

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Restek Corporation

Serial No. 78669093

John F.A. Earley III, Frank J. Bonini, Jr. and Charles L. Riddle of Harding Earley Follmer & Frailey for Restek Corporation.

Sue Carruthers, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Quinn, Bucher and Drost, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Restek Corporation seeks registration on the Principal Register of the mark **Viva** (*in standard character format*) for goods identified in the application as "high-pressure liquid chromatography columns for chemical analysis" in International Class 9.<sup>1</sup>

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when used with the identified goods, so

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<sup>1</sup> Application Serial No. 78669093 was filed on July 13, 2005 based upon applicant's allegation of first use anywhere and first use in commerce at least as early as February 1, 2005.

resembles the following two registered marks owned by the same party:

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**VIVAPURE**

for "membrane chromatography units comprised of centrifugal spin columns, centrifugal filter devices, centrifugal concentrators, and chromatography columns with stacks of membrane adsorbers for laboratory use" in International Class 9;

"membrane chromatography units comprised of centrifugal spin columns, centrifugal filter devices, centrifugal concentrators, and chromatography columns with stacks of membrane adsorbers; and filtration modules and apparatus for purification and contamination removal, especially of biomolecules such as proteins, antibodies, oligonucleotodes, viruses, aggregated biomolecules and endotoxins" in International Class 11;<sup>2</sup>

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**VIVASCIENCE**

for, *inter alia* "scientific instruments, apparatus and equipment, namely, ... microtiter plates and membrane chromatography apparatus; ... filtration devices for scientific, laboratory, medical diagnostic, and medical research for use in the diagnosis of diseases and the identification of substances, nucleic acids, proteins, antibodies, and antigens" in International Class 9; and "... instruments and equipment for the manufacture of medical and pharmaceutical products and for the treatment of living organisms, namely filters, centrifugal filter tubes, centrifugal filter concentrators, filter membrane adsorbers and chromatography filter apparatus ..." in International Class 11.<sup>3</sup>

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<sup>2</sup> Registration No. 2640449 issued to Vivascience AG, a German corporation, on October 22, 2002. The assignment records of the United States Patent and Trademark Office show that this registration is currently owned by Sartorius Stedim Biotech GMBH, Reel 3651, Frame 0579.

<sup>3</sup> Registration No. 2896555 issued to Vivascience AG, a German corporation, on October 26, 2004. The assignment records of the United States Patent and Trademark Office show that this registration is currently owned by Sartorius Stedim Biotech GMBH, Reel 3646, Frame 0440.

as to be likely to cause confusion, to cause mistake or to deceive.

Applicant has appealed. Both applicant and the Trademark Examining Attorney have filed briefs. We affirm the refusal to register.

### **Likelihood of Confusion**

We turn then to a consideration of the issue of likelihood of confusion. Our determination is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on that issue. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

### **Relatedness of the Goods and Channels of Trade**

The Trademark Examining Attorney argues correctly that applicant's goods are clearly related to registrant's goods

inasmuch as both identify chromatography apparatus for scientific use. Inasmuch as applicant has submitted no arguments to the contrary, we regard the goods as very closely related, if not overlapping. Where the goods are identical and/or closely related, and neither identification has any limitations as to channels of trade, we must presume that the respective goods would move through the same trade channels to the same classes of purchasers. Hence, this *du Pont* factor also favors the position of the Trademark Examining Attorney herein.

### **Similarity of the marks**

We begin this part of the analysis mindful of the fact that when marks would appear on virtually identical goods, the degree of similarity in the marks necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. V. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

As to appearance, applicant is correct in noting that when the marks are compared in their entirety, the registered marks have more syllables than applicant's applied-for mark. However, that becomes less relevant when one notes that the dominant portion of all of the marks is "Viva," which comprises the only word in applicant's mark

and the first portion of each of registrant's marks. As a rule, consumers are more inclined to focus on the first term in a trademark. See *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ["it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions].

As to connotation, applicant has merely taken registrant's marks and deleted the words "pure" and "science" from these combined terms. We find that deletion of these particular words from registrant's composite marks is not sufficient to overcome a likelihood of confusion under § 2(d).

The mark **VIVAPURE** identifies "apparatus for purification and contamination removal." The mark **VIVASCIENCE** is used in connection with goods designed for particular *scientific* uses. Thus, if separated from the dominant, root term "Viva" by a space, these terms would likely both be disclaimed due to their descriptiveness relative to the goods. Such matter is typically accorded less significance when marks are compared to determine the similarity in commercial impressions. In fact, as noted by the Trademark Examining Attorney (brief, unnumbered p. 6),

most prospective consumers of such goods would make the assumption that the source of **VIVAPURE** chromatography equipment for laboratory use and **VIVASCIENCE** chromatography apparatus for laboratory, medical and pharmaceutical use would be the likely source for **VIVA** chromatography equipment for chemical analysis.

Although applicant argues that the cited marks create different commercial impressions from applicant's mark because **VIVAPURE** brings to mind "live pure" or "pure living," while **VIVASCIENCE** suggests "science lives," we find no evidence in support of this conjecture. We find more likely that customers without knowledge of either vendors might make an educated guess that a possibly anonymous source of **VIVA** brand chromatography equipment has product marks suggesting *purification* and *scientific* applications.

**Conclusion**

We find that because of the close relationship of the goods involved herein, identical channels of trade, and the similar commercial impressions created by applicant's and registrant's marks, confusion is likely between applicant's mark and the marks in the cited registrations.

*Decision:* The refusal to register under Section 2(d) of the Trademark Act is hereby affirmed.