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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re F5 Networks, Inc.

Serial No. 77816180

Brian E. Lewis of Rosen Lewis PLLC for F5 Networks, Inc.

Raul Cordova, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Walters, Zervas and Ritchie, Administrative
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On August 31, 2009, F5 Networks, Inc. ("applicant")
filed an application (Serial No. 77816180) for registration
on the Principal Register of the mark EDGE GATEWAY (in
standard character form) for goods identified as "computer
networking hardware; computer software for use in
enhancing, optimizing, securing, accelerating, monitoring,
and managing computer network traffic and applications
communicating across networks" in International Class 9.
Applicant claims in its application a bona fide intention

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to use the mark on the claimed goods in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The examining attorney has finally refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), in view of Registration No. 2494636 for the mark GATEWAY (in typed form) for "computers and computer peripherals" in International Class 9.

Applicant has appealed the final refusal of its application. Both applicant and the examining attorney have filed briefs. The refusal to register is affirmed.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first address one evidentiary issue. Applicant, for the first time in its brief, sets forth "meanings" for "gateway" in the computer field located on en.wikipedia.org/wiki/gateway. The examining attorney objected to this information, and we sustain the examining attorney's objection. As set forth in 37 CFR § 2.142 (d), "[t]he record in the application should be complete prior to the filing of an appeal." Thus, the evidence submitted in the first instance with applicant's brief is untimely. We have not further considered these "meanings" in arriving at our decision, and have not been asked to take judicial notice of any definition of "gateway."¹

We now turn to the marks, and compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005). "[T]he test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result."

¹ If we had considered these meanings, our decision in this appeal would not be different.

H.D. Lee Co. v. Maidenform Inc., 87 USPQ2d 1715, 1727 (TTAB 2008).

As the examining attorney points out, both marks contain the term GATEWAY, with GATEWAY being the entirety of registrant's mark. Applicant's mark includes the word EDGE which functions as an adjective in applicant's mark, and has the following meaning taken from merriam-webster.com: c (1) : FORCE, EFFECTIVENESS <blunted the edge of the legislation> (2) : vigor or energy especially of body <maintains his hard edge>."² Adding the term "edge," to GATEWAY suggests a forcefulness or effectiveness of GATEWAY brand products. Thus, applicant's mark, with EDGE modifying GATEWAY, has a meaning similar to registrant's GATEWAY mark. Through the shared term GATEWAY, they also have a similarity in sound and appearance. The commercial impression of the marks is similar too; although there is no indication as the connotation of GATEWAY in the registered mark, there is also no evidence that the addition of EDGE to GATEWAY changes the connotation of the latter term.

² The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format, and we do so here for the term "edge." See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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Applicant argues that EDGE, the initial term in its mark, is different from registrant's GATEWAY mark. We are not persuaded that the marks are dissimilar simply because the first term in applicant's mark is dissimilar from registrant's mark. The first term in applicant's mark is suggestive, modifies the shared term GATEWAY and the entirety of registrant's mark is GATEWAY.

In addition, applicant argues that GATEWAY is weak, relying on Registration No. 2816788 registered to a third-party for International Class 9 goods including protective eyewear, personal head and face protective face shields and personal hearing protective devices. This registration has no probative value on the question of the strength of registrant's mark; it is the only registration applicant relies on, it recites goods unrelated to registrant's goods, and absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); and *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983).

In view of the foregoing, the *du Pont* factor regarding the similarity of the marks is resolved against applicant.

We next consider the *du Pont* factor regarding the similarity or dissimilarity and nature of the goods. We consider those of applicant's goods which are closest to registrant's goods and which applicant and the examining attorney have focused on, i.e., applicant's "computer networking hardware." In order to affirm a refusal, it is only necessary that we find likelihood of confusion with respect to at least one item in each class of applicant's goods or services; see *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) ("[L]ikelihood of confusion must be found if the public, being familiar with [opposer's] use of MONOPOLY for board games and seeing the mark on any item that comes within the description of goods set forth by appellant in its application ...").

In order to find that there is a likelihood of confusion, it is not necessary that the goods on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some

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association between their sources. *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1898 (TTAB 1989). See also *In re G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366 (TTAB 2009).

The dictionary definition of "network" at encarta.com, of which we take judicial notice,³ is:

[a] system of computers: a system of two or more computers, terminals, and communications devices linked by wires, cables, or a telecommunications system in order to exchange data. The network may be limited to a group of users in a local area network, or be global in scope, as the Internet is.

"Hardware" is defined in the same dictionary as:

computer equipment and peripherals: the equipment and devices that make up a computer system as opposed to the programs used on it.

By definition, applicant's identification of goods encompasses common, inexpensive items such as cables and wires, and other items such as servers for home use.⁴ (See encarta.com definition of "server," i.e., "computer that other computers access: a computer in a network that stores application programs and data files accessed by other

³ The Board may take judicial notice of information from the Encarta Dictionary even though it is not available in print format because it is a widely known reference that is readily available in specific denoted editions online and in a CD-Rom format. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). Therefore, we consider this definition, and the others from the Encarta Dictionary.

⁴ The examining attorney states at unnumbered p. 4 of his brief that "computers and computer networks are near synonyms" and "there is little differentiation between computers and computer

computers.")⁵ The webpages (us.acer.com, brctechs.com and welcome.hp.com) of record offer servers, parts and/or accessories on one hand, and computers on the other hand, sold under the same mark. In light of applicant's broad identification of goods, and the evidence in the record, we find that the examining attorney established that consumers encountering applicant's and registrant's goods offered under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources.

The *du Pont* factor regarding the similarity of the goods is resolved against applicant.

As to the *du Pont* factor focusing on the conditions under which and buyers to whom sales are made, applicant's arguments are premised on the assumption that its goods are only the "device[s] implemented within a network on a server"; and that purchasers of its goods are sophisticated, discriminating consumers who will be discriminating because applicant's goods "costs at least tens of thousands of dollars and can be installed and used only by highly trained information technology professions."

networks." While this may be the case, the issue here concerns "computer network hardware" and not computer networks.

⁵ Cf. applicant's argument that "[a]n EDGE GATEWAY product is a device implemented within a network on a server and is not

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Brief at 4. However, in considering applicant's goods, we are required to consider the identification of goods as stated and cannot read restrictions into the identification based on applicant's actual use of its mark. *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Thus, applicant's argument is irrelevant to our analysis; we consider its goods to include all types of "computer networking hardware," including pedestrian goods such as cables, a mouse and wires. These goods are not expensive and are not goods that are only purchased by sophisticated purchasers who give careful consideration before making their purchases.

The *du Pont* factor regarding the conditions under which and buyers to whom sales are made therefore is neutral.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, we conclude that, when potential purchasers of applicant's and registrant's goods encounter the applied-for and registered marks for their respective goods, they are likely to believe that the sources of these goods are in some way related or

operated directly by traditional computer users or on a computer ..." Brief at 4.

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associated with one another. As a result, there is a likelihood of confusion.

DECISION: The refusal to register under Section 2(d) of the Trademark Act is affirmed.