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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Braille Battery, Inc.

v.

Lithionics, LLC

Opposition No. 91198482

Woodrow Pollack of GrayRobinson, PA for Braille Battery, Inc.

Nathan P. Suedmeyer of Larson and Larson PA for Lithionics, LLC.

Before Bucher, Grendel and Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Lithionics, LLC (applicant) has filed an application to register the mark



for “batteries, electrical cells and batteries” in Class 9.¹ Braille

Battery, Inc. (opposer) has opposed the application pursuant to Section 2(d) of the Trademark Act on the ground of likelihood of confusion with its mark

¹ Application Serial No. 85088425, filed on July 20, 2010, based Section 1(b) of the Trademark Act (“intent-to-use”)



for “batteries and battery chargers.” Opposer alleges prior common law use of this mark for its goods and also alleges ownership of application Serial No. 85169335.

The Record and Evidentiary Matters.

By rule, the record includes applicant’s application file and the pleadings. Trademark Rule 2.122(b), 37 CFR §2.122(b).² In addition, opposer filed evidence by notice of reliance. Applicant did not introduce any testimony or evidence.

Applicant moved to strike the notice of reliance on both procedural and substantive grounds. The Board generally does not strike material submitted by notice of reliance but, with respect to objections on substantive ground, the Board will consider any outstanding objections in its evaluation of the probative value of the evidence at final hearing. TBMP § 707.02. As for motions to strike on the ground that the notice of reliance does not meet the procedural requirements of the rule, if the Board finds that the notice is defective, but curable, the Board may allow the party which filed the notice of reliance time within which to cure the defect.

TBMP § 532.

² Attached to the notice of opposition were a number of documents identified as “Exhibit A” and “Exhibit B.” With the exception of registrations issued to a party by the United States Patent and Trademark Office, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence during the period for the taking of testimony. Trademark Rule 2.122, 37 C.F.R. § 2.122. Accordingly, the exhibits attached to the notice of opposition are not part of the record.

Turning first to applicant's procedural objections, applicant asserts that opposer did not indicate the relevance of its registration. However, opposer's registration was introduced pursuant to Trademark Rule 2.122(d)(2), 37 CFR § 2.122(d)(2), which does not require a party to indicate the general relevance of its registration. Accordingly, we deny applicant's motion to strike the introduction of this document.

As for the printed publications and official records, (consisting of the file of opposer's U.S. registration, its Florida State registrations, and material from the internet), we agree with applicant that the notice was defective because opposer did not indicate the general relevance of these documents.. *See* Trademark Rule 2.122(e), 37 CFR § 2.122(e). However, this defect could have been and indeed was cured by opposer's submission of an amended notice of reliance. Therefore, we deny applicant's motion with respect to the procedural defects.

We deal now with the substantive objections.

1. Opposer's Reg. No. 4082905 and file of opposer's registration (Attachments 1 and 3 to notice of reliance)

This registration issued from application Serial No. 85169335, which opposer pleaded in its notice of opposition. Applicant objected to the introduction of this registration because opposer's underlying application was filed after the contested application and because opposer's registration did not issue until after the filing of the notice of opposition.

If a registration issues before the opposer's testimony period ends, it may be admitted into evidence with a notice of reliance. *See Hunt Control*

Systems Inc. v. Koninklijke Philips Electronics N.V., 98 USPQ2d 1558, 1563 n.6 (TTAB 2011) (an applicant is on notice that an opposer intends to rely on a registration that matured from a pleaded application); *UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1045 n. 12 (TTAB 2009). Therefore, this



objection is over-ruled, and Reg. No. 4082195 for the mark for batteries and battery chargers, which issued on January 19, 2012, is part of the record.

Opposer has also met the requirement of the rule to introduce the file of opposer's registration by introducing a statement of the general relevance of the document.

**2. Florida State Registrations
(Attachments 4 - 8 to notice of reliance)**

Applicant objected to the introduction of opposer's Florida registrations on the ground that they are inconsequential.

A state registration (whether owned by a party, or not) is incompetent to establish that the mark shown therein has ever been used, or that the mark is entitled to federal registration. *See, e.g., Faultless Starch Co. v. Sales Producers Associates, Inc.*, 530 F.2d 1400, 189 USPQ 141, 142 n.2 (CCPA 1976) (state registrations do not establish use); and *Kraft, Inc. v. Balin*, 209 USPQ 877, 880 (TTAB 1981) (although parties stipulated to introduction of state registration, said registration is incompetent to prove anything material

to opposition proceeding). Because the state registration was properly introduced, it is part of the record and has been considered for whatever probative value, if any that it may have.

