

This Opinion Is Not a
Precedent of the TTAB

Mailed: December 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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E8 Storage Systems Ltd.

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Application Serial No. 87597189

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A. Tally Eitan of Eitan Mehulal & Sadot for E8 Storage Systems Ltd.

Rhoda Nkojo, Trademark Examining Attorney, Law Office 117,
Hellen Bryan-Johnson, Managing Attorney.

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Before Zervas, Bergsman and Ritchie, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

E8 Storage Systems Ltd. (Applicant) filed an application on the Principal Register of the mark E8 STORAGE, in standard character form, for the goods set forth below, as amended:

Computer software for storage of data and information; computer software that allows software modules in virtual containers to deliver processing of data; Rack-mounted computer storage devices, namely, high speed storage sub systems for high performance and high availability storage of electronic data either locally or via a telecommunications network; all the foregoing not intended for end-users and all the foregoing excluding computer software for use in

monitoring and responding to computer security breaches and computer anti-virus software, in Class 9.¹

Applicant disclaimed the exclusive right to use the word “Storage.”

The Examining Attorney refused to register Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark E8 SECURITY, in standard character form, for “computer software for use in monitoring and responding to computer security breaches; computer anti-virus software,” in Class 9, as to be likely to cause confusion.²

Registrant disclaimed the exclusive right to use the word “Security.”

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); see also *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78

¹ Application Serial No. 87597189 filed September 6, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming February 15, 2017, as the date of first use of the mark anywhere and in commerce.

² Registration No. 4681429, registered February 3, 2015. The registration also includes services in Class 42 that were not included in the Section 2(d) refusal.

USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

I. The similarity of dissimilarity of the marks.

We turn first to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in

either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). In comparing the marks, we are mindful that “[t]he proper test 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.” *Cai v. Diamond Hong, Inc.*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); *see also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

Applicant’s mark E8 STORAGE is similar to the registered mark E8 SECURITY because both marks share the arbitrary term E8. The term E8 has no meaning when used in connection with computer storage software or computer security software.³ An arbitrary mark is a “known word used in an unexpected or uncommon way.” *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong); *see also* *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369,

³ “E₈ is any of several closely related exceptional simple Lie groups, linear algebraic groups of Lie algebras of dimension 248.” Wikipedia attached to the December 21, 2017 Office Action (TSDR 90-96); *see also* Aimath.org attached to the December 21, 2017 Office Action (TSDR 97-98); OXFORD LIVING DICTIONARIES (oxforddictionaries.com) attached to the July 21, 2018 Office Action (TSDR 10-14); Merriam-Webster.com attached to the July 21, 2018 Office Action (TSDR 15-21).

All references to the application record are to the Trademark Status and Document Retrieval (TSDR) system. All citations to documents contained in the TSDR database are to the downloadable .pdf version of the documents.

73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks).

Although we consider the marks in their entirety, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, the descriptive words “Storage” and “Security” have less significance in the analysis regarding the similarity or dissimilarity of the marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

The descriptive words “Storage” and “Security” have diminished significance too because E8 is the lead term in both marks; relevant purchasers are likely to notice and remember E8. E8 in both marks hence form the commercial impression

engendered by the marks. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1048 (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps.*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (noting that the dominance of BARR in the mark BARR GROUP is reinforced by its location as the first word in the mark); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Finally, because both Applicant’s mark and Registrant’s mark are in standard character form, they are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording, and not in any particular display. Thus, Applicant may depict its mark in any manner, regardless of the font style, size, or color. In fact, Applicant may display E8 STORAGE in a manner similar to Registrant’s mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). Applicant’s original and substitute specimens, shown below, display the term E8 as the dominant part of Applicant’s mark.



Likewise, Registrant may display its mark with an emphasis on the leading term E8.

Trade dress may be used to prove that a word mark projects a similar commercial impression. As the Court of Appeals for the Federal Circuit has stated:

Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time. *Vornado, Inc. v. Breuer Electric Mfg. Co.*, 390 F.2d 724, 156 USPQ 340, 342 (CCPA 1968). But the trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression.

