

THIS OPINION IS NOT A  
PRECEDENT OF THE  
TTAB

Mailed: April 25, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Gehr Industries, Inc.*

*v.*

*Ming's Mark Inc.*

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Opposition No. 91238658

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Drew Wilson of Lewis Roca Rothgerber Christie LLP,  
for Gehr Industries, Inc.

Li Jen Shen and Joseph R. Meaney of Venjuris PC,  
for Ming's Mark Inc.

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Before Mermelstein, Adlin and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Ming's Mark Inc. ("Applicant" or "Ming's") seeks registration on the Principal Register of the mark POWER TECHON (in standard characters, with the term "Power" disclaimed) for "Electrical adapters; electrical power extension cords; power

inverters” in International Class 9.<sup>1</sup> In its Notice of Opposition,<sup>2</sup> Gehr Industries, Inc. (“Opposer” or “Gehr”) opposes registration of Applicant’s Mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with its registered mark POWER TECH (in standard characters, with the term “Power” disclaimed) for “Electric extension cords for use with portable electric hand tools, and sold through retail outlets including hardware, plumbing, electrical, and farm supply stores” in International Class 9.<sup>3</sup>

In its Answer,<sup>4</sup> Ming’s denies the salient allegations in the Notice of Opposition and asserts purported “affirmative defenses” (which are really amplifications of Ming’s denials):<sup>5</sup> 1) Gehr’s POWER TECH mark is so inherently weak that it does not extend to prevent registration of Ming’s POWER TECHON mark, even when applied to the same goods (¶ 19); 2) Gehr has variously disclaimed the terms “Power” or “Tech” in its asserted registration and in other registrations issued by the Office, again allegedly demonstrating the weakness of Gehr’s POWER TECH mark (¶ 20);

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<sup>1</sup> App. No. 87497824 (the “824 Application”), filed on June 20, 2017 based on use, stating a date of first use and first use in commerce of March 7, 2016.

<sup>2</sup> 1 TTABVUE. References to the pleadings, the evidence of record and the parties’ briefs refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if applicable.

<sup>3</sup> Reg. No. 1262249 (the “249 Registration”), issued on the Principal Register on December 27, 1983.

<sup>4</sup> 4 TTABVUE.

<sup>5</sup> Ming’s did not pursue its allegation that Gehr “fail[ed] to state a claim” of damage (¶ 18), either by way of a Fed. R. Civ. P. 12(b)(6) motion to dismiss or in its ACR briefs. This defense is therefore waived. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014) (“As applicant did not pursue the affirmative defenses of failure to state a claim and unclean hands, either in its brief or by motion, those defenses are waived.”).

and 4) no USPTO Examiner has ever found likelihood of confusion between Gehr's POWER TECH mark and any other "POWER-TECH" or "POWERTECH" marks filed for registration with the Office (§ 21).<sup>6</sup>

During the ACR trial phase of this proceeding (discussed more fully below), Gehr also asserted alleged likelihood of confusion with a second registered mark, POWER TECH (in standard characters, with the term "Power" disclaimed), which was not pleaded in the Notice of Opposition.<sup>7</sup> Normally, the Board would not permit Gehr to proceed on this second, unpleaded registration.<sup>8</sup> However, the parties' briefs, Statements of Undisputed Facts, and evidence discuss and argue the significance of both the '249 and '247 Registrations for the POWER TECH Mark, as well as the goods recited therein for likelihood of confusion purposes. Moreover, at no time did Ming's object to Gehr's assertion of the '247 Registration in the parties' ACR submissions even though it was not pled in Gehr's Notice of Opposition. Therefore the issue of

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<sup>6</sup> This defense shall be given no further consideration. Prior decisions and actions of other trademark examining attorneys in registering other marks have little persuasive value and are not binding upon the USPTO or the Board. TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(d)(vi); *see also, In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case is decided on its own facts, and each mark stands on its own merits. *Id.*

<sup>7</sup> Reg. No. 3427247 (the "'247 Registration"), issued on the Principal Register on May 13, 2008 for "Electrical extension cords; landscape lighting cable; welding machine extension cords; electrical power strips; portable power cables; electrical extension cords containing ground fault circuit interrupter units; and power surge protectors, all sold through retail outlets, including hardware, electrical, plumbing and farm supplies stores; and data, communication and sound cables" in International Class 9.

