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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sysware Healthcare Systems, Inc.

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Serial No. 78243239

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Susan M. Kornfield of Bodman LLP for Sysware Healthcare Systems, Inc.

Nora Buchanan Will, Trademark Examining Attorney, Law Office 116 (M. L. Hershkowitz, Managing Attorney).

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Before Seeherman, Drost and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Sysware Healthcare Systems, Inc. has filed an application to register POWERLAB (standard character form) for "computer software in the field of health care informatics, namely, software for managing, storing, analyzing, displaying, maintaining, processing, reviewing, distributing, communicating, organizing, sharing,

referencing, monitoring and integrating health care information" in International Class 9.<sup>1</sup>

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used on its identified goods, so resembles the registered mark POWERLAB for "computer hardware and software used for recording and displaying experimental and laboratory data and instruction manuals sold as a unit therewith" in International Class 9,<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing.<sup>3</sup> We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 78243239, filed April 29, 2003, alleging a date of first use anywhere and date of first use in commerce of March 31, 1995. In the October 20, 2003 Office action, the examining attorney required an amendment to the identification of goods and applicant complied with this requirement in its April 20, 2004 response. Although the examining attorney made no mention of this requirement in the Final Office action issued June 11, 2004, she does indicate in her brief that the amended identification of goods is acceptable and the identification of goods set out above reflects the amendment. In addition, in the April 20, 2004 response applicant claimed ownership of registrations for the marks POWERQC, POWERWEB AND POWERAR.

<sup>2</sup> Registration No. 2145382, issued March 17, 1998, Section 8 affidavit accepted.

<sup>3</sup> The print-outs from the Trademark Electronic Search System (TESS) of applicant's claimed registrations attached to its appeal brief were not timely made of record. Trademark Rule 2.142(d); In re Posthuma, 45 USPQ2d 2011, 2012 n. 2 (TTAB 1998). In any event, applicant's argument that its ownership of a "'POWER' suite of software products" supports registration of the

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, 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).

The marks, POWERLAB, are identical, which is a factor that favors a finding of likelihood of confusion. We turn then to a consideration of the goods, keeping in mind that use of identical marks is a fact which "weighs heavily against applicant." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984);

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current application is not well taken. See *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992). The issue before us is "the likelihood of confusion of applicant's mark vis-a-vis the registrant's mark." *In re Lar Mor International, Inc.*, 221 USPQ 180, 183 (TTAB 1983). Thus, even if applicant were to demonstrate that it had established a "suite" or "family" of marks characterized by the term "POWER" it would not entitle applicant to register a different mark that is confusingly similar to the registrant's mark. *Baroid, supra*.

see also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

The examining attorney contends that the identification of registrant's goods is "very broad [and] it is presumed that the registration encompasses all goods/services of the type described, including those in the applicant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers." (Brief, pp. 4-5) She continues by pointing out that "[b]oth applicant's and the registrant's goods are computer software which stores laboratory data [and] [r]egistrant's identification of goods must be read to include computer software containing data related to all types of laboratories, including the medical laboratories to which the applicant's goods pertain." (Brief, p. 5)

In support of her refusal the examining attorney submitted a page from registrant's website noting that it includes a statement that registrant's POWERLAB product offers a "computer-based recording and measurement system with particular application in the life and medical sciences." In addition, she submitted a press release of applicant's which describes applicant's POWERLAB product as

"complete solutions for reference laboratories and hospitals." The press release continues:

Designed specifically for large volume labs and hospitals, POWERLAB enterprise edition integrates all functions of the laboratory in to [sic] a single integrated business tool...POWERLAB has the longest track record of any full featured Microsoft Windows based Laboratory Information Management System utilizing client/server architecture...Sysware Healthcare Systems has been a leader in laboratory information systems...offering a complete range of information management products and services to [the] medical laboratory industry.

Finally, the examining attorney requests that the Board take judicial notice of the following definition for the term "laboratory" taken from Dorland's Illustrated Medical Dictionary, (30<sup>th</sup> ed., Saunders, June 2003):<sup>4</sup>

**laboratory**...a place equipped for performing experimental work or investigative procedures, for the preparation of drugs, chemicals, etc.  
**clinical laboratory**, a laboratory for measurement and examination of materials derived from the human body (e.g., fluids, tissues, cells) for the purpose of providing information on diagnosis, prognosis, prevention, or treatment of disease.

