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

Proceeding	86360663
Applicant	Spy Optic Inc.
Applied for Mark	QUICK DRAW
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Attorney Docket: **SPYNO-480T**

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

Appellant:	Spy Optic Inc.	)	Law Office	110
Serial No.:	86/360,663	)		
Filed:	August 7, 2014	)	Examining Attorney:	Daniel F. Capshaw
For:	QUICK DRAW	)		

APPELLANT'S APPEAL BRIEF ON EX PARTE APPEAL

Assistant Commissioner for Trademarks
Post Office Box 1451
Alexandria, Virginia 22313-1451

Dear Sir/Madam:

Appellant respectfully submits the following in support of registration of its mark.

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I. INTRODUCTION

Appellant has appealed to the Trademark Trial and Appeal Board from the final refusal dated June 18, 2015, for the mark "QUICK DRAW" ("Proposed Mark") in the above-identified trademark application. Appellant noticed its appeal from that final rejection on December 16, 2015. In the final rejection, the Examining Attorney refused registration contending that the Proposed Mark "QUICK DRAW" is confusingly similar to the mark "QUICKDRAW" (U.S. Registration No. 1,751,053; hereinafter "Cited Mark") under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). As set forth in the following sections of this Appeal Brief, Appellant respectfully submits that the Examining Attorney's contention is in error and requests that this Board reverse the Examining Attorney's refusal to register the Proposed Mark under Trademark Act Section 2(d) and pass the Proposed Mark to publication.

II. RECITATION OF THE FACTS

Appellant filed its application to register the Proposed Mark "QUICK DRAW" on August 7, 2014 under 15 U.S.C. § 1051(b). The application was filed in relation to goods in International Class 009, specifically, "sports goggle lens changing system."

On November 26, 2014, the Examining Attorney mailed an initial Office Action stating that registration was refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d) because the Proposed Mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 1,751,053 associated with goods in International Class 009, specifically, "retainer for headband strap for protective goggles." In the initial Office Action, the Examining Attorney additionally indicated that the identification of goods is indefinite and must be clarified.

Appellant filed a response to the initial Office Action on May 26, 2015. In the response,

Appellant amended the identification of goods in International Class 009 to include "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." Appellant additionally argued that there is no likelihood of confusion with the mark that is the subject of U.S. Registration No. 1751053 because the respective goods are different, the respective trade channels are different, the respective marks are different, and there is an abundance of third party "quickdraw"-derivative marks thereby indicating that consumers do not associate "quickdraw" with one particular source of goods/services.

The Examining Attorney mailed a second Office Action to Appellant on June 18, 2015 indicating that the Section 2(d) refusal was maintained and made final.

In response to the second Office Action, Appellant mailed a Notice of Appeal on December 16, 2015, and accordingly, the present Brief herein is timely filed. For the reasons detailed below and for the reasons set forth in Appellant's response to the previous Office Action, Appellant submits that the Proposed Mark is entitled to registration.

III. LEGAL STANDARDS FOR DETERMINING LIKELIHOOD OF CONFUSION

In a refusal to register a mark based on alleged likelihood of confusion, the United States Patent and Trademark Office bears the burden of establishing a *prima facie* showing that the applied-for mark so resembles a registered mark so as to be likely to cause confusion, cause mistake or to deceive within the meaning of 15 U.S.C. § 1052(d).

In general, a likelihood of confusion determination depends on whether the purchasing public would mistakenly believe that Appellant's goods are associated with the owner of the cited mark. *FBI v. Societe: "M. Bril & Co.,"* 172 U.S.P.Q. 310, 314 (T.T.A.B. 1971). There is no litmus rule for determining a likelihood of confusion under Section 2(d). *In re E.I. du Pont de*

Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). Instead, the following factors, when relevant, must be considered to determine a likelihood of confusion: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in the application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, i.e., impulse versus careful sophisticated purchasing; (5) the fame of the prior mark (sales, advertising, length of use); (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between Appellant and the owner of a prior mark; (11) the extent to which Appellant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, i.e., whether de minimis or substantial; and (13) any other established fact probative of the effect of use. *Id.*

If after considering the relevant factors, the Examining Attorney cannot establish that use of the Proposed Mark would give rise to the mistaken believe that the associated goods/services originate from the same source, there is no likelihood of confusion. *FBI v. Societe: "M. Bril & Co.,"* 172 U.S.P.Q. 310, 314 (T.T.A.B. 1971).

IV. <u>THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN THE CITED MARK AND THE PROPOSED MARK.</u>

As set forth below, there is no likelihood of confusion between the Proposed Mark and the Cited Mark because several of the above-referenced factors weigh in favor of no likelihood-

of-confusion, namely, that the goods related to the respective marks are different, the marks are different, the goods are sold through separate and distinct trade channels, and there is a large number of similar marks adopted by third-party registrants.

