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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re MobileAria, Inc.

Serial No. 76290375

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Tanya L. Amos, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Simms, Hohein and Hairston, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

MobileAria, Inc. has filed an application to register the mark MOBILEARIA for "computer communications software for providing voice-enabled access to the Internet via mobile devices, namely, personal digital assistants, personal computers, wireless telephones, and wireless communication devices."[1]

[1] Serial No. 76290375, filed July 24, 2001, based on applicant's allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney has finally refused to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the registration of the mark ARIA for "computer software for use in voice mail and voice messaging, electronic mail, automated attendant, interactive voice response, call processing, word processing, fax processing, video and multimedia applications, namely, for integrating voice messaging, electronic mail and business applications software, and for graphical user interfaces, programming tools and utilities and program development, and instructional manuals distributed therewith."[2]

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the

[2] Registration No. 2,074,241, issued June 24, 1997, Sections 8 and 15 affidavits accepted and acknowledged, respectively.

marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The Examining Attorney argues that ARIA is the dominant part of the marks and that applicant has simply taken registrant's mark and combined it with the highly descriptive term MOBILE. Further, the Examining Attorney contends that the marks are quite similar in appearance and commercial impression. With respect to the goods, the Examining Attorney maintains that they are related in that both applicant's and registrant's computer software would be sold to the same purchasers in the same channels of trade. Further, the Examining Attorney argues that these kinds of computer software emanate from the same sources. The Examining Attorney submitted copies of third-party registrations which she maintains show that "the same mark is registered for access software and telecommunications software." (Brief, p. 9).

Applicant argues that while applicant's and registrant's goods are both computer software, they are "different and do not overlap in any way." (Brief, p. 16). According to applicant, its goods are software products that allow a user to access information available on the Internet by voice command whereas registrant's goods are software products for integrated messaging. Further,

applicant argues that the third-party registrations submitted by the Examining Attorney do not establish that applicant's and registrant's types of computer software are related because the third-party registrations cover a wide range of products. With respect to the marks, applicant argues that its mark is specifically different from registrant's mark because its mark includes the word MOBILE. Applicant argues that the term "mobile" is not descriptive of its goods, but rather merely suggests some relationship to mobile devices. When the marks are viewed in their entireties, applicant maintains that its mark is dissimilar from registrant's mark. Finally, applicant maintains that the term ARIA is widely used in the communications field and applicant's mark is therefore weak and entitled to a limited scope of protection. In support of its contention, applicant submitted a substantial amount of evidence which it maintains establishes that ARIA is widely used in the communications field.

We turn first to a consideration of applicant's and registrant's marks in their entireties to determine if they are similar in sound, appearance or meaning such that they convey similar overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks

are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

In this case, both marks contain the same term ARIA. To this term, applicant adds the descriptive word MOBILE. Regarding descriptive terms, our primary reviewing court has noted that the descriptive component of mark may be given little weight in reaching a conclusion on likelihood of confusion. Cunningham v. Laser Golf Corp., 222 F.3d 942, 55 USPQ2d 1842 (Fed. Cir. 2000) [LASERSWING likely to be confused with LASER for golf clubs]; Wella Corp. v. California Concept Corp., 558 F.2d 1019., 194 USPQ 419, 422 (CCPA 1977) [CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products].

We agree with the Examining Attorney that the term MOBILE is descriptive of applicant’s goods inasmuch as

applicant's computer software is used to provide voice-enabled access to the Internet via mobile devices.[3] Thus, consumers would be unlikely to rely on the term "mobile" in distinguishing a product designed for use in connection with mobile devices. We find therefore that overall the marks are substantially similar in sound, appearance, meaning and commercial impression.

Next, we consider the goods. Applicant's goods are "computer communications software for providing voice-enabled access to the Internet via mobile devices, namely personal digital assistants, personal computers, wireless telephones, and wireless communication devices," and registrant's goods are "computer software for use in voice mail and voice messaging, electronic mail, automated attendant, interactive voice response, call processing, word processing, fax processing, video and multimedia

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[3] The Examining Attorney has made of record an excerpt from www.netlingo.com defining ***"mobile"*** as:

> The ability to move around, it also refers to anything that can be moved around (or transported) and still function properly. It usually describes handheld devices, such as PDAs and cell phones (that is, mobile phones), but it can also refer to laptops or other portable devices.

Although applicant submitted another dictionary excerpt which shows that the term has other meanings, it is well settled that descriptiveness is determined not in the abstract but in relation to the involved goods. The other meanings of mobile are not pertinent to computer software for providing voice-enabled access to the Internet via mobile devices.

applications, namely for integrating voice messaging, electronic mail and business applications software, and for graphical user interfaces, programming tools and utilities and program development and instructional manuals distributed therewith."

