

**This Opinion is Not a
Precedent of the TTAB**

Mailed: November 29, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Spy Optic Inc.

Serial No. 85588592

Kit M. Stetina of Stetina Brunda Garred & Brucker,
for Spy Optic Inc.

Siddharth Jagannathan, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

Before Bucher, Bergsman and Adlin,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Spy Optic Inc. (“applicant”) seeks registration on the Principal Register of the mark **VICTORY** (*in standard character format*) for “sunglass lenses” in International Class 9.¹

The examining attorney has taken the position that applicant’s mark so resembles the following registered mark:

1 Application Serial No. 85588592 was filed on April 4, 2012, based upon applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Act.



registered for goods identified as “eyeglasses, sunglasses, eyeglass frames, sunglass frames, cases for eyeglasses and sunglasses,” also in International Class 9,² as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

After the examining attorney made the refusal final, applicant appealed to this Board. We affirm the refusal to register.

Our determination under Trademark Act § 2(d) is based upon an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

² Registration No. 3939716 issued on April 5, 2011. According to the registration, the mark consists of an image of spectacles intersected at the bridge with a capital letter “V” with an encircled “Co” found inside the capital letter “V” and the words “Victory Collection” in script alongside the design feature. No claim is made to the exclusive right to use the word “Collection” apart from the mark as shown.

A. Comparison of the Marks

While the registered mark is the composite shown at right, applicant has applied to register the mark **VICTORY**.



In comparing the marks, we must consider the marks in their entireties as to appearance, sound, connotation and commercial impression, to determine the similarity or dissimilarity between them. *du Pont*, 177 USPQ at 567, *Palm Bay*, 73 USPQ2d at 1692. The test, under the first *du Pont* factor, 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 that confusion as to the source of the goods offered under the respective marks is likely to result. Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that the examining attorney's analysis inappropriately minimizes the fact that registrant's mark includes the words "Victory Collection" in

a stylized script, and that this wording is only the concluding portion of a composite design including first (when reading from left to right) the capital letter “V,” an image of spectacles and the encircled designation “Co.”

On the other hand, the examining attorney points out that the highly-descriptive word “Collection” has been disclaimed and has little capability to distinguish marks for eyewear. Moreover, when a registered composite mark contains both words and a design, the word portion of a mark is generally considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012). That is true because the word portion of the mark is more likely to be impressed upon a purchaser’s memory and to be used when requesting the goods. *See In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). Furthermore, applicant’s standard character mark, upon usage in connection with sunglass lenses, could be displayed in a script format much like registrant’s cited mark. *Viterra Inc.*, 101 USPQ2d at 1911.

Applying these principles, the portion of the registered mark that carries the greatest trademark significance and thus is most likely to be impressed upon a purchaser’s memory is the arbitrary term “Victory.” Applicant’s mark consists solely of the word VICTORY. As to appearance, clearly the cited registered mark is a composite having additional components not present in applicant’s single word mark. Moreover, even when sounding out the literal portions of the respective marks, “Victory Collection” does have additional syllables not present in the word VICTORY. Nonetheless, we agree with the examining attorney that these visual

and aural dissimilarities between these two marks are far outweighed by the strong similarities as to connotations and overall commercial impressions, and this critical *du Pont* factor favors a finding of likelihood of confusion. None of the precedential cases cited by applicant involve marks that are sufficiently analogous to persuade us to the contrary.

B. Relationship of the Goods and Trade Channels

We next turn our attention to an evaluation of the relationship of the goods in the cited registration to the goods identified in the application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

