

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

Mailed: June 13, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Spy Tec International Inc.

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Serial No. 87543668

Gene Bolmarcich of Law Offices of Gene Bolmarcich,
for Spy Tec International Inc.

Brandan J. Ketchum, Trademark Examining Attorney, Law Office 125,
Mark Pilaro, Managing Attorney.

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Before Wolfson, Gorowitz and Heasley,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Spy Tec International Inc. (“Applicant”) seeks registration on the Principal Register of the mark FOUNDIT THEFT RECOVERY (in standard characters) for

GPS tracking devices, namely, personal asset tracker,
personal tracker, vehicle tracker in International Class 9.¹

¹ Application Serial No. 87543668 was filed on July 26, 2017, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. The phrase “THEFT RECOVERY” was disclaimed.

The Trademark Examining Attorney refused registration of Applicant's mark FOUNDIT THEFT RECOVERY under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the registered mark IFI I FOUND IT (in stylized form with design), as set forth below, (the "Cited Mark"), for "electronic devices for locating and tracking lost articles using radio frequency, global positioning systems, and/or cellular communication networks" in International Class 9"² that it is likely to cause confusion.³



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

I. Likelihood of Confusion.

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*

² Registration No. 4562457 issued on July 8, 2014.

³ The Examining Attorney also cited Registration No. 4813334 for the mark FINDIT (in standard characters) for "electronic tracking systems for use by financial institutions, retailers, manufacturers, and distributors for tracking money and inventory shipments; not for use in relation to vehicles or personal property." The citation was withdrawn in the November 14, 2017 Office Action.

also, In re Majestic Distilling Co., 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 Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *see also In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity of the goods and channels of trade.

We start our analysis with the second and third *du Pont* factors, the similarities or dissimilarities of the goods and the channels of trade. Applicant did not address these issues, but they have been addressed by the Examining Attorney, which bears the burden of establishing the relevant *du Pont* factors. The Examining Attorney has met this burden.

We base our determination under these factors on the goods as they are identified in the registration and application. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). *See also Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's goods are identified as "GPS tracking devices, namely, personal asset tracker, personal tracker, vehicle tracker" and the goods in the cited registration are identified as "electronic devices for locating and tracking lost articles using radio frequency, global positioning systems, and/or cellular communication networks." Both Applicant's and the cited goods include GPS tracking devices for locating "personal assets" or "lost articles." As defined in the *Merriam-Webster On-line*

Dictionary, an asset is “an item of value owned”⁴ and an “article” is a “member of a class of things; *especially*: an item of goods - *articles* of value.”⁵ As such, Applicant’s goods are broad enough to encompass the cited goods, making the goods legally identical in-part.

“[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.” *Bond v. Taylor*, 119 USPQ2d 1049, 1052-53 (TTAB 2016) (quoting *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1073 (TTAB 2011)); *see also Tuxedo Monopoly Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). Therefore, since both Applicant’s and the cited goods are legally identical in-part, likelihood of confusion may be found with respect to the entire class of goods, in this case, International Class 9.

“[I]t is well established that, absent restrictions in the application and registration, [legally identical] goods are presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Therefore, Applicant’s goods and the goods in the cited registration are presumed to be sold in the same channels of

⁴ We take judicial notice of the definition of “asset” from the *Merriam-Webster On-line Dictionary*. “Asset.” *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 31 May 2018.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

⁵ We also take judicial notice of the definition of “article” from the *Merriam-Webster On-line Dictionary*. “Article.” *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 31 May 2018.

trade and to the same customers. *Id.* (The Board is “entitled to rely on this legal presumption in determining likelihood of confusion.”). While the evidence submitted by the Examining Attorney is not extensive, it does establish that goods such as the Applicant’s and the Registrant’s are sold in the same channels of trade (manufacturers’ websites) for sale to the same classes of customers (both businesses and the general public). For example,

Pocketfinder (www.pocketfinder.com) offers a global tracker for tracking people (personal tracker), pets, and vehicles, which can be located using a smartphone, tablet or computer. Illustrative of the products offered is the personal tracker, “PocketFinder+, which provides an ideal way for families and caregivers to keep track of the people they love. Ideal for children heading to or from school or to after school activities and seniors;”⁶

LiveViewGPS (www.liveviewgps.com) offers GPS tracking systems for both business and personal use;⁷ and

Rocky Mountain Tracking Inc. (rmtracking.com) is a “leading provider of location based tracking for various applications, including vehicles, people and assets. ---GPS tracking systems and services for consumers and businesses nationwide.”⁸

As such, we find that the second and third *du Pont* factors strongly favor a finding of likelihood of confusion.

