

This Opinion is not a  
Precedent of the TTAB

Mailed: August 18, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re Ripples Group Limited*  
—

Serial No. 77820105  
—

Sergei Orel of Miskin & Tsui-Yip LLP,  
for Ripples Group Limited.

Andrew Rhim, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

—  
Before Quinn, Ritchie and Kuczma,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Ripples Group Limited (“Applicant”) seeks registration on the Principal Register  
of the mark:



for:

Cases and bags specially adapted for protecting, holding  
and carrying electronic devices, namely, mobile phones,

cell phones, smart phones, portable telephones, media players, analog voice recorders, digital audio recorders, digital voice recorders, video recorders, personal hand-held portable music players, digital audio players for playing voice recordings, MP3 players, MP4 players, digital audio players designed for playing files with .ogg filename extension, WMA players, digital audio players designed for playing files in 3GPP file format, CD players, MD players, audio recorders, digital video players for watching movies, video file players for watching movies, VCD players for watching movies, DVD players for watching movies, digital video recorders for recording movies, and digital cameras with movie recording functions; screen protectors and fitted plastic films known as skins for covering and providing a scratch proof barrier for protection for mobile phones, cell phones, smart phones, portable telephones, media players, analog voice recorders, digital audio recorders, digital voice recorders, video recorders, personal hand-held portable music players, digital audio players for playing voice recordings, MP3 players, MP4 players, digital players designed for playing files with .ogg filename extension, WMA players, digital players designed for playing files in 3GPP file format, CD players, MD players, audio recorders, digital video players for watching movies, video file players for watching movies, VCD players for watching movies, DVD players for watching movies, digital video recorders for recording movies, and digital cameras with movie recording functions; devices and accessories for mobile phones, cell phones, media players, media recorders, namely, hands-free devices for mobile phones, keyboards, batteries, battery chargers in International Class 9.<sup>1</sup>

The Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing the previously registered mark shown below as a bar to registration:

---

<sup>1</sup> Application Serial No. 77820105 was filed on September 3, 2009, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The mark consists of the wording "Ultra case' and design, where the stylized letter 'U' is encircled and is shown with its vertical prongs of the letter 'U' being cut through, making it look like the capital umlaut Ü." "Case" is disclaimed. Color is not claimed as a feature of the mark.

**Registration No. 3199331<sup>2</sup>**

Mark: ULTRACASE

For: Waterproof, all-environment carrying and transit cases for electronic and field instruments in International Class 9

Owner: Underwater Kinetics (composed of Alan K. Uke).

After receiving a final refusal, Applicant filed a Request for Reconsideration and a subsequent final refusal to register was issued. After the suspension of the appeal and remand of the application to the Examining Attorney to clarify Applicant's identification of goods, a subsequent final refusal maintaining both the refusal for likelihood of confusion under § 2(d) and the requirement to clarify the identification of goods was issued. An Examiner's Amendment was subsequently entered clarifying Applicant's identification of goods. Thus, this appeal follows the Examining Attorney's final refusal under § 2(d) of the Trademark Act. Applicant and the Examining Attorney have filed briefs. For the reasons set forth below, the refusal to register is affirmed.

I. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Not all of the *du Pont* factors are relevant to every case,

---

<sup>2</sup> Registration No. 3199331 issued January 16, 2007; § 8 & 15 Declaration accepted and acknowledged.

and only factors of significance to the particular mark need be considered. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Therefore, we focus our analysis on the following factors which include those that have been argued by Applicant and the Examining Attorney: similarity of the marks, relatedness of the goods, channels of trade, classes of consumers, sophistication of the customers, number and nature of similar marks and lack of actual confusion.

A. Similarity of the Marks

In any likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *E.I. du Pont*, 177 USPQ at 567; *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Applicant's ULTRA CASE and Design mark is identical in sound to Registrant's mark ULTRACASE. Additionally, the appearance of the marks is similar. Although Registrant's mark is a single word, the compression of the words ULTRA and CASE into a single term conveys the commercial impression of the two words combined. In other words, consumers would recognize Registrant's mark as consisting of the separate elements ULTRA and CASE. *See In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (URBANHOUSING found to have same meaning as URBAN HOUSING); *In re L.C. Licensing Inc.*, 49 USPQ2d 1379, 1381 (TTAB 1998) (whether unitary or two separate words, the commercial impression is the same).

Because Registrant's mark is presented in standard characters, Registrant is not limited to any particular depiction of its mark. *In re White Rock Distilleries Inc.*, 92

USPQ2d 1282, 1284 (TTAB 2009). Therefore, Registrant is entitled to all depictions of its standard character mark regardless of the font style, size, or color, including the identical font style and size in which Applicant's applied-for mark is shown. *In re Viterra Inc.*, 101 USPQ2d at 1909-10; *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012). *See also Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that a mark in standard character format is distinct from a mark in a logo format; “[b]y presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original)).