<sup>8</sup> *Riceland Foods Inc. v. Pacific Eastern Trading Corp.*, 26 USPQ2d 1883, 1884-85 (TTAB 1993) (only mark pleaded by opposer and tried was its registered design mark, and applicant had no notice that opposer intended to rely on use of unregistered word mark appearing on opposer's packaging).

likelihood of confusion with respect to Gehr's '247 Registration was tried by implied consent, and Gehr's Notice of Opposition is thus deemed amended accordingly. Fed. R. Civ. P. 15(b); *see also Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1653 n.2 (TTAB 2002) (where opposer, during trial, filed notice of reliance on seven unpleaded registrations and where applicant did not object thereto, Board found parties had tried by implied consent any issues arising from those registrations).

### **I. Accelerated Case Resolution**

After the close of discovery,<sup>9</sup> Gehr and Ming's timely moved and cross-moved, respectively, for summary judgment on Gehr's Trademark Act Section 2(d) claim.<sup>10</sup> The Board's suspension order suggested resolving this case through Accelerated Case Resolution ("ACR"),<sup>11</sup> and after briefing was completed, the parties agreed. Specifically, the parties filed a Stipulation agreeing: (1) to forego a traditional trial, and instead submit the case to the Board by means of their previously filed summary judgment briefs and accompanying evidence; and (2) that "[t]he Board may resolve issue [sic] of fact and treat the parties' summary judgment motion papers and evidence as the final record and briefs on the merits of the case."<sup>12</sup> The Stipulation was approved:

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<sup>9</sup> *See* 2 TTABVUE, Institution Notice and Trial Order.

<sup>10</sup> *See* 8 TTABVUE and 9 TTABVUE.

<sup>11</sup> 10 TTABVUE.

<sup>12</sup> 14 TTABVUE. *See* TRADEMARK BOARD MANUAL OF PROCEDURE ("TBMP") (2018) § 702.04(b), further describing this process.

The Board infers from [the parties'] ... stipulation that the Board may make necessary findings of fact in rendering its ACR decision. *See, e.g., Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1513 (TTAB 2009) (parties selected ACR and agreed to forgo trial by stipulating to use evidence submitted in support of opposer's motion for summary judgment as trial evidence and allowing for any additional evidence to be submitted with their trial briefs on the case); *see also* TBMP § 702.04(d) (2016).<sup>13</sup>

## **II. Ming's Unconsented Motion to Amend its POWER TECHON Application**

Shortly prior to the filing of Gehr's ACR Brief, Ming's moved pursuant to Trademark Rule 2.133, 37 C.F.R. § 2.133, without Opposer's consent, to amend the '824 Application to narrow the Identification of Goods<sup>14</sup> as follows:

~~Electrical adapters; Electrical power extension cords;~~ Power inverters.

In its motion, Ming's states:

This proposed amendment accurately reflects the goods and services that Applicant offers in conjunction with the mark at issue: **Power TechOn**.

\* \* \*

Applicant makes this motion in the alternative because Applicant contends – even without the amendment – that confusion is not likely. If, however, the Board ultimately finds that confusion is likely based on the “as-filed” identification of goods, then Applicant requests the following narrowing amendments to overcome any confusion.

In a footnote to its ACR Brief, Gehr's opposed Ming's motion to amend the Identification of Goods in the '824 Application.<sup>15</sup> The Board thereupon identified

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<sup>13</sup> 15 TTABVUE. The standards of proof in an ACR proceeding are the same as the standards of proof in a traditional Board proceeding. In either an opposition or cancellation, the burden of proof remains with the plaintiff, who must establish its case by a preponderance of the evidence. TBMP § 702.04(a); *Bond v. Taylor*, 119 USPQ2d 1049, 1051 (TTAB 2016).

<sup>14</sup> 7 TTABVUE.

