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09 DEC 2003

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DEWEY DATA LLC

Serial Nos. 76218850, 76218851 and 76218853

Thomas I. Rozsa for DEWEY DATA LLC.

Monique C. Miller, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Hanak, Walters and Rodgers, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

DEWEY DATA LLC (applicant) seeks to register in typed drawing form DITTOCOPY (76218850), DITTOSWITCH (76218851) and DITTOLINK (76218853) for "computer hardware and computer software which are both utilized for computer hard disk drive protection, duplication and recovery." (Emphasis added). All three intent-to-use applications were filed on February 28, 2001.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's marks, when applied to applicant's goods, will be likely to cause confusion with the mark DITTO

previously registered in typed drawing form for "computer memory storage devices, namely tape drives; computer memory storage controllers; computer memory storage tape cartridges." (Emphasis added). Registration No. 2,192,936.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing. Because these three appeals involve common questions of law and fact, they will be decided in this one opinion.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the goods and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.")

Considering first the goods, we find that applicant's goods are very closely related to registrant's goods. Obviously, in order to protect, duplicate and recover hard disk drives (applicant's goods), one must first utilize a computer memory storage device (registrant's goods). In

other words, if no data is ever stored, it can never thereafter be protected, duplicated or recovered.

While we feel that the very close relationship between applicant's goods and registrant's goods is obvious on its face, we also note in passing that the Examining Attorney has made of record numerous third-party registrations demonstrating that the same marks had been registered for both computer storage products, on the one hand, and computer protection, duplication and recovery products on the other hand. These third-party registrations are additional evidence as to the very close relationship between applicant's goods and registrant's goods. In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988), aff'd as not citable precedent 88-1444 (Fed. Cir. November 14, 1988).

Considering next the marks, we note at the outset that when the goods are very closely related, as is the case here, "the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Obviously, the first portion of all three of applicant's marks (DITTO) is identical to the cited mark DITTO. This is "a matter is some importance since it is

often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." Presto Products v. Nice-Pak Products, 9 USPQ2d 1825, 1897 (TTAB 1988).

However, of greater importance is that applicant is seeking to register DITTOCOPY, DITTOSWITCH and DITTOLINK in typed drawing form. Of course, the registered mark DITTO is registered in typed drawing form. This means that the three applications are "not limited to the mark[s] depicted in any special form," and hence we are mandated "to visualize what other forms the mark[s] might appear in." Phillips Petroleum Co. v. C.J. Webb Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). See also INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992).

Thus, applicant would be free to depict its marks with the DITTO portion in large lettering in one color, and the COPY, SWITCH and LINK portions in smaller lettering in a different color or colors. If applicant were to do this, then all three of applicant's marks would be extremely similar to the registered mark DITTO. Indeed, purchasers of these very closely related computer products - upon viewing applicant's marks DITTOcopy, DITTOswitch and DITTOlink - might assume them to be auxiliary marks to registrant's mark DITTO.

Of course, it need hardly be said that to the extent that there are any doubts whatsoever on the issue of likelihood of confusion, we are obligated to resolve such doubts in favor of the registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

Decision: The refusals to register are affirmed.