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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 Targus Information Corporation

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Serial No. 77954823

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Before Grendel, Bergsman, and Wellington,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Targus Information Corporation ("applicant") has filed  
an application to register on the Principal Register the  
mark WHO'S CALLING ME? (in standard character form) for  
"application service provider in the field of non-  
downloadable software featuring information about inbound

calls made through cellular phones, telephones" in International Class 42.<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of previously registered mark WHO'S CALLING (in uppercase typed letters) for the following goods and services:

Computer software, namely, an Internet based call measurement and monitoring software suite for business that tracks and evaluates calls and provides call related information via real time and periodic reporting; computer software, namely, an Internet based interactive notification and reporting software suite for business in the fields of marketing, advertising and business development (in International Class 9);

Business marketing consulting services; market research and related services, namely, market analysis and reporting; market data research services, namely, monitoring and measuring the effectiveness of advertising through the Internet and through electronic information storage by tracking telephone calls by telephone number, caller, location, and related marketing data; interactive notification and reporting services, namely, providing user customizable real time and periodic advertising effectiveness and customer profile and contact information... (in International Class 35); and

Data automation and collection service using proprietary software to evaluate, analyze and collect service data; technical consultation in the field of market data research; providing use of online non-downloadable software for call measurement and monitoring services for business that track and evaluate calls and providing call-related information via real time and periodic reporting...

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<sup>1</sup> Serial No. 77954823, filed March 9, 2010, based on an allegation of a bona fide intent to use the mark in commerce.

(in International Class 42).<sup>2</sup>

The refusal is also based on the following previously-registered mark that is owned by the same entity and covers the identical goods and services:<sup>3</sup>



For purposes of this appeal and our likelihood of confusion analysis, we focus on the former mark because it bears a stronger resemblance to applicant's proposed mark inasmuch as it is in typed, all-capital lettering and does not contain any stylization or design elements. If we do not find that registrant's typed drawing mark is similar to applicant's mark, then there would not be a likelihood of confusion between registrant's composite mark and applicant's mark. *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Applicant concurrently appealed the final refusal of its application and filed a request for reconsideration. The examining attorney denied the request for

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<sup>2</sup> Registration No. 2975766, issued July 26, 2005; Section 8 accepted and Section 15 acknowledged. The registration's recitation of goods and services has been abbreviated in the body of this decision.

reconsideration. Both applicant and the examining attorney have filed briefs. As discussed below, the refusal to register is affirmed.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act 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. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (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 *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first consider the relatedness of applicant's services with the goods and services of registrant. In making our determination, we must consider the goods and services as they are described in the registrations and application, and we cannot read limitations into those goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281

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<sup>3</sup> Registration No. 2975767, issued July 26, 2005; Section 8 accepted and Section 15 acknowledged.

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F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987).

We agree with the examining attorney's general statement and analysis, that "[b]oth applicant and registrant provide goods and services that involve software that monitor and track phone calls." Brief, (unnumbered) p. 12. More specifically, however, we can discern that applicant's services involving "non-downloadable software featuring information about inbound calls made through cellular phones, telephones" actually encompass registrant's services recited as "providing use of online non-downloadable software for call measurement and monitoring services for business that track and evaluate calls and providing call-related information via real time and periodic reporting." The "information" ascertained and provided via applicant's services potentially includes the "call measurement and monitoring services for business" information mentioned in registrant's services. Put simply, both applicant and registrant's services involve using software to ascertain information from incoming calls and providing this information to the consumers, namely, the entities receiving the telephone calls. Thus, according a reasonable reading to and interpretation of the

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services, as they are recited in the application and registration, we must consider the services to be legally identical.

We further find a close relationship between applicant's services and registrant's software. Registrant's "Internet based call measurement and monitoring software suite for business that tracks and evaluates calls and provides call related information via real time and periodic reporting" performs a similar function to applicant's services "in the field of non-downloadable software featuring information about inbound calls made through cellular phones, telephones." Again, the "information" derived from the inbound telephone calls with respect to applicant's services may include the same type of information being tracked by registrant's software. For example, a business entity interested in tracking its incoming telephone calls and possibly evaluating information gained from these calls, could enlist applicant's services or purchase registrant's software to accomplish its objective.

In sum, applicant's services are identical to certain services in the registrant and applicant's services are otherwise closely related to registrant's goods. The *du Pont* factor regarding the similarity of the goods and

services weighs strongly in favor of finding a likelihood of confusion.

Because the respective services are in part legally identical, we must assume that the purchasers and channels of trade for such services would also be the same. See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade”); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”).

Applicant implicitly acknowledges that consumers of applicant’s and registrant’s services may be the same, but asserts that they will exercise a higher degree of care in their purchasing decisions. Specifically, applicant argues that their services “require sophistication on the part of purchasers” because they are “directed to businesses that require these technical services” and “[t]hese business owners or business department purchasers are not likely to be confused about the company in which they are dealing.”

Brief, p. 5. Applicant's argument that business owners in need of applicant's and registrant's services will exercise a higher degree of care is not supported by the record.

In view thereof, the factors involving classes of consumers and trade channels favors a finding of likelihood of confusion to the extent that the services are in part legally identical. With respect to consumer sophistication, we cannot make a determination based on the record before us. Even assuming a somewhat higher degree of consumer care, based on a 'business-to-business' services relationship, this would not outweigh the identity of the services and the presumption that the services travel in the same channels of trade and are sold to the same classes of consumers.

We now consider the similarity and dissimilarity between the marks. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

Here, the marks WHO'S CALLING and WHO'S CALLING ME? are clearly very similar in sound, appearance, meaning and commercial impression. Applicant's mark incorporates registrant's mark in its entirety and the addition of the



term ME? does very little to distinguish the marks. Both marks, when used in connection with their respective goods and services, will be understood in the same manner, *i.e.*, as an interrogatory directed to obtaining information regarding incoming telephone calls. Accordingly, we find that the marks, when considered as a whole, are very similar and this *du Pont* factor weighs heavily against applicant.

Finally, we address the strength of the cited mark. Applicant argues that "others are using similar marks for what appear to be related services." Brief, p. 5. Upon review of the entire record, however, there is little to no evidence of third-party use of similar marks in connection with related goods and/or services. Even accepting that there may be a degree of weakness based on the suggestive nature of the registrant's mark in connection with its goods and services, it is undeniable that even weak marks are entitled to protection. *King Foods, Inc. v. Town & Country Food Co., Inc.*, 159 USPQ 44 (TTAB 1968). Here, we are presented with extremely similar marks used for identical and closely related goods and services.

After careful consideration of the briefs and the evidence of record, we conclude that contemporaneous use of applicant's mark WHO'S CALLING ME? and the previously-

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registered mark WHO'S CALLING, on identical services in part or closely related goods and services, is likely to cause confusion as to the source or sponsorship of such services and goods.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.