

2021-1591

In The
**United States Court Of Appeals
For The Federal Circuit**

MICRO MOBIO CORPORATION,
Appellant,

v.

GENERAL MOTORS, LLC,
Appellee.

**APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN CANCELLATION NO. 92068218**

BRIEF OF APPELLANT

**Christopher Horgan, Esq.
ROARK IP
1438 Dahlia Loop
San Jose, CA 95126
(408) 687-8306
chris.horgan@roarkip.com**

Counsel for Appellant

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number	2021-1591
Short Case Caption	Micro Mobio Corporation v. General Motors, LLC
Filing Party/Entity	Micro Mobio Corporation

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Name: Christopher J. Horgan

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1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
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Micro Mobio Corporation		

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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Micro Mobio Corporation v. General Motors, LLC	Trademark Opposition No. 91253385	U.S. Patent & Trademark Office

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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STATEMENT OF RELATED CASES

There have been no previous appeals in this case before this Court or any other appellate court. Counsel is not aware of any other case that will be directly affected by the Court's decision in the pending appeal. However, there is an Opposition pending in the U.S. Patent & Trademark Office between Micro Mobio Corporation ("Micro Mobio") and General Motors, LLC ("GM") involving the same SUPERCRISE mark (Registration No. 3,972,396) owned by Micro Mobio Corporation (Opposition No. 91253385).

STATEMENT OF JURISDICTION

Jurisdiction over this appeal is conferred by 28 U.S.C. § 1295(a)(4)(B) and 15 U.S.C. § 1071(a)(1), in view of the final decision issued by the Trademark Trial and Appeal Board (the "Board") in Cancellation No. 92068218 (the "Cancellation") on November 30, 2020. Appx2. Micro Mobio Corporation timely filed and served its Notice of Appeal on January 22, 2021. Appx1842.

STATEMENT OF THE ISSUES

1) Did the Board err in its analysis of the strength of the Micro Mobio's mark by not rating the conceptual strength of the mark as arbitrary which would put the overall strength of the mark as weighing in Micro Mobio's favor rather than neutral?

- 2) Did the Board use the wrong legal standard in evaluating the similarity of goods in the likelihood of confusion test under 15 U.S.C. §1052(d) by not evaluating whether there was a “viable relationship” between the goods?
- 3) Did the Board err by misinterpreting and misapplying “computer hardware” and “computer software” in Micro Mobio’s goods identification and, as a result, incorrectly compare Micro Mobio’s goods identification with GM’s goods identification?
- 4) Did the Board err as a matter of law in failing to consider the extensive third party evidence on the record of prior registrations, third party websites and newspaper article usage to show that Micro Mobio’s and GM’s goods are complementary?
- 5) Did the Board use the wrong legal standard in evaluating the channels of trade and class of purchasers in the likelihood of confusion test in the case of legally identical goods by not adopting the legal presumption that the goods travel in the same channels of trade to the same class of purchasers?
- 6) Did the Board inaccurately evaluate and fail to give enough weight to the evidence of post-sale confusion?
- 7) Did the Board err regarding the extent of potential confusion to be de minimis?

STATEMENT OF THE CASE

This case arises from a trademark cancellation proceeding in which the Board did not find a likelihood of confusion between Micro Mobio's SUPERCUISE mark (Registration No. 3,972,396) and GM's SUPER CRUISE mark (Registration No. 5,387,518). Appx2-34.

Micro Mobio adopted and began selling SUPERCUISE products nationally in the United States in 2010. (Filipovic Dec., ¶¶ 6, 12; Appx355-358). Micro Mobio's SUPERCUISE branded electronic, control and communication products improve "connectivity" in various types of products including vehicles. (Filipovic Dec., ¶¶ 6, 13; Appx355-356, Appx358). Connectivity is "the quality, state or capability of being connective or connected connectivity of a surface: especially the ability to connect to or communicate with another computer or computer system" (Filipovic Dec., ¶6; Appx355-356). (The terms "communications" and "connectivity" will be used interchangeably herein). Micro Mobio's SUPERCUISE line of products include fourth generation of broadband cellular network technology and Long Term Evolution ("4G LTE" or just "4G") modules; the upcoming fifth generation of broadband cellular network technology ("5G") modules; WiFi modules; and Bluetooth® modules. (Filipovic Dec., ¶6; Appx355-356).

