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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86249068
Applicant	Eyefluence, Inc.
Applied for Mark	EYEOS
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Date	12/16/2015

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Eyefluence, Inc. Serial No.: 86249068 Filed: April 10, 2014 Mark: EYEOS Examining Attorney: Bernice Middleton Trademark Law Office 106	Before the Trademark Trial and Appeal Board on Appeal Brief filed: December 16, 2015

APPEAL BRIEF

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Sir:

Applicant submits this Appeal Brief in support of its appeal of the Final Office Action issued March 13, 2015, and the denial of Applicant's Request for Reconsideration issued October 5, 2015, in which the Examining Attorney has refused to register the mark "EYEOS." Applicant timely filed the Notice of Appeal on September 14, 2015, following a Request for Reconsideration filed September 13, 2015, suspending the proceedings before this Board. This Appeal was resumed pursuant to a "Proceedings Resumed" notice issued October 16, 2015, which allowed Applicant sixty days therefrom in which to file its Appeal Brief. Accordingly, this Appeal Brief is being timely filed within such deadline.

CERTIFICATE OF TRANSMISSION

I hereby certify that this paper (along with any item(s) referred to as being attached or enclosed) is being electronically submitted through the Electronic System for Trademark Trials and Appeals to the Commissioner of Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451 on the date indicated below:

Date of Transmission: December 16, 2015 /James K. Sakaguchi/
James K. Sakaguchi

INTRODUCTION

Applicant appeals the Examining Attorney’s final refusal to register the mark “EYEOS” on the ground that it is confusingly similar to the registered mark “EYEOS” in U.S. Registration No. 4,559,079, to Reptile, Inc. (“the Reptile registration”) pursuant to Trademark Act Section 2(d) (15 U.S.C. §1052(d)). Applicant respectfully submits that this rejection should be reversed because consumer confusion between the cited registered mark and Applicant’s mark is not likely because of the substantial differences in the respective goods, and the dissimilarity of the respective trade channels. Contrary to the Examining Attorney’s refusal, the Reptile registration’s identified goods, including eyewear and components or accessories for eyewear, do NOT include, and are not complementary or suitable for use with, Applicant’s recited goods comprising “computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices.” A consumer would consider the goods identified in the Reptile registration to refer to conventional corrective or protective devices, such as eyeglasses or contact lenses, for the eyes, and not to eyeframes or other wearables having eye tracking or eye movement hardware and/or software. As Applicant’s goods are explicitly limited to computer hardware and software related to eye tracking and/or eye movement for wearable devices, an ordinary consumer would NOT consider the registrant’s goods and the Applicant’s goods to be related, or that the respective goods would emanate from the same source. Accordingly, there is not a likelihood, i.e., a probability, of consumer confusion as to the source of Applicant’s goods and the goods of the Reptile registration. Furthermore, the very differentiated trade channels between Applicant’s goods and the registrant’s goods support that there is not a likelihood of confusion between Applicant’s mark used in connection with Applicant’s goods and the registrant’s mark used in connection with the registrant’s goods.

I. Substantive Refusal - Section 2(d)

In the Final Office Action issued March 13, 2015, the Examining Attorney refused registration of the Applicant's proposed mark, "EYEOS" under Section 2(d), 15 U.S.C. §1052(d), as being likely to cause confusion, to cause mistake, or to deceive a potential consumer as the source of the goods of the Applicant with respect to the goods of the Reptile registration. 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. Because Applicant’s goods are significantly different from, and not linked or complementary to, the registrant’s goods, and the respective trade channels are dissimilar, there is no likelihood of confusion and this refusal should be reversed. seminal

The Court of Customs and Patent Appeals expressed the factors to be evaluated in determining a likelihood of confusion in the seminal case involving Trademark Act Section 2(d), *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). With respect to making a determination of likelihood of confusion, the Court explained that not all factors are relevant and only those relevant factors need be considered, and that the significance of any particular factor may differ from case to case. *duPont*, 476 F.2d at 1361-1362. While the weight applied to the relevant factors may vary, one of the two *key* consideration is the relatedness of the goods or services as described in the application and registration(s). Another factor which may be relevant and must be considered if there is pertinent evidence in the record is the similarity or dissimilarity of established, likely-to-continue trade channels.

