

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 22, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Neptune Eyewear Pty. Ltd.*

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Serial No. 90544913

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Jerald E. Nagae of Christensen O'Connor Johnson Kindness PLLC for Neptune  
Eyewear Pty. Ltd.

Diana Zarick, Trademark Examining Attorney, Law Office 126,  
Andrew Lawrence, Managing Attorney.

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Before Taylor, Larkin, and English,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Neptune Eyewear Pty. Ltd. (“Applicant”) seeks registration on the Principal Register of the standard-character mark AVANTI for goods ultimately identified as “Frames for spectacles and sunglasses, excluding frames for protective eyeglasses” in International Class 9.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90544913 was filed on February 24, 2021 under Sections 1(b) and 44(e) of the Trademark Act, 15 U.S.C. §§ 1051, 1126(e), based on Applicant’s allegation of a bona fide intention to use the mark in commerce and New Zealand Registration No. 1143795. Applicant subsequently asserted Australian Registration No. 2172244 as grounds for

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character mark AVANTÉ, registered on the Principal Register for "protective eyeglasses" in International Class 9,<sup>2</sup> as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

After the Examining Attorney made the refusal final, Applicant requested reconsideration, which was denied, and subsequently appealed. Applicant and the Examining Attorney have filed briefs.<sup>3</sup> We affirm the refusal to register.

#### **I. Record on Appeal and Evidentiary Matter<sup>4</sup>**

The record on appeal includes USPTO electronic records regarding the cited registration;<sup>5</sup> USPTO electronic records regarding third-party registrations of marks

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registration under Section 44(e). A translation statement in the application states that the "English translation of the wording 'AVANTI' in the mark is 'moving forward' or 'ahead.'"

<sup>2</sup> The cited Registration No. 3549210 issued on December 23, 2008 and has been renewed. A translation statement in the registration states that the "English translation of the word 'AVANTÉ' in the mark is forward, ahead, or before."

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's brief appears at 4 TTABVUE, and the Examining Attorney's brief appears at 6 TTABVUE.

<sup>4</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

<sup>5</sup> October 20, 2021 Office Action at TSDR 2. The Examining Attorney originally cited five registrations as bars to registration under Section 2(d), *id.* at TSDR 1, but the final refusal to register pertains only to Registration No. 3549210. We will not summarize evidence pertaining to the other cited marks.

for the involved goods;<sup>6</sup> third-party webpages displaying eyeglasses and eyeglass frames;<sup>7</sup> and dictionary definitions of the words “eyeglass,” “glass,” “goggle,” “protective spectacles,” “spectacle,” and “protect.”<sup>8</sup>

Applicant attached materials to its brief in the form of Exhibits A-E, which consist of four sets of webpages (Exhibits A, C-E) and a dictionary definition of the word “eyeglass” (Exhibit B). 4 TTABVUE 19-33. Applicant argues that Exhibits A and B respond to the Examining Attorney’s argument in the final Office Action refusing registration that Applicant “has not provided evidence showing that Registrant’s goods are limited to protective eyeglasses molded into one piece.” *Id.* at 8. According to Applicant, Exhibit A “demonstrat[es] that Registrant currently offers 14 different styles of protective eyeglasses under Registrant’s Mark, all of which mold together the frame and lens such that the two components are inseparable,” *id.* at 8, while the definition of “eyeglass” in Exhibit B shows that the “protective eyeglasses” identified in the cited registration “encompass both the lens and the frame . . .” *Id.*

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<sup>6</sup> May 25, 2022 Final Office Action at TSDR 2-17. We commend the Examining Attorney for highlighting the pertinent goods in the identifications of goods in these registrations. This practice facilitates the Board’s review of registrations, particularly those with large identifications.

<sup>7</sup> *Id.* at TSDR 23-71; November 19, 2022 Denial of Request for Reconsideration at TSDR 2-8.

<sup>8</sup> May 25, 2022 Final Office Action at TSDR 18-22; November 19, 2022 Denial of Request for Reconsideration at TSDR 9. The Examining Attorney also requests that we take judicial notice of a definition of the Spanish word “avante” from the COLLINS DICTIONARY and a definition of the word “safety” from THE AMERICAN HERITAGE DICTIONARY that she attached to her brief. 6 TTABVUE 4, 8, 15-16. We grant her request, *see In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016), and have considered the definitions for whatever probative value they may have.