Micro Mobio applied to register the SUPERCRUISE trademark in International Class 009 which covers electrical and scientific goods on December 8, 2009, and subsequently received Registration No. 3,972,396 on June 7, 2011 (Filipovic Dec., ¶¶8, 10; Appx356-357) for the following goods identification:

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.

Besides selling vehicles, GM is a manufacturer and seller of electronic hardware and software modules which when added to a vehicle allow it to have semi-autonomous driving capabilities. (Deposition of Mario Maiorana, Chief Engineer – Super Cruise and Advanced Automotive Driving, General Motors, August 7, 2018, (“Maiorana Dep.”), Appx183). GM’s hardware and software modules are an optional package for a vehicle which is sold under the SUPER CRUISE brand name. (Cadillac CT6 – Owner’s Manual, Appx117-128). GM’s semi-autonomous electronics combine a plurality of inputs from environmental sensors (e.g., cameras, ultrasonic sensors, radar object detectors), a global positioning system (GPS) and downloadable maps at a central electronic control module (i.e., the EOCM module) to perform a “sensor fusion” to help maintain the vehicle on a straight line in the center of a lane when engaged in certain predetermined geographic locations. (Maiorana Dep., Appx179-184; “Sensors for Autonomous Vehicle Localization,” Curtis Hay, GM Technical Fellow, Appx317-325; “Hands Off With Cadillac Super

Cruise, the Masterful One-Trick Pony of Self- Driving”, *Extreme Driving*, 9/28/17, Appx292-299). Throughout its operation, the GM’s semi-autonomous system relies on both signals within communication hardware in the vehicle and wireless communication signals from outside the vehicle to function (e.g., downloadable maps, GPS signals, GPS correction signals, Over-The-Air Updates). (Maiorana Dep., Appx160-165, Appx170-173). GM filed an intent-to-use application for the SUPER CRUISE mark on June 20, 2016 which was 5 years after the Micro Mobio mark was registered. GM registered its mark in the same international class as the Micro Mobio mark (i.e., Class 009). (GM Prosecution History of Reg No. 5,387,518, Application No. 87077170, June 20, 2016, Appx220-221). Although GM is currently only using the SUPER CRUISE mark on one brand (i.e., Cadillac), bit is planning to expand the use of the mark to other brands. (Maiorana Dep., Appx174). GM received Registration No. 5,387,518 on January 23, 2018 for the following goods identification:

Computer software, cameras, ultrasonic sensors, global positioning system and radar object detectors for the semi-autonomous driving of motor vehicles. Appx220-221.

SUMMARY OF THE ARGUMENT

Section 2(d) of the Lanham Act provides that the U.S. Patent and Trademark Office may refuse to register a trademark if it “consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office ... as to be likely,

when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). The Board decided the cancellation proceeding based on the likelihood of confusion test outlined in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (C.C.P.A. 1973). In determining whether a mark is likely to cause confusion, only those DuPont factors that are of significance to the marks in question need be considered. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed. Cir. 2010)) (citation omitted). The Board found the following factors to be of significance: 1) the similarity or dissimilarity of the marks; 2) the strength or fame of the prior mark; 3) the similarity or dissimilarity of the nature of goods or services; 4) the similarity or dissimilarity of established and likely to continue trade channels and classes of consumers; 5) the conditions of sale and sophistication of purchasers; 6) the nature and extent of any actual confusion; 7) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; 8) the market interface between applicant and the owner of a prior mark; 9) the extent of potential confusion, i.e., whether *de minimis* or substantial; and 10) any other established fact probative of the effect of use. Appx2-34.

The Board determined in the proceeding below that the parties’ marks are identical except for the space in GM’s mark between the words SUPER and

CRUISE, “which is inconsequential” and found this to be heavily in favor of a finding of likelihood of confusion. Appx12. The Board found the strength of Micro Mobio’s mark to be neutral, that Micro Mobio and GM’s goods were not related, there was no meaningful overlap in the parties’ trade channels or consumers, that the conditions of sale and sophistication of the purchasers was either neutral or weighed only slightly in GM’s favor, that actual confusion was neutral, that market interface was found to be neutral, that the extent of potential confusion favors GM, and that any other established fact probative of the effect of use was neutral. Appx13-34. Micro Mobio addresses each of the *DuPont* factors found in GM’s favor below.

