against the registration of the same or a similar mark for the same or closely related products."). We believe that the relevant purchasers would recollect and associate the goods of both the applicant and the registrant with a single source because of the similarities of the marks.

Finally, even if the differences in the marks were noted and perceived, because of the similarity of the products, the relevant purchasers might believe that the products are variations of different product lines from a common producer of surgical equipment. It would be

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natural, upon noting the common use of the word "Vector," to assume that the manufacturer of the fracture fixation devices had incorporated a subcutaneous spinal positioning device into its portfolio of products.

In view of the foregoing, there is insufficient evidence to undermine the strength of the registrant's mark.

3. There Is Insufficient Evidence Regarding Purchaser Care To Outweigh The Similarity Of The Marks And The Similarity Of The Products.

With respect to the degree of consumer care, applicant argued that surgeons who purchase applicant's products and registrant's products exercise a high degree of care in making decisions regarding those goods. Just from the record description of goods, one would expect that all of applicant's and registrant's purchasers would be highly sophisticated and that they would take great care in selecting surgical equipment. However, there is nothing in the record to explain how that care relates to trademarks or that the surgeons would unquestionably know the source of these products. Indeed, there is nothing in the record regarding the cost of the products, the evaluation process used in selecting surgical equipment, or the salespeople who introduce the products to the surgeons. In the

universe of surgical equipment, there is no evidence suggesting the degree of attention that surgeons will pay to trademarks. Thus, notwithstanding that the purchasers may be technically knowledgeable, there is no evidence supporting their knowledge of trademarks for the products proposed for sale by applicant and sold by registrant. *In re Decombe*, 9 USPQ2d 1813, 1815 (TTAB 1988) ("being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks. [Internal citation omitted]. Nor does it guarantee knowledge of the range of products of the parties with whom one is dealing.").

While surgeons may exercise great care in purchasing surgical equipment, in this case, there is insufficient evidence regarding the degree of care to overcome the similarity of the marks and the similarity of the products.

We find that there is a likelihood of confusion between VECTOR ACCESS TECHNOLOGY proposed for use in connection with "medical devices, namely, portable alignment devices that hook onto screws implanted into spines for subcutaneously positioning guidewires through bone anchors, hooks, guidewires, screws, anchors, implants, and surgical instruments" and VECTOR used in connection

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with "orthopedic implants and prosthesis; namely, a fracture fixation device."

Decision: The refusal to register is affirmed.