

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86360663

MARK: QUICK DRAW

86360663

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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Spy Optic Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO :

SPYNO-481T

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EXAMINING ATTORNEY'S APPEAL BRIEF

The Applicant, Spy Optic Inc., has appealed the Examining Attorney's refusal to register the mark QUICK DRAW under §2(d) of the Trademark Act of 1946 (as amended) (hereinafter "the Trademark Act"), 15 U.S.C. §1052(d).

FACTS

On August 7, 2014 Applicant filed an intent to use based application for the mark QUICK DRAW for goods defined as "sports goggle lens changing system" in International Class 9. [\[1\]](#) In an Office Action dated November 28, 2014 the Examining Attorney refused registration based on a likelihood of confusion, Section 2(d) of the Trademark Act, with U.S. Registration No. 1751053 for the mark QUICKDRAW for "retainer for headband strap for protective goggles" in International Class 9 and required amendment of the description of goods.

On May 26, 2015 Applicant responded to the Office Action arguing against the Section 2(d) refusal and amended the description of goods to read "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 an Office Action dated June 18, 2015 the Examining Attorney made Final the refusal to register under Section 2(d). On December 16, 2015 Applicant timely filed its appeal.

ISSUE ON APPEAL

Whether Applicant's use of the 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" creates a likelihood of confusion with U.S. Registration No. 1751053 for the mark QUICKDRAW for "retainer for headband strap for protective goggles."

LIKELIHOOD OF CONFUSION ANALYSIS

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the Applicant and Registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I.*

du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. See *In re Viterro Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the Registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the Registrant. TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

1. THE MARKS ARE NEARLY IDENTICAL

The marks are nearly identical as they differ only in a space between the words QUICK and DRAW in the applied for mark. The marks are:

QUICKDRAW
QUICK DRAW

As the marks differ only in a space between the words QUICK and DRAW in the applied for mark, the marks are nearly identical in appearance and identical in sound, meaning, and commercial impression. Thus, the marks are nearly identical overall.

2. THE GOODS ARE HIGHLY RELATED

The goods of the parties are highly related as each party provides accessories for use with protective goggles. Applicant provides “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 provides “retainer for headband strap for protective goggles.” The “protective goggles” described in the cited registration include all such protective goggles including those used in sports. Unrestricted and broad identifications are presumed to encompass all goods of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

The third party web pages attached to the Final Action make clear that sports goggles are commonly referred to as “protective goggles” or “protective eyewear.” Thus, each party provides accessories for use with protective goggles and the goods are highly related. A review of the web pages shows the following:

- www.allaboutvision.com article titled “Protective Sports Eyewear” uses the wording “protective eyewear” throughout to refer to refer to “sports goggles” and other sports protective eyewear. See TICRS attachments 2-7 to Final Office Action.
- www.libertysport.com shows a variety of sports eyewear for sale including goggles and refers to such goods as “protective eyewear.” See TICRS attachment 8 to Final Office Action.
- www.momsteam.com shows an article and video discussing protective eyewear in sports. The article titled “*Protective Goggles Prevent*

Most Eye Injuries in Sports” discusses “Buying protective goggles” for sports use. The video titled “Protective Eyewear Prevents Eye Injuries in Sports” includes the caption “Wearing *protective goggles* in sports is important, says optometrist Noah Shriber...”Emphasis added. See TICRS Attachments 12-19 to Final Office Action.

