

This Opinion is not a
Precedent of the TTAB

Mailed: September 27, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Razer Auto Inc.
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Serial No. 86670410
—

Eric Kelly of Kelly Tech Law,
for Razer Auto Inc.

Brian Neville,¹ Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

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Before Quinn, Taylor and Adlin,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Razer Auto Inc. (“Applicant”) seeks registration on the Principal Register of the mark RAZER AUTO (in standard characters and with AUTO disclaimed) for, as amended,

Aftermarket automobile accessories, namely, fender flares, mirror covers, door handle covers, gas door covers, tail light covers and tail light trim, tailgate handle covers, brake light covers, third brake light covers, front light trim, hood guards, window visors, lighting, light brackets, billet

¹ Linda M. Quigley was the Trademark Examining Attorney responsible for the application prior to the Examining Attorney’s response to Applicant’s request for reconsideration.

grilles, mesh grilles, and replacement grilles; wherein such aftermarket automobile accessories do not include tires; and wherein such aftermarket automobile accessories are not for motorcycle, three wheeler, nor quad ATVs in International Class 12.²

The Trademark Examining Attorney (“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 the identified goods, so resembles the three commonly owned registered typed³ or standard character marks listed below as to be likely to cause confusion, to cause mistake, or to deceive:⁴

Registration No. 2855961⁵

RAZR for “tires, ATV tires” in International Class 12;

Registration No. 2899459⁶

RAZR 2 for “tires, ATV tires” in International Class 12; and

² Application Serial No. 86670410 was filed on June 22, 2015, based upon Applicant’s claim of first use anywhere as of October 31, 2012 and first use in commerce since at least as early as August 10, 2013.

³ Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 807.03(i) (April 2017).

⁴ The Examining Attorney, in her first Office Action, also required Applicant to submit a disclaimer of the word AUTO. In response to that request, Applicant sought to amend its application to seek registration on the Supplemental Register. That request subsequently was denied because the application was eligible for registration on the Principal Register, and the disclaimer requirement was maintained and ultimately satisfied.

⁵ Issued June 22, 2004; renewed.

⁶ Issued November 2, 2004; renewed.

Registration No. 34032267

RAZR CROSS for “tires” in International Class 12.

The cited registrations are all owned by the same entity.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed on March 21, 2017.

Applicant, on May 15, 2017, filed a request for remand⁸ to submit additional evidence, which was followed three days later by Applicant’s appeal brief. Subsequently, the request for remand was granted and jurisdiction was restored to the Examining Attorney on May 25, 2017, for consideration of Applicant’s new evidence. The Examining Attorney did not issue an Office Action responding to Applicant’s new evidence. Instead, the Examining Attorney, on July 13, 2017, submitted his Examiner’s Statement noting the remand and presumably considering the new evidence.⁹ Applicant then filed a reply brief on July 31, 2017.

For the reasons discussed, we affirm the refusal to register.

Likelihood of Confusion

⁷ Issued March 28, 2008; Section 8 Affidavit accepted and Section 15 Affidavit acknowledged.

⁸ Although the ESTTA-generated cover sheet indicated that the submission is “Applicant’s Request for Remand and Amendment,” the attached document was titled “Applicant’s Request for Remand” and only included that request. The request to amend the identification of goods, however, was included in Applicant’s June 26, 2016 Response to Office Action and was accepted by the Examining Attorney.

⁹ Even though the Examining Attorney did not issue a separate Office Action addressing the evidence Applicant submitted on remand, that evidence is of record, has been considered in this opinion and has been accorded the appropriate probative weight. Applicant’s brief contemplated the Board’s grant of the request to remand.

Our determination under Section 2(d) is based on an analysis of all of the 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 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”). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

We focus our analysis on cited Registration No. 2855961 for the mark RAZR for “tires; ATV tires,” as this is the mark that is closest to Applicant’s applied-for mark, and the registration covers goods that, when considered vis-à-vis the goods identified in the involved application, are most likely to support a finding of likelihood of confusion. If confusion is likely between Applicant's mark and the mark in the '961 registration, there is no need for us to consider the likelihood of confusion with the other cited marks. On the other hand, if there is no likelihood of confusion between Applicant's mark and the mark of the '961 registration, then there would be no likelihood of confusion with the other cited marks. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Similarity/Dissimilarity of the Marks

We first consider the *du Pont* factor of the similarity or dissimilarity of the marks and compare them, as we must, in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). That is, “[t]he 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). See also *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 mem.*, 972 F.2d 1353 (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. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *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). Here, the average customer includes car owners.

