

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Firefly Technologies, Inc.

Serial No. 76365573

Michael M. McGaw of Smith & Hopen, P.A. for Firefly
Technologies, Inc.

Brian Pino, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Bucher, Grendel and Walsh, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark **FIREFLY** (*in standard character format*) for goods
identified in the application, as amended, as follows:

"systems for alphanumeric text entry, namely,
hand-held and desktop computer input
keyboards and keypads" in Int. Class 9.¹

This case is now before the Board on appeal from the
final refusal of the Trademark Examining Attorney to
register this designation based upon Section 2(d) of the
Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining

¹ Application Serial No. 76365573 was filed on February 4, 2002
based upon applicant's allegation of a *bona fide* intention to use
the mark in commerce.

Attorney has found that applicant's mark, when used in connection with the identified goods, so resembles the mark

FIREFLY (*in standard character format*) registered for the following goods:

"video cameras; digital video input and storage devices, namely, light sensitive devices such as CCD's or CMOS cameras which transfer digital video and image data over devices such as IEEE1394 ports, USB ports and ethernet interfaces to recording devices, namely, hard drives, floppy and compact disks and memory chips; digital and analogue imaging cameras and software for computer imaging uses with said cameras; computer and video hardware, namely, light to electricity converting devices such as CCD and CMOS cameras, and cameras that have image processing capabilities, and software for use with said cameras for creating and capturing still and video images; computer software for acquiring, capturing, creating, manipulating, converting, transferring, presenting and storing still and video images; computer hardware and software for 3-D range sensing, namely, for object dimensioning, object classification, object tracking, and motion control, namely, autonomous navigation; computer hardware and software for 3-D digitization, namely, for 3-D modeling, virtual reality, animation and photorealistic rendering; computer hardware and software for capturing and processing of images associated with video surveillance; and instructional manuals sold as a unit therewith" in International Class 9,²

² Registration No. 2528664 issued on January 8, 2002 based upon an application filed on August 30, 2000, later claiming first use anywhere at least as early as November 9, 2000 and first use in commerce at least as early as December 8, 2000.

as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and applicant have briefed the case. We affirm the refusal to register.

In arguing for registrability, applicant contends that given the difference in the type of goods offered as well as the dissimilarity of trade channels, and in light of the sophistication of the consumers, the Office has failed to demonstrate a likelihood of consumer confusion.

By contrast, the Trademark Examining Attorney contends that the evidence of record demonstrates that the respective goods are of a kind that may emanate from a single source, are highly related, and that the applicant's goods are within the registrant's normal zone of expansion.

Likelihood of Confusion

We turn then to a consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based upon our analysis of all 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 (CCPA 1973). See also In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any

likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The marks

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety. The Trademark Examining Attorney argues that applicant's mark is the same as the registered mark in appearance, sound, connotation and commercial impression. Applicant admits that the respective marks are identical. [Applicant's brief, p. 3]. Hence, we find that applicant's mark is identical in all respects to registrant's cited mark.

The goods

We turn next to the relationship of the goods as described in the application and cited registration. As noted above, the marks are identical in every respect. With both registrant and applicant using the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close

as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ["[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source."].

In order to support a holding of likelihood of confusion, it is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See On-line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

We agree with applicant that our analysis must focus on the way the identified goods are encountered in the marketplace by typical consumers and whether consumers will be confused as to the source of the products. See 3 J.

Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 23:58 (4th ed. 2004) [a tribunal must "attempt to recreate the conditions under which prospective purchasers make their choices" in order to arrive at a "realistic" evaluation of likelihood of confusion].

When faced with a determination of likelihood of confusion in the field of computers, computer peripherals and components, and an array of digital gadgets having state-of-the-art microprocessing capabilities, we certainly have no *per se* rule, for example, that computer keyboards are related to digital video camera and collateral devices for image capture and manipulation.

On the other hand, applicant argues that "the functionality of keyboards and image capture devices, such as video cameras, is quite different." Applicant argues that the uses of a computer keyboard and an image capture device are in no way so related such that they would be likely to be connected in the mind of a prospective purchaser.

