

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

Mailed: May 17, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Internet Promise Group LLC
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Serial No. 85970860
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Internet Promise Group LLC, *pro se*.

Ingrid Eulin, Trademark Examining Attorney, Law Office 111,
Robert Lorenzo, Managing Attorney.

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Before Wellington, Kuczma and Pologeorgis,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Internet Promise Group LLC (“Applicant”) seeks registration on the Principal Register of the mark EASY ACCESS (in standard characters) for:

Computer system with computer hardware and computer software applications, that interfaces with wireless mobile devices and business authentication systems to provide two-factor authentication of remote users to Internet Servers in International Class 9.¹

¹ Application Serial No. 85970860 was filed on June 26, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of a likelihood of confusion with the EZACCESS mark in U.S. Registration No. 4514959² for: "Computer software, namely, computer software for user authentication, authorization and login to protected website accounts and secure computer network resources" in International Class 9.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Preliminary Issue

Before proceeding to the merits of the refusal, we address Applicant's request to remand its application back to the Examining Attorney for consideration of: 1) the evidence submitted with Applicant's Appeal Brief relating to the "definitions of computer hardware and software," and 2) Applicant's detailed arguments on the nature of the goods and the trade channels that Applicant represents are consistent with the identification of the goods.³ Applicant requests remand of the application back to the Examining Attorney for consideration of the evidence and arguments on the ground that they relate to the proper evaluation of Applicant's mark and its identification of the goods.

Trademark Rule 2.142(d), 37 CFR § 2.142(d), provides that the record should be complete prior to the filing of an appeal. Applicant's request for remand must

² Issued April 15, 2014, based on an application filed on April 14, 2011. The mark consists of standard characters.

³ Applicant's Reply pp. 7, 9 (7 TTABVue 8, 10).

therefore include a showing of “good cause” (*i.e.*, a satisfactory explanation as to why the evidence was not made of record prior to appeal), along with the additional evidence sought to be introduced. Generally, the later in the appeal proceeding that the request for remand is filed, the stronger the reason that must be given for good cause to be found. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147 (TTAB 2011) (applicant’s request for remand made after appeal briefs filed denied for failure to show good cause); *In re Herbal Science Group LLC*, 96 USPQ2d 1321, 1322-23 (TTAB 2010); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1334 (TTAB 2009) (request for remand denied for failure to show good cause so late in the appeal). *See also* Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 1207.02 (2015).

The Trademark Examining Attorney objects to Applicant’s new evidence on the ground that it was untimely submitted during appeal and requests that the Board disregard it.⁴ Inasmuch as Applicant has not indicated whether the additional evidence which it seeks to have considered relating to the “definitions of computer hardware and software,” was not previously available, Applicant has not shown good cause for remanding the application to the Examining Attorney. Moreover, we note that the “definitions” do not appear to be from a dictionary and contain additional

⁴ Examining Attorney’s Appeal Brief (6 TTABVUE 12). Inasmuch as the evidence submitted as Exhibit B attached to Applicant’s opening brief (4 TTABVUE 30-32), consists of copies of online pages entitled Introduction to Computers: Hardware and Software from the website http://cs.sru.edu/~mullins/cpsc100book/module02_introduction/module02-03_introduction.html [10/2/2015] and does not appear to be available in printed format, it does not constitute “dictionary definitions” for which we can take judicial notice. *See In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999) (judicial notice not taken of online dictionaries which otherwise do not exist in printed format). Even if we were to consider the information set forth in Exhibit B to Applicant’s opening brief, it would not alter our decision.

information not usually provided in a dictionary definition. Therefore, Applicant's request for remand to the Trademark Examining Attorney for consideration of its evidence relating to the meaning of computer hardware and software attached to Applicant's Appeal Brief is denied.

The Trademark Examining Attorney further objects to Applicant's attempt to narrow the scope of its identified goods, and their trade channels, because Applicant relies on information that is not in the record.⁵ Inasmuch as Applicant's arguments regarding the limitations on the nature of the goods and the trade channels are not supported by the evidence and are not specified with restrictive language in the identification of goods, they address new matter which is untimely and will not be considered. Therefore, Applicant's request for remand of its detailed arguments on the nature of the goods and the trade channels is also denied.

II. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all 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 Co., 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. *See 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

⁵ Examining Attorney's Appeal Brief (6 TTABVUE 12).

cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). In this case, we also consider the similarity of the trade channels, and the classes and sophistication of purchasers for the goods for which Applicant and the Trademark Examining Attorney have submitted arguments.