⁶ November 14, 2017 Office Action, TSDR 7-10.

⁷ *Id.*, TSDR at 24-27.

⁸ *Id.*, TSDR at 28-34.

B. Similarity of the marks.

“When marks ... appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Keeping this in mind, we look at the first *du Pont* factor, the similarity or dissimilarity of Applicant’s mark FOUNDIT THEFT RECOVERY (in standard characters) and the Cited Mark.

We determine the similarity of marks by comparing them “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) (citation omitted). Moreover, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009) (citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975)). As discussed above, the average purchasers of both Applicant’s and Registrant’s goods consist of the general public and the business community.

While “the similarity or dissimilarity of the marks is determined based on the marks in their entireties ... 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 a consideration of the marks in their entireties.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In this case, the Cited Mark is a composite mark consisting of a verbal or literal portion and a design. When a mark contains both words and designs, the verbal portion of the mark is normally more likely to indicate the origin of the goods to which it is affixed because it is the portion of the mark that consumers would use to refer to or request the goods. *Viterra*, 101 USPQ2d at 1908 and 1911 (Likelihood of confusion

found between XCEED and  for agricultural seed.)

The dominant part of the Cited Mark is the literal phrase I FOUND IT. The dominant part of Applicant’s mark is the term FOUNDIT since it is both the first part of the mark and the only element that is not disclaimed. The first part of a mark is frequently the most dominant portion thereof. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t 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 Imps. v. Veuve Clicquot* 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 Am., 23 USPQ2d at 1700 (upon encountering the marks, consumers will first notice the identical lead word).

In addition, in Applicant's mark, the term FOUNDIT is the only portion of the mark that has not been disclaimed. In a mark consisting of multiple words, the words that are disclaimed are generally not regarded as either dominant or critical. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018) (quoting *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011) (“[W]hen a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term.”)); *see also In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION'S, not disclaimed word ROADHOUSE, is dominant element of BINION'S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark's commercial impression.”).

Applicant argues that “the word ‘found’ in relation to Registrant's electronic devices for locating lost articles is not very distinctive.” Appeal Brief 5 TTABVUE 3. We acknowledge that the word, “found” may be weak in connection with Registrant's goods, which is used to locate lost articles. However, “even suggestive or weak marks are entitled to protection from the use of a very similar mark for legally identical [goods].” *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010); *see also King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

Viewing the marks in their entireties with the non-dominant features appropriately discounted, we find the Cited Mark and the mark FOUNDIR THEFT RECOVERY are similar in meaning and sound and that the similarities in the marks outweigh any dissimilarities. Similarity as to one element (e.g., sight, sound, or meaning) has been held sufficient to support a finding of confusing similarity. *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914 (TTAB 2000) (“It is not necessary that marks be similar in all three of the elements of sight, sound, and meaning to support a finding of likelihood of confusion.”).

As such, the first *du Pont* factor favors a finding of likelihood of confusion.

II. Conclusion.

Having considered all the evidence and argument on the relevant *du Pont* factors, whether discussed herein or not, we find that Applicant’s mark FOUNDIR THEFT RECOVERY for “electronic devices for locating and tracking lost articles using radio frequency, global positioning systems, and/or cellular communication networks” is likely to cause confusion with the Cited Mark for “electronic devices for locating and tracking lost articles using radio frequency, global positioning systems, and/or cellular communication networks.”

Decision: The refusal to register Applicant’s mark FOUNDIR THEFT RECOVERY is affirmed.