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February 24, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Xelerated AB, assignee of Xelerated Packet Devices AB

Serial No. 76134524

Keith E. Danish, Catherine R. Keenan and Mark I. Peroff of Kirkpatrick & Lockhart LLP for Xelerated AB, assignee of Xelerated Packet Devices AB

Nicholas K.D. Altree, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Seeherman, Hairston and Bottorff, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Xelerated AB, assignee of Xelerated Packet Devices AB,[1] has appealed from the final refusal of the Trademark Examining Attorney to register XELERATED SYSTEMS, with the

[1] The application was filed in the name of Xelerated Networks AB. During the course of prosecution applicant changed its name to Xelerated Packet Devices AB. The business of this company, including the trademark XELERATED SYSTEMS, was subsequently assigned to Xelerated AB.

word SYSTEMS disclaimed, as a mark for the following goods and services:

> computer network components for hardware-based systems, namely, data switches and routers' (Class 9); and
>
> telecommunication and data communications services, namely, communications tasks, namely, data packet processing, namely, sending bundles of data through a network to a remote location; routing, namely, voice and data transmission routing; voice/data convergence, namely electronic transmission of simultaneous voice and data over a single network (Class 38).[2]

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), in view of registrations for the marks ACCELERATED NETWORKS[3] and ACCELTERATED NETWORKS and Design,[4] as shown below, both owned by the same party for "computer network hardware that enables the bundling of voice and data telecommunications services over a single broadband access network." The word NETWORKS has been disclaimed in both registrations. It is the Examining Attorney's position that applicant's mark so resembles these registered marks that, if it is used on

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[2] Application Serial No. 76134524, filed September 25, 2000 and asserting a bona fide intention to use the mark in commerce.
[3] Registration No. 2377206, issued August 15, 2000.
[4] Registration No. 2377205, issued August 15, 2000.

applicant's identified goods, it is likely to cause or mistake or to deceive.[5]

Both applicant and the Examining Attorney have filed briefs. Applicant did not request an oral hearing.

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 Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis,

[5] Applicant's application has undergone a rather convoluted examination. In the first Office action the Examining Attorney advised applicant that a search of the Office records had found no conflicting registrations. In the second action, however, she refused registration on the ground likelihood of confusion with the two registrations recited above, as well as a third registration. A second Examining Attorney then took over responsibility for the application, and issued a third Office action in which he withdrew the refusal based on likelihood of confusion and issued a final refusal based solely on a requirement for an acceptable identification of goods. Applicant responded with a proposed identification, and the examination of the application was then transferred to a third Examining Attorney (the attorney who is now handling this appeal). The present Examining Attorney refused registration on the ground of likelihood of confusion with the two registrations which form the issue in this appeal. A final refusal of registration subsequently followed.

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).

It is on the basis of these two du Pont factors, similarity of the marks and of the goods/services that the Examining Attorney takes the position that confusion is likely. With respect to the goods and services, the Examining Attorney asserts that applicant's identified network hardware in the nature of "switches and routers" is encompassed within the broadly identified "computer network hardware that enables the bundling of voice and data telecommunications services over a single broadband network." He also points to applicant's data packet processing, which entails "sending bundles of data through a network" and its voice/data convergence services, namely "electronic transmission of simultaneous voice and data over a single network" and asserts that applicant's bundling or convergence of voice and data into a single network is the function of the registrant's goods. The record shows that a network router is a "network device that examines the network addresses within a given

protocol, determines the most efficient pathway to the destination, and routes the data accordingly," and a network switch is "the device used to direct packets in packet-switched networks, usually located at one of the nodes on the network's backbone."[6]

Applicant has not disputed the relatedness of the goods and services, but has instead discussed the marks, and most particular the scope of protection to be accorded applicant's mark and the sophistication of the purchasers.

