

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

Mailed: December 19, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re RedSky Technologies, Inc.
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Serial No. 87411583
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Stephen Lesavich of Lesavich High Tech Law Group SC, for RedSky Technologies, Inc.

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Before Thurmon, Deputy Chief Administrative Trademark Judge, Mermelstein and Bergsman, Administrative Trademark Judges.

Opinion by Thurmon, Deputy Chief Administrative Trademark Judge:

Applicant seeks registration of the mark ECHO 911 (standard characters) for “Computer software used to manage, store, and deliver enhanced emergency telecommunications information in the nature of E911 and 911 infrastructure and emergency location information for individuals in the event of an emergency” in International Class 9.¹ The Examining Attorney refused registration under Section 2(d) (likelihood of confusion) based on a registration of the mark ECHO112 (standard

¹ Application Serial Number 87411583, filed on April 14, 2017, based on alleged first use anywhere and in commerce at least as early as April 1, 2017.

characters) for “Computer software, namely, smartphone application that is a lifesaving application that sends the user’s location to local emergency services, worldwide,” in International Class 9.² The appeal has been fully briefed. We affirm the refusal to register.

I. The Record and the Prosecution History

Applicant filed a use-based application to register the ECHO 911 mark on April 14, 2017. In an Office Action dated June 29, 2017, the Examining Attorney took the following actions:

- registration was refused under Section 2(d);
- the submitted specimen was refused because it appeared to be a digital mock-up;
- additional information was requested about the specimen; and,
- a disclaimer of “911” was required.³

The original Section 2(d) refusal was based on two registrations: the registration cited above and a registration of the mark ECHO for “Electronic alarm hardware and software for emergency signaling” in International Class 9. The Examining Attorney withdrew the refusal based on the second registration in a later Office Action.

Applicant responded with an aggressive and “blunt” response, to use the words of Applicant’s counsel.⁴ In short, Applicant disagreed with the Examining Attorney’s

² Registration 4483053, issued February 18, 2014, from an application filed December 17, 2012. The mark is shown in the registration as **echo112**, but because it is a standard character registration, we depict it in all uppercase letters.

³ Office Action dated June 29, 2017.

⁴ Response to Office Action dated November 16, 2017 at 9 (“Applicant may be blunt with comments but intends to be respectful”). We find the arguments submitted by Applicant’s counsel overly aggressive and personal in nature. It is inappropriate to personally attack an

conclusion that confusion was likely. Applicant submitted a substitute specimen and responded to the request for information.⁵ Applicant entered the required disclaimer, but also stated, “Applicant traverses this assertion,” immediately before making the disclaimer.⁶

In a final Office Action, the Examining Attorney accepted the substitute specimen and the responses to the information request, but made final the Section 2(d) refusal and the disclaimer requirement.⁷ Applicant again submitted the disclaimer in a Request for Reconsideration, and the Examining Attorney entered it.⁸ The sole issue, therefore, before the Board in this appeal is whether there is a likelihood of confusion between Applicant’s mark ECHO 911 and the registered mark ECHO112.

Examining Attorney who is doing her job. Indeed, in reading the prosecution history of this case, we find the Examining Attorney properly cited the law and explained her actions. She provided clear responses to the misguided arguments of Applicant’s counsel. Applicant, on the other hand, repeatedly mischaracterized the analysis of the Examining Attorney and made numerous misguided or misleading arguments.

We note, in particular, that Applicant’s counsel asserted in the Request for Reconsideration: “If a death or injury occurs if a person dial 112 [sic] in an emergency situation and no emergency help arrives, the Examining Attorney, her management and the U.S. Trademark Office could potentially be liable for a claim under the Federal Tort Claims Act for negligence or other wrongful or ‘tortious’ conduct.” Request for Reconsideration at 77-78 (internal citation omitted). This statement is inflammatory, irrelevant, and entirely inappropriate. The issue before the Office is whether Applicant’s mark is registrable, not whether consumers should use the 112 numbers to reach emergency services. Such over-the-top arguments do **not** help Applicant’s case. Counsel is reminded that proceedings before the Office are to be conducted with decorum and courtesy. Trademark Rule 2.192.

