

IN THE UNITED STATES PATENT & TRADEMARK OFFICE

Application Serial No.:	88/439,317
Mark:	HAWKEYE (standard character mark) International Class 009
Applicant:	HawkEye 360, Inc.
Examining Attorney:	Warren L. Olandria, Esq. Law Office 112

Commission for Trademark
P.O. Box 1451
Alexandria, VA 22313-1451

RESPONSE TO OFFICE ACTION

Applicant HawkEye 360, Inc. (“HawkEye” or “Applicant”) respectfully submits this response to the Office Action dated June 26, 2019. For the reasons stated below, Applicant requests that the pending grounds for refusal be withdrawn and the application forwarded for publication.

I. IDENTIFICATION OF SERVICES

The Office Action refuses registration because “the wording ‘Data products generated from proprietary satellite data and through fusing a variety of data sources’ is indefinite and must be clarified.” The Office Action proposes the following amendment:

Data products generated from proprietary satellite data and through fusing a variety of data sources, namely, GPS data logger for recording trips and classifying them into different accounts.

Applicant appreciates the Examining Attorney's suggestion but is concerned that that the proposed additional language does not accurately describe Applicant's goods marketed under the HAWKEYE mark.

Applicant operates a constellation of satellites in low-Earth orbit. The satellites detect radio signals emitted from the Earth's surface or atmosphere (*e.g.*, from transponders aboard commercial ships and airplanes, satellite telephone handsets, and emergency locator beacons). Applicant geolocates the emitters through proprietary algorithms that consider, among other things, differences in the time and position of each satellite when it receives a signal. The geolocation algorithms do not depend on the Global Positioning System ("GPS") or similar systems. In some cases, Applicant uses proprietary analytic methods to correlate the signals with data from other sources (*e.g.*, commercial shipping registries) to identify or provide additional information about the emitters. Applicant then makes downloadable, computer-readable data containing satellite-derived geolocation information that is, in some cases, correlated with other radio emitter information (*e.g.*, the movements of particular vessels over time) available to customers through a web-based portal.

Applicant proposes the following alternative language accordingly:

Downloadable, computer-readable data¹ containing satellite-derived geolocation information sometimes combined with² satellite imagery, synthetic aperture radar, aerial imagery, and commercial data feeds.

Applicant believes this amendment is responsive to the Examining Attorney's indefiniteness concerns while still accurately and more specifically identifying the goods marketed by Applicant in connection with the applied-for mark. Applicant respectfully requests that the above amendment be entered and the refusal withdrawn accordingly.

¹ *See, e.g.*, Trademark ID Manual, Term Nos. 009-2700 and 009-2701 ("downloadable electronic data files").

² *See, e.g.*, Trademark ID Manual, Term No. 006-1134 ("sometimes including").

II. PRIOR-FILED APPLICATION

The Office Action indicates that the Application “may be refused registration under Trademark Act Section 2(d) because of a likelihood of confusion” with pending U.S. Application Serial No. 87/652,071 (“Surgere Application”) to register the HAWKEYE mark for an RFID-based “asset tracking system” in International Class 009. The Surgere Application was filed on an intent-to-use basis, published on April 23, 2019, and allowed on June 18, 2019. No Statement of Use or Request for Extension of Time has yet been filed.

In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973) identifies factors that, “when of record, must be considered” in determining whether there is a likelihood of confusion between two marks. Three are of particular relevance here:

- Factor Two: “The similarity or dissimilarity and nature of the goods or services as described in an application....”
- Factor Four: “The conditions under which and buyers to whom sales are made, *i.e.* ‘impulse’ vs. careful, sophisticated purchasing.”
- Factor Six: “The number and nature of similar marks in use on similar goods.”

Id. Not every *DuPont* factor is relevant and significant in every case. *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”) (*quoting In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed. Cir. 2010)). Applicant will address each factor in turn.

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A. Dissimilarity of the Goods as Described in the Applications

The nature of the goods in question, and particularly their similarity (or dissimilarity), is relevant to the confusion analysis under the second *DuPont* factor. 476 F.2d 1357 at 1361 (“The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.”).

The Surgere Application recites the following goods:

RFID asset tracking system comprised of RFID devices, namely, RFID portals or RFID handhelds, for data collection, associated with data analysis systems.

As particularly relevant here, the redlined clarification was added after the Examining Attorney issued a Final Action on September 3, 2018, concluding, “The identification of goods remains indefinite and must be clarified because ‘RFID devices’ needs clarification.”

“RFID portals or RFID handhelds” are marketed and used to identify items with previously affixed RFID asset tags. *See* “Radio-frequency identification,” Wikipedia, available at https://en.wikipedia.org/wiki/Radio-frequency_identification (last visited July 27, 2019) (“RFID uses electromagnetic fields to automatically identify and track tags attached to objects.”). In typical commercial applications (*e.g.*, tracking boxes moving through a warehouse), RFID readers have a range of 10 cm to 12 m. *Id.* Such a short-range system with RFID tags affixed to targets in advance makes sense for a local “asset tracking system” with “RFID portals or RFID handhelds,” as recited by Surgere.

Applicant uses different technology to address a different problem. As described above, Applicant’s downloadable, computer-readable data contains “satellite-derived geolocation information sometimes combined with satellite imagery, synthetic aperture radar, aerial imagery, and commercial data feeds.” The emitters geolocated by Applicant (*e.g.*, ships, airplanes, satellite phones, and emergency beacons) do not have pre-affixed RFID asset tags and are not within an arm’s reach for “handheld” scanning, nor do they pass through a “portal” (*e.g.*, like boxes on a conveyor belt in a warehouse). Indeed, determining the location and identity of uncooperative emitters (*e.g.*, “ships that are misrepresenting their true locations”) is a

distinguishing feature of Applicant’s products in the marketplace. “Maritime Domain Awareness,” HawkEye 360, *available at* <https://www.he360.com/products/maritime-domain-awareness/> (last visited July 28, 2019).

