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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sage Telecom, Inc.

Serial Nos. 76659745 and 76659746

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for Sage Telecom, Inc.

Dorritt Carroll, Trademark Examining Attorney, Law Office
116 (Michael W. Baird, Managing Attorney).

Before Walters, Holtzman and Rogers, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Sage Telecom, Inc. has filed an application to register
the standard character marks ESAGELINK¹ and SAGE SELECT² on
the Principal Register for "telecommunications services,

¹ Serial No. 76659745 was filed May 5, 2006, based on use of the mark in
commerce, alleging first use and use in commerce as of September 30,
2005. This application includes a disclaimer of LINK apart from the
mark as a whole. While the examining attorney stated that the
disclaimer is not necessary, applicant did not withdraw the disclaimer
and, thus, it remains of record.

² Serial No. 76659746 was filed May 5, 2006, based on use of the mark in
commerce, alleging first use and use in commerce as of September 1,
2005.

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namely transmission of speech, analog data, digital data and facsimile by means of telecommunications networks," in International Class 38.

The 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 SAGE,³ previously registered for, in relevant part, the goods and services listed below that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

"Computer software for use in ... Internet access," in International Class 9; and

"Electronic transmission of data and documents via computer terminals," in International Class 38.⁴

Applicant has appealed. Both applicant and the examining attorney have filed briefs. Due to common issues of fact and law, the appeals in these two applications were consolidated by the order of the Board on August 21, 2008. Therefore, both appeals will be decided in this single opinion.

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

³ Registration No. 3238564, issued May 8, 2007, from an application filed May 24, 2002. The registration is owned by Sage Software, Inc.

⁴ The examining attorney stated in the brief that the goods and services listed above form the basis for the refusal. The subject registration also includes additional goods and services in International Classes 9 and 38 as well as services in International Classes 35 and 42. We have not identified these additional goods and services herein.

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relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We consider, first, the goods and services involved in this case, and 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*,

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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). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

The registrant's relevant services consist of the electronic transmission of data and documents via computer terminals; and its relevant goods consist of computer software for use in Internet access. Applicant's services involve the transmission of, *inter alia*, data and facsimiles via telecommunications networks, which the examining attorney contends is essentially "electronic transmission services by means of computer networks." (Id.) We take judicial notice of the definition in Merriam-Webster's

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Collegiate Dictionary (2003, 11th ed.) of "telecommunication" as "communication at a distance (as by telephone) [;] technology that deals with telecommunication." We also note the definition submitted by the examining attorney from the Internet dictionary www.webopedia.com of "network" as "a group of two or more computer systems linked together." ('45 Office Action, 11/8/07.) In view thereof, the examining attorney argues that "[b]ecause computer networks are composed of computer terminals, the parties' (*sic*) services in International Class 38 are all but identical." (Id.)

Applicant describes its services variously as "provid[ing] Internet connection service to residences and businesses" ('45 Brief, p. 8.) and providing a "benefits program that [applicant] offers to customers who subscribe to its telephone service, providing extra services such as 24-hour customer service and free long distance on holidays." ('46 Response of 12/20/07, p. 3.)

Applicant argues that the respective goods and services do not perform the same function, are not substitutes for one another in the marketplace, and are unlikely to be considered related. Applicant describes registrant's goods as business application software for office purposes such as accounting, budgeting, human resources, and payroll management" ('46 Response of 12/20/07, p. 3); and contends

that registrant "markets its applications in four customer-focused divisions: Business Management, Healthcare, Payment Solutions, and Industry & Specialized Solutions." ('46 Brief, p. 8.) Applicant refers to registrant's website; however, no excerpts from this site have been submitted and the Board will not take judicial notice of websites and matter contained thereon.

Despite the ways in which applicant now characterizes its services and describes registrant's services, both applicant's and registrant's services, *as identified*, involve the transmission of data and documents electronically, whether it is via the Internet or phone lines. As such the respective services are closely related, if not the same.

We do not reach the same conclusion with respect to registrant's specified goods, i.e., "computer software for use in ... Internet access." The examining attorney has submitted no evidence regarding any relationship between this software and applicant's identified services and, thus, we do not find that such a relationship is established in this case.

Moreover, while both applicant's and registrant's services are broadly identified and likely are offered to the same broad category of customers, including businesses and residences, registrant's specified software would appear

to be offered to Internet access providers and/or by those providers to subscribers as part of providing Internet access. Thus, the trade channels and purchasers of registrant's specified software would appear to be quite different from the trade channels and purchasers of both registrant's and applicant's identified services. Applicant argues that the purchasers of registrant's goods and services are sophisticated businesses and purchasers of its services are careful, knowledgeable potential Internet subscribers; however, there is no evidence to this effect in the record and we are not convinced that the purchasers of applicant's services and registrant's specified goods and services are so limited. Regardless, even sophisticated business purchasers and careful consumers are not necessarily knowledgeable about trademarks or immune from source confusion. *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

Therefore, we find that these *du Pont* factors regarding the services, trade channels and purchasers weigh against applicant.

We turn, next, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are

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sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services 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). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Registrant's mark in its entirety consists of the single term SAGE, which is arbitrary in connection with both applicant's services and registrant's goods and services. There is no evidence in this record of third-party use or registration of SAGE in connection with similar or related goods and services and, thus, it would appear to be a strong mark.

We agree with the examining attorney that SAGE is the dominant portion of each of applicant's marks. We take judicial notice of the definition in *Merriam-Webster's Collegiate Dictionary* (2003, 11th ed.) of "e" as "electronic

<e-commerce>." Additionally, the examining attorney submitted during examination a definition from the Internet dictionary, www.webopedia.com, of "link" as "a line or channel over which data is transmitted." Thus, we agree with the examining attorney that the "E" and "LINK" portions of applicant's mark are merely descriptive in connection with its identified services and of less significance in determining the overall commercial impression of the mark. Nor does the combination of these three elements, "E," "SAGE," and "LINK," into a single term change the significance or connotation of the individual terms.⁵ Therefore, when we consider registrant's mark, SAGE, and applicant's mark, ESAGELINK, in their entireties, we consider them to be more similar than dissimilar.

With respect to applicant's mark SAGE SELECT, the examining attorney submitted excerpts from several Internet websites to show that several telecommunications companies use the word "select" to indicate a higher grade of service, e.g., "AT&T select," "Sprint select," "Sprint Nextel select," and "Verizon select." Not only because SELECT is a laudatory term in connection with the identified services, but because SAGE is the initial word in this two-word mark, we find that SAGE is the dominant portion of this mark as

⁵ Moreover, the specimen of record shows the mark ESAGELINK with a lower case initial "e" and upper case letters "S" and "L," thus reinforcing the impression of the individual components of the mark.

well. Similarly, when we consider registrant's mark, SAGE, and applicant's mark, SAGE SELECT, in their entireties, we consider them to be substantially similar. In fact, applicant has merely taken registrant's mark in its entirety and added a laudatory term so that, in connection with the closely related services involved herein, prospective purchasers are likely to believe that applicant's SAGE SELECT services are a "select," i.e., special class, of registrant's SAGE services.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the commercial impressions of applicant's marks, SAGE SELECT and ESAGELINK, and registrant's mark, SAGE, their contemporaneous use on the closely related, if not identical, 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 in each application.