

<p>This Opinion is Not a Precedent of the TTAB</p>
--

Mailed: May 10, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

*In re Skydio, Inc.*

---

Serial No. 88928113

---

Rhett V. Barney of Lee & Hayes PC for Skydio, Inc.

Megan Mischler, Trademark Examining Attorney, Law Office 127,  
Mark Pilaro, Managing Attorney.

---

Before Cataldo, Shaw and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Skydio, Inc., seeks registration on the Principal Register of the proposed mark DIGITAL VISUAL OBSERVER (in standard characters), identifying the following goods and services:

Cameras; digital cameras; digital video cameras; mounting devices for cameras; cameras for aerial photography and video; remotely-controlled video camera containing a camera, transmitter, and receiver for recording and transmitting audio visual data on drones; downloadable computer application software for mobile phones, tablets, handheld computers, for use in managing, controlling, and tracking drones and remotely-controlled video cameras; downloadable computer software for managing, controlling, and tracking drones and remotely-controlled video cameras for drones; Downloadable autopilot software for flying Unmanned Aerial Vehicles (UAV) or Drones; Navigation

apparatus and system for Unmanned Aerial Vehicles (UAV) or Drones comprising of circuit boards, integrated circuits, electronic circuits, electric sensors, proximity sensors, GPS antenna, data processors, digital signal processors, and embedded downloadable computer software for altitude solution and flight controls; Downloadable mission computer software for the command, control and operation of Unmanned Aerial Vehicles or Drones and for the autonomous waypoint navigation, take-off, landing, loiter, and other related algorithms for controlling Unmanned Aerial Vehicles or Drones; Downloadable computer software for the autonomous control and monitoring of Unmanned Aerial Vehicles (UAV) or Drones location, speed, altitude, and position; Downloadable computer software for sending commands and information to and from Unmanned Aerial Vehicles (UAV) or Drones; Downloadable computer software for displaying information, video, and images sent from the Unmanned Aerial Vehicles (UAV) or Drones; Downloadable computer software for use in aerial photography and video, mapping, three-dimensional mapping, and aerial photography and video for use in construction projects and infrastructure maintenance and inspection; Computer hardware for use in drones and unmanned aerial vehicles (UAVs) for the purpose of collision avoidance and object detection; Downloadable computer software systems for use in drones and unmanned aerial vehicles (UAVs) that includes artificial intelligence capabilities for intelligent observation, detection, and collision avoidance in International Class 9;

Drones; drones in the nature of unmanned aerial vehicles for use in aerial photography and video, mapping, and three-dimensional mapping; drones in the nature of unmanned aerial vehicles for use in aerial photography and video for use in construction projects and infrastructure maintenance inspection; camera mounts for drones; unmanned aerial vehicles for surveillance, reconnaissance, mapping, three-dimensional mapping, aerial photography, video and sound recordings, namely, drones in International Class 12; and

Application service provider featuring application programming interface (API) software for use in managing, controlling, and tracking drones and remotely-controlled video cameras; providing a website for uploading, storing, and sharing data and flight information from drones and remotely-controlled video cameras; application service provider featuring application programming interface (API) software for use in aerial photography and video, mapping, three-dimensional mapping, and aerial photography and video for use in construction projects and infrastructure maintenance and inspection; Providing temporary use of online non-downloadable computer software for use in connection with

controlling drones and unmanned aerial vehicles (UAVs) that include artificial intelligence capabilities for intelligent observation, detection, and collision avoidance in International Class 42.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the goods and services identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs. We affirm the refusal to register.

## **I. Issue on Appeal**

The issue on appeal is whether the proposed DIGITAL VISUAL OBSERVER mark merely describes a function, feature or characteristic of the identified goods and services under Section 2(e)(1) of the Trademark Act.<sup>2</sup>

## **II. Analysis of Refusal**

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods [or services] of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1).

---

<sup>1</sup> Application Serial No. 88928113 was filed on May 21, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's assertion of a bona fide intent to use the mark in commerce.

<sup>2</sup> The questions of whether Applicant's proposed mark has acquired distinctiveness under Section 2(f), or is generic, are not before us.

