

**THIS OPINION IS NOT A  
PRECEDENT OF THE T.T.A.B.**

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re NovAtel Inc.

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Serial No. 78454750

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Gregory W. Carr of Carr LLP for NovAtel Inc.

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Office 112 (Angela Wilson, Managing Attorney)

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Before Seeherman, Walsh, and Bergsman, Administrative  
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

NovAtel Inc. filed a use based application to register  
the mark FLEXPAC, in standard character form, for "global  
positioning receivers."<sup>1</sup> Registration was refused under  
Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).  
Registration No. 1,884,731 for the mark FLEXPAC for an  
"electrical interconnection system; namely, electrical

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<sup>1</sup> Application Serial No. 78454750, filed July 22, 2004, claiming  
July 1, 2003 as its dates of first use anywhere and first use in  
commerce.

cable, connectors, sockets and pins" was cited as a bar to registration.<sup>2</sup> When the refusal was made final, applicant appealed. The appeal has been fully briefed.<sup>3</sup> We affirm.

The examining attorney contends that there is a likelihood of confusion because the marks FLEXPAC and FLEXPAK are virtually identical and the goods are related (*i.e.*, "global positioning devices" and electrical cables, connectors, sockets and pins may emanate from a single source) and they move in the same channels of trade. The examining attorney submitted the following evidence in support of her likelihood of confusion refusal:

1. Excerpts from the websites of RadioShack, Best Buy, and CompUSA advertising the sale of connectors, cable, and GPS receivers;
2. Excerpts from the websites of manufacturers of GPS receivers advertising the sale of GPS receivers, cable, and connectors. The following manufacturers' websites were attached:
  - A. Garmin (garmin.com);
  - B. Navman (navman.co.uk);<sup>4</sup>

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<sup>2</sup> Registration No. 1,884,731 issued March 21, 1995; renewed.

<sup>3</sup> With its reply brief, applicant filed a motion for leave to file a late reply brief. As grounds for the motion, applicant explained that it never received the examining attorney's brief. Applicant discovered the examining attorney's brief through a routine status check. Applicant's motion is granted.

<sup>4</sup> Applicant did not object to the foreign website. Also, we note that the "iCN 320 Multi-Region Power Sup" write-up states that it "Include (sic) UK, European, and US plug adaptors." This indicates that Navman is selling (or at least advertising to

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- C. Magellan (Magellangps.com)
  - D. Tyco Electronics (tycoelectronics.com);<sup>5</sup>
  - E. Lowrance (lowrance.com)
  - F. Pharos (pharosgps.com); and,
3. Eleven (11) third-party registrations for GPS receivers (or GPS systems) and cable, connectors, and/or sockets.

Applicant argues that there is no likelihood of confusion because the goods are different, the trade channels are different, consumers exercise a high degree of care, registrant's mark is weak and, therefore, entitled to a narrow scope of protection, and there have been no reported instances of actual confusion. In support of its argument, applicant submitted copies of the following three (3) third-party registrations:

Reg. No.	Mark	Goods
1,077,311	FLEXPAK	Variable speed D-C drives
2,419,309	FLEXPAK	Rechargeable battery pack for use in connection with a radio-controlled toy vehicle
2,993,783	FLEX-PAK	Portable, body-worn, form-fitting radios housed in flexible nylon holsters

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sell) in the United States. Accordingly, we will consider this website for whatever probative value it has.

<sup>5</sup> This appears to be the registrant.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 UPSQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 UPSQ2d 1557, 1559 (Fed. Cir. 2001); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Since Applicant has conceded that the marks are similar,<sup>6</sup> a concession with which we agree, our analysis focuses on the other likelihood of confusion factors.

A. The similarity or dissimilarity of the goods.

In analyzing the similarity or dissimilarity of the goods, we start with the well-settled proposition that where, as here, the marks of the parties are substantially similar, the goods need not be as close to support a finding of likelihood of confusion. *In re Opus One, Inc.*,

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<sup>6</sup> Applicant's Brief, p. 5.

60 UPSQ2d 1812, 1815 (TTAB 2001); *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). See also, *In re Shell Oil Co.*, 992 F.2d 1024, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (even when goods are not intrinsically related, the use of identical marks can lead to the assumption that there is a common source).

It is also well settled that the goods of the applicant and the registrant need not be similar or even competitive to find likelihood of confusion. Likelihood of confusion may be found if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they emanate from the same source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988); *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-596 (TTAB 1978). In this regard, the question is not whether consumers would mistake the products, but whether they would mistake the source of the products.

Finally, our determination of likelihood of confusion is based on the identification of goods as they are recited in the application and registration without regard to what the evidence may show about the exact nature of the goods.

