

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

Mailed: June 2, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Huong Hai Science and Technology Inc.
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Serial No. 86492323
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Matthew H. Swyers of The Trademark Company,
for Huong Hai Science and Technology Inc.

Mildred Black, Trademark Examining Attorney, Law Office 121,
Michael W. Baird, Managing Attorney.

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Before Mermelstein, Greenbaum and Lynch,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Huong Hai Science and Technology Inc. (“Applicant”) seeks registration on the
Principal Register of the mark ZENEK (in standard characters) for

Cell phones; Computers; PC tablets; Wearable digital
electronic devices comprised primarily of software and
display screens for the use of smart phone capabilities and
also featuring a wristwatch; Wireless indoor and outdoor
speakers in International Class 9.¹

¹ Application Serial No. 86492323 was filed on December 30, 2014, based upon Applicant’s
claim of first use anywhere and use in commerce since at least as early as June, 2014.

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that Applicant's mark, when used on or in connection with Applicant's goods, is likely to cause confusion with the mark ZENEC (in standard characters) for

Apparatus for recording, transmitting and reproducing sound or images; radios, amplifiers, equalizers, loudspeakers, television apparatus, touchscreen monitors, liquid crystal display monitors, video monitors, video cameras, CD and DVD playing apparatus, all the aforesaid apparatus are also intended for mounting on vehicles; parts for all the above products in International Class 9.²

When the refusal was made final, Applicant appealed and requested reconsideration solely to add the wording "all of the aforementioned not for mounting on vehicles" to the identification of goods.³ The Examining Attorney denied the request for reconsideration, stating that "While this wording undoubtedly limits the present application, it does not obviate confusion with the cited reference."⁴

Although the Examining Attorney did not specifically accept the proposed amendment to the identification of goods, the proposed amendment is acceptable, and will be entered into the USPTO's electronic database. *See* Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a). The identification of goods in the application therefore is amended to

Cell phones; Computers; PC tablets; Wearable digital electronic devices comprised primarily of software and display screens for the use of smart

² Registration No. 4503699 issued on April 1, 2014, based on International Registration No. 0811907.

³ 4 TTABVue 3.

⁴ 6 TTABVue 3. As discussed below, we agree with the Examining Attorney's reasoning, and add that our acceptance of the amendment has no effect on the outcome of this appeal.

phone capabilities and also featuring a wristwatch; Wireless indoor and outdoor speakers; all of the aforementioned not for mounting on vehicles in International Class 9.

After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal.

I. Likelihood of Confusion - Applicable Law

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (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. See *Federated Foods, Inc. v. Fort Howard 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.”).

A. Comparison of the Marks.

We first address the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. 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) (quotation omitted).

As noted above, Applicant’s mark is ZENEK in standard characters, and Registrant’s mark is ZENEC in standard characters. The marks are virtually identical in appearance, differing only in the presence of the letter “K” in Applicant’s mark in place of the letter “C” in that of Registrant. Furthermore, the substitution of the letter “K” in Applicant’s mark for the “C” in the cited mark has little, if any, effect on their pronunciation such that the marks are likely to sound identical when pronounced. *See Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985) (“In our view, the word portion of applicant’s mark ‘SEYCOS’, is virtually the phonetic equivalent of opposer’s ‘SEIKO’ mark and is, in fact, the phonetic equivalent of the plural of opposer’s mark.”). In its brief, Applicant concedes that the marks are similar.⁵

The first *du Pont* factor weighs strongly in favor of a finding that confusion is likely.