“A mark is ‘merely descriptive’ within the meaning of Section 2(e)(1) ‘if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.’” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at \*3 (TTAB 2020) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). To be merely descriptive, a mark must forthwith convey such information with a “degree of particularity.” *Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2008) (citing *In re TMS Corp. of the Ams.*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s, Inc.*, 15 USPQ 2d 1750, 1751 (TTAB 1990), *aff’d*, 90-1495 (Fed. Cir. Feb. 13, 1991)). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Omniome*, 2020 USPQ2d 3222, at \*3 (quoting *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

The descriptiveness of a mark must be determined in the context of the goods or services identified in the application. *See Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787-88 (Fed. Cir. 1990); *In re Vehicle Identification Network, Inc.*, 32 USPQ2d 1542 (TTAB 1994). Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use,’” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831

(Fed. Cir. 2007)), and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark consists of the terms DIGITAL VISUAL OBSERVER. We “must consider the *commercial impression* of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

If the terms in the proposed mark are individually descriptive of the identified goods or services, we must then determine whether their combination “conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each term instead “retains its merely descriptive significance in relation to the goods [or services], the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods.’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). “The Board resolves

doubts as to the mere descriptiveness of a mark in favor of the applicant.” *Id.* (citing *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994)).

### III. Evidence

In support of the refusal of registration, the Examining Attorney introduced into the record dictionary definitions reflecting the common usage of terms comprising the mark. The evidence shows that the term OBSERVER is defined as:<sup>3</sup>

A representative sent to observe but not participate officially in an activity (such as a meeting or war).

VISUAL is defined as:<sup>4</sup>

Of, relating to, or used in vision.

ELECTRONIC, in the context of digital devices and technology, is defined as:<sup>5</sup>

Characterized by electronic and especially computerized technology.

We further take judicial notice of the following definition of DIGITAL:

Available in electronic form; readable and manipulable by computer.<sup>6</sup>

The Examining Attorney further introduced the following screenshots from three websites, reproduced below in their entirety:<sup>7</sup>

---

<sup>3</sup> August 25, 2020 first Office Action at 9, merriam-webster.com, accessed on August 25, 2020.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> Dictionary.com, accessed on May 2, 2022. Definition retrieved from RANDOM HOUSE UNABRIDGED DICTIONARY (2021).

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format, definitions in technical dictionaries, translation dictionaries and online dictionaries, and we elect to do so here. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

<sup>7</sup> August 25, 2020 first Office Action at 6-8.

The first is an article from 3DInsider.com discussing the purpose of a visual observer of drone flights. The Examining Attorney does not explain, either in her Office actions or brief, whether this website is commercial, informational or regulatory in nature. Thus, we have little context in which to place the information contained therein.

2:06:03 PM 8/25/2020

### **Why would you need a visual observer?**

Ideally, a drone pilot should always pay attention to the drone and its immediate surroundings. Realistically, this is very hard to pull off. The mere act of the pilot having to switch between looking at the drone, the controller, and the camera feed means that there will be moments when they are not looking at the drone.

This is where having a visual observer will come in handy. A visual observer is dedicated to maintaining visual contact with the drone and its surroundings. This leaves the remote pilot free to focus on flying, or on taking photos or videos.

### **What does Part 107 say about having a visual observer?**

Apart from generally being a good idea, having a visual observer is recommended by Part 107 under specific circumstances. According to Section 107.31, the remote pilot in command or a visual observer is required to maintain visual line-of-sight contact with the drone at all times. If a drone pilot is unable to maintain visual line-of-sight with the drone, such as when the pilot is doing FPV flight, then a third-party visual observer will essentially be needed.

The basic duties of a visual observer are outlined in Section 107.33. The regulations require the visual observer and the remote pilot in command to maintain effective communication at all times. It is their joint responsibility to ensure that the visual observer is able to see the drone's altitude, direction, and any airspace hazards which may cause an accident. This means that the responsibility of the visual observer extends beyond monitoring the drone itself, but also scanning the surroundings to identify any potential collision hazards.

<https://3dinsider.com/drone-visual-observer/>

The second screenshot, from DronePilotGroundSchool.com, offers a definition of visual observer.