ARGUMENT

A. Standard of Review

This Court reviews the Board’s legal conclusions de novo and factual findings for substantial evidence. *Princeton Vanguard, LLC v. Frito-Lay North America, Inc.*, 786 F.3d 960, 964 (Fed. Cir. 2015) (citation omitted). Findings with respect to each of the *DuPont* factors is a question of fact, which this Court tests for substantial evidence when called into question on appeal. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002). The overall determination of likelihood of confusion is a question of law and is reviewed without deference. *Coach Servs., Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 1366 (Fed. Cir. 2012).

B. The Trademark Trial and Appeal Board (the “Board”) made a factual error which is not supported by substantial evidence in its analysis of the strength of the Micro Mobio’s mark by not rating the conceptual strength of the mark as arbitrary

The Board stated that the Micro Mobio SUPERCRUISE mark was not arbitrary:

We do not agree, however, that the mark is arbitrary for Micro Mobio'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 Micro Mobio's mark SUPERCRUISE is therefore highly suggestive of Micro Mobio'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, Micro Mobio's mark is not as inherently strong as an arbitrary or fanciful mark. (Appx13-14).

The Board took judicial notice of the definition of cruise as follows:

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...> (Appx14).

When GM was applying for the SUPER CRUISE mark they made the following assertions in the prosecution:

Further, the Applicant submits that the concept of CRUISE as operating a vehicle at a predetermined speed, is not the common, or most likely meaning of this word. The Applicant stresses that the full reading of the definition of CRUISE from the Webster’s New World College Dictionary excerpt submitted by the Examining Attorney is:
cruised, cruis’ing

1. to sail from place to place, as for pleasure or in search of something
2. to ride about in a similar manner: a taxi cruises to pick up passengers

* * * * *

Because the Applicant's computer software allows for autonomous driving and relieves the driver of numerous burdens of driving, the more fitting connotation of CRUISE as applied to the Applicant's goods is "to go or move along, especially in an unhurried or unconcerned fashion" or "to sail from place to place as for pleasure or in search of something, . . to ride in a similar manner." The Applicant's mark therefore suggests that the Applicant's goods provide a pleasurable and worry free driving experience, rather than directly pointing to a function of feature of the goods.

(Registration No. 5,387,518 Prosecution History, January 23, 2017, Response to Office Action, Appx656-660).

First, GM should be held to a connotation of the word "cruise" that they asserted to the United States Patent & Trademark Office during the prosecution of their SUPER CRUISE mark. The term "cruise" should be construed as "to go or move along, especially in an unhurried or unconcerned fashion" or "to sail from place to place as for pleasure or in search of something, . . to ride in a similar manner." There is no evidence on the record that either of these terms are used in the electronics industry. Therefore, they would not be suggestive of Micro Mobio's connectivity products which would make the term SUPERCUISE of an arbitrary nature.

Second, the Board in taking judicial notice chose the second meaning of the term "cruise" which is "to move or proceed speedily, smoothly or effortlessly" as opposed to choosing the first meaning in the Merriam-Webster online dictionary

cited to above which is “to sail about touching a series of ports”. If the first meaning was chosen, it would be clear that the Micro Media SUPERCruise mark would be arbitrary because Micro Mobio’s connectivity products have nothing in common with sailing about.

Third, even if the second meaning of the term “cruise” is to be used in analyzing the SUPERCruise mark, there is no evidence on the record other than the Board’s opinion that the term “cruise” is used in the electronics or software industry and much less that it is used in the industry to suggest that the Micro Mobio products “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” as found by the Board. Appx14. Evidence which is on the record is that the mark was chosen by the Micro Mobio people who have many years of experience in the electronics business specifically because the term had no meaning in the field. Mr. Filipovic, Sales and Marketing Lead for Micro Mobio, stated in his deposition:

When the Micro Mobio SUPERCruise mark was chosen it was based on the fact that my boss, Weiping Wang, and I liked the sound of the mark and the mark did not have any meaning in relation to the electronic, control and communication product field. Except for the GM use of their GM SUPER CRUISE mark, I am not aware of any other company in the field of electronic, control and communication products or any related fields that use the SUPERCruise mark. (Filipovic Dep., Appx357).

