

**This Opinion Is Not a  
Precedent Of The TTAB**

Mailed: May 16, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Clamcase, LLC*

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Serial No. 85654205

Kristen L. Pursley of Dobrusin & Thennisch PC, dba The Dobrusin Law Firm, P.C., for Clamcase, LLC.

Kevin A. Mittler, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

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Before Cataldo, Ritchie, and Hightower, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Clamcase, LLC (“applicant”) filed an application to register the design mark shown below, for goods identified as “Accessories and electronic devices relating to computers and cellular telephones, namely, electronic keyboards for use with touch-screen computers and touch-screen telephones; protective cases for computers and cellular telephones; laptop computers and computer stands specially designed for holding computers,” in International Class 9:<sup>1</sup>

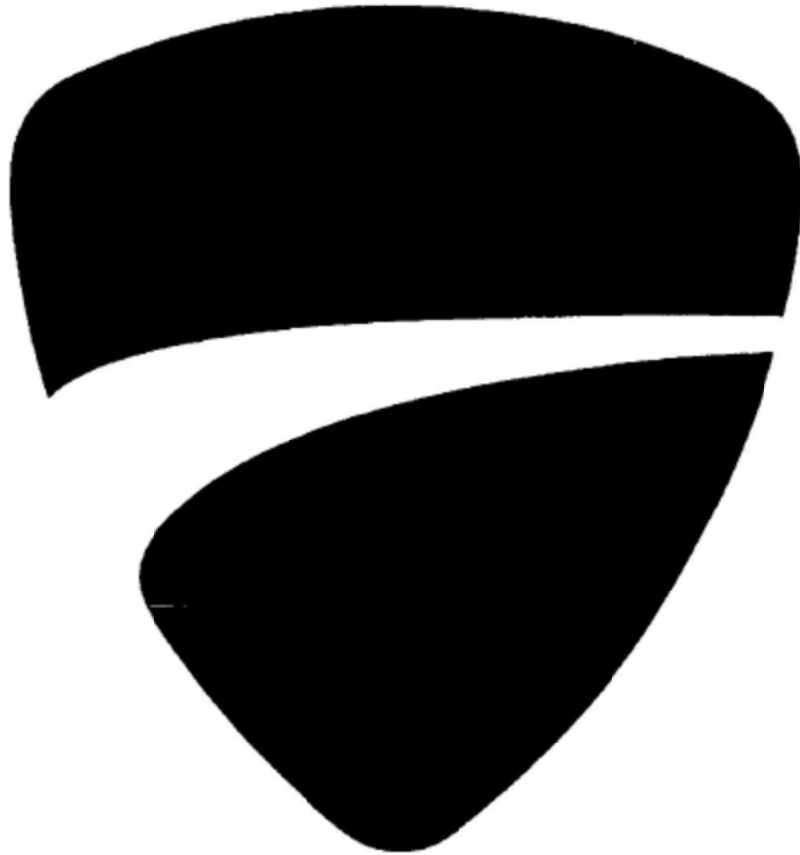
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<sup>1</sup> Serial No. 85654205, filed June 18, 2012, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use and first use in commerce on January 21, 2011.



The mark includes the following description: The mark consists of a partially open clam-shaped figure.

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the following two prior registered design marks, both owned by the same registrant, that when used on or in connection with applicant's identified goods, it is likely to cause confusion or mistake or to deceive:

1.



for “Eyewear, eyeglasses; sunglasses; anti-glare glasses; protective glasses; safety goggles; prescription accessories for eyeglasses and sunglasses, namely, replacement eyeglasses; cases for eyeglasses and sunglasses; eyeglass lenses; eyeglass frames; ear-stems and nose pieces specifically adapted for wearing with eyeglasses; safety helmets for motorcyclists; helmets for motorcyclists; protective clothing, namely, safety boots for motorcyclists and safety gloves for motorcyclists, fireproof motorcycle and automobile racing suits for safety purpose; pre-recorded video cassettes featuring