<sup>15</sup> 8 TTABVUE at n. 1.

certain infirmities in Ming's motion to amend, noted Gehr's opposition to Ming's motion, and deferred ruling on Ming's motion until final decision.<sup>16</sup>

As Gehr and the Board noted,<sup>17</sup> Ming's, in its motion, did not consent to entry of judgment with respect to Gehr's claim of likelihood of confusion regarding the goods Ming's proposed to delete, nor did Ming's make a *prima facie* showing that the proposed amendment would change the nature and character of Applicant's goods or restrict their channels of trade and customers so as to introduce a substantially different issue for trial. *See Johnson & Johnson v. Stryker Corp.*, 109 USPQ2d 1077, 1078-79 (TTAB 2013); *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1435 (TTAB 2007). *See also Wis. Cheese Grp., LLC v. Comercializadora de Lacteos y Derivados S.A. de C.V.*, 118 USPQ2d 1262, 1265 (TTAB 2016) (with detailed analysis of the *Stryker* requirements). Therefore, Ming's motion to amend the '824 Application to narrow the Identification of Goods is **denied**. In any event, had the Board granted Ming's motion, it would not have changed the result of this Opposition.

### **III. The ACR Record**

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 15 C.F.R. § 2.122(b), the file of Applicant's involved application.

#### **A. Opposer's Evidence**

In addition, pursuant to the parties' ACR Stipulation, Gehr introduced the following evidence with its Notice of Opposition and ACR Briefs:

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<sup>16</sup> 10 TTABVUE.

<sup>17</sup> 8 TTABVUE at FN 1 and 10 TTABVUE.

1. A Trademark Electronic Search System (“TESS”) record showing the current status of and title to Opposer’s pleaded registration.<sup>18</sup>
2. Declaration of Galen Ho’o, Opposer’s President.<sup>19</sup>
3. Declaration of Drew Wilson, Opposer’s counsel, with the following exhibits attached:<sup>20</sup>
  - a. Exhibit 1 – the TESS record for Gehr’s ‘249 Registration (mark: POWER TECH).
  - b. Exhibit 2 – the TESS record for Gehr’s ‘247 Registration (mark: POWER TECH).
  - c. Exhibit 3 – the TESS record for Ming’s ‘824 Application (mark: POWER TECHON).
  - d. Exhibit 4 – Ming’s responses to Gehr’s First Requests for Admission.
  - e. Exhibit 5 – Listings for Gehr’s products bearing the POWER TECH Mark on Amazon.com.
  - f. Exhibit 6 – Listings for Ming’s products bearing the POWER TECHON Mark on Amazon.com.
4. Declaration of Carl Tom, Opposer’s Vice President, with the following exhibits attached:<sup>21</sup>
  - a. Exhibit 1 – Gehr’s tradeshow promotion and costs for shows that featured Gehr’s POWER TECH Mark, 2013-2018 (Confidential).
  - b. Exhibit 2 – Photograph of Gehr’s typical tradeshow booth that featured Gehr’s POWER TECH Mark.
  - c. Exhibit 3 – Gehr’s sales figures (in dollars only, with no quantities provided) for Gehr’s POWER TECH extension cords, temp boxes and LED lights, 2013-2017 (Confidential).

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<sup>18</sup> 1 TTABVUE.

<sup>19</sup> 8 TTABVUE.

<sup>20</sup> 8 TTABVUE.

<sup>21</sup> 11 TTABVUE (Confidential); 12 TTABVUE (Non-Confidential).

5. Supplemental Declaration of Drew Wilson, Opposer's counsel, with the following exhibits attached:<sup>22</sup>
  - a. Exhibit 1 – Pages from the website invertersrus.com, explaining the use of a power inverter in connection with the accompanied use of an extension cord.
  - b. Exhibit 2 – Pages from the website donrowe.com, explaining the use of a power inverter in connection with the accompanied use of an extension cord.
  - c. Exhibit 3 – Pages from the website trippelite.com, explaining the use of a power inverter in connection with the accompanied use of an extension cord.

**B. Applicant's Evidence**

Ming's introduced the following evidence with its ACR Brief:<sup>23</sup>

1. Exhibit A – Declaration of Marilyn Layton, Applicant's General Manager.
2. Exhibit B – the TESS records for Gehr's Reg. Nos. 1262249 (mark: POWER TECH, with the term "Power" disclaimed); 3427247 (mark: POWER TECH, with the term "Power" disclaimed); 4965716 (mark: ECO TECH, with the term "Tech" disclaimed); 5006987 (mark: CENTURY POWER, with the term "Power" disclaimed); and 5130009 (mark: GEHR POWER SYSTEMS & Design, with the term "Power" disclaimed).
3. Exhibit C – Gehr's responses to Ming's Second Requests for Admission.
4. Exhibit D – Various documents relating to a TTAB proceeding between Gehr and a third party, FSP Group, Inc., as well as a related consent and settlement agreement entered into between Gehr and FSP Group, in 2007.
5. Exhibit E – a listing of 100 third-party pending applications to register marks comprising or including the term "POWER" in Class 9.
6. Exhibit F – a listing of 100 third-party issued registrations for marks including the term "POWER" in Class 9.
7. Exhibit G – a listing of 100 third-party pending applications to register marks including the term "TECH" in Class 9.