Therefore, for the reasons discussed above, Micro Mobio's mark should have been found to be arbitrary which would render the overall strength of the mark as weighing in Micro Mobio's favor.

C. The Board erred as a matter of law by using the wrong legal standard in evaluating the similarity of goods in the likelihood of confusion test under 15 U.S.C. §1052(d) by not evaluating whether there was a “viable relationship” between the goods

In the Board's decision, in balancing the factors, the Board stated that the marks are “virtually identical”. Appx33. It is axiomatic that when the involved marks are virtually identical as was found by the Board in this case, the extent to which the Micro Mobio's and GM's goods identifications must be similar or related to support a finding of likelihood of confusion is lessened. *In re Opus One Inc.*, 60 U.S.P.Q.2d 1812, 1815 (T.T.A.B. 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (T.T.A.B. 1983). “[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.” *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003) (quoting *In re Shell Oil Co.*, 26 U.S.P.Q.2d at 1689).

Nowhere in the Board's analysis of the similarity of the goods is it shown that the “viable relationship” standard or that a lessened standard was used due to the virtually identical marks. Therefore, the Board erred in the legal standard used in

their goods similarity analysis and if the correct standard had been properly applied (as discussed in more detail below) would have changed this factor of the *DuPont* test from GM's favor to Micro Mobio's favor.

D. In determining whether the goods identifications are similar in the *DuPont* test, the Board made a factual error by misinterpreting and misapplying "Computer Hardware" and "Computer Software" in Micro Mobio's goods identification and, as a result, incorrectly compared Micro Mobio's goods identification with GM's goods identification

The Board adopted Micro Mobio's interpretation of the Micro Mobio SUPERCUISE identification of goods as follows:

- 1) semiconductor devices;
- 2) computer hardware; and
- 3) 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.

Appx18. The Board then made a determination that in each of these three areas when compared to the goods in the GM mark that they were not related for purposes of the likelihood of confusion analysis. Appx25. The Appellant will only discuss below the computer hardware and computer software portions of Micro Mobio's goods identification.

1. Computer Hardware

The Board addresses the similarity of the term “computer hardware” in Micro Mobio’s goods identification to GM’s goods identification as follows:

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 encompasses keyboards, display monitors, printers, disk drives, network connections and scanners.⁴⁰ (Appx21-22).

First, the cameras, ultrasonic sensors, global positioning system, and radar object detectors as called out in GM’s goods description would have difficulty functioning without having each of a CPU, memory and a method of inputting and outputting information and thus qualify under the Board’s definition of “computer hardware” as being related to Micro Mobio’s goods.

Second, the Board asserts that GM’s goods (i.e., cameras, ultrasonic sensors, global positioning system, and radar object detectors) do not fit within the “plain meaning” of the definition of computer hardware. The Board seems to be under the impression that the “plain meaning” of “computer hardware” is somehow limited to a personal computer type workstation. However, in the modern world computer hardware takes many forms. Micro Mobio’s testifying expert Mr. Wilson has

worked in the telematics field since 1992. Appx665. Mr. Wilson stated in his deposition: "...computer hardware can look like many different things. A camera is one of the things that ... computer hardware can look like. But it could also look like...a laptop or a phone." Appx899. In addition, during the deposition of GM's witness, Mr. Maiorana, he confirmed that computer hardware is present in the Super Cruise system. (Deposition of Mario Maiorana, Chief Engineer – Super Cruise and Advanced Automotive Driving, General Motors, on August 7, 2019 ("Maiorana Dep."), Appx194-195. The GM Super Cruise system is made up of a series of computer hardware modules just like Micro Mobio sells computer hardware modules. The GM Super Cruise computer hardware modules rely on communication computer hardware modules to download maps, provide GPS location correction, and connect with a GM centralized server and would not be able to function without the communication computer hardware modules. As discussed in detail Mr. Wilson's expert report below each of the hardware listed in the GM goods identification qualifies as computer hardware.