Kenner Parker Toys Inc. v. Rose Art Indus. Inc., 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992). See *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984).

In sum, because both marks include the dominant, arbitrary term E8 followed by a descriptive term, the marks are similar. “[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). The peripheral differences in this case fail to distinguish the marks.

II. The similarity or dissimilarity and nature of the goods.

In determining whether the goods at issue are related, it is not necessary that the goods of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the goods are related in some manner or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs.*, 101 USPQ2d at 1722; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010).

Where very similar marks are involved, as is the case here, the degree of similarity between the parties' goods that is required to support a finding of likelihood of confusion declines. *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002) ("the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion."); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) (same). It is only necessary that there be a viable relationship between the two to support a finding of likelihood of confusion. *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue here, of course, is not whether purchasers would confuse the parties' goods, but rather whether there is a likelihood of confusion as to the source of these goods. *In re Cook Medical Technologies*

LLC, 105 USPQ2d 1377, 1380 (TTAB 2012); *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

To show that the identified storage software and security software are related, the Examining Attorney submitted excerpts from third-party websites using similar marks for storage and security software, such as that identified in the application and in the cited registration. The Examining Attorney submitted excerpts from the third parties listed below.⁴

Evidence submitted with December 21, 2017 Office Action:

1. IBM

a. IBM Security (ibm.com/security/products)⁵

b. IBM Spectrum Storage (ibm.com/it-infrastructure and ibm.com/storage/spectrum)⁶

2. Hewlett-Packard

a. HP Secure (hp.com)⁷

b. HP software defined storage (hp.com)⁸

⁴ It was not necessary for the Examining Attorney to submit these excerpts a second time in her July 21, 2018 Office Action.

⁵ TSDR 13-41.

⁶ TSDR 44-50.

⁷ TSDR 51-57.

⁸ TSDR 58-64.

3. Veritas

- a. Veritas (veritas.com/solutions/data-protection)⁹
- b. Veritas (veritas.com/products/software-defined-storage)¹⁰

4. Dell

- a. DELL EMC software defined storage (dell.com)¹¹
- b. DELL DATA GUARDIAN (data.security.dell.com/security-solutions)¹²

5. Microsoft

- a. Microsoft software defined storage (microsoft.com-us/cloud-platform/software-defined-storage)¹³
- b. Microsoft Secure (microsoft.com/en-us/security)¹⁴

Evidence submitted with July 21, 2018 Office Action:

1. NetApp

- a. NetApp data storage software (netapp.com)¹⁵
- b. NetApp ONTAP data security (netapp.com)¹⁶

⁹ TSDR 65-67.

¹⁰ TSDR 68-73.

¹¹ TSDR 74-78.

¹² TSDR 79-81.

¹³ TSDR 82-85.

¹⁴ TSDR 86-89.

¹⁵ TSDR 31-38.

¹⁶ TSDR 39-45.

2. VMWARE

- a. VMWARE Professional Services for security (vmware.com/professional-services/transform-security.html)¹⁷
- b. VMWARE defined data storage (vmware.com/products/software-defined-storage.html)¹⁸

In addition, the Examining Attorney submitted copies of five third-party trademark registrations for marks for both computer software security and storage of data and information.¹⁹ Third-party registrations based on use in commerce that individually cover a number of different goods might have probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988). The registrations, with relevant portions of the identifications, are listed below.

Mark	Reg. No.	Goods
CLOUD PROCESSOR	4618925	Computer data processing systems comprising, inter alia, memory and computer security software; computer data storage systems comprising computer memory
SUNGUARD AVAILABILITY SERVICES	4694503	Computer software for use in the field of computer security and data storage optimization

¹⁷ TSDR 46-53.

¹⁸ TSDR 54-56.

¹⁹ July 21, 2018 Office Action (TSDR 71-92). We did not consider Registration No. 5283909 for the mark COPSYNCR because the description of goods does not include computer security software (TSDR 80-84).

