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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

PC Club

v.

Primex Technologies, Inc.

Opposition No. 108,862
to application Serial No. 75/120,520, filed June 17, 1996

and

Opposition No. 109,796
to application Serial No. 75/048,425, filed January 25,
1996

Thomas T. Chan and Ronald M. St. Marie of Chan Law Group
LC for PC Club.

James H. Bicks of Wiggin and Dana for Primex
Technologies, Inc.

Before Hohein, Walters and Rogers, Administrative
Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

PC Club ("opposer") has opposed applications of
Primex Technologies, Inc. ("applicant") to register the

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marks EMPOWER and EMPOWER and design, as reproduced below, each for goods identified, following amendment, as "electrical power supplies to provide an in-seat power supply in transportation vehicles, namely, aircraft, automobiles, boats, buses, trains and vans."¹



The Pleadings

As grounds for opposition to each application, opposer asserts that it is the owner of Registration No. 2,009,265 for the mark ENPOWER for goods opposer summarizes as "computers, computer peripherals and related products"²; that opposer filed its use-based

¹ Application Serial No. 75/048,425 [for EMPOWER], filed January 25, 1996, and application Serial No. 75/120,520 [for EMPOWER and design], filed June 17, 1996, each based on applicant's allegation of a bona fide intention to use the mark in commerce.

² The registration, which issued October 22, 1996, lists dates of use of August 12, 1993, for goods identified as "computers, computer printers, video display terminals, keyboards, modems, printed circuit boards for computers, floppy discs, memory devices, namely, floppy disc drives, optical disc readers, magnetic tape readers, optical character scanners, computer data input and storage devices, namely, magnetic and optical memory disc drives and tape storage units, xy plotters, computer mouse, digital pad and pens, computer operating software and manuals sold as a unit with the above, and facsimile machines, in class 9."

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application for registration of its ENPOWER mark on September 20, 1993, before the filing date of applicant's application; that the parties' marks are substantially similar; and that applicant's use of its EMPOWER marks on or in connection with applicant's goods "is likely to cause confusion, mistake and deception as to the affiliation, connection or association of Applicant with Opposer, and as to the origin, sponsorship, or approval of Applicant's goods by Opposer."

Apart from admitting that it filed its applications, applicant has denied the salient allegations of each notice of opposition. In addition, applicant has asserted the affirmative defenses of laches and acquiescence. Neither defense, however, was pursued by applicant during trial or briefing of these cases. These defenses, therefore, will not be further considered. The cases were consolidated by consented motion of the parties.

The Record

The record includes the pleadings, the files of the opposed applications, testimony from each party and evidence submitted by notices of reliance from each party. Specifically, opposer presented, during its case-

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in-chief, the deposition testimony and associated exhibits of Shirley Sheum, opposer's human resources/administrative manager, and filed by notice of reliance (i) a certified copy of opposer's pleaded registration, showing status and title, (ii) copies of advertisements or articles from certain printed publications, (iii) certain of applicant's responses to opposer's interrogatories, and (iv) certain of applicant's responses to opposer's requests for admissions. Applicant presented, during its case-in-chief, the deposition testimony and associated exhibits of Robert G. Souza, a California-licensed private investigator and director of investigations for Patriot Security & Investigations, and the deposition testimony and associated exhibits of John Wade, director of strategic business development for the electronics business unit of Primex Aerospace Company, a subsidiary of applicant. Applicant also filed a notice of reliance on (i) copies of third party applications and registrations, including an affidavit from an individual who made the copies³, (ii) excerpts and associated

³ Affidavit testimony is not properly made of record by notice of reliance. However, the affidavit is immaterial to our consideration of third party registrations because it was offered only as an attestation of the accuracy of the copies.

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exhibits from applicant's discovery deposition of Shirley Sheum, (iii) excerpts from applicant's discovery deposition of Jackson Lan, opposer's president,⁴ (iv) certain of opposer's responses to interrogatories of applicant, and (v) copies of opposer's advertisements in certain printed publications. For rebuttal, opposer presented the deposition testimony of Shirley Sheum, including one exhibit, and the deposition testimony and associated exhibits of Charles C. Kongkeo, opposer's information systems administrator.

