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Mailed: June 16, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Spy Optic Inc.

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Serial No. 86360663

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

Daniel F. Capshaw, Trademark Examining Attorney, Law Office 110,
Chris A.F. Pedersen, Managing Attorney.

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Before Quinn, Taylor and Wolfson,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Spy Optic Inc. (“Applicant”) seeks registration on the Principal Register of the mark QUICK DRAW (in standard characters) for “sports goggle lens changing system consisting of goggle lenses, a case for holding goggle lenses and a hand tool for removing and inserting goggle lenses sold together as a unit” in International Class 9.¹

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¹ Application Serial No. 86360663, filed August 7, 2014 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a *bona fide* intention to use the proposed mark in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when applied to Applicant's goods, so resembles the previously registered mark QUICKDRAW (in typed form) for "retainer for headband strap for protective goggles" in International Class 9² as to be likely to cause confusion.

The Examining Attorney maintains that the marks are nearly identical and that the goods are highly related. In support of the refusal the Examining Attorney introduced third-party registrations, and excerpts of third-party websites.

Applicant argues that the goods are different and are sold through distinct trade channels. Applicant submitted excerpts of third-party websites.

Evidentiary Objection

Before turning to the merits of the appeal, we direct our attention to an evidentiary matter. In its response filed May 26, 2015, Applicant listed in a table format eleven third-party registrations of QUICKDRAW and QUICK DRAW marks; the only information given is the mark and the registration number. According to Applicant, the listed registrations are "merely exemplary of such 'quick draw' marks on the USPTO database," and that the evidence shows the cited mark is "weak"; Applicant also argues that it is being "singled out and subject to inconsistent treatment." (4 TTABVUE 12-14). The Examining Attorney, in his final refusal, timely objected to the list as "improper evidence," citing TMEP § 710.03. Applicant, in its

² Registration No. 1751053, issued February 9, 1993; renewed. Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 807.03(i) (2016).

brief, again refers to the third-party registrations by setting forth the same list. (4 TTABVUE 12-14). The Examining Attorney objected to the list in his brief. (6 TTABVUE 5).

The Examining Attorney's objection is sustained. To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted. *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006). Mere listings of registrations are not sufficient to make the registrations of record. *In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010). *See generally* TBMP § 1208.02 (2015); TMEP 710.03.

Accordingly, the list of third-party registrations has not been considered in making our determination.³

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). 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 (CCPA 1976).

³ We hasten to add that even if considered, the list would be entitled to very limited probative value, because the only information provided is the mark and registration number. *See In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012), *aff'd*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013).

The Marks

With respect to the *du Pont* factor dealing with the similarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The presence of a space between the two words comprising Applicant’s mark QUICK DRAW does not meaningfully distinguish it from Registrant’s mark QUICKDRAW. *See Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD “are, in contemplation of law, identical”). *See also In re Omaha Nat. Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) (affirming the Board’s finding that FirstTier is the phonetic equivalent of “first tier”); *Armstrong Mfg. Co. v. Ridge Tool Co.*, 132 F.2d 158, 56 USPQ 165, 166 (CCPA 1942) (“Vistand” is the equivalent of “vise stand”). Applicant does not seriously contend to

the contrary, stating only that “[t]he addition of a space between K and the D distinctively transforms the mark from being one word to being two words.” (4 TTABVUE 12).

We find that the marks are identical in sound and meaning, and virtually identical in appearance. Moreover, the marks engender overall commercial impressions that are, in essence, identical. The virtual identity between the marks is a factor that weighs heavily in favor of a finding of likelihood of confusion.

The Goods

As to the second *du Pont* factor regarding the similarity of the goods, Applicant’s goods are identified as “sports goggle lens changing system consisting of goggle lenses, a case for holding goggle lenses and a hand tool for removing and inserting goggle lenses sold together as a unit”; Registrant’s product is described as a “retainer for headband strap for protective goggles.” In considering this *du Pont* factor, we especially note that where virtually identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-89 (Fed. Cir. 1993) (“even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”); *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002); *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood

of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant attempts to distinguish the goods, pointing out that they are “distinctly different from each other,” that they “serve a different function,” and that Registrant’s goods do not have any sport or outdoor application, but rather are for use in the laboratory or in industrial safety situations to protect against chemical splashes, impacts and similar dangers. (4 TTABVUE 8-10). We are not persuaded by these arguments.

Applicant’s argument that Registrant’s goods are limited to protective laboratory or industrial uses, and are not suited for sports applications, as shown by Registrant’s website (Response, App. 1; 5/26/15), is futile. An applicant may not restrict the scope of the goods covered in its application or in the cited registration by argument or extrinsic evidence. *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764 (TTAB 1986). Thus, any specific differences between the actual natures of the goods are irrelevant in our analysis. The identification of goods in the cited registration does not include the limitation highlighted by Applicant; Registrant’s identification is broadly worded so Registrant’s goods are construed to encompass retainers for headband straps for all types of protective goggles, including protective goggles for use while playing sports.

See Paula Payne Products Co. v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958); *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992) (goods in an identification without limitations or restrictions is presumed to encompass all goods of the type identified).