⁵ Response to Office Action dated November 16, 2017 at 70-75, 77-81.

⁶ *Id.* at 75-76.

⁷ Office Action dated January 18, 2018.

⁸ Request for Reconsideration at 80-81. Applicant again stated that it “traverses this assertion,” referring to the disclaimer requirement. We deem Applicant to have freely consented to the entry of the disclaimer, despite the confusing manner in which it was submitted.

The Examining Attorney submitted evidence that some third parties offer the goods identified in the application and the cited registration.⁹ The Examining Attorney also submitted evidence showing that the numerals “112” are an emergency phone number in many parts of the world, and that dialing these numbers in the United States should result in the call being sent to the relevant 911 call center.¹⁰

Applicant submitted evidence regarding actual use of its ECHO 911 mark and the registered ECHO112 mark, plus TESS records for numerous registrations that include the word “echo.”¹¹ Applicant also submitted results from searches of the Apple app store and the Google play store, and Internet reports regarding alleged risks in using the 112 number sequence to reach emergency services in the United States.¹²

II. Applicable Law

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *du Pont* factor for which there is evidence or argument. *See, e.g., In re*

⁹ Office Action dated June 29, 2017 at 3, 20-30; Office Action dated January 18, 2018 at 6, 8-42.

¹⁰ Office Action dated June 29, 2017 at 13-19.

¹¹ Request for Reconsideration at Exhs. A-D (exhibit A was the last in the filing, despite its title).

¹² *Id.* at Exhs. E-N.

Guild Mortg. Co., 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

Varying weights may be assigned to each *du Pont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations in most cases are the similarities between the marks and the similarities between the goods or services. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002) (“The likelihood of confusion analysis considers all *du Pont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”)).

III. Analysis

A. Similarity of the Marks

We compare the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai*, 127 USPQ2d at 1801; *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.¹³ See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The marks at issue here are similar in appearance, sound, connotation and commercial impression. Consumers are likely to notice and remember the word “echo” in these marks, in part because it is the first element of the marks and also because it is the sole textual element of the marks. See, e.g., *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *In re Integrated Embedded*, 102 USPQ2d 1504, 1513 (TTAB 2016); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)).

We find the word “echo” is a distinctive element of each mark. Echo does not appear to describe anything about the goods. There is no evidence of an established meaning of this word within the relevant market. On the other hand, the second

¹³ Based on the evidence of record, we find the consumers of these goods are smartphone users.

element of Applicant's mark, the 911 number sequence, is not distinctive. Applicant submitted a dictionary definition showing 911 and E911 are generic within the relevant field.¹⁴ It is well-established that non-distinctive elements of a mark are given less weight when assessing the similarity of two marks. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)).

There is also evidence in the record concerning the meaning of the 112 sequence found in the registered mark. The Examining Attorney first submitted evidence showing that this sequence is used in many parts of the world to reach emergency services, and that dialing 112 in the United States usually results in the call going to a 911 call center.¹⁵ Applicant submitted Internet articles discussing possible risks associated with use of the 112 sequence in the United States.¹⁶ Though it is not clear why Applicant submitted this evidence, it does show that use of the 112 sequence is common enough within the United States to cause concern among some security experts. We find, therefore, that this evidence shows the 112 sequence is known as an emergency services phone number to a substantial number of consumers in the United States. That means the 112 number sequence, when used as part of a mark for a smartphone app providing emergency services, is not a distinctive element of the registered mark.

¹⁴ Response to Office Action date November 16, 2017 at 49.

¹⁵ Office Action dated June 29, 2017 at 3, 13-19, 20-30; Office Action dated January 18, 2018 at 6, 8-42.

¹⁶ Request for Reconsideration at Exhs. K-N.