In considering the marks, we compare Applicant's mark RAZER AUTO with the cited registered mark, RAZR. RAZER is the dominant portion of Applicant's mark because the word AUTO (denoting "automobile") has little to no source-indicating significance; the word "AUTO" is descriptive or generic for Applicant's aftermarket accessories and has been disclaimed. As such, this term is entitled to less weight in our determination. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (descriptive terms are properly given less weight). Moreover, as the first portion of Applicant's mark, RAZER is most likely "to be impressed upon the mind of the purchaser and remembered." *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

In comparison, the dominant feature of Applicant's mark, RAZER, is the phonetic equivalent of the cited RAZR mark, which may be perceived as an alternate spelling of RAZER. We find the slight differences in spelling, i.e., the addition/absence of an "e" between the letters "z" and "r," does not distinguish the two marks. Indeed, because the additional vowel is embedded at the end of the word, it may not even be

noticed by consumers. *See, e.g., In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“Moreover, although there are certain differences between the marks [CAYNA and CANA] in appearance, namely, the inclusion of the letter ‘Y’ and the design feature in applicant’s mark, there are also obvious similarities between them.”). Thus, the marks are similar in appearance and sound.

Regarding connotation and commercial impression, the term RAZER/RAZR appears to be arbitrary with respect to the automotive industry. However, even if, as Applicant posits, some meaning were attributed to the term RAZER, given that both Applicant’s and Registrant’s goods are used in connection with automobiles, the meaning would be the same – there is no evidence that RAZER and RAZR have different meanings in this context.

Keeping in mind the fallibility of average consumers’ memories, while differences exist between the respective marks, we find that in their entireties, the marks are not only substantially similar in appearance and sound due to the phonetically equivalent common terms RAZER/RAZR but that, they are also substantially similar in connotation and convey a substantially similar commercial impression. *See e.g., Spoons Rests. Inc.*, 23 USPQ2d at 1741 (The fallibility of human memory is a factor when comparing marks, given that a side-by-side comparison is not the ordinary way that a prospective consumer would be exposed to marks.).

We are not persuaded by Applicant’s argument that Registrant’s mark only appears on the sidewalls of tires along with the mark MAXXIS. It is well established that, in contrast to an infringement action where the court examines the visual

appearance of the marks in actual use, in proceedings before the Board, only the drawing of the mark is relevant. *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214 (TTAB 2001) (“in Board proceedings, likelihood of confusion is determined independent of the context of actual usage”); *see also Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729, 19 USPQ2d 1352 (2d Cir. 1991). For purposes of our determination of the similarity or dissimilarity of the marks, we may not consider extraneous matter that is not part of the cited mark as registered.

The factor of the similarity of the marks thus favors a finding of likelihood of confusion.

Before leaving this discussion, we note Applicant’s contention that use of similar terms by different parties decreases the likelihood of confusion. In that regard, Applicant made of record a listing of third-party registrations from a search of the USPTO’s Trademark Electronic Search System (“TESS”) database containing the term RAZER which purportedly shows that the term RAZER is associated with diverse goods. Applicant argues that because the registrations cover diverse goods and cut across many diverse industries, the term RAZER/RAZR is less distinctive. At the outset, while the list is of record, as it has not been objected to by the Examining Attorney, the registrations themselves are not, and the mere list itself has little, if any, probative value. The list consists of only the marks and their application or registration number, as well as a marker indicating whether, in the case of a registration, it is “dead” or “live.” We cannot determine from a mere listing like this the nature of the goods or services for which these purported marks have been

applied-for or registered and many of the marks themselves appear to contain additional matter. The Board does not take judicial notice of registrations or applications residing in the Office,¹⁰ and further, with respect to the applications, they are evidence of nothing more than that they were filed with the USPTO. *In re Jack B. Binion*, 93 USPQ2d 1531, 1535 fn.3 (TTAB 2009). While Applicant makes note of some of the ostensibly associated goods in its brief, Attorney claims cannot substitute for the registrations themselves. The list does not establish that the cited mark is entitled to a narrow scope of protection.

In any event, Applicant is mistaken that third-party registrations covering such diverse goods and industries diminish the scope of protection to be afforded a cited mark.¹¹ To establish weakness, the identified goods and/or services should be in the same or highly related fields. *See In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (finding third-party registrations to be of limited probative value because the goods identified in the registrations “appear to be in fields which are far removed from [the goods at issue]”). *Cf. Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1362, 116 USPQ2d 1129 (Fed. Cir. 2015) (finding third-party registrations relevant to prove that some segment of the

¹⁰ *In re Jonathan Drew, Inc. d/b/a Drew Estate*, 97 USPQ2d 1640, 1644 fn.11 (TTAB 2011).

