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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Alliance Technical Services, Inc.
v.
Alliance Machine Systems International, Inc.

Opposition No. 91159099
to application Serial No. 76381608
filed on March 13, 2002

Eric O. Haugen of Haugen Law Firm for Alliance Technical Services, Inc.

J. Thomas Vitt and Andrew J. Cosgrove of Dorsey & Whitney for Alliance Machine Systems International, Inc.

Before Quinn, Hairston and Kuhlke, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Alliance Machine Systems International, Inc. to register the mark shown below for "material handling products for the paperboard packaging and corrugated industries, namely, folder/gluers, stackers, pre-feeders, loaders, conveyors, and bundle-handlers."[1]

Alliance Technical Services, Inc. opposed registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with applicant's goods, so resembles opposer's previously used mark ALLIANCE for software for use in a variety of applications in the corrugated paper industry, and for repair and maintenance services performed on machines in the corrugated paper industry, as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by each party; stipulated affidavit testimony with related exhibits; a copy of opposer's pending application to register the mark ALLIANCE, and applicant's responses to certain of opposer's requests for admission, all introduced in opposer's notice of reliance; and copies of third-party registrations made of record by way of applicant's notice of reliance. Both parties filed briefs,

[1] Application Serial No. 76381608, filed March 13, 2002, based on allegations of first use anywhere and first use in commerce at least as early as February 2000.

and both were represented by counsel at an oral hearing held before the Board.

The Parties

Opposer is engaged in supplying software for equipment in the corrugated paper industry (90 percent of opposer's revenues). Opposer also is engaged in the repair and maintenance of equipment in the corrugated paper industry (10 percent of opposer's revenues). Opposer's software ranges in price from $5,000 to over $3 million. Daniel P. White, opposer's executive vice president, testified that opposer promotes its goods and services in trade magazines, as well as through appearances at trade shows.

Applicant manufactures and sells machinery used on the finishing side of corrugated box plants; applicant does not sell corrugating machines and is not involved in the corrugating side of the business. Rick Wilkinson, applicant's vice president of sales and marketing, testified that applicant's machinery ranges in price from $30,000 to over $1 million. The goods are promoted in advertisements in trade publications and at trade shows.

Priority of Use

We first turn to the issue of priority. Opposer does not own a registration, but rather is relying upon common law rights.[2] Opposer, as noted above, pleaded rights in the mark ALLIANCE; the notice of opposition did not include reference to other marks that opposer has used, such as ALLIANCE TECHNICAL SERVICES INC. or variations thereof. Nevertheless, it is clear that the parties, at trial, litigated the issues of priority and likelihood of confusion with respect to opposer's marks ALLIANCE as well as ALLIANCE TECHNICAL SERVICES INC. (with or without a design feature). Inasmuch as opposer's rights in the mark ALLIANCE TECHNICAL SERVICES INC. (with or without a design feature) were tried by the consent of the parties, we will treat the mark as if it had been pleaded in the notice of opposition. Fed. R. Civ. P. 15(b). See also TBMP § 507.03(b) (2d ed. rev. 2004).

We find that opposer has established prior common law rights in its marks ALLIANCE *per se*, and ALLIANCE TECHNICAL SERVICES INC. (with or without a design).[3] Mr. White's testimony, coupled with the exhibits, support opposer's priority claim. Although applicant vigorously contests opposer's use of ALLIANCE standing alone, exhibit nos. 2-9 show such use. Mr. White also testified that while opposer

[2] Opposer's application serial no. 76581610 to register the mark ALLIANCE is currently suspended pending a final determination in the present proceeding.
[3] Applicant, in its brief (pp. 8-9), seems willing to concede that opposer has rights in its logo mark.

is disciplined about calling itself by its formal corporate name, customers routinely refer to opposer as "Alliance."

Further, and more specifically, the testimony and evidence establish prior use of these marks in connection with software for the corrugated paper industry, and with repair and maintenance services for the corrugated paper industry.

