

This Opinion is not a
Precedent of the TTAB

Mailed: February 17, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Fujarek

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Serial No. 76709445

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Mark Terry, Esq. for Gary Fujarek.

Jami Holland, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Zervas, Masiello and Goodman,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Gary Fujarek (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark VOICE for “broadcasting services, namely, radio and television broadcasting by satellite and mobile phones, via a global computer network” in International Class 38.¹ The mark was refused under Trademark Action Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the mark merely describes

¹ Application Serial No. 76709445 was filed on October 18, 2011. Applicant claims a *bona fide* intention to use the mark in commerce pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

a feature of Applicant's services, namely, "the sound or sounds uttered through the mouths of human beings."² In addition, the Examining Attorney refused registration of the proposed mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that the applied-for mark is likely to be confused with the following marks:

- THE VOICE OF ST. LOUIS (Reg. No. 1845914)³ in typed form⁴ for "radio broadcasting services" in International Class 38 (ST. LOUIS disclaimed).
- THE VOICE OF CHICAGO (Reg. No. 3129368)⁵ in standard character form for "radio broadcasting" in International Class 38 (CHICAGO disclaimed).
- VOICE OF AMERICA (Reg. No. 3205170)⁶ in standard character form for "Audio broadcasting; Broadcast of cable television programmes [sic]; Broadcasting programs via a global computer network; Cable radio broadcasting; Cable radio transmission; Cable television broadcasting; Cable television transmission; Communication via radio, telephone and television transmissions; Radio broadcasting; Radio broadcasting of information and other programs; Radio communication; Radio program broadcasting; Radio programme [sic] broadcasting; Radio, telephone, telegraph communication services; Satellite communication services; Satellite television broadcasting; Satellite transmission services; Satellite, cable, network transmission of sounds, images, signals and data; Streaming of audio material on the Internet; Streaming of video material on the Internet; Subscription television broadcasting; Television broadcasting; Television programme [sic] broadcasting via cable; Television transmission services; Transmission of news; Video

² Examining Attorney brief, 9 TTABVUE 17.

³ Second renewal, July 12, 2014.

⁴ Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (January 2017).

⁵ Renewed, October 25, 2016.

⁶ Registered, February 6, 2007; Section 8 affidavit accepted August 31, 2012.

broadcasting; Webcasting services” in International Class
38 (AMERICA disclaimed).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Both Applicant and the Examining Attorney filed briefs. We reverse the Section 2(e)(1) refusal and affirm the Section 2(d) refusal.

Mere Descriptiveness

We consider first the Examining Attorney’s Section 2(e)(1) refusal. A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). *See also In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature of them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. *See In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the mark is suggestive. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

According to the Examining Attorney, the term “Voice” refers to “the sound or sounds uttered through the mouths of human beings.” See dictionary.com definition; “the sound or sounds uttered through the mouth of living creatures, especially of human beings in speaking, shouting, singing, etc.”⁷ We note that “voice” is also defined in the same dictionary as “to give utterance or expression to; declare; proclaim; to voice one’s discontent”; and in *Merriam-Webster Dictionary* as “an instrument or medium of expression <the party became the voice of the workers>.”⁸

The Examining Attorney has placed the following in the record:

- “Voice Broadcasting: Introduction to Broadcasting,” at <http://www.ckbooks.com/>

“Radio broadcasting is essentially based on voice. Listeners know hardly about the face, dressing up at times the age of the person whose voice they are listening to. Most broadcasters have their peculiar voice – soft, hard, harsh or sharp.”⁹

- Article entitled “Modifying Broadcasting Voices,” at <http://www.nature.com/>

“[I]n a broadcast talk . . . method of improving the voices of some of the political speakers was described. By using a subtle combination of electrical devices in connection with the microphone, it is possible to improve the broadcast voice by smoothing out rough and strengthening weak notes.”

- Article entitled Top 10 Voices in Broadcast Journalism at <http://www.journalismdegree.com/>, listing “iconic” voices in television and radio broadcasting.

⁷ February 13, 2012 Office Action, TSDR 27.

⁸ October 15, 2015 Response, TSDR 2.

⁹ The author also discusses voice characteristics of a good broadcaster.

