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Mailed:
December 17, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Shaghal, Ltd.

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Serial No. 85192335

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Thomas I. Rozsa of Rozsa Law Group LC for Shaghal, Ltd.

Colleen Kearney, Trademark Examining Attorney, Law Office 113 (Odette Bonnet,
Managing Attorney).

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Before Mermelstein, Wellington, and Hightower, Administrative Trademark
Judges.

Opinion by Hightower, Administrative Trademark Judge:

On December 7, 2010, applicant Shaghal, Ltd. filed application Serial
No. 85192335 for registration of the mark THE TWIG, in standard character form,
for goods identified after amendment as “headsets for mobile telephones, MP3
players and MP4 players,” in International Class 9.

The examining attorney refused registration on the ground of a likelihood of
confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with
Registration No. 3348156 for the mark TWIG, in standard character form, for, in
relevant part, “telecommunication and communication apparatus and instruments,

namely, hand-held personal computers and palm organizers; mobile telephones, cordless telephones”¹

Applicant timely appealed, and briefing is complete.

Analysis

Our determination under Section 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

¹ The complete listing of goods and services for Registration No. 3348156 is: Telecommunication and communication apparatus and instruments, namely, hand-held personal computers and palm organizers; mobile telephones, cordless telephones and GSM (Global System for Mobile), GPS (Global Positioning System), and GPRS (General Packet Radio Service) telephones; computer software and computer programs for use in the provision and rendering of travel information, transport information, operating route planners and viewing electronic maps adapted for use with mobile telephones, telecommunication and communication apparatus and instruments; computer software for use in GPS navigation, mapping, surveying and tracking for use in the fields of travel, transport, navigation, route planning and mapping; location systems software in the fields of travel, transport, navigation, route planning and mapping; computer software for use in creating personalized databases containing photographs, messages and other data generated through use of GPS-enabled wireless devices for use in the fields of travel, transport, navigation, route planning and mapping; computer software for providing and reproducing travel and transport related information; accessories, namely, connection cables, in International Class 9; Telecommunication and communication services, namely, transmission and delivery of digital data, light files, sound files, data, video, information and image signals by means of computer, cable, and satellite transmissions; wireless transmission of data by means of videotext, the internet, GSM (Global System for Mobile) and WAP (Wireless Access Protocol); electronic transmission of data and documents via computer terminals; transmission of data for use in location, navigation, positioning, tracking and guidance in the fields of travel, transport, navigation, route planning and mapping; electronic mail services; technical consultation relating to telecommunication services and communication services, in International Class 38; and Computer services, namely, providing temporary use of non-downloadable software which provides geographical, map image, and trip routing data obtained with the aid of a global [positions] * positioning * system in order to enable third parties to come to an accurate location or orientation; application service provider featuring software for providing an on-line database obtained by means of a global positioning system, enabling others in the fields of travel, transport, navigation, route planning and mapping to determine locations accurately; design and development of navigation systems, route planners, electronic cards and digital dictionaries; design and development of computer software; design and development of telecommunications and data communications and networks; design and development of computer software for providing and/or reproducing travel advice and/or information and transport-related information, in International Class 42.

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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See 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.”). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence. To the extent that any other *du Pont* factors for which no evidence or argument was presented may nonetheless be applicable, we treat them as neutral.

A. Similarity of the Marks

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of “the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991),

aff'd, No. 92-1086 (Fed. Cir. June 5, 1992). Slight differences in marks do not normally create dissimilar marks. See *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985); *U.S. Mineral Prods. Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977); *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); see also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat'l Data Corp.*, 224 USPQ at 751.

Here, applicant’s mark is THE TWIG and the cited registration is for TWIG. The marks are identical except for the definite article THE, which is insignificant as a source-identifier. See *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (affirming refusal to register WAVE due to a likelihood of confusion with registered

mark THE WAVE, stating: “The marks are virtually identical. The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance.”); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (noting the insignificance of the word “the” in comparison of THE MUSIC MAKERS and MUSICMAKERS); *Conde Nast Publ’ns Inc. v. Redbook Publ’g Co.*, 217 USPQ 356, 357 (TTAB 1983) (noting that the word “the” cannot serve as an indication of origin); *U.S. Nat’l Bank of Oregon v. Midwest Savs. & Loan Ass’n*, 194 USPQ 232, 236 (TTAB 1977).

Applicant focuses its main appeal brief on arguments that TWIG and THE TWIG are not similar. Although applicant argues that the term TWIG is relatively weak and “fairly descriptive,” Appeal Brief at 6-7, applicant cites no supporting evidence, and we find none in the record. Nor does applicant explain how TWIG describes or is at all suggestive of either its goods or registrant’s; indeed, the term appears to be arbitrary in association with these goods.

