

This Opinion is Not a
Precedent of the TTAB

Mailed: November 30, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Micro Mobio Corporation
v.
General Motors LLC
—————

Cancellation No. 92068218
—————

Christopher J. Horgan of Roark IP
for Micro Mobio Corporation

Mary A. Hyde, Anessa Owen Kramer, and Ka'Nea K. Brooks of Honigman Miller
Schwartz and Cohn LLP for General Motors LLC
—————

Before Wolfson, Heasley and English, Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Respondent, General Motors LLC, owns Registration No. 5387518 for the standard character mark SUPER CRUISE registered on the Principal Register for “Computer software, cameras, ultrasonic sensors, global positioning system and

radar object detectors for the semi-autonomous driving of motor vehicles” in International Class 9.¹

Petitioner, Micro Mobio Corporation, petitions to cancel Respondent’s Registration No. 5387518, claiming priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on prior use and registration of the mark SUPERCUISE for “Semiconductor devices, computer hardware, and computer software for use in design, simulation and control of electronic circuits and antenna, receiving and transmitting signals, and modulation, demodulation and media access control in voice and data communications” in International Class 9.²

In its answer, Respondent denies the salient allegations in the petition for cancellation.³

For the reasons explained below, we deny the petition for cancellation.

¹ Issued January 23, 2018 from an application filed June 20, 2016 under Section 1(b) of the Trademark Act, later amended to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of first use and first use in commerce on September 25, 2017.

² Registration No. 3972396 issued June 7, 2011 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on a claim of first use and first use in commerce on July 1, 2010; renewed.

³ In its answer, Respondent also pleaded that Petitioner failed to state a claim upon which relief can be granted and affirmative defenses of waiver, laches, estoppel, acquiescence and unclean hands. 6 TTABVue 4-5. We deem these defenses waived or forfeited because Respondent did not argue failure to state a claim by motion or at trial, nor did Respondent argue any affirmative defenses in its trial brief. *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (affirmative defense not argued in brief deemed waived), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014); *Swiss Watch Int’l Inc. v. Federation of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1734 n.4 (TTAB 2012) (same).

Respondent also alleged “affirmative defenses” of no likelihood of confusion between the parties’ marks and that Petitioner’s mark is weak. We treat these allegations as amplifications of Respondent’s denials.

I. The Record and Evidentiary Issues

The record includes Respondent's involved Registration No. 5387518, by operation of Trademark Rule 2.122(b)(1), 37 CFR § 2.122(b)(1), and the pleadings. The parties also introduced evidence:

A. Petitioner's Evidence

1. Petitioner's first and second notices of reliance on third-party registrations and printouts from third-party websites;⁴
2. Petitioner's third notice of reliance on a dictionary definition for the word "semi-autonomous," prosecution histories for applications owned by Respondent but not involved in this proceeding, and registrations listed as owned by non-party OnStar LLC;⁵
3. Petitioner's fourth notice of reliance on Respondent's responses to requests for admission, interrogatories and document requests, as well as documents Respondent produced in response to certain interrogatories;⁶
4. Petitioner's fifth notice of reliance on Respondent's motion for a protective order and Petitioner's response thereto;⁷
5. Petitioner's sixth notice of reliance on online newspaper and magazine articles and printouts from third-party websites;⁸
6. Petitioner's seventh notice of reliance on online newspaper articles and Petitioner's pleaded registration;⁹

⁴ 32 and 33 TTABVUE.

⁵ 34 TTABVUE (The definition is in British English so it has little probative value).

⁶ 35 TTABVUE (confidential); 44 TTABVUE (public version).

⁷ 36 TTABVUE.

⁸ 37 TTABVUE.

⁹ 38 TTABVUE.

7. Petitioner's eighth notice of reliance on the August 7, 2019 discovery deposition of Mario Maiorana;¹⁰
8. Declarations of expert witnesses Christopher Wilson and Don V. Nguyen, and accompanying exhibits;¹¹
9. Declaration, with accompanying exhibits, of Zlatko Aurelio Filipovic, a Sales and Marketing Lead for Petitioner;¹²
10. Petitioner's rebuttal notice of reliance on third-party registrations issued after the close of Petitioner's main testimony period.¹³

B. Respondent's Evidence

1. Respondent's first notice of reliance on Petitioner's responses to requests for admission, interrogatories and document requests, and the discovery depositions and accompanying exhibits of Don V. Nguyen, Christopher K. Wilson, and Zlatko Aurelio Filipovic;¹⁴

¹⁰ 39 TTABVUE (confidential); 43 TTABVUE (public version).

¹¹ 40 TTABVUE.

¹² 41 TTABVUE (confidential) and 42 TTABVUE (public version).

During the suspension of proceedings for expert testimony, Petitioner filed trial evidence, including the declarations of Filipovic, Wilson and Nguyen. The Board struck the declarations and Petitioner's other evidence as untimely. 31 TTABVUE. During its reset trial period, which closed on November 8, 2019, Petitioner refiled the previously executed declarations (Nguyen Declaration, executed December 3, 2018 (40 TTABVUE 171); Wilson Declaration, executed December 3, 2018 (40 TTABVUE 28); Wilson Supplemental Declaration, executed April 4, 2019 (40 TTABVUE 164), and Filipovic Declaration, executed May 28, 2019 (42 TTABVUE 13)).

Under Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1), "a testimony affidavit or declaration must be taken—that is, executed—during the assigned testimony period as required by [Trademark] Rule 2.121(a)." *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089 (TTAB 2019). The declarations Petitioner filed during trial were not executed during Petitioner's assigned trial period. Respondent, however, did not raise this issue so it has waived any objection that the declarations are untimely. *See Of Counsel Inc. v. Strictly of Counsel Chartered*, 21 USPQ2d 1555, 1556 n.2 (TTAB 1991) ("[A]pplicant waived its objection to the premature taking of the trial deposition, which could have been corrected upon seasonable objection.").