Applicant cites Exhibits C-E as support for Applicant's arguments that "Registrant's protective eyeglasses are a highly regulated product that must meet strict safety standards, while Applicant's frames do not," *id.*, that the registrant's "protective eyeglasses must comply with standards established by the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA)," *id.* at 8-9, and that Applicant's frames "are not OSHA-compliant and are not compatible with side shields, which establishes another key difference between Applicant's goods and Registrant's goods." *Id.* at 9.

The Examining Attorney argues that Exhibits A-E are new evidence that was "not previously submitted by [A]pplicant," 6 TTABVUE 3, and objects to this evidence and requests that the Board disregard it. *Id.*

"[T]he record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal." *In re ZeroSix, LLC*, 2023 USPQ2d 705, at \*1 (TTAB 2023) (quoting Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and excluding a list of third-party registrations attached to the applicant's appeal brief). None of the materials attached to Applicant's appeal brief as Exhibits A-E were made of record during prosecution. Applicant expressly states that Exhibits A-B respond to arguments made by the Examining Attorney in the final Office Action, 4 TTABVUE 8-9, and Applicant cites Exhibits C-E in support of arguments made in its Request for Reconsideration, to which this evidence was not attached.<sup>9</sup> Applicant could have presented this new evidence following the final refusal to register by

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<sup>9</sup> October 21, 2022 Request for Reconsideration at TSDR 1-4.

submitting it with Applicant's Request for Reconsideration, or, after the appeal was filed, by requesting remand of the application to the Examining Attorney to submit the evidence, but Applicant did neither.

Because Exhibits A-E to Applicant's brief were not made of record during prosecution, and Applicant does not request that we take judicial notice of the dictionary definition in Exhibit B,<sup>10</sup> we sustain the Examining Attorney's objection to this untimely evidence and have given it no consideration in our decision.

## **II. Analysis of Refusal**

"The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*2 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). *Id.*, at \*4. We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

"In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods or] services."

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<sup>10</sup> A definition of "eyeglass" was made of record by the Examining Attorney during prosecution. May 25, 2022 Final Office Action at TSDR 18.

*Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*14 (TTAB 2023) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

Applicant argues that the relevant *DuPont* factors are the key first two factors as well as “the similarity or dissimilarity of established, likely-to-continue trade channels” and “the conditions under which and sophistication of buyers to whom sales are made.” 4 TTABVUE 7.

#### **A. Similarity or Dissimilarity of the Marks**

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*26 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

“The proper test regarding similarity 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.” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)).

“The proper perspective on which the analysis must focus is on the recollection of the

average customer, who retains a general rather than specific impression of marks.”  
*Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are consumers of frames for non-protective spectacles and sunglasses, and protective eyeglasses, which the record shows include members of the general public.

The involved marks AVANTÉ and AVANTI differ only with respect to their final vowels. Applicant claims that this is dispositive under the first *DuPont* factor because “a different vowel at the end of the respective words may in fact alter the appearance and pronunciation of the word such that the words are distinct in appearance and sound.” 4 TTABVUE 16. According to Applicant,

[t]he last letter “i” in Applicant’s Mark can be pronounced as either a long or short vowel, with pronunciation as either AVANT-EE or AVANT-EYE. Conversely, the last letter “è” [sic] in Registrant’s Mark can be pronounced as either AVANT-AYE or AVANT-EE. Registrant’s Mark and Applicant’s Mark can thus roll off of the tongue in a distinctly different manner based on the different vowel at the end of the marks. It is not possible to foresee how consumers will pronounce the respective marks, therefore other factors in the likelihood of confusion analysis should carry greater dispositive weight.

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

Applicant also argues that the Examining Attorney improperly claims that the marks are similar in meaning because “the English translation of Applicant’s Mark is ‘moving forward’ or ‘ahead’, while the English translation of Registrant’s Mark is

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<sup>11</sup> The registered mark AVANTÉ contains an acute accent, not the grave accent (È) that Applicant discusses.

‘forward’, ‘before’, or ‘ahead.’” *Id.* Applicant contends that “the Examining Attorney improperly applies the doctrine of foreign equivalents because both Applicant’s Mark and Registrant’s Mark are in foreign languages – Italian and Spanish, respectively,” the “average American purchaser is unlikely to be fluent in both Italian and Spanish,” and “the circumstance of the present case do not warrant application of the doctrine of foreign equivalents where the parties’ respective marks are in two foreign languages.” *Id.* at 16-17.

