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Sent: 11/4/2010 12:48:17 PM

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Subject: U.S. TRADEMARK APPLICATION NO. 77396813 - DITTOPRO - DTP 5-001US - EXAMINER BRIEF

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Files: 1-1.jpg, 1-2.jpg, 2-1.jpg, 2-2.jpg, 77396813.doc

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77396813

MARK: DITTOPRO



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

TTAB INFORMATION:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

APPLICANT: ASIST, INC.

CORRESPONDENT'S REFERENCE/DOCKET NO:

DTP 5-001US

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant appealed the refusal to register the proposed mark DITTOPRO and globe design on the Principal Register because the applicant's mark so resembles the mark in U.S. Registration No. 3088658 on the Principal Register for the standard character word mark DITTOCAM when used on or in connection with the respective services as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act §2(d), 15 U.S.C. §1052(d).

STATEMENT OF FACTS

The applicant filed a use based application on February 14, 2008. The examining attorney issued a non-final Office action on June 3, 2008, refusing registration of the applicant's mark DITTOPRO and globe design under Trademark Act §2(d), 15 U.S.C. §1052(d) because the applicant's mark is likely to confuse customers as to the source of

the presumed identical and related communication services in light of the registrant's mark DITTOCAM. The applicant did not respond to the Office action within the statutory time frame and the examining attorney abandoned the application. The Office granted the applicant's petition to revive on February 5, 2009. The examining attorney issued a non-final Office action on February 18, 2009, stating that the application was now active and that the applicant needed to respond to the issues raised in the preceding Office action. The applicant responded to the Office action on August 17, 2009, arguing against the refusal. The examining attorney did not find the applicant's arguments persuasive because the dominant word portion of the marks DITTOPRO and DITTOCAM share an identical first term for communications services that are presumed to be identical and related. The applicant did not respond to the final Office action within the statutory time frame and the examining attorney abandoned the application for the second time on April 1, 2010. The Office subsequently granted the applicant's petition to revive on June 1, 2010, the same day that the Trademark Trial and Appeal Board (TTAB) received the applicant's appeal. The §2(d) refusal is the sole issue on appeal.

ISSUE ON APPEAL

Will the applicant's mark DITTOPRO and globe design with the dominant term DITTO in a large and bold red color and PRO in a small less noticeable dark blue color confuse customers as to the source of the presumed identical and highly related communications services when encountering the registrant's standard character mark DITTOCAM in which the registrant may display its mark as DITTOcam in the same color and stylization as the applicant's DITTOpro wording?

ARGUMENT

There is a likelihood of confusion between the applicant's mark DITTOPRO and globe design and the registrant's standard character word mark DITTOCAM. As the

Trademark Trial and Appeal Board (TTAB) is well aware, Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.* Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361-62, 177 USPQ 563, 567 (C.C.P.A. 1973); *In re 1st USA Realty Prof'ls Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007); *see also In re Dixie Rests. Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). The marks are compared for similarities in their appearance, sound, connotation and commercial impression. TMEP §§1207.01,

1207.01(b). The goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi).

The question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980).

The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b).

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of

confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988).

A. COMPARISON OF THE MARKS.

In the present case, applicant's mark DITTOPRO and globe design is similar to the registered standard character word mark DITTOCAM in sound, appearance, and connotation because of the shared identical and dominant term DITTO as the first portion of the marks. Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., 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" when making purchasing decisions).

Moreover, the term DITTO in the applicant's mark is in a larger font and more distinguishable red color than the much smaller term PRO in the applicant's mark which is displayed in a less visible color blue. Thus, the larger size and bright red color of the applicant's term DITTO make it the dominant portion of the applicant's DITTOPRO mark. The marks are compared in their entireties under a Trademark Act Section 2(d) analysis. *See* TMEP §1207.01(b). Nevertheless, one feature of a mark may be

recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); *see* TMEP §1207.01(b)(viii), (c)(ii).

Furthermore, one must presume that the registrant displays its standard character word mark in the same general display as the applicant's mark, that is with the same font, color, and size, as in the applicant's mark, as the registrant is not limited to any particular stylization or color for its standard character mark. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element itself and not in any particular display. TMEP §1207.01(c)(iii); *see* 37 C.F.R. §2.52(a). Thus, a mark presented in stylized characters or otherwise in special form generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. *See, e.g., In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). Consequently, the likelihood of confusion is clear because of the shared dominant portions of the mark create the same general overall impression.