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We do not read limitations into the description of goods set forth in the application and registration. See, *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Applicant argues that a "global positioning receiver" is so significantly different from an "electrical interconnection system; namely, electrical cable, connectors, sockets and pins" that consumers would not expect them to come from a single source. Applicant's rationale is that "Applicant's goods are highly sophisticated, active and expensive technical equipment" while registrant's goods are "decidedly unsophisticated, passive and common goods."<sup>7</sup>

However, the evidence shows that cable and connectors and global positioning receivers are complementary products in that cable, connectors and sockets can be used to connect or mount sophisticated electronic equipment such as applicant's "global positioning receivers." This is shown by the specimen filed with the application and the website

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<sup>7</sup> Applicant's Brief, p. 6.

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evidence submitted by the examining attorney. The specimen filed with the application is a "specification sheet" shipped with applicant's "global positioning receivers" which sets forth technical information about the products. The specification sheet indicates that the "global positioning receiver" has communication ports and input/output connectors for power, antenna, and communications.

In addition, the website evidence submitted by the examining attorney shows the following:

1. The Garmin website displays GPS units and cable used to "hardwire your GPS directly to a DC power source or some other electronic device";
2. The Navman website displays GPS units and cables and connectors used for connecting the GPS units to cigarette lighters and other power supplies;
3. The Magellan website promotes its GPS units and related accessories, including connection cables;
4. The Lowrance website displays accessories for GPS units such as cables and connectors;
5. The Tyco Electronics web page is a table of products, including GPS receivers, cables, and connectors; and,
6. The Pharos website displays GPS receivers and extension cable.

Registrant's "electrical interconnection system; namely, cable, connectors, sockets and pins" could be used to connect applicant's "global positioning receiver" to a

power source, antenna, or other electronic equipment. For example, registrant's product could be purchased and used as a replacement part for connecting applicant's "global positioning receivers" to a power source, antenna or computer.<sup>8</sup>

In view of the foregoing, we find that "global positioning receivers" and an "electrical interconnection system; namely, electrical cable, connectors, sockets and pins" are related products.

B. The similarity or dissimilarity of trade channels.

Applicant contends that the goods move in distinctly different markets because "Applicant's goods are typically provided to the OEM and system integration market" and "[t]o the extent cables, connectors, sockets and pins are required for operation of Applicant's sophisticated and expensive global positioning receivers, such accessories would be provided along with the system and not purchased

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<sup>8</sup> We note that the examining attorney also submitted eleven (11) third-party registrations for both global positioning receivers and cables, connectors, and/or sockets as evidence that such products emanate from a single source and may be sold under a single mark. However, the cited registration is for an "electrical interconnection system" and the third-party registrations do not specifically identify an "electrical interconnection system." Accordingly, we have not relied on the third-party registrations in reaching our decision.

separately."<sup>9</sup> On the other hand, applicant asserts that registrant's "rudimentary cables, connectors, sockets and pins . . . are marketed, distributed, and sold largely through hardware stores for other purposes than use with global positioning receivers."<sup>10</sup>

Applicant's argument is not well taken. The channels of trade factor concerns how and to whom the respective products are sold and distributed. In other words, this factor focuses on whether the same class of persons are exposed to the marks at issue under circumstances likely to give rise to the mistaken belief that the products emanate from a single source. *Jeanne-Marc, Inc. v. Cluett, Peabody & Co., Inc.*, 221 UPSQ 58, 61 (TTAB 1984). Consumers who purchase or use a global positioning receiver may also purchase or use an electrical interconnection system to connect the receiver to an antenna, power source or other equipment. Accordingly, the same class of persons are likely to be exposed to the marks when users of global positioning receivers need to connect the receiver to an antenna, power source, or other piece of equipment.

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<sup>9</sup> Applicant's Brief, p. 7.

<sup>10</sup> Applicant's Brief, p. 8.

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As indicated *supra*, our determination of likelihood of confusion is based on the identification of goods as they are recited in the application and registration, and we do not read limitations into those descriptions. See, *Hewlett-Packard Co. v. Packard Press Inc.*, *supra*; *Octocom Systems Inc. v. Houston Computer Services Inc.*, *supra*; *In re Elbaum*, *supra*. Because there are no restrictions as to the channels of trade or classes of purchasers in either applicant's or registrant's description of goods, we consider applicant's and registrant's products as if they were being sold in all of the normal channels of trade and to all of the normal purchasers for such products. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Toys R Us v. Lamps R Us*, 219 USPQ 340, 343 (TTAB 1983). Applicant's "global positioning receivers" are not limited to original equipment manufacturers and system integrators, but may be purchased and used by any person who has use for such as device (e.g., boaters, automobile drivers, truckers, etc.). Registrant's electrical interconnection systems comprising cable, connectors, sockets and pins are not restricted to sale in hardware stores, nor are they precluded from use with global positioning receivers. As indicated above, consumers might purchase registrant's electrical

interconnection systems as a replacement part for connecting "global positioning receivers" to a power source, antenna or computer.