2:03:05 PM 8/25/2020

## What is a Visual Observer (VO)?

A Visual Observer (VO) is an optional crew member for a flight mission who serves as a second set of eyes, monitoring the drone in flight in order to support the Remote Pilot in Command (PIC).

Although a VO is not required by the FAA for regular drone missions—missions where the PIC is maintaining a direct visual line of sight with his or her sUAS—having one is certainly useful, and can help lessen the stress of a flight.

<https://www.dronepilotgroundschool.com/visual-observer/>

The third screenshot is a page from an article on the subject of certification of visual observers of unmanned aircraft systems in the context of aviation safety, published by the New Mexico State University Department of Psychology. The article discusses a study of visual observer skills; however, it is unclear to what extent this article is available to the general public or whether the study has any influence in aviation safety regulation or the aviation industry.

Open Access Article

# Establishing Training and Certification Criteria for Visual Observers of Unmanned Aircraft Systems

by  Igor Dolgov  

Department of Psychology, New Mexico State University, Las Cruces, NM 88003, USA

*Safety* **2018**, *4*(2), 15; <https://doi.org/10.3390/safety4020015>

Received: 1 December 2017 / Revised: 11 March 2018 / Accepted: 4 April 2018 / Published: 6 April 2018

(This article belongs to the Special Issue **Aviation Safety**)

[View Full-Text](#)

[Download PDF](#)

[Browse Figure](#)

[Cite This Paper](#)

## Abstract

Safe integration of Unmanned Aircraft Systems (UAS) into airspace generally occupied by manned aircraft and other aviation stakeholders is a pressing global challenge. In the United States, efforts are being made to integrate small and large UAS into the National Airspace System (NAS). Whereas regulations for the civil operation of small UAS (25 kg and lighter) have already been adopted, those for larger unmanned systems are still being crafted. Thus, a two-part mixed methods study was conducted to examine three pivotal issues in the safe operation of large UAS: (1) What kind of visual observer skills are needed to execute safe UAS operations; (2) Should visual observers involved in UAS operations receive formal training; and (3) Should visual observers be required to pass a certification exam? In the first phase, subject matter experts identified various vigilance, trajectory estimation and communication skills that were vital to performing visual observer duties successfully and elaborated on their training regimens. In the second phase, survey participants were approximately evenly split on the need for formal classroom/online and hands-on visual observer training. Furthermore, participants generally favored visual observers having to pass a classroom/online certification exam, whereas they were against a practical (hands-on) exam. [View Full-Text](#)

**Keywords:** [aviation](#); [safety](#); [UAS](#); [unmanned aircraft system](#); [Drone](#); [visual observer](#); [training](#); [certification](#); [integration](#); [National Airspace System](#)

▼ [Show Figures](#)

<https://www.mdpi.com/2313-576X/4/2/15>

Applicant, in support of its arguments in favor of registration, submitted additional screenshots of websites discussing visual observers in the context of drone operation.<sup>8</sup> The following examples are illustrative:

---

<sup>8</sup> February 24, 2021 Response to Office Action at 14-37; September 2, 2021 Request for Reconsideration at 10-68.

The first is a law review article discussing Federal Aviation Administration (FAA) regulations as they apply to visual observers of drone operation.

## Section 107.33 Visual observer.

By Jonathan Rupprecht | July 20, 2019

0 Comment

### Table of Contents of Article [\[hide\]](#)

- [0.1 Previous Regulation—Back to Drone Regulations Directory—Next Regulation](#)
- [1 Section 107.33 Visual observer.](#)
- [2 Advisory Circular 107-2 on Section 107.33 Visual observer.](#)
- [3 FAA's Discussion on Section 107.33 Visual observer from the Final Small Unmanned Aircraft Rule](#)
- [3.1 Previous Regulation—Back to Drone Regulations Directory—Next Regulation](#)

### [Previous Regulation](#)—[Back to Drone Regulations Directory](#)—[Next Regulation](#)

When most people think of 107.33's requirement for visual observers in certain circumstances, they don't think of 107.31. Here's what happens, when you fly beyond line of sight, the remote pilot won't be able to determine if the visual observer can see the aircraft and the visual observer can't use their eyes to maintain awareness of the aircraft. This is why many of the 107.31 waivers being given out also have 107.33 provisions as well.