Likelihood of Confusion

Our 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 of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). "Not all of the factors may be relevant or of equal weight in a given case," and "any one of the factors may control a particular case." In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003), citing In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

After reviewing the record, we conclude that the marketplace realities make confusion unlikely to occur.

Opposer's goods and services and applicant's goods are specifically different and noncompetitive. This factor, coupled with the detailed, lengthy and personal nature of the purchasing process, the high cost of the involved goods, and the sophistication of purchasers, make it unlikely for confusion to occur. Kellogg Co. v. Pack 'em Enterprises Inc., 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) [any single factor may play a dominant role in a likelihood of confusion analysis].

The Marks

In comparing opposer's mark ALLIANCE with applicant's mark ALLIANCE and design, there is no significant difference between the two. The marks are identical in sound and meaning. The only difference between the marks is the design feature in applicant's mark. However, this design feature is clearly subordinate to the literal portion of applicant's mark, and does not serve to sufficiently distinguish the marks in terms of appearance or commercial impression.

When comparing applicant's mark with opposer's mark ALLIANCE TECHNICAL SERVICES INC. (with or without a design), we likewise find that the marks are similar. In comparing the marks, we have not ignored either the "TECHNICAL SERVICES INC." portion of opposer's mark or, when used, the design feature. However, while we have considered the marks in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). With opposer's mark ALLIANCE TECHNICAL SERVICES, INC. (with or without a design), the arbitrary portion "ALLIANCE" dominates the mark. This portion of the mark is most likely to be remembered by purchasers and will be used in calling for opposer's goods and services. And, as shown by the record, opposer's mark is often shortened to just ALLIANCE.

We find that any differences between the marks are outweighed by the similarities. In sum, the parties' marks are similar in sound, appearance, meaning and commercial impression.

The similarities between the marks favor opposer.

Goods and/or Services

Mr. Wilkinson explained the industry in which both parties operate. Corrugated material is durable cardboard used to make boxes, packaging, and displays. Corrugated material is composed of two sheets of cardboard with a fluted wave between the sheets, and this material is made into a structural package. The manufacture of corrugated packaging, according to Mr. Wilkinson, is divided into two parts: 1) the manufacture of corrugated sheets from paper on a corrugated machine, typically called a “corrugator”; and 2) the finishing of the corrugated sheet material by cutting, folding, gluing and printing the material to make a finished product. Simply put, as Mr. Wilkinson explains it, the corrugating side of the business creates the corrugated board, and the finishing side of the business takes the corrugated board and turns it into a box, the finished product. According to Mr. Wilkinson, corrugating plants take paper, put it in a machine called a “corrugator," and the plant makes the board on the corrugator. Once the board is made, it’s die cut into pieces that are moved down to the finishing machines. Mr. Wilkinson states that applicant’s “machines go in front of and behind finishing machines that would die cut, fold and glue these boxes.” (Wilkinson dep., p. 11). Mr. Wilkinson further testified that some manufacturing plants have both corrugators and finishing line equipment, while some plants have just a corragator, and other plants have just finishing line equipment for the corrugated material. Opposer’s software is directed in large part to the corrugating side of the plant, whereas applicant’s machines are used in the finishing side of the plant.

Mr. Wilkinson also testified that the corrugated paper industry has two major segments. The first group, referred to as "integrateds," comprise a few Fortune 500 companies that own forestland, paper mills and corrugated manufacturing plants. These companies include Georgia Pacific, International Paper and Weyerhaeuser. The second group, known as "independents," usually are privately-owned companies that operate one or more corrugated box plants. Unlike the "integrateds," the "independents" are not in the business of making paper to turn into boxes; they simply make boxes.

As shown by the record, opposer sells software for the corrugated paper industry, and supplies aftermarket machine support services. Mr. White testified that "we don't make the machinery, we make the software, we provide the network services that allow the machinery to communicate back and forth." Mr. White went on to state, "in the machinery service side of the business we can and do help our customers keep specific materials handling machines running." (White dep., pp. 12-13). Mr. White estimates that 90 percent of opposer's revenues flow from the sales of its software, while the remaining 10 percent of revenues are from its machinery support services.

