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PRECEDENT OF THE TTAB**

Mailed:
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re U.S. Vision, Inc.

Serial No. 77336400

Sherry Flax of Saul Ewing LLP for U.S. Vision, Inc.

Marcie R. Frum Milone, Trademark Examining Attorney, Law
Office 116 (Robert L. Lorenzo, Managing Attorney).

Before Quinn, Kuhlke and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

U.S. Vision, Inc. ("applicant") filed an intent-to use application to register the mark ATTITUDE EYEWEAR and design, shown below, for "eyewear; eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer; eyeglass cases; eyeglass frames; eyeglasses; sunglasses," in Class 9.



Applicant disclaimed the exclusive right to use "eyewear."

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark ATTITUDE, in standard character form, for "eyeglass lenses," in Class 9, as to be likely to cause confusion.¹

Preliminary Issues

A. Evidence attached to applicant's brief.

Applicant attached to its brief copies of third-party registrations and the hit list from a search of the Trademark Office's Trademark Electronic Search System. Applicant did not make these documents of record during the prosecution of its application. The Examining Attorney objected to the documents on the ground that they were not timely filed. Trademark Rule 2.142(d) provides that "the record in the application should be complete prior to the filing of an appeal." The Examining Attorney's objection is sustained and the evidence attached to applicant's brief that was not previously made of record will be given no consideration.

¹ Registration No. 3082266, issued April 18, 2006.

B. Concessions in applicant's brief that it subsequently contradicted in its reply brief.

In its brief, applicant conceded that the marks and goods at issue are similar.

Although the marks and the goods are similar, the marks are not likely to be confused because the channels of trade are entirely distinctive and the consumers of the registered goods are highly sophisticated.

Subsequently, in its reply brief, applicant argued that the marks and goods were not similar. The main brief is applicant's opportunity to present its strongest arguments why the refusal to register should be reversed. That includes the argument that the marks and goods are not similar. The reply brief is applicant's opportunity to address matters raised by the Examining Attorney in the responsive brief, not to raise entirely new arguments. Applicant may not take one position in its main brief and the opposite position in its reply brief. Accordingly, we will not consider applicant's arguments regarding the similarity or dissimilarity of the marks and goods presented in the reply brief. In this regard, however, we note that the Board makes its own determination regarding the similarity or dissimilarity of the marks and the goods based on record before us, irrespective of the arguments in the briefs.

Likelihood of Confusion

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

- A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case,

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any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods and services offered under the respective marks is likely to result.

San Fernando Electric Mfg. Co. v. JFD Electronics

Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant's mark ATTITUDE EYEWEAR and design and the registered mark ATTITUDE are substantially similar. The word "Attitude" is the dominant feature of applicant's mark because the word "eyewear" is descriptive, if not generic,

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for the products at issue. Disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 24 USPQ2d at 752 ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion"); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). It is unlikely that consumers will use the descriptive word "eyewear" to distinguish the marks.

Furthermore, the design element of applicant's mark is not so distinctive as to make a commercial impression separate and apart from the words. In this regard, we note that where the mark consists of words and a design, the words are normally given greater weight because they would be used by consumers to request the products. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987).

B. The similarity or dissimilarity and nature of the goods and services described in the application and registrations.

Applicant is seeking to register its mark for "eyewear; eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer; eyeglass cases; eyeglass frames; eyeglasses; sunglasses." The cited registration is for "eyeglass lenses."

The Examining Attorney submitted the following evidence to show that the goods at issue are related:

1. The definition of "eyewear."

Something worn over eyes: something worn over eyes to protect them or correct sight, e.g. glasses, goggles, or contact lenses.²

Lenses arranged in a frame holding them in proper position before the eyes, as an aid to vision.³

2. The definition of "spectacles."

An optical appliance consisting of a pair of ophthalmic (sic) lenses mounted in a frame or rimless mount, resting on the nose and held in place by sides extending towards or over the ears. Syn. eyeglass frame; eyewear (colloquial); glasses; spectacle frame.⁴

² msn.encarta.com attached to the June 10, 2009 Office Action.

³ Thefreedictionary.com attached to the June 10, 2009 Office Action.

