

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
January 25, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Solutia, Inc.

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Serial Nos. 77959894 and 77960071¹

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John E. McKie of Ladas & Parry LLP for Solutia, Inc.

Renee Servance, Senior Trademark Attorney, Law Office 116 (Michael W. Baird,
Managing Attorney).

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Before Seeherman, Greenbaum and Masiello, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Solutia, Inc. has appealed from the final refusal of the trademark examining
attorney to register FLEXVUE, in standard characters, and



for goods ultimately identified in each application as:

¹ On March 28, 2012, the Board granted the examining attorney's motion (filed March 20, 2012) to consolidate the two cases for purposes of this appeal. Accordingly, our decision addresses the appeals in both applications.

Functional thin plastic films for sale to manufacturers of photovoltaic modules suitable for use in cleanroom environments, for use as a substrate component of photovoltaic modules onto which semiconductor material coating is applied, with the coated component used in the manufacture of thin film photovoltaic modules; Functional thin plastic films coated with transparent conductive oxide suitable for use in cleanroom environments and sold to original equipment manufacturers for use in thin film plastic photovoltaic modules; Functional transparent conductive coated thin plastic film suitable for use in cleanroom environments and sold to original equipment manufacturers for use as a component within the sensors of touch screen displays; Functional transparent conductive coated thin plastic films suitable for use in cleanroom environments and sold to original equipment manufacturers for use as components in the manufacture of e-readers and other electronic ink and electronic paper displays, all of the foregoing not for use in glass or metal based substrate photovoltaic cells, and all not for labeling, decorative or nameplate uses

in International Class 17.²

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark FLEX-VU (in standard characters) for "adhesive-backed films for labels, decals, nameplates, and decorative trim" in International Class 16,³ as to be likely to cause confusion.

² Serial Nos. 77959894 and 77960071, respectively, both filed on March 16, 2010, based on Section 1(b) of the Trademark Act. The latter application includes a disclaimer of FILMS, and the following description of the mark: "The mark consists of the word 'FLEXVUE' with the letter 'X' presented in larger lettering. The wording 'FILMS WITH TECHNOLOGY INSIGHT' appears under 'FLEXVUE'".

³ Registration No. 1683774, issued April 21, 1992, renewed.

We reverse the refusals of registration.

Before turning to the substantive ground for refusal, we note that in both appeals the examining attorney has objected to Exhibit A, consisting of a one-page printout from a website, www2.dupont.com, for the DuPont Company, which applicant submitted with its appeal briefs.⁴ Trademark Rule 2.142(d) normally precludes the introduction of additional evidence with an appeal brief. However, in this case, the examining attorney previously had made of record two pages from the same website. In these circumstances, because the examining attorney had the opportunity to review the entire website at the time she submitted the excerpts, the Board will treat the additional webpage as part of the record. *See* TBMP § 1208.01 for the analogous situation involving the submission of excerpts of articles from publications; *see also In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 820 (Fed. Cir. 1986), in which the Court treated as part of the record entire articles that were submitted with the applicant's brief because the examining attorney had submitted excerpts of the articles during examination.

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

⁴ For each appeal, applicant submitted both an electronically filed copy of the appeal brief and a printed, mailed copy. It is not necessary to mail a second copy of a brief, and doing so can cause confusion for the Board and the examining attorney. The preferable procedure is to file a single copy of a brief electronically through the Board's ESTTA system. Further, Exhibit A to the printed copy of the brief in Serial No. 77959894 includes as an attachment a copy of an appeal brief filed in an unrelated *ex parte* proceeding. The examining attorney has objected to the unrelated material as untimely, and applicant asserts that it did not include this material in its brief. Whether applicant included this material inadvertently, or the Office mistakenly associated it with applicant's brief, it is clear that it does not belong with applicant's brief and therefore we have not considered the material.

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likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the factor of the similarity or dissimilarity of the goods. We base our evaluation on the goods as they are identified in the cited registration and the subject applications. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also In re Total Quality Group Inc.*, 51 USPQ 1474, 1476 (TTAB 1999).