¹¹ Applicant’s reliance on *Sun Banks of Florida, Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311, 316-18 (5th Cir. 1981) is misplaced. Apart from being an infringement action, the defendant made of record evidence that over 4,400 businesses registered with the Florida Secretary of State used the common word “Sun” in their names. The court found that the word “sun” represented some characteristics of the state, and that a significant number of the uses fell in the relevant industry. Here, the term RAZER/RAZR is arbitrary and Applicant attempted to introduce evidence of third-party registrations, not third-party uses, for marks that cover goods that are unrelated to those at issue here.

composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning in the relevant industry); *Juice Generation, Inc. v. GS Enters.* 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015) (same). Accordingly, we find this *du Pont* factor, i.e., the number and nature of similar marks in use on similar goods, neutral.

Relatedness of the Goods/Channels of Trade/Classes of Consumers

It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in the application vis-à-vis the goods identified in the cited registration. See *In re Dixie Restaurants*, 41 USPQ2d at 1534; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding their marketing are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same source. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722; *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

In this case we compare Applicant's "aftermarket automobile accessories, namely, fender flares, mirror covers, door handle covers, gas door covers, tail light covers and tail light trim, tailgate handle covers, brake light covers, third brake light covers,

front light trim, hood guards, window visors, lighting, light brackets, billet grilles, mesh grilles, and replacement grilles; wherein such aftermarket automobile accessories do not include tires; and wherein such aftermarket automobile accessories are not for motorcycle, three wheeler, nor quad ATVs” to Registrant’s recited “tires and ATV tires.” Contrary to Applicant’s position, Registrant’s identified “tires” is worded broadly and therefore presumptively includes tires for automobiles. An applicant may not restrict the scope of its goods or the scope of the goods covered in a cited registration by extrinsic argument or evidence. *See, e.g., In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986).

The Examining Attorney maintains that the goods are complementary aftermarket vehicle accessories and tires which are often used together on the same vehicle, which are marketed to and purchased by the same class of customers in the same channels of trade. The evidence of record demonstrates that Applicant’s goods are likely to be perceived as originating from the same source as Registrant’s. Specifically, the Examining Attorney has made of record copies of various used-based third-party registrations showing that the same entity has adopted a single mark for both tires and aftermarket automobile accessories and parts.¹² Third-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods and services are of a type that may emanate from a single source. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d at 1467,

¹² Denial of Applicant’s request for reconsideration dated March 16, 2017; TSDR 1-37.

1470 n.6 (TTAB 1988) (“Although third-party registrations are “not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source”). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). The registrations include, by way of example:

Registration No. 3827773 for “after-market automobile parts including both bumpers and tires”;

Registration No. 4115505 for, *inter alia*, “fenders and wheel rim covers and tires”;

Registration No. 3005777 for, *inter alia*, “trailer hitches and shift knobs and tires”; and

Registration No. 4374753 for, *inter alia*, “after-market auto accessories, namely vehicle custom grills, automotive interior trim and fender flares and tires.”¹³

The Examining Attorney also made of record printouts from the websites of Best Buy Tires & Truck Accessories (www.bestbiytire.biz) (selling, e.g., tires for automobiles and chrome accessories, such as fender flares, mirror covers, door handle covers, grills, and showing their use on the same vehicle), H & H Sales (<http://hhsales.com>) (offering, e.g., aftermarket accessories such as chrome fender flares, mirror covers, door handle covers, gas door covers, tail light covers and tail light trim, as well as tires, and picturing trucks featuring all of the products), and 4 Wheel Parts (www.4wheelparts.com) (offering tires and aftermarket accessories for

¹³ Registration Nos. 4097135 has no persuasive value because it does not list goods of the type identified in both Applicant’s application and the cited registration.

use on automobiles, such as fender flares, mirror covers, door handle covers, gas door covers, tail light covers and tail light trim, mesh grilles, and replacement grilles). The three websites show aftermarket vehicle accessories and tires being sold in the same channels of trade for use on the same vehicle.¹⁴

We find the third-party registrations and website evidence sufficient to show that Registrant's broadly worded "tires" and Applicant's aftermarket vehicle accessories are used together on the same vehicle, and often emanate from the same source. We thus find the goods related.

Applicant has questioned the probative value of the Examining Attorney's evidence contending that it is contrary to marketplace reality and industry practice. Applicant further contends that the vast majority of providers of tires and aftermarket automobile accessories provide either "tires" or "aftermarket automobile accessories," but not both. In support of its position, Applicant made of record a screen shot of two search summaries from a search of the TESS database purportedly listing live registrations that only included goods of a type identified in Applicant's application and only goods of a type listed in the cited registration, purportedly to demonstrate that both types of goods rarely emanate from the same source.¹⁵ These lists have extremely limited, if any, probative value in the absence of the registrations themselves. Moreover, even if some entities do not provide goods of a type identified

¹⁴ Exhibits to Final Office Action dated August 27, 2016; TSDR 1-98.