Each party filed a main brief and opposer filed a reply brief. An oral hearing was not requested.

Objections to Evidence

Each party, concurrent with the filing of its main brief, made numerous objections to the other's evidence. In addition, opposer filed, with its reply brief, a combined set of supplemental objections and motion to

Plain paper copies of third-party registrations may be made of record by notice of reliance without need of such an affidavit.

⁴ Neither of the two discovery depositions taken by applicant was taken during the discovery period, either as originally scheduled or as extended by the Board's order of October 1, 1998. Nonetheless, opposer apparently did not object to the taking of the depositions outside the discovery period; and the parties have treated the depositions as discovery depositions. Therefore, the excerpts made of record by applicant's notice of reliance have been considered, but the complete transcripts have not been considered.

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strike those portions of applicant's brief which rely on the disputed items of evidence. Applicant filed a response to the motion to strike.

Opposer's motion to strike is denied. In addition, opposer's supplemental objections to applicant's evidence have been given no consideration. All the evidence for which opposer would have had objections was in the record when opposer filed its brief and only the objections made and/or renewed at that time have been considered.

We sustain applicant's objections to the rebuttal testimony of Charles Kongkeo to the extent that we have not considered his testimony on problems that may result from a laptop user's use of an improper adapter cord. This testimony either is irrelevant, for reasons discussed *infra* at footnote 6, or it is improper rebuttal, to the extent it may relate to opposer's standing.⁵ We have, however, considered the remaining portions of this witness' testimony.

We sustain opposer's objection to applicant's testimony exhibits 38 and 39, introduced during the rebuttal testimony of Mr. Kongkeo. These exhibits are

⁵ We note that, even had we considered this testimony it would not have altered our decision, as the evidence does not relate to the central issue of likelihood of confusion and applicant has not disputed opposer's standing.

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purported to be cartons for adapters manufactured by two of applicant's licensees, but there was no foundation laid for their introduction.

We overrule opposer's objection to applicant's introduction of copies of third-party applications for registration of phonetic equivalents of both involved marks, as filing of plain paper copies of third-party applications by notice of reliance is permissible. We note, however, that the copies are probative of nothing more than the filing of the applications. Glamorene Products Corp. v. Earl Grissmer Co., Inc., 203 USPQ 1090, 1092 n.5 (TTAB 1979).

We overrule opposer's objection to applicant's introduction of third-party registrations for phonetic equivalents of both involved marks, as filing of plain paper copies of third-party registrations by notice of reliance is permissible.

In addition, we overrule opposer's objections to copies of web pages introduced by applicant, showing use of empower, enpower and phonetically equivalent terms in the promotion of various goods and services (primarily computer hardware and software) on the Internet. Applicant properly introduced these copies via the

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testimony of the witness who accessed the pages. See Raccioppi v. Apogee Inc., 47 USPQ2d 1368 (TTAB 1998).

Further, all objections not specifically discussed above are overruled. Each party tendered its objections in a chart which provides no more than a few words of support, often inappropriate in regard to the item in question, for each objection, rather than an explanation why each objection should be sustained. Under the circumstances, we have discussed above only the objections which deal with evidence of import to our decision and overrule the remaining objections as insufficiently supported or inappropriate.

The Parties and Their Businesses

Although applicant's identification of goods in its intent-to-use application encompasses several types of transportation vehicles, the evidence establishes that, at the present time, applicant manufactures and markets a system for routing power created by aircraft to outlets at the seats of air travelers. (Wade dep. pp. 10-13.) The system is primarily intended to provide passengers a source of power for their laptop computers and has been touted by at least one airline in its advertising as an advantageous feature enjoyed by passengers of that