In point of fact, the Examining Attorney submitted third-party webpages showing that terms such as “sports goggles,” “protective goggles,” “sports eyewear” and “protective eyewear” essentially are used interchangeably to refer to the same type of products. (Office action, 6/17/15). Moreover, the terms “protective goggles” and “protective eyewear” are often used in the context of sports. A representative sample includes the following:

Protective Sports Eyewear

Today, sports goggles are an accepted part of everyday life....

(www.allaboutvision.com)

Protective Goggles Prevent Most Eye Injuries in Sports

Protective eyewear is available in either a goggle design or a shield.

(www.momsteam.com)

Action Sports Protective Goggles with Adjustable Strap

(www.shopzerouv.com)

Eye Health: A summer of sports can be fun, but dangerous without protective eyewear

(www.kyforward.com)

AGPtek® Protective Goggles Sports Glasses

(www.amazon.com)

The Examining Attorney also introduced copies of use-based third-party registrations showing that a single entity registered the same mark for both types of goods as involved in this appeal. (Office action, 6/17/15). A representative sample includes the following registrations:

SILVERFISH for “goggles, and their parts and accessories, namely lenses, frames, ear stems, nose pieces, straps, and cases”
(Reg. No. 2656820)

KYRA for “cases for spectacles and sunglasses; lenses for sunglasses; protective eyewear; sports eyewear; eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer”
(Reg. No. 3512339)

MACE for “goggles for snow sports and parts and accessories therefor, namely, replacement lenses ... straps ... and cases specially adapted for goggles”
(Reg. No. 3575351)

XENOLIT for “goggles, namely, protective goggles, swimming, diving, biking and skiing goggles; sport glasses; accessories for spectacles, namely, ... retaining sports bands; optical lenses”
(Reg. No. 4084204)

HLT for “lenses; sports glasses, protective safety glasses; straps for eyeglasses in the nature of eyewear accessories which restrain eyewear movement on a wearer”
(Reg. No. 4071107)

SMITH OPTICS for “sports goggles, and replacement lenses therefor; straps for sports goggles; eye protection devices for use in active outdoor sports”
(Reg. No. 3588946)

I/OX for “sports goggles and replacement lenses therefor; straps for sports goggles”
(Reg. No. 4326902)

EVISU for “goggles for sports; safety goggles; cases for eyeglasses and sunglasses; eyewear accessories, namely, straps neck cords and head straps which restrain eyewear from moving on a wearer”
(Reg. No. 4449036)

“Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services 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).

Based on the evidence of record, we find that Applicant’s “sports goggle lens changing system consisting of goggle lenses, a case for holding goggle lenses and a hand tool for removing and inserting goggle lenses sold together as a unit” and Registrant’s “retainer for headband strap for protective goggles” are sufficiently related that, when sold under virtually identical marks, there is likely to be confusion among purchasers in the marketplace. The evidence shows that sports goggles and protective goggles, and accessories therefor, including lenses, headband straps, and cases, are marketed together by a single entity, often under the same mark. Further, the goods, albeit serving different functions, nevertheless are complementary in nature, both being used in connection with goggles. *See In re Toshiba Med. Sys. Corp.*,

91 USPQ2d 1266, 1272 (TTAB 2009); *Polo Fashions, Inc. v. La Loren, Inc.*, 224 USPQ 509, 511 (TTAB 1984).

When the identification of goods does not include any limitation as to the trade channels or classes of purchasers for the listed goods, as in the present case with respect to the application and the cited registration, it is presumed that the goods move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009); *In re Jump Designs, LLC*, 80 USPQ2d at 1374. Thus, contrary to Applicant's attempt to restrict the trade channels by reference to extrinsic evidence (as also discussed above relating to the goods themselves), the goods are presumed to travel through eyewear retailers which carry sports and protective goggles and related accessories, such as lenses, straps to restrain eyewear movement on a wearer, and cases. Purchasers for these goods would include anyone in the market for protective eyewear, including ordinary consumers.

The similarity in the goods, trade channels and classes of purchasers are factors that weigh in favor of a finding of likelihood of confusion.

Third-party Marks

In an attempt to diminish the distinctiveness of the registered mark, Applicant points to the sixth *du Pont* factor, namely "the number and nature of similar marks in use on similar goods." As discussed above, although Applicant listed eleven third-

party registrations of similar marks, none of the registrations were properly made of record.

In appropriate cases, third-party registration evidence may show that a term carries a highly suggestive connotation in the relevant industry and therefore may be considered somewhat weak, even where the specific extent and impact of the usage has not been established. *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). In the present case, however, there is no third-party registration evidence which can be considered. Accordingly, this *du Pont* factor is neutral.

Conclusion

We have carefully considered all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any not specifically discussed in this opinion. We conclude that purchasers familiar with Registrant's "retainer for headband strap for protective goggles" sold under the mark QUICKDRAW would be likely to mistakenly believe, upon encountering Applicant's mark QUICK DRAW for "sports goggle lens changing system consisting of goggle lenses, a case for holding goggle lenses and a hand tool for removing and inserting goggle lenses sold together as a unit," that the goods originate from or are associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.