Nor is the refusal obviated because the marks have additional wording. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See*

Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii).

Moreover, the applicant's design element does not obviate the refusal. When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods and/or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729, 735 (TTAB 1976); TMEP §1207.01(c)(ii).

Consequently, the shared similarities in the marks create an overall general impression that is likely to confuse customers as to the source of the presumed identical and related communications services when encountered by customers in the same trade channels.

B. ANALYSIS OF THE CHANNELS OF TRADE.

The applicant's services are "video teleconferencing" in International Class 38.

The registrant's services are "radio broadcasting services; telecommunications services, namely, broadcasting of real time images via the global computer network" in International Class 38.

The evidence shows that the respective services are related. Moreover, one must presume, because of the broad wording in the registrant's identification, that the respective services are identical in part. The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient that the goods and/or services are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

In this case, the registrant's services listed as "telecommunications services, namely, broadcasting of real time images via the global computer network" are so broad as to encompass the applicant's services listed as "video teleconferencing." The attached dictionary definition defines "teleconferencing" as "videoconferencing *using telephone*

lines: a system of videoconferencing that uses a restricted band of frequencies and allows participants to be connected by *telephone lines*.” Emphasis added. Based upon the dictionary definition, it is clear that the applicant’s video teleconferencing services utilize telephone lines. In addition, just like the registrant’s *telecommunication* services, the applicant’s services broadcast images from one party to another over telephone lines. Thus, the registrant’s telecommunication services that broadcast real time images over the global computer network encompass video teleconferencing. Therefore, it is presumed that the registration encompasses all goods and/or services of the type described, including those in applicant’s more specific identification, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Optica Int’l*, 196 USPQ 775, 778 (TTAB 1977); TMEP §1207.01(a)(iii).

Even if one were to assume, *arguendo*, that the registrant’s services did not encompass the applicant’s services, the evidence of record still shows that the respective services may emanate from a common source. The examining attorney previously attached copies of printouts from the USPTO X-Search database, which showed third-party registrations of marks used in connection with the same or similar services as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods and/or services listed therein are of a kind that may emanate from a single source. *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB

1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii).

The record shows the following third party use based registrations that include the same or similar services at issue [relevant edited excerpts in International Class 38 below]:

1. Registration No. 2845269 for the mark FUTURE and design in the August 21, 2009, Office action at page 2 in TICRS – audio teleconferencing; broadcasting programs via global computer network; radio broadcasting; video broadcasting; video teleconferencing.
2. Registration No. 3477183 for the mark ON TARGET LIVING and design in the August 21, 2009, Office action at page 5 in TICRS – telecommunications services, namely, broadcasting radio and television programs and motion picture films via a global computer network; video and audio teleconferencing services via the internet.
3. Registration No. 3499515 for a foreign wording design mark in the August 21, 2009, Office action at page 9 in TICRS – radio broadcasting information; video teleconferencing.
4. Registration No. 3474513 for SO ... THINK ABOUT THIS in the August 21, 2009, Office action at page 12 in TICRS – telecommunications services, namely, broadcasting radio and television programs and films via a global computer network; video and audio teleconferencing services via the internet.
5. Registration No. 3316929 for FRAG DOLLS and design in the August 21, 2009, Office action at page 16 in TICRS – broadcasting of radio or television programs; audio and video teleconferencing.
6. Registration No. 2832976 for SUREWEST in the August 21, 2009, Office action at page 19 in TICRS – audio and video teleconferencing services; cable radio and television broadcasting and transmission.
7. Registration No. 2843800 for COMMUNICATE WITH CONFIDENCE in the August 21, 2009, Office action at page 22 in TICRS – telecommunications services, namely, . . . audio and video teleconferencing services . . . ; cable radio and television broadcasting and transmission.
8. Registration No. 2995724 for ACCERIS in the August 21, 2009, Office action at page 24 in TICRS – audio teleconferencing services, video teleconferencing services; wireless cable television broadcasting.