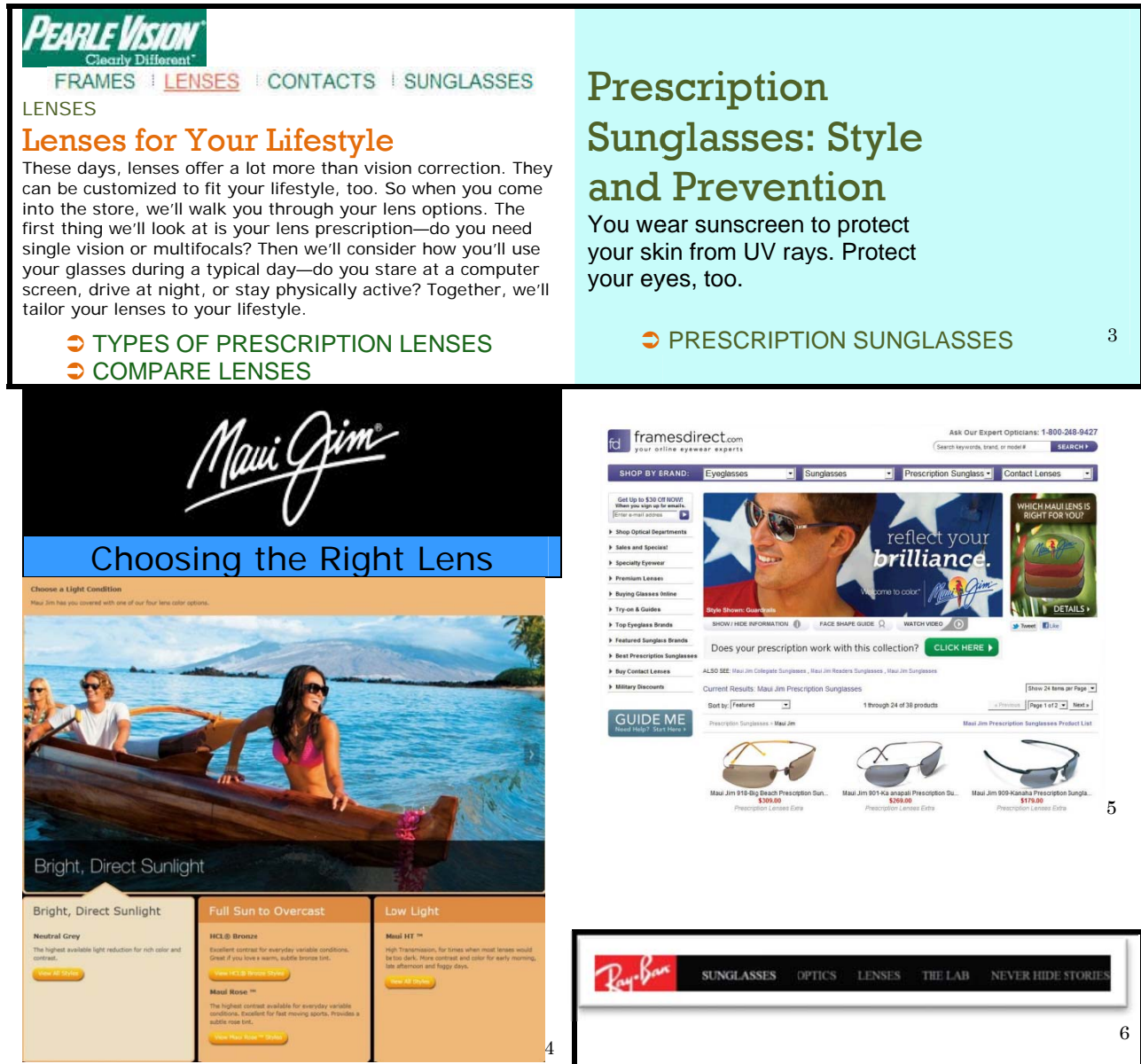
The goods identified in the involved application are “sunglass lenses.” The cited registration lists “eyeglasses, sunglasses, eyeglass frames, sunglass frames, cases for eyeglasses and sunglasses.”

Applicant argues that its mark is only to be used on sunglass *lenses*, a constituent part of sunglasses, as contrasted with registrant's identified goods, namely, complete eyeglass and sunglass products. We agree with applicant that applicant's and registrant's goods, as identified, are not necessarily directly competitive. But as noted earlier, it is not required that the respective goods be competitive in order to find that they are related for purposes of analyzing this *du Pont* factor.

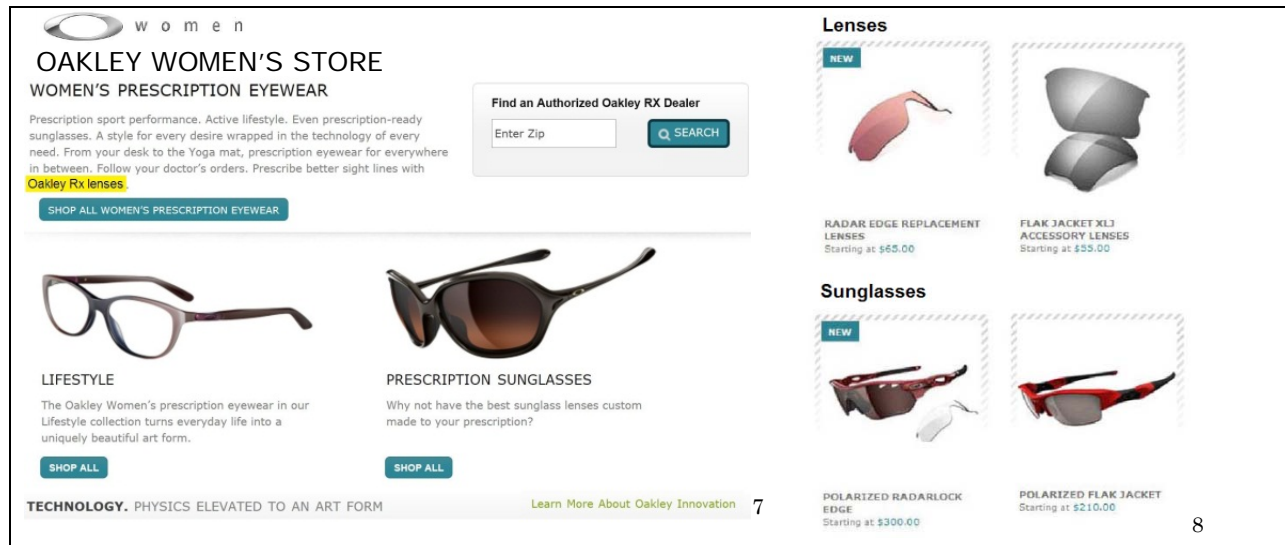
Applicant also argues that in most cases, these two marks would not be encountered by the same classes of consumer inasmuch as its sunglass lenses are purchased by the manufacturer of the completed sunglass assembly while the finished product is purchased by the end user.

