

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Eyefluence, Inc.

Serial No. 86249068
filed April 10, 2014

James K. Sakaguchi, Vista IP Law Group LLP, for Applicant.

Bernice Middleton, Trademark Examining Attorney, Law Office 106, Mary I. Sparrow, Managing Attorney.

Before Mermelstein, Adlin, and Masiello, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Alleging an intent to use the mark in commerce, Applicant Eyefluence, Inc. seeks registration on the Principal Register of **EYEOS** (in standard characters) for use on

Computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices.

International Class 9.

The Examining Attorney issued a final refusal to register pursuant to Trademark Act § 2(d), 15 U.S.C. § 1152(d), on the ground that Applicant's mark so resembles the mark **eyeos** (in standard characters),¹ registered for use on the goods listed below,

¹ Registration No. 4559079, issued July 1, 2014.

that confusion is likely as to the source of the identified goods:

Eyewear; eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer; eyewear cases; eyewear retainers; eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; eyewear, namely, optical goods, namely, eyeglasses, eyeglass frames, fashion eyeglasses, sunglasses, eyeglass cases, eyeglass lenses, reading glasses, and accessories for eyeglasses, namely, cases and chains; frames for spectacles and sunglasses; lenses for sunglasses; spectacles and sunglasses; sunglass chains and cords; sunglass lenses; sunglasses; sunglasses and spectacles.

International Class 9. (For the sake of convenience, we refer to Registrant's goods collectively as "eyewear," although we remain mindful of all of the goods specifically identified.) Applicant appeals the refusal to register.

Because we find that the use of Applicant's mark on the identified goods is not likely to cause confusion, we reverse.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. Similarity or Dissimilarity of the Marks

Applicant's mark is **EYEOS**; the Registrant's mark is **eyeos**. Although Applicant's drawing depicts its mark in uppercase letters while the cited mark is depicted in lowercase, both marks are in standard-character format, so each could be displayed in any case or stylization — including the exact same case and stylization as the other. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258–59 (Fed. Cir. 2011); *Phillips Petroleum Co. v. C.J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971); *In re House Beer, LLC*, 114 USPQ2d 1073 (TTAB 2015) (finding the standard-character marks **HOUSE BEER** and **House Beer** identical).

Applicant makes little mention of this *du Pont* factor in its brief, except for this sentence: “Because Applicant's mark has a materially different look, sound, connotation and commercial impression, than the registered mark, Applicant respectfully requests that the rejection be withdrawn.” *App. Br.* 7 TTABVue 4. Applicant does not elaborate on this argument or cite to any evidence or authority in support of it. In any event, it is beyond dispute that **EYEOS** and **eyeos** — both in standard characters — are legally identical for purposes of our analysis. *See Citigroup, Inc.*, 98 USPQ2d at 1258–59 (“standard character” marks are not limited to any particular manner of display). This factor weighs heavily in favor of a finding that confusion is likely.

B. Similarity or Dissimilarity and Nature of the Goods; Trade Channels; Conditions of Sale

In essence, this case turns on the similarity or dissimilarity of the goods involved

and the related factors of their trade channels and conditions of sale. In comparing the goods, “[t]he issue to be determined . . . is not whether the goods . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). It is not necessary that the parties’ goods be the same or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, in light of the similarity of the marks, give rise to the mistaken belief that the services come from or are associated with the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). We bear in mind that because the marks at issue are legally identical, the extent to which the goods must be similar or related to support a finding of likelihood of confusion is lessened. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. *In re Concordia Int’l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Applicant’s goods are “computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices.” Registrant’s goods comprise “eyewear,” “eyeglasses,” “spectacles,” and “sunglasses,” and various parts and accessories for them. Applicant and the Examining Attorney disagree as to the meaning and scope of the identifications of goods at issue.

“A term in an identification of goods should be read to have its ordinary meaning.” *In re Thor Tech Inc.*, 85 USPQ2d 1474 (TTAB 2007) (citing TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) §§ 1402.01, 1402.05, 1402.07(a)). Words can have more than one meaning or take on different meanings when they appear with other words or on different goods. But while language is fluid, it is not the proverbial “nose of wax, which may be turned and twisted in any direction.” *White v. Dunbar*, 119 U.S. 47, 51–52 (1886). Among other factors, context is an important consideration when determining the meaning of language. Here, neither Applicant nor the Examining Attorney has provided definitions of the terms used in the application or registration, although they take conflicting positions regarding their meaning. In particular, the Examining Attorney argues that “Registrant’s eyewear and accessories could likely be suitable devices for use in tracking eye movements,” *Ex. Att. Br.* 9 TTABVue 7, which Applicant denies, *Reply Br.* 10 TTABVue 3.