Applicant concludes that “the differences between the marks in terms of appearance, sound, and commercial impression easily outweigh their similarities and accordingly the marks are dissimilar when considered in their entireties.” *Id.* at 17.

The Examining Attorney responds that a “different vowel at the end of the respective word is not a significant visual difference, or difference in sound, despite applicant’s arguments to the contrary.” 6 TTABVUE 5. She also argues that the marks have similar meanings because of their similar translations from their respective foreign languages and that there is no categorical rule that the doctrine of foreign equivalents cannot apply where both marks are from different foreign languages. *Id.* at 6. According to the Examining Attorney,

[w]hether the doctrine of foreign equivalents applies is not the crux of issue in this case, but rather whether the overall impressions of the marks are similar. In this case, similar meanings of the marks is [sic] weighed as an important factor in the likelihood of confusion analysis. Viewing the marks in their entireties, the marks in this case are sufficiently similar in terms of sight, sound, meaning, and overall commercial impression to find a likelihood of confusion.

*Id.*



The Examining Attorney concludes that

Applicant's and registrant's mark share a similar sounding word, word structuring, and word meaning, and evoke a highly similar overall commercial impression which substantially outweighs the differences in a different vowel at the end of the word, an accent or lack thereof, and a different language. As such, considered in their entirety, applicant's mark and registrant's mark are sufficiently similar, such that source confusion in the marketplace is likely.

*Id.* at 7.

It is self-evident that AVANTÉ and AVANTI are very similar in appearance, as they begin with the same first five letters A-V-A-N-T. The difference in the final vowel may be noticed if the marks are viewed together, but they “must be considered . . . in light of the fallibility of human memory” and “not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). A consumer with a general rather than specific recollection of the spelling of the cited AVANTÉ mark in that consumer's mind's eye who separately sees Applicant's AVANTI mark is very unlikely to view that mark as different in appearance from the AVANTÉ mark.

With respect to sound, there is no evidence that AVANTÉ and AVANTI are recognized words in the English language, and “[t]here is no correct pronunciation of a trademark that is not a recognized word.” *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (“there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than

intended by the brand owner.”). As a result, we must consider “all the reasonable possibilities” for the pronunciation of both marks. *Inter IKEA Sys., B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 n.19 (TTAB 2014) (citing *Centraz Indus., Inc. v. Spartan Chem. Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006); *Edison Bros. Stores, Inc. v. Brutting E.B. Sport Int’l GmbH*, 230 USPQ 530, 533 (TTAB 1986)).

As noted above, Applicant identifies two such reasonable possibilities as follows: “The last letter ‘i’ in Applicant’s Mark can be pronounced as either a long or short vowel, with pronunciation as either AVANT-EE or AVANT-EYE,” while “the last letter ‘è’ [sic] in Registrant’s Mark can be pronounced as either AVANT-AYE or AVANT-EE.” 4 TTABVUE 16. Applicant argues that this means that the marks can sound different when spoken, *id.*, but obviously they can also sound identical if each is pronounced as “AVANT-EE” or as “AVANT-EYE/AYE.” In any event, just as marks are not viewed together when comparing them in appearance, they are not pronounced sequentially when comparing them for aural similarity or dissimilarity. A consumer with a general rather than specific recollection of the sound of the cited AVANTÉ mark who separately hears the AVANTI mark pronounced in either of the manners suggested by Applicant is likely to believe that those marks sound very similar, if not identical.

Finally, as to meaning, the word AVANTÉ is a Spanish word translated by the registrant as meaning “forward, ahead or before,”<sup>12</sup> while the word AVANTI is an

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<sup>12</sup> October 20, 2021 Office Action at TSDR 2.

Italian word translated by Applicant as “moving forward” or “ahead.”<sup>13</sup> As discussed above, Applicant and the Examining Attorney dispute whether the doctrine of foreign equivalents applies in this situation.

“Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine similarity of connotation with English word marks.” *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at \*6 (TTAB 2019). “When it applies, the doctrine of foreign equivalents treats differently-spelled words as having the same meaning where the foreign word, when translated into English, means the same as the English word.” *Id.* “In general, the Board does not apply the doctrine of foreign equivalents in cases where both marks are non-English words from two different languages.” *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752, 1756 (TTAB 2009). *See also In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at \*11 (TTAB 2021) (declining to apply the doctrine of foreign equivalents to the issue of the mere descriptiveness of a proposed mark consisting of the foreign words TAVERNA (Greek and Italian for “tavern”) and COSTERA (Spanish for “coastal”) because the record did “not support a finding that consumers would stop and translate the two different-language words comprising the TAVERNA COSTERA mark and instead would perceive the mark as it is . . .”).

