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Mailed: 06 MAY 2003  
Paper No. 9  
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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 Spectrum Control, Inc.

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Serial No. 76/169,361

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Kenneth W. Wargo of Quinn, Buseck, Leemhuis, Toohey &  
Kroto, Inc. for Spectrum Control, Inc.

Michele-Lynn Swain, Trademark Examining Attorney, Law  
Office 116 (Meryl Hershkowitz, Managing Attorney).

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Before Cissel, Seeherman, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On November 22, 2000, Spectrum Control, Inc.  
(applicant) filed an application to register the mark POWER  
SAFE (in typed form) on the Principal Register for goods  
ultimately identified as "computer controlled intelligent  
power distribution units (PDUs) and basic PDUs for both  
alternating current and direct current applications with  
functions of remote control, sequential delivery of power

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to outlets and monitoring of power load, voltage, temperature and other variables" in International Class 9.<sup>1</sup>

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a prior registration for the mark POWERSAFE (in typed form) for "electric batteries" in International Class 9.<sup>2</sup> The examining attorney also refused to register applicant's mark because the identification of goods uses a parenthesis for abbreviation purposes.

When the refusals were made final, this appeal followed.

The examining attorney argues that "[e]xcept for the space in applicant's mark, the marks are the same in sound and appearance." Brief at 2. The examining attorney also found that applicant's PDUs and registrant's goods provide power. In addition, the examining attorney maintains that the goods are complementary because "PDUs may be used to allocate power generated by electric batteries." Brief at 3. Because the examining attorney found that purchasers are likely to believe that POWER SAFE PDUs emanate from the

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<sup>1</sup> Serial No. 76/169,361. The application is based on an allegation of applicant's bona fide intent to use the mark in commerce.

<sup>2</sup> Registration No. 1,465,265, issued November 17, 1987, Affidavits under Section 8 and 15 accepted or acknowledged.

same source as POWERSAFE electric batteries, the examining attorney determined that there would be a likelihood of confusion in this case. Regarding the identification of goods, the examining attorney's position is that, according to TMEP § 1402.12, "the only time parentheses may be used in an identification of goods is when the parentheses merely explain or translate the matter preceding the parenthetical phrase in such a way that it does not affect the clarity of the identification. The parenthesis in applicant's identification is not used for explanation or translation but for abbreviation purposes." Brief at 6.

Applicant argues that the examining attorney "erred by simply discounting the sophistication of the buyers" of its products. Brief at 10. Applicant maintains that its goods are "commercially-sold goods" and there is "not even evidence to show that the same companies might be buying the goods of the applicant and the registrant." Id. Finally, applicant points out that "'power' in connection with PDUs and batteries or related items is not particularly unusual." Brief at 11. Applicant does not discuss the requirement to amend its identification of goods clause.<sup>3</sup>

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<sup>3</sup> Despite applicant's failure to respond, we reverse this requirement. We find that applicant's use of the parenthetical

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first factors we consider in this case are the similarities and dissimilarities of the marks. The marks are POWER SAFE and POWERSAFE, both in typed form. Therefore, the only difference between the marks in this case is the absence of a space in registrant's mark. Obviously, the marks would be pronounced identically and they would have the same meaning. The slight difference in appearance that might be caused by the absence of a space

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expression is helpful, logical, and grammatically correct. It also provides "further information about the goods." TMEP § 1402.12 (3<sup>rd</sup> ed. 2002) (The "power distribution units" are also known as "PDUs").

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would not have any significant impact on their commercial impressions. Stockpot, Inc. v. Stock Pot Restaurant, Inc., 220 USPQ 52, 54 (TTAB 1983), aff'd, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); In re Best Western Family Steak House, Inc., 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"). Because the only difference between these marks is that one contains a space, the virtually identical nature of the marks is a significant factor in our likelihood of confusion analysis. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("Without a doubt the word portions of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant"). Finally, we agree with applicant, who "concedes that the two marks are very similar, and that this factor weighs against registration." Brief at 5.

Next, we look at the goods of applicant and registrant to determine if there is a relationship between them. We

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must consider the goods as they are described in the identification of goods in the application and registration. 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"). The cited registration contains no limitations so we must assume that registrant's electric batteries travel through all normal channels of trade. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"). Therefore, we must assume that the registrant is selling all types of electric batteries.

Furthermore, it is not necessary for the examining attorney to show that the registrant and applicant are competitors.

[G]oods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services.

In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

See also Shell Oil, 25 USPQ2d at 1689 ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"). Moreover, as discussed below, the advertising indicates that the goods are likely to be purchased by the same companies.

Applicant's brochure states that: "To help our customers distribute, control and monitor the power and signals driving their networks and equipment, Spectrum Control has formed the Advanced Systems Group." The examining attorney has included a definition of a battery as a "device that produces electricity to provide power for radios, cars, toys, etc." Both applicant's and registrant's goods are involved in providing power to equipment. Applicant has admitted that its goods can be used in conjunction with electric batteries. "Applicant's

goods act to distribute power which is produced elsewhere, whether at the local electric company, an on-site generator, or even an electric battery." Response dated September 28, 2001 at 2. Thus, PDUs and electric batteries can be used in the same systems. This supports a finding that the goods would be purchased by the same customers. In addition, other evidence indicates that PDUs and batteries are sold by the same companies. See *Mega-Power Power System Catalog* ("Our product offerings include UPS systems, DC rectifier systems, AC front-ends, batteries, and power distribution systems"); *DataCom Power, Inc.* (On-Line Power Power Distribution Units ... We carry a full line of Stationary Batteries"); *Advanced Facilities, Inc.* ("Power Distribution Units (PDU)... Batteries"); *Core Power, Inc.* ("Power Distribution Units (PDU) ... Batteries"). This evidence provides support for the argument that batteries and power distribution systems would be sold to the same purchasers from the same businesses and that the channels of trade would overlap. Therefore, the goods of applicant and registrant are related.

Applicant argues that purchasers of its goods are sophisticated buyers based on the description of its goods and its product information. However, when virtually identical marks are used on complementary and related goods

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such as batteries and PDUs, even sophisticated purchasers would likely be confused. In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999) (“[E]ven careful purchasers are not immune from source confusion”). See also 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”).

While applicant also argues that there is no evidence that applicant’s mark is famous, there is no requirement for an examining attorney to show that the cited mark is famous before likelihood of confusion can be found. See Majestic Distilling, 65 USPQ2d at 1205 (citation omitted) (“Although we have previously held that the fame of a registered mark is relevant to likelihood of confusion, we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark’s not being famous”). Finally, while applicant points to another registration for the mark POW-R-SAFE for an electric tool tester<sup>4</sup> and that the term “power” is not an unusual term for

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<sup>4</sup> Registration No. 886,698.

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the goods of applicant and registrant, these facts do not demonstrate that the cited registered mark is so weak that the scope of protection to be afforded it would not extend to prevent the registration of applicant's mark.

Therefore, after considering all the relevant factors, including the virtually identical nature of the marks and the relatedness of the goods, we conclude that confusion is likely.

Decision: The examining attorney's requirement to amend the identification of goods is reversed. The examining attorney's refusal to register applicant's mark POWER SAFE for the identified goods because of a prior registration for the mark POWERSAFE for electric batteries on the ground that it is likely to cause confusion is affirmed.