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Precedent of the TTAB

Mailed: April 17, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Crosby Group LLC

Serial No. 86780353

Mark G. Kachigian of Head, Johnson, Kachigian & Wilkinson, PC,
for The Crosby Group LLC.

Clare Cahill, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.


Before Taylor, Mermelstein, and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

The Crosby Group LLC (“Applicant”) seeks registration on the Principal Register of the mark CROSBY QUIC-TAG (in standard characters) for “radio frequency identification (RFID) tags for material lifting equipment; computer software and firmware for reading radio frequency identification (RFID) tags for material lifting equipment” in International Class 9.¹

¹ Application Serial No. 86780353 includes a claim of ownership of two of Applicant’s active prior registrations, nos. 1100565 and 1139374.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act on the ground that the applied-for mark, as used on the identified goods, is likely to cause confusion with the registered QUICK

TAG and design mark  ("TAG" disclaimed) for "metal identification tags" in International Class 6. 15 U.S.C. § 1052(d).²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We reverse the refusal to register.

I. Prosecution History

Applicant applied to register CROSBY QUIC-TAG on October 7, 2015 based on its allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. 15 U.S.C. § 1051(b).


The Examining Attorney issued a first Office Action on January 20, 2016 refusing registration based on likelihood of confusion with two registered marks, QWIKTAG (in standard characters) and QWIKTAG (stylized), both owned by the same registrant.³ According to the Examining Attorney, the added term in Applicant's mark, "CROSBY," is not dominant because it is a surname.⁴

² Registration No. 2111789, issued on the Principal Register on November 11, 1997, Section 8 and 15 declarations of continued use and incontestability accepted and acknowledged; Section 9 application for renewal granted.

³ Reg. nos. 4347596 and 4347597, Jan. 20, 2016 Office Action pp. 5-9. All references to TSDR citations are to documents in the .pdf format.

⁴ Jan. 20, 2016 Office Action p. 3.

Applicant responded to this Office Action on March 1, 2016, denying a likelihood of confusion and asseverating that the term “CROSBY” in its mark had acquired distinctiveness for material lifting equipment and products associated therewith. Supporting its claim that “CROSBY” had acquired distinctiveness are two prior registrations on the Principal Register owned by Applicant and identified in the Application:

- CROSBY – Reg. no. 1100565 for material lifting equipment such as “wire rope clips,” “load handling chain, chain slings,” issued August 29, 1978, alleging first use in commerce in 1887.
-  – Reg. no. 1139374 for “hardware and metal goods-namely, wire rope clips and thimbles, swage, spelter and wedge sockets, rod ends, lifting eyes, eye nuts and pad eyes, eye bolts and ring bolts; load handling chain, chain slings, replacement links, connecting links, clevis links, swivels, shackles, rings, jaws and hooks for chains; shackles, swivels, jaws and hooks for load handling lines other than chains; and turnbuckles,” issued on September 9, 1980 under Section 2(f), alleging first use in commerce as of July 17, 1974.⁵

Applicant also submitted the Section 2(f) declaration of its Vice President and Chief Legal and Compliance Officer, William D. Fisher, who attested in pertinent part that:

2. The trademark CROSBY has been used for material lifting equipment and related products for many decades.

⁵ See Application, Oct. 7, 2015; 37 CFR § 2.36; Trademark Manual of Examining Procedure (“TMEP”) § 812. In its March 1, 2016 response to the first Office Action, p. 1, Applicant listed twelve additional prior registrations it owns for CROSBY-formative marks, but in the absence of copies of these records, indicating the goods or services for which the marks are registered, they are accorded no weight, as the Board does not take judicial notice of registrations residing in the Patent and Trademark Office. *In Re Nat’l Presto Indus., Inc.*, 197 USPQ 188, 189 n. 3 (TTAB 1977). We hasten to add that consideration of these additional registrations would not affect the outcome of this decision.

3. The CROSBY mark has become distinctive of the goods through this Applicant's substantially exclusive and continuous use in commerce for at least five years immediately before the date of this application.⁶

Applicant further emphasized that its identified RFID tags and computerized readers bearing the applied-for CROSBY QUIC-TAG mark are expressly limited to use for material lifting equipment, as illustrated by a catalogue page:




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⁶ Declaration under Section 2(f) of William D. Fisher, February 26, 2016, March 1, 2016 Response to Office Action p. 6.

⁷ March 1, 2016 Response to Office Action p. 7.

