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Subject: U.S. TRADEMARK APPLICATION NO. 77336400 - ATTITUDE  
EYEWEAR - N/A

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 77/336400

**MARK:** ATTITUDE EYEWEAR



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** U.S. Vision, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

N/A

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EXAMINING ATTORNEY'S APPEAL BRIEF

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL

Applicant: U.S. Vision, Inc. : BEFORE THE  
Trademark: ATTITUDE EYEWEAR : TRADEMARK TRIAL  
Serial No: 77336400 : AND  
Attorney: Sherry Flax : APPEAL BOARD  
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**EXAMINING ATTORNEY'S APPEAL BRIEF**

**STATEMENT OF THE CASE**

Applicant has appealed the Trademark Examining Attorney's final refusal to register the stylized trademark, ATTITUDE EYEWEAR, for the following goods:

“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 International Class 9,

on the ground of likelihood of confusion, mistake or deception under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), with U.S. Registration No. 3082266 for the standard character mark, ATTITUDE, for “eyeglass lenses” in International Class 9.

## **FACTS**

Applicant filed this application on November 26, 2007, seeking registration on the Principal Register of the stylized mark, ATTITUDE EYEWEAR, 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 International Class 9. In the first Office Action, dated January 25, 2008, registration was refused under Section 2(d) on the grounds that the mark, when used in connection with the identified goods, so resembles the standard character mark, ATTITUDE, in Reg. No. 3082266 as to be likely to cause confusion, to cause mistake, or to deceive.

Applicant failed to respond to the first Office action, and the application was abandoned on August 22, 2008. A Petition to Revive was filed on September 2, 2008, providing arguments against the Section 2(d) refusal.

In response, the examiner issued a final refusal on October 21, 2008, again refusing the application under Section 2(d) based on the cited registration. A subsequent final was issued on December 4, 2008, to correct an inadvertent disclaimer requirement.

On June 4, 2009, applicant filed a Request for Reconsideration which the examiner denied on June 10, 2009, as no new issue or reasons were presented that were significant and compelling on that issue. Applicant also filed an appeal on June 4, 2009.

On August 21, 2009, applicant filed its Appeal Brief, and the file was forwarded to the examining attorney for a statement of the case on August 26, 2009.

## **ISSUE**

The sole issue on appeal is whether the mark, when used in connection with the identified goods, so resembles the mark in Reg. No. 3082266 as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d).

**ARGUMENT**

**BECAUSE THE PROPOSED MARK CREATES THE SAME OR A  
HIGHLY SIMILAR COMMERCIAL IMPRESSION TO THE  
CITED REGISTRATION AND THE GOODS ARE IDENTICAL OR  
CLOSELY RELATED AND LIKELY TO TRAVEL THROUGH  
THE SAME CHANNELS OF TRADE TO THE SAME  
CONSUMERS, REGISTRATION IS LIKELY TO CREATE  
CONSUMER CONFUSION AS TO SOURCE.**

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods of applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003).

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods, and similarity of trade channels of the goods. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); TMEP §§1207.01 *et seq.*

**A. SIMILARITY OF THE MARKS: THE PROPOSED MARK CREATES THE SAME OR A HIGHLY SIMILAR COMMERCIAL IMPRESSION TO THE CITED REGISTRATION BECAUSE THE DOMINANT PORTIONS OF THE MARKS ARE IDENTICAL AND THE DIFFERENCES BETWEEN THE MARKS ARE INSIGNIFICANT.**

Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); TMEP §1207.01(b)(ii)-(iii).

Applicant applied to register the stylized mark, ATTITUDE EYEWEAR, with the first term in larger bold font, and the second word appearing in smaller font beneath ATTITUDE. The letter "i" in ATTITUDE is dotted with a star design. The cited registered mark is for ATTITUDE in standard characters.

The marks are compared in their entireties under a Section 2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a

commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); TMEP §1207.01(b)(viii). Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In this case, the word ATTITUDE is dominant in the applicant's mark because it is the first term in the mark and because it appears above the word EYEWEAR in a large, bold font. Therefore, consumers will focus on the term ATTITUDE.

Although applicant's proposed mark also contains the word EYEWEAR, this term merely describes applicant's goods, which include "eyewear" and "eyewear accessories." Applicant conceded the descriptive nature of the term by voluntarily disclaiming it. Disclaimed wording is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). Here, the addition of the descriptive term, EYEWEAR, does not change the commercial impression of applicant's mark. Accordingly, the wording in each mark conveys the same meaning.

Again, the examiner notes that the cited registration is in standard characters. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element itself and not in any particular display. TMEP §1207.01(c)(iii); *see* 37 C.F.R. §2.52(a). Thus, a mark presented in stylized characters or otherwise in special form generally will not avoid likelihood of confusion

with a mark in typed or standard characters because the marks could be presented in the same manner of display. *See, e.g., In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991). Consequently, presentation of applicant's mark in a stylized form will not overcome the likelihood of confusion, as registrant is entitled to present its mark in any particular font style, size, or color.