¹³ 57 TTABVUE.

¹⁴ 49 TTABVUE (public) and 50 (confidential).

2. Respondent's second, third, and fourth notices of reliance on printouts from the websites of Respondent, Petitioner and third-parties, online articles, and a 2020 brochure for the CT6 Cadillac;¹⁵
3. Declaration of Timothy Gorbatoff, Respondent's Lead Counsel for Trademarks and Design Patents;¹⁶
4. Declaration of Mario Maiorana, Respondent's Chief Engineer for Super Cruise and Active Safety;¹⁷
5. Declaration of Aldo Burrascano, Manager, Product Planning and Strategy for Cadillac.¹⁸

C. Respondent's Objections to Petitioner's Expert Witnesses

Respondent objects to the expert testimony declarations of Christopher Wilson and Don Nguyen, arguing that the declarations should be excluded in their entireties.

With respect to the Wilson declaration, Respondent argues that Mr. Wilson "is not qualified by knowledge, skill, experience, training or education to provide opinions on the relatedness of goods from a trademark perspective."¹⁹ Respondent further asserts that Mr. Wilson's "opinions and testimony regarding the 'relatedness' of the parties' respective goods are based on faulty methodology and do not even address the correct issue" because he has focused "exclusively on the technical meanings of the words contained in the parties' registrations and how those goods and their individual components work from a technological and functional perspective" and he "did not survey consumers as part of his research and failed even to consider the point of view

¹⁵ 51, 52, and 53 TTABVUE.

¹⁶ 54 TTABVUE.

¹⁷ 55 TTABVUE.

¹⁸ 56 TTABVUE.

¹⁹ Respondent's Brief, Appendix 1, 60 TTABVUE 47.

of the consumer.”²⁰ Respondent raises similar objections to the Nguyen declaration, asserting that Mr. Nguyen is not qualified to give an expert opinion as to whether the parties’ marks are likely to be confused, that Mr. Nguyen’s opinions are unreliable and not based on any consumer survey, and that Mr. Nguyen’s testimony is irrelevant.²¹

Respondent’s objections to the expert testimony of Wilson and Nguyen are overruled. Petitioner has not offered Mr. Wilson and Mr. Nguyen as expert witnesses in trademark law. Rather, Mr. Wilson, a vehicle data and technology consultant in the field of connected and automated vehicles, has been offered and is qualified as an expert in vehicle telematics. His testimony is relevant to the relatedness of the goods. Similarly, Mr. Nguyen, a supervisor at an independent auto body shop with responsibilities including “Manager, Automotive Technician, Auto Parts Purchaser, and Service Writer,”²² is qualified as an expert in automotive repair, and his testimony is relevant to the relatedness of the parties’ trade channels and classes of consumers.

We give the Wilson and Nguyen declarations appropriate weight. It is important to note, however, that “[w]e will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1402 (TTAB 2010). Moreover, likelihood of confusion is the

²⁰ *Id.* at 51.

²¹ *Id.* at Appendix 2, pp. 56-59.

²² 40 TTABVUE 168, Nguyen Declaration, Part II, ¶ 1.

ultimate question of law to be decided by the Board, not by a witness. *Alcatraz Media Inc.*, 107 USPQ2d at 1755 (opinion of expert witness cannot “serve as a substitute for the Board’s judgment on the legal claims before us”).

D. The Parties’ Confidentiality Designations

Both parties improperly over-designated evidence as confidential. Petitioner designated all of Respondent’s discovery responses and the entirety of the Maiorana discovery deposition as confidential while Respondent submitted the entire discovery deposition of Zlatko Aurelio Filipovic under seal. Although portions of this evidence are confidential, much of these materials consist of non-confidential and, in some instances, public information. Examples of non-confidential information include Respondent’s discovery responses regarding public use of its involved mark and articles published on the Internet; Mr. Maiorana’s deposition testimony and accompanying exhibits concerning Respondent’s user manual and Internet advertising; and Mr. Filipovic’s averments regarding his role in marketing, technical support and sales for Petitioner.²³

Board proceedings are designed to be public, and the improper designation of materials as confidential thwarts this objective. *Edwards Lifesciences Corp.*, 94 USPQ2d at 1402. Unless there is a legitimate need for confidentiality, the Board must be able to discuss the evidence of record as needed to explain the basis for its decision. *Id.* Accordingly, in this opinion, we treat as confidential only evidence that is clearly

²³ We emphasize that these are only a few examples of material improperly designated as confidential. We further note that other documents designated “confidential” and “confidential attorney’s eyes only” were not filed under seal. 42 TTABVUE 162-167, 228-257.

confidential or commercially sensitive. Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g) (“The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.”); *see also Noble House Home Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1416 n.21 (TTAB 2016) (“[W]e will treat only testimony and evidence that is truly confidential or commercially sensitive as such.”); *Edwards Lifesciences Corp.*, 94 USPQ2d at 1402-03 (“Because of the over designation of testimony and evidence by the parties, it is not clear to us what is intended to be truly ‘Confidential’ and ‘Confidential Attorney’s Eyes Only.’ Therefore, in rendering our decision, we will not be bound by the parties’ designation.”).

