

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Elektromotive Australia Pty Ltd.

Serial No. 90025392

Leo M. Loughlin and Davide F. Schiavetti of Rothwell, Figg, Ernst & Manbeck, P.C.
for Elektromotive Australia Pty Ltd.

David I, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

Before Bergsman, Larkin, and Coggins,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Elektromotive Australia Pty Ltd. (“Applicant”) seeks registration on the Principal Register of the mark shown below for “electric bicycles; electric motorcycles” in International Class 12:



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¹ Application Serial No. 90025392 was filed on June 29, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark at

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character mark STEALTH, registered on the Principal Register to separate registrants for "electronically motorized skateboards" in International Class 12,² and "electric motor vehicles, namely, all-terrain vehicles" in International Class 12,³ as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

Applicant appealed after the Examining Attorney made the refusal final. The appeal is fully briefed.⁴ We affirm the refusal to register.

I. The Record on Appeal⁵

The record on appeal includes Applicant's specimens of use, one of which we reproduce below

least as early as January 15, 2014, and first use of the mark in commerce at least as early as January 22, 2014. Applicant has disclaimed the exclusive right to use ELECTRIC BIKES apart from the mark as shown. Applicant describes its mark as follows: "The mark consists of a stylized letter S beside the stylized wording STEALH ELECTRIC BIKES disposed in two lines."

² The cited Registration No. 5752816 issued on May 14, 2019 to Boosted, Inc.

³ The cited Registration No. 5718660 issued on April 9, 2019 to Stealth Manufacturing LLC.

⁴ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney's brief appears at 6 TTABVUE.

⁵ Citations in this opinion to the application record are to pages in the Trademark Status and Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").



Wikipedia entries captioned “Electric bicycle,”⁷ and “All-terrain vehicle,”⁸ Internet webpages regarding electric bicycles;⁹ dictionary definitions of “electric,” “bike,” and “stealth;”¹⁰ USPTO electronic records regarding the cited registrations;¹¹ USPTO electronic records regarding third-party registrations of marks for the goods identified in the application and cited registrations, or similar goods;¹² Internet webpages of sellers of electric bicycles, and electric skateboards or all-terrain vehicles;¹³ and USPTO electronic records from the file history of Application Serial No. 85240986, which matured into the cited registration of STEALTH for all-terrain vehicles.¹⁴

⁶ June 29, 2020 Specimen of Use at TSDR 1.

⁷ October 7, 2020 Office Action at TSDR 2-12.

⁸ April 7, 2021 Response to Office Action at TSDR 13-27.

⁹ October 7, 2020 Office Action at TSDR 13-19.

¹⁰ *Id.* at TSDR 20-26 (MACMILLAN DICTIONARY, macmillandictionary.com); April 7, 2021 Response to Office Action at TSDR 8-12 (DIZIONARIO INGLESE COLLINS).

¹¹ October 7, 2020 Office Action at TSDR 27-28, 38-39.

¹² *Id.* at TSDR 29-37, 40-63.

¹³ June 6, 2021 Final Office Action at TSDR 2-49.

¹⁴ April 7, 2021 Response to Office Action at TSDR 28-47.

II. Analysis of Section 2(d) Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *29 (TTAB 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). Applicant’s appeal brief focuses solely on these two key factors, 4 TTABVUE 6-9, and its reply brief focuses solely on the first factor. 7 TTABVUE 2-4.

We will focus our analysis on the STEATLH standard-character mark shown in Registration No. 5752816 for “electronically motorized skateboards” (the “816 Registration”). “If we find a likelihood of confusion as to that mark and those goods,

we need not find it as to” the other cited STEALTH mark and the different goods for which it is registered. *New Era*, 2020 USPQ2d 10596, at *9.

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘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.’” *Embiid*, 2021 USPQ2d 577, at *11 (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customer of the goods identified in the application, “electric bicycles” and “electric motorcycles,” appears to be an ordinary consumer.