With respect to software, opposer installs the software at the factory level for use in machines on the factory floor. Mr. White described the software's application as follows: "I would say manufacturing business management would be the fairest general descriptor, manufacturing business management, not accounting, not payroll, everything else." (White dep., p. 165). Opposer sells a variety of software applications "enabling plants to monitor and control virtually all resources more efficiently." (White dep., ex. no. 7). The applications serve a range of functions, including monitoring corrugator production schedules; providing inventory on a real-time basis; maximizing corrugator productivity while minimizing trim; preparing load tags for finished product; monitoring machines; and scheduling deliveries. (White dep., ex. no. 9).

On the services side, Mr. White testified that opposer has 75-100 customers; most of opposer's customers are repeat customers, and most of the revenues come from the large "integrateds." According to opposer's "Products & Services Summary," opposer "specializes in providing high quality on-site service products to the corrugated industry on Marquip equipment, extending from detailed machinery tune-ups to retrofits, rebuilds, installations and training." (White dep., ex. no. 7). Mr. White testified that opposer also has repaired equipment of other manufacturers, specifically naming four; the evidence suggests, however, that opposer's services are focused on equipment manufactured by Marquip. In this connection, Mr. White testified that 80-90 percent of opposer's services' revenues relate to work on Marquip equipment.

With respect to applicant's goods, Mr. Wilkinson testified that with the exception of its folder gluers, all of applicant's equipment may be characterized as "material handling equipment." Mr. Wilkinson defines such equipment as "equipment that handles stacks of corrugated, delivers them to the machines, takes the individual blanks away from the machine and generally creates a stack to be shipped to the end user." (Wilkinson dep., p. 16). Mr. Wilkinson further testified that 85% of applicant's sales of its material handling machines are to the seven "integrateds;" and approximately 80% of applicant's specialty folder gluers are sold to "independents."

We acknowledge that the parties' goods and opposer's services are sold in the same industry, namely the corrugated paper industry. Nevertheless, there are significant and specific differences between opposer's software and applicant's material handling equipment. The involved goods relate to different aspects of the corrugated paper business. Further, opposer's services, as actually rendered in the field, concentrate on one manufacturer's equipment. And, we might add, opposer's services constitute only 10 percent of opposer's total revenues.

We recognize that applicant's machinery, not unlike most modern manufacturing equipment, uses embedded software for automation purposes. Given the sophistication of the respective software and equipment, however, we do not find this connection to be dispositive of the likelihood of confusion issue.

In sum, opposer's goods and services are specifically different from and noncompetitive with applicant's goods. This factor favors applicant.

Third-Party Use

Applicant contends that opposer's mark is weak based on 1) opposer's relatively modest sales figures and modest promotional expenditures, and 2) the fact that opposer is just one of "dozens" of companies that use the term ALLIANCE.

As part of its evidence relating to this factor, applicant has relied upon exhibits accompanying the affidavit of Andrew Cosgrove, submitted in connection with the parties' stipulation of facts.

The stipulation indicates that it was submitted to provide "a savings of time and expense," and that the affidavit and accompanying exhibits "are properly offered for admission and to be made of record as stipulated trial testimony." The stipulation lastly states that "Opposer does not waive any objections to the Affidavit and its accompanying documents on any other grounds, including relevance, admissibility, and timeliness."

Mr. Cosgrove, in his affidavit, states that he is an attorney with the law firm representing applicant, and that the documents accompanying his affidavit "are printouts that were published on the Internet and were accessed by this Affiant at the Internet address included on the printouts on the date included on the printouts."

Opposer contends that the exhibits are not self-authenticating, but rather are unauthenticated Internet documents. Opposer has moved to strike the Internet exhibits, stating that "such documents may be introduced into evidence through the testimony of a person who can properly authenticate and identify the subject materials" and that the exhibits "are not printed publications, and are not allowed to be made of record by a Notice of Reliance." (Reply Brief, p. 6).