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<sup>22</sup> 12 TTABVUE.

<sup>23</sup> 9 TTABVUE.

8. Exhibit H – a listing of 100 third-party issued registrations for marks including the term “TECH” in Class 9.
9. Exhibit I – A definition of the term “Inverter” from the Merriam-Webster online dictionary.
10. Exhibit J – Ming’s POWER TECHON power inverters offered for sale on Amazon.com.
11. Exhibit K – Customer comments relating to Ming’s POWER TECHON power inverters offered for sale on Amazon.com.

Ming’s embedded in its ACR Reply Brief photographs showing the manner in which Gehr’s POWER TECH Mark is purportedly used on labels affixed to extension cord/adapter products. “Exhibits and other evidentiary materials attached to [here, embedded within] a party’s brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony.” TBMP § 704.05(b). *See also Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1116 (TTAB 2009). Thus, we give these photographs embedded within Ming’s ACR Reply Brief no consideration.

### **C. The Parties’ Statements of Undisputed Facts**

Accompanying their respective ACR filings, Gehr and Ming’s each submitted Statements of Undisputed Facts (with citations to the evidentiary record),<sup>24</sup> as well as responses thereto.<sup>25</sup> However, the Trademark Rules of Practice within Part 2, Title 37 of the Code of Federal Regulations (governing practice before the Board) do not

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<sup>24</sup> 8 TTABVUE, Gehr’s ACR Brief at pp. 3-4; 9 TTABVUE, Ming’s separately filed Statement at pp. 2-7.

<sup>25</sup> 9 TTABVUE, Ming’s separately filed Response to Gehr’s Statement at pp. 1-2; 12 TTABVUE, Gehr’s separately filed Response to Ming’s Statement at pp. 1-6.

provide for or require this type of Statement. Consequently, we have only considered those facts which were expressly admitted by the parties.

#### **IV. Standing and Priority**

A threshold issue in every inter partes case is the plaintiff's standing to challenge registration. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). An Opposer may establish its standing by properly making of record its pleaded registrations, if it is the basis for a likelihood of confusion claim that is not wholly without merit. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). *See also Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012). Here, Gehr properly made its POWER TECH registrations of record under Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1), and therefore establishing its standing.<sup>26</sup>

Because Gehr's pleaded registrations are of record, priority is not at issue as to the marks and goods covered by the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.7 (TTAB 2012).

#### **V. Likelihood of Confusion**

Our determination under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d

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<sup>26</sup> 1 TTABVUE 9; 8 TTABVUE 22.

1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). We make that determination on a case-by-case basis, *On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000), aided by the application of the factors set out in *du Pont*; and we must consider each *du Pont* factor for which there is evidence or argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Opposer bears the burden of proving a likelihood of confusion by a preponderance of the evidence. *Weider Publn’s, LLC v. D & D Beauty Care Co., LLC*, 109 USPQ2d 1347, 1353 (TTAB 2014).

**A. The Parties’ Goods and Channels of Trade**

Gehr’s goods, as recited in its pleaded registrations, and Ming’s goods, as recited in its challenged Application, are:

<b>Gehr’s Goods</b>	<b>Ming’s Goods</b>
Electric extension cords for use with portable electric hand tools, and sold through retail outlets including hardware, plumbing, electrical, and farm supply stores, in International Class 9 (‘249 Registration).	Electrical adapters; electrical power extension cords; power inverters (‘824 Application)

<b>Gehr’s Goods</b>	<b>Ming’s Goods</b>
Electrical extension cords; landscape lighting cable; welding machine extension cords; electrical power strips; portable power cables; electrical extension cords containing ground fault circuit interrupter units; and power surge protectors, all sold through retail outlets, including hardware, electrical, plumbing and farm supplies stores; and data, communication and sound cables, in International Class 9 (‘247 Registration)	