II. Entitlement to Bring a Statutory Cause of Action²⁴

Entitlement to bring a statutory cause of action is a threshold issue in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1061-62 (Fed. Cir. 2014); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187-89 (CCPA 1982); *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1344 (TTAB 2017). To establish entitlement to bring a statutory cause of action under Section 14 of the Trademark Act, Petitioner must

²⁴ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Mindful of the Supreme Court’s direction in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to bring a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, 4 (Fed. Cir. 2020) (“we discern no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*....”).

demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020); *see also Empresa Cubana*, 111 USPQ2d at 1162; *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 50 USPQ2d at 1026.

Petitioner submitted a Trademark Electronic Search System (TESS) printout showing that its pleaded registration is subsisting and owned by Petitioner.²⁵ Accordingly, Petitioner has established its entitlement to bring a statutory cause of action under Section 14 of the Trademark Act. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008); *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007).

III. Priority and Likelihood of Confusion

To prevail on its Section 2(d) claim, Petitioner must prove priority and likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf*, 55 USPQ2d at 1844; *Hydro-Dynamics Inc. v. George Putnam & Co.*, 811 F.2d 147, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987).

²⁵ Petitioner’s Seventh Notice of Reliance, 38 TTABVUE 34-35.

A. Priority

The filing date of the application that matured into Petitioner's pleaded registration precedes the June 20, 2016 filing date of the application that matured into Respondent's involved registration, and Respondent has admitted that it did not make any use of its mark before Petitioner filed its underlying application.²⁶ Accordingly, Petitioner has priority in its pleaded SUPERCRUISE mark for the goods identified in the pleaded registration. *See, e.g., Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1219-20 (TTAB 2011) (petitioner's priority established based on filing date of the underlying application which matured into its pleaded registration).

B. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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); *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,

²⁶ Petitioner's Fourth Notice of Reliance, 35 TTABVUE 15-16 (improperly filed as confidential), Respondent's responses to Requests for Admissions 2 and 3.

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.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See 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) (“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.”). We discuss these and the other relevant *DuPont* factors below.

1. Similarity or Dissimilarity of the Marks

We compare the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *DuPont*, 177 USPQ at 567. The parties’ marks are identical except for the space in Respondent’s mark between the words SUPER and CRUISE, which is inconsequential. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 2464, 1470 (TTAB 2016) (MINI MELTS essentially identical to MINIMELTS); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD “are, in contemplation of law, identical”). Accordingly, the similarity between the parties’ marks weighs heavily in favor of finding a likelihood of confusion. Respondent does not argue otherwise.

2. Strength of Petitioner's Mark

We next assess both the conceptual strength of Petitioner's mark, based on the nature of the mark itself, and the commercial strength of the mark based on consumer recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).").

In determining the conceptual strength of Petitioner's mark, "we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014). Petitioner argues that its "mark SUPERCRUISE is arbitrary and bears no relation to Petitioner's identified goods.... [T]he mark was chosen because Petitioner's [sic] liked the sound of the mark and the mark did not have any meaning in relation to the electronic, control and communication product field."²⁷

Because Petitioner's mark is registered on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), we must presume that Petitioner's mark is inherently distinctive. *New Era Cap Co. v. Pro Era LLC*, 2020 USPQ2d 10596, *10 (TTAB 2020) ("Opposer's mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act."); *Tea Board of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (same). We do not agree, however, that the mark is arbitrary for

²⁷ Petitioner's Brief, 59 TTABVUE 34 (quoting Filipovic Declaration, 42 TTABVUE 7, ¶ 11).

Petitioner's goods. The word "cruise" means "to move or proceed speedily, smoothly or effortlessly."²⁸ The word "super" is superlative meaning "of high grade or quality"; "very large or powerful"; "exhibiting the characteristics of its type to an extreme or excessive degree."²⁹ Petitioner's mark SUPERCruise is therefore highly suggestive of Petitioner's goods, suggesting that they facilitate the extremely quick and smooth receipt and transfer of signals, control of electronic circuits, and the modulation, demodulation and media access control in voice and data communications. Accordingly, Petitioner's mark is not as inherently strong as an arbitrary or fanciful mark.

Commercial strength or fame is the extent to which the relevant public recognizes a mark as denoting a single source. *See also Tea Bd. of India*, 80 USPQ2d at 1889. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 54

²⁸ We take judicial notice of the dictionary definition of "cruise." Merriam-Webster online dictionary, last visited November 23, 2020 at <https://www.merriam-webster.com/dictionary/cruise>. The Board may take judicial notice of dictionary definitions, *University of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In Venice New York, Inc.*, 259 F.3d 1346, 59 USPQ2d 1778 (Fed. Cir. 2001).

²⁹ We take judicial notice of the dictionary definition of "super." Merriam-Webster online dictionary, last visited November 23, 2020 at <https://www.merriam-webster.com/dictionary/super>.

USPQ2d at 1897; *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Commercial strength may be measured indirectly by the volume of sales and advertising expenditures of the goods, the length of time the mark has been in use, widespread critical assessments and notice by independent sources of the goods identified by the mark as well as the general reputation of the goods. *Bose Corp. v. QSC Audio Prods.*, 63 USPQ2d at 1305 (recognizing that strength of a mark may be measured by sales and advertising figures); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017). To support the assertion that its mark is commercially strong, Petitioner introduced (under seal) sales and marketing expenses for its SUPERCUISE products from 2010-2018.³⁰ In addition, Petitioner points to the continuous use of its mark since 2010 and “promotional efforts” consisting of “employees regularly attend[ing] trade shows seeking new business and contact[ing] potential customers with products containing the SUPERCUISE mark.”³¹ Petitioner’s sales and advertising figures, standing alone, are not particularly impressive and Petitioner has not introduced any market share evidence that would provide context regarding its sales revenue and advertising expenditures. Moreover, the promotional efforts Petitioner has described are modest.