9. Registration No. 3062362 for INFINITACCESS in the August 21, 2009, Office action at page 27 in TICSRS – audio and video teleconferencing services; cable services, namely, cable radio and television programming, broadcasting and transmission

10. Registration No. 3254144 for TOOLIEDOTTER PRESS in the August 21, 2009, Office action at page 30 in TICSRS – telecommunications services, namely, broadcasting radio and television programs and motion picture films via a global computer network; audio and video teleconferencing of seminars and workshops to a global computer network.

11. Registration No. 3294866 for YOUR BLUEPRINT TO STRESS FREE . . . in the August 21, 2009, Office action at page 34 in TICSRS – telecommunications services, namely, broadcasting radio and television programs and films via a global computer network; video and audio teleconferencing services via the internet.

12. Registration No. 3097884 for WHEN ALL YOU REALLY WANT . . . EVERYTHING in the August 21, 2009, Office action at page 38 in TICSRS – telecommunications services, namely, . . . audio and video teleconferencing services . . . ; cable services, namely, cable radio and television broadcasting and transmission

13. Registration No. 3428277 for CALTEL CONNECTIONS in the August 21, 2009, Office action at page 41 in TICSRS – telecommunications services, namely, . . . audio and video teleconferencing services . . . ; cable services, namely, cable radio and television broadcasting and transmission

14. Registration No. 3391868 for IRDETO MOBILE in the August 21, 2009, Office action at page 44 in TICSRS – voice, data, sound and image communications services, namely, . . . radio communications, audio and video teleconferencing; radio, television, satellite, cable and mobile telephone broadcasting services; television, radio, satellite and cable broadcasting services featuring live performances and events.

ANALYSIS OF THE APPLICANT’S ARGUMENTS

The applicant argues that “[t]he mark in question is not visually identical to the cited mark.” Applicant’s Brief at 13. The applicant’s argument is directly contradicted by well settled case law stating that the marks at issue need only create the same overall general impression. *See Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980); *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537,

540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b).

The applicant argues that the term DITTO in the applicant's mark is an acronym. Applicant's Brief at 13. The attached dictionary definition of the term DITTO directly contradicts the applicant's argument as no acronym definition is provided. In addition, the applicant fails to explain how this alleged fact obviates the likelihood of confusion between the marks that share the identical term DITTO. Moreover, even if the applicant's acronym was well known, it would still have the same sound, connotation, and appearance as the DITTO wording in the registrant's mark. As stated above, the shared identical terms DITTO are the dominant portion of each mark because DITTO is the first portion of each mark. In addition, the term DITTO in the applicant's mark is in a larger font and more distinguishable red color than the much smaller term PRO in the applicant's mark which is displayed in a less visible color blue. Furthermore, one must presume that the registrant displays its standard character mark in the same general display as the applicant's mark, that is with the same font, color, and size, as in the applicant's mark as the registrant is not limited to any particular stylization or color for its standard character mark. Consequently, the overall general impression of the marks is clear because of the shared dominant DITTO portions of the mark.

The applicant argues that the respective services are not identical or overlapping because the services differ in their method of communication and that this alleged fact obviates the refusal. Applicant's Brief at 6-12. The applicant's argument is again directly

contradicted by case law that holds that the fact that the services of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular services, but likelihood of confusion as to the source of those services. *See generally In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); TMEP §1207.01; *see Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975). Therefore, it is immaterial that the “[r]egistrant broadcasts; Applicant does not.” Applicant’s Brief at 6.

Furthermore, the services of the parties need *not be identical* or *directly competitive* to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient that the services are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984). In this case, each identification contains telecommunication related services. Additionally, the registrant’s services are so broad in part as to encompass the applicant’s services.

Moreover, the third party registrations serve to suggest that the respective services are of a kind that may emanate from a single source. Thus, the respective telecommunications related services are related in some manner and/or the conditions surrounding their

marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the services come from a common source.

The applicant continues its argument stating that the registrant's services are limited to “. . . incidental Internet video broadcasts – streaming one-way video – of [a] radio show.” Applicant's Brief at 7. The applicant's argument, and any similar argument, is merely a collateral attack on the cited registration. Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate. During *ex parte* prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration (*e.g.*, a registrant's nonuse of the mark). *See In re Dixie Restaurants*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 1387, 165 USPQ 515, 517 (C.C.P.A. 1970); *In re Peebles Inc.* 23 USPQ2d 1795, 1797 n. 5 (TTAB 1992); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2014-15 (TTAB 1988).

