

Mailed:
December 4, 2008

This Opinion is Not a
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Angstrom Power, Inc.

Serial No. 77110855

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109 (Dan Vavonese, Managing Attorney).

Before Quinn, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Rogers, Administrative Trademark Judge:

Angstrom Power, Inc. has filed an application to register HYPHONE as a trademark in Class 9 for goods identified as "Telephonic device powered by hydrogen, namely telephones." The application is based on applicant's stated intention to use the mark in commerce on or in conjunction with the identified goods.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in

connection with the identified goods, will be likely to cause confusion or mistake or to deceive consumers, in view of the prior registration of the mark HI-PHONE for "Auxiliary apparatus to be used with telephones via the Internet, namely, a telephony adapter" also in Class 9.¹

When the refusal was made final, applicant appealed. After remand to the examining attorney because of applicant's filing of a request for reconsideration, and denial of that request, the appeal was resumed. Both applicant and the examining attorney have filed briefs.

Before turning to the merits of the appeal, there is one evidentiary issue to be considered. The examining attorney has objected to applicant's submission, "for the first time at the appeal stage[, of] printouts from the internet regarding registrant's goods." Brief, p. 7. This evidence consists of two-page printouts from each of two different websites.² Applicant first referred the examining attorney to the "exceletel.com" and "ambientweather.com"

¹ Registration No. 2426919 issued February 6, 2001. Section 8 & 15 affidavits accepted and acknowledged, respectively.

² The web addresses are www.exceletel.com/products/HiPhone/Hi-Phone232.htm and www.ambientweather.com/wahideuve.html. In introducing this evidence, applicant noted that the cited registration issued to Shelcad Communications but it had determined that Shelcad "is now called" Way2Call Communications. In fact, USPTO Assignment Records show such a change of name recorded at Reel 2421, Frame 0281, and the "ambientweather.com" website refers to "Way2Call's Hi-Phone Desktop."

websites in its response to the initial refusal of registration, and quoted excerpts of purported descriptions of registrant's product from each website; but applicant did not provide copies of the web pages. Applicant again referenced these website excerpts in its request for reconsideration; but applicant still did not provide copies of the web pages themselves. Finally, applicant discussed the web pages for a third time in its appeal brief, and attached to the brief copies of the web pages.³

The examining attorney's objection that the printouts were submitted for the first time with applicant's appeal brief fails to acknowledge that applicant has referenced the websites throughout prosecution of the application. In addition, neither the examining attorney's final refusal of registration, which followed the response to the initial Office action, nor the order denying the request for reconsideration, informed applicant that mere reference to website addresses and quotations of excerpts from those

³ In its response to the first Office action and its request for reconsideration, the references to the "exceletel.com" website end with "...Hi-PhoneUSB.htm," while the reference in the appeal brief and attached, supporting web page end with "...Hi-Phone232.htm." Nonetheless, the web page excerpt quoted by applicant in each of these submissions is identical, including the apparently erroneous use of "It's" instead of "Its" in all three quotations and on the web page. Accordingly, we do not consider the web page finally made of record with the appeal brief to be significantly different from that referenced in applicant's earlier filings.

websites was not sufficient to make the website evidence of record. See *In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004) ("A mere reference to a website does not make the information of record."). In fact, the examining attorney never even acknowledged the web site excerpts provided by applicant. Under the circumstances, the examining attorney's objection to submission of the web pages with applicant's appeal brief is overruled. Cf. *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581 (TTAB 2007) (At final hearing, Board considered list of three third-party applications and registrations applicant submitted with response to first Office action, since examining attorney did not advise applicant that listing was insufficient), and *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372 (TTAB 2006) (Pages from applicant's and registrant's websites submitted during prosecution considered, but additional pages submitted for first time with appeal brief not considered). To be clear, the reprints of the web pages submitted with the appeal brief are accepted as support for the web site excerpts previously referenced by applicant, but no other material on these pages has been considered. Nonetheless, for reasons discussed *infra*, the web page evidence concerning

registrant's goods has had no bearing on our final determination of the issue of likelihood of confusion.

Our determination under Section 2(d) must be 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, two key considerations are the similarities of the marks and the relatedness of the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Accordingly, we review the evidence of record and the arguments concerning the import of such evidence under the applicable law.

