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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Behavioral Recognition Systems, Inc.

Serial Nos. 77079919 and 77080183

B. Todd Patterson of Patterson & Sheridan for Behavioral Recognition Systems, Inc.

Lesley LaMothe, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Walters, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Behavioral Recognition Systems, Inc. has filed applications to register the standard character mark AISIGHT and the mark shown below on the Principal Register for "computer hardware and behavior recognition software which enables video surveillance cameras to monitor abnormal behavior," in International Class 9.¹ The design mark includes the following description: "The mark consists of a

¹ Serial Nos. 77079919 and 77080183, both filed January 10, 2007, based on allegations of a bona fide intention to use the marks in commerce.

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rectangle in which appears a capital A and capital I in a vertical orientation. The letters SIGHT appear to the right of [the] rectangle."



The examining attorney has issued a final refusal to register in each application under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's marks so resemble the word mark EYESITE, previously registered for a variety of goods and services, shown below, that, if used on or in connection with applicant's goods, they would be likely to cause confusion or mistake or to deceive.

Registration No. 2728551 [registered June 24, 2003; based on a United Kingdom registration under Section 44(e), with a claim of priority under Section 44(d)]

Owner: Motion Media Technology Limited

Goods and Services:

"Security and surveillance apparatus, namely burglar and security alarms, motion sensors, closed circuit television cameras; Remote audio and video surveillance systems, alarm verification systems, remote audio and video entry systems and video traffic monitoring systems, all comprising of [sic] either closed circuit television cameras, or burglar and security alarms, or motion sensors, or photographic and video cameras, or video monitors, or video cassette recorders and players, or radio pagers, or radio telephones and transmitters, or microphones, or amplifiers, or speakers, or telephones, or automatic telephone dialers, or switchboards, or intercoms, or communication servers, or transmission cables, or computer hardware or software for

use in audio and video surveillance and alarm verification; remote audio and video surveillance systems as above applied to telehealth, telemedicine, e-health, e-medicine, e-healthcare and home based telehealthcare; Video conferencing equipment, namely telephones, video phones and video monitors; video conferencing equipment, namely telephones, video phones and video monitors applied to telehealth, telemedicine, e-health, e-medicine, e-healthcare and home based telehealthcare; Telecommunication systems comprising automatic telephone dialers, telephone receivers, telephone transmitters, telephone answering sets, switchboards, intercoms, caller identification boxes, facsimile machines, communication servers, radio pagers, radio telephones, transmitters; telecommunication systems as above applied to telehealth, telemedicine, e-health, e-medicine, e-healthcare and home based telehealthcare; Computer software for operating, controlling and monitoring audio and video surveillance systems, alarm verification systems and video telephony systems, in the fields of security systems and telephones, radio and video communications; computer hardware for telephone and video exchange and transmission; Telecommunication cables, computer and electrical cables and modems, transmission cables and optical fibres and pertinent connectors; Photographic cameras, video cameras, digital cameras, video cassette recorders and players, blank video cassettes, tape players and recorders, microphones, amplifiers and speakers; Telephone hand sets, telephone head sets, keypads, display apparatus, namely monitors, slide projectors, photographic projectors, projection screens and television sets; Parts, modules and components for the aforesaid goods," in International Class 9.

"Security and surveillance apparatus, namely burglar and security alarms, motion sensors, closed circuit television cameras; Remote audio and video surveillance systems, alarm verification systems, remote audio and video entry systems and video traffic monitoring systems, all comprising of [sic] either closed circuit television cameras, or burglar and security alarms, or motion sensors, or photographic and video cameras, or video monitors, or video cassette recorders and players, or radio pagers, or radio telephones and transmitters, or microphones, or amplifiers, or speakers, or telephones, or automatic telephone dialers, or switchboards, or intercoms, or communication servers, or transmission cables, or computer hardware or software for use in audio and video surveillance and alarm verification; remote audio and video surveillance systems as above applied to telehealth, telemedicine, e-health, e-medicine, e-healthcare and home based telehealthcare; Video conferencing equipment, namely telephones, video phones and video