### Section 107.33 Visual observer.

If a visual observer is used during the aircraft operation, all of the following requirements must be met:

- (a) The remote pilot in command, the person manipulating the flight controls of the small unmanned aircraft system, and the visual observer must maintain effective communication with

2/24/2021

- Rupprecht Law P.A.

each other at all times.

- (b) The remote pilot in command must ensure that the visual observer is able to see the unmanned aircraft in the manner specified in §107.31.

- (c) The remote pilot in command, the person manipulating the flight controls of the small unmanned aircraft system, and the visual observer must coordinate to do the following:

- (1) Scan the airspace where the small unmanned aircraft is operating for any potential collision hazard; and

- (2) Maintain awareness of the position of the small unmanned aircraft through direct visual observation.

The second submission is a series of screenshots from the FAA website summarizing regulations of drones and other unmanned aircraft.

2/24/2021

Fact Sheet – Small Unmanned Aircraft Systems (UAS) Regulations (Part 107)



**Federal Aviation  
Administration**

## **Fact Sheet – Small Unmanned Aircraft Systems (UAS) Regulations (Part 107)**

### **For Immediate Release**

October 6, 2020

Contact: [pressoffice@faa.gov](mailto:pressoffice@faa.gov)

---

The Federal Aviation Administration (FAA) rules for small unmanned aircraft systems (UAS), or "drone," operations cover a broad spectrum of commercial and government uses for drones weighing less than 55 pounds. Highlights of the rule, 14 CFR Part 107, follow.

#### **Operating Requirements**

Just as there are rules of the road when driving a car, there are rules of the sky when operating a drone.

- Always avoid manned aircraft.
- Never operate in a careless or reckless manner.
- Keep your drone within sight. If you use First Person View or similar technology, you must have a visual observer always keep your drone within unaided sight (for example, no binoculars).
- You cannot be a pilot or visual observer for more than one drone operation at a time.
- Do not fly a drone over people unless they are directly participating in the operation.
- Do not operate your drone from a moving vehicle or aircraft *unless* you are flying your drone over a sparsely populated area *and* it does not involve the transportation of property for compensation or hire.

You can fly during daylight (30 minutes before official sunrise to 30 minutes after official sunset, local time) or in twilight if your drone has anti-collision lighting. Minimum weather visibility is three miles from your control station. The maximum allowable altitude is 400 feet above the ground, higher if your drone remains within 400 feet of a structure. Maximum speed is 100 mph (87 knots).

[https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=22615](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615)

The third is a set of safety guidelines promulgated by the FPV Freedom Coalition for recreational operation of first-person view (FPV) aircraft.

### **Glossary of Terms Used in Safety Guidelines**

**Class G Airspace:**

Defined as the area not classified as any other class of airspace. Generally starts at ground level and extends to 700 feet above ground level. In some areas, this can extend to 1200 feet.

**FAA - Federal Aviation Administration:**

Government agency primarily responsible for the advancement, safety and regulation of civil aviation.

**Failsafe:**

A system or plan to minimize or prevent damage and safely terminate a flight in the event of signal loss.

**VO - Visual Observer (Spotter):**

Person who assists the sUAS operator avoid conflicts with manned aircraft and other changes adversely affecting the aircraft's operating area such as non-participating personnel entering the area, changing flight conditions, etc.

**VLOS - Visual Line Of Sight:**

The ability of the operator, or a visual observer co-located and in direct contact with the pilot/operator, to see and maintain visual line of sight of the sUAS unaided by any technology other than glasses or contact lenses.

Fourth is an article from a producer of drones and drone components discussing various requirement for maintaining line of sight in an unmanned aircraft.

### **What is a Visual Observer?**

If a drone pilot is unable to maintain visual line-of-sight with the drone during an operation, for example while using First Person View, a Visual Observer (VO) is required.

