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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85970860
Applicant	Internet Promise Group LLC
Applied for Mark	EASY ACCESS
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Date	10/24/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: INTERNET PROMISE GROUP®, LLC  
Applicant

Mark: EASY ACCESS  
Application Ser. No.: 85/970,860  
Filed: 06/26/2013

**APPEAL BRIEF**

Honorable Commissioner of Trademarks  
P O Box 1451  
Alexandria, VA 22313-1451.

After the Final Rejection dated 03/13/1015, by the Examining Attorney of Internet Promise's mark, a Notice of Appeal was timely filed on 09/08/2015.

Internet Promise files the attached Appeal Brief. The Appeal Brief is timely filed within 60 days of the Notice of Appeal dated 09/08/2015 that is on or before 11/07/2015.

Date: October 24, 2015

Respectfully submitted,

By: /Tara Chand/

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: INTERNET PROMISE GROUP®, LLC  Applicant
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Mark: EASY ACCESS  
Application Ser. No.: 85/970,860  
Filed: June 26, 2013

**APPEAL BRIEF**

**I. THE ISSUE ON APPEAL**

Should Applicant Internet Promise Group LLC’s (“Internet Promise”) mark EASY ACCESS be refused registration on the grounds of likelihood of confusion with the trademark registration for EZACCESS (no ID) where (1) the identified goods are substantially different, (2) the channels of trade and (3) sophistication of the customers implicated thereby are substantially different, and where (4) the customers and potential goods implicated thereby do not overlap?

**II. RECITATION OF THE FACTS**

Internet Promise applied-for registration of its mark, EASY ACCESS for the following identification of the goods:

*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 Class 009.*

The Trademark Examining Attorney refused registration on the grounds that the mark so resembles the registered mark EZACCESS (in U.S. Registration No. 4,514,959) that it is likely that a potential consumer would be confused, mistaken,

or deceived as to the source of the goods/services of Internet Promise and registrant.

More specifically, the Examining Attorney cited the following registration for EZACCESS:

U.S. Registration No. 4,514,959 for the following goods:

*Computer software, namely computer software for user authentication, authorization and login to protected website accounts and secure computer networks resource.*

Internet Promise provided arguments to the Trademark Examining Attorney, in office action response, as to why and how the marks are different for the likelihood of confusion analysis and these weigh against likelihood of confusion. The Trademark Examining Attorney, however, maintained her refusal, and Internet Promise Group timely filed the present notice of appeal.

### **III. SUMMARY OF THE ARGUMENT**

The differences between Internet Promise's mark, nature of the goods, trade channels, and customers and prospective customers, and those in the cited registration weigh in favor of no likelihood of confusion. Most importantly, the mere fact that both sets of goods are computer related does not weigh in favor of confusion, and the sophistication of at least Internet Promise's prospective customers and the nearly complete lack of any overlap in any customers and prospective customers weighs heavily against confusion.

The Examining Attorney's refusal to issue a notice of allowance for the applied-for mark under section 2(d) should therefore be reversed.

#### IV. ARGUMENT

In a likelihood of confusion analysis under section 2(d), the issue is not whether the respective marks themselves, or the goods or services offered under the marks, are likely to be confused but, rather, whether there is a likelihood of confusion as to the source or sponsorship of the goods or services because of the marks used thereon. *See, e.g., Paula Payne Prods. Co. v. Johnson's Publ'g Co.*, 473 F.2d 901, 902, 177 U.S.P.Q. 76, 77 (C.C.P.A. 1973) (“[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.”); *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 U.S.P.Q. 2d 1201, 1205 (Fed. Cir. 2003) (“[T]he...mistaken belief that [a good] is manufactured or sponsored by the same entity [as another good] ... is precisely the mistake that §2(d) of the Lanham Act seeks to prevent.”); *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 U.S.P.Q. 2d 1687, 1689 (Fed. Cir. 1993) (“The degree of ‘relatedness’ must be viewed in the context of all the factors, in determining whether the services are sufficiently related that a reasonable consumer would be confused as to source or sponsorship.”); *In re Binion*, 93 U.S.P.Q. 2d 1531, 1534, 1535 (TTAB 2009); *In re Ass’n of the U.S. Army*, 85 U.S.P.Q. 2d 1264, 1267-68, 1270 (TTAB 2007); *Hilson Research Inc. v. Soc’y for Human Res. Mgmt.*, 27 U.S.P.Q. 2d 1423, 1429 (TTAB 1993) (“Although confusion, mistake or deception about source or origin is the usual issue posed under Section 2(d), any confusion made likely by a junior user’s mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship, affiliation or connection.”).

