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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Oblio Telecom, L.L.P.

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Serial No. 78460997

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Drude Faulconer, Esq. for Oblio Telecom, L.L.P.

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(Loretta C. Beck, Managing Attorney).

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Before Hohein, Walters and Bergsman, Administrative Trademark  
Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Oblio Telecom, L.L.P. ("applicant") filed an intent-to-use application on the Principal Register for the mark BRAVO, in standard character format, for "wireless telecommunications, namely wireless telephone services," in Class 38. Applicant claimed ownership of Registration No. 2802973 for the mark BRAVO!, in standard character format, for "prepaid long distance telephone calling cards not magnetically encoded," in Class 16.<sup>1</sup>

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<sup>1</sup> Issued January 6, 2004 to DLH Distributing and Marketing, Inc. The assignment to applicant was recorded on August 11, 2004, at Reel 3041, frame 0493.

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the following marks, all owned by Bravosolution S.p.A., and all for, *inter alia*, "telecommunications services, namely, providing gateway links between businesses and their customers via the Internet," in Class 38:

1. BRAVOBUILD, in typed drawing form;<sup>2</sup>
2. BRAVOSOLUTION, in typed drawing form;<sup>3</sup>
3. BRAVOINDUSTRY, in typed drawing form;<sup>4</sup> and,
4. BRAVOINDUSTRY, in standard character format.<sup>5</sup>

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201,

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<sup>2</sup> Registration No. 2745925, issued August 5, 2003.

<sup>3</sup> Registration No. 2833700, issued April 20, 2004.

<sup>4</sup> Registration No. 2873229, issued August 17, 2004.

<sup>5</sup> Registration No. 3123776, issued August 1, 2006. The description of services in this registration also includes "telecommunications, namely, providing multiple-user access to a global computer information network," in Class 38, and therefore it is not identical to Registration No. 2873229.

Serial No. 78460997

1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, 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 terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977);

Serial No. 78460997

*Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the relevant public would be businesses with Internet networks and users of wireless telephone services.

The marks are similar in appearance and sound because they all include the word "bravo." The word "bravo" is a significant, if not dominant, portion of the registered marks because of its location as the first word of the marks. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word). Accordingly, we believe that

Serial No. 78460997

consumers would likely remember and use "bravo" to refer to the registrant and its services.

Also, in comparing the marks, we note that the registered marks contain the applicant's entire mark (*i.e.*, BRAVO). Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER and Bengal lancer design for club soda, quinine and ginger ale is likely to cause confusion with BENGAL for gin); *In re West Pont-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558, 559 (CCPA 1972) (distinctive griffin design above WEST POINT PEPPERELL is likely to cause confusion with WEST POINT both used on fabrics); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner).

When one incorporates the entire arbitrary mark of another into a composite mark, inclusion in the composite mark of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion. And inclusion of a merely suggestive or descriptive element, of course, is of much less significance in avoiding a likelihood of confusion.

*The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977) (internal citations omitted).

With respect to the meaning of the marks, the Examining Attorney notes that the word "bravo" is defined as an

interjection "[u]sed to express approval, especially of a performance."<sup>6</sup> Thus, we find that the registered marks and applicant's mark share a similar meaning and engender a similar commercial impression to the extent that they convey approval for a job well done.

Applicant agrees that the registered marks "suggest 'a good solution, a good builder, or a good industry,'"<sup>7</sup> but it contends that "bravo" standing alone "is a term used to mean "hurrah" or "ole."<sup>8</sup> Accordingly, applicant concludes that that the marks convey different commercial impressions because "hurrah" or "ole" is different than "a good solution, a good builder, or a good industry." However, we are not persuaded that the addition of the words "build," "industry" and "solution" to the registered marks is a sufficient basis for consumers to distinguish applicant's mark from the registered marks in any meaningful way. In fact, the additional words in the registered marks may increase the likelihood of confusion because customers and potential customers may mistakenly believe that the registrant's services are a variation of applicant's

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<sup>6</sup> The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000) attached to the Examining Attorney's Brief, unnumbered pages 4-5. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>7</sup> Applicant's Brief, unnumbered page 12.

<sup>8</sup> Applicant's Brief, unnumbered page 11.

services and that both services emanate from the same source because of the joint use of the term "bravo."

In view of the foregoing, we find the similarity of the mark is a factor that weighs in favor of finding that there is a likelihood of confusion.

B. The similarity or dissimilarity and nature of the services as described in the application and registrations at issue.

Applicant is seeking to register its mark for "wireless telecommunications, namely wireless telephone services." The registered marks are for "telecommunications services, namely, providing gateway links between businesses and their customers via the Internet." A "gateway" is defined as follows:

- 1) Software that enables communication between two networks that operate on different protocols. Gateways are written for specific purposes, for example, to provide a link between an Ethernet LAN and an IBM mainframe application that uses SNA (Systems Network Architecture). There is a gateway between BITNET and the Internet.
- 2) A computer system that enables two dissimilar applications to exchange data, for example, two mail systems with different message formats.<sup>9</sup>

Accordingly, the registrant is providing a service that allows two parties to communicate through the Internet even though they operate on different platforms. While the applicant's wireless

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<sup>9</sup> net.speak: the internet dictionary, p. 79 (1994).