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carrier. (*Id.* pp. 10-11, 20-21.) Manufacturers of adapter cords used to connect air travelers' laptop computers to applicant's system use applicant's marks, by license, to tout the utility of their cords. Applicant's system has been approved for installation on aircraft by the Federal Aviation Administration.⁶ (Wade dep. pp. 23-26.) Applicant markets its system to airlines and to manufacturers of airliner seats, and advertises in trade publications circulated to airlines, airline seat manufacturers and others concerned with airline "cabin electronics" or in-flight entertainment. (*Id.* pp. 37, 41-50.) Applicant also promotes its goods at trade shows attended by individuals in these industries. (*Id.* pp. 50-51.) The average cost of installing applicant's system on an airliner is between one and two million dollars and, typically, sales are negotiated over weeks

⁶ Opposer, at trial, introduced evidence intended to establish that, if applicant's system is used by laptop owners who have defective batteries, or who employ the wrong adapter cord to connect to the system, damage may result to the laptop or its batteries. The purported safety of applicant's goods is not an issue properly before the Board in an opposition proceeding. Nor did opposer plead in its notices of opposition that applicant's mark is not in lawful use in commerce. Opposer does not argue that any such issue has been tried by consent of the parties, so that we should consider the notices of opposition to be amended pursuant to Fed. R. Civ. P. 15(b). We hasten to add that, even if opposer were to make such a motion, we would not consider the evidence presented to have encompassed trial of the issue of whether applicant's mark is in lawful use in commerce, either by applicant or its licensees.

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or months, for outfitting of multiple aircraft. (*Id.* pp. 38-40.)

Opposer is a manufacturer, wholesaler and retailer of computers, computer parts and computer peripherals under the ENPOWER trademark. (Sheum dep. p. 15.) Opposer also sells at wholesale and retail computer products from other manufacturers under those manufacturers' marks. Opposer manufactures laptop⁷ computers, identified by the ENPOWER mark, for purchasers who specify particular requirements. (Sheum discovery dep. pp. 33-34; Sheum dep. p. 36.) Opposer operates retail stores in southern California, Arizona and Nevada. (Sheum dep. p. 10.) Opposer's ENPOWER mark is used to identify opposer's house-brand line of computers and computer products, including laptop accessories as batteries, battery chargers, AC adapter cords, and car adapter cords.⁸ The record is unclear about the extent and nature of the use of the ENPOWER mark in connection

⁷ Though testimony and exhibits alternately refer to laptop and notebook computers, it is clear the terms have been used synonymously, and we adopt the term "laptop" to refer to both.

⁸ AC adapters have plugs with prongs and are used to connect laptops to electrical outlets in homes or businesses. Car adapters have cigarette lighter style plugs and are used to connect laptops to cigarette lighter style outlets in automobiles or other locations where such outlets are available.

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with laptop accessories.⁹ Opposer has designated ENPOWER brand laptop computers as such by running screensavers featuring the mark on the monitors of ENPOWER laptops on display in its stores. (*Id.* pp. 48-51.) Finally, the mark is used on the invoices (receipts) for laptops and accessories when they are sold. (*Id.* pp. 52-53.) Here, again, the record is unclear in regard to the consistency of this practice. Opposer does not sell AC or car adapter cords except for use with its house-brand ENPOWER laptop computers. (Kongkeo rebuttal dep. pp. 33-34.)

The following tables list the sales of opposer's ENPOWER-

⁹ Shirley Sheum's testimony regarding the regularity of opposer's use of its mark on or in connection with laptop accessories is inconsistent. Moreover, the record reveals that opposer does not always use its mark on or in connection with laptop accessories.

Ms. Sheum testified that opposer used the "ENPOWER logo" which features a stylized letter N only during the last six months of 1998 for laptop computers and accessories, but that the ENPOWER word mark has been used since June 1996 for laptops and, at least by later that year, on boxes for laptop accessories. Later in the same deposition, however, during re-direct examination, she testified that opposer has merely "a spoken policy, a verbal one" regarding use of the ENPOWER label on ENPOWER products and that it had been in effect only "between a year and a year and a half" as of December 29, 1998. Moreover, she testified that "[v]arious people who work in the warehouse" affix these labels and there is no particular individual designated to do so.