Finally, the examiner notes applicant's mark includes a small star design in place of the dot above the "I" in ATTITUDE. However, that design is not significant and does not change the overall commercial impression of the mark. When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); TMEP §1207.01(c)(ii).

In sum, although the marks are not identical, they are so highly similar that they create the same overall commercial impression. Even applicant concurs in the first paragraph of the Appeal Brief that the marks "are similar" and does not challenge the examiner's finding on the similarity of the marks.

**B. SIMILARITY OF THE GOODS: THE GOODS ARE OVERLAPPING AND CAN BE CONSIDERED IDENTICAL OR, IN THE ALTERNATIVE, CLOSELY RELATED AND ARE LIKELY TO TRAVEL THROUGH THE SAME CHANNELS OF TRADE TO THE SAME CONSUMERS.**

A determination of whether there is a likelihood of confusion is made solely on the basis of the goods identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999). Since the marks of the respective parties are highly similar, the relationship between the goods of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *Ancor, Inc. v. Ancor Industries, Inc.*, 210 USPQ 70 (TTAB 1981); TMEP §1207.01(a).

Applicant's goods are "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 International Class 9. Registrant's goods are "Eyeglass lenses" in International Class 9.

Applicant's goods are closely related to the registrant's goods because the goods are overlapping and can be considered identical based on the broad wording in the application or, in the alternative, so closely related that they are likely to travel through the same channels of trade to the same consumers.

Since the identification of applicant's goods is broadly worded, it is presumed that the application encompasses all types of "eyewear," including those containing the individual parts of eyewear, namely "eyeglass lenses," such as those found in the registration. The examiner previously attached evidence to the denial of the reconsideration request to show that "eyeglass lenses" may be considered part of "eyewear." As specific examples, the examiner points to the webpage for Pearle Vision

Centers which lists under “Eyewear” the subcategories of frames, lenses, contacts and sunglasses, in addition to the applicant’s own webpage which shows under “Eyewear” a “Products & Information” page that lists the subcategories of frames, lenses, children’s eyewear, and sunglasses, as well as information on exams. Additionally, the examiner points to the dictionary evidence for “eyewear” which define the term as “something worn over the eyes to protect them or correct sight....” Eyeglass lenses clearly fall into that definition as they are worn over the eyes and protect the eyes and/or correct sight.

However, even if one were to find that the goods of the parties are not overlapping or considered the same, it is axiomatic that the goods of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); TMEP §1207.01(a)(i). Based on the broad language of the application, it is also assumed that the goods of applicant move in all normal channels of trade and that they are available to all potential customers. TMEP § 1207.01(a)(iii). Thus, the goods of the registrant and applicant may be used together by a consumer wanting to replace the lenses in their existing eyewear. Additionally, the goods may be found together in the same channels of trade, such as in eyewear stores, and purchased by the same consumer, namely, ones who want to purchase new prescription eyeglasses or sunglasses. Therefore, all are “related in some manner,” that is, they may be used by wearers of eyewear.

In support of the point that the goods are closely related, the examiner attached evidence of relatedness, including evidence from the applicant's and registrant's own websites to show the nature of their businesses and that applicant itself makes a variety of products, including different eyeglass lenses. As previously shown by numerous third party registrations, the same marks are commonly used for eyeglasses, sunglasses, and eyeglass accessories as well as for eyeglass lenses. Moreover, as previously stated, the goods may be used together since a consumer could buy frames from the applicant and replace the lenses with those of the registrant. See previously submitted Internet evidence from the webpage of the Eyeglass People, attached to the denial of the reconsideration request, showing the existence of services to simply replace lenses in frames already owned by the consumer.

Applicant argues that the channels of trade of the goods are different because applicant's goods are sold to "retail end users of value priced eyeglass frames and eyeglasses" while registrant's goods are "sold to optometrists and similar eye professionals" and those consumers are "highly educated in this field" and thus sophisticated. However, the parties made no restrictions as to the channels of trade in their respective identifications. Therefore, it is presumed that the goods travel in all the normal channels of trade, including retail stores, optometrists, and eyeglass professionals.

Even if the identifications restricted the channels of trade, the fact that registrant's goods are sold to optometrists does not mean that the ultimate consumers, eyeglass wearers, are not the same. In fact, the opposite is true. Retail consumers end up with goods from both applicant and registrant, and those consumers may not be "sophisticated." Still, the fact that purchasers, even optometrists and eye professionals,

are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). In this case, the least sophisticated retail purchaser could easily confuse registrant's eyeglass lenses with applicant's eyewear.