A. THE GOODS ASSOCIATED WITH THE MARKS ARE DIFFERENT

A critical factor for purposes of determining a likelihood of confusion is the relatedness of the goods associated with the marks. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), T.M.E.P. § 1207.01. As the relatedness of the goods decreases, the likelihood of confusion also decreases. Appellant submits that the goods associated with the Proposed Mark are sufficiently unrelated from the goods associated with the Cited Mark so as to mitigate a likelihood of confusion.

A substantial distinction between Appellant's proposed mark and the cited '053 registration lies in the significant disparity between Appellant's goods and Registrant's goods. Along these lines, Appellant's goods are not at all similar to the goods in the cited registration, and thus, consumer confusion between the respective marks is highly unlikely.

Appellant's goods in International Class 009 include: *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 contrast the goods in the cited QUICKDRAW registration consist of a: *retainer for headband strap for protective goggles.*

Both the purpose of the goods related to their respective marks, as well as the physical nature of the goods related to the respective marks illustrates distinct differences in the goods. Appellant's goods are primary purposed for sports, while the goods listed in the '053 registration, as understood, are primarily purposed for use with a general safety goggle. This is seen not only in the description above, but in function as well. In particular, goods in relation to the '053 registration are configured for use with protective goggles for the head of the wearer,

with such goggles being particularly adapted to protect the eyes in an industrial setting from chemical splashes, impacts, and other dangers. Comparatively, Appellant's goods are primarily adapted for use with sports goggles, such as goggles used when participating in snowboarding, skiing, outdoor activities, etc.

Additionally, Appellant's goods include forming an entire sports goggle lens changing system, which compromises at least one lens, a case, and a hand tool, all sold together, while the goods associated with the cited '053 registration merely include a headband strap retainer. These are distinctly different from each other. Appellant's goods deal directly with the lens of a goggle, a way to change the lens of said goggle, the tools necessary to complete said change, and a case for holding the separate lenses. In contrast, the goods associated with the '053 registration are only concerned with the retaining of a headband strap for a protective goggle. There is no mention in the cited '053 registration of a tool for replacing lenses, of a case for storing the lenses. Since Appellant's goods contain different parts and mechanisms that are not contained in the '053 registration, the respective goods do not compete with one another.

Moreover, goods associated with Appellant's proposed mark serve a different function than those associated with the '053 registration. Appellant's goods are designed to be utilized in replacing or swapping a lens from a goggle when the goggles are not in use, as without a lens present, the goggles would not be used appropriately. In contrast, the goods associated with the '053 registration are designed to adjust the headband strap while the goggles are being worn on one's head. Since both the function of the goods associated with their respective marks, replacing a lens vs. adjusting a headband, and the timing of when the goods are used, not in use vs. in use, differ, consumer confusion is highly unlikely.

Furthermore, the goods associated with the '053 registration are not believed to be utilized in any aspect other than laboratory and industrial safety and do not have any sport or

outdoor association. (See Appendix 1 of Appellant's Response dated May 26, 2015). Whereas Appellant's goods are typically sports related and are not billed as having laboratory or industrial safety applications. This further distinguishes Appellant's proposed mark from the cited '053 registration.

Since the goods have several key and distinct points of dissimilarity; sports vs. industrial safety, different parts, and different functional uses, any potential for consumer confusion is mitigated.

B. THE GOODS ARE SOLD THROUGH SEPARATE AND DISTINCT CHANNELS OF TRADE

The marketing channels used by the owners of the marks at issue are relevant to determine how the marks are encountered and to whom the goods are sold. *Leelanau Wine Cellars Ltd. v. Black & Red Inc.*, 84 U.S.P.Q.2d 1225, 1233 (6th Cir. 2007) (citing *Gen. Motors Corp. v. Keystone Auto. Indus., Inc.*, 453 F.3d 351, 357, 79 U.S.P.Q.2d 1456 (6th Cir. 2006)). When the marks are marketed to different consumers and sold through separate channels, there is confusion between the marks is unlikely. *See Leelanau Wine Cellars Ltd.*, 84 U.S.P.Q.2d 1225, 1233 (6th Cir. 2007).

Appellant submits that the goods associated with the Cited Mark and the goods associated with the Proposed Mark are marketed and sold to different consumers. In view of the stark contrast between the goods discussed above, it follows that Appellant's goods and the goods associated with the cited '053 registration travel through separate and distinct trade channels, which further weighs against finding a likelihood of confusion.

As noted above, Appellant's goods are typically associated with sports and outdoor activities, while the goods associated with the cited '053 registration are associated with

laboratory and industrial safety. Appellant's goods are typically found in sporting goods stores. (*See Appendix 2* of Appellant's Response dated May 26, 2015). The goods at those locations typically do not bear similarities to the goods associated with the '053 registration, and thus, consumer confusion in the marketplace is mitigated. Similarly, the goods related to the '053 registration are typically sold from vendors which supply laboratories and other industrial facilities with related safety equipment. Those vendors typically have no relation to Applicant's goods and Applicant's goods are not present at those locations. (*See Appendix 3* of Appellant's Response dated May 26, 2015).