28. In a vehicle, computer hardware is often referred to as an "Electronic Control Unit" (or ECU). These are fully fledged computers designed for automotive applications such as controlling the engine or the airbag system. ...Most, if not all, computer hardware in vehicles has some level of communications capability allowing various parts to communicate data to other ECUs or controllers.

29. References are sometimes made to "a car computer", but there is never simply a single computer in a modern production car. 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), radar object detector (e.g., Forward Range Radar, Short Range Radars),⁴. In my opinion, all of these devices are the same as or overlap with the term "computer hardware". (Wilson Report, Appx670).

Third, the broad term "global positioning system" is used in GM's goods identification instead of using a more specific term such as GPS receiver. A global positioning system is made up of satellites, ground segments, and GPS receivers which would certainly qualify as including "computer hardware" (Wilson Report, Appx677). In a Request for Admission, GM confirmed that the global positioning system includes computer hardware:

Question: "Admit that the global positioning system of the GM Super Cruise System contains computer hardware".

GM Response: "...GM admits that the global positioning system used in connection with its SUPERCruise technology uses computer hardware...". Appx64.

In summary, the cameras, ultrasonic sensors, global positioning system, and radar object detectors as called out in GM's goods description would not operate without a CPU, memory and an input/output device and thus qualify under any definition, including the Board's, of "computer hardware".

2. Computer Software

GM's goods identification calls out "computer software" with a functional statement "for the semi-autonomous driving of motor vehicles". Appx654.

Computer software for semi-autonomous driving of motor vehicles would necessarily encompass all types of computer software used in the semi-autonomous driving of motor vehicles. *In re Linkvest, S.A.*, 24 U.S.P.Q.2d 1716 (T.T.A.B. 1992). There is no limitation on GM's goods in the GM goods identification which would preclude use of the computer software to perform communication functions for use in semi-autonomous driving of a vehicle. Therefore, GM's computer software may be appropriate for any purpose in which computer software is normally employed in the operation of semi-autonomous driving of motor vehicles. Micro Mobio's goods identification should be read to include: i) computer software for use in control of electronic circuits in data communications; and ii) computer software for use in receiving and transmitting signals in data communications. Both of these types of computer software would necessarily be used extensively in semi-autonomous driving of a motor vehicle and therefore would be encompassed by GM's identification of goods.

a. **Computer Software for use in control of electronic circuits in data communications**

Mr. Wilson explained in his expert report the function of software in controlling electronic circuits in data communication:

Control of electronic circuits is the ability to manage or direct the flow of electrons through the circuit, often resulting in some information being generated or some physical action being performed by the circuit. In computer devices, electronic circuits are controlled by computer

software. In a vehicle, computer software controls many electronic circuits such as controllers, transceivers, and relays for the generation and reception of communications signals. Electronic communications devices in the vehicle are the same as or overlap with electronic circuits...Complex systems, such as communications devices for managing the transmissions between the electronic control units which operate a semi-autonomous driving system, almost always require software for their control and it would be exceedingly unusual for such a complex system to not have controlling software. As such, it 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 [Micro Mobio] SUPER CRUISE mark. (Wilson Rept., ¶32, Appx671-672).

The Board asserted that “the mere fact that Respondent's goods for the semi-autonomous driving of motor vehicles may incorporate or use ... 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 [GM’s] goods are ‘the same as’ Micro Mobio's goods or that the parties' products are related for likelihood of confusion purposes...” It is respectfully submitted that the Board is incorrect because these communication software functions listed in Micro Mobio’s goods identification are the type that are critical to the operation of a semi-autonomous driving system and prevalent throughout the system. Therefore, the goods in the Micro Mobio and GM goods identifications have a

technical relationship. Using the viable relationship standard, these goods should be seen as related.

b. Computer Software for use in receiving and transmitting signals in data communications

i. Comparison of GM's and Micro Mobio's "Computer Software" goods identifications and communications within a vehicle

