

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

Mailed: August 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Creative Technology, Ltd.

v.

US Blaster Europe B.V.

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Opposition No. 91161226
to application Serial No. 76196971
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Gretchen R. Stroud of Cooley Godward Kronish LLP for
Creative Technology, Ltd.

H. John Campaign of Graham Campaign for US Blaster Europe
B.V.

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Before Drost, Cataldo and Taylor,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On January 19, 2001, Zenex, B.V., now known as US
Blaster Europe B.V.¹ ("applicant") filed an application to
register on the Principal Register the mark U.S. BLASTER
(typed or standard characters) for the following goods:

audio and video equipment, namely, amplifiers,
loudspeakers, crossover filters, tweeters, sub
woofer boxes, cables, fuses, tft lcd screens,
capacitors, multimedia loud speaker boxes,

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¹ On February 8, 2007, applicant recorded a change of name to US
Blaster Europe B.V. with the Assignment Branch of the United
States Patent and Trademark Office (USPTO) at Reel
3477/Frame0552.

multimedia headsets, multimedia microphones, and all kinds of gold accessories, namely, distribution blocks, battery connectors, fuses, connector blocks, terminal covers and line couplers; software for use in connection with audio apparatus to control sound, volume and quality

in International Class 9.²

Registration has been opposed by Creative Technology, Ltd. ("opposer"). As grounds for opposition, opposer asserts that it is the owner of numerous BLASTER marks, previously used and registered on the Principal Register, including the following:

BLASTER (typed or standard characters)

for "computer software and computer hardware for analog and digital video display and combining text, video, audio and graphics on computers, and user manual therefore sold as a unit" in International Class 9;³ and

The logo for 'BLASTER' is presented in a bold, white, sans-serif font. The letters are set against a solid black rectangular background. The letter 'A' is stylized with a horizontal line through its center. The entire logo is centered on the page.

for "computer hardware, computer peripherals and computer programs for the integration of text, data, audio graphics, still image, animation and moving pictures into a computer

² Application Serial No. 76196971 is based upon applicant's assertion of Benelux Registration No. 0573593, issued on June 15, 1995. "U.S." is disclaimed apart from the mark as shown.

³ Registration No. 1977549 issued on June 4, 1996. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

controlled interactive audio visual delivery and instruction manual therefor" in International Class 9.⁴

Opposer argues in its notice of opposition that it has made use of its BLASTER and BLASTER-formative marks in connection with the above goods since prior to any date of first use upon which applicant can rely; and that applicant's mark, U.S. BLASTER, when used on applicant's goods so resembles opposer's BLASTER marks for its recited goods as to be likely to cause confusion, to cause mistake, and to deceive.

Applicant's answer consists of a general denial of the allegations in the amended notice of opposition.⁵

The Record

By operation of Trademark Rule 2.122, 37 C.F.R. §2.122, the record in this case consists of the pleadings and the file of the involved application. In addition, during its assigned testimony period, opposer submitted, by stipulation

⁴ Registration No. 1921569 issued on September 26, 1995. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

⁵ In addition, applicant asserts as "affirmative defenses" (1) that the notice of opposition fails to state a claim upon which relief can be granted; and (2) that "Opposer does not possess exclusive rights in the United States to the term 'blaster' as a trademark, or as part of a trademark." As to the former, inasmuch as applicant did not file a motion to dismiss under Fed. R. Civ. P. 12(b)(6) by means of which the sufficiency of the notice of opposition may be tested, such "affirmative defense" will be given no further consideration. Applicant's second "affirmative defense" is deemed to be an amplification of applicant's denials of the allegations contained in the notice of opposition.

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of the parties,⁶ the testimonial affidavit of Steven Erickson, vice president and general manager of Creative Labs, Inc., opposer's wholly-owned subsidiary, with the following exhibits:

- (1) Copies of its pleaded BLASTER and BLASTER-formative marks obtained from the USPTO's Trademark Electronic Search System (TESS) database and information regarding ownership thereof from the USPTO's Assignment Branch;
- (2) Copies of photographs of certain of the goods identified in opposer's pleaded registrations, the packaging therefor, and information from opposer's website regarding their purchase;
- (3) Copies of opposer's advertisements and online newsletter concerning its goods;
- (4) Copies of excerpts from a printed publication concerning opposer's goods; and
- (5) Copies of articles from printed and online publications concerning opposer's goods.⁷

During its assigned testimony period, applicant filed a notice of reliance upon third-party registrations for

⁶ We note that while such stipulation is not of record, applicant has not objected to the form or content of opposer's evidence. Accordingly, opposer's affidavit testimony and accompanying exhibits are accepted and considered to be of record. See Trademark Rule 2.123(b). See also TBMP §705 (2d ed. rev. 2004).