Applicant amended its subject Application to claim that the term CROSBY in the applied-for mark had acquired distinctiveness under Section 2(f).⁸

In a March 24, 2016 Office Action, the Examining Attorney withdrew the prior refusal based on the two originally cited registrations, and instead issued a new refusal, citing Registration No. 2111789 for QUICK TAG and design  for “metal identification tags” in International Class 6 as likely to cause confusion. The Examining Attorney also stated that the Section 2(f) claim of acquired distinctiveness in part was unnecessary because the surname CROSBY was combined with the non-generic term QUIC-TAG.⁹

In response to this Office Action, Applicant contended on August 23, 2016 that there was no likelihood of confusion between the marks, not only because of the differences in the marks, but because its goods, channels of trade, and classes of customers differed significantly from Registrant’s. “The Applicant’s goods are used for radio frequency identification chips for the material lifting equipment industry and its associated software or firmware,” in International Class 9, Applicant argued, whereas “[t]he Registrant’s market of metal goods” in International Class 6 “is also narrow and specific, but completely distinct.”¹⁰ Applicant pointed to the Registrant’s specimens of use, which showed a vending machine that makes and dispenses Registrant’s QUICK TAG and design metal identification tags:

⁸ March 2, 2016 amendment; *see also* Aug. 25, 2016 amendment.

⁹ March 24, 2016 Office Action p. 3.

¹⁰ Aug. 23, 2016 Response to Office Action pp. 9-10.

INSTANT PET TAG MACHINE

IN LESS THAN 2 MINUTES the new state-of-the-art Pet-Tag *VENDOR* will provide your customers with their first ever opportunity to create beautiful personalized engraved metal pet tags.

The Pet-Tag *VENDOR* combines leading edge technologies to create a single vending machine which utilizes a computer driven engraver, video touchscreen and an automated credit card/cash processing unit.

With 70,000 puppies and kittens born each day in the United States, the market for these tags is enormous. According to the Humane Society, there are more than 53 million pet dogs and 60 million pet cats in the U.S.

Ending the aggravation and inconvenience of days or weeks spent waiting for a send-away tag, Quick-Tag pet tags are made to order NOW while the customer watches the engraving take place.



Engraving is completed in seconds as the customer watches.



Easy to use touch screen makes personalized pet tags a snap!

BENEFITS TO YOU INCLUDE:

- **Destination products** providing additional store traffic.
- **Significant income** from small space usage.
- **Easy daily audit** of usage volume.
- **No maintenance** other than daily "spray and wipe."
- **No expense** other than minor electrical consumption.



Six tag shapes available for all pets.

The Quick-Tag *VENDOR* is a mighty machine for it's size. With a "footprint" of only 8 square feet it will produce profits/square foot far exceeding your current use of the floor space. The *VENDOR* Measures only 33 inches deep, 33 inches wide and 76 inches high.

Quick-Tag International will pay substantial sales commissions for the opportunity to place Pet-Tag *VENDORS* in your stores. Quick-Tag International sells and services all machines.

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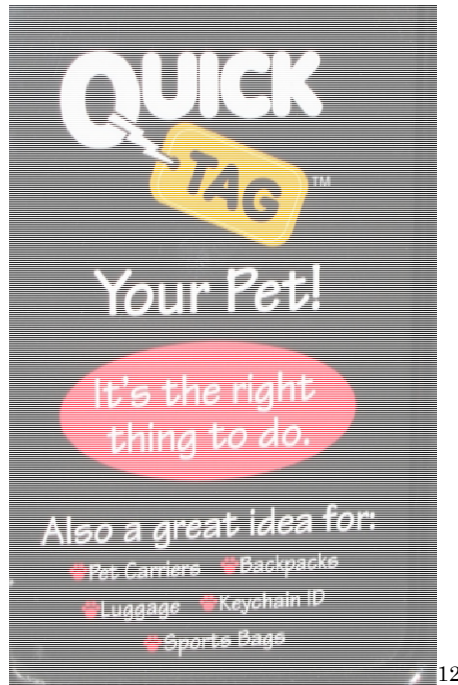


Pet tag shown at actual size.

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Another specimen showed a close-up of Registrant's metal identification tag vending machine in a Petco store:

¹¹ Aug. 23, 2016 Response to Office Action pp. 19-22.



