

This Opinion is a  
Precedent of the TTAB

Oral Hearing: July 20, 2012

Mailed: September 29, 2012

**UNITED STATES PATENT AND TRADEMARK OFFICE**

---

**Trademark Trial and Appeal Board**

---

In re Power Distribution, Inc.

---

Serial No. 77825939

---

Thomas J. Moore of Bacon & Thomas, PLLC for Power Distribution, Inc.

John Kelly, Trademark Examining Attorney, Law Office 117 (Brett Golden,  
Managing Attorney).

---

Before Holtzman, Taylor and Lykos, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On September 14, 2009, Power Distribution, Inc. (“applicant”) filed an application to register the mark POWERWAVE BUS SYSTEM in standard character format for, as amended, “structured electrical busses comprising electrical power connectors, electrical power distribution units, and electric power supplies for use with electric power equipment, not for use with radio frequency power amplifiers, not for use with audio frequency power amplifiers, and not for use with

power supplies for arc welders” in International Class 9.<sup>1</sup> The application includes a disclaimer of the term BUS SYSTEM.

The Trademark Examining Attorney refused registration of applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant’s mark so resembles the registered marks POWERWAVE and POWERWAVE TECHNOLOGIES,<sup>2</sup> also in standard character format, with respect to the registrant’s goods identified therein as “converters” and “electrical power distribution units,” that when used on or in connection with applicant’s identified goods, it is likely to cause confusion or mistake or to deceive. The term TECHNOLOGIES has been disclaimed in the latter registration.

Applicant has appealed the examining attorney’s final refusal to register the application. Both applicant and the examining attorney have filed briefs, applicant filed a reply brief and an oral hearing was held. For the reasons explained below, we affirm the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”).

---

<sup>1</sup> Application Serial No.77825939 based on an intent to use pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> Registration Nos. 3386310 and 3392898, registered respectively on February 19 and March 4, 2008 for a large number of goods and services in International Classes 6, 9, 37 and 42. During ex parte examination of the application, the examining attorney expressly limited the refusal to registrant’s goods identified as “converters” and “electrical power distribution units” in International Class 9. Thus, we have not considered applicant’s arguments in its brief relating to other goods and services either in International Class 9 or other classes.

*See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence.

### *I. The Marks*

First, we consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties as well as the relative strength or weakness of the registered mark. The question 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 their entireties that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant contends that while each mark incorporates the term POWERWAVE, applicant's mark creates a distinct commercial impression because it includes the term BUS SYSTEM. Applicant also argues that the term POWERWAVE is highly suggestive for the identified goods, implying that it is not entitled to a broad scope of protection. In support of its position, applicant requests that we take judicial notice of the dictionary definitions of the terms "power" and

“wave.”<sup>3</sup> Applicant also has submitted two use-based third party registrations which also incorporate the term POWERWAVE.<sup>4</sup>

Applicant’s arguments are unconvincing. It is well established that prospective consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). *See also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). Furthermore, in comparing marks, disclaimed matter is typically less significant or less dominant. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985). In applicant’s mark, the descriptive wording “BUS SYSTEM” has been disclaimed, and in one of the registered marks, the descriptive term “TECHNOLOGIES” has been disclaimed. Because POWERWAVE is the first part of applicant’s mark, and the second portion, BUS SYSTEM is descriptive, POWERWAVE is the dominant element of applicant’s mark. *See Palm Bay Imports v. Veuve Clicquot Ponsardin Maison Fondée En 1772*,

---

<sup>3</sup> We grant applicant’s request to take judicial notice and have considered the dictionary definitions in rendering our decision.

<sup>4</sup> We have not considered third-party Registration No. 3545735 for the mark POWERWAVE because it is registered pursuant to Section 44(e) of the Trademark Act.

73 USPQ2d at 1692. The same reasoning applies to registrant's mark POWERWAVE TECHNOLOGIES.

Moreover, applicant's submission of two third-party registrations incorporating the term POWERWAVE does not imply that registrant's marks are weak and therefore deserving of only a limited scope of protection. Aside from the fact that two third-party registrations on the entire USPTO register is hardly a significant number, third-party registrations are not evidence of use of the marks. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). The third-party registrations are "[a]t best, ... evidence that the consuming public could potentially be cognizant of third-party use of the term [POWERWAVE.]" *See Palm Bay Imports v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d at 1693. As such, the two third-party registrations submitted by applicant are of minimal probative value.