⁷ Opposer also filed a notice of reliance upon official records and publications duplicative of those submitted as exhibits to its testimony affidavit. Accordingly, such notice of reliance need not be considered.

BLASTER-formative marks. By way of rebuttal, opposer submitted a second testimonial affidavit of Steven Erickson.

Only opposer filed a brief on the case.

Opposer's Standing and Priority of Use

In his testimonial affidavit, Steven Erickson identified and introduced copies of opposer's pleaded registrations showing the current status thereof and current title vested in opposer. See Trademark Rule 2.122(d). See also TBMP §704.03(b) (2d ed. rev. 2004) and the authorities cited therein. Because opposer has properly made its pleaded registrations of record, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to the BLASTER and BLASTER-formative marks therefor and goods covered thereby. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood

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of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We will concentrate our discussion of the issue of likelihood of confusion on that registration of opposer's which is closest to the mark for which applicant is seeking registration for the most similar goods, namely, opposer's Registration No. 1977549 for BLASTER in typed or standard characters for "computer software and computer hardware for analog and digital video display and combining text, video, audio and graphics on computers, and user manual therefore sold as a unit" in International Class 9.

The Marks

We turn to the first du Pont factor, i.e., whether applicant's U.S. BLASTER mark and opposer's BLASTER mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot*, supra. The test, under the first du Pont factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks

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are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result.

In comparing the parties' marks, we note that applicant's U.S. BLASTER mark incorporates in its entirety registrant's mark, BLASTER. Essentially, applicant's mark consists of opposer's BLASTER mark with the mere addition of U.S. at the beginning thereof. The term U.S., commonly understood as an abbreviation for the United States, in applicant's mark modifies and refers to the term BLASTER therein. Thus, we consider BLASTER to be the dominant portion of applicant's mark. Because applicant's mark contains registrant's mark as its most prominent feature, we find that, when viewed in its entirety, applicant's U.S. BLASTER mark is nearly identical to opposer's BLASTER mark in appearance and sound. We further find that inasmuch as both marks may connote that the goods identified thereby provide a literal or figurative "blast," applicant's mark is highly similar to opposer's mark in connotation. We find therefore that the marks convey nearly highly similar commercial impressions. As a result, consumers are likely to view the marks as variations of each other, but indicating a single source.

In addition, confusion is more likely when, as here, an applicant's mark incorporates the entirety of a previously registered mark. See, e.g., *In re Hyper Shoppes, Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 1022, 194 USPQ 419, 422 (CCPA 1977).

We thus find that when viewed as a whole, the similarities between the parties' marks as to sound, appearance, connotation and commercial impression heavily outweigh the dissimilarities. In view thereof, this du Pont factor favors opposer.

Strength of Opposer's BLASTER Mark

With regard to the strength of the BLASTER mark, we note opposer's contention that it is a "leader in sound technology in the electronics industry and has sold millions of BLASTER-branded sound cards,"⁸ and that, as a result, "the fame of Opposer's BLASTER marks cannot be disputed."⁹ Opposer's evidence of such fame consists of portions of a book published about one of its BLASTER products,¹⁰ eight articles concerning such products from printed and online newspapers and magazines,¹¹ as well as testimony regarding sales numbers, industry awards, and the nature and extent of

⁸ Brief, p. 14.

⁹ Id.

¹⁰ Erickson Affidavit, para. 14, exhibit H.

¹¹ Id. at para. 15, Exhibit I.

opposer's advertising.¹² However, opposer provides no evidence to indicate the extent to which consumers recognize its BLASTER mark, and the testimony of its officer regarding such recognition is insufficient to support opposer's claim that the BLASTER mark has achieved widespread notoriety.

Furthermore, opposer's testimony and evidence, while indicating that opposer has enjoyed a high degree of success in marketing and selling its goods under the BLASTER mark, fall short of establishing that such mark is famous. That is, opposer's evidence fails to demonstrate that the successful marketing of opposer's BLASTER products translates into widespread recognition of the mark.

Accordingly, we do not find on this record that opposer's mark BLASTER is famous for purposes of our likelihood of confusion determination.