For these reasons, we find that the strength of Petitioner’s mark is neutral in the likelihood of confusion analysis.

³⁰ Filipovic Declaration, 41 TTABVUE 7-8, ¶ 12.

³¹ Petitioner’s Brief, 59 TTABVUE 34-35.

3. Similarity or Dissimilarity of the Goods

Goods need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). But the evidence must establish that the goods are related in some manner, or the conditions surrounding their marketing are such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

We must base our comparison of the goods on the identifications in the parties' registrations. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The parties disagree about how to interpret Petitioner's identification of goods, namely:

Semiconductor devices, computer hardware, and computer software for use in design, simulation and control of electronic circuits and antenna, receiving and transmitting signals, and modulation, demodulation and media access control in voice and data communications.

Petitioner asserts that the commas after "semiconductor devices" and "computer hardware" should be treated as semi-colons, so that the qualifying language "in voice and data communications" at the end of the identification applies only to the computer software description as follows:

- Semiconductor devices;
- Computer hardware; and

- Computer software for use in design, simulation and control of electronic circuits and antenna, receiving and transmitting signals, and modulation, demodulation and media access control in voice and data communications.

Respondent argues that because the identification uses commas instead of semicolons, the qualifying language “in voice and data communications” applies equally to “semiconductor devices,” “computer hardware,” and “computer software” so that the identification reads:

- Semiconductor devices for use in voice and data communications;
- Computer hardware for use in voice and data communications; and
- Computer software for use in design, simulation and control of electronic circuits and antenna, receiving and transmitting signals, and modulation, demodulation and media access control in voice and data communications.

The punctuation in Petitioner’s identification of goods creates ambiguity as to the scope of the identification. If Petitioner intended that “in voice and data communications” apply only to “computer software,” the better practice would have been to use semicolons in the identification. *See In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015) (citing *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 & n.4 (TTAB 2013) (finding that semicolon separated services into discrete categories)); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.01(a) (Oct. 2018) (advising that “commas should be used in the identification to separate items in a particular category of goods or services” and semicolons “should generally be used to separate distinct categories of goods or services within a single class”). But

the use of semicolons is not mandatory,³² and commas are used in the English language to separate items in a list. So it is reasonable to construe the commas after “semiconductor devices” and “computer hardware” as separating these goods from “computer software for use in ... voice and data communications.” This interpretation is supported by the fact that “semiconductor devices” and “computer hardware” are acceptable identifications of goods standing alone, whereas “computer software” is an indefinite identification that generally must specify the function or purpose of the software and field of use. U.S. PATENT AND TRADEMARK OFFICE ACCEPTABLE IDENTIFICATION OF GOODS AND SERVICES MANUAL; TMEP § 1402.03(d). For these reasons, and because we must construe Petitioner’s identification of goods in Petitioner’s favor, we adopt Petitioner’s reading of the identification of goods. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (“[T]he description [of goods] must be construed most favorably to the opposing prior user.”); *see also In re C.H. Hanson*, 116 USPQ2d at 1355 (“To the extent that Registrant’s use of a comma rather than a semicolon creates ambiguity as to the scope of the identification of goods ... we must resolve any doubt in favor of the registrant, given the presumptions afforded the registration under Section 7(b), 15 U.S.C. § 1057.”).

³² The TMEP sets forth guidelines and procedures followed by examining attorneys; it “does not have the force and effect of law[.]” *West Florida Seafood Inc. v. Jet Rests. Inc.*, 31 USPQ2d 1660, 1664 n.8 (Fed. Cir. 1994).

Petitioner argues that the parties' goods "are identical, identical in part and/or encompassing."³³ More specifically, Petitioner asserts that "each of the electronic devices" in Respondent's identification, namely, cameras, ultrasonic sensors, global positioning system, and radar object detectors "may be either considered" semiconductor devices or computer hardware or "they encompass" semiconductor devices or computer hardware.³⁴ In support of this position, Petitioner cites to the testimony of its expert Christopher Wilson:

A semiconductor device is any device made from semiconductors and utilizing their ability to perform as both conductors and insulators.... To the best of my knowledge, any computer hardware, or any electronic device that can operate 'computer software', and that is used in production automobiles today (including semiautonomous vehicles), are the same as, or at least encompass, semiconductor devices including cameras, ultrasonic sensors, global positioning systems and radar object detectors as identified in the GM SUPER CRUISE mark. In addition, many of the electronic devices used for internal communications in a vehicle will also use semiconductor devices.

The GM Super Cruise system as identified in the GM SUPER CRUISE mark makes use of many different system parts comprising computer hardware including a camera (e.g., Camera Image Processing Module), a global positioning system (e.g., satellites, GPS receiver), [and] radar object detector (e.g., Forward Range Radar, Short Range Radars). In my opinion, all of these devices are the same as or overlap with the term "computer hardware".³⁵

Petitioner also points to Respondent's admissions, in response to requests for admission, that Respondent's cameras, ultrasonic sensors, global positioning system,

³³ Petitioner's Brief, 59 TTABVUE 16.

³⁴ *Id.* at 16-17.

³⁵ Wilson Declaration, 40 TTABVUE 12-13, ¶¶ 26, 27, 29 (internal footnote omitted).

and radar object detectors “use semiconductor devices” and Respondents’ cameras and global positioning systems “use computer hardware.”³⁶

Petitioner further relies on Mr. Wilson’s testimony to assert that the parties’ software products are related:

[I]t is my expectation that the computer software for the driving of semi-autonomous vehicles would include the control of transmissions of signals between electronic control units and the cameras, ultrasonic sensors, global positioning systems and radar object detectors as identified in the GM SUPER CRUISE mark, and would be the same as or overlap with ‘computer software for use in control of electronic circuits in data communications’ as in the identification of goods in the MM SUPERCUISE mark.