The VO and remote pilot in command must maintain communication at all times to ensure that the VO is able to see the drone's position and scan its surroundings to identify any potential airspace collision hazards. Note that "daisy chaining," or multiple, successive visual observers to extend the flight distance of the UAS, is not normally approved.

The basic duties of a visual observer are outlined in Part 107 Section 107.33.

### **Text of Part 107.33:**

§ 107.33 Visual observer.

If a visual observer is used during the aircraft operation, all of the following requirements must be met:

- (a) The remote pilot in command, the person manipulating the flight controls of the small unmanned aircraft system, and the visual observer must maintain effective communication with each other at all times.
- (b) The remote pilot in command must ensure that the visual observer is able to see the unmanned aircraft in the manner specified in § 107.31.
- (c) The remote pilot in command, the person manipulating the flight controls of the small unmanned aircraft system, and the visual observer must coordinate to do the

Iris Automation | What is Visual Line of Sight (VLOS)? The Rules To Know

following:

- (1) Scan the airspace where the small unmanned aircraft is operating for any potential collision hazard; and
- (2) Maintain awareness of the position of the small unmanned aircraft through direct visual observation.

Next is an article from the National Aeronautics and Space Administration (NASA) regarding the voluntary submission of forms identifying hazardous flight

Serial No. 88928113

conditions, accidents, near accidents and unsafe operation of aircraft and drones. The form provided with the article includes the title “visual observer” for a member of a drone crew.

**UAS FORM**  
**For immediate action of UNSAFE or UNAUTHORIZED drone operations contact local authorities.**

DO NOT REPORT UAS ACCIDENTS AND CRIMINAL ACTIVITIES ON THIS FORM.  
ACCIDENTS AND CRIMINAL ACTIVITIES ARE NOT INCLUDED IN THE ASRS PROGRAM AND SHOULD NOT BE SUBMITTED TO NASA.  
ALL IDENTITIES CONTAINED IN THIS REPORT WILL BE REMOVED TO ASSURE COMPLETE REPORTER ANONYMITY.

IDENTIFICATION STRIP: Please fill in all blanks to ensure return of strip.  
NO RECORD WILL BE KEPT OF YOUR IDENTITY. This section will be returned to you.

TELEPHONE NUMBERS where we may reach you for further details of this occurrence.

HOME

HOURS

OTHER

HOURS

NAME


ADDRESS/PO BOX

ADDRESS LINE 2

CITY

STATE

ZIP



TYPE OF EVENT / SITUATION (select all that apply)

Airspace Incursion / Excursion

Collision (aircraft, person, object)

Deviation (altitude, procedure)

Equipment Issue

(Use Command/Ctrl to multi-select)

Other:

DATE OF OCCURRENCE (MM/DD/YYYY)

MM/DD/YYYY

LOCAL TIME (24 HR. CLOCK) [HH:MM]

HH:MM

PLEASE FILL IN APPROPRIATE SPACES AND CHECK ALL ITEMS WHICH APPLY TO THIS EVENT OR SITUATION.

**REPORTER**

**How were you involved in the UAS operation?**

---

**If part of a Multi-Person crew tell us:**

☐ Single Person Crew

☐ Multi-Person Crew

☐ Not Involved (e.g. eyewitness)

Crew Size:  (total including reporter)

Role at time of event: (select all that apply)

☐ Person Manipulating Controls (ground control station / remote control transmitter)

☐ Remote Pilot in Command (RPIC)

☐ Visual Observer

☐ Other Crew Member:

Last is a blog article from Pilot Institute discussing visual line of sight (VLOS) for drones.

## **When is a visual observer necessary?**

According to the text of Section 44809, VLOS requires that “the aircraft is flown within the visual line of sight of the person operating the aircraft or a visual observer co-located and in direct communication with the operator”. This introduces the idea of having a visual observer maintain VLOS instead of the drone pilot.

The FAA states one specific situation in which a visual observer is necessary – when the drone is being operated in FPV. Flying in FPV does not satisfy VLOS requirements as it does not achieve the same level of situational awareness as having eyes on the drone. In such a situation, it is the duty of the visual observer to maintain VLOS and warn the drone pilot of any potential hazards.