A. Similarity of the Marks

In any likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *du Pont*, 177 USPQ at 567; *In re Viterra Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

The test is not whether the marks can be distinguished in 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. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant’s mark EASY ACCESS is very similar in sight, sound and meaning to Registrant’s mark EZACCESS. Applicant’s mark is merely a “spelled out” version of

Registrant's mark. That is, Applicant utilizes the term "EASY" which means and sounds the same as the term "EZ" in the registered mark.⁶

Applicant's argument that the word "EASY" changes its mark as well as the character of the mark in its entirety lacks support.⁷ That Applicant's mark is composed of two distinct words whereas the registered mark is a single word, does not overcome the identical sound of the marks. EASY ACCESS as seen in Applicant's mark conveys the same commercial impression as the impression of "EZ" and "ACCESS" with no space in between them as found in Registrant's mark. In other words, consumers would recognize Registrant's mark as consisting of the separate elements "Ez," meaning "easy," and "Access." See *In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (URBANHOUSING found to have same meaning as URBAN HOUSING); *In re L.C. Licensing Inc.*, 49 USPQ2d 1379, 1381 (TTAB 1998) (whether unitary or two separate words, the commercial impression is the same); *In re Narwood Productions, Inc.*, 223 USPQ 1034 (TTAB 1984) (THE MUSIC MAKERS is similar to MUSIC MAKERS).

⁶ The Trademark Examining Attorney requested that we take judicial notice of the definitions for "EZ" that were attached to her brief. (6 TTABVUE 7). We grant the request and take judicial notice of the dictionary definitions provided with her brief. (6 TTABVUE 16-24). See, e.g., *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Driven Innovations, Inc.*, 115 USPQ2d 1261, 1267 n.18 (TTAB 2015) (taking judicial notice of definition from *Merriam-Webster Online Dictionary* at www.merriam-webster.com); *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013). One particular definition establishes that "EZ" means "easy." *Abbreviations Dictionary*, Tenth Edition © 2001 CRC Press LLC; *also see* *Acronyms, Initialisms & Abbreviations Dictionary*, 47th Edition ©2013 Gale, Cengage Learning.

⁷ Applicant's Appeal Brief p. 8 (4 TTABVUE 9).

Although there are minor differences between the appearances of the two marks, Applicant's mark is identical in sound and meaning to Registrant's mark, and has the same commercial impression. Any distinctions between the marks are more than overcome by their similarities in sound, meaning and commercial impression.

B. Similarity of the Goods

While admitting that Applicant's goods and Registrant's goods "may be on the "same ... broad topic of authentication,"⁸ Applicant contends that its EASY ACCESS mark and Registrant's EZACCESS mark "are for inherently and entirely different goods," arguing that although Applicant's and Registrant's goods may be related to computer hardware and software, or the general act of authentication, does not establish that the goods are related.⁹

The fact that Applicant and Registrant both provide computer goods, by itself, does not establish a relationship between the goods such that consumers would believe that all computer software programs and devices originate from the same source simply because they are sold under similar marks. Indeed, the Federal Circuit and the Board have long rejected the view that a relationship exists between goods and/or services simply because each involves the use of computers. *See Octocom Sys., Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476-77 (TTAB 1999); *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1463 (TTAB

⁸ February 16, 2015 Response to Office Action Dated August 20, 2014 (page 7) p. 10.

⁹ Applicant's Appeal Brief p. 15 (4 TTABVUE 16).

1992); *Information Resources Inc. v. X*Press Information Services*, 6 USPQ2d 1034, 1038 (TTAB 1988); *Reynolds and Reynolds Co. v. I.E. Sys., Inc.*, 5 USPQ2d 1749, 1751 (TTAB 1987).

However, the goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each of the parties' goods and/or services. *In re Total Quality Group Inc.*, 51 USPQ2d at 1476; *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). The proper inquiry is not whether the goods could be confused, but whether the source of the goods is likely to be confused. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

Our consideration is limited to the descriptions of the goods set forth in the application and registration. *In re Total Quality Group Inc.*, 51 USPQ2d at 1476. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014). Applicant's characterization of Registrant's goods as "computer software ... for a website login"¹⁰ is incomplete. Rather, Registrant's goods are "computer software for user **authentication**, authorization and login...." (emphasis added). Applicant's goods are a computer system with

¹⁰ Applicant's Appeal Brief p. 18 (4 TTABVUE 19).

computer hardware and computer software applications, that interfaces with wireless mobile devices and business authentication systems to provide two-factor authentication of remote users to Internet Servers. Both Applicant's and Registrant's description of goods cover computer software for authentication of users. While the further restriction of Applicant's goods for its computer system includes wireless mobile devices for a two-factor remote user authentication that is encompassed within Registrant's broader identification of "computer software for user authentication." Thus, the goods of Registrant and Applicant are related to the extent they address computer software for user authentication.