⁴ Thefreedictionary.com attached to the June 10, 2009 Office Action.

3. The entry for "glasses" from *Wikipedia* defining glasses as "frames bearing lenses worn in front of the eyes, normally from vision correction, eye protection or for protection from UV rays."⁵

4. Excerpts from websites, including applicant's website, showing that eyeglass frames and lenses are advertised and sold together.⁶

5. Nineteen (19) third-party registrations based on use in commerce for eyeglasses or eyeglass frames and eyeglass lenses.⁷ A third-party registration which individually covers a number of different goods and services that is based on use in commerce may have some probative value to the extent that it serves to suggest that the listed goods and services are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The dictionary and *Wikipedia* evidence show that eyeglasses and eyeglass lenses are related because eyeglasses encompass lenses. The website evidence shows that eyeglass lenses and frames are sold together.

⁵ June 10, 2009 Office Action.

⁶ June 10, 2009 Office Action.

⁷ October 21, 2008 Office Action.

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Thus, consumers encountering the same marks for lenses and frames are likely to believe that they emanate from the same source. This is corroborated by the third-party registrations that demonstrate that a single source has adopted the same mark for eyeglass lenses and frames.

In view of the foregoing, we find the respective goods are related.

C. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because there are no limitations as to channels of trade or classes of purchasers in the description of goods for the cited registration, we must presume that registrant's eyeglass lenses move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for the listed goods and service. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). The evidence demonstrates that eyeglasses include frames and lenses and that eyeglass frames and eyeglass lenses are sold together, thus, moving in the same channels of trade and sold to the same classes of consumers.

Applicant argues that "[r]egistrant is a manufacturer of a sophisticated specialty product - - eyeglass lenses - - that are marketed and sold to optometrists and similar eye professionals" and that "there is no overlap between

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the consumers of ATTITUDE lenses and ATTITUDE EYEWEAR sunglasses, eyeglasses, and accessories." However, it is well settled that the registrability of applicant's mark must be decided on the basis of the description of goods in the application and cited registration regardless of what the evidence may reveal as to the actual nature of the goods, channels of trade, and classes of consumers.

Octocom Systems, Inc. v. Houston Computer Services, Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Applicant's attempt to differentiate the channels of trade and classes of consumers by relying on restrictions not reflected in the cited registration is unavailing.

D. Third-party registrations and applications comprising the word "Attitude."

Applicant asserts that because the word "Attitude" has been previously registered for eyeglasses and related products, "the cited mark is diluted and no party should have the exclusive right to use the word ATTITUDE." To support its argument, applicant submitted a copy of Registration No. 2934000 for the mark MISS ATTITUDE for sunglasses and a copy of application Serial No. 77646653 for the mark POSITIVE ATTITUDE for "eyeglasses, sunglasses,

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magnifying glasses, eyeglass frames and lenses, eyeglass accessories, namely, cases and chains." This evidence is not sufficient to prove that the word "Attitude" has been registered so many times that it has a specific meaning in the industry. First, an application is only evidence that an application has been filed; it has no other probative value. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003). Moreover, even if we considered the application, applicant has submitted only two records, one registration and one application, featuring the word "Attitude" as part of a mark for eyeglasses or related goods. Considering that applicant has only presented two other entities that have adopted the word "Attitude," the third-party registration and application evidence does not support applicant's argument that the cited registration is a weak mark. Moreover, one third-party registration and one application do not, in our view, justify the registration of another confusingly similar mark. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). However, even if we were to concede that ATTITUDE is a weak mark, it is well established that even the owner of a weak mark is entitled to be protected from a likelihood of

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confusion with another's use of the same or confusingly similar mark. *Giant Foods, Inc. v. Ross and Mastracco, Inc.*, 218 USPQ 521, 526 (TTAB 1982).

E. Balancing the *du Pont* factors.

In view of the facts that the marks are substantially similar and the goods are related and move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's mark ATTITUDE EYEWEAR and design for "eyewear; eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer; eyeglass cases; eyeglass frames; eyeglasses; sunglasses" is likely to cause confusion with the registrant's mark ATTITUDE for "eyeglass lenses."

Decision: The refusal to register is affirmed and registration to applicant is refused.