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PRECEDENT OF THE TTAB

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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 Blue Star Power Systems, Inc.

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Serial No. 85459999

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Edmund J. Sease of McKee, Voorhees & Sease, P.L.C. for Blue Star Power Systems, Inc.

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Before Kuhlke, Wellington, and Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Blue Star Power Systems, Inc. (applicant) has appealed the final refusal to register its mark BLUE STAR POWER SYSTEMS in standard characters for “emergency automatic standby electric generator sets of at least 20 kWe sold through distributors for standby power in industrial and commercial buildings.”¹

Registration was refused pursuant to Section 2(d) of the Trademark Act on the

¹ Application Serial No. 85459999, filed May 31, 2011, based on allegations of use in commerce pursuant to Section 1(a) of the Trademark Act as of November 8, 2011.

ground of likelihood of confusion with the mark BLUE STAR in typed form² for “electric generators for welding or power.”³

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, two key 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 consider the marks BLUE STAR POWER SYSTEMS and BLUE STAR and compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting *du Pont*, 177 USPQ at 567.

While we analyze the marks in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature when evaluating the similarities of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir.

² Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings.

³ Registration No. 1662304, issued October 29, 1991; renewed February 19, 2011.

1985). Here, the term BLUE STAR is the most prominent portion of applicant's mark. Further, it is the first portion of the mark and the most distinctive. The added phrase, POWER SYSTEMS is merely descriptive, if not generic and appropriately disclaimed in the application. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dixie Rest., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). Applicant's mark BLUE STAR POWER SYSTEMS incorporates the entirety of registrant's mark BLUE STAR, adding only the merely descriptive, if not generic phrase. In general, the addition of merely descriptive matter does not obviate a finding of similarity. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004).

Thus, while the added term does present some difference in appearance and sound, the overall commercial impression and connotation remain the same in view of the dominance of the term BLUE STAR in the marks. In view thereof, we find that the similarities outweigh the dissimilarities. *Viterra Inc.*, 101 USPQ2d 1905.

Applicant argues that the term BLUE STAR is weak and entitled to a limited scope of protection. Applicant submitted printouts of 65 third-party registrations in support of its position.⁴ However, these registrations do not establish that the term BLUE STAR is weak for any goods or services under the sixth *du Pont* factor, because there is no evidence that the marks in these registrations are actually in use. Evidence of weakness or dilution consisting solely of third-party registrations is generally entitled to little weight in determining the strength of a mark, because

⁴ The 66th registration submitted was the cited registration.

such registrations do not establish that the registered marks identified therein are in *actual use* in the marketplace or that consumers are accustomed to seeing them. *See: AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). Moreover, the registrations are for unrelated goods and services.

We look next at the goods at issue to determine the similarity or dissimilarity thereof. Our evaluation of the goods is based on the goods as identified in the registration and application. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Further, “where the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers.” *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

While applicant has restricted its goods to “emergency automatic standby electric generator sets of at least 20 kWe sold through distributors for standby

power in industrial and commercial buildings,” the goods in the cited registration are broadly described as “electric generators for welding or power.” “Electric generators for power” encompass applicant’s goods. As such, the cited goods are legally identical to applicant’s goods and are presumed to travel in the same channels of trade as applicant’s goods and to be purchased by all potential customers.

Applicant’s arguments regarding the differences in the actual goods and channels of trade are not persuasive inasmuch as we must make our determination based on the goods as identified, and here, the identifications of goods in the registration and application are not limited to any particular channel of trade. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Applicant contends that the purchasers of its electric generators are sophisticated purchasers. The overlap in channels of trade here would be limited to applicant’s commercial goods, and we agree that electric generators for industrial and commercial buildings are unlikely to be impulse purchases and the purchasers thereof may be sophisticated. However, even sophisticated purchasers may be confused when similar marks are used with respect to the same goods. *In re Cynosure Inc.*, 90 USPQ2d 1644, 1647 (TTAB 2009). *See also In re Research and Trading Corp.*, 793 F2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986).

Applicant’s argument that there have been no known instances of actual confusion is not persuasive. The contemporaneous use of applicant’s and registrant’s marks for a period of approximately eight and one half years without

actual confusion is entitled to little weight. *See Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant’s corporate president’s unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of evidence of actual confusion carries little weight,⁵ especially in an *ex parte* context. In any event, there is not sufficient evidence relating to the extent of use of registrant’s mark and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

Having considered all the evidence and argument on the relevant *du Pont* factors, we find that applicant’s mark BLUE STAR POWER SYSTEMS for “emergency automatic standby electric generator sets of at least 20 kWe sold through distributors for standby power in industrial and commercial buildings” is likely to cause confusion with the cited registration for the mark BLUE STAR for “electric generators for welding or power.” Moreover, to the extent that any of applicant’s points raises a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio)*,

⁵ *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965),

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Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Decision: The refusal to register based on a likelihood of confusion under Section 2(d) of the Trademark Act is affirmed.