Applicant maintains that those knowledgeable about goods and services related to cyber security and remote user authentication would not want to confuse or equate Registrant's single-factor, or password only, authentication with Applicant's two-factor authentication requiring use of a mobile wireless device as these two forms of authentication are vastly different employing different systems, artifacts, steps, processes and procedures.¹¹ Focusing on such differences between Registrant's goods and Applicant's goods misses the point.

The confusion which the trademark statute is concerned with is not only that a customer would mistakenly choose Applicant's or Registrant's product for the job but also whether such a customer, familiar with Applicant's product (or vice versa), would believe that Registrant's product was yet another computer software product that authenticates users emanating from Applicant or that the two products were

¹¹ February 16, 2015 Response to Office Action of August 20, 2014 (page 8) p. 11.

somehow associated with the same source. *In re Uncle Sam Chemical Co., Inc.*, 229 USPQ 233, 234-35 (TTAB 1986). This is the situation present in this case. Therefore, the goods are similar in that they could be associated with the same source.

C. Trade Channels and Customers

Applicant contends that the trade channels for its goods are very different than the trade channels for Registrant's goods arguing, without support, that "registrant describes its consumers as people who log on the websites," while Applicant's goods would be "marketed and sold to sophisticated/professional buyers rather than directly to consumers. In contrast, registrant's goods would be sold directly to consumers."¹² Despite Applicant's argument, there is no evidence in the record noting who Registrant's "consumers" are or who Applicant's customers are.

Applicant maintains that its computer system strongly suggests that its "potential customers are sophisticated purchasers who are not at all likely to be confused into thinking [Applicant's] computer system enabling a two-factor remote user authentication service provided by an OEM service provider emanate from registrant,"¹³ noting that its mark EASY ACCESS is for goods/services "that would be sold or marketed to large businesses, such as, for example, Apple, Google, Microsoft etc."¹⁴ Although Applicant argues that it is reasonable to set a higher standard of care for professional or commercial purchasers than exists for consumers,

¹² Applicant's Appeal Brief p. 19 (4 TTABVUE 20).

¹³ Applicant's Appeal Brief p. 20 (4 TTABVUE 21).

¹⁴ February 16, 2015 Response to Office Action of August 20, 2014 (page 9) p. 12

neither the identification of goods in its application nor in the cited registration include any restrictions as to the nature, type, channel of trade, or classes of purchasers of the goods.¹⁵

When the identification of goods does not include any limitation as to the trade channels or class of purchasers for the listed goods, it is presumed that the goods move in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). An application, such as Applicant’s, with an identification of goods having no restriction on trade channels is not narrowed by Applicant’s argument that its use is, in fact, restricted to a particular class of purchasers. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d. 1335, 209 USPQ 986, 988 (CCPA 1981) (restricted outlets irrelevant when application not so limited). Given the relatedness of Applicant’s goods and Registrant’s goods and the lack of any restrictions in their identifications

¹⁵ It is settled that “...it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods. ... An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence.” *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *see also In re Fisher Scientific Co.*, 440 Fed.2d 434, 169 USPQ 436, 437 (CCPA 1971); *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013).

as to trade channels or purchasers, it is more likely than not that they may be offered to at least some of the same classes of purchasers through the same trade channels.

Moreover, the fact that Applicant considers its customers to be sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune to source confusion. *See In re Shell Oil Co.*, 26 USPQ2d at 1690 (indicating that “even sophisticated purchasers can be confused by very similar marks”); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); *In re Total Quality Grp., Inc.*, 51 USPQ2d at 1477; *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983).

D. Conclusion

In conclusion, because the marks are near equivalents, and given the relatedness of the goods, it is assumed that the goods travel in all channels of trade normally utilized for such goods and are available to at least some of the same classes of purchasers, there is a likelihood of confusion between Applicant’s mark EASY ACCESS and the cited registration for the mark EZACCESS.

Decision: The refusal to register Applicant’s mark EASY ACCESS is affirmed.