

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 27, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Clearview Systems, LLC

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Serial No. 98288775

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Carl M. Davis II and Dorian B. Kennedy of Baker Donelson Bearman Caldwell &
Berkowitz, P.C., for Clearview Systems, LLC.

Cameron Rocha, Trademark Examining Attorney, Law Office 118,
Michael Baird, Managing Attorney.

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Before Adlin, Elgin, and O'Connor,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Clearview Systems, LLC (“Applicant”) seeks registration on the Principal Register of the mark FITSYNC (in standard characters) for “Athletic footwear; Athletic shoes” in International Class 25.¹

The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that, as applied to

¹ Application Serial No. 98288775 was filed on Nov. 28, 2023 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) based upon Applicant’s bona fide intent to use the mark in commerce. Because “footwear” encompasses “shoes,” athletic footwear and athletic shoes are legally equivalent.

the goods identified in the application, it so resembles the registered mark FITSYNC (in typed characters) for the following goods and services in International Classes 9, 35, and 42, as to be likely to cause confusion, to cause mistake, or to deceive.²

Computer software in the field of fitness consultation capable of communicating with portable devices such as hand held communication devices to design individualized fitness programs, recommend vitamins and nutritional supplements, and record exercise routines in Class 9;

Computerized on-line ordering services for mobile ordering of a variety of products and services in the field of fitness, health and nutrition in Class 35; and

Fitness consultation via the global computer network, namely to design individualized fitness programs, recommend vitamins and nutritional supplements, and record exercise routines; computer services, namely, designing and providing consultation regarding physical fitness programs, exercises and routines via mobile wireless devices in Class 42.

When the refusal was made final,³ Applicant filed an appeal, which has been briefed.⁴ For the reasons set forth below, we affirm the refusal to register.

² Reg. No. 2724947, registered June 10, 2003 on the Principal Register; renewed. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 1363 n.2 (Fed. Cir. 2012); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 807.03(i) (2024).

³ June 17, 2024 Final Office Action. Citations in this opinion to the prosecution record refer to the .pdf version of the TSDR system. Citations to the briefs in the appeal record refer to the Board's TTABVUE docket system. *See In re Integra Biosciences Corp.*, Ser. No. 87484450, 2022 TTAB LEXIS 17, *6 (TTAB 2022).

⁴ Applicant's Brief is at 4 TTABVUE. The Examining Attorney's Brief is at 6 TTABVUE.

Analysis of Likelihood of Confusion

“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, 1379 (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, 1361 (CCPA 1973) (“*DuPont*”). See *In re Charger Ventures, LLC*, 64 F.4th at 1379.

We consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (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.” *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, *18 (TTAB 2023) (citing *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976)). These, and other factors, are discussed below.

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*, Can. No. 92068086, 2021 TTAB LEXIS 464, *33 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005)). Here, the

marks are identical, and Applicant does not argue otherwise.⁵ The first *DuPont* factor favors a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Trade Channels

“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.” *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). We group these *DuPont* factors together because of the shared focus on the identifications of the goods and services.

The goods and services need not be identical or even competitive to support a finding that confusion is likely. *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000) (“[A]lthough the [goods and] services are different, it is reasonable to believe that the general public would likely assume that the origin of the [goods and] services are the same.”) (citing *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000)). Instead, likelihood of confusion can be found “if the respective [goods or services] are ‘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.’” *Coach Servs. Inc. v. Triumph Learning*

⁵ *See* 4 TTABVue 6 (arguing the *DuPont* factors disfavoring a finding of likelihood of confusion are “the dissimilarity of the goods, the dissimilarity of the trade channels, and the dissimilarity of the consumers and conditions under which purchasing decisions are made.”).

LLC, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, *28-29 (TTAB 2007)). We also keep in mind that where the marks are identical, as here, the degree of similarity or relatedness between the goods and services needed to support a finding of likelihood of confusion declines. *See In re i.am.symbolic, llc*, Ser. No. 85044494, 2015 TTAB LEXIS 369, *16 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993)).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods or services are used together or used by the same purchasers; advertisements showing that the relevant goods or services are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both Applicant's goods and the goods listed in the cited registration. *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 TTAB LEXIS 381, *9-10 (TTAB 2019).