The particularly sophisticated consumers who purchase the products at issue here—as described in Section II(B) below—would understand that Surgere’s RFID-based “asset tracking system” relies on a fundamentally different technology, and addresses a fundamentally different problem, than Applicant’s satellite-derived data and so not form “the mistaken belief that they originate from the same source.” TMEP § 1207.01(a)(i); *see also Quartz Radiation Corp. v. Comm/Scope Co.*, 1 U.S.P.Q.2d 1668, 1669 (T.T.A.B. 1986) (holding that QR for coaxial cable and QR for photocopying, drafting, and blueprint machines are not likely to cause confusion because of the differences between the nature and purpose of the goods and by whom they are purchased).

B. Careful & Sophisticated Purchasers

Sophistication of buyers and circumstances of sale are relevant to the confusion analysis under the fourth *DuPont* factor. 476 F.2d 1357 at 1361 (“The conditions under which and buyers to whom sales are made, *i.e.* ‘impulse’ vs. careful, sophisticated purchasing.”).

Neither Surgere’s “asset tracking system” nor Applicant’s “satellite-derived geolocation information” is marketed to casual consumers, and neither is an impulse purchase. Applicant’s data “support[s] needs in defense, border security, maritime, emergency response, and telecommunications” with typical customers including federal government agencies, select foreign governments, the military, and multi-national corporations. “RFGeo Signal Mapping Product,” HawkEye 360, *available at* <https://www.he360.com/products/rfgeo/> (last visited July 28, 2019).

The nature of these products and customers “suggest[s] care in purchasing” that “may tend to minimize the likelihood of confusion” because sophisticated consumers understand the fundamental differences between reading an RFID tag (*e.g.*, affixed to a box in a warehouse) with a “handheld” scanner and geolocating emitters (*e.g.*, ships on the ocean or airplanes in flight) with a constellation of satellites. TMEP § 1207.01(d)(vii). Moreover, because Surgere’s RFID-based system addresses a fundamentally different problem than Applicant’s satellite-based

data products, it is unlikely that “they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source.”

TMEP § 1207.01(a)(i); *see also In re N.A.D., Inc.*, 754 F.2d 996, 999–1000 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because the marks are similar).

C. Crowded Field of Suggestive HAWKEYE Marks

“[A]ctive third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services.” TMEP § 1207.01(d)(iii).

Presumably due to its suggestive nature,³ HAWKEYE (and similar) marks are used for a wide variety of tracking and remote sensing products marketed to governmental, military, and corporate customers. As a non-exhaustive list of examples, the Principal Register includes the following “live” registrations:

Reg. No.	Mark	Goods/Services
3,382,671	HAWKEYE	“Surveillance command and control aircraft”
4,624,861	HAWKEYE	“Sonar equipment and parts thereof”
5,671,469	HAWK EYE SURVEILLANCE	“Camera hardware systems for IP (internet protocol) video surveillance....”
2,184,663	HAWKEYE	“Proximity sensors....”
3,494,052	HAWK-EYE	“Apparatus for monitoring the actual path of a ball and extrapolating that path to predict the future path of the ball, namely, tracking equipment, namely, cameras, radar, and a series of computers....”
5,022,137	HAWKEYE	“Telescopes”

³ *See, e.g.*, “have eyes like a hawk,” The Free Dictionary, *available at* <https://idioms.thefreedictionary.com/have+eyes+like+a+hawk> (last visited July 27, 2019).

2,680,508	GLOBAL HAWK	“Electrical and scientific apparatus; namely airborne surveillance and aircraft control apparatus including radars, low light cameras, thermal imaging cameras, GPS receivers, radio altimeters, inertial navigation systems and ground proximity sensors”
4,750,070	TRIHAWK	“Radar apparatus; radar systems comprising displays and consoles; maritime patrol radars; radar receivers; radar transmitters; radar antennas....”
4,732,715	MINI-HAWK	“Small wall mount RFID unit comprised of radio frequency identification (RFID) readers, two to four antennas and a power over ethernet (PoE) connection”

As these registrations demonstrate, “the consuming public is exposed to third-party use of similar marks on similar goods,” a consideration relevant to the confusion analysis under the sixth *DuPont* factor. 476 F.2d 1357 at 1361 (“The number and nature of similar marks in use on similar goods.”). The HAWKEYE mark in the Surgere Application, which is identical to several live registrations for similar goods and services, is thus “relatively weak and entitled to only a narrow scope of protection” at most. TMEP § 1207.01(d)(iii); *see also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (Trademark Tr. & App. Bd. 2016) (that third parties adopted identical or similar marks for similar goods “may show that [the mark] carries a highly suggestive connotation in the industry and, therefore, may be considered weak”). Such narrow protection does not extend to uses, like Applicant’s here, that solve a different problem, rely on different technology, and are marketed to particularly sophisticated consumers.

* * *

Applicant believes the amended application meets the requirements for registration and requests that it be forwarded for publication. In the event that the Examining Attorney determines grounds for refusal remain, however, Applicant suggests that a telephone interview is likely to expedite prosecution and invites the Examining Attorney to contact Applicant's undersigned representative to discuss any remaining issues with an eye towards resolving them by Examiner's Amendment.

Respectfully submitted,

Dated: October 15, 2019

/s/ Matthew J. Ricciardi

John Gary Maynard, III, Esq.
Matthew J. Ricciardi, Esq.

Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Direct: (804) 788-8772
Fax: (804) 344-7999
E-mail: hwritm@huntonak.com