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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Connect, Inc.

Serial No. 75/619,820
Serial No. 75/695,625
Serial No. 75/695,626
Serial No. 75/695,630

Clyde R. Christofferson for Connect, Inc.

Michael Webster, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

Before Simms, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

The above applications have been filed by Connect, Inc. to register the following marks:

POWERNET

for "high speed computer hardware communication servers and computer network device interoperability software for use in integrating multiple and incompatible asynchronous wireless client computer networks"[1] in Class 9.

[1] Serial No. 75/619,820; filed January 12, 1999, alleging dates of first use and first use in commerce on May 15, 1997.

POWERNET TWINCLIENT

for "Computer software for wireless data terminals for use in providing high speed interoperability between servers and both thin and thick clients"[2] in Class 9.

POWERNET OPENAIR

for "high speed computer hardware communication servers and wireless computer network device interoperability software for use in providing interoperable wireless computer network services"[3] in Class 9.

POWERNET ENTERPRISE

for "priority management computer software for use in managing the performance of data with different class of service requirements on a computer network"[4] in Class 9.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act in each application on the ground that applicant's marks, when used in connection with applicant's goods, so resemble the mark **POWERNET** shown in Registration No. 1,877,456 for "computer software programs for use with uninterruptible power supplies (UPSs) for UPS monitoring

[2] Serial No. 75/695,625; filed April 30, 1999, alleging dates of first use and first use in commerce on January 15, 1999.
[3] Serial No. 75/695,626; filed April 30, 1999, alleging dates of first use and first use in commerce on April 15, 1999.
[4] Serial No. 75/695,630 filed April 30, 1999, alleging a bona fide intention to use the mark in commerce; the word ENTERPRISE has been disclaimed.

and unattended shutdown of network operating systems" as to be likely to cause confusion.[5]

When the refusal in each case was made final, applicant appealed. Briefs have been filed and an oral hearing was held. Because the issues in these four applications are substantially the same, the appeals have been consolidated and are being treated in a single decision.

In any likelihood of confusion analysis, we look to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand and the evidence of record, including the similarity of the marks and the relatedness of the goods or services.

Applicant's mark POWERNET and registrant's mark POWERNET are identical in sound and appearance. The meaning of POWERNET may differ somewhat in relation to the respective goods, POWERNET in registrant's mark suggesting electrical support to a network and applicant's POWERNET mark suggesting the strength of the network. However, these differences in meaning are subtle, and not likely to be readily perceived or recalled by purchasers in a marketing environment. Thus, we find that the similarities in the two terms far outweigh any possible differences in their meaning.

[5] Issued February 7, 1995; Section 8 and 15 affidavit accepted and acknowledged, respectively.

Moreover, although POWERNET is suggestive of the respective goods, there is no evidence that the term is commonly used or registered for such goods, or any other evidence in the record to suggest that POWERNET should be entitled only to a limited scope of protection.

Registrant's POWERNET mark is fully encompassed by applicant's other marks, POWERNET TWINCLIENT, POWERNET ENTERPRISE and POWERNET OPENAIR. The additional words in those marks, TWINCLIENT, ENTERPRISE and OPENAIR, do not substantially affect the overall commercial impressions the marks convey, particularly in view of the suggestive nature of those words in relation to the identified goods. The term TWINCLIENT suggests the type of computer configuration, the term OPENAIR suggests the type of transmission, and the disclaimed word ENTERPRISE is at least suggestive of the type of network.[6] Therefore, each of applicant's marks, when considered in relation to the mark POWERNET alone, is more likely to suggest a product related to

[6] The identification of goods for the POWERNET TWINCLIENT mark states that applicant provides software for use "between...both thin and thick clients." A "thin client" is defined as "a desktop computer that downloads all applications from the network server and obtains all of its data from and stores all changes back to the server" and a thick or "fat client" is "[a] client machine in a client/server environment that performs most or all of the application processing with little or none performed in the server." *The Computer Glossary* (Eighth Edition 1998). The word "enterprise" suggests, for example, that applicant's network includes different types of networks and computer systems from different vendors. *Id.* The term "open air transmission" is defined in the *Data Telecommunications Dictionary* (1999) as "[a] type of transmission.... Radio, shortwave, and microwave transmissions are primarily open air systems."

registrant's POWERNET software rather than a different product and source therefor.