The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration. *See, e.g., In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); *J & J Snack Foods*

Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973). Therefore, the applicant's argument should not be considered because it impermissibly seeks to limit the scope of the registrant's services. Furthermore, the applicant presumes a linkage between the respective services where none may exist. In other words, the applicant assumes that the registrant's first listed radio broadcasting services are linked in purpose and use with the registrant's telecommunications services, namely, broadcasting of real time images via the global computer network. However, the record is silent as to the nature of the respective services, so any alleged linkage between the services is nothing more than the applicant's purely speculative collateral attack on the registration identification.

The applicant also argues that the third party registrations do not show that the respective services are related. The applicant points to Registration No. 3254144 as an example of the alleged failure of the third party registrations.¹ Applicant's Brief at 9. Presumably, the applicant seeks to demonstrate that the services listed in the third party registration are different than the applicant's video teleconferencing services because the third party registrant's telecommunication services of audio and video teleconferencing are related to seminars and workshops. However, the applicant's services encompass the third party

¹ The applicant also states that “. . . the fact that several entities have obtained registrations for use in conjunction with both the services of the Applicant and services of the Registrant. . .” Applicant's Brief at 10. The applicant's statement contradicts the applicant's own argument and serves as an admission that the third party registrations do in fact encompass the respective services.

registrant's services as there is no limitation to the applicant's video teleconferencing services. Thus, the applicant's services encompass the third party registrant's video teleconferencing services related to seminars and workshops. As shown above, the use based third party registrations of record do show that the services listed therein are of a kind that may emanate from a single source.

The applicant argues that because some of the third party registrations provide more than a few telecommunications related services, that the third party registrations are less valid than a registration with a few telecommunications services because

“[t]elecommunications companies that provide the infrastructure and connectivity required for accessing the Internet will necessarily be involved with almost *all* types of communication services.” Applicant's Brief at 10. There is not a single shred of evidence in the record to support the applicant's theory about what is common in the telecommunications industry. Therefore, the applicant's speculative argument is not reliable.

The applicant continues its speculative arguments, unsupported by any evidence, arguing that the respective consumer groups for the services at issue are different based upon the applicant's interpretation of the registrant's services. Applicant's Brief at 11-12. The applicant forgets that the registrant's services are so broad as to encompass the applicant's services. Moreover, the applicant may not restrict the services covered in the registration by extrinsic argument or evidence. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Additionally, the applicant fails to recognize

that the respective services do not have any limitation as to the trade channels or particular customers. Therefore, both parties may offer their services to any customer in any trade channel. *See, e.g., In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Therefore, the applicant’s argument should be ignored as it is not legally sound.

CONCLUSION

The applicant’s mark DITTOPRO and globe design is similar to the registered standard character word mark DITTOCAM in sound, appearance, and connotation. The shared identical terms DITTO are the dominant portion of each mark because DITTO is the first portion of each mark. Moreover, the term DITTO in the applicant’s mark is in a larger font and more distinguishable red color than the much smaller term PRO in the applicant’s mark which is displayed in a less visible color blue. Furthermore, one must presume that the registrant displays its standard character mark in the same general display as the applicant’s mark, that is with the same font, color, and size, as in the applicant’s mark as the registrant is not limited to any particular stylization or color for its standard character mark. Moreover, the applicant’s design element does not obviate the refusal because the word portion is more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods and/or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. Additionally, the services are presumed to be identical in part. The registrant’s services listed as “telecommunications services, namely, broadcasting of real time images via the global computer network” are so broad as to encompass the applicant’s services listed as

“video teleconferencing.” Therefore, it is presumed that the registration encompasses all goods and/or services of the type described, including those in applicant’s more specific identification, that they move in all normal channels of trade, and that they are available to all potential customers. Furthermore, even without the presumption concerning the scope of the registrant’s services, the evidence shows that the respective services are of a kind that may emanate from a common source. Consequently, the shared similarities in the marks create an overall general impression that is likely to confuse customers as to the source of the related services when encountered by customers in the same trade channels. Consequently, the examining attorney respectfully requests that the Trademark Trial and Appeal Board affirm the refusal.

Respectfully submitted,

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