Also, during her deposition, Ms. Sheum identified an invoice and certain ENPOWER products that did not have the mark on them (including an adapter powering opposer's attorney's laptop during the deposition). Similarly, applicant's witness Robert Souza testified about his direct purchase of ENPOWER products which did not bear the mark (though the invoice he received did have the mark).

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branded laptops and laptop accessories.¹⁰ (Sheum dep. pp. 72-75; exh. 10.)

Laptop sales	1996	1997	1998	Totals
Laptop units sold	1,255	2,800	2,414	6,469
Laptop sales value	\$2.6 million	\$6.1 million	\$5.0 million	\$13.7 million

Laptop accessories sales¹¹	1996	1997	1998	Totals
Batteries	\$151,000.	\$301,000.	\$271,000.	\$723,000.
Adapters	\$36,000.	\$125,000.	\$116,000.	\$277,000.
Battery Chargers	\$24,000.	\$2,000.	\$13,000.	\$39,000.

While the record is less clear in regard to opposer's expenditures on advertising of its ENPOWER-branded laptops and laptop accessories,¹² it is clear that opposer

¹⁰ Figures in each table for 1998 run only through the third week in November. (Sheum dep. pp. 73-74.)

¹¹ There is no testimony as to units of batteries, adapters or chargers sold or a breakdown of adapter sales between AC and car adapters.

¹² The testimony of Shirley Sheum during opposer's case in chief in regard to advertising was scarcely more than a guess as to the percentage of all advertising expenses, of opposer and two related companies, attributable to promotion of ENPOWER-branded products. Testimony during rebuttal was clearer but still vague. There is no apportionment between all ENPOWER-branded products and opposer's ENPOWER laptops and laptop accessories.

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spent at least several hundred thousand dollars during each of the years 1996 through 1998 and that the expenditures have increased from year to year.

Analysis

As noted above, opposer has made of record a certified copy of its pleaded registration for its ENPOWER mark, which establishes that the registration is subsisting and owned by opposer. In view thereof, there is no issue of priority with respect to this mark. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). That is, opposer, as the owner of a subsisting registration of its mark, would be entitled to prevail herein, if there is a likelihood of confusion, even if opposer were a subsequent user.¹³ See Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d).

Turning then to the central issue in these proceedings, our determination of likelihood of confusion

¹³ We note that applicant, in a footnote in its brief, asserts that opposer does not claim use of its ENPOWER mark on laptop adapters until "in or about mid-1998" and that any trademark use of applicant's mark by its licensees on adapters would be prior to opposer's use. The argument, however, is purely theoretical, in that applicant denies that its licensees use the EMPOWER mark "in a trademark sense." Moreover, applicant did not plead or, at trial, attempt to prove priority.

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under Section 2(d) must be based on an analysis of all the *du Pont* factors which are relevant under the present circumstances and for which there is evidence of record. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity of the goods and the similarity or dissimilarity of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209, 1210 (TTAB 1999).

First, we consider the similarity or dissimilarity of the marks. We note that opposer's ENPOWER mark and applicant's EMPOWER word mark, in serial no. 75/048,425, are nearly identical in sound and appearance.

Applicant argues that the one letter difference between these marks is significant. We disagree. Applicant also argues that opposer always displays its mark with a stylized letter N. The record clearly reveals otherwise. Moreover, opposer's mark is registered in typed form and neither the method of opposer's actual use nor our analysis can be restricted to consideration only of opposer's mark with a stylized letter N. See Squirtco v. Tomy Corporation, 216 USPQ

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937, 939 (Fed. Cir. 1983). Similarly, applicant argues that its word mark is always used in a stylized form wherein the letters E and P are presented in larger form. Again, applicant seeks registration of its word mark in typed form and we must consider all possible displays of the mark, not just the display applicant claims is the only one in use. *Id.*

Considering opposer's ENPOWER word mark and applicant's EMPOWER and design mark, in serial no. 75/120,520, applicant's argument that opposer always presents its mark with a stylized letter N remains unavailing, as explained above. Moreover, because opposer's mark is registered in typed form and can be presented in a variety of displays, the mark very well could be presented in the same form as the word portion of applicant's composite EMPOWER and design mark, i.e., with a larger E and P.