music; pre-recorded video cassettes featuring action, adventure, romance, comedy, drama, theater, cartoon, animation, literary, historical, political, religious, biographical, suspense, documentary, music, musical performance, and sporting events movies and motion pictures and movies and motion pictures featuring information in the field of sports, fashion, and entertainment; pre-recorded CD-ROMs featuring music and video games; pre-recorded CD-ROMs featuring action, adventure, romance, comedy, drama, theater, cartoon, animation, literary, historical, political, religious, biographical, suspense, documentary, music, musical performance, and sporting events movies and motion pictures, and movies and motion pictures featuring information in the field of sports, fashion, and entertainment; amusement apparatus and games adapted for use with television receivers only, namely, video output game machines for use with television; arcade game machines; computer game cartridges; video game cartridges; computer game cassettes; computer games equipment, namely, gaming machines and computer game software used therewith; memory devices, namely, disc memories; computer game programs; computer software for video games to be used in connection with automatic and coin operated machines; computer game equipment, namely, steering wheels for computers with double gear-shifting systems; computer screen savers software, mouse pads; computer mice; desktop computers; notebook computers; laptop computers; portable computers; magnetically encoded key cards for portable computers and personal computers; keyboards; tablet personal computers; computer monitors; LCD computer monitors; printers, bags and cases especially adapted for holding computer batteries for notebook computers; personal digital assistants; electronic personal organizers; pen drivers, namely, USB pen drive;

memory cards; digital voice recorders; cameras; digital cameras; digital video cameras; multimedia projectors; digital multimedia projectors; camera lenses, namely, zoom lenses; scanners; photo printers; photographic apparatus, namely, photographic cameras; hi-fi systems, namely, sound systems comprising remote controls, amplifiers, loudspeakers and components therefor; television sets; television and LCD display screens; CD players; digital video discs players; barometers; barometers with projection devices; electronic language translators; electronic time and date devices, namely, time and date stamping machines; electric remote sensors for data related to temperature, pressure, flow and other physical data; global positioning system (GPS); wireless weather stations, namely, weather balloons; wireless weather information apparatus and instruments, namely, meteorological instruments; meteorological instruments, namely, wireless remote thermo hygro [sic] sensors; radios incorporating alarm clocks with outdoor, indoor and remote temperature sensors; radios incorporating dual band compact travel clocks with indoor temperature digital alarms; cordless telephones; telephones; cellular telephones, cellular masks in the nature of cell phone covers; devices for hands-free use of cellular phones; head sets for cellular phones; calculators; binoculars; opera glasses; television cameras; telescopes; microscopes; palm pilots being electronic handheld units and accessories for the wireless receipt and transmission of data which also enable to transmit and receive voice communications, e-mail messages and to store data; MP3 players; home theatre systems, comprising DVD players, audio amplifiers, audio speakers; walkie-talkies; decorative magnets in the nature of pins and badges; magnetic cards; encoded

magnetic cards; blank smart cards” in International Class 9, as relevant.<sup>2</sup>

The mark contains the following description: The mark consists of a triangle with curved corners intersected by a curved line resembling a road.

2.



for “Eyewear, eyeglasses; sunglasses; anti-glare glasses; protective glasses; safety goggles; prescription accessories for eyeglasses and sunglasses, namely, replacement eyeglasses; cases for eyeglasses and sunglasses; eyeglass lenses; eyeglass frames; ear-stems and nose pieces specifically adapted for wearing with eyeglasses; safety helmets

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<sup>2</sup> Registration No. 3991713, issued July 12, 2011 with goods and services in multiple classes, under Section 66(a) of the Trademark Act.

for motorcyclists; helmets for motorcyclists; protective clothing, namely, safety boots for motorcyclists and safety gloves for motorcyclists, fireproof motorcycle and automobile racing suits for safety purpose; pre-recorded video cassettes featuring movies, motion pictures, and music; pre-recorded CD-ROMs featuring computer programs for pre-recorded games, video games, music, movies, motion pictures; amusement apparatus and games adapted for use with television receivers only, namely, video output game machines for use with television; arcade game machines; computer game cartridges; video game cartridges; computer game cassettes; computer games equipment, namely, gaming machines, namely, devices which accept a wager and computer game software used therewith; memory devices, namely, disc memories; computer game programs; computer software for video games to be used in connection with automatic and coin operated machines; computer game equipment, namely, steering wheels for computers with double gear-shifting systems; computer screen savers software, mouse pads; computer mice; desktop computers; notebook computers; laptop computers; portable computers; magnetically encoded cards for portable computers and personal computers; keyboards; tablet personal computers; computer monitors; LCD computer monitors; printers, bags and cases especially adapted for holding computer batteries for notebook computers; personal digital assistants; electronic personal organizers; pen drivers, namely, USB pen drive; memory cards; digital voice recorders; cameras; digital cameras; digital video cameras; multimedia projectors; digital multimedia projectors; camera lenses, namely, zoom lenses; scanners; photo printers; photographic apparatus, namely, photographic cameras; hi-fi systems comprised of compact disc players and tuners thereof, tape players, records