The examining attorney argues that "[t]he marks are phonetic equivalents and thus sound similar." Further, the examining attorney contends that applicant's use of HY instead of HI as an element of its mark does not result in a composite mark with a different overall commercial impression, and that there is no evidence of record to support applicant's contention that consumers would view HY as having a different meaning than HI. The examining attorney concludes that typical consumers of telephones

would be likely to see HY merely as an alternate spelling of HI. Brief, pp. 2-3.

Applicant contends that the marks are different in meaning because registrant's mark "employs an appearance and connotation of a greeting, 'HI,' which is a conventional, familiar, telephone greeting." Brief, p. 2. "This impression is contrary to that imparted by the HYPHONE mark. The prefix 'HY' does not connote a conventional greeting. The spelling and appearance are not that of a conventional greeting." Brief, p. 3. In essence, applicant contends that consumers will think of the HY in its mark as standing for hydrogen, even though it is not the chemical symbol for the element, because "most consumers of the HYPHONE product will not, by and large, be chemists and won't know the symbol for hydrogen [is H]." Id. Applicant also "asserts that consumers will associate the HYPHONE with cutting edge, 'green' technology that is very different from anything being offered by telephony companies today." Id.

As for the involved goods, the examining attorney essentially contends that applicant's goods are telephones, notwithstanding their being powered by hydrogen fuel cells, and must be presumed to include telephones that can be used via the Internet. Brief, p. 4. Similarly, the examining

attorney explains, there is no restriction in the identification of registrant's goods that limit the types of phones with which the telephone adapters can be used. *Id.*, at p. 7. Therefore, the examining attorney concludes, "the goods are very highly related and complimentary [sic]." June 6, 2007 (First) Office Action. Moreover, the examining attorney argues, the evidence attached to the final refusal of registration, including third-party registrations that each show registration of a single mark for both telephones and telephone adapters, and reprints of Internet web pages showing that telephones and adapters are both available at the same websites, all demonstrate that the goods "are of a kind that may emanate from a single source." December 19, 2007 (Final) Office Action, and Brief, at pp. 5-6.

Applicant argues that its goods and registrant's goods will have very different uses: "There is nothing else like the HYPHONE telephone in the world. The novelty and excitement associated with the launch of the HYPHONE telephone will, in and of itself, distinguish it from a retrofitted component used to turn a PC into a telephonic device." Brief, pp. 3-4. Applicant also contends that the Internet evidence it introduced regarding registrant's goods shows the channels of trade and classes of consumers

Ser No. 77110855

for the involved goods will be different. Specifically, applicant argues that registrant's goods, as shown by the Internet descriptions of the goods, are sold to developers, system integrators, and OEMs and they would not use such goods in conjunction with applicant's hydrogen-powered telephone. November 30, 2007 Response to First Office Action.

Our consideration of the arguments and evidence of record has led us to the conclusion that the refusal of registration must be affirmed. As for the marks, applicant concedes that they sound alike. November 30, 2007 Response to First Office Action. The one letter difference in appearance is minor and may not be noticed by many consumers. *See Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (TMS and TMM found to look and sound alike and to create likelihood of confusion even among discriminating purchasers of expensive software systems).

In essence, applicant relies on the asserted difference in connotation of the marks as the means to distinguish them. However, the application is based on applicant's stated intention to use the mark in commerce and there is no evidence the mark has been used or the product marketed. Thus, applicant's contention that

consumers will automatically construe its mark to mean "hydrogen phone" is entirely speculative. And as the examining attorney has pointed out, the chemical symbol for hydrogen is H, not HY, and there is no evidence of record that would tend to indicate how many consumers would nonetheless think of hydrogen when seeing HY. Moreover, when we consider the goods, and the possible purchase of the goods by average consumers, we cannot assume that such consumers will be aware of or concerned with the means by which a telephone is powered, and therefore have any reason to cogitate about what the HY component in applicant's mark means.

We conclude, therefore, that the marks are virtually identical. Specifically, they would, as applicant concedes, likely be pronounced the same by prospective consumers of the involved products, and as for appearance, consumers might easily overlook the one-letter visual difference between HYPHONE and HI-PHONE. See *Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc.*, 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) ("[s]ide-by-side comparison is not the test. The focus must be on the 'general recollection' reasonably produced by appellant's mark and a comparison of appellee's mark therewith.") (citation omitted). Even if we were to accept

applicant's speculative contention that the marks have dissimilar connotations, we still would find them similar, for likelihood of confusion purposes, because of their nearly identical appearance and pronunciation. See *Weiss Associates, supra*, and *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992) (likelihood of confusion found when marks looked and sounded alike, even though they arguably might have different connotations, in part because of fallibility of customer memory).