The analysis here is similar to that approved by the Federal Circuit in the *Chatam* case cited above. The marks at issue in that case were JOSE GASPAR GOLD and GASPAR'S ALE, both for beer. *Chatam Int'l*, 380 F.3d at 1342-43. The Court noted that the word "ale" was generic for a type of beer and had been disclaimed in the registration. "Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under *DuPont*." *Id.* at 1343. The same analysis is proper here, where Applicant has disclaimed the generic 911 portion of its mark. The evidence shows that the 112 portion of the registered mark is at least descriptive to a substantial number of consumers, so we give less weight to that portion of the registered mark, too. 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 entirety. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *see also In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We do not ignore the numeric portions of the marks, but for the reasons just given, we find the word "echo" is likely to create and leave a more lasting impression on consumers. The marks ECHO 911 and ECHO112, therefore, when considered in their entirety, are similar in appearance and sound. In addition to the common term "echo," the numeric sequences are also similar. Both marks have the "one-one" sequence, and six of the seven characters in these marks are identical. The "9" and "2" are different and are at a different location. But these are the types of details

consumers may not recall about a mark. *See, e.g., Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980) (REMACS and RE/MAX indistinguishable in sound). The similarities clearly outweigh the differences here.

The marks are also similar in meaning, given that the sequences 911 and 112 have similar meanings. As we noted above, both the Examining Attorney and the Applicant submitted evidence showing the related nature of these two number sequences within the relevant market.¹⁷ The commercial impressions made by the marks within the relevant market are also similar, and perhaps somewhat more so due to the similar role played by the 911 and 112 number sequences, when used as phone numbers.

Applicant makes much of the fact that the Examining Attorney in the first Office Action stated, “It does not matter that applicant’s mark features the number ‘911’”, and “It does not matter that registrant’s mark ECHO112.”¹⁸ We agree this language went too far. It does matter that Applicant’s mark includes the numbers 911 and that the registered mark includes the numbers 112. Nonetheless, “if the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral

¹⁷ Applicant submitted Internet evidence to show that some security experts advise against use in the United States of the 112 sequence in place of the 911 sequence. Request for Reconsideration at Exhs. K-N.

¹⁸ 4 TTABVUE 11-12. This example is one of many instances in which Applicant singled out specific wording or statements made by the Examining Attorney rather than reading the Examining Attorney’s analysis as a whole. The result of this approach is a scattershot argument by Applicant that often fails to address the real issues.

differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). The difference between these number sequences does not distinguish the marks for the reasons given above.

We have performed the proper evaluation of the marks and find them substantially similar. This factor, therefore, weighs in favor of a likelihood of confusion.

B. Similarity of Goods, Trade Channels, and Buying Conditions

“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.” *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). We group these three *du Pont* factors because of the shared focus on the identification of the goods.¹⁹

¹⁹ Our analysis here covers the second, third and fourth *du Pont* factors: “The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;” “The similarity or dissimilarity of established, likely-to-continue trade channels;” and, “The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.” *du Pont* 177 USPQ at 567.

The goods are presented in the table below for ease of comparison.

Applicant's Goods	Registrant's Goods
Computer software used to manage, store, and deliver enhanced emergency telecommunications information in the nature of E911 and 911 infrastructure and emergency location information for individuals in the event of an emergency	Computer software, namely, smartphone application that is a lifesaving application that sends the user's location to local emergency services, worldwide

Both goods are software relating to communication in emergencies, and both provide location information for an individual. These aspects of the goods are taken directly from the identifications and are identical. Applicant's identification does not disclose how its ECHO 911 software is deployed. However, Applicant's broadly worded description of goods necessarily encompasses deployment through a smartphone application. *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'"). *See also Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where services are broadly identified in an application or registration, "we must presume that the services encompass all services of the type identified."); *Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, 81 USPQ2d 1887, 1893 (TTAB 2007). Nevertheless, we note that the specimen of record shows that Applicant's mark is used with a smartphone app.²⁰ The software goods offered under both marks are deployed using

²⁰ Response to Office Action dated November 16, 2017 at 77-81 (substitute specimen). The only use of Applicant's mark on the goods in the specimen is on the screen of the smartphone. Other uses of the ECHO 911 mark in the specimen appear in a marketing or promotional

smartphone apps. There is evidence showing that some third parties offer goods similar to those identified in the application and registration.²¹ This evidence supports the conclusion that the goods are similar or related.