Nevertheless, we find that the evidence is sufficient to show that opposer's BLASTER mark has achieved at least a degree of recognition and strength in the market and thus is not a weak mark that is entitled only to a very narrow scope of protection, as argued by applicant. In coming to this determination, we have considered all of the evidence relevant thereto, including applicant's evidence, more fully discussed below, of third-party registration of various BLASTER-formative marks.

¹² Id. at para. 5, 10-13.

Registration of Similar Marks

In its notice of reliance, applicant identifies and introduces third-party registrations for various BLASTER-formative marks from the USPTO's TESS database.

We note, however, that most of these third-party registrations are for marks that are more dissimilar to opposer's pleaded mark than applicant's involved mark. Such marks include the following: RASTER BLASTER; LIGHT BLASTER; TONE BLASTER; BLASTER LEARNING SYSTEM; READING BLASTER; and BOOTIE BLASTER, all of which convey different commercial impressions from that of opposer's BLASTER mark. We further note that these third-party registrations largely recite various goods that are more dissimilar to either registrant's goods or the goods in the application at issue herein. As a result, we cannot say that these registrations demonstrate that BLASTER is a weak mark that is entitled to a limited scope of protection. We also point out that third-party registrations are not evidence that the marks shown therein are in use. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973). Thus, they have no probative value with respect to the du Pont factor of the number and nature of similar marks that are in use for similar goods and services.

The Goods

With respect to the goods, it is well established that the goods or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telephone Corp.*, 197 USPQ 910, 911 (TTAB 1978).

We base our determination of the similarity or dissimilarity between the parties' respective goods, as we must, upon the goods recited in the involved application and opposer's above-noted registration for its BLASTER mark. See *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.") In that regard, we observe that, as identified, opposer's goods

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under its BLASTER mark are "computer software and computer hardware for analog and digital video display and combining text, video, audio and graphics on computers, and user manual therefore sold as a unit." Applicant's goods, as identified in its subject application, are

audio and video equipment, namely, amplifiers, loudspeakers, crossover filters, tweeters, sub woofer boxes, cables, fuses, tft lcd screens, capacitors, multimedia loud speaker boxes, multimedia headsets, multimedia microphones, and all kinds of gold accessories, namely, distribution blocks, battery connectors, fuses, connector blocks, terminal covers and line couplers; software for use in connection with audio apparatus to control sound, volume and quality.

As identified, applicant's various audio and video equipment is not limited to any particular use or purpose. Accordingly, we must presume that applicant's goods may be used for any purpose suitable therefor. See *Id.* See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") As a result, we find that applicant's goods would be suitable for any normal audio and

video applications, including the more narrowly identified applications for which opposer's computer hardware and software are used. Put another way, applicant's audio and video equipment, including loudspeakers, tft lcd screens, cables, headsets, and accessories therefor, which are identified without limitation as to their use, are presumed to be suitable for use with opposer's computer hardware and software for audio and video applications, namely, analog and digital video display and for combining text, video, audio and graphics on computers. In addition, we find that, as identified, applicant's computer software used to control sound, volume and quality is related to opposer's computer hardware and software used for video display and to combine text, audio, video and graphics on computers in that both include software used for audio applications.

In view of the related nature of opposer's goods and those of applicant, this du Pont factor also favors opposer.

Channels of Trade

Because of our finding that the above goods are related, and because there are no recited restrictions as to their channels of trade or classes of purchasers, we must assume that the goods are available in all the normal channels of trade to all the usual purchasers for such goods, and that the channels of trade and the purchasers for opposer's goods as well as applicant's goods would, at a

minimum, overlap. See *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, supra. See also *Paula Payne Products v. Johnson Publishing Co.*, supra.

We find that, as a result of the foregoing, this du Pont factor also favors opposer.

Summary

We have carefully considered all of the evidence pertaining to priority of use and the relevant du Pont factors, as well as all of opposer's arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

We conclude that opposer has established its standing to bring this proceeding; its priority of use; and that a likelihood of confusion exists between its BLASTER mark and applicant's U.S. BLASTER mark, as used in connection with their respective goods. To the extent there exists any doubt about our conclusion, we resolve such doubt on the issue of likelihood of confusion in favor of the prior user and against the newcomer. See *San Fernando Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 2 (CCPA 1977).

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DECISION: The opposition is sustained on the ground of priority and likelihood of confusion, and registration to applicant is refused.