A computer software (and hardware) standard for receiving and transmitting data communications within a vehicle is the controller area network (CAN). “Referring specifically to communications in a vehicle, a controller area network (CAN) is a common form of communication bus standard used in vehicles for transmission of signals along a CAN bus between the electronic control circuits of the many subsystems.” (Wilson Rept., ¶30, Appx670). The functions of this computer software and how it relates to Registrant’s identification of goods is described by Mr. Wilson as follows:

While it might be possible for one of the dedicated circuits within the GM Super Cruise part of the vehicle system to be based entirely on hardware, CAN transceivers for sending and receiving signals along a CAN, or other data bus, in a vehicle between electronic control units are more common... Transceivers for vehicle data buses (usually CAN), are quite sophisticated and, to the best of my knowledge, all use software control. Therefore, it 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. (Wilson Rept., ¶33, Appx672).

In the deposition of GM's Mr. Maiorana, Mr. Maiorana discussed the internal communications in a vehicle with a semi-autonomous driving capability. One of the Super Cruise key design elements is the fusion of sensor inputs to generate a virtual control path down the center of a lane (i.e., the blue line). (Maiorana Dep., Appx183-184). These sensor inputs are communicated from the sensors such as the radar detector, ultrasonic sensors, GPS receiver and other sensors to a central module which determines the "blue line" upon which the vehicle must be maintained to keep the Super Cruise system engaged. The computer software handling these communications are necessary for the operation of the Super Cruise system and are not just a minor feature.

ii. **Comparison of GM's and Micro Mobio's
"Computer Software" goods identifications and
communications with the outside of the vehicle**

For communications outside of a vehicle, radio data communications must also be managed by computer software for semi-autonomous driving of motor vehicles. (Wilson Rept., ¶34, Appx672). As Mr. Wilson explained in his deposition, the air map updates for the Super Cruise system are received wirelessly. (Wilson Rept., ¶36, Appx673). In addition to receiving over-the-air map updates, the GM Super Cruise system will constantly receive GPS correction signals to help the vehicle operate in semi-autonomous mode (Wilson Rept., ¶35, Appx 672-673). The GM Super Cruise system would not be able to work without the map updates and

constant GPS correction signals made possible by computer software for receiving and transmitting signals as called out in Micro Mobio's goods identification.

3. The Board's Goods Relatedness Analysis

The Board addresses the computer hardware and computer software in Micro Mobio's goods identification as follows:

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" Micro Mobio's goods or that the parties' products are related for likelihood of confusion purposes.

Appx22-23. The Board then cited to *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1169 (TTAB 2001) and *Falk Corp. v. Toro Mfg. Corp.*, 493 F.2d 1372, 181 USPQ 462, 467 (CCPA 1974).

First, the GM SUPER CRUISE goods identification calls out specific hardware modules (i.e., cameras, ultrasonic sensors, global positioning system and radar object detectors) and computer software for use in the semi-autonomous driving of motor vehicles. A vehicle today is made up of hundreds of computer modules and is basically a computer system on wheels. Similarly, the computer hardware and computer software in Micro Mobio's goods identification would be spread throughout a semi-autonomous driving system such as the hardware modules and computer software in GM's goods identification. The facts of the case can be

distinguished on this basis from *Toro Co. v. ToroHead Inc.* and *Falk Corp. v. Toro Mfg. Corp* examples because they both involved products that were on different system levels. In *Toro Co. v. ToroHead Inc* the goods comparison involved specific parts of a hard drive versus lawn mowers or irrigation systems and the like and in *Falk Corp. v. Toro Mfg. Corp* the goods comparison was shaft couplings versus lawn care equipment. *Toro Co.*, 61 USPQ2d at 1169; *Falk Corp.*, 181 USPQ at 467. Both of these cases involve comparisons of a minor part of a system to a larger system. Unlike both these cases, the products listed in the GM SUPER CRUISE identification (i.e., cameras, ultrasonic sensors, global positioning system and radar object detectors) are on the same level as computer hardware because they are computer hardware. In addition, the type of communication computer software in the Micro Mobio goods identification would be the type found throughout the operation of the computer software for operating a semi-autonomous vehicle and would be critical to its operation.