¹⁵ 7 TTABVUE 7-10.

in both the application and the cited registration, as demonstrated by the third-party registration made of record by the Examining Attorney, others do.

Because there are no limitations as to channels of trade or classes of purchasers in Applicant's or Registrant's identifications of goods, we must presume that Applicant's and Registrant's goods move in all channels of trade normal for those goods, such as automotive supply stores, and that they are available to all classes of purchasers for those goods, including ordinary car owners. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Thus, at a minimum, the channels of trade and classes of purchasers overlap.

Accordingly, the *du Pont* factors of the relatedness of the goods, trade channels and classes of purchasers favor a finding of likelihood of confusion.

Applicant's arguments to the contrary are unavailing. Applicant again attempts to limit the trade channels through extrinsic evidence which it claims shows that Registrant's tires are for ATV vehicles, and not full sized vehicles, which likely are sold to ATV hobbyists and enthusiasts and only by dealers that do not carry Applicant goods. However, because there are no such limitations reflected in the respective recitations, we must consider all usual trade channels and classes of consumers. *Viterra*, 101 USPQ2d at 1908.

Applicant also introduced a survey it presumably created by itself through the website SurveyMonkey.com, which purportedly demonstrates that "a significant majority of relevant consumers do not purchase Applicant's types of goods and

Registrant's types of goods in a single transaction or a single location." This survey has little probative value because there is no indication that it was executed under established survey protocols; there is little explanation as to how it was conducted, how the participants were chosen, the geographic diversity of the sample group or whether the participants understood the nature of the questions as they applied to trademark principals.¹⁶ Even if we were to accept Applicant's conclusion, the fact that purchasers bought Applicant's and Registrant's goods at different times and locations does mean that the goods are not also available at the same locations.

Both Applicant and the Examining Attorney have relied on a variety of cases to bolster their respective contentions that the goods are, or are not, related. However, as is often noted by the Board and the Courts, each case must be decided on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 51 USPQ2d 1564, 1566 (Fed.Cir. 2001). *See also, In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001). Here, the identified goods are related and their trade channels overlap.

Sophistication of the Relevant Consumers

Applicant contends that buyers of Applicant's goods and Registrant's goods are likely to be sophisticated due to "relatively high and not insignificant purchase prices of the respective goods," and also due to what Applicant labels "the mechanics of purchasing goods" or, as it concisely explains, the "highly specific nature of both

¹⁶ The survey consisted of four questions: Q1 – Have you ever purchased any of the following products for your vehicle from any vendor?; Q2 Have you ever purchased any tires for your vehicle from any vendor?; Q3 – Have you ever purchased tires and the product [sic] for question #1 during the same transaction from the same vendor?; Q4 – What was the vendor's name where you bought tires and products from related to question #1?.

Applicant's and Registrant's goods, wherein buyers must know their vehicle's make, model and year to know the good's size or style in order to make an appropriate purchase." App. br. p. 11.¹⁷ While there is little information as to costs in the record, the nature of both Applicant's and Registrant's goods leads us to conclude that consumers will exercise some degree of care – at least with regard to compatibility and fit. Nevertheless, even knowledgeable and careful purchasers can be confused as to source, especially where, as here, very similar marks are used in connection with complementary and related goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”)). *See also Refreshment Machinery Inc. v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not automatically eliminate the likelihood of confusion because “[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved”).

We find that this *du Pont* factor somewhat favors Applicant.

¹⁷ 8 TTABVUE 15.

Actual Confusion

Applicant, through the declaration of its President and CEO, Samuel Chi, maintains that it has consistently and without interruption marketed and sold its goods in interstate commerce since August 10, 2013 (and since October 31, 2012 in intrastate commerce), and that there has been no actual confusion between its mark and the cited marks. Applicant argues that this coexistence without actual confusion should be accorded substantial probative weight.

However, it is not necessary to show actual confusion in order to establish likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an *ex parte* proceeding, Applicant's assertion of the absence of actual confusion is of little probative value because there is no evidence that there has been a significant opportunity for actual confusion to have occurred, such that the absence of confusion is meaningful. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value."). *See also In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984).

Thus, this *du Pont* factor is neutral.

Conclusion

When we consider all of the arguments and evidence relating to the relevant likelihood of confusion factors, even if not specifically discussed in this opinion, we conclude, on balance, that confusion is likely between Applicant's RAZER AUTO

mark and the cited registered mark RAZR. We find so principally due to the substantial similarity between the marks, the relatedness of the goods, and the overlap in purchasers and trade channels, all which outweigh any sophisticated purchasing decision.

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