A. The Applicant’s Goods and the Registrant’s Goods are So Unrelated that There is No Likelihood of Confusion Even if the Marks are Identical

The mark “EYEOS” used in connection with recited goods, namely “computer hardware

and software for providing a user interface involving eye tracking and/or eye movement for wearable devices” are so dissimilar to the goods of the Reptile registration, namely eyewear and components and accessories, that a consumer would not be likely to be confused as to the source of the respective goods. The registrant’s goods are related to conventional eyewear and components and accessories, while Applicant’s goods are related to computer hardware and software for wearable devices. Even though conventional eyewear and components and accessories therefor may be related to a generic wearable device, they are completely unrelated to computer hardware and computer software for providing a user interface involving eye tracking and/or eye movement for wearable devices. Accordingly, a consumer simply would not consider the source of conventional eyewear and related items to also be the source of Applicant’s goods, and confusion is ultimately to be decided on the basis of whether there is a *likelihood* of confusion as to the source or origin of the services. *See Globe-Union Inc. v. Raben Laboratories Inc.*, 180 U.S.P.Q. 469 (T.T.A.B. 1973). To sustain a holding of likelihood of confusion, it is not sufficient that there exists “de minimus” situations of confusion, or a “possibility” that the proposed mark will engender confusion with a cited registration. *See MTD Prods. v. Universal Tire Corp.*, 193 U.S.P.Q. 56 (T.T.A.B. 1976); *Carter-Wallace, Inc. v. Procter & Gamble Co.*, 167 U.S.P.Q. 713 (9th Cir. 1970). A refusal to register based upon confusing similarity should only be made when a “likelihood,” meaning “probability,” of confusion has been established and not merely a “possibility” while assuming perceptions which are “possible,” but unlikely. In the present case, there is simply no probability of consumer confusion as to the source of the respective goods.

A consumer would understand the registrant’s goods to be limited to conventional eyewear and components and accessories for such eyewear. The registrant’s goods include a

very extensive list of eyewear, and components and accessories therefore:

> 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.

This extensive list of goods does not include a single description or item related to computer technology such as computer hardware or software. All of the listed goods are clearly directed to conventional eyeglasses, components for conventional eyeglasses (such as frames and lenses), or accessories for conventional eyeglasses (such as cases and chains).

Indeed, the broad term “eyewear” is defined as “corrective or protective devices (as glasses or contact lenses) for the eyes”. See, e.g. www.merriam-webster.com/dictionary/eyewear Merriam Webster online dictionary. In cases where the terminology in an identification is unclear or undefined, the Trademark Trial and Appeal Board has permitted an applicant to provide extrinsic evidence, such as dictionary definitions, to show that the registrant’s identification has a specific meaning to members of the trade. *See, e.g., In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 & n.10 (TTAB 2009) (noting that, although extrinsic evidence may not be used to limit or restrict the identified goods, it is nonetheless proper to consider extrinsic evidence in the nature of dictionary entries to define the terminology used to describe the goods). Accordingly, the registrant’s goods are properly limited to conventional eyeglasses, contact lenses, and components and accessories for such items.

In marked contrast, Applicant’s recited goods are computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices.

Accordingly, Applicant’s goods are explicitly limited to computer hardware and software. Furthermore, Applicant’s goods are only related to wearable devices which are compatible with the computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices. It is unequivocal that not all wearable devices are compatible with such computer hardware and software. In fact, for wearable devices which are eyeglasses, the eyeglasses must be specifically configured for use with the computer hardware and software for providing a user interface involving eye tracking and/or eye movement. This understanding is inherent in Applicant’s recitation of goods which are explicitly limited to computer hardware and software for providing a user interface involving eyetracking and/or eye movement for wearable devices.

Therefore, contrary to the Examiner’s unsupported conclusions in the Final Office Action, the registrant’s goods, including conventional eyeglasses, and components and accessories therefor, are clearly NOT compatible or configured for use with Applicant’s goods.

Moreover, a consumer would not expect that computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices, or even specially configured eyeglasses having such computer hardware and software, would emanate from the same source as registrant’s goods comprising eyeglasses or components or accessories for eyeglasses. A consumer would expect the Applicant’s goods to come from a technology company involved in developing and commercializing computing devices and/or electronics, not a source of eyeglasses having no computing or electronic functionality or stated compatibility therewith. Conversely, a consumer would NOT expect a provider of conventional eyeglasses to provide eyeglasses compatible for use with computer hardware and software for providing a user interface involving eye tracking and/or eye movement for wearable devices.

Thus, there would not be a likelihood of confusion, mistake, or deceit with respect to Applicant’s mark and the registrant’s mark in connection with the significant dissimilarity of the respective goods.

In fact, the Examining Attorney has provided absolutely no evidence to support the finding in the Final Office Action that Applicant’s goods and the registrant’s goods “have complementary uses in various industries from science and medicine to marketing and consumer research.” To the contrary, the evidence of third party websites showing various eyeglasses having electronic and/or computer functionality support that such eyeglasses are specially designed and configured with the electronic and/or computer functionality. In fact, ALL of the products shown in the evidence of eye-tracking eyeglasses are specially designed eyeglasses integrated with the electronics and computer devices, and NONE of the products are for use with conventional eyeglasses provided by another party. Accordingly, the Examiner’s assertion that eyetracking and eyeware are somehow complementary is refuted by the Examining Attorney’s own evidence.

Moreover, the Examining Attorney provides no evidence of any conventional eyewear, such as the registrant’s goods, which can be used with any of the electronic and computer devices and computer software shown in the third party websites provided by the Examining Attorney. For instance, the examples of eye-tracking software and eye-drawing software in Attachments 10 and 11 of the Final Office Action are ONLY for use with the provider’s own electronic glasses or with other commercial eyetracking glasses (e.g., MyTobii; see Attachment 11) and not with conventional eyewear.

