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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Azimuth Systems, Inc.

Serial No. 78285760

Thomas F. Dunn of Pendleton, P.C. for Azimuth Systems, Inc.

Paula B. Mays, Trademark Examining Attorney, Law Office 106
(Mary Sparrow, Managing Attorney).

Before Quinn, Grendel and Cataldo, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Azimuth Systems, Inc. to register the mark AZIMUTH DIRECTOR ("DIRECTOR" disclaimed) for "computer software, namely, software for synchronized setup, operation and reporting of test equipment and procedures in the wireless network test environment."¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that

¹ Application Serial No. 78285760, filed August 11, 2003, based on an allegation of a bona fide intention to use the mark in commerce. Applicant claims that it is the owner of Registration No. 2848650.

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applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark shown below



for "computer development software services in the field of information operations; computer network design engineering services; and technical consultation and research in the fields of navigation and communications,"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.³

Applicant contends that, although the marks share a common element, the marks are different in appearance, sound and overall commercial impression. As to the goods and services, applicant argues that there is no *per se* rule when considering the likelihood of confusion between

² Registration No. 2683697, issued February 4, 2003. The word "incorporated" is disclaimed apart from the mark.

³ Applicant accompanied its appeal brief with evidence that was being submitted for the first time. As correctly pointed out by the examining attorney, the submission is untimely. Trademark Rule 2.142(d). Accordingly, the evidence has not been considered in reaching our decision.

computer goods and services. More specifically, applicant asserts that its software is specialized for the wireless network testing industry, whereas registrant's services are general in nature.⁴ Applicant also asserts that the cost of its specialized software requires a careful purchase made by a sophisticated purchaser. Applicant also points to its ownership of a registration for the mark AZIMUTH for goods that applicant characterizes as "very similar" to applicant's goods listed in the present application.

The examining attorney maintains that applicant's and registrant's marks are dominated by the common term "AZIMUTH," and that the marks are similar so that, when used in connection with similar goods and services, confusion is likely to occur among purchasers. As to the goods and services, the examining attorney states that they

⁴ During prosecution, applicant submitted an exhibit in support of its assertion that the cited mark is not famous; the exhibit indicates that registrant has gone out of business. Although applicant stated that it was not attacking the validity of the cited registration, we want to be clear on this point. Section 7(b) of the Trademark Act provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the goods and services specified in the certificate. During *ex parte* prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration, as is the case herein. See *In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n. 5 (TTAB 1992). Thus, we have given no consideration to applicant's remarks in this regard.

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are related. Given the similarities between the mark and the goods and services sold thereunder, the examining attorney asserts that even well informed, technically trained and discriminated purchasers may be confused. The examining attorney also is not persuaded by applicant's ownership of its previously issued registration, stating that each case must stand on its own merits.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: *In re Dixie Restaurants Inc.*, supra.

We first turn our attention to a comparison of the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot*

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Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 their entireties that confusion as to the source of the goods and services offered under the respective marks is likely to result.

In comparing the marks, we find that AZIMUTH is the dominant element of both applicant's mark and the cited mark, and accordingly it is entitled to more weight in our analysis. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In registrant's mark, the term "incorporated" is disclaimed, and the term clearly has virtually no source distinguishing quality and is subordinate to "AZIMUTH." Further, the arrow designs are visually smaller than the word "AZIMUTH." If a mark comprises both a word and a design, then the word is normally accorded greater weight

because it would be used by purchasers to request the goods or services. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). For these reasons, we consider AZIMUTH to be the dominant feature of the registered mark. Likewise, insofar as applicant's mark is concerned, the term "direction" apparently is descriptive, and has been disclaimed by applicant pursuant to the examining attorney's requirement.⁵ Thus, AZIMUTH, also being the first word of the mark, is the dominant portion of applicant's mark, and the portion that is most likely to be remembered by purchasers.

The term "azimuth" would appear to be arbitrary when used in connection with either the involved goods or services. In this connection, we take judicial notice of the dictionary definition of the term "azimuth": "an arc of the horizon measured between a fixed point (as true north) and the vertical circle passing through the center of an object, usually in astronomy and navigation being measured clockwise from the north point through 360 degrees and in surveying clockwise from the south point."

⁵ The reproduction in the Office action of the dictionary definition of "direction," retrieved from an online source, is incomplete, stopping in mid-sentence. In her brief, the examining attorney states that the term refers to "a computer program for use in creating presentations and for storage of information." (Brief, p. 5).

Webster's Third New International Dictionary (unabridged ed. 1993).

We appreciate applicant's contention that the marks are specifically different due to the presence of "direction" in applicant's mark, and the presence of "incorporated" and the arrow designs in registrant's mark. Nevertheless, the same portion, namely the word "AZIMUTH", dominates the marks. We find that, when the marks are compared in their entireties, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related goods and services, confusion would be likely to occur.

With respect to the goods and services, as pointed out by applicant, there is no *per se* rule mandating that likelihood of confusion is to be found in all cases where the goods in question involve computer software and/or hardware. *Information Resources, Inc. v. X*PRESS Information Services*, 6 USPQ2d 1034 (1988), citing *In re Quadram Corp.*, 228 USPQ 863 (TTAB 1985).

The sum of the examining attorney's argument on this du Pont factor is as follows: "Logically, [registrant's] software services likely include testing of the network equipment and wireless network testing as performed by the applicant's software. In other words, the registrant's

services likely include the software used for such testing, which are the goods of the applicant. The goods and services of the parties therefore are very closely related." (Brief, pp. 8-9). The examining attorney did not submit any evidence in connection with her argument, instead relying solely on the terminology of the identifications of goods and services.

We find that the examining attorney's finding on this du Pont factor is too tenuous. Applicant's software appears to be highly specialized for use in connection with testing in the wireless network field. Registrant's services, on the other hand, appear to be more general in nature, albeit the services involve, in part, computer networks and communications. Moreover, purchasers and users of applicant's software and registrant's services are likely to be sophisticated. Under these circumstances, confusion among these sophisticated purchasers is unlikely to occur.

As the Board stated in *Reynolds & Reynolds Co. v. I.E. Systems, Inc.*, 5 USPQ2d 1749, 1751 (TTAB 1987), "in order to support a holding of likelihood of confusion, there must be some similarity between the goods and services at issue herein beyond the fact that each involves the use of computers. In view of the fact that computers are useful

and/or used in almost every facet of the world of business, commerce, medicine, law, etc., it is obvious that distinctions must be made." In the present case, there is no evidence to support the examining attorney's conclusory statement that the goods and services are related. The terminology of the identifications of goods and services, standing alone in the present case, is an insufficient basis upon which to conclude that the goods and services are related for purposes of our analysis.

The connection between applicant's goods and registrant's services is so tenuous that purchasers would not view the goods and services as having a common source. Based only on the mere conclusory statement of the examining attorney, we see the likelihood of confusion claim asserted by the examining attorney as amounting to only a speculative, theoretical possibility.⁶ Language by our primary reviewing court is helpful in resolving the likelihood of confusion issue in this case:

⁶ In passing, we also note, as highlighted by applicant, that it owns Registration No. 2848650, issued June 1, 2004, for the mark AZIMUTH for "electronic and optical testing hardware and software for use in testing communications equipment functionality, conformance, interoperability and performance; electronic and optical testing hardware and software for use in analysis of communications equipment behavior under different test conditions; electronic and optical testing hardware and software for use in verification of communications equipment security functionality and performance of security features."

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We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), *citing* Witco Chemical Co. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

Decision: The refusal to register is reversed.