We need not decide whether to apply the doctrine of foreign equivalents here, however, because we agree with the Examining Attorney that “[w]hether the doctrine of foreign equivalents applies is not the crux of issue in this case, but rather whether

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<sup>13</sup> April 19, 2022 Response to Office Action at TSDR 1.

the overall impressions of the marks are similar.” 6 TTABVUE 6. Applicant argues that the marks AVANTÉ and AVANTI do not have similar meanings because of similar translations into English from Spanish and Italian, respectively, but does not explain how the marks differ in meaning if consumers simply “perceive the mark[s] as [they are].” *Taverna Izakaya*, 2021 USPQ2d 1134, at \*11. Even assuming that consumers who speak only English will not understand what AVANTÉ and AVANTI mean in their respective foreign languages, such consumers are more likely than not to perceive both marks as being foreign words from Romance languages, because of the presence of an acute accent in the cited AVANTÉ mark and the fact that Applicant’s mark AVANTI ends in the vowel “i,” and as evoking the English word “advance.” *Cf. id.*, at \*11 n.22 (“some foreign words resemble their English language counterparts so closely that even consumers unfamiliar with the foreign language understand the word and its meaning.”). We find that a consumer with a general rather than specific recollection of the cited mark AVANTÉ who separately encounters Applicant’s mark AVANTI is more likely than not to perceive the marks as having a similar connotation and commercial impression even if the exact meanings of the marks are not known.

The marks are very similar in appearance and sound, and more similar than dissimilar in meaning, and the first *DuPont* factor supports a conclusion that confusion is likely.

**B. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Consumers**

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” *In re Embiid*, 2021 USPQ2d 577, at \*22 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)), while “the third *DuPont* factor considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *Id.* (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1052 (quoting *DuPont*, 177 USPQ at 567)).

**1. Similarity or Dissimilarity of the Goods**

The goods “need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (citations omitted). “They need only be ‘related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [they] emanate from the same source.’” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal quotation omitted)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

*Embiid*, 2021 USPQ2d 577, at \*22-23 (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5 (TTAB 2020)).

The goods identified in the cited registration are “protective eyeglasses,” while the goods identified in the application are “frames for spectacles and sunglasses, excluding frames for protective eyeglasses.”<sup>14</sup>

Applicant makes three main arguments in support of its position that its “goods, namely, ‘frames for spectacles and sunglasses, excluding frames for protective eyeglasses’, are dissimilar to Registrant’s goods for ‘protective eyeglasses’ such that the consuming public would not perceive the goods as emanating from the same source.” 4 TTABVUE 8.

First, Applicant argues that its “goods and Registrant’s goods are entirely different products” because “Registrant’s ‘protective eyeglasses’ are unlike regular eyeglasses in that the lenses and frames are molded together into one singular piece.” *Id.*<sup>15</sup> Second, Applicant argues that “Registrant’s protective eyeglasses are a highly regulated product that must meet strict safety standards, while Applicant’s frames do not.” *Id.*<sup>16</sup> Finally, Applicant argues that “the nature and type of ‘protection’ offered by Registrant’s protective eyeglasses is dissimilar to the kind of ‘protection’ offered by Applicant’s frames.” *Id.* at 10.

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<sup>14</sup> “Spectacles” are “a pair of eyeglasses.” May 25, 2022 Final Office Action at TSDR 22 (THE AMERICAN HERITAGE DICTIONARY).

<sup>15</sup> The fact that the involved goods are different does not ipso facto make them dissimilar for purposes of the second *DuPont* factor because the “issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods.” *Embiid*, 2021 USPQ2d 577, at \*28 n.39 (quoting *Ox Paperboard*, 2020 USPQ2d 10878, at \*5).

<sup>16</sup> We summarized above some of Applicant’s specific points supporting these arguments in sustaining the Examining Attorney’s objection to the evidence on which they are based.