Turning to the goods, the Examining Attorney contends that applicant's and registrant's goods are related based on the fact that registrant's UPS software is used in connection with applicant's hardware communications servers and software products. The Examining Attorney argues that both applicant's and registrant's software products are used with communication servers in a computer network and that a computer network encompasses wireless networks. The Examining Attorney has submitted the following computer dictionary definition of UPS describing the function and purpose of a UPS device as:

> Backup power used when the electrical power fails or drops to an unacceptable voltage level. A UPS system can be connected to a file server so that, in the event of a problem, all network users can be alerted to save files and shut down immediately.[7]

As support for his position that the goods are related, the Examining Attorney has made of record six use-based third-party registrations and one third-party application covering both power supplies or uninterruptible power supplies for computers, on the one hand, and communications servers and software, including

[7] *The Computer Desktop Encyclopedia* (1996).

client/server software, on the other.[8] In arguing that the respective goods are likely to be used and purchased by the same parties, the Examining Attorney notes that there are no restrictions in the respective identifications of goods as to markets or purchasers and points to the statement in the second of two declarations of applicant's CEO, James F. Christofferson, that "both products may be purchased by the same ultimate consumer." The Examining Attorney maintains that despite the fact that respective goods perform different functions, the same person, such as a network administrator, will purchase both products or will influence purchasing decisions.

Applicant, on the other hand, attempts to distinguish the markets or fields for the respective goods as well as the purchasers for those goods. Based on the two declarations of Mr. Christofferson, applicant argues that the products, while both involving computer software and some connection to computer networks, are unrelated in that they are used in different ways in different fields "having nothing to do with one another apart from a common connection to the general field of computers." (Brief, p.2). Applicant contends that while registrant's goods

[8] The remaining seven third-party applications submitted by the Examining Attorney are not based on use, but rather on an intention to use the mark, and are therefore of little probative value. The Examining Attorney's printouts from the two third-party websites are not particularly useful because it is not clear from either web page that any computer products are being offered.

are "used in the field of power management to computer networks," applicant's products "[are] in the field of interoperability of devices serving wireless computer networks." (Brief, p.6). Applicant maintains that the fact that both products "have some connection to computer networks," does not in itself establish a relationship whereby relevant persons would be confused.

Applicant further argues that "there is not a shred of evidence that those who would be involved in the purchase of applicant's products would also be involved in the purchase of registrant's [products]." (Brief, p.6). It is applicant's contention that the Examining Attorney has failed to identify "'relevant persons' who would be confused by the two marks." (Reply brief p.2). According to applicant, the purchasing of uninterruptible power supplies would fall to those responsible for facilities management whereas "the customers with whom [applicant does] business typically have purchased or are about to purchase handheld bar code scanners to be used in keeping track of inventory and the like." (Decl. January 31, 2000, p.1). Relying on Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992), applicant argues that the fact that both products "may be purchased by the same ultimate consumers" is not sufficient to identify a "relevant person" within the meaning of that case since the "ultimate consumers" are companies, not individuals

within the companies. Applicant further contends that the sophistication of the purchasers of its products "is evident" (brief p. 6) and that there is no evidence that the "ordinary user" of computers on a network would have occasion to knowingly use these products much less have more than a de minimis influence on purchasing decisions for those products.

Where the marks are identical, or nearly so, as in this case, it is only necessary that there be a viable relationship between the goods in order to support a holding of likelihood of confusion. In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983). There is at least a viable relationship between the goods in these cases.