We are not persuaded by the Examining Attorney's arguments that the consuming general public will immediately, without reflection, recognize that "voice," as used with Applicant's services, is merely descriptive of a feature of Applicant's services, namely, that it identifies the "the sound or sounds uttered through the mouths of human beings." "Voice" has additional meanings; "to give utterance or expression to; declare; proclaim; to voice one's discontent" and as "an instrument or medium of expression <the party became the voice of the workers>." We find that these additional definitions are more apt in the context of the specified services, and that giving "utterance or expression to; declare; proclaim; to voice one's discontent" or being "an instrument or medium of expression" are non-specific in nature and convey nothing about the services. They hence are without the required immediacy of meaning or significance in the context of Applicant's identified services. Further, the webpages on which the Examining Attorney relies concern the sounds a person makes in the context of broadcasting, *e.g.*, "soft, hard, harsh or sharp" voices; they do not describe a specific characteristic or feature of broadcasting services, but rather of persons who are involved in or featured in broadcasting services. In addition, as Applicant points out, "Applicant's services also include the use of satellites, mobile phones, communication towers, electrical equipment, music, televisions, electrical components, and numerous other components[, and] Applicant also provides videos, instrumental music and other music products, and visual art"; and "[t]he fact that a person's voice is one component utilized in conjunction with a variety of other components does not mean that a consumer will 'immediately' ascertain" Applicant's

services.¹⁰ In sum, the evidence does not establish the immediacy required pursuant to *In re Abcor Development Corp.*, 200 USPQ at 217-18. The refusal to register under Section 2(e)(1) is therefore *reversed*.

Likelihood of Confusion

Our determination under Trademark Act § 2(d) is based on an analysis of all of the probative 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Similarity of the Services, Trade Channels and Classes of Purchasers

The registrations for THE VOICE OF ST. LOUIS and THE VOICE OF CHICAGO both identify radio broadcasting services, which encompass the specific radio broadcasting services set forth in Applicant’s recitation of services. In addition, the

¹⁰ Applicant’s brief at 15-16, 7 TTABVUE 16-17.

VOICE OF AMERICA registration identifies radio program broadcasting as well as television broadcasting, which encompass the radio and television broadcasting services set forth in Applicant's recitation of services. Thus, the services of each registration and the application are identical in part.

Turning to the trade channels and classes of purchasers, because Applicant's identified services and those in the cited registrations contain no trade channel or purchaser restrictions, and because they are identical in part, we presume both Applicant's and the cited Registrants' services move in all normal channels of trade and are available to all potential classes of ordinary consumers. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on legal presumption that "absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers" (citations omitted)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"); *American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Consumers of such services include members of the general public who listen to radio broadcast services. Thus, the *du Pont* factors regarding the similarity of the services, trade channels and classes of purchasers strongly weigh in favor of a finding of likely confusion.

Number and Nature of Similar Marks in Use on Similar Goods

Evidence of use by third parties of similar marks on similar goods is probative of the ultimate inquiry of likelihood of confusion when such use is so extensive that “customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the basis of minute distinctions.” *Palm Bay Imports*, 73 USPQ2d at 1694. *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation*, 115 USPQ2d at 1675-76 (internal citations omitted). “The weaker [the Registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). *See also Palm Bay*, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”). Third-party registrations such as those offered by Applicant are not evidence of use of the marks, *Olde Tyme Foods, Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992), but they can be used to show that a mark or portion thereof has a descriptive or suggestive meaning, leading to the conclusion that it is weak. *See Juice Generation*, 115 USPQ2d at 1675; *Jack Wolfskin*, 116 USPQ2d at 1136; *Tektronix, Inc. v.*

Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”).

The record contains the following registrations:¹¹

Reg. No.	Mark	Services	Disclaimer
1845914	THE VOICE OF ST. LOUIS	Radio broadcasting services	ST. LOUIS
1992278	SPORTS VOICE OF THE SOUTH	Radio broadcasting services	none
3008342	LA VOZ DE LA COMMUNIDAD	Television broadcasting services	none
4235584	RTV VOICE OF THE WORLD VOICE ¹²	Television and Radio Broadcasting Services	VOICE
3697506	MEDIA VOICE GENERATION	Broadcast services, namely, cable and satellite television broadcasting services in the fields of news, current events, social and cultural issues, faith issues, Christianity, spirituality, and religion; streaming of audio, video, and audiovisual content via a global communications network in the fields of news, current events, social and cultural issues, faith issues, Christianity, spirituality, and religion	MEDIA

¹¹ The record contains several cancelled registrations. A cancelled registration is generally evidence only of the fact that that registration issued. *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006).