In the seminal case, *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), the United States Court of Customs and Patent Appeals discussed the factors relevant to a determination of likelihood of confusion under Section 2(d). In setting forth the factors, the court cautioned that, with respect to determining likelihood of confusion, “[t]here is no litmus rule which can provide a ready guide to all cases.” *Id.* at 1361, 177 U.S.P.Q. at 567. Not all of the factors are relevant and only those relevant factors for which there is evidence in the record must be considered. *Id.* at 1361-62, 177 U.S.P.Q. at 567-68; *see also In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 U.S.P.Q. 2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”); *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 U.S.P.Q. 2d 1201, 1204 (Fed. Cir. 2003) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 U.S.P.Q. 2d 1531, 1533 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 946, 55 U.S.P.Q. 2d 1842, 1845 (Fed. Cir. 2000). Furthermore, the significance of a particular factor may differ from case to case. *See du Pont*, 476 F.2d at 1361-62, 177 U.S.P.Q. at 567-68; *Dixie Rests.*, 105 F.3d at 1406-07, 41 U.S.P.Q. 2d at 1533 (noting that “any one of the factors may control a particular case”).

A determination of the likelihood of confusion under Section 2(d) is made on a case-by-case basis and the factors set forth in *du Pont*. Not all of the *du Pont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control depending upon the evidence of record. Although the weight given to the relevant *du Pont* factors may vary, the following two factors are key considerations in any likelihood of confusion determination:

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

- The relatedness of the goods or services as described in the application and registration(s).

*See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976); *In re Iolo Techs., LLC*, 95 U.S.P.Q. 2d 1498, 1499 (TTAB 2010); *In re Max Capital Grp. Ltd.*, 93 U.S.P.Q. 2d 1243, 1244 (TTAB 2010); *In re Thor Tech, Inc.*, 90 U.S.P.Q. 2d 1634, 1635 (TTAB 2009).

The following factors may also be relevant in an *ex parte* likelihood-of-confusion determination and must be considered if there is pertinent evidence in the record:

- The similarity or dissimilarity of established, likely-to-continue trade channels.
- The conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing (see TMEP §1207.01(d)(vii)).
- The number and nature of similar marks in use on similar goods (see TMEP §1207.01(d) (iii)).
- The existence of a valid consent agreement between the applicant and the owner of the previously registered mark (see TMEP §1207.01(d)(viii)).

*See, e.g., du Pont*, 476 F.2d at 1362-63, 177 U.S.P.Q. at 568-69; *In re Thor Tech, Inc.*, 113 U.S.P.Q. 2d 1546 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 U.S.P.Q. 2d 1198, 1203-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 U.S.P.Q. 2d 1266, 1272-74 (TTAB 2009); *Ass’n of the U.S. Army*, 85 U.S.P.Q. 2d at 1271-73.

The determination of likelihood of confusion under §2(d) in an intent-to-use application under §1(b) of the Trademark Act does not differ from the determination in any other type of application.

In this case, the following factors are the most relevant: the dissimilarity of the marks, the dissimilarity of and the nature of goods, and the dissimilarity of the trade channels of the goods. Internet Promise submits (i) that the marks themselves, the applied-for mark EASY ACCESS and prior registered mark EZACCESS, (ii) their identification of goods, and (iii) their trade channels or source of goods are entirely different from each other. Therefore, for the reasons as detailed herein there is no likelihood of confusion under section 2(d) between the applied-for mark and the prior registered mark.

#### **A. The Marks are Not Similar**

EZACCESS, the prior registered mark, and EASY ACCESS, Internet Promise's mark, are different and these marks are both different in visual appearance as well as sound quality or connotation.

Case law requires that where the mark is composed of two different words, the mark is to be analyzed as a single unitary mark and not as two separate words.

In *Princeton Vanguard LLC v. Frito-Lay N. AM., Inc.*, 786 F.3d 960 (Fed. Cir. 2015), in a case directed to test for generic-ness, the court stated that the mark "pretzel-crisps" for pretzel crackers was improperly analyzed by evaluating each term separately rather than both terms as a whole. The same reasoning is equally applicable to evaluating a mark for likelihood of confusion.

Contrary to this established case law principal, the Examining Attorney failed to evaluate the mark as a whole, ignoring the first word “EASY” of the applied-for mark, and instead comparing only the word “ACCESS” of the applied-for mark to the registered mark “EZACCESS,” leading her to reach an erroneous finding of Section 2(d) likelihood of confusion.