Applicant “submits that the difference in the marks is sufficient to warrant a reversal of the refusal.” 4 TTABVUE 6. Applicant argues that the marks differ significantly in sound and appearance for two reasons:

First, the marks in both cited registrations are one-word marks in standard characters, while that of Applicant is a design three-word mark. Applicant’s thunderbolt design, to represent the letter “S”, is the most prominent element of its mark. Second, the overall commercial impression and pronunciation of the marks is prominently different, thus signaling to prospective purchasers that the marks signify different sources.

Id.

Applicant further argues that the addition of the words ELECTRIC BIKES to STEALTH in its mark “results in a difference in both pronunciation and appearance,” *id.*, and that the Board “has routinely found that marks that are comprised of a different number of terms carry dissimilar commercial impressions, and this applies to the analysis between a two-word mark and a one-word mark.” *Id.* at 7 (citations omitted). According to Applicant, the “case at hand warrants a finding of no likelihood of confusion to an even greater degree” because “Applicant’s mark is a (i) design (ii) three-word mark, compared to Registrants’ two standard, one-word marks.” *Id.*

The Examining Attorney responds that “the dominant portion of the Applicant’s mark is the term ‘STEALTH,’” and that “the dominant portion of the applicant’s mark is identical to each of the registered marks.” 6 TTABVUE 6. He further argues that the term ELECTRIC BIKES in Applicant’s mark is “generic in relation to the Applicant’s claimed goods and ha[s] been disclaimed as such,” *id.* at 7, and that the design element of Applicant’s mark is subordinate to the word portion because “when

evaluating a composite mark consisting of words and design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used to refer to or request the goods and/or services.” *Id.* at 8 (citations omitted). He concludes that “because the dominant portion of the applicant’s mark is identical to each of the cited registered marks and the applicant has merely formed [its] mark by adding generic terms to the registrants’ marks the marks are similar in connotation and create a similar commercial impression.” *Id.* at 9.

In its reply brief, Applicant argues that the Examining Attorney “disregards the following elements of Applicant’s mark: (i) Applicant’s prominent design; (ii) two completely different literal elements; (iii) Applicant’s word mark stylization, while attention is focused solely on one literal term that is shared with the cited registrations.” 7 TTABVUE 4. Applicant concludes that “[b]ecause marks have to be considered in their entirety, all the elements comprising Applicant’s mark contribute to its distinctive commercial impression and outweigh the single similarity of one literal element shared with the cited registrations.” *Id.*

“While the marks must be considered in their entirety, ‘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 entirety.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *30-31 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d

1047, 1050 (Fed. Cir. 2018) (internal quotation omitted)). As discussed above, Applicant argues that its “thunderbolt design, to represent the letter ‘S’, is the most prominent element of its mark,” 4 TTABVUE 6, while the Examining Attorney argues that “the dominant portion of the Applicant’s mark is the term ‘STEALTH.’” 6 TTABVUE 6. We will thus begin by determining the dominant element of Applicant’s mark. For ease of reference in following our analysis, we reproduce Applicant’s mark again below:



“In marks ‘consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.’” *Sabhnani*, 2021 USPQ2d 1241, at *31 (quoting *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). “The verbal portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.’” *Id.* (quoting *Viterra*, 101 USPQ2d at 1911). *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) (“We have also explained that when a mark consists of both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’”) (citation omitted).

