

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: November 12, 2019

Mailed: February 6, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Toyota Jidosha Kabushiki Kaisha
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Serial No. 87734664
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Christopher I. Donahue of Oblon, McClelland, Maier & Neustadt, L.L.P.,
for Toyota Jidosha Kabushiki Kaisha.

Rebecca A. Eubank, Trademark Examining Attorney,¹
Christine Cooper, Managing Attorney, Law Office 116.
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Before Wellington, Lykos, and Coggins,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Toyota Jidosha Kabushiki Kaisha (“Applicant”) seeks registration of the mark

SkyDrive (in standard characters) on the Principal Register for:

“aircraft; structural parts for aircraft; airplanes; structural parts for airplanes; autogyros; gliders and structural parts therefor; turbo-jet airplanes; turbo-prop airplanes; tilt rotor aircraft; propeller airplanes; helicopters; structural parts for helicopters; empennages; propellers for aircraft; propeller blade protectors for aircraft; landing gear for aircraft; landing gear wheels for aircraft; fuselages for aircraft; hot air balloons; seaplanes; airships; rotor blades for helicopters; aircraft wings; fuel tanks

¹ The appeal was briefed by Examining Attorney Brittany Lee-Richardson. The application was then assigned to Examining Attorney Rebecca Eubank, who argued on behalf of the Office at the oral hearing held on November 12, 2019.

for aircraft; tires for aircraft; civilian drones; airplane seats; amphibious airplanes; flying cars and structural parts therefor; fitted covers for flying cars; air vehicles, namely, ultralight aircraft; structural parts for air vehicles; fitted covers for air vehicles; electrically powered motor vehicles for use in the air; structural parts for electrically-powered motor vehicles for use in the air; fitted covers for electrically powered motor vehicles for use in the air; roadable aircrafts; structural parts for roadable aircrafts; fitted covers for roadable aircrafts; rotorcraft; vertical take-off and landing propeller airplanes; vertical take-off and landing aircraft capable of road travel; vertical take-off and landing aircraft; short take - off and landing aircraft; structural parts for vertical take-off and landing aircraft capable of road travel; fitted covers for vertical take-off and landing aircraft capable of road travel; parachutes”

in International Class 12.²

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to nearly all of the goods identified in the application,³ so resembles the registered mark SKY DRIVE for “speedometer speed sensors” in International Class 9,⁴ as to be likely to cause confusion, to cause mistake, or to deceive.

² Application Serial No. 87734664 was filed December 26, 2017 and is based on Applicant’s claim of a bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The presentation of Applicant’s mark on the drawing page does not change the nature of the mark from a standard character mark to a special form mark. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (setting forth requirements for standard character mark). *See also In re Calphalon Corp.*, 122 USPQ2d 1153, 1158-61 (TTAB 2017) (applicant’s amendment of mark from SHARPIN to SharpIn did not transform mark from standard character to special form).

³ The Examining Attorney has excluded “gliders and structural parts therefor; hot air balloons; and parachutes” from the refusal. *See* 10 TTABVue 4 (n.1).

⁴ Registration No. 4045304, issued October 25, 2011; Section 8 declaration of use accepted and Section 15 declaration of incontestability acknowledged.

When the refusal was made final, Applicant requested reconsideration, which was denied by the Examining Attorney and the appeal resumed. The appeal has been briefed, including Applicant's reply brief. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake, or to deceive. Our determination of 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) (cited in *B&B Hardware, Inc. v. Hargis Ind., 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 must consider each *du Pont* factor for which there is evidence of record. *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 goods or services. 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."); see also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("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.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity of the Marks in Their Entireties

We first consider the *DuPont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, Slip Op. No. 18–2236 (Fed. Cir. Sept. 13, 2019) (mem) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted).