The Examining Attorney made of record evidence that companies provide both mobile fitness applications and athletic footwear under the same marks. He argues this evidence demonstrates that Registrant's goods in Class 9 and Applicant's goods emanate from the same sources and are complementary because they are used together and by the same consumers.⁶ In addition, he argues the evidence shows the relatedness of Applicant's goods and Registrant's Class 35 and 42 services.⁷

⁶ *Id.* at 6, 8.

⁷ *Id.* at 7-8.

We focus on the evidence relating to Applicant's goods and Registrant's software goods in Class 9. This evidence includes printouts from:

- Nike providing athletic shoes and the "Nike Training Club" application featuring fitness workouts and guidance for fitness and nutrition;⁸
- Under Armour providing athletic shoes and the "Map My Fitness by Under Armour" application featuring fitness workouts and tracking tools;⁹ and
- adidas providing athletic shoes and the "adidas Running" application featuring walking and running training plans and tracking tools.¹⁰

The remaining third-party evidence of record (namely, from Asics¹¹ and Reebok¹²) involves relevant goods and services, but the websites on which the software applications appear are both from Australia. Because the record does not support a finding that relevant U.S. consumers be exposed to these goods from outside the country, we do not find the evidence probative. *See In re Well Living Lab Inc.*, Ser. No. 86440401, 2017 TTAB LEXIS 156, *12 n.10 (TTAB 2017) ("Various factors may

⁸ Mar. 5, 2024 Office Action at TSDR 7-21; *see also id.* at TSDR 18 (referring to the Nike App (featuring "the latest gear"), Nike Run Club ("Everything you need to start running, keep running, and enjoy running more"), and SNKRS ("Your ultimate sneaker source.")), 19 (links to "Training Shoes").

⁹ *Id.* at TSDR 22-31; *see also id.* at TSDR 30 (referring to the "Map My Run by Under Armour," "Map My Walk by Under Armour," and "Map My Ride by Under Armour" mobile applications).

¹⁰ June 17, 2024 Final Office Action at TSDR 6-15.

¹¹ *Id.* at 16-27 (Asics providing athletic shoes and Asics Australia promoting the "Asics Runkeeper" application with tracking tools for various fitness activities such as running, cycling, and rowing).

¹² *Id.* at 28-40 (Reebok providing athletic shoes and Reebok Australia providing the Reebok Fitness app for tracking, planning, and analyzing training workouts, including running, and connecting with training equipment).

inform the probative value of a foreign website in any given case, such as ... whether the nature of the goods or services makes it more or less likely that U.S. consumers will encounter foreign websites in the field of question.”).

The Examining Attorney also provided a printout from a website from “Nanalyze” entitled “Smart Shoes that are Digitally Connected,”¹³ which he claims shows “it is not just the world’s biggest shoe companies that are developing fitness consultation software, there are also numerous startups developing shoes and fitness consultation software Therefore, the compared goods are complimentary [sic] because they are used together and by the same consumers.”¹⁴ The article mainly discusses companies which are developing athletic shoes and mobile software applications to view biometric data, with no indication of whether such goods are actually available to U.S. consumers. It identifies one U.S. company, Altra Footwear owned by VF Corporation (which also manages the Timberland, The North Face, and Vans brands), which sold “smart” shoes to record biometric data, which we can infer from context was viewable through a mobile software application.¹⁵ Together, we have evidence of four parties in the United States (Nike, Under Armour, adidas, and Altra/VF Corporation), that have used the same mark for athletic shoes, on the one hand, and mobile software applications for fitness and/or nutrition on the other.

¹³ Mar. 5, 2024 Office Action at TSDR 32-43.

¹⁴ 6 TTABVUE 5-6.

¹⁵ Mar. 5, 2024 Office Action at TSDR 38-39.