Mark	Reg. No.	Goods
CM BROWSER	5056339	Computer security and privacy software; software for use in database management and electronic storage of data
NORTON SECURED	4365342	Computer software for database management in the field of cryptographic network security and data security functions; computer software and firmware for the management, transmission, and storage of data and information
RUGGED. RELIABLE. READY.	5501841	Computer storage devices, namely, high-speed storage subsystems for storage and backup of electronic data either locally or via a telecommunications network; computer security consultancy; computer security consultancy in the field of scanning and penetration testing of computers and networks to assess information and security vulnerability

Applicant contends that the goods are not related for the following reason:

Registrant performs behavior analytics. This means the security element of Registrant monitors the user's behavior, learn[s] from it, and act[s] upon it in their security product. Whereas Applicant's product, by contrast is not even exposed to the end users because it is only attached to the servers.

* * *

[T]he Applicant provides infrastructure integrated software to form cost-effective storage services. Applicant does not sell to computer administrators which Registrant's [sic] sell to.²⁰

The problem with Applicant's contention is that we must compare Applicant's and Registrant's respective goods as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317,

²⁰ Applicant's Brief, p. 2 (7 TTABVue 3).

110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's description of goods includes "computer software for storage of data and information" "excluding computer software for use in monitoring and responding to computer security breaches and computer anti-virus software" and Registrant's description of goods includes "computer anti-virus software." Notwithstanding Applicant's argument regarding the actual scope of its own and the cited Registrant's commercial use of its mark, the evidence submitted by the Examining Attorney shows that the same companies use the same or similar marks to identify both "computer software for storage of data and information" and "computer anti-virus software."

Applicant argues that "[t]he fact that other parties may provide security software and storage software by the same source, does not warrant that this is the case in the present circumstances as in the present case."²¹ While Applicant may not provide security software and Registrant may not provide storage software, the evidence shows that some companies provide both types of software under the same or similar marks. Thus, a consumer familiar with E8 SECURITY software encountering E8 STORAGE software may mistakenly believe that the software emanates from the same source because of the similarity of the marks used to identify the software.

We find that the goods are related.

²¹ Applicant's Brief, p. 4 (7 TTABVUE 5).

III. Established, likely-to-continue channels of trade and classes of consumers.

As noted above, Registrant’s description of goods is “computer software for use in monitoring and responding to computer security breaches; computer anti-virus software” without any limitations or restrictions. Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in the cited registration, we presume that Registrant’s goods are offered in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139, 140 (CCPA 1958); *In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). This means that Registrant’s could license its security software to those who are not “end-users,” that is, consumers who would or could license Applicant’s storage software. Thus, the restrictions in Applicant’s description of goods do not remove the potential overlap in channels of trade and classes of consumers.²² Registrant’s description of goods is unrestricted which allows Registrant’s channels of trade and classes of consumers to overlap with Applicant’s channels of trade and classes of

²² The restrictions “all the foregoing not intended for end-users and all the foregoing excluding computer software for use in monitoring and responding to computer security breaches and computer anti-virus software” are separated from the rest of the description of goods by a semicolon. “Semicolons should generally be used to separate distinct categories of goods or services within a single class.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.01(a) (2018). However, as the restrictions do not make sense as a standalone category of products. Given the structure of the identification, as worded, we find that the restrictions apply to all of the products identified.

consumers. In this regard, it is common knowledge that security software protection is essential for any computer system or network no matter its size or complexity. Because security is an essential feature of any computer system or network, it would not be unusual for a computer system or network to have both storage software (whether or not licensed to end users) and security software.

We find that Applicant's goods are offered in some of the same channels of trade and to some of the same classes of consumers as Registrant's goods.