monitors; video conferencing equipment, namely telephones, video phones and video monitors applied to telehealth, telemedicine, e-health, e-medicine, e-healthcare and home based telehealthcare; Telecommunication systems comprising automatic telephone dialers, telephone receivers, telephone transmitters, telephone answering sets, switchboards, intercoms, caller identification boxes, facsimile machines, communication servers, radio pagers, radio telephones, transmitters; telecommunication systems as above applied to telehealth, telemedicine, e-health, e-medicine, e-healthcare and home based telehealthcare; Computer software for operating, controlling and monitoring audio and video surveillance systems, alarm verification systems and video telephony systems, in the fields of security systems and telephones, radio and video communications; computer hardware for telephone and video exchange and transmission; Telecommunication cables, computer and electrical cables and modems, transmission cables and optical fibres and pertinent connectors; Photographic cameras, video cameras, digital cameras, video cassette recorders and players, blank video cassettes, tape players and recorders, microphones, amplifiers and speakers; Telephone hand sets, telephone head sets, keypads, display apparatus, namely monitors, slide projectors, photographic projectors, projection screens and television sets; Parts, modules and components for the aforesaid goods," in International Class 38.

"Consultation services relating to the design, installation and operation of telecommunications systems and networks; consultation in the field of telecommunications design and product development; leasing of surveillance apparatus; remote visual and audio monitoring of alarm systems; monitoring burglar and security alarms." In International Class 42.

Applicant has appealed the refusal in each application and both applicant and the examining attorney have filed briefs in these cases. In view of the common issues of law and fact, we have considered and determined the refusals to register in each application in this single opinion.

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

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confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Regarding, first, the marks, the examining attorney contends that the only phonetic difference between applicant's marks and the registered mark is the letter "A," that this will not affect the pronunciation of applicant's mark to any significant degree, and that, therefore, the marks are likely to be perceived as phonetically equivalent; that, visually, the "A" in applicant's mark is insufficient to distinguish the marks and, while the words EYESITE and AISIGHT are visually different, they are identical in connotation.

Applicant acknowledges that "eyesite" is a common misspelling of "eyesight," but contends that the prefix "AI" distinguishes the marks visually because it is distinctive and the dominant portion of its mark, arguing that SIGHT and SITE are suggestive of surveillance equipment. Applicant contends that the marks are likely to be perceived as aurally different because the prefix of its marks is likely to be pronounced with a long "A" and long "I" sound, but applicant acknowledges that there is no correct pronunciation of a mark and that "a host of other pronunciations are possible and likely." (Brief, p. 5.) Finally, applicant contends that the connotations of the marks differ, arguing that the registered mark, EYESITE, is likely to be perceived as suggestive of surveillance equipment, whereas its marks are "not necessarily suggestive of applicant's goods, particularly in light of the variety of potential pronunciations" and that "a potential customer could even understand applicant's proposed mark as suggesting artificial intelligence (A-I-SIGHT), a connotation not readily identifiable with the registered mark." (Brief, p. 6.)

We agree with applicant that the marks have the noted differences. However, these differences are not sufficient to distinguish them. The question is not whether the marks can be distinguished when they are compared side-by-side,

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but whether the marks convey similar commercial impressions, such that consumers will view the marks as indicating services emanating from the same source. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Nike Inc. v. WNBA Enter. LLC*, 85 USPQ2d 1187, 1199-1200 (TTAB 2007).

As applicant admits, "sight" and "site" are likely to be perceived as equivalent. As noted, there is no one correct pronunciation of a trademark, and the "AI" prefix to applicant's marks may be subject to several pronunciations, including "long A followed by long I," "long A," or "long I." See *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984). However, because the "AI" prefix is followed by the word SIGHT and "eyesight" is a common word, consumers are likely to perceive of applicant's marks as equivalent to the word "eyesight." This is particularly true with applicant's design mark, in which the letter "I" is the largest letter in the mark and the first letter "A" is so small as to appear to be a dot over the "I." The additional design elements in applicant's design mark are minimal and the dark rectangle merely highlights the initial "I" in applicant's mark. The registered mark is in standard character format and, thus, registrant could conceivably display its mark in

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any manner, including using the same font and contrasting letters that appear in applicant's design mark. 37 C.F.R. § 2.52(a); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988) (when registering mark in block letters, registrant remains free to change the display of its mark at any time).