The objection is overruled inasmuch as Mr. Cosgrove, in his affidavit, authenticated the Internet evidence. The evidence consists of excerpts of third-party websites. This Internet evidence, however, is entitled to minimum probative value. There are no corroborating facts regarding the extent of the third-party uses of ALLIANCE. That is to say, the record is devoid of information regarding sales, market share, promotional efforts, and the like under the third-party marks. Thus, we cannot ascertain whether the marks have made an impact in the marketplace, or that customers are even familiar with the uses. See, e.g., Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131 (TTAB 1995).

Applicant more specifically points to two other uses of ALLIANCE by entities in the corrugated paper industry. Mark Duchesne, applicant's president and chief executive officer, testified that he was aware of two third-party uses of ALLIANCE in the industry. He identified Alliance Packaging, a corrugated manufacturer located in the state of Washington that has been using that name since 2001; and Alliance Group, an association of corrugated box manufacturers.

These two third-party uses likewise are entitled to minimal probative value. Again, there is no evidence regarding the extent of these uses or that customers are familiar with them. Standing alone, the existence of these uses does little to impact the distinctiveness of opposer's mark for its goods and services.

Applicant also introduced nineteen third-party registrations for ALLIANCE or ALLIANCE formative marks. The third-party registration evidence is of no value. Firstly, 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 similar marks in the marketplace, and as a result are able to distinguish between the ALLIANCE marks based on slight differences between them. Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and Richardson-Vicks, Inc. v. Franklin Mint Corp., 216 USPQ 989 (TTAB 1982). Secondly, none of the registrations specifically covers goods or services in the corrugated paper industry.

In sum, applicant's evidence hardly establishes that opposer's rights to exclude others from using the term ALLIANCE is, in applicant's words, "necessarily very limited." In our du Pont analysis, this factor is neutral.

Trade Channels

Opposer's goods and applicant's goods travel in similar trade channels, albeit specifically distinct. While both parties operate in the corrugated paper industry, the goods move in distinct trade channels within the industry. Admittedly, both parties advertise in the same trade publications, and attend the same trade shows. However, with respect to the "integrateds," to whom sales comprise the majority of revenues flowing from sales of the parties' goods, information technology (IT) professionals purchase opposer's computer software, whereas engineers buy applicant's equipment. See Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d

1388, 1391 (Fed. Cir. 1992) ["[a]lthough the two parties conduct business not only in the same fields but also with some of the same companies, the mere purchase of the goods and services of both parties by the same institution does not, by itself, establish similarity of trade channels or overlap of customers."].

As for the "independents," the parties' goods are bought by the plant owners. Thus, there would appear to be an overlap in this situation. Further, with respect to opposer's services, there appears to be an overlap in both the "integrateds" (where engineers would make the purchasing decision) and the "independents" (where plant owners make the purchasing decision).

This factor cuts both ways depending on the specific situation.

Conditions of Sale and Classes of Purchasers

Applicant has expended significant effort to show that the involved goods are expensive and that the purchasing process, involving sophisticated purchasers, is lengthy, detailed and highly personal in nature.

As will be apparent from the discussion below, this du Pont factor weighs heavily in applicant's favor. See In re Shell Oil, 992 F.2d 1206, 26 USPQ2d 1687, 1688 [the various du Pont factors "may play more or less weighty roles in any particular determination"]. "Indeed, any one of the factors may control a particular case." In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997), citing In re du Pont, 177 USPQ at 567. Simply put, the marketplace realities make confusion unlikely to occur.