Applicant attached to its brief a printout from the TESS database of Registration No. 3510036 for the mark TWIGS for “computer software for creating searchable databases of information and data, namely, software for use on a personal computer or workstation for the purpose of acquiring and managing personal information” in International Class 9. To the extent that applicant’s argument that the mark TWIG is weak may rest on this registration, we note that, as per the examining attorney’s objection, this evidence was not timely submitted and is due no consideration. 37 C.F.R. § 2.142(d); *In re Fitch IBCA Inc.*, 64 USPQ2d

1058, 1059 n.2 (TTAB 2002); *In re Trans Cont'l Records, Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002); TBMP §§ 1203.02(e), 1207.01. In any event, such a registration would not prove that TWIG is a weak term. A third-party registration is not evidence that a mark has been used at all, let alone used so extensively that consumers have become sufficiently conditioned by its usage that they can distinguish between such marks on the bases of minute differences. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“As to strength of a mark, however, registration evidence may not be given *any* weight.”); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). Moreover, we must decide each case on its own merits. “Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board” *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Applicant also asserts that the marks THE TWIG and TWIG have different meanings. Appeal Brief at 8-9. We recognize that applicant’s mark includes the article “the,” while the prior registrant’s does not. However, applicant provides no explanation or evidence as to how the inclusion of “the” changes the meaning of TWIG in any significant way or what the different meanings would be, and we see none. In the absence of any such explanation, we find them to be legally identical.

In view of the above, we find applicant’s mark THE TWIG to be highly similar to the cited mark TWIG in sight, sound, connotation, and commercial

impression. Therefore, the first *du Pont* factor strongly supports a conclusion that confusion is likely.

B. Similarity of the Goods and Channels of Trade

We turn next to the similarity of the goods and their channels of trade, the second and third *du Pont* factors, respectively. In determining the similarity or dissimilarity of the goods, we note that the more similar the marks at issue, the less similar the goods need to be for the Board to find a likelihood of confusion. *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). The goods need not be identical or even competitive in order to support a finding of a likelihood of confusion. Rather, “[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion.” *In re Concordia Int’l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Applicant’s “headsets for mobile telephones” are intended for use with “mobile telephones,” which are included among the goods in the cited registration; thus, these goods are clearly complementary. Where the goods at issue have complementary uses, and therefore are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (finding bread and cheese to be related because they are often used in combination, and stating: “Such complementary use has long been recognized as a relevant consideration in

determining a likelihood of confusion.”); *Polo Fashions, Inc. v. La Loren, Inc.*, 224 USPQ 509, 511 (TTAB 1984) (finding bath sponges and personal products such as bath oil and soap to be closely related because they are complementary goods that are likely to be purchased and used together by the same purchasers).

In addition, the examining attorney submitted with her March 11, 2011 and June 22, 2011 Office actions approximately 30 different use-based third-party registrations covering mobile phones, cordless phones, and/or handheld personal computers on the one hand, and headsets, MP3 players, and/or MP4 players on the other. These registrations demonstrate that applicant’s and registrant’s goods are of a kind that may emanate from a single source under a single mark. *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the identified goods are products which are produced and/or marketed by a single source under a single mark. *See Venture Out Props. LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887, 1893 (TTAB 2007).

The examining attorney also submitted with the final Office action screenshots from the Apple.com and T-Mobile.com websites offering mobile telephones, headsets designed for use with mobile phones, and MP3 playing devices. This evidence not only demonstrates that registrant’s and applicant’s goods travel through the same channels of trade, but also that they are related.

Applicant argues that its goods are unrelated to the goods and services in the cited registration because the registrant's goods are related to GPS tracking devices. *See* Appeal Brief at 4; Reply Brief at 2-3. In support of this argument, applicant submitted during prosecution a printout from a website that appears to relate to the registrant's goods and services. We are bound by the identification as written in the registration and cannot limit registrant's goods, channels of trade, or classes of customers to what any evidence shows them to be. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) ("It is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined by an analysis of the marks as applied to the goods identified in the application vis-à-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be."). There are no limitations in the goods identification as to registrant's related goods; registrant's mobile and cordless telephones, hand-held personal computers, and palm organizers are not modified by or limited to the asserted GPS tracking functions.

In sum, we find that the examining attorney has submitted persuasive evidence establishing that the parties' goods discussed herein move in the same channels of trade and are sufficiently complementary or related that source confusion is likely.² In our likelihood of confusion analysis, these findings under the second and third *du Pont* factors support a conclusion that confusion is likely.

² In its reply brief, applicant offered to delete "headsets for mobile telephones" from the identification of goods if it would allow the application to proceed. Reply Brief at 2. Applicant's request is untimely and, in any event, would not avoid a likelihood of confusion because the evidence shows that applicant's remaining goods (MP3 and MP4 players) are

Balancing the Factors

We have considered all of the evidence of record as it pertains to the relevant *du Pont* factors. We have carefully considered applicant's arguments and evidence, even if not specifically discussed herein, but have not found them persuasive. In view of our findings that the marks are highly similar and that the goods are related and move in the same channels of trade and to the same customers, we find that applicant's mark THE TWIG for headsets for mobile telephones, MP3 players, and MP4 players is likely to cause confusion with the registered mark TWIG.

Decision: The examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act is affirmed.

related to registrant's mobile phones, cordless phones, and hand-held personal computers. See TBMP § 1205 (3d ed. rev. 1 2012); *In re Big Pig, Inc.*, 81 USPQ2d 1436, 1437-38 (TTAB 2006).