Each of these arguments appears to be based on Applicant's particularly narrow interpretation of the goods identified in the cited registration as "protective eyeglasses." Applicant argues that "the meaning of the word 'protect' should not be considered in a vacuum, and when the meaning of a term is ambiguous, extrinsic evidence may be provided to show 'that the description of goods has a specific meaning to members of [a] trade,'" *id.* (quoting *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990)), and that "when used in connection with Registrant's goods, it is evident that the definition of 'protect' is highly different from 'protect' as applied to dress eyeglasses." *Id.* Applicant concludes that "the correct definition to be applied to the term 'protect' in Registrant's protective eyeglasses is an industry specific, highly regulated definition that is highly dissimilar to the protective qualities of Applicant's frames." *Id.*

The Examining Attorney responds that "Applicant's frames for spectacles and sunglasses, excluding frames for protective eyeglasses are closely related to protective eyeglasses, because the parties' goods are commonly offered by the same companies and are commonly offered through the same channels of trade." 6 TTABVUE 7. With respect to Applicant's interpretation of the "protective eyeglasses" identified in the cited registration, the Examining Attorney argues that "the evidence of record shows that there are many forms of protective eyeglasses encompassed by the identification of registrant, despite applicant's characterization of registrant's particular goods as a very narrow type of protective eyeglass, narrower than the ordinary meaning of the wording." *Id.* at 10. She cites dictionary definitions of

“protect” and “eyeglasses,” *id.*, and argues that “[t]aken together, the ordinary meaning of ‘protective eyeglasses’ in registrant’s identification means pairs of lenses mounted in a light frame, used to correct faulty vision or protect the eyes, or to cover or shield the eyes from exposure, injury, damage, or destruction.” *Id.*

With respect to relatedness per se, the Examining Attorney points to “Internet evidence, consisting of a representative sample of third-party use in commerce, [that] establishes that the same entity commonly manufactures, produces, or provides the relevant goods and markets the goods under the same mark,” *id.* at 9,<sup>17</sup> as well as “evidence from the USPTO’s X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case.” *Id.* at 12. She concludes that

the evidence of record and analysis herein shows that applicant’s identified Class 9 goods of “frames for spectacles and sunglasses, excluding frames for protective eyeglasses,” as amended, are closely related to U.S. Registration No. 3549210’s identified Class 9 goods of “protective eyeglasses.” Thus, confusion is likely, as consumers would believe that applicant’s and registrant’s goods emanate from a single source.

*Id.* at 13.

We begin our analysis “with the identifications of goods . . . in the registration and application under consideration.” *Country Oven*, 2019 USPQ2d 443903, at \*5. As discussed above, Applicant and the Examining Attorney focus primarily on the

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<sup>17</sup> The Examining Attorney’s reference to a “representative sample of third-party use in commerce” is unhelpful. “[E]vidence is either of record or it is not,” *In re Brunetti*, 2022 USPQ2d 764, at \*5 (TTAB 2022), and we consider only the evidence of record whether or not there may be additional similar evidence located by an applicant or examining attorney that was not submitted.



interpretation of the phrase “protective eyeglasses” in the identification of goods in the cited registration. We must construe that phrase as broadly as reasonably possible “to include all goods of the nature and type described therein,” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018) (quoting *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)), and we must resolve any ambiguities regarding the scope of its coverage in favor of the cited registrant “given the presumptions afforded the registration under Section 7(b)” of the Trademark Act. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015) (citing 15 U.S.C. § 1057(b)).

In that regard, we disagree with Applicant that the word “protective” in the phrase “protective eyeglasses” in the registrant’s identification of goods is sufficiently unclear as to require resort to extrinsic evidence “to show ‘that the description of goods has a specific meaning to members of [a] trade.’” 4 TTABVUE 10 (quoting *Trackmobile*, 15 USPQ2d at 1154 (considering extrinsic evidence to determine the meaning of the phrase “light railway motor tractors” in the registrant’s identification of goods)). Consumers of the goods identified in the cited registration are not limited to “members of [a] trade,” but instead consist of members of the general public, and we thus focus on the ordinary meaning of the words “protective eyeglasses” to such consumers, as reflected in the dictionary evidence in the record.

“Eyeglasses” are “glasses for the eyes,”<sup>18</sup> and “glasses” are “a pair of lenses mounted in a light frame, used to correct faulty vision or protect the eye.”<sup>19</sup> The verb “protect” means “to cover or shield from exposure, injury, damage, or destruction,”<sup>20</sup> and we take judicial notice that the adjective “protective” means “giving protection.”<sup>21</sup> Construing the phrase “protective eyeglasses” as broadly as reasonably possible and resolving any ambiguities regarding its scope in favor of the cited registrant, we conclude that “protective eyeglasses” encompass any sort of eyeglasses that give protection to the eyes by “cover[ing] or shield[ing] [them] from exposure, injury, damage, or destruction” in some manner, not simply the particular type of protective eyeglasses discussed by Applicant.