The stylized font utilized for the term ULTRA CASE in Applicant's mark does not alter the meaning or the commercial impression formed by the words “ultra case” in the mark. Thus, the stylization of the word portion of Applicant's mark will not avoid a likelihood of confusion with the cited mark in standard characters, because Registrant has the right to present its mark in a similar stylized script. *See, e.g., In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

In Applicant's mark, the presence of the image of the “U” in a circle<sup>3</sup> contributes to the connotation of the mark as a whole, and lends something to Applicant's mark that is not present in Registrant's mark. However, the words in Applicant's mark dominate and any contribution of the design to the connotation and overall

---

<sup>3</sup> We are not persuaded by Applicant's argument that “the vertical prongs of the letter U cut thru the middle, which makes it look like an umlaut Ü ...”.

commercial impression of Applicant's mark would be outweighed by this dominant portion. *See BVD Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1508-09 (TTAB 2007) (presence of image of hatted man contributes to the connotation of the mark as a whole lending something to applicant's mark that is not present in opposer's mark; however, letters in applicant's mark dominate any contribution of the design to the connotation and overall commercial impression of applicant's mark would be outweighed by the dominant letters); *Chemetron Corporation v. NRG Fuels Corporation*, 157 USPQ 111 (TTAB 1968) (opposition to registration of the mark NRG, with a flame design, set in a circle carrier, sustained in view of opposer's prior registrations of NCG per se or with other design elements).

We find that Applicant's mark and Registrant's mark create very similar overall commercial impressions. While marks must be compared in their entireties, one feature of a mark may have more significance than another, and in such a case there is nothing improper in giving greater weight to the dominant feature. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). The word portion of the marks is most likely to be impressed upon a customer's memory as it is used by prospective purchasers when asking for Applicant's and Registrant's goods. In the case of marks such as Applicant's mark which consists of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods. *See In re Viterra Inc.*, 101 USPQ2d at 1911; *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Group, Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). The word portions, namely ULTRA CASE and ULTRACASE, of the marks at issue are nearly identical in appearance, sound, and commercial impression; the addition of the design element of Applicant's mark does not obviate the similarity of the marks in this instance. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993).

Accordingly, while the marks have some differences, the sound, appearance and overall commercial impressions are very similar.

#### B. Similarity of Goods, Channels of Trade and Classes of Consumers

We next consider the *du Pont* factors involving the similarity or dissimilarity of Applicant's goods in relation to the goods in the cited registration and their respective channels of trade and classes of consumers. It is well-settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved

application and registration. *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012).

In determining the similarity of Applicant's and Registrant's goods, it is sufficient if likelihood of confusion is established for any item encompassed by the identification of goods for that class. See *In re Wacker Neuson SE*, 97 USPQ2d 1408, 1409 (TTAB 2010) (citing *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). Applicant's goods include "cases and bags for protecting, holding and carrying electronic devices, namely, mobile phones, cell phones, smart phones, portable telephones ..." while the goods for the cited mark ULTRACASE are "waterproof, all-environment carrying and transit cases for electronic and field instruments."

Unrestricted and broad identifications, such as found in Registrant's goods, are presumed to encompass all goods of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Upon comparing the goods in the cited registration with Applicant's goods, Registrant's "carrying ... cases for electronic ... instruments" is broad enough to cover Applicant's "cases ... for ... carrying electronic devices, namely, mobile phones, cell phones, smart phones, portable telephones ...". This overlap finds the goods to be legally identical.

Contrary to Applicant's arguments,<sup>4</sup> the question of likelihood of confusion is determined based on the description of the goods in the application and registration at issue, not on extrinsic evidence of actual use. *See, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (quoting *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Hughes Furniture Industries, Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015).

---

<sup>4</sup> App. Brf. pp. 6-7, 10 (31 TTABVUE 8-9, 12). In making its argument, Applicant refers to Exhibits submitted with its appeal brief. While most of the Exhibits submitted with Applicant's brief were submitted during prosecution, additional evidence may have been submitted in support of its appeal brief. Papers that are already in the application should not, as a matter of course, be resubmitted as exhibits to the brief. *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1220 n.9 (TTAB 2008) (attaching exhibits to brief of material already of record only adds to the bulk of the file, and requires Board to determine whether attachments has been properly made of record); *In re Thor Tech, Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and is unnecessary). Usually, evidence submitted with an appeal brief is not considered. Materials not previously made of record during prosecution of the application are untimely if submitted for the first time at briefing. *See* TBMP § 1203.02(e) (2015) and authorities cited therein. Trademark Rule 2.142(d) addresses the submission of evidence submitted after an appeal is filed:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.

However, evidence submitted after appeal, without a granted request to suspend and remand for additional evidence, *see* TBMP § 1207.02, may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. TBMP § 1207.03. Inasmuch as the Examining Attorney addressed Applicant's Exhibits in his brief, we treat all of the evidence submitted by Applicant as part of the record.