To determine the relationship between the parties’ goods, the second *du Pont* factor, 177 USPQ at 567, we are bound by the identifications in Applicant’s involved application and Opposer’s registrations. *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (“Likelihood of confusion must be determined based on an analysis of the marks as applied to the ... [goods] recited in applicant’s application vis-à-vis the ... [goods] recited in [the] ... registration[s], rather than what the evidence shows the ... [goods] to be.”) (citing *Can. Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)). *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Here, Ming’s Application and Gehr’s registrations all recite “electrical extension cords,” so not only are the parties’ goods identical, but we must presume that the channels of trade and classes of purchasers for those goods are also the same. *See In*

*re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of purchasers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). Likelihood of confusion also may be is found when relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

Even if we had granted Ming's motion to amend, Gehr submitted sufficient evidence showing the relatedness and complimentary nature of Gehr's extension cords and Ming's power inverters. In fact, according to undisputed evidence of record, a power inverter converts DC current to AC current, which can be used during power failure emergencies in connection with products such as computers, sensitive equipment, boats, recreational vehicles, and at worksites or for camping – all in connection with extension cords if needed.<sup>27</sup> Thus, the parties' goods are related and complimentary, and travel in overlapping trade channels – which supports a finding of likelihood of confusion.

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<sup>27</sup> 9 TTABVUE, Ming's Statement of Undisputed Facts ¶¶ 24, 25 and 27; and 12 TTABVUE, Gehr's Responses to Ming's Statement of Undisputed Facts ¶¶ 24, 25 and 27. *See also* 12 TTABVUE, Supplemental Declaration of Gehr's counsel, ¶¶ 2-4, Exhs. 1-3. Gehr properly submitted this Internet evidence by including the relevant URLs and access or print dates of the captured website pages. *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010); TBMP § 528.05(e) (2018).

**B. The Strength of Gehr's POWER TECH Mark**

We next consider the strength of Gehr's mark, POWER TECH, the fifth *du Pont* factor, 177 USPQ at 567. "In determining strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark." *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).").

According to Merriam-Webster online dictionary (<https://www.merriam-webster.com/dictionary>), one of the definitions of the term POWER is "a source or means of energy." Merriam-Webster also defines TECH as a shortened form of TECHNOLOGY, which in turn has as one of its definitions "a capability given by the practical application of knowledge," such as by processes or devices.<sup>28</sup>

When considered in relation to Gehr's goods, electrical extension and power cords, etc., the individual dictionary terms "POWER ..." and "... TECH" in Gehr's POWER TECH Mark are weak as trademark formatives, as Ming's points out.<sup>29</sup> However, each of Gehr's '249 and '247 Registrations for the POWER TECH mark was issued on

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<sup>28</sup> The Board may take judicial notice of dictionary definitions *sua sponte*. *See Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>29</sup> 4 TTABVUE (Answer), 9 TTABVUE (Ming's ACR Brief); 13 TTABVUE (Ming's Reply ACR Brief).

the Principal Register without a required showing of secondary meaning pursuant to Trademark Act Section 2(f), 15 U.S.C. § 1052(f). Thus, by virtue of Trademark Act Section 7(b), 15 U.S.C. § 1057(b), the POWER TECH mark is presumed to be valid. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“[registration] is ‘prima facie evidence of the validity of the registered mark . . . .’”) (citing *B&B Hardware, Inc. v. Hargis Indus. Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2048-49 (2015)). Moreover, it is settled “that likelihood of confusion, mistake or deception is to be avoided as much between weak marks as between strong marks.” *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (citing *King Candy Co.*, 182 USPQ at 109).

On top of the presumption of distinctiveness afforded by the Trademark Act, Gehr also introduced evidence of marketplace strength in the POWER TECH mark through consistent use.<sup>30</sup> This evidence included Gehr’s sales of a number of products that bear its POWER TECH mark on Amazon.com;<sup>31</sup> copies of representative sales invoices demonstrating that customers have purchased Gehr’s products bearing the POWER TECH mark;<sup>32</sup> trade show signage prominently displaying the POWER

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<sup>30</sup> “Acquired distinctiveness, i.e., ‘[s]econdary meaning,’ ‘is a term of art which denotes that there is an association formed in the minds of the consumers between the mark and the source or origin of the product.’ (citation omitted). ‘To determine whether a mark has acquired secondary meaning, ... [the Board] consider[s]: advertising expenditures and sales success; length and exclusivity of use; unsolicited media coverage; copying of the mark . . . ; and consumer studies.’ (citation omitted).” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1377 (Fed. Cir. 2018).