Internet Promise’s mark EASY ACCESS from the perspective of visual appearance is made of two different and distinct words compared with the registrant’s mark EZACCESS. Further, Internet Promise’s mark EASY ACCESS is made of two different and distinct sound connotations that of (i) EASY and (ii) ACCESS.

Internet Promise’s mark EASY ACCESS and registrant’s mark EZACCESS, when displayed in written form on a website and used in marketing literature are entirely different to a consumer. By having word EASY in Internet Promise’s mark, the marks are not similar as the word “EASY” changes the mark as well as the character of the mark in its entirety and there is no likelihood of confusion between these two marks, on this factor of similarity of marks alone.

Further, the “EASY” part of the mark in normal language usage refers to ease of use or convenient and cannot be disregarded for the purpose of similarity of marks analysis. Thus, this makes Internet Promise’s mark EASY ACCESS fundamentally different than the registrant’s mark, EZACCESS.

Therefore, both from the visual perspective and sound connotation perspective, Internet Promise’s mark EASY ACCESS and registrant’s mark

EZACCESS are dissimilar marks that are unlikely to cause confusion to a prospective buyer.

Based on the applicable case law, the factor of “similarity of marks” is judged for appearance, sound, connotation, and commercial impression.

### **1. The Marks Do Not Appear Similar**

The appearance of the applied-for mark and the prior registered mark is entirely different in that the applied-for mark is EASY ACCESS and the prior registered mark is EZACCESS and the appearance of these two marks, the applied-for mark and the prior registered mark is such that there is not likely to be a cause confusion as to the origin of the goods.

The applied-for mark is composed of two separate and distinct words EASY and ACCESS, whereas the prior registered mark is composed from a single word, EZACCESS.

Additionally, the first word EASY in the applied-for mark is a separate word. Therefore, in the applied-for mark, the words EASY and ACCESS begin with capital letters and pronounced as two different words and sounds.

Further, the appearance of the mark is different and is not likely to cause confusion, in that the applied-for mark would be displayed on literature and marketing material for a computer system for a service for a two-factor remote user

authentication requiring a wireless mobile device and the prior registered mark is displayed on a website, and does not require use of a wireless mobile device.

Internet Promise's mark, based on the identification of the goods, is a computer system used as a remote user authentication system exclusively for use with a wireless mobile device and its interaction with the computer system (Internet Server), where the Internet server, first identifies and authenticates the wireless mobile device and by implication its user, then provides a one-time and limited-time use password and then copies that one-time and limited time password to an authentication server of a business where the user is desiring to login.

Thus, the identified goods provide a two-factor remote user authentication computer system; one factor being the one time or the limited or temporary password and the second factor being the hardware identification of the wireless mobile device, exclusively via use of a mobile wireless device and its unique identification mechanisms of caller id and hardware device identification.

The trade channels of the applied-for mark is a large service business such as Google, Apple, Yahoo etc., that would use the mark and deploy the applied-for service for authentication to their systems and thus offer a two-factor remote user authentication, without having to provision and deliver a hardware security token to each customer.

In contrast, registrant's mark is for use with a website and does not offer or provide any technology service.

A retail customer on seeing the prior registered mark “EZACCESS” for computer software application on a website would readily understand that such a website service is different than a computer system for a two-factor remote user authentication service that exclusively works with a wireless mobile device, where the hardware of the wireless mobile device is used for one of these factors of authentication and where this Internet Promise’s applied for mark for a two-factor remote user authentication service is offered by a large service provider such as Google, Yahoo etc. to their customers

When a retail customer is being provided services under the applied-for mark they are being provided a service that only works with a wireless mobile device in conjunction with a large service provider, and thus the trade channels are entirely different. In contrast, the prior registered mark is for software goods that are made available via a website to retail customers.

As discussed above, the appearance of the applied-for mark and the prior registered mark is different on multiple grounds including appearance of the mark, packaging of the goods, and trade channels in which these goods would be distributed.

Therefore, these two marks are not similar in appearance at all so as to likely to cause confusion to a retail customer for these goods.

## **2. The Marks Do Not Sound Similar**

The **sound** of the applied-for mark and the prior registered mark is different in that the applied-for mark is “EASY ACCESS” and the prior registered mark is

“EZACCESS” and they would be pronounced very differently because visually they are very different. These two marks are different because the applied-for mark is composed of two different and distinct words whereas the prior registered mark is a single word.