- www.shopzerouv.com shows the online sale of protective goggles for “action sports” described as “ACTION SPORTS PROTECTIVE GOGGLES WITH ADJUSTABLE STRAP.” See TICRS Attachments 20-21 to Final Office Action.
- www.sikids.com shows an article titled “Spurs Star Tony Parker on Protective Eyewear and His Hot Start to the Season” and discusses protective eyewear in sports. The NBA player is interviewed and refers to a fellow NBA player where he states “He continues to wear *protective goggles*.” Emphasis added. See TICRS Attachments 22-26 to Final Office Action.
- www.mandelsonvision.com shows an article titled “LASIK and Sports” and discusses the need to wear “protective goggles” in sports activities after LASIK surgery. The article uses the wording “protective goggles” multiple times to refer to protective eyewear worn during sporting activities. See TICRS Attachments 27-32 to Final Office Action.
- www.sports.yahoo.com shows an article discussing NBA star Tony Parker’s eye injury and protective eyewear. The article states “he had to wear *protective goggles* on the court to prevent further injury to his eye.” Emphasis added. See TICRS Attachments 33-35 to Final Office Action.
- www.seeingblacksports.com shows an article titled “Preventing Eye Injuries in Sports” and recommends the wearing of “protective goggles” throughout to prevent eye injury while playing a variety of sports. See TICRS Attachments 36-39 to Final Office Action.
- www.kyforward.com features an article titled “Eye Health: A summer of sports can be fun, but dangerous without protective eyewear” and includes the picture caption “...swimming can also be dangerous for the eyes without proper *protective goggles*.” Emphasis added. See TICRS Attachments 40-42 to Final Office Action.
- www.vsp.com shows an article from a vision care company titled “Guide to Prescription Sports Eyewear” and refers to such eyewear as “protective eyewear” and “protective goggles.” See TICRS Attachments 43-45 to Final Office Action.
- www.eyes4kids.com is the website of a pediatric ophthalmologist and features an article discussing eyewear for use in sports. Such eyewear is referred to in the article as “protective eyewear” and “protective glasses and goggles.” See TICRS Attachments 46-47 to Final Office Action.
- www.amazon.com shows a sale listing for “AGPtek® *Protective Goggles* Sports Glasses: Basketball Football Ice Hockey Rugby Baseball.” Emphasis added. See TICRS Attachments 48-53 to Final Office Action.
- www.cbssports.com shows an article discussing an NBA player’s use of goggles and states “...he will “most likely” wear *protective goggles* for his own safety throughout the season.” Emphasis added. See TICRS Attachments 55-56 to Final Office Action.

The evidence highlighted above makes clear that the words “protective goggles” and “protective eyewear” are commonly used to identify sports goggles such as identified in the application. Thus, the scope of Registrant’s description of goods includes “retainer for headband strap(s)” for use with sports goggles as sports goggles are types of “protective goggles.” Therefore, each party provides accessories for use with sports goggles. Thus, based on the identifications themselves, the goods of the parties are highly related. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding likelihood of confusion “as a matter of law” based on a comparison of the parties’ identifications, although they involved different goods and services within the fields of technology); *In re Iolo Technologies LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010) (“Here, based on the identifications themselves, we find that Applicant offers a product that is complementary in function and purpose to the software installation, maintenance and updating services offered by Registrant.”).

Further, as the goods of the parties are both accessories for sports goggles, as “protective goggles” include sports goggles, the goods are complimentary. Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. See *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods

have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease); *Polo Fashions, Inc. v. La Loren, Inc.*, 224 USPQ 509, 511 (TTAB 1984) (holding bath sponges and personal products, such as bath oil, soap, and body lotion, to be related because they are complementary goods that are likely to be purchased and used together by the same purchasers). Here, the goods of the parties will be used together with protective sports goggles. Thus, the goods are complimentary in use.

Additionally, attached to the Final Office Action are third party registrations which show that it is common for producers of class 9 goggles and protective eyewear (which include goggles), to also produce a great variety of goggle and eyewear accessories, including lenses and straps and headbands, under a single mark. This evidence supports the conclusion that consumers encountering the goggle accessory products of the parties would understand them to originate from the same source. See *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii). 26 third party registrations owned by 21 different parties were attached to the Final Office Action. A sample of the registrations includes the following:

