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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re National Weather Networks, Inc.

Serial No. 76273134

W. Whitaker Rayner of Watkins Ludlam Winter & Stennis for
National Weather Networks, Inc.

Michael H. Kazazian, Trademark Examining Attorney, Law
Office 113 (Odette Bonnet, Managing Attorney).

Before Hohein, Walters and Rogers, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

National Weather Networks, Inc. has filed an
application to register the mark WEATHERVISION on the
Principal Register for "audio and video broadcasting of
customized, localized weather forecasts," in International
Class 38, and "weather forecasting, namely, providing
customized audio and video local weather forecasting

information via multi-media means," in International Class 42.¹

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark WEATHERVISION, previously registered for "weather consulting services, including consulting services in the nature of expert testimony in the field of meteorological conditions,"² that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs,³ but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney contends that the marks are identical and the services are "highly related and commonly

¹ Serial No. 76273134, filed June 18, 2001, based on use in commerce, alleging first use and use in commerce as of June 1, 2000.

² Registration No. 1703882, issued July 28, 1992, in International Class 42, which is owned by New World Communications of Tampa, Inc. The registration has been renewed for a term of 10 years from July 28, 2002. Sections 8 (6 year and 10 year) and 15 declarations accepted and acknowledged, respectively.

³ Applicant filed an untimely reply brief. Applicant was directed by the Board to explain why the brief was untimely; and, after receiving no response, the Board, on September 13, 2004, notified applicant that its reply brief would not be considered. Applicant then submitted a copy of a letter previously filed, with a certificate of mailing, explaining that the reply brief was filed late due to a docketing error. We accordingly set aside the Board's order of September 13, 2004, and consider applicant's explanation for its late filing. Without condoning docketing errors, we have exercised our discretion and we have considered applicant's reply brief.

provided by a single entity and in the same channels of trade" (brief, unnumbered p. 4), and that weather forecasting services are within the logical zone of expansion of registrant's weather consulting services.

In support of his claim of a close relationship between applicant's and registrant's services, the Examining Attorney submitted copies of third-party registrations listing identifications that include both consulting and information services in diverse fields,⁴ and excerpts of articles retrieved from the LEXIS/NEXIS database containing references to both weather consulting and forecasting services offered by the same entity.⁵ The Examining

⁴ With regard to the third-party registrations submitted by the Examining Attorney, we note that although third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). Two of the third-party registrations list identifications that include weather consulting, forecasting and information services; and the remaining eleven registrations pertain to a wide variety of fields other than weather and list identifications that include consulting, research and information services, which are of limited probative value.

⁵ The following LEXIS/NEXIS excerpts are representative examples:

Those storms sent a small front carrying lots of rain-cooled air to the north, said Mike Smith, a meteorologist with Weather Data Inc., a weather forecasting and consulting firm based in Wichita, Kan. [*Omaha World-Herald*, June 24, 2000.]

The company [Strategic Weather Services] supplies weather forecasting and consulting programs to many Fortune 1000 industries such as PEP Boys and Charming Shoppes. [*Northeast Pennsylvania Business Journal*, May 1998.]

Meteorological consulting services with the ability to conduct past weather investigations or weather assessments and which can

Attorney argues that the classes of purchasers in applicant's and registrant's identifications of services are not limited; and he disagrees with applicant's contention that the services identified in the cited registration are limited to expert testimony services provided to the legal profession, noting that the identification is not so limited by its language, but, rather, includes all types of weather consulting services.

Applicant does not dispute that the marks are identical, but contends that the respective services are different, namely, weather forecasting versus "expert testimony of meteorological conditions." (Brief, p. 2.) Applicant states further that registrant could have, but did not, include weather forecasting services in its registration; that the services are different from one another, as shown in the *USPTO Acceptable Identification of Goods and Services Manual*, because consulting is not included among two other acceptably identified services, weather reporting and weather forecasting; that "the term 'consulting' implies the providing of services as a result of a one-on-one relationship as opposed to distribution to the public at large [as with forecasting]" (brief, p. 3); and that the services travel in different channels of trade

help develop a defense against litigation are often affiliated with meteorological research institutes, universities, and weather-forecasting firms. [*Electrical World*, 1993, Vol. 207, No. 11; p. 41.]

to different classes of purchasers. Applicant argues that registrant's identification of services is essentially "consulting services in the nature of expert testimony" and that, as such, the class of purchasers would be the legal profession, who would obtain such services after careful consideration.

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 likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

Considering, first, the marks, there is no question that the marks are in all respects identical, and applicant

does not contend otherwise. It is well established that when the marks at issue are the same, the goods or services in question do not have to be as close to find that confusion is likely. As the Board stated in *In re Concordia International Forwarding Corp.*, 222 USPQ 352, 356 (TTAB 1983), "... the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion."

Considering the services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

It is true that registrant's and applicant's services are not the same. However, the question is not whether purchasers can differentiate the services themselves but rather whether purchasers are likely to confuse the source of the services. See *Helene Curtis Industries Inc. v. Suave*

Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the services of applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective services 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 identity or 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.*, *supra* note 4;; and *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Applicant goes to great lengths to convince us that the registrant's services are limited to consulting services in the nature of expert testimony and thus, that there are distinctly different trade channels for the respective services. However, we find applicant's reasoning flawed and conclude that the use of the word "including" in the identification of services, "weather consulting services, including consulting services in the nature of expert testimony in the field of meteorological conditions," does not limit the services, but rather serves to indicate that the clause beginning with "including" is an example or a clarification of the preceding *clause*, i.e., that the

identified "weather consulting services" include the specified expert testimony services.⁶ Thus, registrant's services as identified encompass all types of consulting services pertaining to weather. Similarly, applicant's services encompass customized weather forecasting that is broadcast or disseminated via all types of media. These services are closely related, as exemplified by the excerpts from the LEXIS/NEXIS database. Further, there is no basis in fact for limiting registrant's purchasers to the legal profession. It is reasonable to conclude that the channels of trade and purchasers of these closely related services are at least overlapping, if not the same.

Therefore, we conclude that in view of the identity in the commercial impressions of applicant's mark and registrant's mark, WEATHERVISION, their contemporaneous use on the closely related services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

Decision: The refusal under Section 2(d) of the Act is affirmed.

⁶ The fact noted by applicant that the USPTO generally finds the use of terms like "including" in an identification of goods or services to be unacceptable does not change the plain language meaning of the term or of its meaning in the context of the recitation of services in the cited registration.