This general principle applies squarely to Applicant's mark. The stylized S design "serves primarily to reinforce the first letter in" STEALTH. *Sabhnani*, 2021 USPQ2d 1241, at *33. Within the verbal elements of the mark, the word STEALTH "is '[d]isplayed in a large bold typeface' and 'comprises the largest [word] in the mark in terms of size, position, and emphasis.'" *Id.* (quoting *Aquitaine Wine USA*, 126 USPQ2d at 1184-85). The word STEALTH is "also the first term in the mark" when the verbal elements are read from top to bottom, "further establishing its prominence." *Aquitaine Wine USA*, 126 USPQ2d at 1185 (citing *Palm Bay Imps.*, 73 USPQ2d at 1692; *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)). The term ELECTRIC BIKES, which appears beneath STEALTH in smaller typeface, has "no source-identifying significance and has been disclaimed," *Sabhnani*, 2021 USPQ2d 1241, at *33, and it is "entitled to less weight in the likelihood of confusion determination." *Aquitaine Wine USA*, 126 USPQ2d at 1185 (citing *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1188 (TTAB 2014)). We find that the word STEALTH is the dominant portion of Applicant's mark.

We turn now to the required comparison of the marks in their entireties, giving greater weight in that comparison to the word STEALTH in Applicant's mark than to the other portions of the mark.

With respect to appearance, the cited mark STEALTH "is a standard character mark, which 'may be presented in any font style, size or color, including the same font, size and color as the literal portions of [Applicant's] mark.'" *Sabhnani*, 2021

USPQ2d 1241, at *34 (quoting *Aquitaine Wine USA*, 126 USPQ2d at 1186). We thus must assume that the cited STEALTH mark in the '816 Registration could be displayed in the same font as the word STEALTH in Applicant's mark, which we display below

STEALTH

Id.

Applicant's "composite mark displays the word [STEALTH] above the [term ELECTRIC BIKES] in much larger letters, and [next to] a design element that serves, in the context of the composite mark, to reinforce the leading letter ['S'] in [STEALTH]." *Id.*, at *35. There are some differences in appearance between the marks resulting primarily from the presence of the stylized "S" in Applicant's mark, but as noted above, the "proper test regarding similarity 'is not a side-by-side comparison of the marks" *Embiid*, 2021 USPQ2d 577, at *11. For a consumer with a "general rather than a specific impression," *id.*, of the cited STEALTH mark in the '816 Registration displayed in the same font as the word STEALTH in Applicant's mark, the additional visual elements in Applicant's mark are not likely to cause the mark to be viewed as significantly different from the cited mark. We find that the marks are more similar than dissimilar in appearance due to the common presence of the word STEALTH.

With respect to sound, the stylized letter "S" in Applicant's mark is "likely to be 'viewed, not spoken'" when the mark is verbalized. *Sabhani*, 2021 USPQ2d 1241, at *36 (quoting *In re Electrolyte Labs., Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed.

Cir. 1990)). The term STEALTH ELECTRIC BIKES and the word STEALTH are more similar than dissimilar in sound “because of the common presence of the word [STEALTH],” *id.*, and the “similarity in sound will be greater if consumers engage in ‘the penchant of consumers to shorten marks.’” *Id.* (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016)). We find that it is likely that consumers will “drop the non-source-identifying [term ELECTRIC BIKES] when verbalizing” Applicant’s composite mark. *Id.* (citing *Bay State Brewing*, 117 USPQ2d at 1961 (the penchant to shorten marks “would lead many consumers to drop the highly descriptive/generic term ‘Blonde’ when calling for” the applicant’s TIME TRAVELLER BLOND beer)). We find that the marks are quite similar in sound.

Finally, with respect to meaning, in the absence of any evidence to the contrary, we find that the word STEALTH would have the same meaning in both marks when they are used for electric bicycles and electronically motorized skateboards, namely, “a cautious, unobtrusive, and secretive way of moving or proceeding intended to avoid detection.”¹⁵ Consumers familiar with the cited mark STEALTH in the ’816 Registration for electronically motorized skateboards who encounter Applicant’s STEALTH-dominated composite mark for electric bicycles could readily conclude that the registrant has extended its line of STEALTH vehicles that provide (at least

¹⁵ MERRIAM-WEBSTER DICTIONARY (www.merriam-webster.com, last accessed on July 1, 2022). “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format.” *Chutter*, 2021 USPQ2d 1001, at *36 n.72. Applicant submitted a similar definition of “stealth” as “the act or characteristic of moving with extreme care and quietness, esp so as to avoid detection” from what appears to be an Italian edition of the COLLINS DICTIONARY (Dizionario inglese Collins). April 7, 2021 Response to Office Action at TSDR 9.

figuratively) “a cautious, unobtrusive, and secretive way of moving or proceeding intended to avoid detection” from electronically motorized skateboards into electric bicycles. We find that the marks are quite similar in connotation and commercial impression.