It is well settled that the issue of likelihood of confusion herein must be determined on the basis of the goods as they are identified in the involved application and the cited registration, regardless of what the evidence may show as to the nature of the applicant's and/or registrant's goods. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Further, it is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. In re

Melville Corp., 18 USPQ2d 1386 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978). We readily acknowledge that there is no per se rule relating to likelihood of confusion in the computer field. In re Quadrum Corp., 228 USPQ 863, 865 (TTAB 1985).

We find that applicant's and registrant's computer software products are sufficiently related that, when sold under the substantially similar marks in this case, confusion is likely to occur among purchasers. At the outset, we note that both applicant's and registrant's goods are in the nature of computer communications software. Moreover, in view of the fact that registrant's identification of goods is broadly worded, we do not view registrant's goods as simply being in the nature of computer software for integrated messaging. Rather, the registrant's identification of goods is broad enough to encompass computer software for use in voice mail and voice messaging, electronic mail, automated attendant, interactive voice response, call processing, word processing, fax processing, <u>and</u> for use in video and multimedia applications, namely for integrating voice messaging, electronic mail and business applications. Further, in the absence of any limitations in the application and registration, we must assume that

applicant's and registrant's computer software products travel in all the normal channels of trade to all prospective purchasers, and this would include large commercial enterprises as well as individual computer users.

Further, the evidence of record includes copies of at least six use-based third-party registrations which cover the types of computer communications software involved in this case.[4] For example: Registration No. 2,509,184 for the mark CSIWEBMAIL is for "on-line downloadable computer software to enable access to secured networks over global computer networks to provide services used by businesses and institutions; namely, electronic mail, messaging …"; Registration No. 2,626,010 for the mark UMBANET is for "computer software, namely, telecommunications software for electronic mail, internet access …instant messaging, … and wireless communication, … electronic mail software for electronic mail applications…"; Registration No. 2,591,410 for the mark ALEXIS is for "computer hardware and software

[4] We agree with applicant that the probative value of some of the third-party registrations submitted by the Trademark Examining Attorney is lessened considerably to the extent that they cover goods or services not involved in this case, and to the extent that they are for house marks and/or cover too wide a variety of goods.

for controlling and accessing a private branch telephony system utilizing a world wide computer network to provide telephone services, world wide computer network access, voice recognition and remote computer access providing telecommunications connections to a global computer network”; Registration No. 2,629,628 for the mark MAILSITE is for “computer software for sending and receiving electronic mail and for use in enabling computer users to access the global information network and create virtual mailboxes”; Registration No. 2,585,548 for the mark WHISTLE is for “computer hardware and software for … providing electronic mail delivery and notification applications, access and publishing capabilities on a global computer network; and network management software”; and Registration No. 2,516,538 for the mark MAP is for downloadable computer software used to allow remote users to access data and information on the global computer network through personal digital assistants, two-way pagers, laptop computers, web phones and cell phones, used to create on-line presentations, used to arrange deliveries, used to exchange electronic mail, and used to place orders, all by means of a global computer network”.

Although these registrations are not evidence that the marks shown therein are in commercial use, or that the

public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under a single mark. In re Albert Trostel & Sons Co., 29 USPQ2d 1783; In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467 (TTAB 1988).

In this case, an individual or company may purchase registrant's computer software for use in voice mail and voice messaging and/or electronic mail and applicant's computer communications software for providing voice-enabled access to the Internet via mobile devices. Persons familiar with registrant's ARIA computer software, upon encountering applicant's MOBILEARIA computer software, may well believe that the latter software is a type originating from registrant for use with mobile devices.

Applicant argues that marks consisting of or containing the word "Aria" are weak marks and registrant's ARIA mark is therefore entitled to a limited scope of protection. Applicant contends that the word "Aria" is so frequently used in the communications field that no one party is entitled to claim exclusive rights thereto. As noted earlier, applicant submitted a substantial amount of evidence in an effort to support its contention that ARIA marks are not uncommon. The evidence consists of:

printouts of web site pages of companies with a trade name that contains ARIA; the results of searches of "*Switchboard.com*" (electronic yellow pages), *Dialog American Business Directory*, and *Dun & Bradstreet* for businesses with a trade name that contains ARIA; a list of third-party applications and registrations for marks that contain ARIA from the USPTO data base; and four third-party registrations for marks that include ARIA. As additional support for its position, applicant relies on Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 205 USPQ 969, 975 (5th Cir. 1980,) cert denied, 494 U.S. 899 (1980); and In re Broadway Chicken Inc., 38 USPQ2d 159 (TTAB 1996).