Having so construed the registrant’s identification of goods, we turn to the record evidence of the relatedness of those goods to the “frames for spectacles and sunglasses, excluding frames for protective eyeglasses” identified in the application. As discussed above, the Examining Attorney relies on third-party registrations and uses to show the relatedness of the involved goods.

We begin with the Examining Attorney’s third-party registration evidence. The Examining Attorney made of record 16 third-party, use-based registrations of marks

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<sup>18</sup> May 25, 2022 Final Office Action at TSDR 18 (THE AMERICAN HERITAGE DICTIONARY).

<sup>19</sup> *Id.* at TSDR 19 (THE AMERICAN HERITAGE DICTIONARY).

<sup>20</sup> November 19, 2022 Denial of Request for Reconsideration at TSDR 9.

<sup>21</sup> CAMBRIDGE DICTIONARY (dictionary.cambridge.org, last accessed on August 22, 2023). “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions.” *Monster Energy*, 2023 USPQ2d 87, at \*20 n.41.

for both “protective eyeglasses” and “frames for spectacles and sunglasses,” owned by 14 different owners.<sup>22</sup> “As a general proposition, third-party registrations that cover goods and services from both the cited registration and an Applicant’s application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark.” *Country Oven*, 2019 USPQ2d 443903, at \*8 (citing *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)). The 16 registrations made of record by the Examining Attorney “are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Id.*, at \*10 (considering 15 third-party registrations of marks for

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<sup>22</sup> May 25, 2022 Final Office Action at TSDR 2-17 (Registration Nos. 5597692, 3491571, 3141619, 3189243, 3249344, 5614588, 5679306, 5843867, 6191463, 5873247, 6241430, 6452215, 6617943, 6586168, 6675419, 3740366). The exclusion in Applicant’s identification of goods “Frames for spectacles and sunglasses, excluding frames for protective eyeglasses” does not lessen the probative value of these registrations. “Just as we must consider the full scope of the goods and services as set forth in the application and registration under consideration, we must consider the full scope of the goods and services described in a third-party registration. Because the benefits of registration are commensurate with the scope of the goods specified in the certificate of registration, a registration that describes goods broadly is presumed to encompass all goods or services of the type described.” *Country Oven*, 2019 USPQ2d 443903, at \*9 (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)). We thus agree with the Examining Attorney that “the term(s) frames for spectacles and sunglasses in the third-party registrations are broad enough to encompass frames for protective spectacles and sunglasses, as well as frames not for protective spectacles and sunglasses in the application.” 4 TTABVUE 12.

the involved goods and services owned by 14 different owners). Applicant did not offer such evidence during prosecution.

The Examining Attorney also made of record third-party websites offering protective eyeglasses and frames for spectacles and sunglasses.<sup>23</sup> Applicant expressly agrees that the ArtCraft and FramesDirect.com websites “do in fact sell both Registrant’s and Applicant’s goods,” 4 TTABVUE 11, and effectively concedes that the Oakley website does so as well. *Id.* at 12. The website of ArtCraft, which touts itself as “America’s Oldest Family Owned and Operated Optical Frame Manufacturer Since 1918,”<sup>24</sup> offers dress frames “includ[ing] the latest trends in fashion eyewear,”<sup>25</sup> as well as what it describes as “Safety Eyewear,” “Protective Eyewear,” and “Safety Prescription Eyewear,”<sup>26</sup> which we find to be forms of “protective eyeglasses.” The FramesDirect.com website offers eyeglass frames as well as what it describes as “Prescription Safety Glasses,”<sup>27</sup> which we find to be a form of “protective eyeglasses.”

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<sup>23</sup> In determining what goods are offered through these websites, we must take into account that goods may sometimes be described on the Internet in colloquial language that does not track the technical language of acceptable identifications of goods in applications and registrations, including those involved here. In such instances, we must decide whether the goods as described on the websites fall within the full scope of the involved identifications. *Cf. In re Dare Foods, Inc.*, 2022 USPQ2d 291, at \*6 (TTAB 2022) (broadly construing smoked salmon, shellfish, and caviar cream spread displayed on a website as “falling within the ambit of Applicant’s ‘snack food dips’”).