In addition, we note that words tend to dominate in composite marks and are often accorded greater weight. See Kabushiki Kaisha Hattori Tokeiten v. Scutto, 228 USPQ 461, 462 (TTAB 1985); see also Giant Food, Inc. v. Nation's Food Service, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). The word portion of applicant's composite mark clearly predominates in this case, because

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the design element, showing a "plugged-in" laptop, is suggestive of the nature of applicant's power supply system. Thus, the substantially similar sound and appearance of opposer's mark and the word portion of applicant's composite word and design mark, in our view, outweighs the significance of applicant's design element.

In regard to the connotations of the marks, applicant contends that EMPOWER has a dictionary definition while opposer's mark does not and, therefore, the connotations are different. We do not dispute that "empower" has a meaning in the English language¹⁴, but we are not persuaded that general consumers would note the distinction between the words ENPOWER and EMPOWER. The main part of both marks is the root word "power." The prefixes "en" and "em" sound similar since the letters n and m are pronounced similarly. To the extent consumers attribute a particular connotation to opposer's mark, we believe many will perceive it as a phonetic variant of,

¹⁴ **empower** v.t. **1.** to give power or authority to; authorize. **2.** to enable or permit. 434 The Random House College Dictionary (Rev. ed. 1982). Dictionary definitions are fit subjects for judicial notice. See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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and attribute to it the same meaning as, the word "empower."¹⁵

In regard to the strength of the marks, applicant has made of record copies of third-party registrations for phonetic equivalents of both marks, and copies of web pages from the Internet which show use of enpower, empower or phonetic equivalents. The registrations are not evidence that those marks are in use; nor are the copies of web pages probative on the issue of consumers' exposure to the marks therein and ability to distinguish between them. Nonetheless, the registrations and web pages are probative of the fact that power-variant marks in general, and phonetic equivalents of both opposer's and applicant's marks in particular, have "appealed to others as a trademark element" in the field of computer hardware and software and electrical power systems, and that such marks may not be particularly distinctive in these fields. See Bost Bakery, Inc. v. Roland Industries, Inc., 216 USPQ 799, 801 n.6 (TTAB 1982).

Thus, we conclude, in regard to the marks, that they are similar in sound, appearance and connotation, but

¹⁵ We note, in this regard, that opposer's president, Jackson Lan, testified that he chose the ENPOWER mark because it had a connotation remarkably similar to the definition of "empower." (Lan discovery dep. p. 49.)

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that they are not strong and the scope of protection to which opposer's mark is entitled is, therefore, limited.

We consider next, the relatedness of the goods. The record is clear that the goods are not competitive. Moreover, there is no evidence that a manufacturer, wholesaler and retailer of computers and computer products would expand into the field of manufacturing power supply systems for transportation vehicles. The only relationship between the parties' goods is that users of laptop computers, using an appropriate adapter cord, can power their computers by tapping into applicant's power supply system.

Next, we consider the related questions of channels of trade and classes of purchasers for the respective goods. We note that neither opposer's registration nor applicant's application contains restrictions as to channels of trade or classes of purchasers and we must, therefore, consider all normal channels of trade and classes of purchasers for the respective goods.

Opposer's goods, which based on the identification in its pleaded registration include laptop computers, may be sold at wholesale or retail and to average consumers. Opposer's testimony, as to its sales of laptops and the value of the units sold, reveals the average cost per

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laptop is approximately \$2100. While these are not inexpensive items, neither party argues that the purchasers of such items do not encompass all consumers.

