

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: 9/2/04

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Skywire Software, LLC
v.
Asta Technology Group, Inc.

Opposition No. 91153532
to application Serial No. 76336774
filed on November 13, 2001

Sanford E. Warren, Jr. and R. Scott Rhoades of Winstead
Sechrest & Minick for Skywire Software, LLC.

Inga Regenass of Holland & Hart for Asta Technology Group,
Inc.

Before Simms, Quinn and Rogers, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Asta Technology Group, Inc.
to register the mark SKYWIRE for "computer software used to
develop a group of applications and libraries designed to
allow you to manipulate and receive data on wired and
wireless devices."¹

¹ Application Serial No. 76336774, filed November 13, 2001,
alleging a date of first use anywhere and a date of first use in
commerce of October 1, 2001.

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Skywire Software, LLC opposed registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used on applicant's goods, so resembles opposer's previously used and registered mark SKYWIRE for "business consulting in the fields of high-end application development, business process re-engineering, supply chain management and business incubation services,"² and SKYWIRE for other goods and services such as computer software for business use and computer software development and integration services, as to be likely to cause confusion.

Applicant, in its answer, admitted that the parties' marks are similar, but otherwise denied the salient allegations in the notice of opposition. Applicant also set forth several allegations captioned as "affirmative defenses."

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by opposer; a certified copy of opposer's Registration No. 2683037, and copies of two applications owned by opposer to register the mark SKYWIRE wherein applicant's application has been raised as a potential bar under Section 2(d) to the registrations sought by opposer, all made of record by way of opposer's notice of reliance.

² Registration No. 2683037, issued February 4, 2003.

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Applicant neither took testimony nor offered any other evidence. Only opposer filed a brief. An oral hearing was not requested.

There is no issue as to opposer's priority in view of opposer's registration of the mark SKYWIRE which opposer has made of record. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Further, opposer has established common law rights in its mark SKYWIRE for computer software for business use and related services. Opposer's use, both as a trade name and as a trademark/service mark, dates back to at least as early as December 2000, a date prior to the filing date of the involved application which, in the absence of evidence, is the earliest date upon which applicant is entitled to rely.

Our 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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

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The marks involved herein are identical. The identity of the marks in sound, appearance, meaning and overall commercial impression weighs in favor of a finding of likelihood of confusion in this case.

We turn next to the second du Pont factor, that is, the similarity or dissimilarity of the parties' respective goods and/or services. As has been often stated, it is not necessary that the goods and/or services of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and/or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and/or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); and In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978). Moreover, the greater the degree of similarity between the parties' marks, the lesser the degree of similarity between the parties' goods and/or services that is required to support a finding of likelihood of confusion. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d

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1687 (Fed. Cir. 1993); and In re Opus One Inc., 60 USPQ2d 1812 (TTAB 2001).

The testimony of Patrick Brandt, opposer's founder and chief executive officer, together with the exhibits, details opposer's use of its SKYWIRE mark in connection with a variety of computer software products and related services for business use. Opposer's software and related services have been directed to the development and integration of applications for customers in the insurance, financial, healthcare, wireless and Internet fields. The evidence shows that opposer's revenues have increased, along with the number of new customers, and that opposer has partnered its efforts with entities such as IBM.

It is clear that opposer's computer software for various business uses, including use in developing applications, and applicant's "computer software used to develop a group of applications and libraries designed to allow you to manipulate and receive data on wire and wireless devices" are closely related. In addition, opposer's computer software development and application integration services, and consulting services in the field of computer software for business use are also closely related to applicant's goods.

As identified in the involved application, applicant's computer software is presumed to travel in all normal trade

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channels for such goods to all of the usual purchasers for goods of the type identified. Canadian Imperial Bank v. Wells Fargo, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Given that applicant's computer software is so closely related to opposer's computer software and services, it is likely that the parties' goods and services would travel in the same trade channels and would be purchased by the same classes of customers.

In conclusion, in view of the identity of the marks, their contemporaneous use on the parties' closely related goods and services is likely to cause confusion as to the source or sponsorship of such goods and services.

Inasmuch as applicant neither took testimony nor introduced any evidence at trial, the allegations set forth as "affirmative defenses" in the answer are entirely unsupported and, therefore, must fail.

Decision: The opposition is sustained, and registration to applicant is refused.