

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
December 11, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael Weber

Serial No. 78711049
Serial No. 78711089

Matthew H. Swyers of The Swyers Law Firm, PLLC for Michael Weber.

David Yontef, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Holtzman, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

On September 12, 2005, Michael Weber filed two use-based applications for the mark HOT-MAPS, in standard character format, for the following goods and services:

Printed matter, namely, atlases, city guides, and travel guides, in Class 16 (Serial No. 78117089); and,

Computer services, namely, providing access to maps, city guides and travel guides on the Internet and other communication media, in Class 42 (Serial No. 78117049).¹

¹ Because the same applicant filed both applications, the same Examining Attorney reviewed both applications, and both applications involve common issues of fact and law, we have consolidated the appeals.

Serial No. 78117049

Serial No. 78117089

The Examining Attorney finally refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark, used in connection with its goods and services, so resembles the mark HOTMAPS for "computer software containing electronic chart data used in conjunction with computerized navigational devices," in Class 9, as to be likely to cause confusion.²

In the HOT-MAPS application for "computer services, namely, providing access to maps, city guides and travel guides on the Internet and other communication media," the Examining Attorney finally refused registration because the description of services is indefinite. The Examining Attorney required clarification of the terms "providing access" and "other communication media." Applicant never addressed this refusal.

Likelihood Of Confusion

Our determination 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

² Registration No. 2821382, issued March 9, 2004.

Serial No. 78117049

Serial No. 78117089

F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

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

We turn first to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra*. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). *See also, In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988).

In the case *sub judice*, the marks are legally identical: HOTMAPS versus HOT-MAPS. The hyphen between the words "hot" and "maps" in applicant's mark will not prevent the public from recognizing HOT-MAPS as being the

Serial No. 78117049

Serial No. 78117089

equivalent of HOTMAPS. *Thymo Borine Laboratory v. Winthrop Chemical Co., Inc.*, 155 F.2d402, 69 USPQ 512, 514 (CCPA 1946) (the hyphen in appellant's mark THY-RIN has no significance). See also *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479 (TTAB 1983) (contractions of terms do not alter the essential identity or character and meaning between the full word and its contraction, and therefore "L'il' Lady Buggy," for toy doll carriages is likely to cause confusion with "Little Lady," for dolls and doll clothing); *Henry I. Siegel Co., Inc. v. Highlander, Ltd.*, 183 USPQ 496, 499 (TTAB 1974) (H.I.S., pronounced "his," is likely to cause confusion with the mark HE for the same products); *In re Strathmore Products, Inc.*, 136 USPQ 81, 82 (TTAB 1962) (GLISTEN is phonetically equivalent to GLISS'N and have the same meaning since GLISS'N is a contraction of GLISTEN).

In view of the foregoing, the similarity of the marks weighs in favor of finding that there is a likelihood of confusion.

- B. The similarity or dissimilarity and nature of the goods; and,
- C. The similarity or dissimilarity of established, likely-to-continue trade channels.

It is well settled that likelihood of confusion is determined on the basis of the goods as they are identified

Serial No. 78117049

Serial No. 78117089

in the application and the cited registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). Moreover, the greater the degree of similarity between the applicant's mark and the mark in the cited registration, the lesser the degree of similarity between the goods and services in the application and the cited registration is required to support a finding of likelihood of confusion. *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). If the marks are the same, or almost so, it is only necessary that there be a viable relationship between the goods and services to support a finding of likelihood of confusion. *In re Engine Supply, Inc.*, 225 USPQ 216, 217 (TTAB 1985); *In re Concordia International Forwarding Corp.*, 222 USPQ 335, 356 (TTAB 1983).

It is well settled that the goods and services of the applicant and the registrant do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective goods and services are related in some manner and/or that the conditions surrounding their marketing are

Serial No. 78117049

Serial No. 78117089

such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, *supra* at 1785; *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The goods in the cited registration are identified as "computer software containing electronic chart data used in conjunction with computerized navigational devices." A "chart" is a map.