While we do not view Registrant’s identification of goods as ambiguous — to relevant consumers, within the industry or otherwise — to give full consideration to the Examining Attorney’s position, we have considered extrinsic evidence² in determining the nature of the identified goods. *Cf. In re Trackmobile, Inc.*, 15 USPQ2d 1152

² It is important to note that in looking to extrinsic evidence, we do not *limit* Applicant’s or Registrant’s goods as they are set out in the respective identifications. Our inquiry is only to determine the *ordinary* meaning of the terms used, not the scope of the goods as identified. Once defined, the descriptions of goods must be construed to cover all such goods, even if Applicant’s or Registrant’s marketplace activities are broader or more limited than those identified. *In re Thor Tech Inc.*, 90 USPQ2d at 1638 n.10. We have purposely not focused on

(TTAB 1990).

As noted, the Registrant's goods include variations of "eyewear," "eyeglasses," "spectacles," and "sunglasses," and parts and accessories for them. The dictionaries we have consulted are generally consistent in their definitions; the following are relevant definitions from Merriam-Webster (online),³ <http://www.merriam-webster.com> (visited May 16, 2016):

Eyeglass

1 a: EYEPIECE

b: a lens worn to aid vision; *specifically* : MONOCLE

c plural: GLASSES, SPECTACLES

Eyewear

: corrective or protective devices (as glasses or contact lenses) for the eyes

Spectacle

* * *

2 *plural*: GLASSES

Glass

* * *

2 * * *

the evidence of record regarding either Applicant's or the Registrant's actual goods.

³ The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

b (1): an optical instrument or device that has one or more lenses and is designed to aid in the viewing of objects not readily seen (2): FIELD GLASSES, BINOCULARS—usually used in plural

c *plural*: a device used to correct defects of vision or to protect the eyes that consists typically of a pair of glass or plastic lenses and the frame by which they are held in place—called also *eyeglasses, spectacles*

Sunglass

* * *

2 *plural*: glasses to protect the eyes from the sun

These definitions show that the ordinary and usual meaning of those words in Registrant’s identification of goods relates — as we would expect — to lenses worn in front of the eyes for the purpose of aiding or correcting vision or for protection. While the Registrant’s goods are clearly not limited to the particular eyewear that it actually sells, *Paula Payne Prods. Co. v. Johnson Publ’g Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77–78 (CCPA 1973) (Board must “give full sweep” to an identification of goods regardless of Registrant’s actual business), Applicant’s evidence of Registrant’s actual goods, *see Response to Ofc. Action*, Exh. 2 (Jan. 21, 2015), is consistent with these definitions, and the Examining Attorney has not offered any evidence that these terms are used differently in the relevant trade or in the Registrant’s identification of goods. The ordinary meaning of Registrant’s identification of goods does not support the Examining Attorney’s supposition that they could be used for eye-tracking.

Applicant’s goods are more technical and serve a different purpose: “computer hardware and software for providing a user interface involving eye tracking and/or

eye movement for wearable devices.” Again, we take notice of relevant definitions (all from MICROSOFT COMPUTER DICTIONARY (5th ed. 2002)):

hardware *n.* The physical components of a computer system, including any peripheral equipment such as printers, modems, and mouse devices. *Compare* firmware, software.

software *n.* Computer programs; instructions that make hardware work. * * *

user interface *n.* The portion of a program with which a user interacts. Types of user interfaces, or UIs, include command-line interfaces, menu-driven interfaces, and graphical user interfaces. *Acronym:* UI.

wearable computer *n.* A portable personal computer that its user wears like eyeglasses, clothing, or a wristwatch but which, unlike those items, is interactive, responds to commands, and carries out instructions. A wearable computer may be used like a conventional computer for data collection, storage, and retrieval, but without tying the user to a stationary location while operating the computer. The earliest wearable computers were clandestine devices used in the mid-1960s to predict the performance of roulette wheels. Today, wearable computers are used for such applications as inventory and express package tracking.

And finally, some recently published books shed further light on the meaning of the term “wearable devices” as used in Applicant’s identification of goods:

The terms “wearable technology,” “wearable devices,” and “wearables” all refer to electronic technologies or computers incorporated into items of clothing and accessories, which can comfortably be worn on the body.