Therefore, the applied-for mark is pronounced as four separate and distinct phonetic syllables. Such a distinct vocal pronunciation of the applied-for mark coupled with a visual difference makes the applied-for mark and the prior registered mark different and less likely to cause confusion.

### **3. The Connotations of the Marks Are Not Similar**

The **connotation** of the applied-for mark and the prior registered mark is different in that the applied-for mark is “EASY ACCESS” and the prior registered mark is “EZACCESS”, as discussed above, and they connote entirely different goods, one directed to a two-factor remote user authentication using a wireless mobile device for providing and being used as a hardware security token, whereas the prior registered mark is for a traditional one-factor login on a website using a user id and a password.

These two marks are different because the applied-for mark is composed of two different and distinct words whereas the prior registered mark is a single word.

### **4. The Commercial Impressions of the Marks Are Not Similar**

The **commercial impression** of the applied-for mark and the prior registered mark is also different in that the applied-for mark is EASY ACCESS and the prior

registered mark is EZACCESS. These two marks are not likely to cause confusion because the applied-for mark is composed of two different and distinct words, the first word EASY being perceived as an independent word separate and apart from the second word ACCESS for commercial impression, whereas the prior registered mark is a single word.

Additionally, the sound impression of the applied-for mark and the prior registered mark is different in that the applied-for mark is “EASY ACCESS” and the prior registered mark is “EZACCESS” and they would be pronounced differently because how they read. These two marks are different because the applied-for mark is composed of two different and distinct words whereas the prior registered mark is a single word.

Further, the appearance of the applied-for mark is different and is not likely to cause confusion, in that the applied-for mark would be displayed on an OEM’s literature and marketing material and would be accompanied by a marketing literature on how the service is to be used using a mobile wireless device and the prior registered mark is displayed on a website.

A retail customer on seeing prior registered mark “EZACCESS” on a website for traditional login using a user id and a password readily understands that such a login service via a website is different than a two-factor remote user authentication service to a large service provider via exclusively using a mobile wireless device, both as a hardware security token and a wireless communication device for delivery of a one-time and limited time password.

When a retail customer is using the goods for the applied-for mark, they are using a two-factor remote user authentication service exclusively via a wireless mobile device for logging on to a service provider such as Apple, Google, Yahoo etc. , and thus in appearance the marketing for the goods of the applied for mark is also entirely different because the trade channels are also entirely different.

Therefore, the commercial impression of the applied-for mark and the prior registered mark is different in that the applied-for mark is “EASY ACCESS” and the prior registered mark is “EZACCESS” connote entirely different goods, one directed to a two-factor remote user authentication service that works exclusively via a wireless mobile device, as security token, whereas the prior registered mark is for a traditional login on a webpage, without a two-factor remote user authentication and without use of a wireless mobile device as a hardware security token.

These two marks are different because the applied-for mark is composed of two different and distinct words whereas the prior registered mark is a single word.

A retail customer on seeing prior registered mark “EZACCESS” on a website for logging in, and seeing the applied-for mark “EASY ACCESS” in a marketing literature of OEM service customers such as Google, Yahoo, etc., for use with a wireless mobile device as a security token would not be confused for the origin of these goods, as not only the marks are different but the marketing literature, use literature, and the trade channels are also entirely different.

Therefore, based on the above analysis for the similarity of marks factor, the applied-for mark does not result in a likelihood of confusion with the prior registered mark.

**B. The Identified Goods Are Not Similar**

EZACCESS, registrant's mark, and EASY ACCESS, Internet Promise's mark, are for inherently and entirely different goods.

Internet Promise's goods are only a computer system with hardware and software application hosted on a server, and further, the computer system is used for security purposes, namely, a two-factor remote user authentication, wherein one of the two factors of authentication is a hardware security token in the form of a circuit card inside a wireless mobile device, and the second factor is a one time and a limited time password delivered by the computer system via the wireless mobile device.

In contrast, registrant's goods are a software application directed to a traditional one-factor remote user authentication via a traditional password login on a website.

With due respect, therefore, Internet Promise avers the Examining Attorney's position that the goods are same or similar for the issue of likelihood of confusion. The fact that both Internet Promise's and registrant's goods may be related to computer hardware and software or general act of authentication does not establish that the goods are related. Because of the ubiquitous use of computers in all aspects of business in the United States, the TTAB, and the

Federal Circuit have long rejected the view that a relationship exists between goods and services simply because each involves the use of computers:

In view of the fact that computers are useful and/or are used in almost every facet of the world of business, commerce, medicine, law, etc., it is not obvious that distinctions must be made.