- 1: MAP as a: an outline map exhibiting something (as climatic or magnetic variations) in its geographical aspects b: a map for the use of navigators.

Merriam-Webster Online (m-w.com). See also Merriam-Webster's Collegiate Dictionary, p. 193 (10th ed. 1998).³

"Navigational" is the adjective form of the word "navigation" (e.g., navigational aid). "Navigation" means the following:

1. the act or process of navigating.

³ Attached as exhibits to the Examining Attorney's Brief. The Board may take judicial notice of online dictionaries that also exist in printed format. *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n. 3 (TTAB 2002). See also, *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Serial No. 78117049

Serial No. 78117089

2. The art or science of plotting, ascertaining, or directing the course of a ship, aircraft, or guided missile.

Dictionary.com Unabridged (v 1.1) based on the Random House Unabridged Dictionary (2006).

"Navigating" means the following:

1. to move on, over, or through (water, air, or land) in a ship or aircraft: to navigate a river.
2. to direct or manage (a ship, aircraft, or guided missile) on its course.
3. to ascertain or plot and control the course or position of (a ship, aircraft, etc.).
4. to pass over (the sea or other body of water), as a ship does.
5. to walk or find one's way on, in, or across: It was difficult to navigate the stairs in the dark.

Id.

Based on the description of goods in the cited registration, the mark HOTMAPS is used in connection with computer software in the field of electronic maps used with computerized devices for plotting a course.

Applicant describes its goods and services as follows:

1. Atlases, city guides, and travel guides; and,

Serial No. 78117049

Serial No. 78117089

2. Computer services, namely providing access to maps, city guides, and travel guides on the Internet and other communication media.

"Atlases" are "a bound collection of maps often including illustrations, informative tables, or textual matter" or "a bound collection of tables, charts, or plates." *Merriam-Webster Online* (m-w.com).

A "guide" means the following:

- 1a: one that leads or directs another's way; . . .
- 1c: something that provides a person with guiding information.

Id.

Applicant explains that its goods and services "would be used by tourists in need of maps, city guides, and travel guides available to the general public."⁴ Based on the description of goods and services in the applications, applicant's goods are, in essence, printed maps, and its services are providing maps via the Internet or other means of communication. Based on a comparison of the goods and services in the application and cited registration, registrant's goods and the applicant's goods and services are closely related because they all involve providing maps and directions to potential consumers.

⁴ Applicant's Briefs, p. 5, citing applicant's declaration, ¶1.

Serial No. 78117049

Serial No. 78117089

The Examining Attorney contends (and we agree) that the third-party registrations made of record show the relatedness of the goods and services described in the application and the cited registrations. Third-party registrations based on use in commerce that individually cover a number of different items might serve to suggest that the listed goods and services are a type that 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., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The following third-party registrations are a sampling of the registrations that show a relationship between applicant's "computer services, namely providing access to maps, city guides, and travel guides on the Internet and other communication media" and the "computer software containing electronic chart data used in conjunction with computerized navigational devices" set forth in the cited registration:⁵

⁵ In the following tables, we have not included the entire description of goods and services for each of the subject registrations. Only the goods and services analogous to those found in the application and the cited registrations are listed.

Serial No. 78117049

Serial No. 78117089

Mark	Registration No.	Goods/services
GEOMICRO	2342267	Computer software for use in developing computer applications containing geographical and mapping information, in Class 9; and, Computer services, namely, providing an on-line database featuring geographical information and maps, in Class 42
MAPQUEST	2500767	Computer software for trip planning and customized mapping of locations, electronic map display, in Class 9; and, Computer services, namely, providing map enablement for the websites of others, in Class 41; and, Providing interactive maps, driving directions and destination information by means of an online website, in Class 39
GLOBAL PLANNER	2660371	Electronic mapping databases featuring digital topographical maps and computer software for viewing and maintaining electronic mapping databases, in Class 9; and, Providing an online electronic mapping database, in Class 42