[I]t is my expectation that the computer software for the driving of semi-autonomous vehicles would include computer software for use in receiving and transmitting signals in data communications between electronic control units and the cameras, ultrasonic sensors, global positioning systems and radar object detectors as identified in the GM SUPER CRUISE mark.

[I]n the various data communications devices used in conjunction with the GM Super Cruise system (OnStar 4G cellular communications, GPS reception), there is software control of the communications devices, including modulation, demodulation and media access control. To the best of my knowledge, all communications devices with this level of sophistication utilize computer hardware and computer software. Specifically, they use software to control the modulation and demodulation of signals, and for media access control. These devices all provide data communications.³⁷

Mr. Wilson’s assertion that “[a] semiconductor device is any device made from semiconductors and utilizing their ability to perform as both conductors and

³⁶ Petitioner’s Fourth Notice of Reliance, 35 TTABVUE 24-29 (improperly filed as confidential), Respondent’s responses to Requests for Admission Nos. 52, 53, 54, 55, 57, and 59.

³⁷ Wilson Declaration, 40 TTABVUE 15, ¶¶ 32-33.

insulators”³⁸ is an egregious overgeneralization that does not comport with the plain meaning of the word “semiconductor” defined as:³⁹

“a substance, as germanium or silicon, whose conductivity is poor at low temperatures but is improved by minute additions of certain substances or by the application of heat, light, or voltage: used in transistors, rectifiers.”

“a substance that can act as an electrical conductor or insulator depending on chemical alterations or external conditions.”

None of Respondent’s goods fall within these definitions. *See Electronic Data Sys. Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1463 (TTAB 1992) (“[T]he issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both, or whether both can be classified under the same general category.”).

Similarly unconvincing is Mr. Wilson’s assertion that Respondent’s cameras, ultrasonic sensors, global positioning system, and radar object detectors for the semi-autonomous driving of motor vehicles “are the same as or overlap with the term ‘computer hardware’” because the goods are comprised of computer hardware. These goods do not fit within the plain meaning of “computer hardware,” namely, the “physical elements of a computer ... generally divided into the central processing unit (CPU), main memory (or random-access memory, RAM), and peripherals,” which

³⁸ *Id.* at 12, ¶ 26.

³⁹ We take judicial notice of the definitions of “semiconductor.” Collins Dictionary, last visited November 17, 2020, www.collinsdictionary.com/dictionary/english/semiconductor.

encompasses keyboards, display monitors, printers, disk drives, network connections and scanners.⁴⁰

Moreover, the mere fact that Respondent's goods for the semi-autonomous driving of motor vehicles may incorporate or use semiconductors, computer hardware, and/or computer software for use in design, simulation and control of electronic circuits, receiving and transmitting signals, and modulation, demodulation and media access control in voice and data communications does not mean that Respondent's goods are "the same as" Petitioner's goods or that the parties' products are related for likelihood of confusion purposes. *See Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1169 (TTAB 2001) ("It would be untenable to find that the parties' goods are related merely because applicant sells parts for computer hard drives that would be sold to hard drive manufacturers to be used in hard drives that would in turn be sold to computer manufacturers to be incorporated into computers that would eventually be sold by opposer as part of its computerized irrigation systems."); *Falk Corp. v. Toro Mfg. Corp.*, 493 F.2d 1372, 181 USPQ 462, 467 (CCPA 1974) ("Toro cannot prevail merely on the ground that 'rubber element shaft couplings' may be contained in some of its machines."). As Mr. Filipovic, a Sales and Marketing Lead for Petitioner testified, Petitioner's "connectivity modules ...could be in hundreds, thousands of products,

⁴⁰ Encyclopedia Britannica.com, last visited November 17, 2020, www.britannica.com/technology/computer/Supercomputer#ref829455. The Board may take judicial notice of encyclopedias and other standard reference works. *See, e.g., In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.3 (TTAB 2016); *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013).

lamps, seats, cushions, glasses with headphones, something built with the speakers in for the wireless connectivity, Bluetooth, GPS, the radar, anything.”⁴¹ Accordingly, the mere fact that Petitioner’s goods may be incorporated into Respondent’s goods or have an application in motor vehicle connectivity is not, in itself, a sufficient basis for finding the parties’ goods related.⁴²

Petitioner argues in the alternative that its “computer software for use ... in receiving and transmitting signals ... in voice and data communications” is complementary to Respondent’s SUPER CRUISE goods because such goods require a connectivity platform to operate.⁴³ Respondent’s “connected platform,” OnStar, is integral to the operation of Respondent’s goods as explained on Respondent’s website at Cadillac.com:⁴⁴

New owners of 2018 and 2019 models receive the Super Cruise package, which includes 3 years of OnStar to support functionality. To continue Super Cruise functionality after the 3-year Super Cruise package ends, an OnStar plan must be purchased.

OnStar uses fourth generation long-term evolution cellular technology (4G LTE) “for multiple things, GPS correction, map updates, as well as data uploads as well as data uploads back to [Respondent’s] office server.”⁴⁵ For example, “[m]ap updates are

⁴¹ Filipovic Discovery Deposition, 50 TTABVUE 32, 113:3-115:3; *Id.* at 26, 93:1-17.

⁴² Mr. Filipovic testified that Petitioner has sought patent protection for and “spent a significant amount of money, time and effort working on vehicle connectivity technology.” Filipovic Declaration, 42 TTABVUE 12, ¶ 19.