**3. Internet materials
(Attachments 9 - 11 to notice of reliance)**

Applicant objected to the introduction of opposer's internet materials on the ground that they are inadmissible, asserting, in part, that an elevated standard is required for the admissibility of internet materials, and that "the appropriate materials for introduction by a notice of reliance are printed publications available to the public, such as books and periodicals, or materials that constitute official records." However, in *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010), the Board specifically held that internet materials may be introduced under a notice of reliance:

"[I]f a document obtained from the Internet identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e)."

These internet documents submitted by opposer all bear the URLs and either the date on which they were published (Documents 9 and 10) or the date on which they were printed (Document 11), and are therefore admissible. However, to the extent that opposer relies on these documents to show priority, the reliance is misplaced. Documents 9 and 10 do not reflect use of the mark asserted by opposer, while document 11 was printed on April

9, 2012, and therefore does not show use prior to the filing of applicant's application.

In addition to the foregoing documents, opposer made of record the file history of applicant's abandoned application, Ser. No. 85064068, for the mark BRAILLE BATTERY and applicant's answers to opposer's first set of requests for admission. Applicant did not object to the introduction of these documents in its motion to strike.


Opposer and applicant have filed trial briefs. As part of its brief, opposer included a photograph, stating that it had produced this picture during discovery and that applicant did not challenge its authenticity. However, opposer did not properly make this photograph of record, and therefore we have not considered it.

Analysis

- Standing

Opposer has properly made its registration of record. Accordingly, opposer has established its standing in this proceeding. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

- Priority

Opposer is the owner of Reg. No. 4082195 for the mark  for "batteries and battery chargers." Opposer's ownership of its pleaded registration removes priority as an issue with respect to the goods covered by the registration. *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1169 (TTAB 2011)

referring to *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

- Likelihood of confusion.

The only ground for opposition is likelihood of confusion. Our determination of this issue 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).³ 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 start our analysis by determining “the similarity between the goods,” which is the second *du Pont* factor. It is well established that in a proceeding such as this, the question of likelihood of confusion must be determined on the basis of an analysis of the mark as applied to the goods and/or services recited in applicant’s application vis-à-vis the goods and/or services recited in an opposer’s registration.

³ It is noted that opposer has discussed this issue in terms of the seven factor test set forth in *Frehling Enter, Inc. v. Int’l Select Group, Inc.* 192 F.3d 1330 (11th Cir. 1999). This test is not utilized by the Board. The Board follows the thirteen factor test set forth by the Court of Customs & Patent Appeals, the predecessor of our primary reviewing court, in *In re E. I. du Pont de Nemours & Co.* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Canadian Imperial Bank of Commerce v. Wells Fargo Bank, NA, 811 F.2d 1490, 1 USPQ2d 1813, 1814 (Fed. Cir. 1987).

The identifications of goods in both the opposed application and opposer's registration include "batteries." As such, the goods are legally identical and thus this *du Pont* factor weighs in favor of opposer.

When the goods are closely related and there is no restriction on the goods in the application or registration, they are presumed to travel in the same channels of trade, and be sold to the same class of purchasers. *See: Hewlett -Packard Co. v. Packard Press Inc.*, 281 F3d 1251, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002). Applicant admitted that these presumptions are in fact reflective of the market in its response to question 33 in opposer's first set of requests for admission:

Request No. 33: "Applicant and Opposer offer goods to the same consuming public."

Answer: "Applicant admits that Applicant and Opposer offer goods to the same consuming public."

Accordingly, the *du Pont* factor of the similarity of the channels of trade and of the purchasers also favors a finding of likelihood of confusion.

We turn now to the first *du Pont* factor of the similarity or dissimilarity of the marks in their entirety, keeping in mind that in cases such as the current opposition, "[w]hen marks appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likelihood of confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The marks at issue are:



and



While “the similarity or dissimilarity of the marks is determined based on the marks in their entireties... there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The description of applicant’s mark in its application is: The wording “Li” with a superscript number “3” inside a circle with an opening on the right side of circle. Within the opening of the circle is another smaller circle with a plus-sign within the smaller circle and the smaller circle otherwise filled.”