Mr. White testified that opposer's software could range in price from $5,000 to over $3 million for a substantial implementation. As in the case of applicant's sales, opposer engages in face-to-face meetings, and opposer routinely makes site visits to the prospective customers' plants. The software sales require technical analysis and customization efforts with the customer's information technology department. As Mr. White stated, "Typically you're dealing with the IT or information technology systems department at a corporate level." (White dep., p. 167). The sales process may take as little as thirty days, or as long as a few months: "So I would say never less than 30 days, typically months, and I think a year is the extreme at the other end, and then you've got those who you're not entirely certain are ever going to buy." (White dep., p. 172).

Mr. Wilkinson explained that applicant sells large, expensive and sophisticated material handling machinery used in the finishing side of a corrugated box plant. Applicant sells specialty folder gluers ($600,000-$1 million); load formers ($40,000); automatic pre-feeders ($80,000-$200,000);

stackers ($300,000-$450,000); bundle breakers ($60,000-$80,000); and inverters and rotators ($30,000).

As noted earlier, 85 percent of applicant's sales are made to the "integrateds." According to Mr. Wilkinson, applicant stays in direct contact with the "integrateds" on a weekly basis; these regular contacts increase if there is a project under consideration. For the "integrateds," the sales process ranges from around three months to three years. The process includes in-person visits to the plant to meet with the customer, resulting in a detailed written sales proposal with technical specifications and drawings. The sales process with "independents" usually takes a shorter period of time to complete, but the process still involves face-to-face meetings and detailed written proposals. That sales process may even be more personal in nature inasmuch as it involves a major investment by the plant owner that may transform the "independent's" business.

Mr. Wilkinson confirms that applicant, in selling its goods, deals with plant engineers and maintenance supervisors. The "integrateds" generally have an experienced team that deals with applicant in negotiating the various terms of the sale. In selling goods to "independents," applicant often deals directly with the owner of the company. In either event, Mr. Wilkinson maintains that customers and their purchasing personnel are sophisticated and knowledgeable about the corrugated equipment that is being purchased.

As previously noted, while the parties conduct business in the same industry with some of the same companies, the mere purchase of the goods and/or services of both parties by the same institution does not, by itself, establish similarity of trade channels or overlap of customers. "The likelihood of confusion must be shown to exist not in a purchasing *institution*, but in a 'customer or purchaser.'" Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1391 (emphasis in original).

Insofar as the "integrateds" are concerned, opposer, in selling its software, deals with the information technology department. Applicant, in negotiating with the "integrateds," deals with a purchasing team that generally includes a director of corporate purchasing who negotiates commercial aspects of the sale, a director of manufacturing or engineering services who handles the technical details of the purchase, as well as plant managers and engineers. Thus, there is no overlap.

With respect to the "independents," both parties deal with the owners of the companies. The owners may be a second or third generation family member who has owned and operated a corrugated box plant. In each instance, the purchasers are knowledgeable about the industry. After a lengthy, personal sales process, these purchasers know with whom they are dealing.

Insofar as opposer's services are concerned, in rendering its services to the "integrateds," opposer's contacts include plant engineers and plant maintenance supervisors. With respect to the "independents," opposer deals directly with the owners. Thus, there is an overlap here with applicant's customers. The record shows, however, that repair and maintenance services constitute only about 10 percent of opposer's business. Thus, any overlap is de minimis. In any event, these plant owners are very sophisticated customers.

Given the detailed, lengthy and personal nature of the purchasing process, and the high cost of the involved goods, as well as the sophistication of the purchasers, confusion is not likely to occur. Mr. White essentially admitted as much when he testified, in pertinent part, as follows (dep. pp. 175-79):

> Do you think that it's even remotely possible that somebody could go through the [purchasing] process you've just described thinking that you're not Alliance Technical but, instead, are Alliance Machine Systems?
>
> If--your--your question assumes something that actually is the problem. **In answering your question, no.** But the real problem is could I conceivably lose the opportunity to ever get an opportunity to make the initial contact with that customer because they assume

that somehow I'm affiliated with not just a competitor but that there is some relationship and they can't or won't buy, and, again, it's anecdotal. I don't have a paper trail, but a--a potential client in Germany, just to illustrate, we were trying to set up a meeting with someone who is an original equipment manufacturer in Germany. It's just another supplier. He's not even a converter, and he would be in a position to create opportunity for us as sort of an add-on, our systems would complement his systems, and we were trying to set up the meeting, his initial reaction or question is why on earth would I take a meeting with a competitor, and his assumption was that somehow we were related to Alliance Machine Systems International, who competes with his concern.