Serial No. 78117049

Serial No. 78117089

Mark	Registration No.	Goods/services
GDT GEOGRAPHIC DATA TECHNOLOGY	2634546	Electronic database featuring geographic, road, routing, population, points of interest, street address, postal boundaries and census information, in Class 9; and, Providing an Internet accessible database for comparing geographic and address data, in Class 42
Design mark	1955683	Computer software featuring databases of geographic information, maps, and the locations of pages and grids on maps, in Class 9; and, Provision of geographic and demographic information by means of a computer, in Class 42
TRAVEL-BY-MOUSE	2496758	Software for creating and viewing maps, software for providing travel and routing information for travelers, computer programs featuring maps, in Class 9; and, Providing cartographic and geographic information via a global computer network, in Class 42
ARCINFO	2743272	Prerecorded discs and CD-ROMs featuring geographic information, in Class 9; and, Providing geographic data and mapping services through a global computer network, in Class 42

Serial No. 78117049

Serial No. 78117089

Mark	Registration No.	Goods/services
NAVTEQ	2983667	Electronic database, prerecorded CD-ROMs, DVDs, memory cards, and hard drive featuring maps and travel information, in Class 9; and, Providing online map and travel information, in Class 39
TRAILS ILLUSTRATED	2268114	Prerecorded CD-ROMs featuring maps, in Class 9; and, Providing an online database featuring maps, in Class 42
KIVERA	2769491	Computer software for displaying maps and providing directions, in Class 9; and, Providing maps and directions via a global computer network, in Class 42

The following third-party registrations are a sampling of the registrations that show a relationship between applicant's "printed matter, namely, atlases, city guides, and travel guides" and the "computer software containing electronic chart data used in conjunction with computerized navigational devices" set forth in the cited registration:

Mark	Registration No.	Goods/services
Design mark	1955683	Computer software featuring databases of maps, in Class 9; and, Printed publications, namely, maps and atlases, in Class 16

Serial No. 78117049

Serial No. 78117089

Mark	Registration No.	Goods/services
TBM	1902558	Computer software relating to maps and geography, in Class 9; and, Printed publications, namely maps and atlases, in Class 16
TRAVEL-BY-MOUSE	2496758	Software for viewing maps and providing directions, in Class 9; and, Maps and atlases, in Class 16
MAPMAKERS FOR THE 21 st CENTURY	2381069	Prerecorded CD-ROMs featuring atlases and maps, in Class 9; and, Atlases and maps, in Class 16
MAPQUEST	2523222	Software for displaying maps and destination information, in Class 9; and, Maps and city guides, in Class 16
WE BRING TECHNOLOGY DOWN TO EARTH	2720346	Software for displaying maps and travel and navigation information, in Class 9; and, Atlases and gazetteers, in Class 16
CHARTKIT	2685395	Digitized maps, in Class 9; and, Marine navigation books, maps, charts and guides, in Class 16
EARTHA	236351	Computer programs for the display of geographic information, in Class 9; and, Maps, charts, atlases, and guide books, in Class 16

Serial No. 78117049

Serial No. 78117089

Mark	Registration No.	Goods/services
ONLINE PLANT DIRECTORY	2673443	Computer database in the field of maps for industrial plants, in Class 9; and, Data sheets and booklets containing maps with industrial plant locations, in Class 16
SCEC	2800140	Electronic publications in the nature of maps in the field of earthquake research in Class 9; and, Maps in the field of earthquake research, in Class 16

Applicant's argument and evidence that the registered mark is used solely for lake maps for fishing is not persuasive, nor is it relevant. As indicated *supra*, we must consider the goods and services as they are set forth in the cited registration and the applicant's application. We cannot read any limitations or restrictions into the description of goods and services. *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

Serial No. 78117049

Serial No. 78117089

to which the sales of goods are directed"); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). If the application and/or the cited registration describe the goods and services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the application and/or the cited registration encompass all the goods and/or services of the type described, that they move in same channels of trade normal for these goods and/or services, and that they are available to all classes of purchasers for the described goods and/or services. *In re Linvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). In this case, the cited registration describes its goods broadly and without limitation as to the type of charts and navigational devices, channels of trade or classes of purchasers. Also, applicant's descriptions of goods and services are without any restrictions or limitations. Accordingly, we must presume that the charts and navigational devices described in the cited registration and applicant's guides and atlases and computer services move in the same channels of trade and are sold to the same class of purchasers.