Applicant stated in the application that “Li3 has no meaning in the relevant trade or industry.” However, we take judicial notice that “Li” is the symbol for the chemical element “lithium,” which has an atomic number of “3.” Oxforddictionaries.com.⁴ “Lithium, the lightest metal known, ... is used especially in alloys and glass, and in ... storage batteries.” “Merriam-Webster Online Dictionary.” The use of lithium in connection with storage batteries renders both

⁴ The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

the term lithium and its combined chemical symbol and atomic number (Li³) descriptive of batteries. This descriptive term is then encompassed in a design element to form applicant's composite mark.

In view of the descriptive nature of Li and 3 in applicant's mark, it is appropriate for us to give greater weight to the arbitrary elements of the mark when comparing it to opposer's mark. *See In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990).

The design element in applicant's mark  is identical to the circular

design element in opposer's mark . Although one might speculate about a positive terminal and a round battery cell, there is no evidence in the record showing that the design has any significance in relation to the goods.⁵ The other elements in opposer's mark, consisting of the letter "b" and an arrow design, have been taken into consideration in our evaluation of the marks. It is notable that we have no evidence of the meaning of either of these elements.

Comparing the marks in their entirety, and giving greater weight to the arbitrary and therefore dominant elements, we conclude that the marks are similar in appearance and that this case is similar to the following cases in which likelihood of confusion was found based on similar design elements in the marks at issue: *In re Application of Computer Communications, Inc.*, 484 F.2d 1392, 179 USPQ 51

⁵ Applicant contends in its brief that the design is descriptive of batteries, however, no evidence was submitted supporting its contention.



Computer Communications

(CCPA 1973) - for computer peripheral equipment and



for control panel wiring accessories for electronic data processing machines, etc.; *Envirotech Corporation v. National Service Industries, Inc.*, 197 USPQ 292



LITHONIA

(TTAB 1977) - for florescent lighting fixtures and



lights and lighting equipment in conjunction with the advertising, sale and erection of industrial and municipal equipment; and *Boise Cascade Corporation v.*



Mississippi Pine Manufacturers Association, 164 USPQ 364 (TTAB 1969) - for an association of manufacturers to indicate membership in the Mississippi Pine



Manufacturers Association and for the manufacture and sale of a wide variety of commercial products, including products made of wood such as lumber plywood, paper and the like.

Accordingly, we find applicant's mark, considered in its entirety, to be so similar to opposer's mark, that when used on identical or closely related goods, there is a likelihood of confusion. Thus, this *du Pont* factor weighs in favor of finding likelihood of confusion.

Opposer has also asserted that applicant adopted its mark in a deliberate intent to trade on opposer's goodwill, based on the fact that applicant's principal,

Steven Tartaglia, had worked for opposer before becoming associated with applicant. Although the evidence shows that Mr. Tartaglia “is a former officer of opposer” (response to request for admission No. 32), there is not sufficient evidence in the record to show when he held a position with opposer, the nature of his responsibilities, etc. Even if we presume that he knew of opposer’s mark, we cannot infer from this record that applicant’s adoption of its mark was made in bad faith.

Similarly, there is no evidence of record to support such other claims made by opposer in its brief that Mr. Tartaglia “learned nearly all facets of Braille’s business,” including opposer’s customers and vendors.

Finally, we note that in its brief opposer makes the bald statement that “there has been actual confusion.” P. 15. However, there is no evidence of record of actual confusion to support this claim, and therefore we treat this *du Pont* factor as neutral.

In view of the similarity of the marks, and the identity of the goods, trade channels and purchasers, we find that opposer has proven that applicant’s mark for its goods is likely to cause confusion with opposer’s mark for its goods. To the extent that there is any doubt on this issue, it is a well-established principle such doubt must be resolved in favor of the prior registrant because the newcomer has the opportunity of avoiding confusion and is charged with the obligation to do so. *See In re Shell Oil Co.*, 992 F.2d 1204, 1209, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026

(Fed. Cir. 1988); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1372 (TTAB 2009).

After considering all of the evidence of record and balancing all of the applicable *du Pont* factors, whether specifically discussed herein or not, we conclude that applicant's mark for its goods is likely to cause confusion with opposer's mark for its goods.⁶

Decision: The opposition is sustained on the ground of likelihood of confusion under Section 2(d) of the Trademark Act.

⁶ We note that for many of the du Pont factors for which there is no evidence, applicant makes the assertion that they should be resolved in favor of applicant. We disagree. If there is no evidence regarding a particular factor, we treat it as neutral.