⁴³ Maiorana Discovery Deposition, 39 TTABVUE 15, 11:6-7 (“Super Cruise requires the OnStar package to function.”) *see also id.* at 79, Ex. 4 consisting of printouts from the Cadillac.com website.

⁴⁴ *Id.* at 15, 11:6-12.

⁴⁵ *Id.* at 14, 10:8-10, 11:13-15.

received over-the-air with the 4G LTE, and then ... [t]he module that receives the maps will communicate to the module that needs the map via the Wi-Fi.”⁴⁶

Petitioner attempts to equate its computer software for use in receiving and transmitting signals in voice and data communications to Respondent’s OnStar system.⁴⁷ OnStar, however, is a telecommunications system comprising many parts.⁴⁸ Petitioner acknowledges that its computer software for use in receiving and transmitting signals in voice and data communications is “for **use in** connectivity products.”⁴⁹ Goods are not complementary because one product is incorporated as a part in another product. Rather, complementary goods are those that are likely to be purchased and used together by the same purchasers. *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1587 (TTAB 2013) (surge protectors, wall mounts and brackets complementary goods because purchasers are likely to encounter both during course of purchasing a television, audio or home theater system); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (“When we consider that applicant’s and registrant’s goods are medical diagnostic equipment that can originate from the same source (applicant itself is a source of both types of equipment), that can be purchased

⁴⁶ *Id.* at 24, 20:12-18; *see also id.* at 112, Exhibit 6.

⁴⁷ Petitioner’s Brief, 59 TTABVUE 25 (“Both of OnStar’s 4G LTE and WiFi connectivity systems are encompassed within Petitioner’s identification of goods.”).

⁴⁸ We take judicial notice that “[e]ach telecommunication system consists of three basic elements: a transmitter that takes information and converts it to a signal[;] a transmission medium over which the signal is transmitted[; and] a receiver that receives the signal and converts it back into usable information.” New World Encyclopedia at www.newworldencyclopedia.org/entry/Telecommunication (last visited November 19, 2020).

⁴⁹ Petitioner’s Brief, 59 TTABVUE 10 (emphasis added); *See also id.* at 7-8 (“Petitioner’s SUPERCRUISE branded electronic, control and communication products improve ‘connectivity’ in various types of products including vehicle applications.”).

by the same facilities, and that are used on the same patients to treat the same disease by the same physician, we conclude that these goods are related.”). The record reflects no such relationship here.

In sum, Petitioner’s arguments focus on the “technological relationship” between the parties’ goods based on the internal architecture of Respondent’s SUPER CRUISE goods and the OnStar system.⁵⁰ In analyzing likelihood of confusion, however, we must consider whether the conditions surrounding the marketing of the parties’ goods are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003-04 (Fed. Cir. 2002); *see also In re Rexel, Inc.*, 223 USPQ 830, 831 (TTAB 1984). The evidence here simply does not demonstrate that the same consumers would purchase the parties’ goods or otherwise encounter the goods in such a way that we can find them related for purposes of a likelihood of confusion analysis.⁵¹ For these reasons, we find that the second *DuPont* factor weighs strongly against a finding of likely confusion.

⁵⁰ “Without a communication signal, the semi-autonomous system would not operate properly and anymore of a technological relationship could not be imagined.” Petitioner’s Rebuttal Brief, 62 TTABVUE 10.

⁵¹ We acknowledge the third-party registrations, websites and articles showing that autonomous and semi-autonomous driving systems require a level of connectivity to function. This evidence, however, does not support the argument that it is common for third-parties to offer both semi-autonomous driving systems and Petitioner’s specific products under the same mark.

4. Similarity or Dissimilarity of the Trade Channels and Classes of Consumers

Petitioner sells its products primarily to original equipment manufacturers, original design manufacturers and replacement market suppliers in the “wireless communication connectivity space.”⁵² “Computer hardware” also may flow to end users of computers.

Respondent’s products flow to consumers of automobiles. Auto manufacturers like Respondent typically manufacture parts for use in their own cars, which are sold through their own dealerships to car buyers. Respondent’s automotive parts may also travel to car buyers as components of cars purchased through used-car dealerships. Another market for Respondent’s parts would be independent auto repair businesses.

Petitioner takes the position that confusion between the parties’ goods is likely to occur among persons who repair automobiles. In support of this position, Petitioner submitted the declaration of Mr. Nguyen, the supervisor of an auto body shop, who testified that:

1. Businesses involved in car repair “will encounter on a daily basis both vehicle systems (e.g. semi-autonomous driving systems) and discrete system parts while performing maintenance and/or repair on vehicles.”⁵³
2. “As with many ... car repair and purchasing individuals ... I frequently use the ALLDATA Repair and ProDemand software databases in the performance of my duties and find them to be very reliable. These databases have an extensive symptom and diagnostic task database that helps me to quickly order parts; repair software that helps me to prepare time estimates for each repair job; and gives me access to repair manuals, repair procedures, diagnostic help, provide specifications for parts, electrical components, modules, control units,

⁵³ Nguyen Declaration, 40 TTABVUE 169, Part IV, ¶ 3.

electrical diagrams, and/or technical service bulletins for common repair issues.”⁵⁴

3. In the process of repairing a car “I frequently come across the names of many vehicular systems and system parts while diagnosing the problem and ordering up repair parts. In a typical data sheet from ALLDATA or ProDemand databases, there will be the vehicle name, the name of the vehicle system being worked on and the system part.”⁵⁵
4. “If I was working on a semi-autonomous driving system like the GM Super Cruise system and I saw a system part with the same name as the semi-autonomous driving system, I would likely be confused as to the source of the system part.”⁵⁶

Petitioner’s SUPERCRUISE products, however, are not automotive parts, nor does Petitioner directly “make any systems for cars that are branded SuperCruise.”⁵⁷ Moreover, Mr. Nguyen testified that the names of non-car manufacturers would not appear in the ALLDATA or ProDemand databases.⁵⁸ To the extent Petitioner’s products may be incorporated into automotive parts, Mr. Filipovic, a Sales and Marketing Lead for Petitioner, testified that he didn’t “think” Petitioner’s mark would appear in an owner’s manual for a car.⁵⁹ He also testified that he was not aware of any instances where Petitioner’s mark appears in data sheets related to fixing cars.⁶⁰ This is not surprising, given that Petitioner’s goods are not auto parts.