Of course, applicant has not limited its customers to manufacturers of completed sunglasses. Unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (*citing In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Moreover, as noted above, this *du Pont* factor must be based on the identifications of the respective goods as listed in the application and registration at issue, not on extrinsic evidence of actual use. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Octocom Sys. Inc.*, 16 USPQ2d at 1787. Based on this guidance, the examining attorney argues that we must presume that applicant's sunglass lenses and registrant's sunglasses, sunglass frames and cases for sunglasses could well be available to the same classes of purchasers.

In support of this position, the examining attorney also included screenshots from third-party websites to show that consumers are accustomed to encountering sunglass lenses in the same trade channels in the marketplace as sunglasses, sunglass frames and cases for sunglasses. We have reproduced representative excerpts of these websites:



³ <http://www.pearlevision.com/eyewear/lenses.action> as accessed by the examining attorney on July 19, 2012.



In addition to the above websites, the examining attorney also included in the record copies of the following use-based, third-party registrations (all of which issued in 2012) to suggest that the goods are of a type which may emanate from a single source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993):

TRILENIUM

for “eyeglass lenses; eyeglasses; sunglass lenses; sunglasses” in International Class 9;⁹

⁴ http://www.mauijim.com/right_lens.html as accessed by the examining attorney on July 19, 2012.

⁵ <http://www.framesdirect.com/Maui-Jim-prescsgc/rxsgc-lalhng-s-l-k-k.html> as accessed by the examining attorney on July 19, 2012.

⁶ <http://www.ray-ban.com/usa/sunglasses> as accessed by the examining attorney on October 16, 2012.

⁷ <http://www.oakley.com/women/store/prescription> as accessed by the examining attorney on July 19, 2012.

⁸ <http://www.oakley.com/women/search?Ntt=lenses> and <http://www.oakley.com/store/products/women/sunglasses/polarized> as accessed by the examining attorney on October 16, 2012.

⁹ Registration No. 4126157 issued on April 10, 2012.

MaxFreq

for “cases for eyeglasses and sunglasses; cases for spectacles and sunglasses; chains for spectacles and for sunglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; eyewear, namely, sunglasses; frames for spectacles and sunglasses; lenses for sunglasses; nose guards which can be worn by attachment to eyewear such as sunglasses and ski goggles; spectacles and sunglasses; sunglass chains and cords; sunglass lenses; sunglasses; sunglasses and spectacles” in International Class 9;¹⁰



for “cases for eyeglasses and sunglasses; cases for spectacles and sunglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; frames for spectacles and sunglasses; lenses for sunglasses; spectacles and sunglasses; sunglass lenses; sunglasses; sunglasses and spectacles” in International Class 9;¹¹



for “cases for eyeglasses and sunglasses; cases for spectacles and sunglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; frames for spectacles and sunglasses; lenses for sunglasses; spectacles and sunglasses; sunglass lenses; sunglasses; sunglasses and spectacles” in International Class 9;¹²



for “cases for eyeglasses and sunglasses; eyewear; frames for spectacles and sunglasses; lenses for sunglasses; sunglasses and spectacles” in International Class 9;¹³



for “cases for eyeglasses and sunglasses; chains for spectacles and for sunglasses; eyeglass chains and cords; eyeglass lenses; frames for spectacles and sunglasses; spectacles and sunglasses; sunglass lenses” in International Class 9;¹⁴

Squintless

for “eyeglass frames; eyeglass lenses; eyeglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and

¹⁰ Registration No. 4150009 issued on May 29, 2012.

¹¹ Registration No. 4165554 issued on June 26, 2012. The mark consists of the letters “P” and “X” in stylized lettering.