Turning to the goods, our analysis must be based on the identifications in the involved application and cited registration, without restriction based on any evidence of what happens in the marketplace. See *In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) ("Indeed, the second DuPont factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration") (internal quotation marks omitted). Accordingly, we cannot artificially limit the telephony adapters in the cited registration to items of equipment that would only be purchased by sophisticated telecommunications developers, systems integrators and OEMs. In fact, the second of the web site excerpts on which applicant relies states, in

part, that registrant's product "is ideal for ... individuals seeking quality voice connection for their home or office." Therefore, we must conclude that registrant's product is targeted to individual consumers as well as the sophisticated professionals applicant notes.

Applicant's goods, while noted to be hydrogen-powered, nonetheless are telephones. We must assume these telephones can include both standard (or land-line) suitable telephones for use in a home or office, as well as cellular telephones. As for our inclusion of the latter, in its discussion of arguably irrelevant evidence regarding hydrogen fuel cell batteries,⁴ applicant suggests that its yet to be produced product may in fact be a cell phone: "The Examiner has cited several issued patents and patent applications that discuss and claim hydrogen fuel cell batteries. However, the Examiner has not provided any evidence that any fuel cell product has ever been commercialized for use with a cell phone." June 9, 2008 Request for Reconsideration.

⁴ The examining attorney attached to the final refusal of registration evidence said to illustrate "the emerging technology of hydrogen powered telephone batteries." However, given that the identification of applicant's goods acknowledges that its phones are hydrogen-powered, it is unclear why this evidence was necessary.

Because of the nature of the involved identifications, we must assume that applicant's goods include standard phones and cell phones and registrant's goods include adapters that could be used with such phones. In that sense, the goods are related because they are complementary. See *Synergistic International LLC v. Korman*, 402 F.Supp.2d 651, 77 USPQ2d 1599, 1605 (E.D. Va. 2005) ("it is well cited law that 'complementary products, or services, are particularly vulnerable to confusion.'") citing *Communications Satellite Corp. v. COMCET, Inc.*, 429 F.2d 1245, 166 USPQ 353, 358 (4th Cir. 1970). See also, *In re Code Consultants Inc.*, 60 USPQ2d 1699 (TTAB 2001) (although the Board found "obvious differences" between the involved services, it concluded it was "clear that there is a complementary relationship").

In addition, the examining attorney has put into the record third-party registrations showing the same mark registered for both telephones and telephone adapters. This is a common method for showing a relationship between otherwise different products. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Finally, the examining attorney put into the record reprints from various websites which show that AT&T, CISCO and Skype sell both telephones and telephone adapters. This is direct

evidence showing the related nature of the goods, and evidence which applicant has not challenged in any way.

As alluded to above, applicant contends that the involved goods will be marketed to different classes of consumers through different channels of trade. We have already noted that registrant's goods, according to the web page excerpt made of record by applicant, can be targeted to business and home users of telephone adapters, and there can be no doubt that telephones are also used by both businesses and individuals, in the office and at home. Accordingly, there is no question that the involved goods must be considered to be marketed to the same class of consumers. Applicant contends that consumers of its goods are different because they are "early adopter consumers interested in cutting edge, [sic] products." Brief p. 4. Even assuming this speculative contention to be true, there may be "early adopters" of applicant's "cutting edge" phones who will need a telephone adapter to use with the phone. Moreover, in the absence of any restrictions in the involved identifications, we must assume that the identified products can be sold to all typical consumers for such products and be marketed in all customary channels of trade for such products. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d

1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). Further, even if applicant plans to market its hydrogen-powered phones in a particular channel of trade not now employed by registrant, registrant's rights "are not to be tied into its current business practices, which may change at any time." See *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 2 (CCPA 1977). Registrant's identified goods must therefore be presumed suitable for marketing in any channel of trade which applicant might choose to employ, e.g., wholesale and retail sales, sales on the Internet, in stores, catalogues and by any other possible means of commerce.

Considering the limited evidence of record, the arguments of applicant and the examining attorney, and balancing the *du Pont* factors to which the evidence relates, we find that confusion is likely.

Decision: The refusal of registration is affirmed and registration to applicant is refused.