Serial No. 78460997

telephone services and the registrant's Internet gateway services are not identical, we must determine whether they are related in some manner other than both being broadly defined as telecommunications services.

In this regard, the Examining Attorney has submitted numerous third-party, use-based registrations encompassing both wireless telephone services and gateway services. The following registrations are illustrative:<sup>10</sup>

<b>Mark</b>	<b>Reg. No.</b>	<b>Services</b>
POWERFULLY SIMPLE SIMPLY POWERFUL	2330628	Telecommunications gateway services; wireless telephone communication services
BELLSOUTH SOLUTIONS <sup>11</sup>	2704985	Telecommunications gateway services for providing access to global computer communications networks; telecommunications services, namely wireless cellular and digital networks.
WORLDCONNECT	2911625	Wireless telephone services; telecommunications gateway services
VINATOUCH	3242429	Cellular telephone communication; cellular telephone services; telecommunications gateway services

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<sup>10</sup> In the following table, we have not included the entire description of services for each of the registrations. Only the services found in applicant's applications and registrant's registrations are listed.

<sup>11</sup> The Examining Attorney submitted four other registrations owned by the same entity, BellSouth Intellectual Property Corporation, for similar services.

Mark	Reg. No.	Services
YOU ADD WE SUBSTRACT	3028633	Wireless telecommunication services; telecommunications gateway services

Although use-based, third-party registrations are not evidence that the marks shown therein are in commercial use, they have some probative value to the extent that they may serve to suggest that the listed services are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

While we acknowledge that the services at issue are not identical, the question is not whether purchasers would confuse the services, but rather whether purchasers are likely to confuse the source of the services. *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Permagrain Products, Inc.*, 223 USPQ 147, 148 (TTAB 1984). See also *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975) ("In determining whether products are identical or similar, the inquiry should be whether they appeal to the same market, not whether they resemble each other physically or whether a word can be found to describe the goods of the parties"). Thus, the services at issue need not be similar or even competitive to support a finding of likelihood

Serial No. 78460997

of confusion. It is sufficient if the respective services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785; *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Applicant contends that the services at issue are not related because applicant markets pre-paid cell phones to individual customers. Specifically, "applicant markets cell phones which are pre-loaded with a specific number of pre-paid minutes which, when exhausted, can be replenished by purchasing a new pin card for the phone."<sup>12</sup> However, in an *ex parte* appeal, likelihood of confusion is determined on the basis of the services as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *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

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<sup>12</sup> Applicant's Brief, unnumbered p. 8.

Serial No. 78460997

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").

As the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court, explained in *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981):

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this appeal prevent likelihood of confusion. We cannot take such facts into consideration unless set forth in its application.

Likewise, in this case, we must also analyze the similarity or dissimilarity of the services based on the description of services set forth in the application and the cited registrations. In other words, we may not limit applicant's services to pre-paid cell phones sold to individuals; rather, it includes all wireless telephone services including wireless telephone services sold to businesses.

As noted above, the Examining Attorney has made of record third-party registrations that show various entities have adopted a single mark for gateway services and wireless telephone services suggesting that purchasers may expect that

Serial No. 78460997

such services sold under similar marks would emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-1786; *In re Mucky Duck Mustard Co.*, 6 USPQ2d at 1470 n.6.

Accordingly, we find that gateway services and wireless telephone services are sufficiently related that, if identified by confusingly similar marks, confusion as to source is likely.

C. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because there are no limitations as to channels of trade or classes of purchasers in either the application of the cited registrations, it is presumed that the registrations and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services. See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Both wireless telephone services and providing gateway links are services that may be sold to businesses and their customers. Accordingly, we must presume that applicant's wireless telephone services and the registrant's gateway services move in the same channels of trade and are rendered to the same classes of purchasers.

D. Strength of the registered marks.

Applicant argues that the registered marks are weak marks that are entitled to a narrow scope of protection or exclusivity of use for the following reasons:

1. Applicant, "who has provided pre-paid telephone services in interstate commerce . . . for several years has never heard of any of the registered marks," and therefore they must be considered "'weak' since there is no 'instant buyer recognition' of any of these marks among potential customers."<sup>13</sup>

2. There are more than 500 "Bravo" marks that have been registered or the subject of an application "in almost every" class of goods and services, and this proves that "the word BRAVO, when used as a mark, is not unique, in and of itself, but is registrable when uniquely used to identify some specific goods or services."<sup>14</sup>

Applicant's contention that the registered marks are weak because applicant has never heard of them is not probative of the market strength of the registered marks because applicant's "testimony" is essentially an informal survey of one interested party.

Applicant's assertion that the registered marks are weak because there are over 500 registered marks and applications for marks comprising, in whole or in part, the word "bravo" also is not probative of the strength of the cited registered marks. First, applicant did not submit copies of the registrations, and the Board does not take judicial notice of registrations. *In re*

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<sup>13</sup> Applicant's Brief, unnumbered pp. 6-7.

