

**This Opinion is Not a
Precedent of the TTAB**

Mailed: July 9, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re TPK U.S.A., LLC
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Serial No. 85192690
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Gokalp Bayramoglu of Bayramoglu Law Offices, LLC,
for TPK U.S.A., LLC

Blake Lovelace, Trademark Examining Attorney, Law Office 119,
J. Brett Golden, Managing Attorney.

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Before Bucher, Cataldo and Greenbaum,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

TPK U.S.A., LLC (“Applicant”) seeks registration on the Principal Register of the

mark  (the words “Touch Monitor” disclaimed) for

Amusement apparatus adapted for use with an external display screen or monitor; Amusement apparatus and games adapted for use with television receivers or with video or computer monitors; Amusement machines, namely, hand-held electronic game units adapted for use with an external display screen or monitor; Anti-glare filters for televisions and computer monitors; Computer monitor frames; Computer monitors; Computer screens; Computer software, namely, game engine software for

video game development and operation in International Class 9.¹

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant's mark so resembles the previously registered marks TRUETOUCH (in standard characters) for "Capacitive touch screen products and solutions, namely, computer and telephone touch screens, touch sensors for computer and telephone monitors and integrated circuits" in International Class 9,² and, TRU (in standard characters) and **tru** for, among other things, "computer games software; software incorporating computer games; software incorporating computer games for mobile phones" in International Class 9,³ as to be likely to cause confusion, to cause mistake, or to deceive.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

¹ Application Serial No. 85192690 was filed on December 7, 2010, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. Applicant's mark includes the following description:

The mark consists of black colored capital letters "TR", a small letter "U" with a line on top in red color, with the combination forming the word "TRU", three circles in red color connected to each other with arcs in black color appear to the left of the wording "TRU", the wording "Touch Monitor" is written in gray color beneath the design and the word "TRU".

² Registration No. 3944837 for TRUETOUCH, owned by Cypress Semiconductor Corp., was registered on the Principal Register on April 12, 2011.

³ Registration Nos. 4181663 for TRU (standard characters) and 4188770 for TRU (stylized), both owned by Truphone Ltd., were registered on the Principal Register on July 31, 2012, and August 14, 2012, respectively.

I. Applicable Law

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); and *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). 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.” *Id.* at 29; *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

We focus our analysis on Registration No. 4181663 for the mark TRU as the mark most similar to Applicant’s mark.⁴ If confusion is likely between that mark and Applicant’s mark, there is no need for us to consider the likelihood of confusion with **tru** or TRUETOUCH, while if there is no likelihood of confusion between Applicant’s mark and TRU, then there would be no likelihood of confusion with

⁴ To be clear, the refusal pertains only to the three cited registrations, and not to the various third-party registrations that the Examining Attorney attached to the Final Office Action. As the Examining Attorney aptly notes, the third-party registrations were submitted to demonstrate that the goods identified in the application and cited registrations are related. Ex. Atty. Br. at 6.

tru or TRUETOUCH. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Relatedness of the Goods, Channels of Trade and Classes of Purchasers

We begin with the *du Pont* factors of the relatedness of the goods, channels of trade and class of purchasers. We base our evaluation on the goods as they are identified in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

The Examining Attorney focuses his comparison of Applicant's "Computer software, namely, game engine software for video game development and operation" with the "computer games software; software incorporating computer games; software incorporating computer games for mobile phones" identified in the registration. Registrant's broad identification of "computer games software" encompasses all variations of such software, including Applicant's "game engine software for video game development and operation." Thus, the identifications of goods in the application and registration are, in part, legally identical, and Applicant does not argue otherwise. It is sufficient for a finding of likelihood of confusion if the relatedness is established for any item encompassed by the identification of goods within a particular class in the application. *Tuxedo*

Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

Further, because the goods include legally identical computer games software, and there are no limitations as to channels of trade or classes of purchasers in either the application or cited registration, we must presume that Applicant's and Registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. *See Stone Lion*, 110 USPQ2d at 1161; *Viterra*, 101 USPQ2d at 1908 (the Board may rely on this legal presumption in determining likelihood of confusion); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.").

The similarity between the goods, channels of trade and purchasers are factors that weigh in favor of a finding of likelihood of confusion.

B. The Similarities and Dissimilarities Between the Marks

We turn then to the *du Pont* factor of the similarities and dissimilarities between Applicant's mark  and Registrant's mark TRU. We analyze "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. "The 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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). We also note that where, as here, the goods include legally identical items, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that the differences in the marks in appearance due to the additional wording and design element in Applicant’s mark are sufficient to distinguish them. The Examining Attorney focuses on the shared literal element TRU, which he contends is the most distinctive portion of Applicant’s mark, making it the strongest source identifying element.

While we view the marks in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Here, the dominant portion of Applicant’s mark  is the word TRU, which is identical to Registrant’s entire mark. Likelihood of confusion often has been found where an entire mark is incorporated within another. *See The Wella Corp, v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design for men’s cologne, hair spray, conditioner and shampoo is likely to cause confusion with the mark CONCEPT for cold permanent wave lotion and neutralizer); *In re West Point-Pepperell, Inc.*, 468

F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL and griffin design for fabrics is likely to cause confusion with WEST POINT for woolen piece goods); *S. Gumpert Co., Inc. v. ITT Continental Baking Company*, 191 USPQ 409 (TTAB 1976) (FLAV-O-BAKE for seasoned coating mix is likely to cause confusion with FLAVO for cake icing flavoring products).

The addition of the descriptive words TOUCH MONITOR, which have been disclaimed, is not sufficient to distinguish the marks. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), *quoting*, *National Data*, 224 USPQ at 752 (“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.”); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 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.”). Furthermore, the wording TOUCH MONITOR is presented in very small size relative to the word TRU in Applicant’s mark. As a result, from a visual standpoint, the wording TOUCH MONITOR is far less prominent than the word TRU. In addition, the stylization and design in Applicant’s mark is minimal and does not overcome the dominance of the literal element TRU shared by both Applicant’s and Registrant’s marks. In the case of marks consisting of words and a design, the words normally are given greater weight because they would be used by consumers to request the products. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553,

1554 (TTAB 1987). Moreover, because the cited mark is registered in standard characters, it is not limited to any particular display and can be used in any stylization, including that similar to Applicant's mark. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).

In view of the foregoing, we find that when Applicant's mark and Registrant's mark are compared in their entirety, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related goods, confusion would be likely to occur. As such, this *du Pont* factor also favors a finding of likelihood of confusion.

C. Conclusion

We have carefully considered all of the evidence of record as it pertains to the relevant *du Pont* factors, as well as Applicant's arguments (including any evidence and arguments not specifically discussed in this opinion). We find that because the goods include legally identical products, the channels of trade and classes of purchasers are the same, and the marks are similar, confusion is likely between

Applicant's mark  and Registrant's mark TRU.

Decision: The 2(d) refusal to register Applicant's mark is affirmed.