Applicant’s mark is SkyDrive and the cited mark is SKY DRIVE, both presented in standard characters. The marks are identical in sound and nearly identical in appearance. The lack of space between the terms SKY and DRIVE in Applicant’s mark does not alter the commercial impression of the mark and is insignificant for

purposes of distinguishing the marks. *See e.g., Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (finding STOCKPOT and STOCK POT confusingly similar); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEFMASTER and BEEF MASTER found “practically identical”). Moreover, given that both marks are in standard characters, we must consider that they can be displayed in the same font style, including any mix of upper and lower case letters. *See* Trademark Rule 2.52(a); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“a ‘standard character mark’ . . . may be used in ‘any particular font style, size, or color.’”). In other words, Applicant’s mix of upper and lower case lettering in its mark has no meaningful distinctive quality in comparison to the registered mark.

Given the marks are the composite of the same two words in standard characters, they have the same appearance, sound, connotation, and commercial impression.

This *DuPont* factor therefore weighs heavily in favor of finding a likelihood of confusion.

B. Relatedness of the Goods

We turn now to the *DuPont* factor involving a comparison of the involved goods and what degree, if any, of relatedness exists between them, keeping in mind that where the marks of the respective parties are identical or virtually identical, as in this case, the degree of similarity or relatedness between the goods needed to support a finding of likelihood of confusion declines. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687,

1689 (Fed. Cir. 1993)), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). The respective goods need not be identical or directly competitive for there to be a likelihood of confusion; rather, in cases where the marks are practically identical, such as this one, there need only be a “viable relationship” between the goods to find that there is a likelihood of confusion. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001), cited in *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009) and *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1110 (TTAB 2007). We also need not find a likelihood of confusion exists as to every item identified within each class; it is if relatedness is established for any item listed in the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). We note, however, the Examining Attorney has specifically excluded “gliders and structural parts therefor; hot air balloons; and parachutes” from the refusal (see Note 3).

The goods in the cited registration are “speedometer speed sensors.” Applicant contends that “a plain reading of the identification [of goods in the cited registration] conveys the goods are speed sensors for speedometers.”⁵ We agree and, in this regard, rely on the following definitions submitted by the Examining Attorney:⁶

Speedometer: Instrument usually found on the dashboard which is used to determine forward speed of a vehicle in kilometers per hour or miles per hour.

⁵ 7 TTABVUE 10.

⁶ DICTIONARY OF AUTOMOTIVE TERMS (www.motorera.com/dictionary/sp), Request for Reconsideration Denied, 5 TTABVUE 28, 29.

Speed Sensor: A detection device that measures the speed of a wheel or drive axle and sends the information in the form of an analog voltage signal to the ECU.

Registrant's goods are fairly construed as wheel or drive axle speed detection devices that are used in conjunction with vehicle speedometers. Specifically, "a speedometer sensor measures the rate at which the vehicle's driveshaft is rotating; this data is sent to the vehicle's computer, where it is converted into a number and displayed on the speedometer."⁷ Given that speedometer speed sensors use driveshaft or wheel speed, their application appears to be limited to land vehicles.⁸

The Examining Attorney argues that the involved goods are related "because Applicant intends to manufacture vehicles and vehicle parts" and "the registered goods are vehicle parts."⁹ The Examining Attorney relies on the defined meaning of the term "vehicle"¹⁰ that includes Applicant's various types of aircraft, and asserts that Registrant's goods are "vehicle parts." In support of the refusal, the Examining

⁷ Office Action issued April 4, 2019, TSDR p. 58; 5 TTABVUE 62.

⁸ Printouts from Registrant's (Tachman and Canadian Automotive Instruments, Ltd. www.c-a-i.net) website contain a photograph of an automobile dashboard, but also appear to incorporate GPS technology in their "Sky Drive GPS Speedometer Speed Sensor" products. *Id.*, TSDR p. 82; 5 TTABVUE 86.

We also note the evidence submitted by the Examining Attorney showing speedometers being used in boats. *See, e.g.*, printouts from Overton's website (www.overtons.com) attached to Office Action issued on September 18, 2018, at TSDR pp. 45-47. However, the evidence does not show speed sensors being used in connection with these speedometers.