The marks are more similar than dissimilar in appearance, and quite similar in sound and connotation and commercial impression. The first *DuPont* factor supports a finding of a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods

The second *DuPont* factor “considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration’” *Embiid*, 2021 USPQ2d 577, at *22 (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1051 (internal quotation omitted)). The goods identified in the application are “electric bicycles; electric motorcycles,”¹⁶ while the goods identified in the ’816 Registration are “electronically motorized skateboards.”

“The goods need not be identical, but ‘need only be 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.’” *Id.* (quoting *Coach*

¹⁶ “The Examining Attorney need not prove, and we need not find, similarity as to each product listed in [Applicant’s] description of goods. ‘[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.’” *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015)). See also *Tuxedo Monopoly, Inc. v. Gen Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citation omitted)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration.

Id., at *22-23 (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020)).

In its appeal brief, Applicant argues that “there is no likelihood of confusion between Applicant’s mark and the cited mark because the respective parties’ goods are sufficiently different in that the respective products do not overlap and the public would not associate the goods with the same source.” 4 TTABVUE 8. Applicant further argues that its “goods would not be encountered in the same manner as those of the Registrants, and are substantially different such that confusion is unlikely as the products are used for completely different purposes.” *Id.*¹⁷ As noted above, Applicant does not address the second *DuPont* factor in its reply brief.

The Examining Attorney responds that “applicant and the registrants are offering highly related electronically motorized vehicles.” 6 TTABVUE 10. He cites third-

¹⁷ Applicant’s arguments regarding the differences in the goods per se address the wrong inquiry. The “issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods.” *Embiid*, 2020 USPQ2d 577, at *28 n.39 (quoting *Ox Paperboard*, 2020 USPQ2d 10878, at *5).

party, use-based registrations covering Applicant's and the cited registrant's goods, as well as Internet webpages offering both goods. *Id.* at 10-11.

The Examining Attorney made of record 10 third-party, use-based registrations of marks for both "electric bicycles" and "electronically motorized skateboards,"¹⁸ as well as webpages from Swagtron and Tempus Electric offering both electric bicycles and electric skateboards.¹⁹ Applicant does not address, much less refute, this evidence of relatedness, and we agree with the Examining Attorney that it shows that "electric bicycles" and "electronically motorized skateboards" are commonly offered under the same mark. The second *DuPont* factor supports a finding of a likelihood of confusion.

C. Summary

The marks are similar in all means of comparison, and "electric bicycles" and "electronically motorized skateboards" are commonly offered under the same mark. On the basis of the record as a whole, we find that a consumer familiar with the cited STEALTH mark in the '816 Registration for "electronically motorized skateboards" who encounters Applicant's STEALTH-dominated composite mark for "electric bicycles" is likely to believe mistakenly that those electric bicycles originate with, or are authorized or sponsored by, the owner of the cited STEALTH mark for electronically motorized skateboards.

Decision: The refusal to register is affirmed based on a likelihood of confusion with the mark shown in Registration No. 5752816.

¹⁸ October 7, 2020 Office Action at TSDR 29-37, 40-58 (Registration Nos. 5593197, 5625591, 5540503, 5611488, 5803674, 5794084, 6014843, 5998352, 6013420, and 6062789).

¹⁹ June 6, 2021 Final Office Action at TSDR 2-36.