## **Is it possible for the visual observer to be located far from the drone pilot?**

This has been a common question of drone pilots through the years and continues to be a point of contention until today. The short answer is no, you cannot have a visual observer located even just 100 feet away in an attempt to extend the range of VLOS. You also cannot have a chain of visual observers to achieve the same purpose.

The rule for such a scenario is established by the requirement for the visual observer to be “co-located” with the drone pilot. Further guidance is provided by Advisory Circular 91.57B which states that the visual observer needs to be “co-located with the recreational flyer and able to communicate directly with the recreational flyer without the use of technological assistance.

We find this evidence to be probative of the issue under consideration in this case. The Federal Circuit has approved the use of internet evidence in ex parte proceedings. *See, e.g., Bayer*, 82 USPQ2d at 1833 (“Internet evidence is generally admissible and may be considered for purposes of evaluating a trademark”) (citations omitted); *see also Pacer.*, 67 USPQ2d at 1632 (Federal Circuit is “mindful of the reality that the PTO is an agency of limited resources”); *In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 868 (Fed. Cir. 1985) (the examining attorney “does not have means” to undertake the research, such as a marketing survey, necessary to prove that the public would actually make the goods/place association asserted).

#### **IV. Discussion**

The Examining Attorney argues that the mark DIGITAL VISUAL OBSERVER merely describes features of Applicant’s goods and services that perform the functions of a person who is a member of a drone crew tasked with visually monitoring a drone in flight.

The dictionary definitions and third-party webpages demonstrate that a VISUAL OBSERVER describes a member of a drone crew tasked with maintaining visual line of sight with the drone during operation. The VISUAL OBSERVER serves as a second set of eyes, monitoring the drone in flight during operation by the remote pilot in command (PIC). In its brief, Applicant explains that “Visual observers must maintain awareness of the position of the small unmanned aircraft through direct visual observation in order to determine the aircraft’s location and locate air traffic

hazards.”<sup>9</sup> Thus, the proposed mark DIGITAL VISUAL OBSERVER describes an electronic, computer readable and controllable, or DIGITAL, version of an individual tasked with determining a drone’s location and air traffic hazards, or VISUAL OBSERVER.

When combined in Applicant’s mark, the terms DIGITAL and VISUAL OBSERVER retain their descriptive significance with respect to Applicant’s goods and services. Applicant’s Class 9 goods include computer software “for managing, controlling, and tracking drones,” and computer hardware and software “for use in drones and unmanned aerial vehicles (UAVs) for the purpose of collision avoidance and object detection.” Applicant’s Class 12 goods include various types of drones. Applicant’s Class 42 services include providing use of software used to control drones, “that include artificial intelligence capabilities for intelligent observation, detection, and collision avoidance.” The evidence of record shows that a VISUAL OBSERVER determines and maintains a line of sight of a drone’s location and related air traffic hazards. Applicant’s computer hardware, software, drones and its services of providing software for observation, detection and collision avoidance perform, inter alia, the functions of a computer readable or DIGITAL version of a human VISUAL OBSERVER. The proposed mark DIGITAL VISUAL OBSERVER merely describes a feature or characteristic of, at least, Applicant’s computer hardware, software, drones and the services of providing use of non-downloadable software, all used for maintaining the position of drones and avoiding collisions and other air traffic

---

<sup>9</sup> 6 TTABVue 10 (Applicant’s brief).

hazards. Registration may be refused if the proposed mark is merely descriptive of any of the goods or services in each International Class identified in the application. *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). DIGITAL VISUAL OBSERVER thus merely describes Applicant's goods and services.

In its brief, Applicant argues: "the goods Applicant sells, or plans to sell, consist of cameras and software which allow the **drone itself** to monitor its own surroundings in order to automatically avoid collisions and detect objects."<sup>10</sup> Applicant contends that because its goods and services "do not electronically visually monitor the drone itself in flight, Examiner failed to meet its burden of proving the Mark is merely descriptive of the goods [or services]. Similarly, Examiner failed to demonstrate, without improperly dissecting the mark, that the wording DIGITAL VISUAL OBSERVER describes any qualities, characteristics, or function of the claimed goods [or services]."<sup>11</sup>

We disagree. Applicant acknowledges that its goods and services allow drones to detect objects and avoid collisions. These are some of the functions performed by a human VISUAL OBSERVER. As discussed above, Applicant's goods and services serve as a DIGITAL VISUAL OBSERVER by performing these functions. We see no improper dissection of Applicant's mark in the Examining Attorney's analysis of the mark as a combination of DIGITAL and VISUAL OBSERVER in coming to this conclusion. We further disagree that Applicant's evidence establishes that its

---

<sup>10</sup> 6 TTABVUE 11 (emphasis supplied by Applicant).

