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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RTX Telecom A/S

Serial No. 79019433

John A. Clifford and Danielle I. Mattessich of Merchant & Gould P.C. for RTX Telecom A/S.

William T. Verhosek, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Quinn, Grendel and Kuhlke, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

RTX Telecom A/S, applicant herein, seeks registration on the Principal Register¹ of the mark **RTX** (in standard character form) for services recited in the application as:²

¹ Serial No. 79019433, filed on November 15, 2004. The application was filed pursuant to Trademark Act Section 66(a), based on International Registration No. 0872818.

² The application also includes Class 9 goods as to which no refusal exists, and which are not at issue in this appeal.

"repair, installation and maintenance of telecommunication and data communications equipment, and equipment based on wireless technology and other related equipment, apparatus and instruments," in Class 37;

"consultation within the areas of telecommunication and data communications," in Class 38; and

"development of products based on wireless technology in the nature of development of projects in relation to telecommunication and data communications; design and development of computer hardware; development of DECT technology and other kinds of wireless telephony systems; development of overall solutions and specially designed products making use of wireless technology, namely wireless personal area networks (WPAN), DECT, WDCT, DCT 2,4 GHz, GSM/GPRS, CDMA, TD-SCDMA, 3G and WLAN; implementation of the aforementioned development projects," in Class 42.

The Trademark Examining Attorney has issued a final refusal to register applicant's mark in all three of these classes, on the ground that the mark, as applied to the recited services, so resembles the mark **RTX**, previously registered on the Principal Register (in standard character form) for Class 9 goods identified in the registration as "computer software tools and extensions for the development and deployment of real-time applications, together with associated user's manuals and documentation, all sold together as a unit," as to be likely to cause confusion, to

cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant has appealed the final refusal. After careful consideration of the evidence of record and the arguments of counsel, we affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Under the first *du Pont* factor, we find that applicant's mark RTX and the cited registered mark RTX are identical in terms of appearance, sound, connotation and commercial impression. Applicant argues that its mark as actually used is displayed in a stylized form which distinguishes it from the cited registered mark. However, applicant is seeking to register its mark in standard character form, not in any stylized form. Any stylization

of the mark as actually used therefore is irrelevant to our comparison of the marks under the first *du Pont* factor. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000). We find that the marks are identical, and that the first *du Pont* factor therefore weighs heavily in favor of a finding of likelihood of confusion.

The second *du Pont* factor requires us to determine the similarity or dissimilarity of the goods and services as identified in the application and in the cited registration. It is settled that it is not necessary that the goods and services be identical or even competitive in order to find that the goods and services are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods and services themselves, but rather whether they would be confused as to the source of the goods and services. See *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). It is sufficient that the goods and services be related in some manner, or that the circumstances surrounding their use be such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same

source or that there is an association or connection between the sources of the respective goods and 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); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). Finally, in cases such as this where the applicant's mark is identical to the cited registered mark, there need be only a viable relationship between the respective goods and services in order to find that a likelihood of confusion exists. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001); and *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

The goods identified in the cited registration are "computer software tools and extensions for the development and deployment of real-time applications, together with associated user's manuals and documentation, all sold together as a unit." The Trademark Examining Attorney has submitted evidence from an online computer dictionary which shows that "real-time" "describes an application which requires a program to respond to stimuli within some small upper limit of response time." (www.foldoc.org)

Also of record is evidence showing that wireless products and technologies like those to which applicant's services are directed can involve and utilize real-time applications. See, for example the following excerpts from various Internet websites:

Real-Time Service Provisioning for Mobile and Wireless Networks - As mobile devices and wireless networks are becoming ubiquitous, the interest of users to deploy real-time applications, e.g. online gaming or Voice-over IP in such environments is also increasing. ... This paper gives an overview of the key technical challenges that are fundamental and need to be solved in order to easily support real-time applications in wireless and mobile environments. (whitepapers.techrepublic.com)

Real-Time Wireless Communications-Based Applications to Drive Next Phase of Internet's Evolution ... Delivering compelling real-time applications on reliable, energy-efficient devices will drive the future growth of wireless communications and the mobile Internet. (www.ti.com)

Internet telephony reflects the beginning of a new communication era, which is characterized by running real-time applications over Internet/Intranet based computer communication infrastructure. (dSPACE.mit.edu)

Tasman's technology will complement Nortel's enterprise infrastructure portfolio and is expected to further our ability to provide seamless, feature-rich networks that support critical real-time applications including voice, video and streaming media applications." (www.nortel.com)

This investment is intended to accelerate the development of the Lynx industry-leading real-

time operating system (RTOS) technology which is built on a scalable, standards-based architecture. The technology will enable Motorola and others in communications-focused industries to build complex, highly reliable, intelligent systems for their leading-edge products. One of the key technologies accelerated by this investment is high availability platforms, such as cellular infrastructure equipment, and other applications. (www.linuxworks.com)

Also of record are printouts of various third-party registrations, in which the identifications of goods show wireless and other telecommunications products and technologies involving real-time applications. For example:

Reg. No. 2636252: "Devices and systems to provide real-time audio, video and/or data communication over switched circuit networks and/or data networks..."