<sup>31</sup> 8 TTABVUE, Ho’o Declaration, ¶ 2.

<sup>32</sup> 8 TTABVUE, Wilson Declaration, ¶6, Exh. 5.

TECH mark;<sup>33</sup> in excess of \$1 million in trade show advertising from 2013 to 2018;<sup>34</sup> and in excess of \$5 million in product sales from 2013 to 2018.<sup>35</sup> While these advertising and sales numbers are not particularly high, collectively Gehr's evidence suffices to demonstrate that its POWER TECH mark has at least some market recognition.

The evidence provided by Ming's is not to the contrary. Ming's submitted TESS database printouts of Gehr's pleaded and unpleaded federal registrations of its marks in which the term "POWER" or the term "TECH" was disclaimed:<sup>36</sup> POWER TECH ("Power" disclaimed), ECO TECH ("Tech" disclaimed), CENTURY POWER ("Power" disclaimed), and GEHR POWER SYSTEMS & Design ("Power Systems" disclaimed).<sup>37</sup> However, as Gehr observes: "the examiner did not consider Opposer's POWER TECH Mark as a whole to be [merely] descriptive, and nowhere in the file wrapper was ... [Gehr] required to prove secondary meaning. TMEP § 1209.01. [The POWER TECH Mark] ... is therefore at the very least, suggestive."<sup>38</sup>

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<sup>33</sup> 12 TTABVUE, Tom Declaration, ¶ 3, Exh. 2.

<sup>34</sup> 11 TTABVUE, Tom Declaration, ¶ 2, Exh. 1 (Confidential).

<sup>35</sup> 11 TTABVUE, Tom Declaration, ¶ 4, Exh. 3 (Confidential).

<sup>36</sup> "If a mark is comprised in part of matter that, as applied to the goods or services, is generic or does not function as a mark, the matter must be disclaimed to permit registration on the Principal Register." TMEP § 1213.03(b).

<sup>37</sup> 9 TTABVUE, Ming's ACR Brief, Exh. B.

<sup>38</sup> 12 TTABVUE, Gehr's ACR Reply Brief, p. 3. *See also Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 765-66 (2d Cir. 1976) ("A term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of good[s]. A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods. If a term is suggestive, it is entitled to registration without proof of secondary meaning.").

In a further effort to demonstrate the conceptual weakness of the “POWER ...” and “... TECH” formatives of Gehr’s POWER TECH mark, Ming’s also submitted: 1) a TESS listing of 100 third-party pending applications to register marks comprising or including the term “POWER” in Class 9; 2) a TESS listing of 100 third-party issued registrations for marks including the term “POWER” in Class 9; 3) a TESS listing of 100 third-party pending applications to register marks including the term “TECH” in Class 9; and 4) a TESS listing of 100 third-party issued registrations for marks including the term “TECH” in Class 9. However, these submissions have little evidentiary value.<sup>39</sup>

“Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015). However, the mere listings of third-party registrations are not sufficient to make those registrations of record. *See In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996) (“In order to make

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<sup>39</sup> Even if Ming’s had properly introduced the registrations, the question is whether POWER TECH is commonly used for the goods in the cited registration, or related goods. *See In re i.am.symbolic*, 123 USPQ2d at 1751-52 (“Symbolic has not pointed to any record evidence to support a finding that multiple third parties use the mark I AM for the listed goods in its class 3 and 9 applications.”); *In re Inn at St. Johns, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (“The relevant *du Pont* inquiry is ‘[t]he number and nature of similar marks in use on *similar goods*’ ... It is less relevant that ‘Century is used on unrelated goods or services such as ‘Century Dental Centers’ or ‘Century Seafoods.’”) (quoting *Weiss Assocs. v. HRL Assocs.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990)). Ming’s has not provided us with this evidence.

third-party registrations properly of record in a proceeding such as this, applicant should submit copies of the registrations themselves, or the electronic equivalent thereof, namely, printouts from the electronic records of the Patent and Trademark Office's Trademark Automated Search System...").