- Registration 2656820 SILVERFISH owned by Silverfish, LLC, for goods including "...goggles, and their parts and accessories, namely, lenses, frames, earstems, nose pieces, straps, and cases." See TICRS attachment to Final Office Action page 57.
- Registration 3588946 SMITH OPTICS owned by Smith Sport Optics, Inc., for goods including "sports goggles...and replacement lenses therefore" as well as "frames and straps for sunglasses and sports goggles" and "goggle film advancement systems comprising clear plastic film for use with goggles to provide clear vision." See TICRS attachment to Final Office Action pages 71-73.
- Registration 3076631 (design mark featuring dragon design) owned by Dragon Alliance, LLC, for goods including "Goggles and replacement parts for goggles, namely, lenses, frames, replacement foam for sports goggles, head straps and cases, used for snow skiing, snowboarding, motocross racing, bicycling, BMX bicycling, wakeboarding, water skiing and surfing." See TICRS attachment to Final Office Action pages 77-78.
- Registration 3750792 WILEY X owned by Wiley X, Inc., for goods including "Protective eyewear, namely, ...goggles, all for multi-purpose use including sports, boating, fishing, hunting, motorcycle, military, law enforcement, firefighting and leisure activities; replacement parts and accessories for the aforesaid protective eyewear, namely, lenses, frames, frame gaskets, head straps, retainers, earstems, earstem tips and nose pieces; cases for the aforesaid protective eyewear, parts and accessories." See TICRS attachment to Final Office Action pages 82-84.
- Registration 4135554 (Design mark) owned by Liquid Icon, Inc., for goods including "...sports goggles;" and "...sports goggle replacement lenses and parts and accessories therefor, namely, frames, earstems and nose pieces, eyeglass, sunglass and sport goggle cases, chains, straps and chords." See TICRS attachment to Final Office Action pages 97-99.
- Registration 4616626 BE HEADWEAR (stylized) owned by Brent Davidson, for goods including "frames, lenses and protective cases for eyewear, eyeglasses, sunglasses and goggles; snow goggles; sport goggles for use in snowboarding;" as well as "eyewear accessories, namely, straps, neck cords, chains and head straps." See TICRS attachment to Final Office Action pages 122-124.

The third party registrations highlighted above make clear that it is common for providers of protective eyewear including sports goggles to also provide a variety of accessories such as lenses and cases as well as straps and headbands under a single mark. Applicant's goods are used with goggle lenses and Registrant's goods are used with goggle straps and headbands. The evidence strongly suggests that consumers would believe the goods of the parties to emanate from the same source.

Finally, as the marks of the respective parties are virtually identical, the relationship between the relevant goods need not be as close to support a finding of likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re House Beer, LLC*, 114 USPQ2d 1073, 1077 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); TMEP §1207.01(a).

As Registrant's description of goods is not limited, its accessories for use with "protective goggles" include use with all such "protective goggles" including "sports goggles." Indeed, the evidence of record proves that sports goggles are commonly referred to as

“protective goggles.” Thus, the goods of the parties are related based on the identifications themselves and based on their complimentary use as they may be used together with sports goggles. Moreover, the attached third party registrations show that it is common for providers of protective eyewear including sports goggles to also provide a variety of accessories such as lenses and cases as well as straps and headbands under a single mark. The evidence strongly suggests that consumers would believe the goods of the parties to emanate from the same source. Thus, the goods are related and refusal to register should be affirmed.

3. APPLICANT’S EVIDENCE AND ARGUMENTS ARE UNPERSUASIVE

Applicant argues that the Registrant’s channels of trade and goods are limited to industrial type safety goggles. However, the Registrant’s description of goods contains no limits. Thus, Applicant’s argument is unpersuasive. With respect to Applicant’s and Registrant’s goods, the question of likelihood of confusion is determined based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). In this case, the identification set forth in the registration has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods “travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Further, the registration uses broad wording to describe the use of the goods and this wording is presumed to encompass all goods of the type described, including protective goggles for use in sports. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)). Therefore, applicant’s argument limiting Registrant’s goods is unpersuasive.

Applicant argues that the goods are different in kind and have different functions. However, the goods are related as they may be used together as accessories for sports protective goggles. Further the fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01.

Finally, Applicant argues that certain third party registrations exist which make the registered mark weak. As stated in the Final Office Action, the Examining Attorney objects to Applicant’s list as improper evidence pursuant to TMEP §710.03, *Evidence of Third-Party Registrations*.

CONCLUSION

The marks at issue are virtually identical. The goods at issue are related as each party provides accessories for use with protective goggles including protective goggles used in sports. Thus, there is a likelihood of confusion and refusal to register should be affirmed.

Respectfully submitted,

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[\[1\]](#) The application was unsigned. On September 4, 2014 Applicant filed a voluntary amendment which included a signed declaration in support of the application.