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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Accu-Sort Systems, Inc.

Serial No. 78167171

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Ronald L. Fairbanks, Trademark Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Hohein, Zervas and Walsh, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On September 24, 2002, Accu-Sort Systems, Inc. filed an application (serial no. 78167171) to register the mark AXIOM (in standard character form) on the Principal Register for goods ultimately identified as "fixed position automatic identification scanners for reading labels and other identification markings on goods and packaging of goods to facilitate inventory control, tracking, sorting, and/or distribution of such goods" in International

Class 9. The application claims a bona fide intent to use the mark in commerce under Trademark Act 1(b), 15 U.S.C. § 1051(b).

The examining attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of two registrations owned by two different entities. First, the examining attorney has refused registration in view of Registration No. 1765699 (renewed) for the mark AXIOM (in typed form) on the Principal Register for "computer programs for materials resource planning and inventory tracking for use in the manufacturing, order processing and delivery fields" in International Class 9. Registration No. 1765699, which issued on April 20, 1993, claims first use anywhere on October 26, 1984 and first use in commerce on February 8, 1985. Second, the examining attorney has refused registration in view of Registration No. 2811168 for the mark AXIOM and design, as shown below on the Principal Register,

for "computer software for operating system support; computer software for executing, tracking, and automating orders; and computer software for managing inventories" in

International Class 9.[1] Registration No. 2811168, which issued on February 3, 2004, claims first use anywhere on April 2, 2001 and first use in commerce in May 2001.

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *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, but not exclusive, 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 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Each of the relevant *du Pont* factors is discussed below.

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[1] Applicant has identified the mark of Registration No. 2811168 as AXIOM DELIVERING (and Design). Office records show that on September 19, 2005, an amendment to the registration under Section 7 of the Trademark Act was entered to delete the term DELIVERING from the mark. Thus, we consider the mark as depicted above, and not as identified by applicant.

The Marks

Our focus in considering the *du Pont* factor regarding the similarity or dissimilarity of the marks is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The mark of Reg. No. 1765699 and applicant's mark are identical, both consisting of the word AXIOM in typed or standard character form. Further, the mark of Reg. No. 2811168 is identical to applicant's mark in sound and meaning. Additionally, the marks are highly similar in appearance and commercial impression because applicant, which seeks registration of its mark in standard character form, would be free to depict its mark in any reasonable format, including the identical style as that depicted in Reg. No. 2811168.[2] See, e.g., *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992), citing

[2] Applicant points out that its mark as used is different in appearance from registrant's mark. Applicant's argument is irrelevant because it has submitted a standard character drawing. See, e.g., *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[T]he argument concerning a difference in type style is not viable where one … asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted." (Italics in original)). Moreover, we consider the mark depicted in the drawing, not the mark as actually used in determining a likelihood of confusion. Further, even if we had considered applicant's mark as actually used, we would not arrive at a different conclusion in our decision.

Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012 (TTAB 1988); *Sunnen Products Co. v. Sunex International Inc.*, 1 USPQ2d 1744 (TTAB 1987). Further, the design of registrant's mark only slightly contributes to the overall commercial impression of the mark inasmuch as it is merely a simple geometric form. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) (although the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark.) Thus, the *du Pont* factor involving the similarities of the marks weighs in favor of finding a likelihood of confusion.

The Goods and Trade Channels

It is well settled that goods need not be similar or competitive in nature to support a finding that the goods are related. *See Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). The goods at issue need not be identical or directly competitive in order for there to be a likelihood of confusion. Rather, the respective goods need only be related in some manner or the conditions surrounding their marketing be such that they

could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Applicant's and registrants' identifications of goods specify that their goods may be used for inventory control or tracking, or more broadly, for the management of inventories. Further, registrants' goods are software, and software is a necessary part of any system which uses a sophisticated product such as a scanner for reading labels in order to facilitate inventory control, tracking sorting, and/or distribution of goods.[3] In fact, as described, applicant's and both registrants' goods could be used as part of the same inventory tracking or management system. Thus, we find that there is a relationship between applicant's scanners and registrants' software for tracking and/or managing orders or inventories and that they may