and compact discs featuring music; television sets; television display screens being television monitors; LCD display screens being LCD panels; CD players; digital video disc players; barometers; barometers with projection devices; electronic language translators; electronic time and date devices, namely, time and date stamping machines; electric remote sensors for data related to temperature, pressure, flow and other physical data; global positioning system (GPS); meteorological instruments, namely, wireless weather stations; wireless weather information apparatus and instruments, namely, meteorological instruments; meteorological instruments, namely, wireless remote thermo hygro [sic] sensors; radios incorporating alarm clocks with outdoor, indoor and remote temperature sensors; radios incorporating dual band compact travel clocks with indoor temperature digital alarms; cordless telephones; telephones; cellular telephones, cellular masks in the nature of cell phone covers; devices for hands-free use of mobile phones; head sets for cellular phones; calculators; binoculars; opera glasses; television cameras; telescopes; microscopes; palm pilots being electronic handheld units and accessories for the wireless receipt and transmission of data which also enable to transmit and receive voice communications, e-mail messages and to store data; MP3 players; home theatre systems, comprising DVD players, audio amplifiers, audio speakers; walkie-talkies; decorative magnets in the nature of pins and badges; magnetic cards; encoded magnetic cards; blank smart cards,” in International Class 9, as relevant.<sup>3</sup>

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<sup>3</sup> Registration No. 3950005, issued April 26, 2011, with goods and services in multiple classes, under Section 66(a) of the Trademark Act.



The mark contains the following description: The mark consists of the wording “DUCATI” in stylized font with a design of a shield cut into two.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a 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 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 or services. *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.”).

#### The Goods and Channels of Trade

Both the application and the cited registrations identify keyboards (in applicant’s case, the subset “electronic keyboards for use with touch-screen computers and touch-screen telephones”), cases for cellular phones, and laptop computers. Applicant admits in its brief that there is “one (1) overlapping good.” (appl’s brief at 8). We note in regard to this admission that likelihood of confusion may be found based on *any* item that comes within the identification of goods in the involved application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). In addition to the overlapping goods, the examining attorney submitted evidence of various third-party registrations that include goods identified in both the

cited application and in the cited registrations. These third-party registrations serve to suggest that the goods are of a type which may emanate from a single source under a single mark. *See In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Neither the identification of goods in the application, nor the identification of goods in the cited registrations contain any limitations in channels of trade. Accordingly, we must assume that all may travel via the same channels of trade. *See Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). This is particularly so where the goods are in-part-identical. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”). The examining attorney further submitted evidence of websites showing third parties offering for sale both goods listed in the application, and goods listed in the cited registrations, for example at *www.dell.com*, *www.hp.com*, *www.kantek.com*, *www.griffintechology.com*, and *www.lenovo.com*. Although applicant argues that the goods are in fact in “completely different markets” this is not borne out by the plain wording of the identifications, by which we are bound in our analysis. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of

an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") (citations omitted). Accordingly, the second and third *du Pont* factors weigh heavily in favor of finding a likelihood of confusion as to both cited registrations.