⁵⁴ *Id.* at 169, 170, IV ¶ 5.

⁵⁵ *Id.* at 170, ¶ 6.

⁵⁶ *Id.* at ¶ 8.

⁵⁷ Filipovic Discovery Deposition, 50 TTABVUE 30, 106:18-22, 107:2-7.

⁵⁸ Nguyen Discovery Deposition, 49 TTABVUE 286, 79:11-13.

⁵⁹ *Id.* at 30, 107:23-25.

⁶⁰ *Id.*, 107:6-25, 108:3-25, 109:1-10

Mr. Nguyen's testimony that "If I was working on a semi-autonomous driving system like the GM Super Cruise system and I saw a system part with the same name as the semi-autonomous driving system, I would likely be confused as to the source of the system part"⁶¹ has little, if any, probative value. The testimony is purely speculative because it is unlikely that those in the auto repair industry would encounter Petitioner's SUPERCUISE mark in the course of repairing a car.

Petitioner further asserts that the parties' trade channels are related because both parties are involved in the "connectivity ecosystem":

Technical standard bodies set the rules and specifications for the entire connectivity ecosystem made up of carriers, suppliers, purchasing agents, consumers, wholesalers, wireless operators, and stores. GM's participation in technical standard bodies, road shows, symposiums, trade shows, and the like devalues and confuses our SUPERCUISE brand in the market since we both are involved with and [are] marketing to the same ecosystem which will create confusion among our peers and customers.⁶²

It is, however, "error to deny registration simply because" the parties may sell their goods within the same field or "ecosystem." See *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992). "This is especially true where, as here ... [the parties'] goods are specifically different and noncompetitive." *Id.* Purchaser confusion is the "primary focus" in a likelihood of confusion analysis and "the enquiry generally will turn on whether actual or potential 'purchasers' are confused." *Id.* at 1390.

⁶¹ Nguyen Declaration, 40 TTABVUE 170, ¶ 8.

⁶² Filipovic Declaration, 42 TTABVUE 9, ¶ 14.

While both parties may interface with wireless carriers, neither party targets its products to wireless carriers.⁶³ As for trade shows and conferences, Petitioner markets its products at the Consumer Electronics Show (CES) and conferences of the International Wireless Industry Consortium (IWIC) as well as to attendees of the conferences of the standard body of engineers, “who decide on the standards, technical standards of any product.”⁶⁴ The record shows that Respondent has had a booth at the CES, made a presentation about the SUPER CRUISE system to the IWIC, and discussed the SUPER CRUISE system at a meeting of the standard body of engineers.⁶⁵ The evidence, however, does not support that Respondent is a regular attendee or presenter at such conferences or that Respondent routinely markets its semi-autonomous driving systems through such trade channels.

In sum, there is no meaningful overlap between the parties’ trade channels or consumers. Accordingly, the third *DuPont* factor supports a finding that confusion is unlikely.

5. Conditions of Sale and Sophistication of the Purchasers

We now consider the conditions under which the goods are likely to be purchased, e.g. whether on impulse or after careful consideration, as well as the degree of any consumer sophistication. Automobiles are expensive, and the record reflects that

⁶³ Filipovic Discovery Deposition, 50 TTABVUE 26, 91:8-12 (testifying that Petitioner does not “sell directly” to wireless carriers).

⁶⁴ *Id.* at 21, 71:6-8, 72:6-17; Filipovic Declaration, 42 TTABVUE 11, ¶ 18.

⁶⁵ Filipovic Discovery Deposition, 50 TTABVUE 21, 71:15-19. Mr. Filipovic testified that “one of the GM guys” was at a meeting of the standard body of engineers “talking about, say, SuperCruise and things like that. So a lot of companies come there **from all industries** to present their case.” *Id.* (emphasis added); Filipovic Declaration, 42 TTABVUE11, ¶ 18.

Respondent's SUPER CRUISE semi-autonomous driving system is an expensive add-on feature costing approximately \$5,000.⁶⁶ The purchasing process also can be lengthy,⁶⁷ and semi-autonomous driving systems raise safety concerns. Accordingly, we find that consumers are likely to purchase Respondent's goods only after careful thought and consideration.

Petitioner's products are comparatively inexpensive, but Petitioner sells its products through "very high-level marketing"⁶⁸ primarily to sophisticated consumers "who have some technological background [and] understand technology."⁶⁹ Petitioner's products are subject to a lengthy sales negotiation process, involving several steps and back and forth with the consumer regarding product specifications.⁷⁰ Sometimes Petitioner requires prospective consumers to sign a nondisclosure agreement.⁷¹ We acknowledge, however, that "computer hardware" is broad enough to encompass goods sold to ordinary consumers with little sophistication.

Accordingly, we find that the fourth *DuPont* factor is neutral or weighs only slightly in Respondent's favor.