[3] Applicant website, made of record by the examining attorney, states: "Accu-Sort provides manifesting software and interfaces static and in-motion scales, bar code scanning, and when applicable, label print and apply. This level of integration combines advanced manifesting software for commercial carriers with state-of-the-art data collection and control technology." Clearly, applicant's scanners operate in conjunction with software.

travel in the same trade channels.[4] In so finding, we reject applicant's suggestion that the Board should consider the descriptions of registrants' products in their promotional materials and that reliance on the identification of goods in determining the purpose and goals of the goods is improper. The Board must make determinations of likelihood of confusion on the basis of the identifications of goods and services set forth in applications and registrations and may not read in limitations into such identifications. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the identification in an application or a cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the

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[4] Applicant argues that "[e]ven if the products were to be purchased by the same companies, the products are so dissimilar in their nature and utilization that the person with purchasing authority would certainly be different. … [T]he Registrants' goods are typically purchased by IT personnel. Such persons are different from those persons responsible for purchasing fixed position scanner systems." Brief at pp. 13 – 14. We are not persuaded by applicant's argument, unsupported by any evidence, that purchasing decisions regarding applicant's and registrants' goods would not necessarily be made by the same individuals. Also, while applicant maintains that its goods are "typically purchased by IT personnel," applicant has not indicated whether

registration encompasses all goods or services of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Additionally, applicant argues that "software has become ubiquitous"; and that "many industries have labeled the software they use by the almost generic moniker 'inventory management software,'" even for software for industries including warehousing, distribution, medical records storage, GIS mapping, retail inventory, and wire and steel products manufacture. (Applicant cites to web pages and the results of a search on the Google search engine, submitted with its request for reconsideration.) Rather, applicant maintains that "the relatedness focus should be on whether there is 'a sufficient overlap of the respective purchasers of the parties' goods'"; and that the examining attorney has not proved that there is an overlap in potential purchasers of applicant's and registrants' goods. We disagree. While we may consider whether there is an overlap of the respective purchasers of goods in determining whether the goods are related, we are not

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others, such as users or business managers, are involved in such decisions.

restricted to consider only such purchasers, and need not do so even when concerned with computer software. It is appropriate to conclude that goods are similar based on other evidence, and, in view of the identifications of goods and the lack of any trade channel restrictions in them, it would be error to arrive at any other conclusion regarding the similarity of the goods.

In view of the foregoing, and because the greater the degree of similarity between the applicant's mark and the cited registered mark(s), the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion, see *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001), we find that applicant's goods are related to registrants' goods and resolve the *du Pont* factor regarding the similarity of the goods against applicant.[5]

Purchasers and Conditions of Purchase

We have no reason to doubt applicant's contention that the cost of the goods in question is high, and that purchases are subject to long sales efforts and careful

[5] We are not persuaded by the examining attorney's argument regarding a zone of expansion. The only evidence of record submitted by the examining attorney in support of his argument is from applicant's website and does not show scanners and software for scanners under the same mark.

customer decision-making. Even so, and even if purchasers of applicant's and registrants' goods are sophisticated in their purchasing decisions, because of the identity of applicant's mark and the mark of Reg. No. 1765699, and the identity in sound and spelling of applicant's mark and the mark of Reg. No. 2811168, we find that even these sophisticated purchasers, under the circumstances of their purchases, are likely to be confused as to the source of the respective products. See *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) ("Appellant's argument that purchasers of safety devices would not be confused because of the care they would be expected to exercise in the selection of that equipment is not persuasive in view of the very close similarity between the marks. That 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.") Under the circumstances of this case, we conclude that the sophistication of purchasers would not diminish the likelihood of confusion.

Number and Nature of
Similar Third-Party Marks

Applicant argues that AXIOM is a weak mark in view of third-party uses of AXIOM and has submitted extensive

evidence in support of its argument. As explained below, we are not persuaded by applicant's argument.

Applicant's evidence of listings of registrations and applications are of limited probative value because they do not identify any of the goods or services of the registrations and they include registrations and applications identified as "dead." Further, the applications are only evidence that the applications have been filed. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047 (TTAB 2002). The third-party registrations submitted by applicant are also entitled to limited probative value. The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Moreover, the probative value of the third-party registrations is significantly diminished by virtue of the fact that the marks cover goods unrelated to registrants' goods. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Fed. Cir., June 5, 1992). Also, of the third-party

registrations, one registration is based on Section 44(e) of the Trademark Act, another registration has been cancelled and a third registration has been amended to delete software from the identification of goods, leaving "herbicides for agricultural use" as the operative identification of goods.