<sup>11</sup> 6 TTABVUE 12.

proposed mark is suggestive. To the contrary, Applicant's evidence buttresses and supports our determination that DIGITAL VISUAL OBSERVER merely describes at least some of the applied-for goods and services in each class.

Applicant argues that DIGITAL VISUAL OBSERVER is incongruous:

The term "digital" is not merely modifying the term "visual observer." Instead, DIGITAL VISUAL OBSERVER requires the relevant consumer, cognizant of regulations and of the concept of human visual observers, to mentally pause and use some imagination in order to grasp what Applicant's goods are. Applicant employs a unitary mark with an incongruous meaning and, as such, the mark is suggestive.<sup>12</sup>

We find no incongruity in the wording DIGITAL VISUAL OBSERVER. As discussed above, DIGITAL VISUAL OBSERVER immediately describes computer hardware and software, either downloadable or available as a service, as well as drones, that feature the ability to monitor a drone in flight to fix its position and avoid collisions and other air traffic hazards. Such a meaning presents no incongruity. *Cf., e.g., In re Tennis in the Round Inc.*, 199 USPQ 496, 498 (TTAB 1978); *In re Shutts*, 217 USPQ 363, 364–65 (TTAB 1983). Consumers of Applicant's goods and services will immediately understand that DIGITAL VISUAL OBSERVER describes a feature thereof, namely, that the goods and services digitally perform some of the functions of a human member of a drone flight crew known as a VISUAL OBSERVER.

We similarly are not persuaded that DIGITAL VISUAL OBSERVER is a double entendre. We find no evidence that consumers will view DIGITAL VISUAL OBSERVER as having several connotations in connection with Applicant's goods and

---

<sup>12</sup> 6 TTABVUE 16.

services. *Cf. In re Colonial Stores Inc.*, 157 USPQ at 382; *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062 (TTAB 2008).

Additionally, even if Applicant is the first or only user of DIGITAL VISUAL OBSERVER in connection with its particular goods and services, such use does not necessarily render the proposed mark incongruous, suggestive or distinctive in connection therewith. *See Fat Boys*, 118 USPQ2d at 1514; *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); TRADEMARK MANUAL OF EXAMINING PROCEDURE §1209.03(c) (July 2021).

Moreover, “[t]he question is not whether someone presented with only the mark could guess what the [goods or] services are. Rather, the question is whether someone who knows what the [goods or] services are will understand the mark to convey information about them.” *Tower Tech Inc.*, 64 USPQ2d at 1316-17. *See also In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Assoc. of Greenville*, 18 USPQ2d 1313 (TTAB 1990); *In re Am. Greetings Corp.*, 226 USPQ 365 (TTAB 1985). In this case, the evidence of record demonstrates that consumers encountering DIGITAL VISUAL OBSERVER will recognize the term as describing Applicant’s goods and services used to avoid collisions and air traffic hazards during drone operation.

To the extent that Applicant has relied upon a variety of cases to bolster its contention that its proposed mark is not merely descriptive, as is often noted by the Board and the Courts, each case must be decided on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *see also In re*

*Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001). Herein, the record clearly establishes that DIGITAL VISUAL OBSERVER merely describes the identified goods and services.

## **V. Conclusion**

Based on the record before us, we find that the Examining Attorney has demonstrated that the proposed mark DIGITAL VISUAL OBSERVER is merely descriptive of Applicant's identified goods and services, and that Applicant has failed to rebut the Examining Attorney's *prima facie* case.

**Decision:** The refusal to register Applicant's mark under Section 2(e)(1) of the Trademark Act is affirmed.