Applicant's identification of goods does not contain a limitation of any kind with respect to customers or channels of trade. In the absence of any limitations, it is presumed that the goods in the application move in all channels of trade normal for those goods, and that the goods are available to all classes of purchasers for the listed goods. *Squirtco v. Tomy Corp.*, 216 USPQ at 939; *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012).

Applicant's attempt to distinguish the channels of trade and customers based on differences in the goods on which Applicant and Registrant use their marks<sup>55</sup> is not relevant. Inasmuch as the identification of goods in the cited registration, "waterproof, all-environment carrying and transit cases for electronic and field instruments" encompasses Applicant's "cases and bags for protecting, holding and carrying electronic devices, namely, mobile phones, cell phones, smart phones, portable telephones ... ," we must presume that Applicant's goods move in some of the same channels of trade and are sold to some of the same classes of customers as the goods in the ULTRACASE registration. *See Paula Payne Products Co.*, 177 USPQ at 77-78; *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008); *In re Elbaum*, 211 USPQ at 640. *See also In re Viterra Inc.*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

---

<sup>55</sup> App. Brf. pp. 10-11 (31 TTABVUE 12-13).

In view of the foregoing, based on the legally identical or highly related nature of the goods set forth in the application and cited registration, and the overlap of the trade channels and customers, the *du Pont* factors of the similarity of the goods, trade channels and customers favor a finding of likelihood of confusion.

C. Sophistication of Purchasers

The fourth *du Pont* factor considers “[t]he conditions under which and buyers to whom sales are made, *i.e.* ‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 177 USPQ at 567. There is no evidence that the consumers of Applicant’s goods are sophisticated and Applicant did not introduce any evidence regarding the degree of care exercised by its customers. However, even assuming that Applicant’s and Registrants’ goods may involve a careful purchase after exercising due diligence, it is settled that the fact that purchasers are 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, especially in cases such as the instant one involving highly similar marks and related goods. *See, e.g., Stone Lion Capital Partners, L.P.*, 110 USPQ2d at 1163; *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

D. Number and Nature of Similar Marks

Applicant argues that the USPTO has “allowed multiple registrations that incorporate the same common element of the marks to coexist with each other on the Principal Register for goods no less similar to each other than those of the Cited

Registration and the Mark.”<sup>6</sup> In support of its argument, Applicant submits copies of four third-party registrations for the mark “ULTRA.” In reviewing these registrations, we note that two of the three active registrations are owned by the same owner, and that furthermore, we have no information as to any agreements that may have been made between them, or otherwise, about their records.<sup>7</sup> Thus, this evidence demonstrates little, if anything.

Furthermore, the existence on the register of a few other seemingly similar marks does not provide a basis for registrability of Applicant’s mark.<sup>8</sup> *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999). Prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the TTAB. *See In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d at 1165 n.3 (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ at 269; *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009). More importantly, third-party

---

<sup>6</sup> App. Brf. p. 11 (31 TTABVUE 12).

<sup>7</sup> Two of the four registrations are owned by the same owner; and one of the two remaining registrations has been cancelled. It is well-established that an expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).

<sup>8</sup> This case presents different facts than the recent decision in *Juice Generation, Inc. v. GS Enters. LLC*, \_\_\_ F.3d \_\_\_, \_\_\_ USPQ2d \_\_\_, 2015 BL 230200 (Fed. Cir. July 20, 2015) which was remanded to the Board for consideration of the strength or weakness of opposer’s mark in view of the “extensive evidence of third-party use and registrations.”

registrations are of little probative value in determining likelihood of confusion because they are not evidence that the marks depicted therein are in use or that the public is aware of them. *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 94 USPQ2d at 1259).

#### E. Actual Confusion

Applicant attaches various evidence in connection with the use of its mark arguing that there is no adverse impact on Registrant or actual confusion among the public.<sup>9</sup> Applicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of Applicant and Registrant is of little probative value in an *ex parte* proceeding such as this where there is no evidence pertaining to the nature and extent of the use by Registrant and, Registrant has no opportunity to be heard. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is not necessary to show actual confusion to establish a likelihood of confusion. *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983)).

#### F. Conclusion

We have carefully considered all of the evidence, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in

---

<sup>9</sup> App. Brf. p. 13-14 (31 TTABVUE 15-16) and Exhibits (33 TTABVUE).

this opinion. To the extent that any other *du Pont* factors for which no evidence or argument were presented may nonetheless be applicable, we treat them as neutral.

In view of the similarity of the marks in their entirety in sound, appearance, and commercial impression, and the legal identity of Applicant's "cases and bags for protecting, holding and carrying electronic devices, namely, mobile phones, cell phones, smart phones, portable telephones ... ," to Registrant's "waterproof, all-environment carrying and transit cases for electronic and field instruments," we find that Applicant's ULTRA CASE and Design mark is likely to cause confusion with the ULTRACASE mark in Registration No. 3199331.

**Decision:** The refusal to register Applicant's mark  is affirmed.