Even on larger websites, such as Amazon.com, clear distinctions are made between the types of goggles looked for by consumers. Searches in "Sports and Outdoors" for "goggles" direct a user to products similar to Applicant's field of goods, and not anything similar to those associated with the '053 registration. (*See Appendix 4* of Appellant's Response dated May 26, 2015). While searches in "Tools and Home Improvement" or "Industrial & Scientific" for "goggles" direct a user to products similar to those in the same field as goods related to the '053 registration, and not anything similar to goods related to Appellant's prospective mark. (*See Appendix 5* of Appellant's Response dated May 26, 2015). Safetyglassesusa.com has the same type of differentiation as Amazon, one for "Sports Eyewear," where a user will find goods of the type associated with Appellant's proposed mark and one for "Safety Goggles," which contains goods more likely to be associated with the '053 registration. (*See Appendix 6* of Appellant's Response dated May 26, 2015).

While a consumer may find goods related to the proposed mark and goods related to the '053 registration on a site such as Amazon, this does not lead to confusion. Since they are clearly separated in subcategories, there is little likelihood that a consumer would be confused. Indeed, also on Amazon are things such as Back Bone, a lens modification kit and Backbone, a software

program, and thus their mere presence on Amazon does not lead to a likelihood of confusion as consumers searching for these products will look in different areas and be readily able to tell the products and their manufacturers apart.

Furthermore, consumers searching for these products will likely be looking for different features, different terminology, and different functionality when searching for the respective goods.

Since there is no similarity in the trade channels associated with the respective goods, there is not likely to be confusion amongst consumers with regards to the '053 registration and Applicant's proposed mark.

C. SEVERAL THIRD PARTY DERIVATIVE MARKS

Likelihood of confusion is further mitigated by differences in the marks themselves. In particular, Appellant's proposed mark and the cited '053 registration create unique and distinctive appearances, particularly in view of the differences in good and trade channels, as noted above.

The cited registration contains the mark QUICKDRAW whereas the proposed mark is QUICK DRAW. The addition of a space between the K and the D distinctively transforms the mark from being one word to being two words.

Moreover, a search of the USPTO database reveals that there are over several "quickdraw" derivative marks registered by third parties. Such third party registrations illustrate that the cited mark has "weak trademark significance in [the applicable] field because of its suggestiveness, which is evidenced by its widespread adoption and registration." *In re Hamilton Bank,* 222 U.S.P.Q. 175, 177 (T.T.A.B. 1974). In *In re Hamilton Bank*, the Trademark Trial and Appeal Board reversed the refusal to register under Section 2(d) based on the fact that the federal

register showed over twenty registrations for banking services incorporating the word "key." *Id.* "What this case boils down to is the fact that the term "KEY' is part of at least twenty registered service marks adopted in the banking field." The TTAB held that "the applicant's mark is no more likely to cause confusion with the five cited registered marks than the five cited registered marks arc likely to cause confusion with the fifteen other registered marks which contain the term "KEY.' " *Id.* Likewise, Appellant's mark is no more likely to cause confusion with the cited mark than the cited mark is likely to cause confusion with the numerous registrations listed below on the Principle Register.

The following marks are merely exemplary of such "quick draw" derivative marks on the USPTO database:

Registration Number	Word Mark
4605562	QUICK DRAW
4265219	QUICK DRAW
4584733	QUICK DRAW PRODUCTIONS
4577263	QUICKDRAW
4562428	QUIKDRAW PLUS
4558568	QUIKDRAW
4557171	QUIK DRAW
2769376	QUICK-DRAW
3070308	QUICK DRAW
3776310	QUICK DRAW
3317200	QUICKDRAW

The TTAB has stated that the PTO should avoid inconsistent practices. See e.g., *In re Women's Publishing Co., Inc.*, 23 U.S.P.Q.2d 1876, 1878 (T.T.A.B. 1992). In view of the PTO's

approval of these other registrations, Appellant submits that it should not be singled out and subject to inconsistent treatment in this case.

In fact, Appellant respectfully submits that the TTAB and the courts have consistently found that it is even possible for identical marks to be used on closely related goods and services without a likelihood of confusion.

Clearly, time and time again, even when the marks involved were identical, the T.T.A.B. and the courts have found that no likelihood of confusion exists between the marks. The marks in the present case are even less similar than the marks in the referenced cases.

Accordingly, Appellant submits that there is no likelihood of consumer confusion.

V. CONCLUSION

Appellant respectfully submits that the Proposed Mark does not so resemble the Cited Mark such that there is a likelihood of confusion. As such, it is respectfully submitted that the Examining Attorney's refusal to register the Proposed Mark is inappropriate and cannot be sustained. Appellant hereby appeals to the Trademark Trial and Appeal Board from the final decision dated June 18, 2015, refusing registration of the Proposed Mark. Therefore, Appellant respectfully requests that the mark be passed to publication.

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The Assistant Commissioner for Trademarks is hereby authorized to charge payment of any additional fees required or credit any overpayment of the same to Deposit Account No. 19-4330.

Respectfully submitted,

Date: 2/4/16

By: _____

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