We find, therefore, that the channels of trade and classes of consumers are the same.

C. Degree of consumer care.

Applicant argues that its customers exercise a high degree of care in making their purchases because applicant's goods are "for special applications such as precision agriculture, marine, mining and machine control, unmanned vehicles and sports media."<sup>11</sup> However, applicant's goods are not restricted to such special applications. As noted, they may be purchased by members of the general public, such as car and truck drivers and boaters. Such customers, even if they were to exercise some degree of care in purchasing a global positioning receiver, may not pay as much attention to the cable, connectors, sockets and pins that they purchase to connect the global positioning receivers to other equipment or to mount the receiver. Thus, applicant's customers familiar with

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<sup>11</sup> Applicant's Brief, p. 8. Again, we note that applicant's description of goods is not limited to "special applications such as precision agriculture, marine, mining and machine control, unmanned vehicles and sports media."

applicant's FLEXPAC global positioning receiver may, because of reverse confusion, purchase FLEXPAC cable, connectors, sockets and pins because of the similarity of the marks.

In any event, even if applicant's customers are sophisticated about technology does not provide assurance that they are sophisticated and knowledgeable about trademarks, or that they have such good memories for minute differences, that they could differentiate between applicant's mark and registrant's mark or appreciate that similarity between the marks does not imply some kind of business relationship or affiliation. *Hydrotechnic Corporation v. Hydrotech International, Inc.*, 196 USPQ 387, 392 (TTAB 1977).

We find the degree of care factor is neutral.

D. The number and nature of similar mark in use on similar goods.

Applicant argues that the three (3) third-party "Flexpak" registrations that it submitted are evidence of third-party use of the mark on related goods and, presumably, that registrant's FLEXPAC mark is a weak mark entitled to a narrow scope of protection.<sup>12</sup> Contrary to

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<sup>12</sup> Applicant's Brief, p. 9.

applicant's argument, third-party registrations, absent evidence of actual use of those marks, are entitled to little weight on the question of likelihood of confusion. Third-party registrations are not evidence of use of the marks shown therein. Without evidence of use, the third-party registrations prove nothing about the impact of the third-party marks on purchasers in terms of conditioning consumers as to the existence of similar marks in the marketplace. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973); *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-286 (TAB 1983). Third-party registrations may, of course, have probative value in the manner of a dictionary definitions to show that a term has a significance in a particular industry. However, the limited number of registrations submitted by applicant, and the differences in the goods identified in those registrations and those at issue herein, do not indicate that FLEXPAC or FLEXPAK has a common significance that would restrict registrant's mark to a limited scope of protection vis-à-vis FLEXPAK for related goods.

We find that the number and nature of similar marks in use on similar goods is factor that favors finding a likelihood of confusion.

E. The fame of registrant's mark.

Applicant contends that registrant's mark is not famous and, therefore, the fame factor mitigates against a likelihood of confusion. The examining attorney did not submit any evidence regarding whether registrant's mark is famous. Although, if a registrant's mark is famous, it may play a dispositive role in the likelihood of confusion analysis, the fact that a mark is not famous does not favor a finding of no likelihood of confusion. Accordingly, the fame of registrant's mark is a neutral factor.

F. The nature and extent of any actual confusion.

Applicant argues that the absence of any reported instances of any actual confusion over the past three (3) years proves that there is no likelihood of confusion. However, the fact that an applicant in an *ex parte* proceeding is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board has no way of knowing whether the registrant is unaware of any instances of actual confusion. In addition, we have no evidence of the extent of applicant's use or registrant's use of their respective marks, so it is not possible to determine whether there has been any significant

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opportunity for actual confusion to have occurred. *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Jeep Corporation*, 222 USPQ 333, 337 9TTAB 1984); *In re Barbizon International, Inc.*, 217 USPQ 735, 737 (TTAB 1983).

Accordingly, this factor is neutral.

Based on a balancing of the likelihood of confusion factors, and in particular the virtual identity of the marks, the relatedness of the goods, and the similarity of trade channels, we find that applicant's use of the mark FLEXPAC for "global positioning receivers" so resembles the mark FLEXPAC for an "electrical interconnection system; namely, electrical cable, connectors, sockets and pins" as to be likely to cause confusion.

Decision: The refusal to register is affirmed.