⁹ 10 TTABVUE 11.

¹⁰ The Examining Attorney relies on the defined meaning of "vehicle: a means of carrying or transporting something," as provided in the Merriam-Webster online dictionary (www.merriam-webster.com), printout attached to April 4, 2019 Office Action, TSDR p. 2; 5 TTABVUE 6.

Attorney submitted copies of several third-party registrations that cover “speedometers” with other aircraft parts, for example:

Registration No. 3424598 – various aircraft parts including “speed control systems, namely, digital speed and fuel flow rate-control computers, speedometers.”¹¹

Registration No. 4536754 – various “aircraft parts and supplies,” including “airspeed sensors” and “speedometers.”¹²

Registration No. 4535137 – “vehicle, boat, and aircraft parts,” and “speed sensors” and “speedometers,” and “adapters to correct speedometer and tachometer readings.”¹³

The Examining Attorney also attached printouts from the Hondajet website (www.hondajet.com) showing the HONDA mark used in connection with business jets and a Honda automobile parts retail website (www.estore.honda.com) offering automobile parts, including speedometer speed sensors.¹⁴ The Examining Attorney argues that this evidence “demonstrates the entity [Honda] manufactures aircraft, land vehicles and speed sensors.”¹⁵

In addition, the Examining Attorney submitted Wikipedia evidence showing that aircraft generally use an “airspeed indicator or airspeed gauge” as the “instrument used in an aircraft to display the craft’s airspeed, typically in knots, to the pilot.”¹⁶ The airspeed indicator is “used by the pilot during all phases of flight, from take-off .

¹¹ Attached to Office Action issued January 26, 2018, TSDR pp. 22-23.

¹² *Id.*, TSDR pp. 39-40.

¹³ Attached to Office Action issued September 18, 2018, TSDR pp. 71-72.

¹⁴ Attached to Office Action issued September 18, 2018, TSDR pp. 15-23.

¹⁵ 10 TTABVUE 17.

¹⁶ See printouts from Wikipedia online encyclopedia (www.wikipedia.com) attached to Office Action issued September 18, 2018, TSDR pp. 51-54.

. . [to] landing in order to maintain airspeeds specific to the aircraft type.”¹⁷ The Examining Attorney asserts this shows that the “meaning of airspeed indicator and airspeed gauge . . . is the same of a speedometer.”¹⁸

In response, Applicant argues that there is no evidence demonstrating that “airspeed indicators and speed sensors can be substituted for speedometer speed sensors, for the purpose of establishing that the goods in the cited registration are closely related to Applicant’s goods.”¹⁹ Applicant essentially attempts to distinguish its goods (i.e., air vehicles and motor vehicles for use in the air, which would necessarily use “air speed indicators” to measure the vehicle’s speed), from Registrant’s goods which are used to measure speed in connection only with speedometers found in automobiles.

Thus, although Applicant acknowledges that its goods may be “broadly characterized as ‘vehicles,’ and speedometer speed sensors, airspeed indicators and speed sensors may be used in the broad category of ‘vehicles,’” Applicant further contends that this is insufficient and there is no evidence showing “speedometer speed sensors are used with the same type of vehicles for which airspeed indicators and speed sensors are used.”²⁰ Applicant concludes that the evidence does not establish a “relationship” between the involved goods and consumers will not “believe that airspeed indicators and speed sensors are equivalent to speedometer speed

¹⁷ *Id.*

¹⁸ 10 TTABVUE 17.

¹⁹ 7 TTABVUE 18.

²⁰ *Id.* at 26-27.

sensors, such that airspeed indicators and speed sensors can be substituted for speedometer speed sensors, for the purpose of establishing a likelihood of confusion.”

We find Applicant’s argument flawed to the extent it is premised on none of its vehicles being used in ground transportation. We point out, however, that several of the goods identified in the application are not purely aircraft, but function as both land and air vehicles. Specifically the identification includes:

“flying cars and structural parts therefor . . . roadable aircrafts; structural parts for roadable aircraft . . . [and] structural parts for vertical take-off and landing aircraft capable of road travel.”

