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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/519618

APPLICANT: Microvision Optical, Inc.

CORRESPONDENT ADDRESS:

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**BEFORE THE
TRADEMARK TRIAL
AND APPEAL BOARD
ON APPEAL**

MARK: FRAMELOCK

CORRESPONDENT'S REFERENCE/DOCKET NO: 2800 framelo

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant:	Microvision Optical, Inc.	:	BEFORE THE
Trademark:	FRAMELOCK	:	TRADEMARK TRIAL
Serial No:	78/519618	:	AND
Attorney:	Rob R. Phillips	:	APPEAL BOARD
Address:	Greenberg Traurig 3773 Howard Hughes Parkway Suite 500 North Las Vegas, Nevada 89109	:	ON APPEAL

STATEMENT OF THE CASE

Applicant has appealed the Trademark Examining Attorney's final refusal to register the trademark FRAMELOCK on the ground of likelihood of confusion, mistake or deception under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), with the mark in Reg. No. 2222472, namely FRAMELOC.

FACTS

Applicant filed this application on November 18, 2004, applying to register on the Principal Register the mark FRAMELOCK for "eyeglass frames and fastners." In the First Office Action dated June 30, 2005, registration was refused under Section 2(d) on the ground that the mark, when used in connection with the identified goods, so resembles the mark in Reg. No. 2222472 as to be likely to cause confusion, to cause mistake, or to deceive.

On December 30, 2005, the applicant argued against the refusal to register the mark under Section 2(d) likelihood of confusion with regard to Reg. No. 2222472.

On January 15, 2006, the refusal to register under Section 2(d) with regard to Reg. No. 2222472 was maintained and made final.

On July 14, 2006, applicant filed a notice of appeal.

On September 12, 2006, the applicant filed its appeal brief, and the file was forwarded to the examining attorney for statement on September 18, 2006.

ISSUE

The issue on appeal is whether the mark, when used in connection with the identified goods and services, so resembles the mark in Registration No. 2222472 as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d).

ARGUMENT

BECAUSE THE MARKS WILL BE APPLIED TO OVERLAPPING GOODS, CONSUMER CONFUSION AS TO SOURCE IS LIKELY

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods and services. TMEP §1207.01. The Court in *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods and services.

(A) **SIMILARITY OF THE GOODS**

Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Since the identification of the registrant's goods and/or services is very broad, it is presumed that the registration encompasses all goods and/or services of the type described, including those in the applicant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Optica International*, 196 USPQ 775 (TTAB 1977); TMEP §1207.01(a)(iii).

The applicant's identified goods, as originally filed are, "eyeglass frames and fasteners."

The registrant's identified goods are, "fasteners, namely, metal screws" in Class 6.

The applicant's identified goods are overlapping with the registrant's goods. The applicant's "fasteners" are broad enough to encompass the registrant's more specific goods thereby creating a strong likelihood of confusion as to source of sponsorship in the minds of purchasing consumers.

The applicant argues that the goods are not related, referring to information gathered from the registrant's website. An applicant may not restrict the scope of its goods and/or the scope of the goods covered in the registration by extrinsic argument or evidence, for example, as to the quality or price of the goods. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). TMEP §1207.01(a)(iii). The registration does not restrict the scope of uses of the metal screws. One use of metal screws is to secure eyeglass frames. Metal eyeglass screws are well within the scope of the registration. Accordingly, applicant's arguments should not be considered as the applicant is attempting to restrict the scope of the registrant's identification of goods.

Applicant also argues that the methods of marketing and channels of distribution are so different as to obviate any likelihood of confusion. Registrant's identification of goods does not restrict the channels of trade. The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods and/or services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods and/or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-5 (TTAB 1980). Applicant bases this argument on "further research into the actual goods offered under [the marks]." Again, these arguments should not be given

any weight because applicant is attempting to restrict the channels of trade through the use of extrinsic evidence.

In support of these arguments applicant attached the specimen of record from Registration No. 2222472 and a screenshot from the registrant's website at www.fastecindustrial.com. See applicant's brief at page 4. The examining attorney objects to this evidence as it was introduced after the appeal. The record must be complete prior to appeal. 37 C.F.R. §2.142(d); TMEP §710.01(c); TMEP §1501.02. It is requested that the Board reject this evidence as untimely.

(B) SIMILARITY OF THE MARKS

When determining whether there is a likelihood of confusion under Section 2(d), the question is not whether people will confuse the marks, but rather whether the marks will confuse the people into believing that the goods they identify emanate from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); TMEP §1207.01(b).

The applicant applied to register the mark FRAMELOCK. The registered mark is FRAMELOC. The marks are phonetic equivalents and create a nearly identical overall commercial impression. Applicant argues to the contrary relying on the addition of the letter “K” to applicant’s mark. The terms LOC and LOCK are identical in sound. Furthermore, they both conjure images of locking something. In this case, both marks indicate that the goods will lock frames. The sound and overall commercial impression of the marks is highly similar and strongly supports a likelihood of confusion.

The overriding concern is to prevent buyer confusion as to the source of the goods and services. *Miss Universe, Inc. v. Miss Teen U.S.A., Inc.*, 209 USPQ 698 (N.D. Ga. 1980). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

(C) APPLICANT’S MARK IS NOT IN A CROWDED FIELD

Finally the applicant argues that the mark is registrable because of the existence of several registrations for the same mark, or slight variations thereof. The applicant has cited three live registrations for various incarnations of the term FRAMELOCK. These registrations are for goods wholly unrelated to eyeglasses or fasteners. The cited registrations are FRAMELOCK (Ser. No. 78151858) for medical apparatus bracket assembly; FRAMELOCK (Ser. No. 75635462) for audio/visual and computer equipment;

and FRAME LOCK (Ser. No. 78142521) for extension poles and paint applicators. *See attached registrations.* As such, the marks FRAMELOCK and FRAMELOC are not in a “crowded field” of trademarks in the field of fasteners.

Even if the goods in the registrations were related, it is well settled that third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion. *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Third-party registrations are not evidence of what happens in the marketplace or that the public is familiar with the use of those marks. *In re Comexa Ltda*, 60 USPQ2d 1118 (TTAB 2001); *National Aeronautics and Space Admin. v. Record Chem. Co.*, 185 USPQ 563 (TTAB 1975); TMEP §1207.01(d)(iii). Further, existence on the register of other confusingly similar marks would not assist applicant in registering yet another mark which so resembles the cited registered mark that confusion is likely. *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999).

CONCLUSION

The applicant’s mark FRAMELOCK is likely to be confused with the registrant’s mark FRAMELOC where the applicant’s mark creates a highly similar commercial impression to the registrant’s mark. The goods of the applicant and the cited registrant are overlapping. For the foregoing reasons, it is respectfully submitted that the refusal of registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), be affirmed.

Respectfully submitted,

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