Second, the Board cites to the testimony of Micro Mobio's Mr. Filipovic that Micro Mobio's connectivity modules could be in "...hundreds, thousands of products". Appx22-23. However, the Board is mistakenly using extrinsic evidence here when comparing the relatedness of the goods rather than relying on the language of Micro Mobio and GM goods identifications. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1053 (Fed. Cir. 2018) (noting the impermissibility of an

applicant's attempt to restrict the breadth of the goods or trade channels described in the cited registration).

Third, when using the proper “viable relationship” standard when comparing the Micro Mobio and GM goods identifications, as discussed above, there is found both a technological and commercial relationship between the goods. Not only are the type of goods in the Micro Mobio goods description found in semi-autonomous driving systems, but they are also sold and advertised alongside semi-autonomous driving systems in a complementary manner. For example, GM sells communication hardware and software used with their SUPER CRUISE semi-autonomous driving system as the ONSTAR system and every single sale of a GM vehicle with a SUPER CRUISE system has an associated ONSTAR system so that it can receive wireless communications. Appx753. Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that “[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion”); *In re Toshiba Med. Sys. Corp.*, 91

USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease).

In conclusion, Micro Mobio's goods identification and GM's goods identification should be seen as overlapping, identical-in-part, encompassing and/or complementary.

E. The Board made an error as a matter of law in failing to give the proper weight to the extensive third party evidence on the record of prior registrations, third party websites and newspaper article usage to show that the Micro Mobio and GM goods are complementary

Third-party registrations that cover a number of different goods or services may have probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source, if the registrations are based on use in commerce. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (T.T.A.B. 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (T.T.A.B.), *aff'd per curiam*, 864 F.2d 149 (Fed. Cir. 1988). As explained above, Micro Mobio type communication products may be found inside a semi-autonomous driving package but also sold alongside it as a separately sold product which would allow the semi-autonomous package to continuously, wirelessly communicate with the outside world. Both semi-autonomous driving systems and Micro Mobio type communication products are promoted together which establishes that GM type

goods and Micro Mobio type goods commonly emanate from a single source. Micro Mobio introduced into evidence 53 third party registrations that selected for their identification of goods both communication (or connectivity) products and semi-autonomous driving systems for vehicles; 30 third party websites from vehicle companies that sell connectivity products and some type of semi-autonomous driving system in the same vehicle; and 64 examples of excerpts from newspapers and/or magazine articles showing the use of the words “connected” (or synonyms thereto) and “semi-autonomous driving” (or synonyms thereto) together in the same acronyms (e.g., CAV), same sentence, same paragraph and/or within a few paragraphs of each other. In footnote 51 of the decision, the Board stated “[w]e 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 Micro Mobio's specific products under the same mark.” Appx25. Other than this terse statement, there was no explanation of why this substantive amount of evidence showing the complementary nature of the parties’ goods did not have probative value and was basically ignored in determining whether Micro Mobio and GM’s goods are complementary. The applicant in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129,

1136 (Fed. Cir. 2015) presented 26 third party uses or registrations of record to show a mark was weak and this was considered voluminous evidence. Micro Mobio submitted 53 third party registrations in addition to the other third party website and newspaper evidence to show the Micro Mobio goods and GM goods are at least complementary and the Board dismissed it in a footnote without a proper explanation. In order to “allow effective judicial review, the agency is obligated to ‘provide an administrative record showing the evidence on which the findings are based, accompanied by the agency's reasoning in reaching its conclusions.’” *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016) (quoting *In re Sang-su Lee*, 277 F.3d 1388, 1342 (Fed. Cir. 2002)); *see Lee*, 277 F.3d at 1342 (“For judicial review to be meaningfully achieved within these strictures, the agency tribunal must present a full and reasoned explanation of its decision. The agency tribunal must set forth its findings and the grounds thereof, as supported by the agency record, and explain its application of the law to the found facts.”). The Board, as an administrative agency, must articulate logical and rational reasons for its decisions and just mentioning a significant amount of evidence in a footnote that is typically used in determining whether goods are complementary does not qualify.