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To demonstrate the weakness of the terms QUICK and TAG, Applicant adduced a TESS listing of numerous applications for QUICK- formative marks and another TESS listing of applications for TAG-formative marks.¹³

In her September 16, 2016 Final Office Action, the Examining Attorney responded *inter alia* that Applicant's mark, CROSBY QUIC-TAG, contains the Registered mark's wording, QUICK TAG, with identical pronunciation and minor misspelling. Even though the words "QUICK" and "TAG" may appear on the Register, they do not appear frequently in the same mark, she argued. Furthermore, she maintained,

¹² *Id.* at p. 26.

¹³ *Id.* at pp. 7, 12-16. Applicant's TESS list of applications for marks containing "QUICK" and separate list of applications for marks containing "TAG" are not probative, first because a mere TESS listing is insufficient to make them of record, *In re Jump Designs*, 80 USPQ2d 1370, 1372 (TTAB 2006), and second because the listings describe applications, which prove nothing more than the fact that they have been filed. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); TBMP § 1208.02 (Jan. 2017).

Applicant's addition of "CROSBY" did not significantly change the commercial impression of the mark, as adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion.¹⁴ Comparing the goods, the Examining Attorney noted that the cited registration's unrestricted and broad identification encompasses all types of "metal identification tags," not just those specified in Registrant's specimens. Further, the Examining Attorney submitted Internet evidence of third parties that manufactured and produced metal identification tags and RFID tags under the same mark.¹⁵ The Examining Attorney accordingly maintained the refusal to register Applicant's mark based on likelihood of confusion under Section 2(d).

As detailed below, we conclude that likelihood of confusion has not been established.

II. Likelihood of Confusion

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"), cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, ___ U.S. ___, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In the course of applying the *du Pont* factors, we bear in mind the fundamental purposes

¹⁴ September 16, 2016 Office Action p. 3.

¹⁵ September 16, 2016 Office Action pp. 4, 9-25.

underlying Section 2(d), which are to prevent consumer confusion as to commercial sources and relationships, and to protect mark owners from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *du Pont*, 177 USPQ at 566.

We have considered each *du Pont* factor pertaining to the arguments and evidence of record, and have treated any other factors as neutral. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Varying weights may be assigned to each *du Pont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination.”). 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); *In re i.am.symbolic, LLC*, 116 USPQ2d 1406, 1409 (TTAB 2015).


A. The Similarity or Dissimilarity of the Marks

Under the first *du Pont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks as compared in their entireties, taking into

account their appearance, sound, connotation and commercial impression. *Du Pont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark. On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, 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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985), *quoted in ProMark Brands*, 114 USPQ2d at 1243.

In this case, we find that the dominant, distinguishing component of Applicant’s mark is CROSBY. It is the first term in the applied-for mark—the part that is most prominently displayed, first encountered by purchasers of material lifting equipment, and most likely to be remembered by those purchasers. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *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); *Presto Prod. Inc. v. Nice-Pak Prod., 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”).

Although CROSBY is a surname, it has acquired distinctiveness among purchasers of material lifting equipment and related products. The Examining Attorney advised Applicant that its claim of acquired distinctiveness was unnecessary and could be withdrawn, but made the distinctiveness of CROSBY an issue by arguing that as a surname, it is entitled to little weight in comparing Applicant's mark with Registrant's. In that respect, the distinctiveness of CROSBY is very much an issue, regardless of the necessity of Applicant's Section 2(f) claim.

Applicant has used the CROSBY mark for more than the five years' substantially exclusive use specified by statute, on material lifting equipment and related products.¹⁶ 15 U.S.C. § 1052(f); 37 CFR § 2.41(a)(2); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1212.02(f)(i)(2) (Jan. 2017) (proof of five years' substantially exclusive and continuous use of relevant portion of mark in commerce). And Applicant owns prior registered marks that consist of CROSBY—one in standard characters, issued in 1978, and the other in stylized letters, , issued in 1980—both for various forms of material lifting equipment.¹⁷ This evidence of acquired distinctiveness is uncontroverted.

The acquired distinctiveness of the CROSBY element carries over to its present Application. "An intent-to-use applicant may assert a claim of acquired distinctiveness under § 2(f) as to part of a mark prior to filing an acceptable allegation

¹⁶ Declaration under Section 2(f) of William D. Fisher, February 26, 2016, March 1, 2016 Response to Office Action p. 6.