Even if we considered applicant's argument and evidence that the goods in the cited registration were used solely in connection with lake charts for fishing, we would

Serial No. 78117049

Serial No. 78117089

not be persuaded the goods and services were so different as to be preclude finding that there is a likelihood of confusion. Because of the identity of the marks and the relatedness of the goods and services, consumers and potential consumers could mistakenly believe that applicant's goods and services and the goods in the cited registration are somehow related or affiliated.

In view of the foregoing, we find that the similarity of the goods and services and the similarity of the channels of trade and classes of purchasers are factors that weigh in favor of finding that there is a likelihood of confusion.

D. The conditions under which and buyers to whom sales are made, (i.e., "impulse" vs. careful, sophisticated purchasing).

Applicant argues that registrant's consumers will exercise a high degree of care, but its customers will not.

[P]urchasers of the registrant's higher-end products are more sophisticated than the target consumers of Applicant's goods insofar as they are owners of expensive marine electronics equipment which are required for use of the goods of the registrant whereas the average purchaser of the Applicant's goods are mere individuals requiring simple maps in non-marine settings requiring no

Serial No. 78117049

Serial No. 78117089

sophisticated electronics to operate the same.⁶

First, we cannot restrict the goods in the cited registration to lake charts used for fishing because the registration it is not so limited or restricted. Based on the description of goods, the mark in the cited registration could be used to identify high-end, sophisticated, marine charts, or it could be used in connection with an inexpensive, simple, hand-held GPS. Second, we must look at the degree of care used by the purchasers of both applicant's and registrant's products. Consumers of applicant's goods and services are also potential consumers of the registrant's goods and vice versa. Because there are no restrictions in either the applicant's or registrant's description of goods, we must consider all potential consumers, including those who exercise a lower degree of care. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986) (average ordinary wine consumer must be looked at in considering source confusion). If as applicant contends, its customers do not exercise a high degree of care, then a potential purchaser familiar with the registrant's HOTMAPS product may select

⁶ Applicant's Briefs, p. 6, citing the Michael Weber Declaration, ¶3.

Serial No. 78117049

Serial No. 78117089

applicant's products or services thinking it comes from the same source.

Finally, even assuming that a portion of registrant's customers are sophisticated and exercise a high degree of care, even sophisticated purchasers are not necessarily knowledgeable regarding trademarks or immune from source confusion. *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). This is especially true in a case like this where the marks are virtually identical and the goods and services are closely related.

Accordingly, we find that applicant has failed to demonstrate that the degree of care exercised by the consumers has any probative value in this case. Moreover, to the extent that we give this factor any weight, it would favor finding there is a likelihood of confusion because the purchasers of applicant's products comprise, at least in part, ordinary consumers who may not exercise a high degree of care when making their purchase.

E. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Applicant contends that applicant and registrant have concurrently used their HOTMAPS and HOT-MAPS marks for three years without any reported instances of actual confusion. However, the fact that an applicant in an ex

Serial No. 78117049

Serial No. 78117089

parte case is unaware of any instances of actual confusion has little probative value. First, the Board has no way of knowing whether the registrant is unaware of any reported instances of confusions. Second, it is not possible in this case to determine whether there has been any significant opportunity for actual confusion to occur. *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001). In view thereof, we are not persuaded that the absence of any instances of actual confusion is entitled to any weight in our analysis.

F. Balancing the factors.

Having carefully considered the evidence of record, we find that the marks are nearly identical, the goods and services are closely related, and the channels of trade are similar. Therefore, we conclude that a likelihood of confusion exists, and that the registration of applicant's mark is barred under Section 2(d) of the Trademark Act of 1946.

Because we have refused to register application Serial No. 78117049 on the ground of likelihood of confusion, we need not reach the issue of whether the description of services is indefinite.

Decision: The refusal to register is affirmed.