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This Opinion is Not Citable As Precedent of the TTAB
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Robert Ameet

Serial No. 78114391

John J. Connors of Connors & Associates for Robert Ameet.

Georgia Ann Carty Ellis, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Hairston, Rogers and Zervas,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Robert Ameet applied to register FASTRAK, in standard character form, as a mark on the Principal Register for services originally identified as "automatic electronically tracking and locating of items and persons," in International Class 45. During prosecution of the application, the identification was eventually amended to read "tracking services for retrieval of encoded products, excluding railcars in transit," in International Class 45.

It is clear that the phrase "excluding railcars in transit" was included in the amended identification as part of applicant's attempt to overcome a refusal of registration that was made final by the examining attorney. Specifically, the examining attorney has made final a refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on the prior registration of FAST-TRAX for "services for computerized tracking and tracing of railcars in transit," in International Class 35 (Registration No. 2727717). Despite applicant's arguments against the refusal, and notwithstanding applicant's above-referenced amendment of the identification in a request for reconsideration, the examining attorney has maintained the final refusal of registration. In this appeal, applicant and the examining attorney have each filed a brief.

We analyze the issue of likelihood of confusion using the factors that were articulated by a predecessor of our primary reviewing court, the Court of Customs and Patent Appeals, in the case of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities

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of the marks and the similarities of the goods or services. 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 [or services] and differences in the marks").

In this case, we compare applicant's FASTRAK mark and the FAST-TRAX mark in the cited registration by considering similarity, or differences, in the appearance, sound, connotations and overall commercial impressions of the marks. Giant Food, Inc. v. Nation's Foodservice, Inc., 218 USPQ 390, 395 (Fed. Cir. 1983). In this case, both marks begin with the identical word, FAST, and end with a phonetically equivalent term, TRAK or TRAX. The only differences between the marks are that TRAK would be viewed as a singular term, while TRAX would be viewed as a plural term; and applicant ties the two words together by presenting them in a telescoped fashion wherein the first word and the second share a letter, see TMEP Section 807.12(e)(4th ed. April 2005), while the registered mark ties the words together with a hyphen. The shared letter in applicant's mark would not yield a difference in pronunciation or connotation. Nor is the difference between the singular and plural form of the second word in

these marks particularly distinguishing. See Wilson v. Delauney, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word "Zombie" and they will therefore be regarded here as the same mark"); and In re Pix of America, Inc., 225 USPQ 691 (TTAB 1985).

Visually and phonetically, the marks are virtually identical; and the connotation of the marks is essentially the same, in that each conveys the notion of rapid tracking. Accordingly, the differences between the marks are inconsequential, and we find them to present the same overall commercial impression. We do not find persuasive applicant's argument that the marks are "spelled different" and are visually "very dissimilar." Brief, p. 3.

Applicant argues, notwithstanding the great similarity of the marks, that there is no likelihood of confusion, because the marks will be imperfectly recalled and "customers usually compare an imperfectly recalled mark with the mark on a product that they are presently observing." Brief, p. 3. Applicant also argues that the services are different because applicant's services "do not concern tracking of railcars," the registered mark is in a

different class, the channels of distribution are different, and the types of customers are different. Id.

We note, however, that neither identification is restricted as to channels of trade and we must assume that the respective services can be marketed through all possible channels of trade typical for these services. 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"). Accordingly, we can give no weight to applicant's mere assertion, unsupported by evidence, that its services are offered through different channels of trade than registrant's services.¹

As for classes of customers, registrant's services obviously would be offered to those concerned with tracking

¹ While the identifications of services and applicant's specimen yield some information about classes of customers for the respective services, there is no specific information in the record that actually sheds light on how the services would be marketed to such customers. There is nothing, therefore, to support applicant's contention that the channels of trade are different.

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railcars. These customers could include operators of passenger and freight railways, operators of public transit systems, and even possibly governmental entities ranging from the military to civilian concerns. Customers might also include freight shipping companies that utilize railways in their operations. We note, in this regard, that there is nothing in registrant's identification that limits its services to actual owners or operators of railcars; and some of the other prospective customers we have noted, while not perhaps owners or operators of railcars, might nonetheless have a need to track railcars for various reasons.

Applicant's services, as specified in its identification, are more limited than is suggested by review of its specimen of use. The specimen reveals that applicant's services can be used to track "the location of items valuable and important to you," and lists specific applications, such as pet owners tracking pets, parents tracking children, caregivers tracking Alzheimer's patients or patients with other disorienting conditions, and individuals or commercial entities tracking vehicles such as cars and trucks. The identification, in contrast, only refers to tracking of "encoded products," not pets, people,

or vehicles.² Thus, based on the identification of services, we must consider whether prospective customers for a service that would be used to track "encoded products" might overlap with prospective customers for registrant's services.

We find that there is an overlap of customers. As noted, registrant's services might be used by a freight shipping company that utilizes railways, so it could determine, at any particular time, the location of a train carrying its freight. Similarly, such a customer could utilize applicant's services to track the freight itself on the trains. In this manner, the respective services can be seen as somewhat competitive. The freight shipper would be provided with a choice between tracking its freight ("encoded products") on a train, or merely tracking the train that it knew contained its freight. The services could also be seen as complementary by such customers, for applicant's services could be used to track freight before and after loading onto trains, while registrant's services

² The question has not been presented by this appeal whether the specimens support use of the mark for the identified services. They do refer to use of the services for tracking "valuable and important" items, even though the specific examples primarily appear not to be "encoded products." In this regard, we normally would consider a "product" to be an item produced by a manufacturer or sold by a retailer or wholesaler, and none of the specific examples discussed on applicant's specimen appear to encompass such items.

might be used to track the freight while on trains. Other prospective customers of registrant's services might also have use for applicant's services. Of course, without specimens or other information explaining the specific nature of what applicant means by the phrase "encoded products," we are forced to engage in some degree of conjecture when comparing the services. We cannot accept, however, applicant's contention that there would be no overlap of customers.

We note, too, that the circumstances need only be such as to create a likelihood that consumers would be exposed to both marks and might conclude that there was some relationship between the services, or common source or sponsorship, given the marks used on or in connection with the respective services. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978). While applicant has not argued that the customers for the respective services would be sophisticated and discriminating, we accept that certainly prospective purchasers of registrant's services are likely to be in business or government. Such purchasers, however, are not necessarily experts in differentiating virtually

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identical service marks used for potentially competitive or complementary services.

Given the great similarity of the marks in sound, connotation and overall commercial impression, the relatedness of the services, and the presumptive marketing in overlapping channels of trade to at least some of the same classes of consumers, we conclude that a likelihood of confusion exists.³

If evidence regarding the differences in the precise nature of the services had been properly made of record, and if the record showed the nature of the prospective purchasers to be discriminating, we might, then, have some doubt about our conclusion that confusion is likely, especially given the suggestive nature of the marks. Even then, however, we would be required to resolve this doubt in favor of registrant. See Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992).

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

³ The fact that the services are classified in different classes has no bearing on the likelihood of confusion analysis. See Jean Patou Inc. v. Theon Inc., 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993)