Now, obviously, if I'm relaying all this--all of this to you, we had this conversation with this client who took the meeting.

I don't know how many meetings, to be frank, that I haven't been invited to because people based on misinformation or confusion never gave us the opportunity.

The fairest answer to a fair question is could anyone--**it's virtually impossible that if we got to a point in the process where we were here that anyone would be confused.** We have some anecdotal, internal hearsay. I completely respect that, honest face or not, if I can't prove it and--and, obviously, there's got to be a standard for that, it's just what I'm saying...It's almost a suffocating association because of the disparity in size between the two entities, and--and given that there never was anyone but us as Alliance preceding their use of the name, the assumption for the longest time, from 2000--and I don't even want to suggest that we're past it because we still have these episodes that would suggest some kind of confusion at some level. There is the assumption at Weyerhaeuser, of all places, and any sane person at Weyerhaeuser would know us as separate entities. But the question was casual, was what is the association? Did they buy you? Did you buy them? And it makes the smaller entity the more nervous because you sort of disappear in all the noise and confusion of this.

So our reality is that we won't get those opportunities. You know, can I--do I have paper trails like I do with the misdirected payments? No. I mean, I'm not going to waste anyone's time saying I can prove something that I can only relate based on anecdotal conversations, but the issue for me is getting that opportunity...

So I would acknowledge it's unlikely once we get to a certain point in the sales process that there could be confusion. Our concern is in what may or may not be happening when they're coming up with that short list of vendors to invite, and I've got too many instances where I found out after the fact that assumptions were made, that I'm not going to exclusively attribute to your client's use of Alliance, but I know of instances where there were near misses, and I can only know about those near misses because someone says so-and-so thought there was some relationship between your two companies or what have you.

So it isn't even necessarily our competitors. It's such a small group of suppliers that the fact that two of us would bother to have the same name implies because it's such--if our customer base were 20 million instead of --instead of 2,000, and it's even less than that when you start lumping those

> plants that are controlled by a single buying entity...
>
> But that would be the fairest--thank you for allowing me the answer because it was lengthy, but the concern of the problem as I perceive it is before we get to the point where there's a lot of contact.
> (emphasis added)

Mr. White further testified (pp. 231-232):

> Are you aware of any evidence of somebody buying one of [applicant's machines] or any of these other pieces of capital equipment thinking that [applicant] was [opposer]?
>
> I'm not aware, no.
>
> Would you agree with me that's pretty unlikely?
>
> I would grant you that.
>
> What I'm looking for is whether there's any evidence that you're aware of a customer or potential customer seeing [applicant's] logo on a machine and then being confused by that use and thinking there's an affiliation between the two companies?
>
> Well, depending on their visual acuity, and I have--I'm nearsighted severely—
>
> I'm not asking for speculation. I'm asking for a real life example if you're aware of that ever happening?
>
> Oh, my--no, I'm not aware of it ever happening.

As shown by the above testimony, Mr. White essentially concedes that in view of the lengthy negotiating process leading up to a sale, prospective customers are not likely to be confused as to source. Thus, at least at the point of purchase after a lengthy buying process, Mr. White recognizes that confusion is not likely to occur among purchasers. See Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank, 842 F.2d 1270, 6 USPQ2d 1305, 1308 (Fed. Cir. 1988); and Bongrain International Corp. v. Delice de France Inc., 811 F.2d 1479, 1 USPQ2d 1775 (Fed. Cir. 1987) [Businessmen in the marketplace are in a better position to know the real life situation than bureaucrats or judges.].