Without any accompanying indication of the owners of the registrations or goods or services associated therewith, the listings have little, if any, probative value because there is no information by which we may assess Applicant's argument, or how many of these registrations, if any, identify goods related to those at issue. *See Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (TESS listing has little, if any, probative value); *see also* TBMP § 1208.02 (2018) and the authorities cited therein. Moreover, third-party applications are evidence only of the fact that they have been filed. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1365 n.7 (TTAB 2007); *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003), and have no probative value.

While we recognize that Gehr's POWER TECH Mark is on the weaker end of the spectrum conceptually, even marks that are deemed "weak" are still entitled to protection under Section 2(d) of the Trademark Act against the registration by a subsequent user of a similar mark for goods that are legally identical in-part and otherwise related, as is the case here. *See King Candy Co.*, 182 USPQ at 109; *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010).

**C. The Parties' Marks**

We consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, the first *du Pont* factor, 177 USPQ at 567. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic, llc*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc.*, 101 USPQ2d at 1721 (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Moreover, where, as here, the parties’ “trademarks would appear on substantially identical goods, ‘the degree of similarity necessary to support a conclusion of likely confusion declines.” *Coach Servs. Inc.*, 101 USPQ2d at 1722.

Generally, because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); see also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not

be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

On the other hand, different features may be analyzed to determine whether the parties’ marks are similar. *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955); *see also In re Nat’l Data Corp.*, 224 USPQ at 751 (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, 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 consideration of the marks in their entireties.”)

Here, Gehr’s mark is POWER TECH, and Ming’s mark is POWER TECHON. As it is the first term in each mark, POWER is the dominant term. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

The second term of each of the parties’ marks is TECH vs. TECHON. While these terms differ slightly in appearance, this minor difference in spelling<sup>40</sup> is not significant and does not sufficiently distinguish the marks. Slight differences such as this do not normally make the marks dissimilar for likelihood of confusion purposes. *See In re Energy Telecomms. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983) (ENTELEC is similar to INTELECT); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (REMACS and RE/MAX “indistinguishable in sound” and confusingly

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<sup>40</sup> 8 TTABVUE, Wilson Declaration, ¶ 5, Exh. 4., Admission Response 18.

similar); *In re Cresco Mfg. Co.*, 138 USPQ 401, 402 (TTAB 1963) (CRESCO and KRESSCO “are phonetically indistinguishable” such that there would be a likelihood of confusion).

Because the parties’ marks differ only in their last two letters, they would likely be pronounced similarly. Even with the addition of the letters “... ON” at the end of the word “TECH ...” the commercial impression of “TECH” still comes through. Overall, the marks still look and sound similar and suggest that the goods have “TECH” features.

Thus, the similarities between the parties’ marks strongly support a finding of likelihood of confusion.

#### **D. Purchaser Sophistication**

The fourth *du Pont* factor is the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful,’ sophisticated purchasing.” *du Pont*, 177 USPQ at 567. Precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion Capital Partners*, 110 USPQ2d at 1163. The evidence shows that some of Ming’s products sold in connection with the POWER TECHON mark have a manufacturer’s suggested retail price of under \$20;<sup>41</sup> that Ming’s POWER TECHON power inverters range in prices from \$130 to \$400;<sup>42</sup> and that some of Gehr’s products, as identified in the pleaded registrations, can be

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<sup>41</sup> 8 TTABVUE, Wilson Declaration, ¶ 5, Exh. 4., Admission Response 30.

<sup>42</sup> 9 TTABVUE, Ming’s ACR Brief, Exh. A, Layton Declaration, ¶¶ 5 and 10; and Exh. J (web page captures of POWER TECHON products sold on Amazon.com).

purchased for less than \$10.<sup>43</sup> Even if these goods are not subject to impulse buying, these are not high price points and, in the absence of evidence showing a higher degree of purchasing care will be exercised,<sup>44</sup> we find this *du Pont* factor to be either neutral or weighing slightly in favor of finding a likelihood of confusion. Extension cords are everyday items purchased by ordinary consumers without the help of electricians or instruction manuals, and the standardization of AC power in the United States means that little care is needed in purchasing them.

