

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Hearing: October 24, 2013 Mailed: November 6, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re SpaceCo Business Solutions, Inc.

Serial No. 85198235

Carl A. Hjort III for SpaceCo Business Solutions, Inc.

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(Angela Wilson, Managing Attorney).

Before Cataldo, Mermelstein and Ritchie,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Spaceco Business Solutions, Inc., filed, on December 15, 2010, an application to register the mark ADAPT in standard characters for, as amended, "desktop LED lighting fixtures for use in commercial and industrial lighting applications ordered through specialty office furnishings ordering services" in International Class 11.¹

¹ Application Serial No. 85198235, based upon applicant's assertion of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. 1051(a).

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark EDAPT in standard characters for "electrical lighting fixtures" in International Class 11 as to be likely to cause confusion.²

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs and, in addition, presented arguments at an oral hearing held before this panel on October 24, 2013.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The

² Registration No. 3181898 issued December 5, 2006. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

We first turn to consider the *du Pont* factor regarding the similarity between the identified goods. The goods in the cited registration are broadly identified as "electrical lighting fixtures." Applicant's goods, identified as "desktop LED lighting fixtures for use in commercial and industrial lighting applications ordered through specialty office furnishings ordering services," are a subset of registrant's goods. Because registrant's goods are broadly identified without limitation as to type, we must presume that its "electrical lighting fixtures" include lighting fixtures of all types and manners of use, including applicant's more narrowly identified desktop LED lighting fixtures.³ See, e.g., *In re Thor Tech, Inc.*, 90 USPQ2d 1634 (TTAB 2009) (finding "recreational vehicles, namely, travel trailers and fifth wheel trailers" to be encompassed by and legally identical to "trailers"); and

³ We note in addition that, to the extent there was any question regarding the relationship between the goods as identified in the involved application and cited registration, the examining attorney made of record with his March 17, 2011 Office action internet articles demonstrating that LED lighting products are in fact a type of electrical lighting fixture.

In re Linkvest S.A., 24 USPQ2d 1716 (TTAB 1992) (finding "computer software for data integration and transfer" to be encompassed by and legally identical to "computer programs recorded on magnetic disks").

Applicant asserts in its brief that its goods are fundamentally different from those of registrant in nature and purpose and would not be confused therewith because registrant's lights are overhead lighting products, while applicant's goods are "LED lighting fixtures for use on an office desktop." (Applicant's Brief at 17; Firkus Declaration, ¶ 9.)⁴ However, even if we assume these asserted facts regarding applicant's and registrant's respective lighting products to be true, they would avail applicant nothing here. This is because in our comparison of applicant's goods and registrant's goods under the second *du Pont* factor, "... it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods." *In re La Peregrina Ltd.*, 86 USPQ2d 1645 at 1646 (TTAB 2008). See also *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990);

⁴ Applicant submitted the Declaration of Darcy Firkus, its President, with its September 16, 2011 response to the examining attorney's March 17, 2011 Office action.

In re Thor Tech Inc., 90 USPQ2d at 1637; and *In re Association of the United States Army*, 85 USPQ2d 1264, 1270-71 (TTAB 2007). As discussed above, registrant's identification of goods does not include any limitation or specification as to the nature or type of its "electrical lighting fixtures."⁵

For these reasons, we find that the "desktop LED lighting fixtures for use in commercial and industrial lighting applications ordered through specialty office furnishings ordering services" identified in applicant's application and the "electrical lighting fixtures" identified in the cited registration are similar and indeed legally identical, for purposes of the second *du Pont* factor. Because the respective goods are legally identical, we find that the second *du Pont* factor weighs

⁵ Moreover, even if this asserted difference between the respective goods (i.e., overhead lights versus LED office desktop lights) had been set forth in the respective identifications of goods in the registration and the application, that would not in itself have precluded a finding that the respective goods are similar and related for purposes of the second *du Pont* factor. It is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. See *Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562, 1568 (TTAB 2007); and *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

heavily in support of a conclusion that confusion is likely.

Furthermore, where the goods in a cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of goods encompasses not only all goods of the nature and type described therein, but that the identified goods are offered in all the normal channels of trade for such goods, and that they would be purchased by all the usual customers for them. *See, e.g., In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In this case applicant's goods, as identified in its application, are specifically "ordered through specialty office furnishings ordering services." However, because registrant's goods are not limited to any particular trade channel or class of purchasers, we must assume that they will be available in all trade channels common for electrical lighting fixtures, including specialty office furnishing ordering services, and be available to all usual customers, including customers of applicant's more narrowly identified goods. Thus, the customers and trade channels for registrant's goods must be presumed to include those of applicant. As a result, these *du Pont* factors also weigh

heavily in support of a conclusion that confusion is likely.

We next turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) quoting *du Pont*, 177 USPQ at 567. In comparing the marks, we are mindful that the 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. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Moreover, in comparing the marks, we observe that where, as here, the goods are legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp.*

Ex Parte Appeal No. 85198235

v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); and *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

In this case, applicant's mark ADAPT, is highly similar in appearance to registrant's mark, EDAPT, both in standard characters, inasmuch as the marks differ solely by their first letter, and otherwise consist of the identical letters "-DAPT." In addition, the marks are highly similar in sound, inasmuch as both contain two syllables, the first consisting of a vowel in both marks and the second consisting of the root "-DAPT." Furthermore, while there is no correct pronunciation of trademarks, it stands to reason that the two marks will be verbalized in a very similar manner by consumers. *Cf. In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) ("as we have said many times, there is no 'correct' pronunciation of a trademark").

With regard to meaning or connotation, applicant's mark, ADAPT, is a recognized word and suggests that applicant's desktop LED lighting fixtures adapt to their environment or conditions. With regard to registrant's EDAPT mark, applicant argues that this tribunal's precedential determinations with regard to "E-" formative

marks compel a finding that EDAPT connotes "electronically adaptable." (Applicant's Brief at 12.) See, e.g., *In re Styleclick.com Inc.*, 57 USPQ2d 1445, 1447 (TTAB 2000) (in applied-for E FASHION mark, "e" is abbreviation for "electronic"). Nonetheless, regardless of whether registrant's EDAPT mark is perceived as a misspelling of "adapt" or viewed as "electronically adaptable," either connotation is highly similar to that of applicant's ADAPT mark. Thus, even if applicant is correct that registrant's EDAPT mark connotes lighting fixtures that electronically adapt, such connotation is closely related to that of applicant's ADAPT mark.

Based upon the foregoing, we find that applicant's mark is highly similar to registrant's mark in appearance, sound and connotation and that, when viewed in the context of their respective goods, convey highly similar commercial impressions. This *du Pont* factor further favors a finding of likelihood of confusion.

Applicant also urges us to consider consumer sophistication. To the extent we accept that applicant's goods may be marketed to more careful purchasers with some advanced knowledge of lighting fixtures, we expect that with highly similar marks used on legally identical goods, even a careful, sophisticated consumer of these goods may

experience confusion as to their source when offered under the marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000). As stated by our primary reviewing court, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Accordingly, we deem this *du Pont* factor to be neutral or, at best, to slightly weigh in favor of a finding of no likelihood of confusion.

Finally, to the extent that any of applicant's arguments raise a doubt about likelihood of confusion, we must resolve that doubt in favor of the prior registrant. *In re Hyper Shoppes (Ohio), 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).

Summary

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