<sup>24</sup> May 25, 2022 Final Office Action at TSDR 23.

<sup>25</sup> *Id.* at TSDR 24.

<sup>26</sup> *Id.* at TSDR 25-27.

<sup>27</sup> *Id.* at TSDR 38.

The Oakley website offers eyeglass frames as well as a category of eyewear described as “Safety Glasses,”<sup>28</sup> which we find to be a form of “protective eyeglasses.”

The RecSpecs website offers everyday eyeglass frames as well as “Sports eyegear engineered to protect + perform,”<sup>29</sup> which we find to be a form of “protective eyeglasses.” The Torrance Optometry website offers “high fashion, designer eyeglass frames” as well as prescription and non-prescription safety eyewear,<sup>30</sup> which we find to be a form of “protective eyeglasses.” The Wiley X website offers what it touts as the “World’s Best Protective Eyewear” as well as numerous eyeglass frames.<sup>31</sup>

Applicant belittles this evidence, arguing that

Applicant’s goods and Registrant’s goods are not commonly provided by the same entities. . . [T]he third-party evidence establishes that only a few entities provide both goods similar to Applicant’s and goods similar to Registrant’s. For example, there are five brands that sell protective eyewear which meets OSHA and ANSI standards on FramesDirect.com, while there are over 200 that sell regular eyeglasses. . . . Of those five brands, only one also sold regular eyeglasses; thus, it is not common for the same entity to provide both Registrant’s and Applicant’s goods. . . . While the same entity **could** offer both Registrant’s and Applicant’s goods for sale on their website, such as Oakley, these companies are not common in the marketplace. The vast majority of brands have distinct business lines, with distinct distribution, which is not handled by the same sources.

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<sup>28</sup> *Id.* at TSDR 45-53.

<sup>29</sup> *Id.* at TSDR 40-44.

<sup>30</sup> *Id.* at TSDR 62-64.

<sup>31</sup> *Id.* at TSDR 65-67.

4 TTABVUE 12 (record citations omitted; emphasis in bold here in italics in the original).

We do not find Applicant's argument persuasive. Applicant's claim about the size of the eyeglass market is based on argument of counsel, which is "no substitute for evidence," *Embiid*, 2021 USPQ2d 577, at \*40 (quotations omitted), but even if relatively few companies sell some type of protective eyeglasses, the record shows that a number that do also sell frames for non-protective spectacles and sunglasses.<sup>32</sup> The Examining Attorney's third-party website evidence corroborates the third-party registration evidence showing that both frames for non-protective spectacles and sunglasses, and protective eyeglasses, frequently originate from a common source, and "bolsters our finding of relatedness." *Country Oven*, 2019 USPQ2d 443903, at \*11. The second *DuPont* factor supports a conclusion that confusion is likely.

## **2. Similarity or Dissimilarity of Channels of Trade and Classes of Consumers**

Applicant argues that "Applicant's and Registrant's goods are marketed to different consumers and thus the same potential purchasers would not encounter both marks" because "Registrant's goods are marketed to those working in industry-specific occupations in which hazardous conditions and materials increase risk of severe eye injuries." 4 TTABVUE 11. Applicant further argues that the "evidence of record establishes that these entities have drawn a line in the sand themselves – a

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<sup>32</sup> We note in that regard that the 14 owners of the 16 third-party registrations in the record do not include the companies whose websites were made of record. As a result, the record shows about 20 users or registrants of marks for both sets of goods.

line between consumers seeking safety eyeglasses specifically designed for work environments and consumers seeking regular dress frames” that “effectively serves as a barrier between two very different channels of trade and different types of consumers.” *Id.*

Applicant’s arguments are based on the cramped definition of “protective eyeglasses” that we have rejected above. *Id.* at 11-12. “Neither the registration nor the application contains any restriction on the channels of trade or classes of purchasers.” *Country Oven*, 2019 USPQ2d 443903, at \*14. “[A]bsent any explicit restriction in the application or registration, we must presume the . . . identified goods to travel through all normal channels of trade for goods of the type identified, and we must consider them to be offered and sold to all of the usual customers for such goods.” *Embiid*, 2021 USPQ2d 577, at \*31 (quoting *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*13-14 (TTAB 2020) (internal quotation omitted)).