We agree with the Trademark Examining Attorney that merely because applicant's goods may have different "functionalities" or uses from registrant's goods, this fact does not preclude a finding of likelihood of confusion. The issue is not likelihood of confusion between particular

goods, but likelihood of confusion as to the source of those goods. *In re Shell Oil Co., supra.* In support of his position, the Trademark Examining Attorney has made of record a sampling of third-party registrations (all based on use in commerce) drawn from the X-SEARCH database showing that a number of third parties have registered the same mark for both computer keyboards and devices for image capture such as video cameras:

AURORA

for, *inter alia*, "... **computer keyboards ... photographic cameras, video cameras and motion picture cameras; video recorders ...**" in International Class 9;³

HEIDELBERG

for, *inter alia*, "... **keyboards, trackballs, touchscreens, video cameras ...**" in Inter. Class 9;⁴

MAXFIRE

for, *inter alia*, "... **computer keyboards ... and video cameras**" in International Class 9;⁵

TRIANA

for, *inter alia*, "... **keyboards ... photographic video cameras and lenses therefore ...**" in Int. Class 9;⁶

³ Registration No. 2263931 issued on July 27, 1999; Section 8 affidavit (six-year) accepted.

⁴ Registration No. 2275080 issued on September 7, 1999. Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

⁵ Registration No. 2283631 issued on October 5, 1999. Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

⁶ Registration No. 2320324 issued on February 22, 2000. Section 8 affidavit (six-year) accepted.



for, *inter alia*, "... **computer keyboards ... video cameras ...**" in International Class 9;⁷



for, *inter alia*, "... **computer keyboards ... video cameras, video cassette recorders ...**" in International Class 9;⁸

HYP ICT

for, *inter alia*, "... **digital cameras**, television sets, television cameras, **video cameras ... computer keyboards ...** audiovisual apparatus and apparatus for recording, transmitting or reproducing sound or images, namely, **video cassette recorders, video cameras**, sound tape recorders, **video tape recorders**, video disk players ..." in International Class 9;⁹

SCHOOL TECHNOLOGY SOLUTIONS

for, *inter alia*, "... **keyboards ... video recorders ... video cameras ...**" in International Class 9;¹⁰

EPSON SMART PANEL

for, *inter alia*, "... **computer keyboards ... video cameras, digital cameras ...**" in International Class 9;¹¹

I/O MAGIC

for, *inter alia*, "... **computer keyboards; video cameras ... digital cameras ...**" in International Class 9;¹²

⁷ Registration No. 2409124 issued on November 28, 2000. Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

⁸ Registration No. 2421709 issued on January 16, 2001. Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

⁹ Registration No. 2520648 issued on December 18, 2001.

¹⁰ Registration No. 2563962 issued on April 23, 2002.

¹¹ Registration No. 2574992 issued on June 4, 2002.

¹² Registration No. 2623403 issued on September 24, 2002.

MAKING YOUR MOBILE LIFE EASIER

The logo for vtech, featuring the word "vtech" in a bold, lowercase, sans-serif font. The "v" is stylized with a thick stroke.

for, *inter alia*, "... **keyboards ... digital and video cameras ...**" in Inter. Class 9;¹³

for, *inter alia*, "... **computer keyboards ...** apparatus for recording, transmission or reproduction of sound or images, namely, **digital cameras, digital video recorders, ... video cameras, photographic cameras,** video monitors ..." in International Class 9;¹⁴

PARKERVISION

for, *inter alia*, "... **video cameras,** teleprompters, **keyboards ...**" in International Class 9;¹⁵

EPSON MATRIXCCD

for, *inter alia*, "... **computer keyboards ...** video cassette recorders, **video cameras,** sound tapes recorders, **video tape recorders ... digital cameras ...**" in International Class 9;¹⁶

The logo for EMKAY, featuring the word "EMKAY" in a bold, uppercase, sans-serif font. Below it, in a smaller font, is "A DIVISION OF KNOWLES ELECTRONICS". The logo is framed by two curved lines that sweep around the text.

for, *inter alia*, "... remote **keyboards** for personal computers ... **video cameras, digital cameras ...**" in International Class 9;¹⁷

¹³ Registration No. 2694811 issued on March 11, 2003.

¹⁴ Registration No. 2782574 issued on November 11, 2003.

¹⁵ Registration No. 2788645 issued on December 2, 2003.

¹⁶ Registration No. 2823690 issued on March 16, 2004.

¹⁷ Registration No. 2823809 issued on March 16, 2004.