We find that applicant's marks and the registered mark, when viewed in their entireties, are quite similar in terms of appearance, sound, connotation and commercial impression.

Turning, next, to consider the goods and services involved in this case, the examining attorney contends that the goods are closely related. The examining attorney submitted excerpts "from three online retail establishments that offer security surveillance systems which include surveillance equipment, computer hardware and behavior recognition software"; and concluded that "[t]he evidence demonstrates that companies offering remote video surveillance systems realize the importance of including behavior recognition software as an added component to surveillance systems to improve quality, promote efficiency and allow for rapid response" and that "[c]learly, the goods of applicant and registrant overlap, are complementary, are used together and travel in the same trade channels to the same class of purchaser." (Brief, unnumbered p. 12.)

Following are excerpts from the evidence submitted by the examining attorney:

www.video-surveillance-guide.com - "Video surveillance technology used to be rather simplistic. That is simply not the case anymore. ... The latest advancement in video security systems is the integration of behavior recognition capabilities."

www.oki.com - press release - "Oki Electric Industry Co., Ltd. today announced it has added a 'Behavior Recognition Function' to its remote video surveillance system, VisualCast®SS. This new function detects and alerts suspicious behavior and intrusions."

www.securitysales.com - "Sophisticated behavior recognition software available today - also generically called intelligent video - can recognize a human being, distinguish the person from an inanimate object and accurately determine the number of people in the camera area, where they are going, and where they have been."

Applicant contends that the respective goods are "clearly distinguishable, particularly in the mind of a potential customer." (Brief, p. 6.) Applicant states that the registration "clearly describes typical security and surveillance equipment used primarily for the protection of a facility, such as a store or office building. In contrast, applicant's mark is strictly associated with more advanced technology, i.e., behavior recognition software. Behavior recognition is an emerging technology for advanced monitoring systems and particularly sophisticated customers." (Brief, p. 7.) Applicant states that its software "recognizes, remembers and tracks objects frame by

frame in order to learn what is normal or 'acceptable' behavior or patterns for a given situation. While security monitoring is one potential use of the system, other example situations include traffic monitoring or swimming pool monitoring for abnormal behavior such as a traffic accident or a person not moving in a pool." (Response, August 28, 2007.) Applicant submitted a definition of "abnormal" as "not typical, usual, or regular; not normal; deviant." (*The American Heritage Dictionary of the English Language*, 4th ed. 2000, www.bartleby.com.) Applicant concludes that the potential customers of the respective goods are different; and that these customers would not expect the respective goods to be produced by the same manufacturer.

The question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a

finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

Registrant's International Class 9 goods include "surveillance apparatus," "remote audio and video surveillance systems," "computer hardware or software for use in audio and video surveillance," among other goods. Based on the evidence of record and applicant's own statements, these identified goods clearly encompass applicant's identified "computer hardware and behavior recognition software which enables video surveillance cameras to monitor abnormal behavior." Behavior recognition software is a component of sophisticated video surveillance systems. To this extent, applicant's and registrant's goods are legally identical. The registrant's goods are not

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limited so as to exclude behavior recognition software, as applicant argues.

Further, inasmuch as the identifications of goods in both the involved application and the cited registrations are not limited to any specific channels of trade, we presume an overlap and that these identical goods would be offered in all ordinary trade channels for these goods and to all normal classes of purchasers. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). In other words, we presume the customers and trade channels for both applicant's and registrant's surveillance systems incorporating behavior recognition software are the same.

Applicant contends that, by their nature, its goods are advanced, complicated and expensive systems that are purchased with care by sophisticated buyers; that applicant must install and extensively train its customers on the use of its systems. We do not dispute this contention, but because the marks are so similar, and the goods are in part legally identical, even sophisticated and careful purchasers are not immune to source confusion.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the commercial impressions of

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applicant's marks, AISIGHT, both in standard character and design formats, and registrant's mark, EYESITE, their contemporaneous use on the related goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

Further, to the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); *Ava Enterprises Inc. v. Audio Boss USA Inc.*, 77 USPQ2d 1783 (TTAB 2006); *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844 (TTAB 2004).

Decision: The refusal under Section 2(d) of the Act is affirmed in each of the two applications herein.