*Reynolds & Reynold Co. v. I.E. Sys., Inc.*, 5 U.S.P.Q. 2d 1749, 1752 (TTAB 1987).

Just because both an applicant and a cited registrant provide computer goods 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. *In re Octocom Systmes, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 U.S.P.Q. 2d 1783 (Fed. Cir. 1990); *Information Resources Inc. v. X\*Press Information Services*, 6 U.S.P.Q. 2d 1034 (TTAB 1988).

In the instant case, the registrant's goods are computer software, namely software for user authentication, authorization and login to protected website accounts, (*See*, registrant's April 15, 2014 Certificate of Registration No. 4,514,959, attached hereto for convenience as **Exhibit A**). Internet Promise's goods are a computer system requiring an OEM delivering the service and service requiring use exclusively of a wireless mobile device providing a hardware security token of a two-factor remote user authentication service, and being used as a communication chanel for delivering a one time and a limited time use password.

It is well recognized that computer systems embodying both a computer software and computer hardware are much different than computer software applications and the like. Computer hardware refers to the physical elements of a computer and computer software helps computer hardware and computer systems itself. By contrast, computer software applications allow users to accomplish one or more tasks. Please see **Exhibit B** – Introduction to Computers Hardware and Software.

In fact, Internet Promise submits that, for the applied-for mark and the prior registered mark, the goods are very different and so different that on this factor alone, there is no likelihood of confusion for a retail customer. A retail customer on seeing prior registered mark “EZACCESS” on a website readily understands that such a one-factor login service is different than a two-factor remote user authentication service, requiring a wireless mobile device as a security device for logging on to the OEM’s authentication servers.

When a retail customer is using the two-factor remote user authentication service for the applied-for mark, they are using a unique and a distinctive protocol of a two-factor remote user authentication service requiring the use of a wireless mobile device as a security token and delivery to the wireless mobile device, a onetime and a limited time password for use with the website of an OEM authentication server and thus in appearance the marketing and packaging is also entirely different in appearance because the trade channels are also entirely different.

Therefore, based on the above analysis for the similarity of goods factor, the applied-for mark does not result in a likelihood of confusion with the prior registered mark.

### **C. The Implicated Trade Channels Are Not Similar**

With due respect, Internet Promise avers the Examining Attorney's position that the trade channels for the applied-for mark and the prior registered mark are same or similar for the issue of likelihood of confusion. In fact, Internet Promise submits that the trade channels are very different.

Internet Promise's customers would not associate the computer software of registrant's for a website login with Internet Promise's computer system requiring use of a wireless mobile device for a two-factor remote user authentication.

Consumers purchasing or using Internet Promise's goods are likely to put a high degree of care and discrimination into their purchasing decision. The Federal Circuit has held that it is reasonable to set a higher standard of care for professional or commercial purchases than exists for consumers. Such professional buyers are less likely to be confused than the ordinary consumer. *In re Electronic Design, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 718, U.S.P.Q. 2d 1388 (Fed. Cir. 1992) (No likelihood of confusion where Plaintiff sold "E.D.S." computer services to "experienced corporate officials after significant study and contractual negotiation" while Defendant sold "EDS" power supplies and battery chargers to OEMs. Both parties' goods and services "are usually purchased after careful consideration by persons who are highly knowledgeable.")

As is usual and customary in purchasing specialized computer goods and services, OEM customers research and obtain an overall understanding or expertise of the products that they are purchasing. For this reason alone, Internet Promise's specialized customers become sophisticated clients. As a result, it is evident in this case that the care and sophistication of prospective purchase of Internet Promise's goods significantly reduces any likelihood of confusion. *See, e.g., Quartz Radiation Corp.*, 1 U.S.P.Q. 2d at 1669 (holding no likelihood of confusion since parties' goods are sold to different technically sophisticated purchasers).

As a matter of fact, registrant describes its consumers as people who log on the websites. Internet Promise's highly specialized technical 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.