Janet Holland, ed., WEARABLE TECHNOLOGY AND MOBILE INNOVATIONS FOR NEXT-

GENERATION EDUCATION (IGI Global 2016).

Recent years witnessed an explosive growth in wearable technology. A wearable device is essentially a tiny computer with sensing, processing, storage and communications capabilities.

Edward Sazonov & Michael R. Neuman, eds., *WEARABLE SENSORS*, xi (Elsevier 2014).

A wearable device is one that is designed to be worn on the body by the user, with the implicit assumption that it can be removed easily.

Panagiotis D. Bamidis, *et al.*, *HANDBOOK OF RESEARCH ON INNOVATIONS IN THE DIAGNOSIS AND TREATMENT OF DEMENTIA*, 383 (IGI Global 2015).

We therefore construe Applicant's goods to be hardware and software which provides an interface, *i.e.*, a means to interact with a program on a wearable computer by tracking eye movement. Consistent with this definition, Applicant notes that goods of this type are commonly used for various types of research and as a means for disabled persons to use a computer despite being unable to use a mouse or touchpad. *App. Br.* at 9.

Arguing that "the goods are similar as they relate to wearable eye devices," the Examining Attorney opines that "Registrant's eyewear and accessories could likely be suitable devices for use in tracking eye movements." *Ex. Att. Br.* 9 TTABVue 7. We disagree. There is no evidence in the record that the Registrant's identified eyewear — given the ordinary and usual meaning of the terms in the cited registration — provide a computer interface or are capable of tracking eye movements. Nor does the

fact that Registrant's goods are — as described by the Examining Attorney — “wearable eye devices” make them related to Applicant's “computer hardware and software for . . . wearable devices.” While one might possibly call eyeglasses a “device,” which is “wearable,” the term “wearable devices” has a particular meaning in the context of Applicant's goods which is not related to Registrant's goods. More to the point, Applicant intends to use its mark for hardware and software which interacts with a wearable device, and provides eye tracking. Applicant's goods do not correct vision defects or protect the eyes, nor can Registrant's identified eyewear perform eye tracking or any computer functions.

It is clear that the goods are significantly different in kind: Registrant's passive, non-electronic eyeglasses and related goods are not computer hardware or software of any kind, and cannot track eye movement, while Applicant's computer hardware and software does not include corrective or protective lenses or any frames or accessories for them. The goods are likewise different in purpose: Applicant's goods are used as an interface — a means of interacting — with a computer, while Registrant's goods are used to aid or correct vision or to protect the eyes. Registrant's goods are little changed from spectacles available centuries ago, whereas Applicant's did not exist until quite recently, and bear no resemblance in function or use to Registrant's.

The Examining Attorney argues that “[a]bsent restrictions,” goods “are presumed to travel in the same channels of trade to the same class of purchasers.” *Ex. Att. Br.* 9 TTABVue 9 (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62

USPQ2d 1001, 1005 (Fed. Cir. 2002)). However, that presumption is only valid if and to the extent the goods at issue are *identical*, as they were in *Viterra*. A more generally applicable statement of the rule is that absent an explicit restriction in the application or registration, identified goods must be presumed to move in all channels of trade and to all prospective purchasers *usual for goods of that type*. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). It follows, then, that if the goods are identical in whole or part, their channels of trade and prospective purchasers must also be presumed identical to the same extent — regardless of the applicant's or registrant's actual business practices. *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968). If, on the other hand, the goods are not identical, we may still presume that each will travel in all usual channels of trade and to all usual customers for such goods. But the usual channels of trade and prospective purchasers for one good cannot be presumed to be the same as for another. They may in fact overlap, but we may not conclude that they do so merely by the absence of any restrictions in the application or registration. As discussed, Applicant's goods are distinct from those set out in the cited registration; none of Registrant's goods are encompassed by Applicant's and vice versa. That difference does not prove that the channels of trade and relevant customers for those goods are different, but it does require consideration and comparison of the evidence of the likely channels of trade for each set of goods and the customers who are likely to purchase them.