With respect to search reports generally, it has long been the Board's view that search reports are not evidence that the marks and/or trade names therein are in use. See, e.g., National Football League v. Jasper Alliance Corp., 16 USPQ2d 1212, 1215 at n. 3 (TTAB 1990); and In re Hub Distributing, Inc., 218 USPQ 284, 285 (TTAB 1983). See also: Charette Corp. v. Bowater Communication Papers Inc., 13 USPQ2d 2040, 2043 (TTAB 1989) [not clear from a search report how terms are being presented, that is, whether they are intended to be trademarks, trade names or other]; and Tiffany & Co. v. Classic Motor Carriages Inc., 10 USPQ2d 1835, 1839 at n. 5 ["the probative value of such reports is

limited, since the reports do not indicate the extent to which a company's name is used or what opportunity the public has had to become aware of any use."]. See generally: J. T. McCarthy, McCarthy on Trademarks and Unfair Competition, §11.27 at 145 (3rd ed. 1992) ["Merely introducing a list of third-party uses alone is not particularly persuasive. To present a more compelling case, [a party] should go further to show how extensive these uses are and how long they have continued . . . "].

We recognize that in the *Broadway Chicken* case, the Board gave weight to a *Dun & Bradstreet* report and yellow and white pages listings of "Broadway" restaurant, bar and related services. Of course, in contrast to *Broadway Chicken*, the present case involves trademarks rather than service marks. As noted by our primary reviewing court in Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed Cir. 1993), "[a] service mark is different from a mark for goods, especially in the manner it is used in commerce. The legally sufficient use giving rise to rights in a mark for goods is derived from placing of the mark in some manner on the goods either directly or on their containers or packaging."

In this case, applicant's evidence of third-party use is lacking in a number of respects. With respect to the

printouts from "*Switchboard.com*" and the *Dialog of American Business Directory*, they are of little probative value because we are unable to ascertain from the limited information provided (i.e., company name, address and, in some cases the general category of the business) whether any of the companies listed therein are using ARIA trade names or marks in connection with goods or services even arguably related to the goods involved in this case. The printout from Dun & Bradstreet contains company names and addresses and in the case of some of the businesses, the type of business is also provided. We have carefully reviewed this printout but only two of the businesses listed therein appear to be in a field that is arguably related to computer communications software, namely Arias Systems Concepts, Inc., whose line of business is listed as system software engineering, and Aria Software Inc., whose line of business is listed as prepackaged software services. The printouts of the web site pages show that there are several companies which are offering services which are arguably related to computer communications software, e.g., "Aria Solutions Inc." provides system integration, development and consulting; "Ariasys" is a global technology consulting firm; and "Aria Networks" offers Internet and computer network consulting.

With respect to the four third-party registrations, it is well settled that such registrations are not evidence that the marks depicted therein are in use or that the public is aware of them, and thus they are of little probative value. Moreover, we note that three of the registrations cover goods which are entirely unrelated to the goods involved in this case. (i.e., telephone calling cards; telephone headsets; and portable digital audio player). The other registration covers a wireless telephone call system.

Further, as to the list of third-party applications and registrations, it is of limited probative value for the reason that it consists simply of a list of marks by registration or application number, and thus fails to indicate the particular goods in connection with which the marks are registered or are sought to be registered.

In sum, the existence of a few companies in the broad fields of technology and communications does not justify the registration of a confusingly similar mark. In contrast to the *Broadway Chicken* case where there was evidence of widespread third-party use of trade names/marks containing the term “Broadway” for the services involved in that case, i.e., restaurant services, as well as other closely related goods and services, the evidence here does

not demonstrate that a substantial number of third parties are using the term “Aria” in connection with the types of computer communications software involved herein or closely related goods and services.

As to applicant’s reliance on *Amstar Corp. v. Domino’s Pizza, Inc.,* suffice it to say that unlike this ex parte appeal, that case involved an infringement and unfair competition claim.

Several other matters require comment. Applicant argues that registrant’s ARIA mark is not a coined term. However, there is no requirement that a mark be coined in order to be entitled to protection from a confusingly similar mark.

Also, applicant submitted the results of a “Google” search of “mobilearia” and argues that because the first fifty “hits” are references to applicant, this establishes that its MOBILEARIA mark is not weak. Rather, according to applicant, its mark is distinctive and is likely to be recognized by consumers. Suffice it to say that the strength/weakness of applicant’s mark is not an issue in this ex parte appeal.

In view of the foregoing, we conclude that purchasers and prospective purchasers familiar with the registered mark ARIA for the various computer communications software

identified in the cited registration, would be likely to believe, upon encountering the substantially similar mark MOBILEARIA for applicant’s computer communications software for providing voice-enabled access to the Internet via mobile devices, namely, personal digital assistants, personal computers, wireless telephones, and wireless communication devices, that such closely related goods emanate from or are associated with or sponsored by the same source.

Decision: The refusal to register under Section 2(d) is affirmed.