F. The Board used the wrong legal standard in evaluating the channels of trade and class of purchasers in the likelihood of confusion test in the case of legally identical goods by not adopting the legal presumption that the goods travel in the same channels of trade to the same class of purchasers

Goods and services should be compared as to their respective trade channels and class of purchasers based on how they are identified in the application and cited registration. *Stone Lion Capital, LP*, 110 U.S.P.Q.2d at 1162; citing *Octocom Sys.*, 16 U.S.P.Q.2d 1783. Where the goods are in part legally identical and where both goods are unrestricted as to trade channels and class of purchasers (as is the case here), it is presumed that the channels of trade and class of purchasers are the same. *In re Viterra Inc.*, 101 U.S.P.Q.2d at 1908 (legally identical goods are presumed to travel in the same channels of trade to the same class of purchasers).

GM's goods are restricted to a particular function (i.e., semi-autonomous driving of motor vehicles) but they are unlimited as to channels of trade, class of consumers and fields of use. Micro Mobio's goods are not limited to a particular function for computer hardware and in the case of computer software, limited to communication functions as discussed above, but are unlimited as to channels of trade, class of consumers or fields of use. There are no specific or mutually exclusive limitations in the description of goods in either GM's or Micro Mobio's registrations. Therefore, it should be legally presumed that the channels of trade and class of consumers are the same.

G. The Board made a factual error by inaccurately evaluating and failing to give enough weight to the evidence of post-sale confusion

In the discussion of post-sale confusion, the Board made the statement that “that Petitioner's goods are not auto parts” and this is one of the reasons the decision was based on. Appx27. This is a factual error because there is extensive evidence on the record that connectivity systems are standard on most vehicle sales today and Micro Mobio’s products are specifically sold into the vehicular market. Appx358. Therefore there is potential for confusion in the vehicle aftermarket supply and repair market. In the car aftermarket (including retrofits), connectivity modules (e.g., 4G LTE, WiFi) are also sold to replace defective or damaged equipment or provide upgrades to older communication systems and GM is a major supplier of products in the car aftermarket. (Filipovic Dec., ¶18, Appx361-362).

H. The Board made a factual error by regarding the extent of potential confusion to be de minimis

The Board found that the extent of potential confusion to be de minimis based on the third and fourth *DuPont* factors:

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.

Appx32. The goods involved here are the type of goods that would be marketed to and purchased by at least the same number of purchasers as for GM's goods because the goods (at a minimum) are complementary and every time a semi-autonomous driving system is sold, it is accompanied by a connectivity module. Therefore, the potential for confusion would be possible in every sale of GM's products and cannot be deemed to be de minimis. Further, the evidence the Board relies on is extrinsic evidence in an attempt to limit the goods identification, so there should not be a finding under this factor. In addition, the logical extension of the Board's argument is that the trademarks used on these products make no difference at all and that even identical marks on identical products will not be likely to cause confusion. To reach such a conclusion would be to disregard the marks altogether, a proposition which is contrary to the fundamental principles upon which the law of trademarks is founded. This factor should be deemed neutral.

CONCLUSION

For all the reasons stated above, Micro Mobio submits that the Board erred in determining that the GM SUPER CRUISE mark is not likely to cause confusion with the Micro Mobio SUPERCRISE mark. The marks are virtually identical and the goods are both technically and commercially related as well as meeting the other criteria under the *DuPont* analysis. Accordingly, Micro Mobio respectfully requests that this Court reverse the Board's decision and sustain the cancellation of the GM SUPER CRUISE mark.

Dated: May 5, 2021

Respectfully submitted,

/s/ Christopher J. Horgan

Christopher J. Horgan

ROARK IP

1438 Dahlia Loop

San Jose, CA 95126

Counsel for Appellant

ADDENDUM

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<p>This Opinion is Not a Precedent of the TTAB</p>
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Mailed: November 30, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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 entirety 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 SUPERCUISE 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 SUPERCruise 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 SUPERCruise 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 (TMPEP) § 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 SUPERCruise 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 SUPERCruise 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 SUPERCruise 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 TTABVUE 11, ¶ 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.”).

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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.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on May 5, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

Respectfully submitted,

/s/ Christopher J. Horgan

Christopher J. Horgan

ROARK IP

1438 Dahlia Loop

San Jose, CA 95126

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

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/s/ Christopher J. Horgan

Christopher J. Horgan

ROARK IP

1438 Dahlia Loop

San Jose, CA 95126

Attorneys for Appellant