Applicant also raises the existence of other "ATTITUDE" registrations in an effort to show that the marks co-exist and are "weak." As discussed below in more detail, the only evidence submitted by applicant that may be considered properly are the pages from registrant's website, which were attached to the Petition to Revive, and the USPTO records for one registration and one pending application attached to the reconsideration request. However, as indicated in the denial of the reconsideration, the examiner disagrees with the applicant's contention that the differences between the cited registration and the two marks discussed by applicant, namely MISS ATTITUDE and POSITIVE ATTITUDE, would allow for the approval of the instant case. Unlike the MISS ATTITUDE and POSITIVE ATTITUDE cases, the registered mark here has the same overall commercial impression as the applicant's mark. In the other registration and application, the words "MISS" and "POSITIVE" change the overall commercial impressions of those marks, even if the goods are identical or closely related. They instead describe the consumer or wearer of the goods. In the present case, the common wording, ATTITUDE, is not descriptive or diluted, and the additional wording is

EYEWEAR, a generic term for the goods, which does not add to the trademark significance of the common wording. Therefore, the marks have the same overall commercial impression.

Applicant has also provided with the Appeal Brief third party registrations and records from the USPTO database that were not provided previously, including registrations for AA AMERICAN ATTITUDE and REAL LIFE UV PROTECTION WITH ATTITUDE LYNN ROBERTS INTERNATIONAL. However, the new registration evidence cannot be considered by the examining attorney, as it was not made of record in a timely fashion. Further, applicant's search results list attached to the Appeal Brief is also unacceptable because the record in an application must be complete prior to the filing of an appeal. The mere list of registered marks applicant attached is not acceptable as proof because the TESS search record listing includes both live and dead marks, does not show on which register the marks appear, and does not include any evidence of disclaimers or acquired distinctiveness. Because the proposed evidence was untimely submitted, this evidence should not be considered. 37 C.F.R. §2.142(d); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

In the event that the examiner's objection is not sustained by the Board, the examiner makes the following alternative arguments. First, it is important to note that prior decisions and actions of other trademark examining attorneys in registering different marks are without evidentiary value and are not binding upon the Office. Each case is decided on its own facts, and each mark stands on its own merits. *AMF Inc. v.*

*American Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973). Second, the additional TESS printout for AA AMERICAN ATTITUDE shows that the stylized mark was registered for similar goods to those of applicant and registrant. However, the wording AA AMERICAN ATTITUDE and design again has a different overall commercial impression. Like MISS ATTITUDE and POSITIVE ATTITUDE, the additional wording AA AMERICAN is sufficient enough to amend the overall commercial impression of the mark in relation to the goods because it describes the consumer or wearer of the goods. Moreover, the registration for REAL LIFE UV PROTECTION WITH ATTITUDE LYNN ROBERTS INTERNATIONAL includes more wording to differentiate it from the cited registered mark. In that case, the common wording, ATTITUDE, is preceded by REAL LIFE UV PROTECTION WITH and followed by LYNN ROBERTS INTERNATIONAL. Additionally, the mark contains more design elements, and the overall commercial impression of the mark differs from both the registrant's and applicant's marks. Finally, as indicated above, the mere list of registered marks is not acceptable as proof because the TESS search record listing includes both live and dead marks and does not show on which register the marks appear nor any evidence of disclaimers or acquired distinctiveness. In other words, the list does not put the marks into any context. It merely shows live and dead marks containing the wording ATTITUDE and having at least one item listed in International Class 25.<sup>1</sup>

The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely

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<sup>1</sup> The examiner notes that the goods of this applicant and the cited registrant are contained in International Class 9 and not International Class 25.

related goods and/or services. *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982); TMEP §1207.01(b)(ix). Nevertheless, the examiner points out that the registrations referenced by applicant are not the same. Simply because the same phrase may be found in multiple third-party registrations does not mean that the registrations have the same or similar overall commercial impression. In applicant's case, however, the proposed mark has an identical or very similar overall commercial impression since ATTITUDE is the dominant wording, the marks only differ in the descriptive or generic matter added to the dominant wording, and the goods are identical or very closely related. This proposed mark may "bridge the gap" that could seem to exist among any other "ATTITUDE" registrations. As indicated earlier, the overriding concern is to prevent buyer confusion as to the source of the goods.

In sum, when confronted by marks with an identical or highly similar commercial impression on overlapping and thus identical or closely related goods, a consumer is likely to have the mistaken belief that the goods originate from the same source. Because this likelihood of confusion exists, registration of applicant's proposed mark must be refused. Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); TMEP §§1207.01(d)(i).

## **CONCLUSION**

Applicant's stylized mark, ATTITUDE EYEWEAR, is likely to be confused with the registered standard character mark, ATTITUDE, because applicant's mark creates an identical or highly similar commercial impression as the cited mark, and is used on

identical or closely related goods which travel through the same channels of trade to the same consumers. For the foregoing reasons, it is respectfully submitted that the refusal of registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), be affirmed.

Respectfully submitted,

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