B. Relatedness of the Goods.

We next consider the *du Pont* factor of the relatedness of the goods. We base our evaluation on the goods as they are identified in the application and the cited

⁵ 8 TTABVUE 10.

registration. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

It is Applicant's position that the phrase "are also intended for mounting on vehicles" limits the goods identified in the registration to those "for use exclusively in mounting on vehicles," and that by limiting the goods identified in the application to "not for mounting on vehicles," there is no likelihood of confusion despite the similarity of the marks. The Examining Attorney counters that

the word "also" in the registrant's identification implies an addition to the goods rather than a limitation to the goods. Applicant argues, without providing evidence, that the word "also" in the registrant's identification limits the registrant's goods to items made for mounting on automobiles. The wording "all the aforesaid apparatus are also intended for mounting on vehicles" does not limit the registrant's goods to items to be mounted on vehicles. The word "also" is used to combine words and phrases rather than limit them. Had the registrant meant to limit its goods to goods only intended for mounting on vehicles, it would have simply said "only" or "limited to" rather than using the word "also," a word with the common dictionary definition of "in addition." (Citations omitted.)⁶

Even if we were to agree with Applicant's semantic interpretation of the word "also," the "Apparatus for recording, transmitting and reproducing sound or images" identified in the registration is not subject to the limitation, and encompasses all such apparatus, including the "Cell phones; Computers; PC tablets; [and] wearable digital

⁶ 10 TTABVUE 10.

electronic devices comprised primarily of software and display screens for the use of smart phone capabilities and also featuring a wristwatch ... not for mounting on vehicles” identified in the application. *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (“Under standard examination practice, a semicolon is used to separate distinct categories of goods or services.”). Cell phones, computers and PC tablets generally feature built-in cameras, the ability to record, download and play music, and in the case of some computers and PC tablets, built-in CD and DVD players.⁷ Similarly, wearable electronic devices such as those identified in the application can send and receive messages, among other things. Accordingly, regardless of the meaning of the word “also,” the goods identified in the application and registration are, in large part, legally identical. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)) (unrestricted and broad identifications are presumed to encompass all goods of the type described). We need not discuss Applicant’s remaining goods (i.e., “wireless indoor and outdoor speakers ... not for mounting on vehicles”), although we note that the record includes relatedness evidence for them. For purposes of our analysis, it is sufficient if likelihood of confusion is found with respect to use of Applicant’s mark on any good in a particular class. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*,

⁷ *See, e.g.*, 6 TTABVUE 16, 20. *See also* Fed. R. Evid. 201(b)(1); *Wella Corp. v. California Concept Corp.*, 192 USPQ 158 (TTAB 1976), *rev’d on other grounds*, 558 F.2d 1019, 194 USPQ 419, 422 n.5 (CCPA 1977) (fact of common knowledge, e.g., of purchasers and channels of trade for home permanent wave kits, appropriate for judicial notice); *In re Thermo LabSystems Inc.*, 85 USPQ2d 1285, 1291 (TTAB 2007) (common knowledge that places are often named after individuals).

648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

We find that the relatedness of the goods also strongly favors a finding of likelihood of confusion.

C. Lack of Actual Confusion

With regard to Applicant's assertion of no known instances of actual confusion, we first observe that while a showing of actual confusion would be highly probative, the lack thereof is not. "The lack of evidence of actual confusion carries little weight, especially in an ex parte context." *Majestic Distilling*, 65 USPQ2d at 1205 (internal citations omitted) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). See also *In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). In any event, the record is devoid of probative evidence relating to whether there have been meaningful opportunities for actual confusion to have occurred in the marketplace. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

D. Conclusion

We have carefully considered all evidence of record and Applicant's arguments, even if not specifically discussed herein, as they pertain to the relevant *du Pont* factors. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record. Because the marks are highly similar when viewed in their entirety, and the goods identified in the application are legally identical to the goods identified in the registration, we find that confusion is likely between Applicant's mark ZENEK and Registrant's mark ZENEC.

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

The identification of goods in the application will be amended to:

Cell phones; Computers; PC tablets; Wearable digital electronic devices comprised primarily of software and display screens for the use of smart phone capabilities and also featuring a wristwatch; Wireless indoor and outdoor speakers; all of the aforementioned not for mounting on vehicles in International Class 9.