Applicant (which does not distinguish between the goods and services in the cited registration's three classes) first contends that athletic footwear and computer software applications are dissimilar on their face: "[T]here is no likelihood of confusion in view of this *du Pont* factor because the actual footwear worn by a person is extremely and materially different from computer software of the cited registration even if that computer software may relate to fitness in some manner."¹⁶ Second, Applicant criticizes the evidence of record as from "some of the biggest and most famous companies in the world [which] are not the typical computer software-related company providing an app service for computerized devices."¹⁷

The above-described evidence of record is consistent with the Examining Attorney's argument that Registrant's software in the field of fitness and Applicant's athletic shoes are complementary, *i.e.*, they are, or can be, used together for a certain purpose. "[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination); *see also Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 943 (Fed. Cir. 1990) (OCTOCOM as used on modems is confusingly similar to OCTACOMM as used on computer programs in part because programs and modems are commonly used together); *In re Cook Med. Techs. LLC*, Ser. No. 77882876, 2012 TTAB LEXIS 496, *10 (TTAB 2012) ("If goods are

¹⁶ 4 TTABVUE 7.

¹⁷ *Id.* at 7-8.

complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion.”) (citing *In re Martin’s Famous Pastry Shoppe, Inc.*, *supra*). See also J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:26 (5th ed. Nov. 2024 update) (“If a similar mark appears on complementary goods, then there may be a strong likelihood that buyers will think that there is some connection between the sources of such goods.”).

However, the mere fact that goods can be used together is not a sufficient basis on which to find them to be complementary. “Rather, there must be some showing that customers would seek out both types of goods for the same purpose, for example, making an outfit by matching shoes and clothing, or making a sandwich by combining bread and cheese, to show that the goods are complementary.” *N. Face Apparel Corp. v. Sanyang Indus. Co.*, Opp. No. 91187593, 2015 TTAB LEXIS 328, *46 (TTAB 2015) (internal citation omitted).

Here, the evidence of record indicates that Registrant’s software in the field of fitness consultation and Applicant’s athletic footwear may be sought out together by the same consumers and for the same purpose, i.e., to enhance or optimize athletic performance. Moreover, as demonstrated by the use by Altra/VF Corporation, fitness software applications may be provided as features of “smart” athletic shoes.

The fact that the examples provided by the Examining Attorney are not more numerous does not detract from their significance. Development of software and athletic footwear are not inexpensive or simple undertakings, and thus it is reasonable to expect that the number of examples are fewer than, for example, less

complicated or expensive consumer goods.¹⁸ Moreover, because the examples are from companies which are “some of the biggest and most famous companies in the world,” their use has a much greater impact on consumer exposure such that the consuming public would be conditioned to make an association between the relevant goods. These uses are far more probative of relatedness than evidence of a greater number of smaller companies would be. We find, therefore, that Applicant’s athletic footwear and Registrant’s software goods in the field of fitness in Class 9 are complementary and commercially related such that, when identified by identical marks, confusion is more likely.¹⁹

Moreover, because there are no limitations as to channels of trade or target purchasers in the cited registration or the subject application, it is presumed that the respective goods would move in all normal channels of trade, and that they are available to all usual purchasers for these goods. *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, *12 (TTAB 2018) (“where an application contains no such restrictions, examining attorneys and the Board must read the application to cover all goods of the type identified, to be marketed through all normal trade channels, and to be offered to all normal customers therefor.”). Here, the “normal”

¹⁸ See, e.g., Mar. 5, 2024 Office Action at TSDR 34 (describing \$2.3 million investment to develop FeetMe Sport “smart” athletic footwear).

¹⁹ Applicant also asserts that the Examining Attorney has failed to show “something more” than merely that goods and services are used together. 4 TTABVUE 8. In *In re St. Helena Hosp.*, 774 F.3d 747, 754 (Fed. Cir. 2014), the Federal Circuit held that “‘something more’ than the mere fact that goods and services are used together” is required “whenever relatedness of the goods and services is not evident, well-known or generally recognized.” Even were we to assume “something more” is required in this case – which it is not – we find that it has been satisfied by the evidence of record.

channels of trade for Applicant's and Registrant's goods are fitness-focused, and the "usual" purchasers are seeking to improve fitness. Thus, the fact that Applicant asserts (without evidence) that it sells through "brick-and-mortar or online retail stores, which typically specialize in sports equipment including footwear or athletic garments," is not persuasive.²⁰ Applicant's customers are likely to seek fitness software applications through sports or athletic sections of app stores, and fitness app users are likely to buy shoes in brick-and-mortar or online retail stores, often in the sports/athletic footwear sections thereof. The third-party evidence discussed above confirms that the same consumers may encounter athletic footwear and fitness software applications through the same websites (e.g., Nike) or even as components of the same product, such as "smart" footwear. We conclude that the categories of consumers and channels of trade overlap.

