

THIS DECISION  
IS NOT A PRECEDENT OF  
THE T.T.A.B.

Hearing:  
December 6, 2006

Mailed:  
March 2, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Smith

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Serial No. 78316052

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Jay Flemma of Law Offices of Jay Flemma, Esq. for David M. Smith.

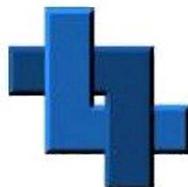
Dannean J. Hetzel, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

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Before Quinn, Zervas and Cataldo, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

David M. Smith has appealed from the final refusal of the trademark examining attorney to register the mark



LinguaLinX

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Serial No. 78316052

for the following services, as amended; "foreign language translation and interpretation services focusing on business advertisements, corporate contracts, corporate brochures, and corporate marketing materials" in International Class 41.<sup>1</sup>

The examining attorney has refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered mark



for, inter alia, "translation of and interpreting foreign languages," in International Class 42,<sup>2</sup> that, as used in connection with applicant's identified services,

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<sup>1</sup> Application Serial No. 78316052, filed October 20, 2003, claiming first use anywhere and first use in commerce on March 22, 2002. Applicant claims the colors blue and black as a feature of the mark and has entered the following color location statement: "The upside down right angle is dark blue, the right side up right angle is light blue. The word mark LINGUALINX appears to the right of the helix logo in black. The logo appears on a white background." Also, applicant has entered the following description of the mark: "The mark consists of a diagonal helix of two interlocking right angles, one upside down and the other right side up."

<sup>2</sup> Registration No. 1699525, issued July 7, 1992; renewed. Registrant has entered a disclaimer of the word "Language."

applicant's mark is likely to cause confusion or mistake or to deceive.<sup>3</sup>

Applicant has appealed the final refusal of his application. Both applicant and the examining attorney have filed briefs and an oral hearing was held on December 6, 2006. As discussed below, the refusal to register is affirmed.

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, although not exclusive, 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

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<sup>3</sup> The registration also recites services in International Class 41, i.e., "foreign language instruction; production for others of foreign language and English videotapes for use in foreign markets." However, the examining attorney has not relied on the International Class 41 services in refusing registration of applicant's mark and does not refer to them in her brief. Thus, applicant's arguments, to the extent that they are directed to registrant's International Class 41 services, are given no further consideration.

(CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first consider the similarities of the services. Because registrant's identification of services does not include limitations as to the nature of the materials or information to be translated or interpreted and hence presumptively includes the translation of business advertisements, corporate contracts, corporate brochures and corporate marketing materials, applicant's "foreign language translation and interpretation services focusing on business advertisements, corporate contracts, corporate brochures and corporate marketing materials" are encompassed within registrant's services, i.e., "translation of and interpreting foreign languages."<sup>4</sup> The second *du Pont* factor hence is resolved against applicant.

We next consider the trade channels of applicant's and registrant's services. Applicant argues that there are no

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<sup>4</sup> Applicant has argued at p. 6 of his brief that "The Registrants are only entitled to protection for their computers [sic] program in the case of Lingualinks and foreign language instruction in the case of Language Link [sic]." This is not the case because in addressing the question of likelihood of confusion, the Board considers those goods and/or services that are recited in an application and registration, and not the actual goods or services sold to purchasers. See *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods [or services].").

overlapping markets and that applicant's services are obtained by "direct sales." Brief at p. 6. However, because there are no trade channel limitations in registrant's identification of services, we presume that the identified services move in all channels of trade that would be normal for such services.<sup>5</sup> *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Such trade channels include applicant's trade channels. Hence, the third *du Pont* factor also is resolved against applicant.

Now, we consider the similarities of the marks viewed in their entirety. Specifically, we consider whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods or services offered under the respective marks is

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<sup>5</sup> At p. 6 of his brief, applicant refers to "accolades, press releases and advertisements" attached as Exhibit B. The copy of the brief received by the Board did not include any exhibits. Even if the exhibits had been attached to applicant's brief, we would not have considered the exhibits because the submission of evidence for the first time with a brief is untimely. See Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d); TBMP §1207 (2d ed. rev. 2004).

**Serial No. 78316052**

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).