¹² Registration No. 4165555 issued on June 26, 2012. The mark consists of the letter “C,” facing backwards, and the letter “B,” both in stylized lettering.

¹³ Registration No. 4165662 issued on June 26, 2012.

¹⁴ Registration No. 4168042 issued on July 3, 2012. The mark consists of the number “365” with wings projecting upward from the number “6,” the wings styled in mirror images of the letter “F,” situated above two V-shaped designs, all encompassed by a solid outline forming a shield design.

	cases therefor; eyewear, namely, reading glasses; reading eyeglasses; reading glasses” in International Class 9; ¹⁵
PureVue	for “coated ophthalmic lenses for use in prescription eyeglasses, excluding sunglass lenses, namely, lenses coated with anti-reflective, scratch resistant, impact resistant and dirt resistant coatings” in International Class 9; ¹⁶
	for “eyewear, namely, sunglasses, eyeglasses, ophthalmic frames, cases, eyeglass and sunglass lenses and eyewear accessories in the nature of nose guards which can be worn by attachment to eyewear such as sunglasses and eyeglasses and side guards for eyeglasses and sunglasses” in International Class 9; ¹⁷
	for “cases for eyeglasses and sunglasses; cases for spectacles and sunglasses; chains for spectacles and for sunglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; eyewear, namely, sunglasses; frames for spectacles and sunglasses; lenses for sunglasses; nose guards which can be worn by attachment to eyewear such as sunglasses and ski goggles; spectacles and sunglasses; sunglass chains and cords; sunglass lenses; sunglasses; sunglasses and spectacles” in International Class 9; ¹⁸
 Rectangle box	for “cases for eyeglasses and sunglasses; cases for spectacles and sunglasses; chains for spectacles and for sunglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; eyewear, namely, sunglasses; frames for spectacles and sunglasses; lenses for sunglasses; nose guards which can be worn by attachment to eyewear such as sunglasses and ski goggles; spectacles and sunglasses; sunglass chains and cords; sunglass lenses; sunglasses; sunglasses and spectacles” in International Class 9; ¹⁹
REFLECT YOUR BRILLIANCE	for “sunglasses and sunglass lenses” in International Class 9; ²⁰

¹⁵ Registration No. 4171551 issued on July 10, 2012.

¹⁶ Registration No. 4172983 issued on July 10, 2012.

¹⁷ Registration No. 4190548 issued on August 14, 2012.

¹⁸ Registration No. 4201828 issued on September 4, 2012. The mark consists of seven leaves expressed with detailed stems, with curved “Universal” word on the top and straight line “SUN-V” on the bottom.

¹⁹ Registration No. 4202520 issued on September 4, 2012. The mark consists of one rectangle shape in connection with one horizontal bar protruded from the right hand side along with one identifier “Rectangle Box” underneath the entire logo.

²⁰ Registration No. 4207593 issued on September 11, 2012.

LENTEVISION	for “chains for spectacles and for sunglasses; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; sunglass lenses; sunglasses; sunglasses and spectacles” in International Class 9; ²¹
PRO PLAYER	for “eyewear and eyewear accessories, namely, frames for prescription and non-prescription eyeglasses and sunglasses, prescription and non-prescription sunglasses, eyeglass and sunglass chains, eyeglass and sunglass lenses, goggles for sports and cases for all the aforementioned goods” in International Class 9; ²²

We are persuaded that the respective goods are of a type that may emanate from a single source, and that consumers are accustomed to encountering sunglass lenses in the same trade channels in the marketplace as complete sunglasses and sunglass frames. Accordingly, we find that these several *du Pont* factors weigh in favor of a finding of likelihood of confusion.

C. Conditions of sales

As to the conditions under which and buyers to whom sales are made, inasmuch as these goods may be worn for several years, applicant argues it is likely that such purchases will be made only after informed decision-making on the part of discriminating purchasers. However, there is no evidence to support the fact that applicant’s customers will be discriminating. Moreover, even discriminating or sophisticated purchasers, when faced with substantially similar marks, may be subject to source confusion. *See In re Cynosure, Inc.*, 90 USPQ2d 1644 (TTAB 2009); *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

²¹ Registration No. 4208914 issued on September 18, 2012. The English translation of the word “LENTE” in the mark is “Lens.”

²² Registration No. 4211357 issued on September 18, 2012.

D. Balancing the factors

In view of the facts that the respective marks are highly similar as to connotations and overall commercial impressions, that the goods are closely related and may move through the same channels of trade, we find that applicant's registration of its **VICTORY** mark in connection with sunglass lenses is likely to cause confusion – even if we were to assume that the relevant purchasers of the involved goods are discriminating.

Decision: The refusal under Section 2(d) of the Lanham Act to register applicant's **VICTORY** mark is hereby affirmed.