We fully agree with Mr. White's assessment. That is to say, given the detailed, lengthy and personal nature of the sales process, and the high cost of the involved goods, as well as the sophistication of the purchasers, confusion is not likely to occur. Sales of the parties' specifically different and noncompetitive goods occur only after long-term negotiations, direct communications and on-going contacts between the seller and the sophisticated buyer. See Continental Plastic Containers Inc. v. Owens Brockway Plastic Products, Inc., 141 F.3d 1073, 46 USPQ2d 1277, 1282 (Fed. Cir. 1998) ["[T]he wholesale purchasers may be characterized as sophisticated buyers because...sales to these parties are likely to be the culmination of long-term negotiations, direct communications between the parties and ongoing contact...These purchasers are very unlikely to be confused over the source of the bottles.”]. See also Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1388; Dynamics Research Corp. v. Langenau Mfg. Co., 704 F.2d 1575, 217 USPQ 649 (Fed. Cir. 1983); and Hewlett-Packard Co. v. Human Performance Measurement, Inc., 23 USPQ2d 1390 (TTAB 1991).

On the other hand, Mr. White is concerned about what he perceives to be initial confusion. (White dep., pp. 179). Many courts have recognized the initial interest confusion theory, even though no actual sale is finally completed as a result of the confusion, as a form of likelihood of confusion which is actionable. See HRL Associates, Inc. v. Weiss Associates, Inc., 12 USPQ2d 1819 (TTAB 1989), *aff’d on other grounds*, 902 F.2d 1546, 14 USPQ 2d 1840 (Fed. Cir. 1990) [Board found that the likelihood of initial interest, pre-sale confusion overcame the sophisticated purchaser defense; on appeal, the Federal Circuit expressly avoided reaching the issue of initial interest confusion]. See generally J. T. McCarthy, <u>McCarthy on Trademarks and Unfair Competition</u>, § 23:6 (4th ed. 2004). However, as is the case in any inter partes proceeding involving likelihood of confusion, the plaintiff has the burden of proof to show, by a preponderance of the evidence, that it is entitled to prevail on its claim. Initial interest confusion, even when the marks are similar, will not be assumed, but rather must be proven by the evidence. The problem with opposer's theory, however, is that the record falls short of proving initial interest confusion. Mr. White's testimony is telling on this point (p. 180):

> Are you aware, Mr. White, of a single incident in the United States where you didn't get an opportunity to bid for a software project because of this issue with Alliance Machine?
>
> I, myself, at the moment am not aware of that specific consequence being the result of what I just described to you.

As readily conceded by Mr. White, his theory is supported not by probative evidence that has been introduced into the record, but rather by mere anecdotal statements. The claim of initial interest confusion is too speculative on which to base a finding of likelihood of confusion in this case. At most, the record in support of initial interest confusion is de minimis and weak.

In sum, the record shows that when selling their respective goods to the large "integrateds," opposer and applicant generally are dealing with different purchasing agents of the same business: opposer negotiates with information technology professionals while applicant deals with engineers. We recognize that when opposer is selling its services to the "integrateds," it is likely to be dealing with engineers as well. And, when the parties are selling to the "independents," they are likely to be dealing with the same purchasing agent, namely the owner of the plant. As shown by the evidence, however, any overlap involves only a de minimis number of individuals. Moreover, these purchasers are very sophisticated and, after a lengthy buying process, they certainly know with whom they are dealing. "Where the purchasers are the same, their sophistication is important and often dispositive because '[s]ophisticated consumers may be expected to exercise greater care.'" Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1392, citing Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482, 212 USPQ 246, 252 (1st Cir. 1981).