Reg. No. 2512640: "developing computer software applications used to integrate real-time and delayed messaging, paging, email and facsimile services via the Internet, telephones, personal computers and/or wireless devices..."

Reg. No. 2566727: "computer services, namely, providing online computer software applications for others, enabling bi-directional dialog between internet based applications and mobile devices for facilitating real-time commercial transactions and information exchange via wireless devices..."

Reg. No. 2611803: "computer consultation, custom software development, and computer integration services of real-time logistic decision support systems, real-time embedded systems,

communication protocol and wireless communications systems in the field of surface transportation and wireless communication..."

Reg. No. 2658365: "audio visual telecommunications and video conferencing products, namely portable wireless video phone, real-time wireless video surveillance unit for digitally recording, transmitting and receiving live information..."

Reg. No. 3039355: "...web-based multimedia teleconferencing services, and web-based real-time multimedia communications services, which allow users to simultaneously view electronic data, documents, and applications using a standard web browser or other software application..."

Reg. No. 2990312: Class 9 "communications software...for allowing computer users to access on-line software applications, namely, access to a software application that provides the user with a text messaging system that allows users to communicate with each other on a real-time basis." Class 38 "wireless communications services, namely, digital text messaging which allows communication on a real-time basis."

Reg. No. 2910464: "...technical consultation in the field of real-time reconfigurable wireless communications handsets and network equipment for use in wideband communications..."

Relying on printouts from registrant's website, applicant contends that, in the actual marketplace, registrant's real-time application software has a specific purpose which is unrelated to the wireless communications field in which applicant's services are rendered. That is, registrant "provides a software product under the RTX brand

that enhances Microsoft Windows by providing hard real-time and control capabilities to a general purpose operating system." (Brief at 13.)

However, regardless of what the record might show to be the nature of registrant's actual goods, our likelihood of confusion determination must be based on registrant's goods as they are identified in the registration. See *Cunningham v. Laser Golf Corp.*, *supra*; *In re Dixie Restaurants Inc.*, 105 F.3d 1405 (Fed. Cir. 1997); *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). The "computer software tools and extensions for the development and deployment of real-time applications" identified in the cited registration's identification of goods must be deemed to include software pertaining to any and all real-time applications, including real-time applications for the wireless and telecommunications fields like those to which applicant's services are directed.

For these reasons, and based on the evidence of record, we find that applicant's services as identified in the application are sufficiently closely related to the goods identified in the cited registration that source confusion is likely to result from use of the identical marks involved in this case. As noted above, because

applicant's mark is identical to the cited registered mark, there need be only a viable relationship between the respective goods and services in order to find that a likelihood of confusion exists. See *In re Shell Oil Co.*, *supra*; *In re Opus One Inc.*, *supra*; *In re Concordia International Forwarding Corp.*, *supra*. We find that the requisite viable relationship exists in this case. The second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Under the third *du Pont* factor, we find that applicant's services as recited in the application and registrant's goods as identified in the registration would be marketed in similar trade channels and to similar classes of purchasers in the telecommunications industry. Registrant's real-time application software tools would be marketed to the same wireless industry purchasers to whom applicant renders its repair and maintenance services, consultation services, and product development services. The third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

It is likely that registrant's goods and applicant's services are purchased with a degree of care by knowledgeable purchasers. The fourth *du Pont* factor (conditions of purchase) therefore weighs in applicant's

favor. However, it is settled that even purchasers knowledgeable in their particular fields may still be confused by the use of identical marks on related goods and services. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

Considering all of the evidence of record as it pertains to the relevant *du Pont* factors, and for the reasons discussed above, we conclude that a likelihood of confusion exists. To the extent that any doubts might exist as to the correctness of this conclusion, we resolve such doubts against applicant. See *In re Shell Oil Co. supra*; *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc. supra*.

Decision: The refusal to register as to Classes 37, 38 and 42 is affirmed. However, the application shall proceed as to Class 9, which was not the subject of the refusal.