¹⁷ Reg. nos. 1100565 and 1139374, Section 8 and 15 declarations accepted and acknowledged, renewed. March 1, 2016 Response to Office Action p. 1.

of use if the applicant has already used the relevant part of the mark in commerce on or in connection with the specified goods or services, or related goods or services.” TMEP § 1212.09(b) (Jan. 2017). Moreover, an applicant may prove acquired distinctiveness of a portion of its applied-for mark through ownership of active prior registrations on the Principal Register of the relevant portion of the mark for goods that are sufficiently similar to those identified in the pending application. 37 CFR § 2.41(a); TMEP §§ 1212.02(f)(i),(ii) (Jan. 2017); *see generally In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001) (“[A]n applicant can establish acquired distinctiveness in an intent-to-use application where it can show that ‘same mark’ acquired distinctiveness for related goods or services, and that this acquired distinctiveness will transfer to the goods or services specified in the application when the mark is used in connection with them.”); *In re Rogers*, 53 USPQ2d 1741, 1744 (TTAB 1999).

Acquired distinctiveness is “a mental association in buyers’ minds between the alleged mark and a single source of the product.” 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (4th ed. March 2017 update). *See Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012). Here, the record evidence demonstrates that purchasers of material lifting equipment and related goods have been conditioned over time to associate CROSBY with a single source: Applicant.

The Examining Attorney contends that “The addition of Applicant’s registered mark ‘CROSBY’ does not significantly change the commercial impression of the mark.

Adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion under Section 2(d).¹⁸ Although Applicant has not applied to register a house mark, *see* TMEP § 1402.03(b), CROSBY is very much akin to a house mark, in that it is the dominant, source-identifying component the present Application shares with Applicant's prior registrations—all pertaining to material lifting equipment and related goods.

The addition of such a distinctive mark—even a house mark—to another mark can render the two marks distinguishable if the other mark is highly suggestive or descriptive. For example, in *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313 (TTAB 2005), the registrant's mark, ESSENTIALS, was so highly suggestive of articles of clothing that the applicant's addition of the house mark NORTON MCNAUGHTON to ESSENTIALS for clothing sufficed to distinguish the marks. *See also Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1174 (TTAB 2011) (addition of ZIG ZAG to the highly suggestive phrase "CLASSIC AMERICAN BLEND" held sufficient to outweigh the similarities in marks); *Rocket Trademarks Pty Ltd. v Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (ZU ELEMENTS (stylized) not confusingly similar to ELEMENTS for identical clothing goods due, in part, to suggestiveness of term "ELEMENTS").

Here, Applicant adds CROSBY to QUIC-TAG, a suffix that is very similar to Registrant's wording, QUICK TAG. We agree with the Examining Attorney that these elements, QUIC-TAG and QUICK TAG, are phonetically equivalent, and that

¹⁸ Examining Attorney's brief, 7 TTABVUE 6.

misspelling QUIC and an addition of a hyphen does nothing to distinguish these terms. *See In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (“There is no legally significant difference here between ‘quik’ and ‘quick.’”), *cited in Nazon v. Ghiorse*, 119 USPQ2d 1178, 1185 (TTAB 2016); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (“the hyphen in Applicant’s mark MINI-MELTS does not distinguish it from Opposer’s mark [MINI MELTS].”).

But the words in Registrant’s mark are at best highly suggestive and at worst generic. “TAG” is disclaimed in the cited Registration, as it is generic for metal identification tags. *See In re Nat’l Data*, 224 USPQ at 751 (“That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark[.]”). “QUICK” is highly suggestive, as it suggests that Registrant’s tags are provided quickly. *See In re Quik-Print Copy Shop*, 205 USPQ at 507 (“Clearly the term ‘QUIK’ describes one of the qualities or characteristics of this service, namely: the speed with which it is done.”); *In re Vanilla Gorilla, L.P.*, 80 USPQ2d 1637, 1639 (TTAB 2006) (“Even if there was no evidence that such terms as NU, QUIK, KWIK, KUP, or ORGANIK were used, it would not mean that they were not descriptive.”). And the lightning bolt used to stylize the “Q” in “QUICK” merely reinforces the suggestion that Registrant’s QUICK TAG metal identification tags are dispensed quickly.

QUICK TAG is thus highly suggestive—so much so that the addition of CROSBY, a dominant, distinctive component, suffices to distinguish it. Considering Applicant’s

and Registrant's marks in their entirety, in appearance, sound, and overall commercial impression, the dissimilarities outweigh the similarities. Consequently, the first *du Pont* factor weighs against a finding of likelihood of confusion.

B. The Similarity or Dissimilarity of the Goods

The second *du Pont* factor concerns the similarity or dissimilarity and nature of Applicant's and Registrant's goods as described in the Application and Registration. *du Pont*, 177 USPQ at 567.