Thus, the Examining Attorney has failed to provide any evidence showing any relationship between the registrant’s conventional eyeware and Applicant’s computer hardware

and software for providing a user interface involving eye tracking and/or eye movement for wearable devices. The Examining Attorney must provide evidence showing that the goods and services are related to support a finding of likelihood of confusion. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). As in *White Rock*, the Examining Attorney has not provided any evidence that the registrant’s goods and Applicant’s goods are related.

As the similarity/dissimilarity is one of the two *key* factors in determining likelihood of confusion, the Examining Attorney’s failure to show a relationship between the Applicant’s goods and the registrant’s goods weighs heavily in favor of finding that there is not a likelihood of consumer confusion. Therefore, the Examining Attorney has not shown that there is a likelihood of consumer confusion between Applicant’s mark used on Applicant’s goods and the same mark used on registrant’s goods. As a result, the rejection under Section 2(d) should be reversed.

A. The Trade Channels of Applicant’s and the Registrant’s Goods Are Different Thereby Also Negating A Likelihood of Consumer Confusion

The inherent trade channels associated with the registrant’s goods and Applicant’s goods are different, which also weighs against a finding of likelihood of confusion between Applicant’s mark and the registrant’s mark. As explained in *duPont*, the dissimilarity of established, likely-to-continue trade channels is another factor which must be considered if there is pertinent evidence in the record. Here, the Applicant has provided evidence of the channels of trade of the

registrant based on the registrant’s recited goods and evidence of the actual trade channels utilized by the registrant. Applicant has also explained the trade channels inherent in the type of goods recited in Applicant’s trademark application. Accordingly, there is evidence of the dissimilarity of the trade channels and this factor must be considered.

As evidenced by Exhibits 2 and 3 from Applicant’s response dated January 21, 2015, the only established trade channels for the registrant’s goods of record is their own website – at which they sell conventional “reader” glasses. There is no evidence of record that demonstrates that the registrant sells eye tracking systems nor that their reader eyeglasses could be utilized with such systems. Thus, any conclusion that Reptile is likely to expand into eye tracking systems is without any basis on the record and is directly contrary to the evidence of record demonstrating the actual, established trade channels for Reptile’s goods.

Further, as demonstrated by previous Exhibit 3, Reptile’s products are “premium reading eyewear” that are “targeted to mid- to high-end optical and optometric practices, refractive surgery practices, and ophthalmology practices.” Thus, the channels of trade for Reptile’s goods are its own website with sales targeted to specialized medical practitioners for sale to their patients.

There is no basis that either Applicant’s goods or the eye tracking systems identified in the evidence provided by the Examining Attorney in the Final Office Action would be targeted to such medical practitioners and their patients. Instead, the exemplary eye tracking systems examples identified in the Final Office Action relate to various research fields (the Tobii eye tracker) or allowing disabled persons to communicate or create art (the Eye-Writer/Eye-Drawing system). Thus, they would likely be marketed to researchers or caregivers for disabled persons. None of these systems would be marketed to ophthalmologists to sell to patients nor is there any

basis on the record for concluding that a provider of eyeglasses to ophthalmology practices would likely expand into eye tracking systems.

Finally, the conditions under which purchasing decisions are made support that confusion is not likely. Eye tracking systems potentially cost thousands of dollars and so would not be the subject of impulse decisions, but rather careful, sophisticating purchasing. Thus, a purchaser of eye tracking systems would be unlikely to conclude that the source of conventional eyewear is somehow associated with such systems.

Therefore, this *duPont* factor also supports a finding that there is no likelihood of consumer confusion between Applicant's mark and the registered mark. Thus, the refusal under Section 2(d) should be reversed.

CONCLUSION

In view of the lack of any relationship between Applicant's goods and registrant's goods, and the markedly different trade channels of the respective goods, the Examiner has failed to show a likelihood of consumer confusion between Applicant's mark and the registrant's mark. As shown herein by the Applicant, there would just not be a likelihood - a probability, not merely a possibility -that a typical consumer would be confused as to the source of Applicant's goods and/or registrant's goods bearing the subject mark. Accordingly, Applicant respectfully submits that the rejection on the basis of likelihood of confusion should be reversed.

Respectfully submitted,

Dated: December 16, 2015 By: /James K. Sakaguchi/
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1. *Carter-Wallace, Inc. v. Procter & Gamble Co.,* 167 U.S.P.Q. 713 (9th Cir. 1970)

2. *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973)

3. *Globe-Union Inc. v. Raben Laboratories Inc.*, 180 U.S.P.Q. 469 (T.T.A.B. 1973)

4. *MTD Prods. v. Universal Tire Corp.*, 193 U.S.P.Q. 56 (T.T.A.B. 1976)

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