Applicant relies heavily on “extrinsic evidence” supposedly “to show that a registrant’s identification of goods or services has a specific meaning to members of the trade.”²² Applicant, however, mischaracterized its own evidence and arguments. Applicant recites highly detailed information about the actual products it sells and a product it alleges is sold under the registered mark.²³ Nowhere in this discussion does Applicant link this evidence to the actual identifications of goods found in the application and registration. This is not an attempt to explain what the identification means.²⁴ It is an attempt to ignore the identification and rely instead on extrinsic evidence. That is something we cannot do. *Octocom Sys. v. Houston Comput. Servs.*, 16 USPQ2d at 1788 (“an identification of goods having no restriction on trade channels obviously is not narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers”). We do not read limitations or

flyer explaining the way Applicant’s system operates. Such presentations of the ECHO 911 mark do not constitute use of the mark on goods. 15 U.S.C. § 1127.

²¹ Office Action dated June 29, 2017 at 3, 20-30; Office Action dated January 18, 2018 at 6, 8-42.

²² 4 TTABVUE 15.

²³ *Id.* at 16-17.

²⁴ We do accept, however, that Applicant’s evidence confirms its goods may be deployed through a smartphone app, a fact that increases the similarity of the goods. The identification is unclear on this point, the specimen shows only use on a smartphone, and the extrinsic evidence confirms that a smartphone app is used to provide Applicant’s goods under the ECHO 911 mark. This use of extrinsic evidence is appropriate, because it does serve to explain what the identification of goods means.

restrictions into the identification of goods. *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Our analysis of the trade channels also focuses on the identification of goods found in the application and registration. We can consider extrinsic evidence to help explain the type of trade channels typically used with the specific goods identified in the application and registration, but we cannot impose limits on the likely trade channels that are inconsistent with the identifications. For example, Applicant submitted evidence showing what appear to be hundreds of smartphone apps relating to emergency services available through the Apple app store and the Google Play store.²⁵ That evidence shows how smartphone apps are typically marketed, and because both parties offer their software through smartphone apps, this evidence shows overlapping, if not identical, trade channels for these types of goods.²⁶

²⁵ Request for Reconsideration at Exhs. K-N.

²⁶ Applicant admits both parties’ goods are marketed through the Google Play store. 4 TTABVUE 18-19. This shows the trade channels overlap for such goods, but Applicant argues that because the apps are presented as separate products, there is no likelihood of confusion. *Id.* at 19. Applicant’s evidence seems to show multiple versions of some apps within the Apple app store and the Google Play store. The fact that multiple versions of an app provided by a single source appear on these sites suggests consumers do not regard each separate app as coming from a distinct source, which is apparently the argument Applicant is making.

Applicant argues that its goods are sold to universities and start at \$40,000.²⁷ Applicant describes a detailed process used to obtain and install its systems, which apparently include the ECHO 911 app.²⁸ These facts may be true, but they are not reflected in the identification of goods in the application, which makes no mention of universities or other institutional purchasers of high-priced systems. The identification mentions only individuals. The evidence shows that smartphone apps marketed to individuals are typically sold through the same trade channels. That fact makes confusion more likely.

Finally, we consider whether the purchasing conditions impact the likelihood of confusion. The goods identified in the application and in the registration relate to emergencies. Consumers may exercise more care when selecting such goods. We note, however, that these are smartphone apps. Applicant submitted evidence showing hundreds of smartphone apps relating to safety or emergencies. Though we cannot use that evidence to alter the identification of goods in the record, it does tend to show that consumers are confronted with hundreds of choices within this market, many of which appear to be free. This evidence suggests that consumers of these goods may not exercise as much care as one might otherwise expect. On balance, we cannot say that the relevant consumers of the type of goods identified in the application and registration would exercise a greater than average level of care or sophistication. However, the applicable standard of care for a likelihood-of-confusion analysis is that

²⁷ *Id.* 20-21.