Turning then to the marks, the Examining Attorney asserts that ACCELERATED is the dominant element in the cited marks, and XELERATED is the dominant element in applicant's mark. We agree that the descriptive and disclaimed words NETWORKS and SYSTEMS in the respective marks have little source-identifying value. We also agree that the words ACCELERATED NETWORK in Registration No. 2377205 are more likely to be remembered than the abstract triangular design element because it is by this word portion that consumers will refer to and call for the

[6] www.psps.com/pages_frames/tech_/telecommunications_dictionary.htm. The Examining Attorney merely quoted the definition in the body of the Office action, and did not submit a printout from the on-line dictionary, which would have been the better practice. However, because the applicant did not object as to the accuracy of the definition, we have considered it.

goods. See In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

Having said this, however, we cannot, in determining the issue of likelihood of confusion, compare the marks only on the basis of the words ACCELERATED/XELERATED and, because these words are pronounced the same, find that the marks are confusingly similar. We must also, as applicant has pointed out, take into consideration the strength of the cited marks or, in other words, determine whether it is entitled to a broad or a limited scope of protection.

In this connection, applicant has submitted evidence to show that the word "accelerated" or variations thereof is used in connection with computer networks. The term is used in identifications of goods and services, e.g., "computer hardware, computer peripherals and computer software for use in securing and/or accelerating network traffic between computer networks that operate on different protocols";[7] "integrated circuits which accelerate data packet transmission in high speed networks";[8] and "computer services, namely providing accelerated access to electronic communications networks."[9] Applicant has even provided

[7] Application Serial No. 78029357.
[8] Registration No. 2167319.
[9] Registration No. 2600461.

evidence of the generic usage of "network accelerator," i.e., it is used as an identification in Registration No. 2504890, and it is used in an article from "elibrary.com," dated July 7, 1998 and entitled "Softcom Introduces the First Network Accelerator."

Applicant has also submitted evidence of third-party registrations for marks which contain ACCELERATOR or ACCELERATED or variations thereof. See, for example, ACCELURATOR for "computer software for the communications industry, namely, programs for real time data collection and real time applications for updating information for telecommunications network and business management systems on a continual basis";[10] ACCELERATING THE INTERNET for "computer hardware used to increase security and to enhance the capability and/or performance of exchanging information";[11] computer software and hardware of optimizing network performance over existing networks consisting of wide and local area networks and the global computer information network";[12] and XCELERATIA for "computer software for use in performance enhancement of personal computer systems or computer networks."[13]

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[10] Registration No. 2108370.
[11] Registration No. 2351009 (Supplemental Register).
[12] Registration No. 2714458.
[13] Registration No. 2574150.

Finally, applicant has submitted evidence referring to one of the registrant's own systems which discusses using the system "to accelerate the high-speed data delivery of services like DSL to its business and residential customers."

In view of the foregoing evidence, it is clear that consumers for applicant's goods and services view ACCELERATED as a highly suggestive or descriptive term for computer products and services, including telecommunications goods and services and those involving computer networks. As a result, they will not assume that all marks that contain the word ACCELERATED or a variation thereof indicate a single source for the goods and services.

In this commercial environment, the differences in the marks, and in particular, the distinctive way that XELERATED in spelled, is sufficient to distinguish applicant's marks from those of registrant. Not only does XELERATED give applicant's mark a different appearance, but the differing words SYSTEMS and NETWORKS in the marks, despite their descriptive significance, gives the marks different connotations and commercial impression. We acknowledge the Examining Attorney's point that in certain circumstances similarity in pronunciation is a sufficient

basis on which to find likelihood of confusion, but in this case, given the highly suggestive nature of the word ACCELERATED, and the limited scope of protection to be accorded the cited registrations, similarity in pronunciation alone is not sufficient.

The du Pont factor of the conditions under which and purchasers to whom sales are made also favors a finding of no likelihood of confusion. Registrant's goods and applicant's goods and services are obviously offered to sophisticated consumers who are knowledgeable about their industry. Such consumers, as indicated above, are aware of the suggestive or descriptive significance of the word ACCELERATED, and are not likely to assume that all marks containing this word identify a single source. Further, these goods and services are bought with care and deliberation. Under such circumstances, purchasers will certainly note the differences in the marks, and particularly the unusual appearance caused by applicant beginning its mark with an "X."

Decision: The refusal of registration is reversed.