We take judicial notice of the following definition for the word “roadable”:²¹

- 1 : capable of being driven along roads like an automobile usually under power delivered to one or more wheels.
2. *of an airplane* : capable of being transformed into an automobile by removal or folding of wings and tail.

Applicant’s “roadable aircraft” is therefore understood as vehicles that can be transformed into an automobile. Applicant’s “flying cars” would, by its plain meaning, include automotive vehicles that are capable of flying. Thus, even if we accepted Applicant’s argument that the evidence demonstrates little or no relationship between speedometer speed sensors that are used primarily in land vehicles and aircraft, the application’s identification of goods is not limited to vehicles that travel by air only. Put simply, Applicant’s “roadable aircraft” and “flying cars” are vehicles

²¹ Taken from the Merriam-Webster online dictionary (www.merriam-webster.com/dictionary/roadable), accessed February 5, 2020. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

capable of transforming into automobiles and thus may utilize speedometer speed sensors.

We therefore find a viable relationship exists between Applicant's vehicles, and their structural parts, that are capable of road travel and Registrant's speedometer speed sensors which are used in land vehicles. *Tuxedo Monopoly, Inc.*, 209 USPQ 988 (relatedness need only be established for any item encompassed in the application's identification of goods in a particular class to suffice for a finding of likelihood of confusion as to the application's other items listed within the same class). This *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Trade Channels

Applicant argues that there is no "probative evidence [showing] Applicant's goods are sold in the same channels of trade as [Registrant's] . . . or marketed to the same classes of purchasers."²² We do not find that the absence of such evidence to be dispositive nor does this lack of evidence establish that the respective goods are found in disparate trade channels. We further note that the Examining Attorney's evidence shows speedometer speed sensors may be purchased through online retail automotive parts sites. To the extent that some of Applicant's vehicles may be transformed into automobiles, it would not be unreasonable for owners of these vehicles to buy replacement parts from the same sources. Regardless, without any evidence establishing the existence of similar or separate trade channels, we find the *DuPont* factor regarding trade channels to be neutral in our analysis.

²² 7 TTABVUE 24.

D. Sophistication of Purchasers

Applicant argues that the involved goods are “both expensive and require skill to purchase and operate.” There is no evidence supporting the sophistication of customers or the price points for Registrant’s goods, and we cannot conclude that all of Applicant’s “structural parts for roadable aircraft” are necessarily expensive. Nevertheless, based on the nature of Applicant’s goods and that they will potentially be airborne, we may assume that Applicant’s consumers will exercise a level of heightened care in their selection of structural parts. This does not necessarily mean, however, that they are immune to source confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (even careful purchasers who are knowledgeable as to the services are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar marks on or in connection with those services); *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Wilson*, 57 USPQ2d at 1866. “Human memories even of discriminating purchasers ... are not infallible.” *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 1406, 168 USPQ 110, 112 (CCPA 1970).

Although there is no evidence establishing relevant-consumer sophistication, we recognize that given the inherent nature of Applicant’s goods there would be an elevated level of purchasing care for those goods. Accordingly, the fourth *DuPont* factor weighs in Applicant’s favor.

E. Balancing the Likelihood of Confusion Factors

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. Because Applicant's mark is virtually identical to Registrant's mark and there is at least a viable relationship between the goods, we ultimately conclude that Applicant's use of the SkyDrive mark for the goods identified in the application is likely to cause confusion with the SKY DRIVE mark for the goods identified in the cited registration. We reach this conclusion in spite of a finding that consumers of Applicant's goods, given the nature of these goods, may exercise a higher level of purchasing care. The factors favoring a finding of a likelihood of confusion outweigh this factor weighing against.

Decision: The refusal to register Applicant's mark is affirmed as to all of the goods identified in the application, except "gliders and structural parts therefor; hot air balloons; and parachutes."

The identification of goods in the application will be amended accordingly and forwarded for publication in due course.