Moreover, we must resolve any ambiguities regarding the coverage of the cited registration in favor of Registrant "given the presumptions afforded the registration under Section 7(b)" of the Trademark Act. *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS 353, *11 (TTAB 2023) (quoting *In re C.H. Hanson Co.*, Ser. No. 77983232, 2015 TTAB LEXIS 357, *14 (TTAB 2015)). We find that Applicant's goods and Registrant's goods in Class 9 are related, and the channels of trade and consumers for such goods overlap. The second and third *DuPont* factors weigh in favor of likelihood of confusion.

²⁰ See 4 TTABVUE 9. "Attorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citation omitted).

C. Degree of Care in Purchasing

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *DuPont*, 476 F.2d at 1361). A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc.*, 396 F.3d at 1376.

Applicant’s argument as to the fourth factor is wholly without evidentiary support. It argues that its athletic shoes “typically retail for well over a hundred dollars” and its purchasers “are careful purchasers seeking a specialized shoe that will provide performance for a particular sport.”²¹ Applicant also contends that the “computer software . . . can be expensive to purchase and oftentimes comes with a subscription that requires a monthly charge to maintain the information or service being subscribed,” and consumers of these products are sophisticated and unlikely to be confused.²²

²¹ 4 TTABVUE 10. Because Applicant’s application was filed under Section 1(b) of the Trademark Act, no specimen of use is of record.

²² *Id.*

The subject application does not contain any limitations, and thus, the potential class of purchasers of Applicant's goods includes any consumer of athletic footwear of all types. There is no evidence of record as to the sophistication of customers that typically purchase athletic footwear or Registrant's software applications. We may draw certain conclusions, however, based on the nature of the goods themselves.

It is well-known that the cost of athletic footwear varies widely. The record reveals that athletic footwear sold by third parties such as Nike and Reebok may cost under or around fifty dollars.²³ As to Registrant's goods, the record indicates that mobile applications for fitness may be free to download and have optional "in app purchases" available.²⁴ We conclude that the prices of the relevant goods may be relatively low or even free, and thus we cannot infer a high level of sophistication to their purchasers.

Where prospective consumers may span a spectrum of sophistication, we base our decision on the least sophisticated potential purchasers. *Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Can. No. 92079409, 2024 TTAB LEXIS 289, *13 (TTAB 2024) (citing *Stone Lion Cap. Partners, L.P.*, 746 F.3d at 1325). In view of the lack of evidence that the least sophisticated purchaser of these broadly-identified goods would exercise anything more than ordinary care in purchasing them, the

²³ See, e.g., Mar. 5, 2024 Office Action at TSDR 8, 10, 11, 24, 25; June 17, 2024 Final Office Action at TSDR 12, 30, 31, 33-34.

²⁴ See, e.g., Mar. 5, 2024 Office Action at TSDR 28; June 17, 2024 Final Office Action at TSDR 6. Registrant's most recent specimen of use demonstrates that it provides free membership to its online service, but requires a premium membership to use the mobile application. There is no indication of the cost of the premium service on the specimen. See Reg. No. 2724947, May 16, 2023 Specimen of Use.

fourth *DuPont* factor is neutral. *Cf. Turdin v. Trilobite, Ltd.*, Con. Use No. 94002505, 2014 TTAB LEXIS 17, *31 (TTAB 2014) (finding the fourth *DuPont* factor neutral where “there is argument in the briefs on the *DuPont* factor regarding the conditions of sale and purchaser sophistication, but no evidentiary support for the arguments”).

D. Weighing the *DuPont* Factors

We have carefully considered, weighed, and balanced all of the evidence made of record, and the arguments related thereto. *In re Charger Ventures, LLC*, 64 F.4th at 1384 (“[I]t is important . . . that the Board . . . weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”) (emphasis in original).

Because we have found that Applicant’s mark FITSYNC and the cited mark are identical; Registrant’s goods in Class 9 are related to Applicant’s “athletic footwear; athletic shoes”; the goods move in the same or overlapping trade channels and are offered to the same classes of purchasers; and the other factors are neutral, we conclude that confusion between Applicant’s mark and the cited mark in Registration No. 2724947 is likely.

Decision

The refusal to register is **affirmed**.