

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB NOV. 17, 99
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ProCyte Corporation

Serial No. 75/236,506

Dennis K. Shelton of Christensen, O'Connor Johnson &
Kindness for ProCyte Corporation.

John Dalier, Trademark Examining Attorney, Law Office 105
(Thomas Howell, Managing Attorney).

Before Simms, Hanak and Walters, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

ProCyte Corporation (applicant) seeks to register
GRAFTCYTE in typed drawing form for "medicated
micronutrient gels, topical solutions, and shampoos, and
wound dressings, all for use in recovery from hair
transplantation procedures." The application was filed on

Ser No. 75/236,506

February 5, 1997, with a claimed first use date of December 3, 1996.

The Examining Attorney refused registration pursuant to Section 2(d) of the Trademark Act on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark GRAFT-SITE, previously registered in typed drawing form for "stretchable locating bandage for covering primary bandages and dressings on the body." Registration number 1,810,241.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key considerations are the similarities of the goods and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.")

Considering first the goods, applicant's goods include wound dressings for use in recovery from hair transplantation procedures. Registrant's goods are stretchable locating bandages for covering primary bandages and dressings on the body. At the outset, we note that the terms "dressing" and "bandage" are essentially synonyms. The term "dressing" is defined as "any of various materials utilized for covering and protecting a wound. See also bandage." Dorland's Illustrated Medical Dictionary (25th ed. 1974). This same reference work, in defining the term "bandage," makes cross-reference to "dressing."

In essence, applicant's goods include a particular type of wounded dressing or bandage, namely, one for use in recovery from hair transplantation procedures. Registrant's goods are stretchable bandages or dressings for covering primary bandages and dressings on the body. Registrant's goods are not restricted as to where they can be used on the body or as to what medical procedures they can be used in connection with. Without providing any evidentiary support, applicant makes the mere assertion that "the type of bandage identified in the registration is not likely to be used in association with appellant's wound healing compositions, and vice versa." (Applicant's brief

page 6). We simply disagree. Registrant's goods are stretchable locating bandages for covering primary bandages and dressings on the body. Applicant's goods include wound dressings (bandages). Thus, it is entirely possible for registrant's stretchable bandages to be used to cover applicant's wound dressings (bandages) in order to better secure applicant's wound dressings in place. While we do not take issue with applicant's contention that registrant's bandages and applicant's wound dressings are "not interchangeable," we do find that the two products are very closely related in that they are both bandages (dressings) which could be used together. (Applicant's brief page 6).

Turning to a consideration of the marks, we note at the outset that when the goods of the applicant and registrant are very closely related, the degree of similarity of the marks necessary to support a finding of likelihood of confusion declines. Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Marks are compared in terms of visual appearance, pronunciation and meaning or connotation. In terms of visual appearance, the two marks are very similar in that

both consist of nine letters with the first five and final two letters being identical. Applicant argues that "when viewed side-by-side, the appellant's and registrant's marks are not identical in appearance." (Applicant's brief page 5). As has been repeatedly stated, "side-by-side comparison [of two marks] is not the [proper legal] test" for determining likelihood of confusion. Johann Maria v. Chesebrough-Pond, 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972). Consumers rarely have the benefit of comparing marks on a side-by-side basis. Rather, consumers are more likely to see one mark and merely retain a "general recollection" of it. Johann Maria, 176 USPQ at 200. The inquiry then is whether, upon seeing the second mark, consumers -- armed with only this "general recollection" of the first mark -- would confuse the two marks. We believe that the visual similarities between the two marks in question are great enough such that there would be a likelihood of confusion.

Turning to a consideration of the two marks in terms of pronunciation, we find that they are virtually identical, especially when one takes into account the fact that "there is no correct pronunciation of a trademark." In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969). Obviously, the first portion of both marks (GRAFT)

would be pronounced in an identical manner. The second portion of both marks (CYTE and SITE) would both be pronounced as "sit." See Webster's New World Dictionary, (2d ed. 1970).

Turning to the third factor of meaning or connotation, applicant makes the interesting argument "that even marks which are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion." (Applicant's brief page 5). Applicant explains that CYTE is a "medical or scientific prefix/suffix denoting relationship to a cell." (Applicant's brief page 5, original emphasis). Applicant then states that SITE "denotes the spacial location of a structure." (Applicant's brief page 5, original emphasis). The problem with applicant's argument is that not only can registrant's bandages be purchased by ordinary consumers, but in addition, applicant has conceded that its "goods are sold by hair transplant surgeons to their patients." (Applicant's brief page 6). Obviously, patients are ordinary consumers. These ordinary consumers will simply not understand the term CYTE, which applicant concedes is

"a medical or scientific prefix/suffix." (Applicant's brief page 5). In short, to ordinary consumers, the two marks, if they have any meaning at all, will have essentially the same meaning.

In any event, even if the meanings of the two marks were somewhat different, given the fact that the marks are identical in terms of sound and are very similar in terms of visual appearance, we find that overall, the two marks are either extremely similar or virtually identical.

Because the marks are, at a minimum, extremely similar and because registrant's goods and certain of applicant's goods are very closely related, we find that the contemporaneous use of the two marks is likely to result in confusion.

One final comment is in order. Applicant has made of record numerous third-party registrations of marks containing GRAFT or SITE or CYTE. Two points deserve mention. First, none of the third-party registrations are for marks which are even remotely as similar to registrant's mark as is applicant's mark.

Second, "in the absence of any evidence showing the extent of use of any of such [third-party] marks or whether any of them are now in use, they provide no basis for

Ser No. 75/236,506

saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a

bearing on likelihood of confusion." Smith Bros. v. Stone Mfg., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973).

Decision: The refusal to register is affirmed.

R. L. Simms

E. W. Hanak

C. E. Walters
Administrative Trademark
Judges, Trademark Trial
and Appeal Board