Because of the nature of Internet Promise's products, the purchase of the goods is made only after careful deliberation and thought. Thus, it is evident that the circumstances under which the goods are purchased further reduces a likelihood of confusion. *Elec. Data Sys. Corp.* 23 U.S.P.Q. 2d at 1465 (likelihood of confusion is always reduced in cases where the goods are expensive and purchased after careful deliberation); *Astra Pharm. Prod., Inc. v. Beckman Instruments, Inc.*, 220 U.S.P.Q. 786, 790 (1st Cir. 1983) (no likelihood of confusion between ASTRA for computerized blood analysis machine and related products versus ASTRA for pharmaceutical products, both marketed to hospitals – court finding that goods are sold to sophisticated purchasers in different departments within the hospital); *In re Digirad Corp.*, 45 U.S.P.Q. 2d at 1843-44.

Internet Promise's goods are sold as an OEM system for incorporation in other's remote user authentication systems, whereas registrant's goods comprise a computer software application used on a website for logging in via the website enabled to be used as a software application directly by a user.

Therefore, given the prior registrant's nature of the goods, and Internet Promise's nature of the goods as described above, there is no similarity in the nature of the goods, and trade channels of the registrant's goods and Internet Promise's goods. Hence, on this factor alone, the trade channels and nature of the goods are entirely different and are not likely to cause confusion to a customer.

**D. Internet Promise's OEM Customers are Sophisticated and Its Goods Are Purchased with Care and Deliberation**

The goods listed in Internet Promise's application, namely a computer system, strongly suggest that Internet Promise's potential customers are sophisticated purchasers who are not at all likely to be confused into thinking Internet Promise's computer system enabling a two-factor remote user authentication service provided by an OEM service provider emanate from the registrant. *See, Arrow Fastener Co., Inc. v. The Stanley Works*, 59 F.3d 384, 399 (2nd Cir. 1995) (finding no likelihood of confusion where consumers must possess high level of knowledge and the product is expensive).

Internet Promise's customers likewise are sufficiently sophisticated not to be confused into thinking that computer systems enabling a two-factor remote user authentication service using a wireless mobile device hardware as a security token under the EASY ACCESS trademark emanates from the registrant. In fact,

Internet Promise's potential customers (OEM such as Google, Yahoo, etc.) would likely *not* expect registrant to sell any kind of computer system with registrant's goods/services.

Moreover, this Board has repeatedly held that the relevant customers and potential customers to evaluate for the likelihood of confusion determination are those who are likely to encounter both the goods of registrant and the goods of the Applicant. *In re Albert Trostel & Sons Co.*, 29 U.S.P.Q. 2d 1783, 1785 (TTAB 1993).

The facts of the present case are similar to those presented in *In re Shipp*, 4 U.S.P.Q. 2d 1174 (TTAB 1987). In *Shipp*, the Trademark Office had refused registration of PURITAN for laundry and dry-cleaning services on the grounds that it was likely to cause confusion with the already registered PURITAN trademark for dry cleaning machine filters and parts and dry cleaning preparations. *Id.* at 1175. The Board found that the applicant's services were offered to the general public while the pertinent goods of the cited registrations were not ordinarily sold to the general public, but to a narrow class of purchaser, namely, owners and operators of dry cleaning establishments. *Id.* at 1176. The Board found that it was unlikely that the applicant's customers would encounter any of the goods encompassed by the cited registrations sold under the PURITAN mark. *Id.*

Rather, the Board held, the relevant prospective class of purchasers is the class of purchaser having the potential to encounter both the respective goods and services. *Id.* Applying this rule, the Board found that the relevant class of purchasers was the owners and operators of dry cleaning establishments and held that these purchasers were relatively sophisticated and discriminating in matters

pertaining to the dry cleaning industry, are likely to be aware of the source of commercial dry cleaning equipment, and are likely to know that a dry cleaning establishment offering laundry and dry cleaning services is not likely to be the source of commercial dry cleaning equipment, even where such services and goods are offered under virtually identical marks. *Id.*

Here, as in *Shipp*, Internet Promise's computer system for a two-factor remote user authentication service using a wireless mobile device is offered to the large OEMs such as Google, Yahoo; whereas the computer software offered under the cited registered trademark are offered to only a narrow class of purchasers, namely, "website development companies." Internet Promise's prospective customers such as large OEM service providers are not likely to encounter the registrant's website login computer software. The only prospective purchasers therefore who have the potential of encountering both the respective goods and services would, at most, consist of registrant's "general public who use these specific web sites using Registrant's computer software and public who logon to OEMs such as Google, Yahoo, etc., and use the two-factor remote user authentication dependent on having and using a wireless mobile device."

Any such overlapping prospective purchasers would be public who would readily discriminate in matters pertaining to" the tax accounting industry. *See, Shipp*, 4 U.S.P.Q. 2d, at 1176. On the evidence of the record, including the goods listed in the cited registration and the goods listed in Internet Promise's application, the registrant's goods most likely would not be encountered by Internet Promise's customers.