Applicant's identified goods consist of radio frequency identification tags and computerized readers, whereas Registrant's goods consist of metal identification tags. There is no suggestion that Applicant's readers are similar to Registrant's goods. The issue of similarity *vel non* arises solely as to Applicant's RFID tags and Registrant's metal identification tags. *See Bond v. Taylor*, 119 USPQ2d 1049, 1052-53 (TTAB 2016) ("[A] likelihood of confusion may be found with respect to a particular class based on any item within the identification of goods for that class.").

Applicant argues that the tags are different in kind. Its RFID tags (in International Class 9 for electronic and computer equipment and software), are attached to material lifting equipment, and emit radio frequency signals that its computerized readers can read. By contrast, "Registrant's mark is in International Class 006 which is primarily for metals and metal materials. These goods are in different non-overlapping groups, serve different purposes, and, indeed, involve

different goods. ... A consumer would not be confused between the two marks as the two products cannot be mistaken for one another.”¹⁹

The Examining Attorney responds that the differing classifications do not mean the goods are unrelated. *See Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993). A half-dozen third-party websites of record offer metal tags and RFID tags under the same mark:

- Seton.com, showing a variety of metal tags, RFID asset tags, and RFID firmware available for purchase;
- Emedco.com, showing a variety of metal identification tags as well as a “custom returnable container RFID asset tag” available for purchase;
- Bradyid.com, showing RFID tags, RFID software and firmware, and a variety of metal tags available for purchase;
- Ableid.com, showing RFID tags, including RFID tags made of steel and RFID firmware available for purchase;
- Idplate.com, showing RFID asset tags, and a variety of metal tags available for purchase; and
- Fricknet.com, showing metal tags and RFID tags available for purchase.²⁰

In some cases, the Examining Attorney observes, the RFID tags can be made of metal.²¹ Consequently, the Examining Attorney argues, Applicant’s and Registrant’s metal and RFID identification tags are related. *See In re Davey Prods. Pty Ltd.*, 92

¹⁹ Applicant’s brief pp. 11, 12-13, 4 TTABVUE 12-14.

²⁰ Examining Attorney’s brief, 7 TTABVUE 10; March 24, 2016 Office Action pp. 5–21; September 16, 2016 Office Action pp. 5–21.

²¹ Examining Attorney’s brief, 7 TTABVUE 9, March 24, 2016 Office Action p. 17.

USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

We find that Registrant’s metal identification tags can be considered somewhat related to Applicant’s RFID tags. They both identify the matter to which they are attached, although they function and are used in different ways. Metal identification tags enable visual identification. Radio frequency identification tags are “placed on objects, people, or animals to relay identifying information to an electronic reader by means of radio waves....”²² They are commonly used to trigger access to garages, or, as in Applicant’s case, to track inventory.²³ As Applicant points out, that difference in function explains their separate International Classifications—one for metal goods, the other for electronic and computer goods.

However, the fact that goods may appear in different International Classes sheds no light on whether they are related for purposes of determining the likelihood of confusion. “[C]lassification is wholly irrelevant to the issue of registrability under [Trademark Act §] 2(d), which makes no reference to classification.” *Jean Patou*, 29 USPQ2d at 1774. “[T]he issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods.” *In re Davia*, 110 USPQ2d 1810, 1818 (TTAB 2014) (citing *J. C. Hall Co. v. Hallmark*

²² Dictionary.com. Dictionary definitions may be used to determine the meaning of technical terms. *See In re Thor Tech, Inc.*, 90 USPQ2d at 1638n. 10. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006); *Bond v. Taylor*, 119 USPQ2d at 1056n. 14.

²³ *See* March 1, 2016 Response to Office Action p. 7.

Cards, Inc., 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965)). The goods need not be identical or even competitive to find a likelihood of confusion; a likelihood of confusion can be found if they are “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

The Examining Attorney’s Internet evidence of third-party uses shows some relatedness between RFID tags and metal identification tags, although not as strongly as in *Davey* and *Toshiba*. In *Davey* the applicant’s goods were an essential component of the registrant’s goods. *Davey Prods.*, 92 USPQ2d at 1202 (“We find that applicant’s goods identified as ‘electric motors for machines’ are related to registrant’s goods identified as ‘air compressors and parts therefor,’ because the record shows that an electric motor is or can be an essential component and/or replacement part of an air compressor.”). And in *Toshiba*, the applicant’s and registrant’s goods, ultrasound and magnetic resonance imaging machines, respectively, performed related medical diagnostic functions. *Toshiba*, 91 USPQ2d at 1218-19.