Both applicant's and registrant's marks contain a word component and a design component. The examining attorney cites the proposition that the word component of a mark is normally accorded greater weight in determining the likelihood of confusion because the word portion is more likely to be impressed upon a purchaser's memory and used in calling for the goods or services. *In re Dakin's Miniatures Inc.* 59 USPQ2d 1593 (TTAB 1999). This proposition is particularly true in this case, where the design components are geometric in nature and not likely to be considered in calling for the services. Thus, we find that the word components of the marks are the dominant components of each mark.<sup>6</sup>

When we consider the word components of the marks, we find them to be similar in sound, connotation and commercial impression. Both marks have a first word portion consisting of terms comprising or relating to

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<sup>6</sup> Although the marks must be considered in their entirety, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

language. In applicant's case, the term is LANGUAGE and in registrant's case, the term is LINGUAL, if consumers perceive registrant's mark as a telescoped mark, or LINGUA if consumers do not perceive registrant's mark as a telescoped mark. LINGUAL is defined in *The Random House Dictionary of the English Language* (unabridged) (2d ed. 1987) as inter alia "pertaining to languages."<sup>7</sup> LINGUA is the first term in "lingua franca," which is defined in the same dictionary as "a language that is widely used as a means of communication among speakers of other languages."<sup>8</sup> Also, both marks have a second word portion that is LINK or a variation thereof - LINX, pronounced "links," in applicant's mark is a misspelling of the plural form of the word LINK. When the word portions of the marks are considered as a whole, the marks are similar in sound,

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<sup>7</sup> The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>8</sup> The examining attorney argues that LINGUA translates into the word "language" in Spanish, Italian and Latin; and that "consumers would stop and translate 'lingua' into 'language' because of the relatively large portion of the United States population which is familiar with Spanish and because consumers are in the market for foreign language translation services." Brief at unnumbered p. 3. We disagree. The remainder of the word portion of the mark is LINX, which phonetically is identical to the word "links," an English word. The examining attorney has not explained why one portion of a term would be translated by consumers but not the other portion, and we are unaware of any reason why consumers would do so.

connotation and commercial impression - both suggesting a link to languages.

As for the design component of the marks, it is apparent that the designs are different. However, the designs do not dominate the marks or suggest a particular meaning for the word portions of the marks.<sup>9</sup> The examining attorney has correctly noted that "Neither the applicant nor registrant's design creates a distinctive visual component of the marks that would draw consumers' attention to the design and away from the word portions of the marks." Brief at unnumbered pp. 4-5.

Thus, when we consider the marks as a whole, we find them to be similar in meaning, sound and commercial impression. Any differences in appearance are outweighed by the similarities in meaning, sound and commercial impression. In view thereof, and because when marks appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines, see *Century 21 Real Estate Corp. v.*

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<sup>9</sup> In this regard, we note applicant's description of the mark, which states: "The mark consists of a diagonal helix of two interlocking right angles, one upside down and the other right side up" and applicant's observation in his brief that "Neither capitalized 'L' is inverted, they are both right side up." Brief at p. 4. At best, the interlocking "L"s are reflective of the two "L"s in LINGUALINX and play on the meaning of LINX as a misspelling of "links."

*Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), we resolve the first *du Pont* factor against applicant.

Applicant has made several additional arguments, each of which we reject and each of which we address briefly below.

First, applicant states that the "sophisticated purchaser exercises a greater degree of care than the consumer of mass-produced goods." Brief at p. 6. To the extent that applicant maintains that the consuming public of applicant's and/or registrant's services consists of sophisticated purchasers, applicant has not provided any explanation or evidence in support of his contention and there simply is no evidence in the record from which we can make a determination of whether such purchasers are "sophisticated." We add too that even if applicant's purchasers are "sophisticated," sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

Second, applicant states the "marks have co-existed side by side with no actual confusion for three years." Brief at p. 6. However, and as pointed out by the examining attorney, it is not necessary to show actual

**Serial No. 78316052**

confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Applicant's assertion of the absence of actual confusion in this ex parte proceeding is of little probative value in our determination on the issue of likelihood of confusion. See *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984). Moreover, on the record before us there is no evidence as to whether there has been any opportunity for confusion to occur. Applicant's argument regarding actual confusion therefore is unpersuasive, and the seventh *du Pont* factor is neutral.

Third, applicant relies heavily on *In re Broadway Chicken Inc.*, 38 USPQ2d 1559 (TTAB 1996), in which the Board found no likelihood of confusion between BROADWAY CHICKEN and BROADWAY PIZZA for identical services. At p. 7 of his brief, applicant argues that "because 'Broadway' was a common and popular geographical term, it was weak by itself and therefore 'the consuming public is more likely to rely upon the non-common portions of the marks ... to distinguish among these services.'" *Broadway Chicken* is inapposite because there is no evidence of third-party use of any of the components of applicant's or registrant's marks in this case. Besides, likelihood of confusion is

**Serial No. 78316052**

determined on a case-specific basis, using the *du Pont* factors which are relevant as our guide. See *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.2d 1333, 57 USPQ2d 1557 (Fed. Cir. 2001). Even considering *Broadway Chicken* - and other cases cited by applicant - the factors having the greatest weight in these other cases were much different from the ones involved here.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, we conclude that, when potential purchasers of applicant's services and registrant's services encounter the applied-for and registered marks for these services, they are likely to believe that the sources of these services are in some way related or associated. As a result, there is a likelihood of confusion.

**DECISION:** The refusal to register the mark under Section 2(d) of the Trademark Act is affirmed.