### The Marks

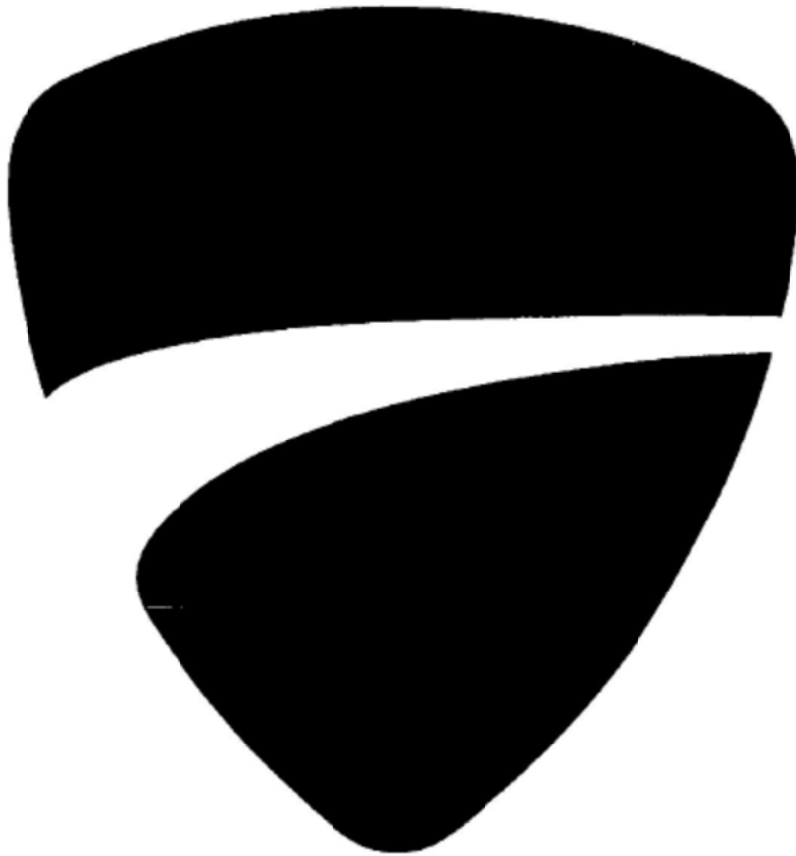
Preliminarily, we note that when the goods at issue are identical, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than if the goods were not identical. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012), citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

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 and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks.

*Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980);

*Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in Registration No. 3991713 is shaped like a curved triangle or shield, with a curved slice through the middle, opening in the middle of the left side, and getting smaller toward the right:



The mark in Registration No. 3950005 is identical, except that it contains the term “DUCATI” in the upper half:



The mark in the application is also a curved triangle, of highly similar proportions, with almost the same curved slice through the middle of the left side, getting smaller toward the right, with the difference that the slice is more arched and does not reach the right edge as it does in the mark in the cited registrations:



Although, as applicant points out, its mark may be described as resembling a shell, and the marks in the cited registrations may be described as resembling a shield, it is not unlikely that a consumer may refer to one or the other as resembling either. Furthermore, the relative dimensions are highly similar, as are the characteristics of both. Accordingly, we find the marks to be quite similar in appearance, commercial impression and connotation, as well as likely to be called-for or referred-to in a similar manner. There is no evidence to indicate that the marks in the cited registrations are not inherently strong, nor that there are other similar marks in use such as to render smaller distinctions more noticeable to consumers. Although Registration No. 3950005 contains the literal term “DUCATI,” this may be presumed to be the house mark of registrant Ducati Motor Holding S.P.A. It has often been said that likelihood of confusion will not be avoided when trade names and house marks are added to otherwise highly similar terms. “[S]uch addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the

marks so as to avoid source confusion.” *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (citations omitted) (finding LE CACHET DE DIOR confusingly similar to CACHET). *See also In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558, 559 (CCPA 1972) (stating that addition of a trade name will make consumers think that products have a common origin or that the companies have merged); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1201-02 (TTAB 2007) (applying principle that “the addition of a trade name or house mark or other such matter to one of two otherwise similar marks will not serve to avoid a likelihood of confusion.”).

Viewing the marks in their entirety, we find this *du Pont* factor also weighs in favor of finding a likelihood of consumer confusion.

#### Consumer Sophistication

Applicant urges us to consider consumer sophistication as a factor. However, applicant has submitted no evidence that either its consumers or those of registrant, buying such relatively low-priced items as cell-phone covers, would be sophisticated. Furthermore, as our precedent dictates, even sophisticated buyers are not immune from source confusion where, as here, the marks are highly similar and the goods are in-part-identical. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

#### Balancing the Factors

In summary, we have carefully considered all of the evidence and arguments of record relevant to the pertinent *du Pont* likelihood of confusion factors. We conclude that with in-part-identical goods travelling in the same channels of trade, and highly similar marks with similar connotations, there is a likelihood of confusion between

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applicant's design mark, for the goods for which it seeks registration, and the marks in the two cited registrations for the goods identified therein.

*Decision:* The refusal to register is affirmed.