The conditions of expensive sales and the sophistication of purchasers is a du Pont factor that weighs heavily in applicant's favor. Further, as noted earlier, the parties' goods are specifically different and noncompetitive. "There is always less likelihood of confusion where goods are expensive and purchased after careful consideration." Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1392, citing Astra Pharmaceutical Products v. Beckman Instruments, 718 F.2d 1201, 220 USPQ 786, 790 (1st Cir. 1983). Indeed, this factor principally controls the result in the present case. In re Dixie Restaurants Inc., 41 USPQ2d at 1533. See Dynamics Research Corp. v. Langenau Mfg. Co., 217 USPQ at

649 [Court affirmed conclusion that because the marks are used on goods that are quite different and sold to different, discriminating customers, there is no likelihood of confusion even though both parties used the identical mark DRC.].

Actual Confusion

Opposer, in connection with this factor, has introduced evidence that it characterizes as "substantial." (Brief, p. 23). Opposer points to "misdirected payments, attempts to put charges through on credit cards believed to be associated with the wrong party, misdirected inquiries based upon materials affixed to machines sold by Applicant and serviced by Opposer, and the like." Id. Opposer claims that it never experienced, during a ten-year period, any confusion-based problems until applicant began using its ALLIANCE mark. As asserted by opposer, a showing of actual confusion is highly probative of a likelihood of confusion. In re Majestic Drilling Co., 65 USPQ2d at 1205.

Applicant claims that over a period of five years of contemporaneous use, "there has not been one example of real, relevant trademark confusion." (Brief, p. 18). Applicant dismisses opposer's evidence as comprising "a few isolated instances of misdirected payments, almost all by the large integrated companies, and most occurring several years ago, shortly after [applicant's] name change."

(Brief, pp. 18-19). Applicant further criticizes opposer's evidence on the grounds that three of the purported instances of actual confusion involve foreign entities; that the documents in support of opposer's claim constitute inadmissible hearsay; and that the evidence falls short of showing actual trademark confusion. Applicant further contends that, to the extent opposer's evidence shows actual confusion, the confusion is de minimis.

Although we have considered all of the purported instances of actual confusion, the three involving foreign entities are entitled to less probative weight than the others. We say this after taking into account differences in language, and the significant point that the likelihood of confusion analysis centers on domestic customers.

As to applicant's hearsay objection, hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Courts have responded to the hearsay objection in varying ways. See generally, J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, § 23:15 (4^{th} ed. 2004).

We have not considered Mr. White's testimony and relevant exhibits for the truth of the matter asserted. We have accepted the testimony and evidence to show, however, that opposer received misdirected payments and inquiries that were meant for applicant. Thus, we deem the testimony and evidence to be admissible.

As to the probative value of the testimony and evidence, Mr. White indicated that he did not know the identities of the specific persons making the mistakes, or the reason why the persons made the mistakes. In the absence of such corroborating evidence about these misdirected payments and inquiries, we are reluctant to place significant weight on this evidence. Had the specific individuals who were purportedly confused been identified and made available for cross-examination, they could have explained their reasons for their misdirected communications. While Mr. White testified, not surprisingly, that the reason for the misdirected communications was the similarity between the marks and the goods and/or services sold thereunder, we would prefer to hear it from the individuals themselves. See Toys "R" Us, Inc. v. Lamps R Us, 219 USPQ 340 (TTAB 1983) [While sales clerk's testimony is not excluded as hearsay, the evidence has little weight if there is no evidence to indicate whether "the reason for the question as to affiliation was the result of the similarity of the marks."].

In sum, we have accorded only minimal weight to opposer's evidence on this factor. We also agree with applicant that such occurrences are so few in number, over a period of five years of contemporaneous use, that they are de minimis.

This factor is neutral.

Conclusion

Based on the record before us, we see opposer's likelihood of confusion claim as amounting to only a speculative, theoretical possibility. Language by our primary reviewing court is helpful in resolving the likelihood of confusion controversy in this case:

> We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1391, *citing* Witco Chemical Co. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

We have carefully considered all of the evidence pertaining to the relevant duPont factors, as well as all of the parties' arguments with respect thereto (including any evidence and arguments not specifically discussed in this opinion), and we conclude that opposer has not proved its Section 2(d) claim of likelihood of confusion, as based on its common law rights.

Decision: The opposition is dismissed.