Applicant has also submitted partial listings of search results from google.com and yahoo.com for the terms (i) "axiom" and "software," and (ii) "axiom" and "inventory," with its request for reconsideration. The partial Google and Yahoo listings are not particularly probative; the excerpts that appear in the Google and Yahoo listings are extremely truncated with brief bits of text, and we do not have the web pages themselves from which to examine the context within which the search terms are used or to even determine whether the linked websites are active. Further, we are not able to determine whether the references to AXIOM are to applicant, one of the cited registrants, or a third party, or whether certain entries refer to the same entity. Also, some of the excerpts do not include the term "axiom," others are in a foreign language and yet others refer to a foreign company.

Additionally, applicant has submitted numerous web pages located through its Google and Yahoo searches. Those

web pages which are from foreign websites (e.g., austrade.gov.au), which are not from software companies (e.g., amerigraphx.com and axiomtek.com), which are from articles in Internet magazines (e.g., scs-mag.com), which are from foreign companies that do not show contact information in the United States (e.g., axiomsoftware.net and axiomgb.com), and which pertain to businesses which are not related to those of applicant and/or registrants (e.g., axioumjobq.com - "Axiom is a company that is already renowned in the human resources profession") have limited probative value. However, the following web sites are relevant to applicant's position that the mark is weak:

- Edatam.com – AXIOM WAREHOUSE – "FULLY INTEGRATED SOFTWARE THAT TIES TOGETHER ALL CRITICAL WAREHOUSE FUNCTIONS …. KNOW WHAT'S IN, WHERE IT'S AT, WHO ORDERED IT AND WHEN IT SHIPPED – ALL IN 'REAL TIME.'" "… INVENTORY – track costs, quantities, locations, etc. Print bar code labels for marking locations, pallets, cartons and items. Capable of providing low stock alerts to initiate reorders."

- Axgrp.com – "Axiom recognizes the [sic] some clients seek to use the offsite resources of the Axiom Group to provide the same services as our Managed Service but with the additional benefit of an ASP for the market data inventory and control system."

- Axiomsw.com – "Here's a sampling of the software systems we developed:

  Satellite Scheduling
  Fixed Asset Tax Depreciation and Deferred Income Tax

Inventory Management
Mail Room Data Collection
Limousine Reservation, Dispatch, and Billing
Shop Equipment Utilization and
Configuration"

· axiombss.com – "Whether it's invoices, quotes, purchase orders, statements, or sales reports, aXicom is the complete tool to manage and deliver any of your Crystal Forms and Reports as well as streamline your business processes."

We find this evidence insufficient to conclude that the marks in the registrations are weak. And, even if we were to find, based on applicant's evidence, that registrants' marks are weak and entitled to a narrow scope of protection, the scope of the cited registrations is still broad enough to prevent the registration of an identical mark or a substantially identical mark for related goods. See *In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

Applicant has also argued that AXIOM is weak because the two cited registrations are "for similar software products" and that one registration was allowed to register despite the existence of the other registration. Brief at p. 19. However, as noted in the examining attorney's brief, prior decisions of examining attorneys "are not binding on the agency or the Board. Each case must be decided on its own merits." *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984).

Actual Confusion

Applicant also points our that there have been no instances of actual confusion. Applicant's contention is not persuasive on the question of likelihood of confusion. Uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *In re Majestic Distilling Company, Inc.*, *supra*. Also, there is no evidence in the record to support the contention that there has been a sufficient opportunity for confusion to occur.

Conclusion

After considering all evidence of record in this case bearing on the *du Pont* factors, we conclude that there is a likelihood of confusion between applicant's mark and the marks in the cited registrations. We conclude so principally due to the similarity of the marks and the fact that the goods of applicant and the registrants are related and travel through the same or overlapping trade channels.

Decision: The refusal to register under Section 2(d) in view of Registration Nos. 1765699 and 2811168 is affirmed.