**E. Other Factors**

*Du Pont* instructs us to consider other factors if supporting evidence relating to these factors has been made of record during the proceeding, in this case: the extent to which applicant has a right to exclude others from use of its mark on its goods, and any other established fact probative of the effect of use. *Du Pont*, 177 USPQ at 567 (factors 11 and 13).

Ming’s points us to a consent and settlement agreement entered into between Gehr and a third party, FSP Group, Inc., in 2007 to resolve Cancellation No. 92042808 that Gehr brought against FSP Group’s Reg. No. 2290031 (mark: POWERTECH & Design).<sup>45</sup> The parties’ marks in that cancellation proceeding were:

Gehr Industries, Inc.’s Mark	FSP Group, Inc.’s Mark
<b>POWER TECH</b>	

<sup>43</sup> 8 TTABVUE, Ho’o Declaration, ¶ 3.

<sup>44</sup> See, 9 TTABVUE Ming’s ACR Brief, Exh. K (customer comments regarding POWERTECHON products sold on Amazon.com). These customer comments demonstrate that the purchasers of Ming’s POWERTECHON products are of varying levels of sophistication.

<sup>45</sup> 9 TTABVUE, Ming’s ACR Brief, Exh. D.

FSP's POWERTECH & Design registration expired in January 2013.

Ming's makes much of the provisions in the 2007 agreement between Gehr and FSP Group, describing the circumstances under which their marks could co-exist on the Principal Register and in the marketplace. However, merely because a third party, FSP Group, in the past maintained its mark on the Principal Register as a result of a settlement agreement with Gehr does not mean that Ming's can register its POWER TECHON Mark *without* such an agreement.

In *In re Majestic Distilling Co.*, 65 USPQ2d at 1205-06, the Federal Circuit Court of Appeals determined no presumption can be made that a trademark registrant (here, Gehr) would consent to a junior party's use or registration of its similar applied-for mark (here, Ming's POWER TECHON mark) merely because the registrant consented to the registration of a similar mark by a third party. Board decisions prior and subsequent to *In re Majestic* have similarly held, particularly where, as here, the agreement between the registrant and the third-party is old.<sup>46</sup>

Thus, no presumption can be made that Gehr would consent to the use or registration of marks similar to POWER TECH in connection with goods identical or

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<sup>46</sup> See *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1118-19 (TTAB 2015) (in proceeding involving yogurt-based beverages, Board discounts significance of 9 to 10 year old prior consent agreements concerning coffee); *Andersen Corp. v. Therm-O-Shield Intl., Inc.*, 226 USPQ 431, 435 (TTAB 1985) ("estoppel may not be invoked by an applicant against an opposer based on that opposer's acquiescence in a third party's use or registration of a similar mark in the absence of a showing that applicant is in privity with that third party"); *Real Property Mgt., Inc. v. Marina Bay Hotel*, 221 USPQ 1187, 1190-91 (TTAB 1984) (MARINA HOTELS vs. MARINA BAY; determining as irrelevant that third party "Marina ..." hotels "may be operating under their present names by license or consent agreement or on some other basis approved by petitioner...").

complimentary to the goods recited in Ming's '824 Application. Obviously, by virtue of this proceeding, any such presumption would be incorrect.

## **VI. Conclusion**

After considering all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion, we conclude that confusion is likely between Applicant's POWER TECHON mark for "electrical adapters; electrical power extension cords; power inverters" (or simply for "power inverters") and Opposer's mark POWER TECH for the following goods:

Electric extension cords for use with portable electric hand tools, and sold through retail outlets including hardware, plumbing, electrical, and farm supply stores (as recited in the '249 Registration); and

Electrical extension cords; landscape lighting cable; welding machine extension cords; electrical power strips; portable power cables; electrical extension cords containing ground fault circuit interrupter units; and power surge protectors, all sold through retail outlets, including hardware, electrical, plumbing and farm supplies stores; and data, communication and sound cables (as recited in the '247 Registration).

The parties' goods are in-part identical, and otherwise complimentary and related, the trade channels and classes of consumers are overlapping, and the marks are similar. Relevant purchasers are not necessarily sophisticated or careful. The other factors we have considered are neutral.

**Decision:** The opposition on the ground of priority and likelihood of confusion is sustained.