IV. Consumer purchasing care

Applicant contends that the prospective purchasers of Applicant's and Registrant's software exercise a high degree of care when making their purchasing decisions because of the complexity of those products. The prospective purchasers have "a clear understanding of the needs and requirements of the products are aware of the full spectrum of the respective products' capabilities."²³ In addition, "the purchase process is carefully designed, thereby eliminating likelihood of confusion."²⁴ Finally, the high price of Applicant's software minimizes the likelihood of confusion.

As stated above, the purchase patterns for the respective products are very specific. This fact, together with the difference in nature of the products, the sophistication of the buyers and different channels of trade of the respective products, and the price of Applicant's software which amounts to US\$100,000 further support the conclusion that any possibility of confusion is negated. Again, the buyers of Applicant's goods do not make the purchase decision hastily. As a matter of necessity, the purchase patterns call for careful consideration and do not allow for impulse purchasing habits. Evidently, the products of the

²³ Applicant's Brief, p. 4 (7 TTABVUE 5).

²⁴ Applicant's Brief, p. 5 (7 TTABVUE 6).

Registrant also address specific needs of Registrant's buyers who seek security software solution for monitoring end-users' behaviour to detect security breaches.²⁵

The first problem with Applicant's arguments is that they are attorney argument; they are not supported by any evidence. As the Federal Circuit has held, "Attorney argument is no substitute for evidence." *Zheng Cai, d/b/a Tai Chi Green Tea Inc. v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)); see also *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

Even assuming that we could accept counsel's arguments as facts, Applicant did not explain the purchasing process. Compare *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1413 (TTAB 2010) (products cost \$14,000 and \$47,000 respectively and testimony established that purchases of both products involve significant study and negotiation).

Finally, Applicant relies on extrinsic evidence to explain or clarify the nature of Applicant's data storage software and Registrant's security software. As noted above, Applicant's description of goods includes "computer software for storage of data and information" not intended for end users and excluding computer software for use in monitoring and responding to computer security breaches and computer anti-virus software. However, we may not read other limitations or restrictions into the description of goods. See *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v.*

²⁵ Applicant's Brief, p. 6 (7 TTABVUE 7).

Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). Therefore, we must presume that Applicant’s storage software includes all types of storage software of various levels of complexity and at various price ranges other than software licensed to end users and excluding security software. Likewise, Registrant’s identified security software includes all types of security software of various levels of complexity and price ranges. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”); *In re Opus One Inc.*, 60 USPQ2d at 1817 (while the applicant “offered evidence to show that registrant’s OPUS ONE wine is an expensive wine... ‘wine’ must be presumed to encompass inexpensive or moderately-price wine.”); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Given the nature of the goods, we accept Applicant’s assertion that the respective software may be licensed by consumers exercising a heightened degree of purchaser care. Nevertheless, even careful purchasers are likely to be confused when

encountering similar goods sold under similar marks. As stated by the Court of Appeal for the Federal Circuit, “[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. ‘Human memories even of discriminating purchasers ... are not infallible.’” *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)). Therefore, the fact that the purchasers are experienced computer software professionals who may exercise care before licensing these software products does not mean there can be no likelihood of confusion. In the present case, the similarity between the marks and the similarity between the goods as identified outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff’d*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

We find this *DuPont* factor to be neutral.²⁶

V. Conclusion

Because the marks are similar, the goods are related, and the goods are offered in some of the same channels of trade to some of the same classes of consumers, we find that Applicant’s mark E8 STORAGE for “computer software for storage of data and

²⁶ Even had we found this factor to weigh against a likelihood of confusion, it is outweighed by the other factors in our finding that confusion is likely.”

information; computer software that allows software modules in virtual containers to deliver processing of data; Rack-mounted computer storage devices, namely, high speed storage sub systems for high performance and high availability storage of electronic data either locally or via a telecommunications network; all the foregoing not intended for end-users and all the foregoing excluding computer software for use in monitoring and responding to computer security breaches and computer anti-virus software” is likely to cause confusion with the registered mark E8 SECURITY for “computer software for use in monitoring and responding to computer security breaches; computer anti-virus software.”

Decision: The refusal to register Applicant’s mark E8 STORAGE is affirmed.