The record shows that both frames for non-protective spectacles and sunglasses, and protective eyeglasses, are offered to members of the general public seeking eyewear for various purposes on the websites of eyewear companies and optometrists, “and have been registered under a single mark by numerous . . . businesses.” *Id.* “The channels of trade and classes of customers plainly overlap, and this supports a finding of a likelihood of confusion.” *Id.*

### C. Purchasing Conditions and Consumer Sophistication

The fourth *DuPont* factor considers “the conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Embiid*, 2021 USPQ2d 577, at \*31 (quoting *DuPont*, 177 USPQ at 567).

Applicant’s brief contains a section captioned “Purchasers of Registrant’s Goods are Sophisticated Because Registrant’s Goods are Potentially Life Saving and Require Knowledge of Complex Regulatory Requirements under OSHA and ANSI.” 4 TTABVUE 13. In that section, Applicant argues that

Registrant’s goods are specifically designed for use by those working in hazardous occupations where there is a heightened and severe risk of eye-threatening or life-threatening injuries. These injuries include, for example, optical radiation, impact from sparks and shrapnel, and chemical splashes in occupational environments such as welding, chemical handling, and machinery operations. Purchasers of protective eyeglasses must exercise great care in their selection, as the safety of their eyes is ultimately at stake. Purchasers of protective eyeglasses are sophisticated and informed consumers who make highly consequential decisions concerning what could potentially be an eye-saving or lifesaving purchase.

*Id.* at 13-14.<sup>33</sup> Applicant also argues that purchaser care is required because of regulatory requirements. *Id.* at 14.

Applicant concludes that “OSHA’s complex regulatory requirements, coupled with the life-threatening risks associated with working in hazardous environments, support the conclusion that potential purchasers of Registrant’s goods are highly

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<sup>33</sup> These arguments are based in part on Exhibit C to Applicant’s brief, 4 TTABVUE 13, which we have excluded above as untimely.



sophisticated and are inclined to exercise a greater degree of care in selecting protective.” *Id.* at 14-15.

The Examining Attorney responds that “even if considering applicant’s characterization of registrant’s consumers as sophisticated, the standard of care is that of the least sophisticated potential purchaser,” and that “[i]n this case, the relevant analysis would include the least sophisticated potential purchaser of applicant’s goods.” 6 TTABVUE 13.

We agree with the Examining Attorney that Applicant focuses under the fourth *DuPont* factor on the degree of care of the purchasers of the goods identified in the cited registration, while ignoring the degree of care of the purchasers of frames for non-protective spectacles and sunglasses. In our analysis under Section 2(d), we must consider the possibility of both “forward” and “reverse” confusion, *Sabhnani*, 2021 USPQ2d 1241, at \*17, but in the more typical “forward” confusion scenario, which exists “when consumers believe that goods bearing the junior mark . . . came from, or were sponsored by, the senior mark holder,” *In re FCA US LLC*, 126 USPQ2d 1214, 1227 (TTAB 2018) (internal quotation and quotation marks omitted), it is the sophistication of the consumers of the junior user’s goods (here Applicant’s) that matters. Applicant is silent on that issue, and the record shows that consumers of frames for non-protective spectacles and sunglasses are members of the general public, that the goods may be purchased online as well as in brick-and-mortar world outlets, and that the goods are offered at a wide variety of price points. For example,

the websites of *eyebuydirect* and *MarvelOptics* offer a variety of frames for purchase online, with prices as low as \$6.<sup>34</sup>

“Board precedent requires our decision to be based on the least sophisticated potential purchasers.” *FCA US*, 126 USPQ2d at 1222 (citing *Stone Lion*, 110 USPQ2d at 1163). There is nothing in the record to suggest that the least sophisticated potential purchasers of frames for non-protective spectacles and sunglasses are likely to exercise anything more than ordinary care in purchasing the goods. The fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

#### **D. Summary**

The first, second, and third *DuPont* factors support a conclusion that confusion is likely, while the fourth *DuPont* factor is neutral. The standard-character marks AVANTÉ and AVANTI are quite similar, and “protective eyeglasses” and “frames for spectacles and sunglasses, excluding frames for protective eyeglasses” are commonly offered under the same marks through the same channels of trade to members of the general public. We conclude, on the basis of the record as a whole, that consumers familiar with protective eyeglasses sold under the AVANTÉ mark who separately encounter frames for non-protective spectacles and sunglasses sold under the AVANTI mark are likely to believe mistakenly that the goods have a common source.

**Decision:** The refusal to register is affirmed.

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<sup>34</sup> November 19, 2022 Denial of Request for Reconsideration at TSDR 2-8.