<sup>14</sup> Applicant's Brief, unnumbered p. 7.

Serial No. 78460997

*Delbar Products, Inc.*, 217 USPQ 859, 861 (TTAB 1981); *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). Therefore, there are no third-party "Bravo" registrations in the record to consider.

Second, any third-party expired registrations and pending and abandoned applications referenced by applicant have no probative value in this appeal. *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything"); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) (applications are evidence only of the fact that they were filed).

Third, even if applicant had submitted copies of the third-party registrations, absent evidence of actual use of those marks, the third-party registrations are entitled to little weight in our likelihood of confusion analysis. *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983).

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third party (sic) registrations are still in use. Because of this doubt, third party (sic) registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as their weakness in distinguishing source.

*In re Hub Distributing, Inc.*, 218 USPQ at 286.

Fourth, the market strength of a mark is determined by analyzing "the number and nature of similar marks in use on similar goods." *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. *See also NCTA v. American Cinema Editors*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991) (use of term by unrelated companies on numerous goods and services does not require a finding that the term is a weak mark because even in a common word may stand alone in the relevant market). In this case, applicant included third-party registrations beyond the scope of the services identified in the application and registrations at issue.

Finally, even if we were to consider applicant's weakness of the mark argument, third-party registrations will not aid an applicant to register its mark if it is likely to cause confusion with the cited registrations. *Independent Grocers' Alliance v. Potter-McCune Co.*, 404 F.2d 622, 160 USPQ 46, 46 (CCPA 1968) (if applicant's mark is likely to cause confusion with a previously registered mark, third-party registrations are not controlling); *In re Hamilton Bank*, 222 USPQ 174, 177 (TTAB 1984) (third-party registrations cannot assist an applicant in registering a mark that is likely to cause confusion with a registered mark).

E. Applicant's prior registration for the mark BRAVO!

Applicant contends that its ownership of Registration No. 2802973 for the mark BRAVO! for "prepaid long distance telephone calling cards not magnetically encoded" proves that applicant's mark and the registered marks can coexist because the services of the applicant and the registrant are completely different.<sup>15</sup> Applicant's argument presupposes that "prepaid long distance telephone calling cards not magnetically encoded" and "wireless telephone services" are identical. While "prepaid long distance telephone calling cards" and "wireless telephone services" may be related, they are not identical. Therefore, the Office is not precluded from examining the registrability of applicant's mark when it seeks to register additional services, even when, as here, those services may be related to the goods identified in its prior registration. *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

[E]ach case must be decided on its own merits based on the evidence of record. We obviously are not privy to the record in the files of the registered marks and, in any event, the issue of registration(s) by an Examining Attorney cannot the control the result of another case.

*In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472

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<sup>15</sup> Applicant's Brief, unnumbered pp. 7-8. Applicant's argument that its date of first use of the mark BRAVO! precedes the filing dates of the applications for the cited registrations is irrelevant. The question of priority of use is not germane in an *ex parte* appeal determining an applicant's right to register. *In re Calgon Corporation*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971); *In re Cook United, Inc.*, 185 USPQ 444, 445 (TTAB 1975).

F. Evidence of actual confusion.

Applicant argues that it "has openly sold its phone cards for almost 7 years under the registered mark BRAVO without any complaints from anyone" regarding reported instances of actual confusion.<sup>16</sup> In the context of an *ex parte* appeal, applicant's reliance on the lack of any reported instances of actual confusion carries little, if any, weight. See *In re Majestic Drilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("The lack of evidence of actual confusion carries little weight"). First, the registrant is not a party to the appeal, and therefore it has not had the opportunity to present any evidence of confusion that may have occurred. Second, because there is no evidence regarding the nature and extent of either applicant's use of its mark the registrant's use of its marks, we cannot determine whether there has been an opportunity for confusion to have occurred. *In re Kangaroos*, 223 USPQ 1025, 1026-1027 (TTAB 1984).

G. The degree of consumer care.

Applicant contends that degree of consumer care is a factor that favors finding no likelihood of confusion because price and convenience are the primary considerations for applicant's customers, and the registrant's consumers will likely be

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<sup>16</sup> Applicant's Brief, unnumbered p. 12.

sophisticated, business consumers who will not be misled as to the source of its telecommunications services in the nature of gateway links.

Even though we can make certain suppositions about the degree of care consumers exercise when selecting wireless telephone services and providers of gateway links, as with the other *du Pont* factors, the degree of care cannot be "supposed," it must be supported by evidence. The issue of care includes the degree to which consumers consider the marks and the process by which consumers select wireless telephone service and gateway link providers. Unfortunately, there is no such evidence in the record, and consequently, there is no evidence regarding the degree of care exercised by relevant consumers.

H. Balancing the factors.

In view of the facts that the marks are similar and that the registrant's services of providing gateway links between businesses and their customers via the Internet and applicant's wireless telephone services are related, and because we must presume that the services move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's registration of the mark BRAVO is likely to cause confusion with the marks BRAVOSOLUTIONS, BRAVOINDUSTRY and BRAVOBUILD in the cited registrations.

Decision: The refusal to register is affirmed.