The examining attorney asserts that this definition "establishes that the term 'laboratory' as identified in the registrant's identification of goods encompasses a 'clinical laboratory'" which includes gathering information

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<sup>4</sup> University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (Board may take judicial notice of dictionary definitions).

on "diagnosis, prognosis, prevention, or treatment of disease." (Brief, pp. 4-5) Thus, in contrast to applicant's attempt to restrict registrant's goods to "recording experimental research data," the definition of laboratory is not restricted to "a scientific research function but also includes the work of a medical laboratory." Id.

In response, applicant contends that the respective goods are different. Specifically, applicant states that its software sold under the POWERLAB mark "provides physicians with tools critical to quality diagnosis and treatment of patients." Id. In contrast, applicant asserts that registrant's goods are "for the life sciences basic research market" (brief, p. 10) and that registrant and applicant do not "operate in the same trading space." (Brief, p. 3)

Further, applicant asserts that its customers exercise extreme care in purchasing products sold under POWERLAB and the costs of these systems range "from the tens of thousands of dollars to systems in excess of one million dollars" and the "sales cycle for POWERLAB is measured in months, and for some customers, in excess of one year" due in part to the involved purchasing decision. (Brief, p. 4)

Finally, applicant states that the marks have been in concurrent use for ten years and applicant "has not been made aware of even a single instance of confusion."<sup>5</sup>

(Brief, p. 7)

It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider registrant's goods as they are described in the registration and we cannot read limitations into those goods. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade

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<sup>5</sup> Applicant also referenced co-existing third-party registrations for computer software products in support of its position that "the proper focus for...computer software is on the competitiveness and relatedness of the goods." However, the listing of third-party registrations is not probative inasmuch as prior decisions of other examining attorneys are not binding upon the Office and the Board must decide each case on its own facts and record. In re *International Taste Inc.*, 53 USPQ2d 1604 (TTAB 2000); In re *Consolidated Foods Corp.*, 200 USPQ 477 (TTAB 1978).

or class of purchasers, it is presumed that the 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). An applicant may not restrict the scope of the goods covered in the registrant's registration by extrinsic evidence. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Applicant argues that registrant's goods are only for use in research in the field of "life sciences" (brief, p. 10). The web page from registrant's website submitted by the examining attorney belies applicant's position because it clearly shows that registrant's computer software also has applications in the "medical sciences." Applicant's argument also fails because registrant's goods, as identified in the registration, are not limited in the way applicant suggests.

When we consider registrant's goods as they are described in the registration, and in light of the legal constraints cited above, we find that they would include recording and displaying "health care information." See *In re Linkvest S.A.*, supra. As shown by the dictionary definition of "laboratory data" and applicant's press

release indicating that its product is designed for "large volume labs and hospitals" and offers a "complete range of information management products and services to [the] medical laboratory industry," laboratory data includes health care information. Thus, computer software for displaying laboratory data encompasses computer software for displaying health care information. In view thereof, and inasmuch as there are no limitations in registrant's identification of goods, we must deem registrant's computer software for recording and displaying laboratory data to encompass software for displaying health care information.

In reaching our decision, we have considered applicant's contention that its goods are extremely expensive, and its customers are sophisticated and take great care in the purchasing decision. We find that the identity between the marks and the overlap in the computer software clearly outweigh any purchaser sophistication. In re Decombe, 9 USPQ2d 1812 (TTAB 1988); In re Pellerin Milnor Corp., 221 USPQ 558 (TTAB 1983). Moreover, the fact that purchasers are sophisticated in a particular field does not necessarily mean that they are knowledgeable in the field of trademarks or immune from source confusion. In re Total Quality Group Inc., 51 USPQ2d 1474, 1477

(TTAB 1999); In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products").

Finally, we do not accord significant weight to applicant's contention that there have been no instances of actual confusion despite an asserted ten years of concurrent use of the respective marks. The Federal Circuit has recently addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context. Majestic Distilling, 65 USPQ2d at 1205.

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

In conclusion, we find that, given the use of identical marks on these related goods, confusion is likely. To the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

**Decision:** The refusal to register is affirmed.