Here, in contrast, one good is not an essential component of the other, nor is there any reason to assume that they would be used together. RFID electronic chips may be embedded in plastic tags, adhesive paper labels, or metal casings, among other

forms.²⁴ And the tags are loosely related in function—one generally enabling visual identification, the other permitting radio identification.

On the whole, while Registrant’s metal identification tags do not encompass Applicant’s RFID tags, the Examining Attorney’s evidence of third-party use demonstrates that the goods may emanate from a common source, and may overlap at times. We find, therefore, that the goods are somewhat related under the second *du Pont* factor.

C. Established, Likely-to-Continue Channels of Trade and Sophistication of Purchasers

The third and fourth *du Pont* factors concern the similarity or dissimilarity of established, likely-to-continue trade channels, and the conditions under which and buyers to whom sales are made, i.e. “impulse” versus careful, sophisticated purchasing. *du Pont*, 177 USPQ at 567. Applicant argues that that Registrant has no established or likely-to-continue trade channels in the material lifting equipment industry: “It is extremely unlikely that Applicant’s consumer[s] for RFID tags for material lifting equipment would shop for this tag at the same outlet as Registrant’s consumer for pet ID tags, such as Petco.”²⁵ The Examining Attorney responds that “the question of likelihood of confusion is determined based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use.”²⁶ *See Stone Lion Capital Partners*, 110 USPQ2d at 1162.

²⁴ See March 1, 2016 Response to Office Action p. 7, March 24, 2016 Office Action pp. 10, 12, 15-16, 20-23; September 16, 2016 Office Action pp. 9–12, 21-24.

²⁵ Applicant’s brief p. 13, 4 TTABVUE 14.

²⁶ Examining Attorney’s brief 7 TTABVUE 8.

Since Applicant limits its identified goods to radio frequency identification tags and computerized readers “for material lifting equipment,” and the cited Registration contains no such limitation, the only possible point of overlap is businesses that purchase and use material lifting equipment. *See Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1222 (TTAB 2011) (Registrant’s identified services were limited to financial institutions. “Therefore, the only overlap in terms of customers for defendant’s services are financial institutions as well.”). So if we assume that Registrant offers its goods in Applicant’s channel of trade, the classes of customers in that channel would be industrial purchasers of material lifting equipment. As our reviewing Court has put it, “[W]e believe that, at least in the case of goods and services that are sold, the inquiry generally will turn on whether actual or potential ‘purchasers’ are confused. ... ‘If likelihood of confusion exists, it must be based on the confusion of some relevant person; *i.e.*, a customer or purchaser.’” *Elec. Design & Sales Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1390 (Fed. Cir. 1992) (quoting *Astra Pharm. Prods. v. Beckman Instruments*, 718 F.2d 1201, 1206, 220 USPQ 786, 790 (1st Cir. 1983)).

Here, as we have seen, Applicant has an established reputation in the field of lifting equipment, evidenced not only by the declaration of its Vice President, but by the prior CROSBY marks it has registered, all in the same industry. In view of the very nature of that industry, involving material lifting equipment, it stands to reason that its institutional purchasers will exercise greater care in making their purchases than the general purchasing public. *See In re HerbalScience Group LLC*, 96 USPQ2d

1321, 1324 (TTAB 2010) (manufacturers “must be assumed to be knowledgeable and careful purchasers.”); *In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001) (assuming wholesalers and storeowners are sophisticated purchasers). Thus, while Registrant could offer its products to industries requiring material lifting equipment, it is unlikely that the purchasers in those industries will confuse its mark with Applicant’s CROSBY-formative mark. As our reviewing Court has made clear, “We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.” *Witco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969), *quoted with approval in Elec. Design & Sales Inc.*, 21 USPQ2d at 1391; and *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1040 (TTAB 2016).

For these reasons, the third and fourth *du Pont* factors weigh against a likelihood of confusion.

III. Conclusion

After considering all evidence and arguments bearing on the *du Pont* factors, including the evidence and arguments that we have not specifically discussed herein, we conclude that although Applicant’s and Registrant’s goods are somewhat related, the dissimilarities in their respective marks, coupled with the mostly diverse channels of trade and sophisticated classes of purchasers, create “a confluence of facts which persuasively point to confusion as being unlikely.” *In re Gen. Motors Corp.*, 23 USPQ2d 1465, 1470 (TTAB 1992).

Decision: The refusal to register Applicant's mark CROSBY QUIC-TAG is reversed.