We therefore find that applicant's mark and registrant's marks are highly similar in appearance, sound, connotation and commercial impression. This first *du Pont* factor weighs in favor of finding a likelihood of confusion.

## *II. The Goods and Trade Channels*

Next, we compare the respective goods as well as the channels of trade, keeping in mind that our determination is based on the goods as listed in the application and cited registration. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846. *See also Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992).

Applicant's goods are identified as "structured electrical busses comprising electrical power connectors, electrical power distribution units, and electric power supplies for use with electric power equipment, not for use with radio frequency power amplifiers, not for use with audio frequency power amplifiers, and not for use with power supplies for arc welders." Applicant essentially contends that because "electrical power distribution units" are component parts of "structural electrical busses," the goods are neither identical nor related.

We do agree with applicant that "electrical power distribution units" are listed as a component part of "structured electrical busses" in applicant's identification. However, according to the wording of applicant's identification of goods, "electrical power distribution units" are not sold as a unit with applicant's "structured electrical busses." Applicant's identification is therefore ambiguous as to whether the mark refers only to the finished product. Based on this wording, we must assume that the component parts of "electrical power distribution units" are sold separately. As such, registrant's goods which are individually identified as "electrical power distribution units" are identical to the "electrical power distribution units" sold as a component of applicant's structured electrical busses."

The fact that the identification of goods for applicant's products contain limitations regarding use, does not affect our determination because registrant's goods do not include any such limitations.

Even if, however, we were to assume that such goods are not identical, applicant's goods of "structural electrical busses" are closely related to registrant's

“converters” and “electrical power distribution units.” By their intrinsic nature, the goods are related because they both consist of electrical power distribution products used for similar purposes, namely, for the distribution of electrical power. As evidence thereof, the examining attorney has submitted an excerpt from the Internet website <http://www.electronicsmanufacturers.com/products/electrical-electronic-components/power-distributionbusbar/> explaining that “[e]lectrical power distribution busway systems are used to distribute electrical power throughout buildings.” See Final Office Action dated February 15, 2011. In instances involving the technical goods, it is entirely appropriate for the Board to consider extrinsic evidence in order to ascertain the significance of the goods. *See In re Edwards Life Sciences*, 94 USPQ2d 1399 (TTAB 2010) (“However, applicant has submitted extrinsic evidence to demonstrate the meaning of its description of goods, not to restrict or limit the goods. Where, as here, applicant's description of goods provides basic information, and the goods are of a technical nature, it is entirely appropriate to consider extrinsic evidence to determine the specific meaning of the description of goods.”).

It is well established that the respective goods do not have to be identical or even competitive in order to determine that there is a likelihood of confusion; rather, it is sufficient that the respective goods are related in some manner, or the conditions surrounding their marketing must be such that the goods will be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that they originate from the same source. *See, e.g., On-line*

*Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). We find that based on the evidence discussed above, applicant's and registrant's goods are related.

Regarding the channels of trade, as noted above, although the identification of goods set forth in the application contains restrictions, the identification in the cited registrations does not include any limitations. Therefore, it is presumed that the registrations encompass all goods of the type described, including the electrical power distribution units comprised in the applicant's structured electrical busses, referred to in applicant's more specific identification, that the goods move in all normal channels of trade, and that they are available to all potential customers. See *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638-39 (TTAB 2009); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus these *du Pont* factors weigh in favor of finding a likelihood of confusion.

### *III. Sophistication of Purchasers*

Given the technological nature of the involved products, the purchasers of both applicant's and registrant's goods are sophisticated and knowledgeable in their purchasing decisions, and would be highly familiar with the use and purpose of both parties' products. However, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source

confusion. See *In re Cynosure, Inc.*, 90 USPQ2d 1644 (TTAB 2009); *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). This factor also weighs in favor of finding a likelihood of confusion.

To the extent that there are any other relevant *du Pont* factors, we treat them as neutral. In addition, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

After considering all of the evidence of record and argument pertaining to the *du Pont* likelihood of confusion factors, we conclude that there is a likelihood of confusion between applicant's mark and the registered mark when used in connection with their identified goods and services.

**DECISION:** The refusal to register is affirmed.