The Examining Attorney had the burden of proof on this issue. *Id.* Here,

the Examining Attorney failed to show that it is customary for a software company to also offer income tax return preparation and filing services and income tax refund anticipation loan services. Thus, in the absence of such evidence on this matter, the Board should conclude, as it did in *Shipp* under almost identical facts, that the respective goods and services are not so related that confusion would be likely. *See, id.* In fact, as the Board found in *Albert Trostel*, 29 U.S.P.Q. 2d at 1783, the record here contains no convincing evidence that any ultimate purchasers would be likely to encounter both marks.

Therefore, any overlapping customers, as rare as they may be, would likely be quite sophisticated and likely be in the business of exercising considerable care and diligence in purchasing either party's listed goods, which argues against a likelihood of confusion. *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 718 (Fed. Cir. 1992) (where purchasers are "sophisticated enough . . . the likelihood of confusion remains remote").

## V. CONCLUSION

Hence, Internet Promise's mark for its computer system for a two-factor remote user authentication service using a wireless mobile device as a security token and a wireless communication channel for delivery of one-time and limited time password identified in its application is not likely to cause confusion with the prior registrant's mark for registrants identified goods directed to computer software for website login.

Considering the foregoing discussed factors in combination, the registrant's mark, goods, trade channels, and customers and prospective customers, compared

to those in Internet Promise's application, there is no likelihood of confusion. Internet Promise therefore respectfully submits that the Examining Attorney's refusal to issue a notice of allowance for the applied-for mark under section 2(d) should be reversed.

Signed/Date: 10/24/2015

//Tara Chand//

President

Internet Promise Group® LLC

2390 Crenshaw Blvd. Ste. 239,

Torrance, CA 90501-3300,

310 787 1400

**Exhibit A**

United States of America  
United States Patent and Trademark Office

# EZACCESS

**Reg. No. 4,514,959**

WEBCETERA, L.P. (TEXAS LIMITED PARTNERSHIP)  
601 SILVERON BLVD., SUITE 170  
FLOWER MOUND, TX 75028

**Registered Apr. 15, 2014**

**Int. Cl.: 9**

FOR: COMPUTER SOFTWARE, NAMELY, COMPUTER SOFTWARE FOR USER AUTHENTICATION, AUTHORIZATION AND LOGIN TO PROTECTED WEBSITE ACCOUNTS AND SECURE COMPUTER NETWORK RESOURCES, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

**TRADEMARK**

**PRINCIPAL REGISTER**

FIRST USE 8-20-2013; IN COMMERCE 8-20-2013.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 85-295,470, FILED 4-14-2011.

JOHN WILKE, EXAMINING ATTORNEY



*Michelle K. Lee*

Deputy Director of the United States  
Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL  
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE  
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

**Requirements in the First Ten Years\***

**What and When to File:**

***First Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. *See* 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

***Second Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.\*  
*See* 15 U.S.C. §1059.

**Requirements in Successive Ten-Year Periods\***

**What and When to File:**

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

**Grace Period Filings\***

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or  
reminder of these filing requirements.**

**\*ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. *See* 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. *See* 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

**NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.**

**Exhibit B**

[previous sub-module](#)
[module](#)
[course](#)
[next sub-module](#)

## 2.3. Introduction to Computers

### Hardware and Software [\[src\]](#)

#### Hardware

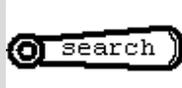
[Hardware](#) refers to the physical elements of a computer. This is also sometime called the machinery or the equipment of the computer. Examples of hardware in a computer are the keyboard, the monitor, the mouse and the processing unit. However, most of a computer's hardware cannot be seen; in other words, it is not an external element of the computer, but rather an internal one, surrounded by the computer's casing (tower). A computer's hardware is comprised of many different parts, but perhaps the most important of these is the motherboard. The motherboard is made up of even more parts that power and control the computer.

In contrast to software, hardware is a physical entity. Hardware and software are interconnected, without software, the hardware of a computer would have no function. However, without the creation of hardware to perform tasks directed by software via the central processing unit, software would be useless.