⁶⁶ Gorbatoff Declaration, 54 TTABVUE 4, ¶ 10; Maiorana Declaration, 55 TTABVUE 3, ¶ 10.

⁶⁷ Maiorana Declaration, 55 TTABVUE 4, ¶ 14 (purchasing process for Respondent's SUPER CRUISE system can "be quite time-consuming ... particularly ... if the purchaser opts for financing, which is common with all vehicles."); *see also* Burrascano Declaration, 56 TTABVUE 4, ¶ 16.

⁶⁸ Filipovic Discovery Deposition, 50 TTABVUE 18, 61:8-9.

⁶⁹ *Id.* at 22, 76:18-21.

⁷⁰ *Id.* at 24, 82:1-25, 82:1-25, 83:1-19.

⁷¹ *Id.* at 18, 61:13-14; *id.* at 20 67:25; 68:1-3, *id.* at 23 81:7-19.

6. Actual Confusion

The seventh and eighth *DuPont* factors are “[t]he nature and extent of any actual confusion” and “[t]he length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Respondent asserts that there has been no actual confusion and that this weighs against a finding of likelihood of confusion. It is not necessary, however, to demonstrate actual confusion to establish a likelihood of confusion. *Weiss Assoc. v. HRL Assoc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (TTAB 1990). Moreover, the absence of actual confusion here is not surprising given the differences between the parties’ goods, consumers and trade channels, and the conditions under which the parties’ goods are purchased, as well as the relatively short period of contemporaneous use of the parties’ marks. *See Barbara’s Bakery*, 82 USPQ2d at 1287 (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred). Accordingly, the seventh and eighth *DuPont* factors are neutral.

7. Market Interface between the Parties

Respondent argues that the tenth *DuPont* factor weighs in its favor because there is a lack of “market interface between the parties and their respective products.”⁷² “*DuPont* lists several possible market interfaces, such as: (1) consent to register or use; (2) contractual provisions designed to preclude confusion; (3) assignment; and (4) laches and estoppel attributable to the challenger that would indicate lack of

⁷² Respondent’s Brief, 60 TTABVUE 41 (emphasis omitted).

confusion.” *Cunningham v. Laser Golf*, 55 USPQ2d at 1847 (citing *DuPont*, 117 USPQ at 567). There is no evidence in the record regarding any market interface between the parties. Accordingly, we find this *DuPont* factor neutral.

8. The Extent of Potential Confusion

Respondent argues that the potential for confusion is *de minimis*, given that the parties “operate in completely different commercial spaces and sell their products through completely different channels of trade, each to discriminating customers that typically must go through a lengthy process in order to purchase their respective products.”⁷³ Essentially, Respondent is rearguing the third and fourth *DuPont* factors. For the reasons discussed above, we agree that the potential for confusion is *de minimis*. Accordingly, the twelfth *DuPont* factor favors Respondent.

9. Any Other Established Fact Probative of the Effect of Use

Petitioner asserts that another factor probative of the effect of use is that Respondent was aware of Petitioner’s mark when Respondent filed its application. Petitioner argues: “It is axiomatic that the junior use should avoid the senior user’s mark and Registrant had an opportunity to do so, but deliberately chose not to.”⁷⁴

⁷³ *Id.*

⁷⁴ Petitioner’s Brief, 59 TTABVue 36-37. Indeed, Petitioner argues the opposite asserting that Respondent’s mark is likely to cause reverse confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (explaining reverse confusion: “The junior user does not seek to benefit from the goodwill of the senior user; however, the senior user may experience diminution or even loss of its mark’s identity and goodwill due to extensive use of a confusingly similar mark by the junior user.”).

Where, as here, goods are not competitive and are marketed to different types of consumers, reverse confusion is unlikely. 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:10 (5th ed. 2020 update) (“When few of the senior user’s customers will be exposed to or familiar with the junior user’s mark, there will be no ‘overwhelming’ or ‘swamping’ effect on the smaller senior user’s good will and mark.”); *see also Checkpoint Sys.*

Petitioner, however, does not argue nor is there any evidence to support an inference that Respondent adopted the SUPER CRUISE mark in bad faith. *See, e.g., Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987) (“an inference of ‘bad faith’ requires something more than mere knowledge of a prior similar mark.”). Accordingly, the thirteenth *DuPont* factor is neutral.

IV. Balancing the Factors

Petitioner has proven its entitlement to bring this cancellation action and its priority, but based on all of the evidence of record, we find that there is no likelihood of confusion. The parties’ marks are virtually identical, but the goods are different and are marketed to different consumers. Even if confusion were theoretically possible, the Trademark Act does not prevent registration of a mark based on the mere possibility of consumer confusion, but requires that confusion be likely. *Electronic Design & Sales*, 21 USPQ2d at 1391 (“We are not concerned with the mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with practicalities of the commercial world, with which the trademark law deals.”) (quoting *Whitco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969), *aff’g*, 153 USPQ 412 (TTAB 1967)); *Bongrain Int’l (Am.) Corp. v. Delice de France, Inc.*, 811 F.2d 1479, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987) (“The statute refers to likelihood, not the mere possibility, of confusion.”); *Electronic Data v. EDSA Micro Corp.*, 23 USPQ2d at 1465 (“Section 2(d) of the

Inc. v. Check Point Software Techs., Inc., 296 F.2d 270, 60 USPQ2d 1609, 1620 (3d Cir. 2001) (“Because the products serve different functions, and there is only ‘minimal overlap’ in the product technology, it is unlikely consumers would be confused by the similar marks.”).

Trademark Act is concerned about the likelihood of confusion, not some theoretical possibility built on a series of imagined horrors.”).

Decision: The petition to cancel Registration No. 5387518 is denied.