In considering applicant's goods, we note that it is well established that we must consider the goods as they are identified in its involved application. See Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 1 USPQ2d 1813 (Fed. Cir. 1987). Accordingly, though the evidence reveals that applicant's power supply systems are presently sold almost exclusively in the airline industry, the application is based on a bona fide intention to use the mark for all the identified goods, i.e., for use in automobiles, vans and boats, among other transportation vehicles. Therefore, applicant's argument that its goods are sold only to purchasers for airlines and airline seat manufacturers is unpersuasive. Even so, we find applicant's system is not the type of item that typically would be sold at retail. Though it might be incorporated in a car, van or boat bought by a general consumer, the system itself is likely to be bought by the manufacturers or dealers of one of these vehicles for installation. Finally, even if we were to consider

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applicant's system as one which would be available at retail to a do-it-yourselfer for aftermarket installation, it is unlikely the system would be sold in retail outlets that sell computers and computer-related goods, as it is a power supply that would be sold in outlets for automotive or boating accessories.

As the record reveals, the availability of applicant's power supply system on airliners has been touted to the general public by Delta Airlines as an incentive to fly on Delta. Moreover, the laptop adapter cords manufactured by applicant's licensees are marketed to laptop owners who may be planning to travel with their computers.

Taking into account all these circumstances, there is an overlap in the classes of purchasers for opposer's goods and users of applicant's power supply system. We do not, however, find more than a theoretical possibility that applicant's goods would be purchased by general consumers at retail.

Next we consider the care that would be exercised by purchasers. The purchase of a laptop computer or, for that matter, even the purchase of a far less expensive

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adapter cord¹⁶ that would allow such a computer to be used with applicant's system, is a purchase made with some degree of care. Apart from the cost of the laptop itself, opposer's advertising reveals that the prospective purchaser of a laptop computer must make numerous choices regarding processor power, amount of memory, size of display, type of battery, etc. Likewise, the purchase of a car adapter cord, or an EMPOWER-compatible adapter cord, requires the purchaser to select the proper cord for the particular laptop brand and model. Opposer, for example, only sells adapters for its own computers and encourages prospective purchasers to bring their laptops into opposer's stores to ensure that the proper match is made between cord and computer. (Kongkeo rebuttal dep. pp. 33-34.) Applicant's goods, which the record reveals are expensive and, as we have already discussed above, are much more likely to be bought by vehicle manufacturers or dealers, also would be purchased with a good deal of care. Even if we consider the possibility of a do-it-yourselfer purchasing applicant's power supply system for aftermarket installation on a personal vehicle such as an automobile

¹⁶ The record reveals that car (i.e., cigarette lighter style) adapter cords may retail for under \$50 and applicant's licensee's adapters may retail for \$100 or less.

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or boat, due to the expense of the product, such a consumer would be likely to act with care.

Thus, we conclude that the parties' respective goods are likely to be purchased with care.¹⁷ Our determination of this *du Pont* factor militates against finding a likelihood of confusion.

There is no evidence of actual confusion of any type. This, however, is not surprising, in view of the rather brief period of contemporaneous use of the parties' marks and the non-competitive nature of the goods. Thus, this factor is not probative in this case.

It is long-settled that our obligation is to determine whether there is a likelihood of confusion, not whether there is a mere theoretical possibility that someone might be confused based on contemporaneous use of the respective marks. See Witco Chemical Co. v. Whitfield Chemical Co., 164 USPQ 43, 44-45 (CCPA 1969);

¹⁷ We are not persuaded otherwise by opposer's argument that applicant's licensees market EMPOWER-branded adapters which might mistakenly be perceived by consumers as adapters for opposer's ENPOWER brand laptops. In essence, opposer argues that consumers will see EMPOWER as indicating the computer with which the cord is compatible, and mistakenly read it as ENPOWER. We disagree. The adapter advertisements by applicant's licensees show the EMPOWER marks used to indicate compatibility with applicant's system. At worst, a prospective cord purchaser might perceive EMPOWER as a brand name for the cord, because the manufacturer would have to separately list the computer with which the cord would be compatible.

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Phoenix Closures Inc. v. Yen Shaing Corp., Ltd., 9 USPQ2d
1891, 1894 (TTAB 1988).

Having considered the entirety of the record and the parties' arguments based thereon, we conclude that any possibility of confusion in these cases is de minimus.

Decision: The oppositions are dismissed.

G. D. Hohein

C. E. Walters

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board