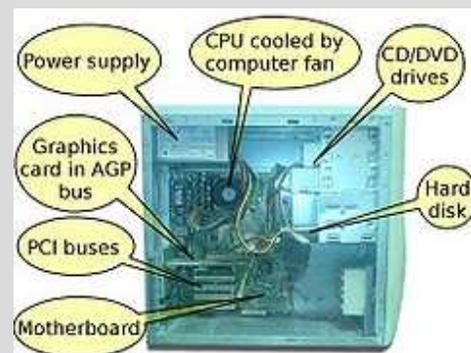
Hardware is limited to specifically designed tasks that are, taken independently, very simple. Software implements algorithms (problem solutions) that allow the computer to complete much more complex tasks.



[personal computer hardware](#)



[what is computer hardware](#)



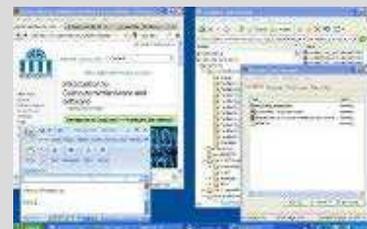
Basic internal hardware

[Miko3k](#) [\[GFDL or CC-BY-SA-3.0\]](#), from [Wikimedia Commons](#)

#### Software

[Software](#), commonly known as programs, consists of all the electronic instructions that tell the hardware how to perform a task. These instructions come from a software developer in the form that will be accepted by the platform (operating system + CPU) that they are based on. For example, a program that is designed for the Windows operating system will only work for that specific operating system. Compatibility of software will vary as the design of the software and the operating system differ. Software that is designed for Windows XP may experience a compatibility issue when running under Windows 2000 or NT.

Software is capable of performing many tasks, as opposed to hardware which only perform mechanical tasks that they are designed for. Software is the electronic instructions that tells the computer to perform a task. Practical computer systems divide software systems into two major classes:

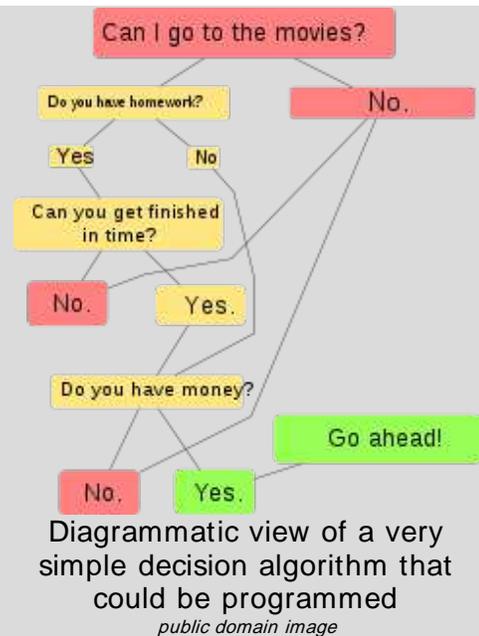


System software on right. Applications on left. More system and application software is indicated in the tray at the bottom.

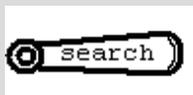
By Paul Mullins: [screenshot](#)

- **System software:** Helps run computer hardware and computer system itself. System software includes operating systems, device drivers, diagnostic tools and more. System software is almost always pre-installed on your computer.
- **Application software:** Allows users to accomplish one or more tasks. Includes word processing, web browsing and almost any other task for which you might install software. (Some application software is pre-installed on most computer systems.)

Software is generally created (written) in a high-level programming language, one that is (more or less) readable by people. These high-level instructions are converted into "machine language" instructions, represented in binary code, before the hardware can "run the code". When you install software, it is generally already in this machine language, binary, form.



[software](#)



[what is software](#)

## Firmware

[Firmware](#) is a very specific, low-level program for the hardware that allows it to accomplish some specific task. Firmware programs are (relatively) permanent, i.e., difficult or impossible to change. From the higher-level view of software, firmware is just part of the hardware, although it provides some functionality beyond that of simple hardware.

Firmware is part of devices (or device components) such as a video card, sound card, disk drive and even the motherboard. The AMIBIOS image to the right is from a [Baby AT Motherboard](#).



ROM BIOS chip holding firmware used to boot the computer  
*public domain image*

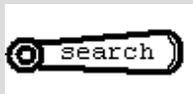


Analogy with autopilot as firmware

By Paul Mullins: [constructed image](#)



[firmware](#)



[what is firmware](#)



[what is firmware](#)

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Attribution: Dr. Paul Mullins, Slippery Rock University

These notes began life as the [Wikiversity](#) course [Introduction to Computers](#).

The course draws extensively from and uses links to [Wikipedia](#).

A large number of video links are provided to [labrats.tv](#). (I hope you like cats. And food demos.)