AnexTEK

for, *inter alia* "... **keyboards** ... surveillance systems, namely, **video cameras**, electronic locks, electronic motion sensors; **digital video recorders** ..." in International Class 9¹⁸

GAGGENAU

for, *inter alia*, "... units and input/output devices, namely, **keyboards** and display monitors; ... reproduction and processing of sounds and/or characters and/or images, namely, **video cameras** ..." in International Class 9;¹⁹

marazst

for, *inter alia* "... **computer keyboards**; ... computer interface boards; color monitoring **video cameras**" in International Class 9;²⁰

We have held that these printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely computer keyboards and devices for image capture such as video cameras, are of a kind that may emanate from a single source. See In re Infinity Broad Corp., 60 USPQ2d 1214, 1217-1218 (TTAB 2001); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

In response to this evidence, applicant argues that of nearly four thousand federal trademark registrations listing

¹⁸ Registration No. 2860706 issued on July 6, 2004.

¹⁹ Registration No. 2861161 issued on July 6, 2004.

²⁰ Registration No. 2864207 issued on July 20, 2004.

either "keyboards" or "video cameras" in the identification of goods, only 125 list both of these terms.

The Trademark Examining Attorney contends that applicant's quick numerical comparison is misleading inasmuch as registrant's long listing of goods includes much more than just "video cameras." Moreover, he points out that there is not a minimum number of such registrations the Office must place into the record in order to support a finding of likelihood of confusion.

Other than these third-party registrations, we note that the record is devoid of any showing of the relationship in the actual marketplace of applicant's type of goods to registrant's type of goods. Nonetheless, while the respective goods are not competitive, given the fact that we are faced with identical marks, we find that the Trademark Examining Attorney has provided sufficient probative evidence that under the circumstances of this case, these respective goods could be encountered by the same persons under conditions that could give rise to the mistaken belief that they originate from the same producer. Thus, the factor of the relatedness of the goods favors a finding of likelihood of confusion.

Channels of trade

There are no limitations in either applicant's or registrant's identifications of goods as to their nature, type, channels of trade or classes of purchasers. Hence, it is presumed that the scope of the registration encompasses all goods of the nature and type described, and that the identified goods move in all channels of trade that would be normal for such goods. Accordingly, both applicant's and registrant's goods must be deemed to be rendered in all channels of trade that are appropriate for computers, digital video cameras, and the components of each. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991) [women's shoes are complementary to women's outerwear, and there are no restrictions on registrant's channels of trade]; and In re Elbaum, 211 USPQ 639, 640 (TTAB 1981) ["geriatric preparation" is considered to encompass "therapeutic soak for arthritic hands and feet"]. Hence, the related du Pont factor focusing on the channels of trade also favors a finding of likelihood of confusion.

The conditions under which and buyers to whom sales are made

We noted earlier that neither applicant nor registrant has limited the identification of goods to particular customers. Moreover, applicant has acknowledged that its

own goods (e.g., computer keyboards) are commonly sold at a relatively low price and therefore would not be subjected to a high level of scrutiny or care.

As to registrant's goods, applicant argues that "these are highly sophisticated goods that would only be purchased by a highly sophisticated consumer after exercising a great deal of care." Applicant bases this conclusion, in part, on registrant's identification of goods (e.g., "computer hardware and software for 3-D range sensing, namely, for object dimensioning, object classification, object tracking, and motion control, namely, autonomous navigation; computer hardware and software for 3-D digitization, namely, for 3-D modeling, virtual reality, animation and photorealistic rendering ...").

However, this does not change the outcome herein. Assuming that registrant's goods may well be offered to both professionals and the general public, the standard of care is determined by looking to the least sophisticated purchasers in the class - ordinary consumers. Additionally, the fact that some purchasers may be sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. See In re Decombe, 9 USPQ2d 1812 (TTAB 1988); and In re Pellerin

Milnor Corp., 221 USPQ 558 (TTAB 1983). Rather, even consumers of registrant's goods who are professionals would mistakenly believe that these respective goods originate with, or are in some way associated with, the same producer.

Conclusion:

Applicant's goods are sufficiently related to registrant's goods that given their sale under identical marks, ordinary consumers are likely to be confused as to the source or origin of the respective goods.

Decision: We affirm the refusal to register herein based upon Section 2(d) of the Lanham Act.