While there is no evidence in the record of the usual channels of trade and customers for the type of eyewear and accessories identified in the cited registration, it is common knowledge that such goods are sold in various channels of trade to a broad range of customers. Eyewear is commonly sold in boutique eyewear outlets in stand-alone stores and malls, by opticians, and over the internet. Moreover, eyewear and accessories of the type identified in the cited registration are typically marketed and sold to a very broad range of customers — anyone needing vision correction or wishing to protect their eyes from the sun or other typical hazards. The choice of eyewear (or at least the lenses themselves) is important for health, comfort, and occupational reasons, which would normally suggest that customers exercise some care in their choice. Nonetheless, this category of goods also includes items such as the ubiquitous cheap sunglasses and reading glasses available for low prices in all sorts of retail settings. Moreover, the very broad range of prospective customers for such goods makes it likely that at least some customers are relatively unsophisticated and choose their eyewear without careful investigation into the source of the goods. *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (“Board precedent requires the [likelihood of confusion] decision to be based on the least sophisticated potential purchasers.”) (quotation marks and citation omitted).

By contrast, Applicant’s goods are not common items. Evidence made of record by the Examining Attorney suggests that eye-tracking devices (and thus the hardware and software interfaces for them) are primarily marketed and sold to researchers and

those who have a need to control a computer device by eye movements. One advertisement notes that “[t]he sleek and robust Mobile Eye-XG glasses combined with ASL’s analysis software . . . offers researchers a complete solution that displays easy to interpret visualizations such as gaze plots, scan paths, and heat maps.”⁴ Another says its “eye tracking software detects and tracks the position of a pupil from an incoming camera or video image, and uses a calibration sequence to map the tracked eye/pupil coordinates to positions on a computer screen or projection.”⁵ There is no evidence of record which would suggest that Applicant’s goods would be marketed through common channels of trade to broad segments of the general public. While some of Applicant’s customers are undoubtedly prospective purchasers of eyewear, they are clearly more sophisticated, technically savvy purchasers than those of Registrant’s goods, and they are likely to exercise care in the selection of eye-tracking devices and interfaces for them. Indeed, the mere fact that many consumers of Applicant’s hardware and software will at some point also purchase glasses is not a basis upon which to find that the channels of trade or classes of consumers are the same. *Coach Services*, 101 USPQ2d at 1723; *Sports Auth. Mich. Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2002) (“We think it a fit subject for judicial notice that purchasers of computer hardware and software also would be purchasers of, at least, footwear and apparel, and perhaps sporting goods and equipment. There is nothing

⁴ <http://www.asleyetracking.com/Site/Products/MobileEyeXGGlasses/tabid/70/Default.aspx>. See also <http://tobii.com/en/eye-tracking-research/global/landingpages/tobii-glasses-2/our-offering/> (“With Tobii Glasses 2 you can do research you couldn’t do before.”). Both web pages attached to the final office action, March 13, 2015.

⁵ <http://eyewriter.org/developer/>. Attached to the final office action, March 13, 2015.

in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship.”).

We note that the advertisement quoted above and the other two advertisements of record use the word “glasses” in describing their eye-tracking devices. For instance:

Tobii Glasses Live View

All you need to start reaping the benefits of wearable eye-tracking: Tobii Glasses Eye Tracker and Glasses Controller Software to easily control your test, and record and live view eye tracking data. The software runs on a standard Win 8 Pro tablet or any Win 8 or 7 computer.

And:

The EyeWriter software is two parts — an eye-tracking software designed for use with our low-cost glasses, and a drawing software designed for drawing with eye movements.

See also MICROSOFT COMPUTER DICTIONARY (a “wearable computer” can be worn “like eyeglasses”)

Nevertheless, the context makes clear that these references to “glasses” do not mean that goods of the type identified by Applicant are identical — or even related — to Registrant’s eyewear. Although these eye-tracking “glasses” comprise wearable devices which are worn in the manner of eyeglasses, the goods identified in the cited registration (eyewear, eyeglasses, sunglasses, etc.) do not include eye-tracking devices or computer hardware or software of any sort, nor are they used for the same or even related purposes. Rather, Registrant’s goods are lenses, frames, and related accessories worn for correction or protection. While Applicant’s and Registrant’s goods are similarly attached to the wearer’s face, and have something to do with the eyes,

that alone does not create a meaningful commercial relationship between them.

Finally, the record is devoid of any evidence suggesting that eyewear such as that identified in the cited registration does (or would be thought to) emanate from the same sources as computer hardware and software for eye tracking. It does not appear that any of the purveyors of eye-tracking devices and software make or sell corrective or protective lenses and associated accessories or vice versa.

We conclude that the goods at issue are not related and that their customers and channels of trade do not significantly overlap. This factor weighs heavily against a finding of likelihood of confusion.

III. Conclusion

We have carefully considered all of the evidence and argument of record, including any not specifically discussed. Although the marks are identical, that alone is an insufficient basis for a finding of likelihood of confusion.

Decision: The refusal to register is REVERSED.