First, it is necessary to understand the nature of registrant's software program and the importance of its role in network operations and stability. Registrant's software program is used with uninterruptible power supplies (UPSs) for UPS monitoring and unattended shutdown of network operating systems. The UPS device is described in the dictionary definition supplied by the Examining Attorney, and to further assist our understanding of applicant's software, we take judicial notice of the following additional dictionary references. To begin with, as explained in *Random House Webster's Computer and Internet*

Dictionary,[9] the "power supply," that is, "the component that supplies power to a computer," is usually provided through a standard electrical outlet. Since not all power supplies "do an adequate voltage-regulation job,...a computer is always susceptible to large voltage fluctuations." *Id.* For example, power surges, blackouts or brownouts may cause damage to the server and may cause unsaved data to be corrupted or irretrievably lost. See *Microsoft Computer Dictionary Fourth Edition* (1999). In order to prevent such damage, an uninterruptible power supply (UPS) device is connected between a computer and the power supply to "ensure[] that electrical flow to the computer is not interrupted." *Id.* As further explained, UPS devices

> ...are equipped with a battery and a loss-of-power sensor; if the sensor detects a loss of power, it switches over to the battery so that the user has time to save his or her work and shut off the computer.

It is noted, as indicated in *Random House Webster's Computer & Internet Dictionary*, supra, that many UPSs "now offer a software component that [enables the user] to automate backup and shutdown procedures in case there is a power failure while [the user] is away from the computer." This is the type of software registrant provides under its POWERNET mark.

[9] Third Edition, 1999.

There is no question that there are specific differences in the respective products in this case. They do not have the same function and they are not used for the same purpose.[10] However, the question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to be confused as to the source of the goods. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods of the applicant and registrant be similar or competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Notwithstanding the differences in these products, applicant's communications servers and software, on the one hand, and registrant’s UPS software, on the other, are related in the sense that the UPS software would be an important if not an indispensable accessory for applicant's hardware server system

[10] However, contrary to applicant's apparent contention, the terminology "computer network" retains its ordinary meaning in the context of either applicant's or registrant's goods.

and associated software used in running wireless communications. In addition, the third-party registrations and third-party application made of record by the Examining Attorney, while not evidence of use of the marks therein, suggest that applicant's and registrant's products are of a type that would emanate from the same source. See, e.g., In re Albert Trostel & Sons Co., supra at 1785-1786; and In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988).

Applicant contends that the markets for the respective products are different. However, there is no restriction in registrant's identification which would limit registrant's sale of its UPS software to any particular market or field. In fact, it would seem to be a matter of common sense for any company to use some form of UPS device to ensure the stability and efficient performance of its computer system, regardless of the particular field in which that system is used.

Furthermore, the purchasers for applicant's and registrant's products would be the same. It is reasonable to assume that the same individuals, that is, a network manager or administrator or consultant or some other computer specialist in a company, would make the purchasing decisions concerning both products. There is no limitation in registrant's identification of goods, and nothing inherent in the nature or function of its goods which would operate to limit the particular purchasers for registrant's

UPS software to purchasers other than those who would purchase applicant's goods. Furthermore, although applicant denies that the respective purchasers are the same, applicant has failed to identify any person or department within its customers' organizations who would be responsible for purchasing applicant's system, and has not explained why such person would not also purchase power supply software for that system from registrant. Moreover, even if the actual purchasers for the respective products are not the same, the users of applicant's network, not the "ordinary user" described by applicant, but those responsible for the management or maintenance of the system, would be likely to influence the decision to purchase such goods in the future.

Finally, we note that although no specific evidence on this point has been submitted, it is reasonable to assume that the overlapping customers for, or users of, applicant's and registrant's goods would be relatively sophisticated and knowledgeable about those products. However, even such persons would be susceptible to source confusion, particularly under circumstances where, as here, the goods are related and are sold under virtually identical or substantially similar marks. See In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999).

To the extent that we have any doubt on the issue of likelihood of confusion, it is settled that such doubt must be

resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register in each case is affirmed.