Registrant's goods are identified as "adhesive-backed films for labels, decals, nameplates and decorative trim." Applicant produces functional thin plastic films for use as a component of photovoltaic (PV) products, touch screen displays and electronic ink/paper displays. In the December 14, 2010 Response to Office Action, applicant explains that its goods:

are highly specialized and embody sophisticated technology. Photovoltaic modules are solar panels, e.g., packaged interconnected assemblies of solar cells used to generate and supply electricity in commercial and residential applications. Touch screens are electronic visual displays that can detect the presence and location of a touch within the display area. Electronic paper and electronic ink are electronic displays that mimic the appearance of ordinary ink on paper, for example the kind of display found in e-readers. ... Applicant's goods are used to make sophisticated electric/electronic devices: solar panels and electronic displays with specialized characteristics, requiring exacting specifications for proper interaction with other components in a demanding technical environment. Components in electrical and electronic applications have to prevent improper

interaction between the other components in the view screen, or the photovoltaic module, for example.

In the March 25, 2011 Request for Reconsideration, applicant further explains that its goods “feature specialized contaminant-protective, antistatic, electrically conductive or non-conductive properties, and/or light manipulation properties. Applicant’s goods are sold directly to manufacturers, OEMs, who utilize the Applicant’s goods, specifically for the properties they embody, in the manufacture of an end product.”

In an effort to show that the goods are related, the examining attorney made of record screenshots from third-party websites showing various types of film. The most probative examples are from the Dunmore Corporation, the Lamart Corporation and the DuPont Company: The Dunmore website indicates that Dunmore offers a wide variety of film products, including thin plastic films used in the PV industry, and printable films used for labels, decals and tags (www.dunmore.com); the Lamart website lists the custom and standard products it provides, including printable films and laminates with various uses, such as label stock and printing, and thin film solar PV films and laminates (www.lamartcorp.com); and the DuPont website indicates it produces films for PV modules, as well as “polyester film for packaging converters and label manufacturers” and “anti-counterfeiting films and labels” (www.dupont.com).⁵

⁵ While we accept applicant’s statement that DuPont is a large company that manufactures many items in many countries under many different marks, the nature of the company reduces, but does not eliminate, the probative value of this particular piece of evidence.

The examining attorney also submitted an article from the on-line publication, PFFC (“Paper, Film & Foil Converter”), which discusses registrant’s PV activities, including the production of thin film PV products for manufacturers who use PV laminates for renewable energy platforms:

As the photovoltaic industry continues to ramp up technologies to harness the power of the sun, FLEXcon has dedicated full-time resources to meet the increasing demands from solar module and encapsulant producers who require FLEXcon’s photovoltaic backsheets protective laminates for their renewable energy platforms. (www.pffc-online.com).

Although the third-party websites and the above-noted article suggest that the goods identified in the application and the registration are of types that can be manufactured by the same companies, there is no indication that the purchasers of the goods are the same. Significantly, the purchasers of applicant’s goods are OEMs of PV products and consumer electronics—products that could include labels and nameplates.⁶ However, registrant’s goods are adhesive-backed films for labels and nameplates, and not the labels and nameplates themselves. There is no evidence that these OEMs would purchase adhesive-backed film to be applied to labels and nameplates separately from the finished labels and nameplates that are applied to PV modules and/or consumer electronics.

Each of the *du Pont* factors may play a dominant role in any particular case. *du Pont*, 177 USPQ at 567 (CCPA 1973). *See also, Kellogg Co. v. Pack’em*

⁶ The examining attorney submitted a screenshot from registrant’s website (www.flexcon.com) discussing the need for manufacturers of consumer electronics products to affix warning/instructional labels and notices of compliance with regulatory standards to their goods.

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Enterprises Inc., 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“[w]e know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive.”). The differences in the potential purchasers is the determinative factor in this case. Based on the record, it appears that applicant’s goods and the registrant’s goods would not be encountered by the same class of purchasers, and therefore, despite the close similarity between the marks, there would be no opportunity for confusion to occur.

Decision: The refusals under Section 2(d) of the Trademark Act are reversed.