²⁸ *Id.*

of the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (likelihood of confusion analysis must consider “the least sophisticated potential purchasers”); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

Applicant aggressively argues that its customers are highly sophisticated and spend a great deal of money on its goods.²⁹ That may be true, but it is not supported by the goods identified in the application. If Applicant wanted the Office to consider such facts, it should have amended its application to limit the identification to such customers or trade channels. Given the broad and general nature of the identification of Applicant’s goods, we cannot consider the evidence of actual customer sophistication presented by Applicant. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

To summarize our evaluation of these three *du Pont* factors, we find the goods, as identified in the application and registration, overlap or are very similar, a fact that increases the likelihood of confusion. We further find that such goods are likely to travel through the same or similar trade channels to the same purchasers, a fact that also increases the likelihood of confusion. We find the evidence cuts both ways concerning the sophistication and care of customers, and for that reason, we must

²⁹ 4 TTABVUE 19-21.

consider the least sophisticated consumer. We do not place much weight on the customer sophistication factor.

C. Strength of the Cited Marks

In identifying “strength” as a single factor, we are combining two of the *du Pont* factors.³⁰ “A strong and fanciful mark is entitled to broad protection.” *Mishawaka Rubber & Woolen Mfg. Co. v. Bata Narodni Podnik*, 222 F.2d 279, 285 (CCPA 1955); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1339 (Fed. Cir. 2004) (same). “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010)); *see also Top Tobacco, L.P. v. North Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:83 (5th ed. 2019). Our focus is on the strength of the senior user, or the registered mark in this context.

To evaluate the conceptual strength of word marks, we place the mark in one of the following classes: “(1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. The lines of demarcation, however, are not always bright.” *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). Market strength also

³⁰ In *Du Pont*, the court identified the fifth and sixth factors as follows: “the fame of the prior mark” and “the number and nature of similar marks in use on similar goods.” *In re E.I. Du Pont de Nemours & Co.*, 177 USPQ at 567. These two factors go to the strength of Plaintiff’s mark and, therefore, are treated together here.

“varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

There is no evidence of the market strength of the registered ECHO112 mark. Applicant submitted evidence of applications and registrations that include the word “echo,” but that is not evidence of current use of the marks.³¹ Contrary to Applicant’s assertion, this evidence does not show “wide third-party use of the formative word, ECHO ...”³² “The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers.” *Scarves by Vera, Inc. v. Todo Imps., Ltd.*, 544 F.2d 1167, 192 USPQ 289, 294 (2d Cir. 1976); *see also Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011).

In addition, many of the marks shown in the records submitted by Applicant involve materially different goods. International Class 9 is quite broad. For evidence to be relevant to the distinctiveness of a particular term, that evidence must relate to uses of the term with the same or similar goods. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, LLC*, 123 USPQ2d at 1751

³¹ Request for Reconsideration at Exh. A.

³² Request for Reconsideration at 36-37.

(disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue). Software alone is an extremely broad genus of goods, but International Class 9 also includes electronic devices. For example, one of the registered marks noted by Applicant is ADS ECHO for certain electronic devices, not software.³³ The word “echo” was disclaimed in that registration. We offer this example to show the extreme variance of meaning of words even within International Class 9.

We cannot determine whether the ECHO112 mark has market strength, but it does have some conceptual strength. The mark is inherently distinctive, and therefore, at least moderately strong. This fact tends to increase the likelihood of confusion, but because the evidence on this issue is thin, we place little weight on this factor in our analysis.

D. Conclusion – There is a Likelihood of Confusion

There is no evidence or substantial argument on any other *du Pont* factors. We found the similarity of the marks, the similarity of the goods, and the similarity of the likely trade channels all suggest that confusion is likely. The registered mark ECHO112 has some conceptual strength, and while that fact makes confusion a bit more likely, we put little weight on this fact. The sophistication and customer care

³³ Registration Number 5413622.

factor was even and does not impact our analysis. We find, therefore, that confusion is likely and affirm the refusal to register.

Decision: The refusal to register based on Section 2(d) is affirmed.