¹² Applicant is the owner of this registration.

3205170	VOICE OF AMERICA	Audio broadcasting; Broadcast of cable television programmes;	AMERICA
3129068	THE VOICE OF CHICAGO	Radio broadcasting	CHICAGO
4031386	WE'RE CHICAGOLAND'S ETHNIC VOICE	Radio program broadcasting	none
4471207	VOICE OF THE SOCIAL GENERATION	entertainment services, namely, providing pre-recorded songs, music, television shows, and movies for live performances or exhibitions broadcasted via television, radio, satellite, cable, the Internet, the global computer network, PDA's, mobile telephones and wireless devices	none
4165580	AMERICA'S NU VOICE	Broadcasting programs via a global computer network; Cable television broadcasting;	AMERICA'S
4153358	RAISE YOUR VOICE	audio, text and video broadcasting services over computer or other communication networks, namely, uploading, posting, displaying, tagging, and electronically transmitting data, information, audio and video images;	
4508913	CHILDREN'S RADIO FOUNDATION AMPLYFYING YOUTH VOICES ACROSS AFRICA and Design	radio broadcasting services, radio program broadcasting, radio broadcasting consultation, and Internet radio services, namely, transmission of audio material via the Internet	FOUNDATION
4618729	CHARTER SPECTRUM VOICE	pay-per-view television and video transmission services; video-on-demand television transmission services; and interactive television	VOICE

		broadcasting and transmission services providing access to information from third-party sources and the global computer network	
4804725	REACH BEYOND THE VOICE AND HANDS OF JESUS, TOGETHER and Design	Broadcasting of radio programs featuring Christian religious content or content based on Christian religious values; audio and video broadcasting; broadcasting programs via a global computer network; broadcasting of video and audio programming on the Internet; streaming of audio, visual and audiovisual material on the Internet	none
4662614	VOICE OF ISRAEL	Broadcasting of video and audio programming over the Internet	none
4761772	LIBERTY'S VOICE	Broadcasting of television, cable television, satellite television, internet and radio programs	none
4823558	Voicekick	Broadcasting of audio programming over the Internet	none

The record contains no evidence that the referenced third-party marks are in actual use or that consumers are aware of them. *Olde Tyme Foods*, 22 USPQ2d at 1545. Thus, the evidence before us falls short of a showing that would allow us to conclude that “voice” is diluted and commercially weak. *Cf.*, *Jack Wolfskin*, 116 USPQ2d at 1136 (“extensive” evidence not only of third-party registrations but also “of these marks being used in internet commerce” for the relevant goods); *Juice*

Generation, 115 USPQ2d 1671 (uncontradicted testimony of “a considerable number” of third party uses of similar marks, along with third-party registrations). Instead, we find based on this record and our consideration of the third-party registrations only that the term “voice” is conceptually weak due to its suggestiveness with respect to audio broadcasting. Nonetheless, even assuming some degree of conceptual weakness of VOICE, this is not dispositive, as “likelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks.” *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

Similarity or Dissimilarity of the Marks.

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. “[T]he test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result.” *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008). Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and

considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion”). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *National Data Corp.*, 224 USPQ at 751.

Applicant argues:

Unlike the Applicant’s mark, all of the Cited Registrations have a common thread – all the Cited Registrations use the words “voice of” followed by a specific geographic location.

The use of the words “voice of” followed by a specific geographic location gives the Cited Registrations the commercial impression that the mark or someone associated with the mark is speaking on behalf of a specific geographic location. According to the Merriam-Webster Dictionary, the term “voice of” means an instrument or medium of expression or an opinion openly or formally expressed. ... As a result, the commercial impression of each of the Cited Registrations are indeed quite similar to each of the other Cited Registrations in that they all give the commercial impression of: expressing the opinions of a geographic area, i.e., Chicago, America, New York and St. Louis.

On the other hand, the Applicant’s mark gives quite a different commercial impression. In the Applicant’s case, the textual portion of Applicant’s mark includes only the single word “VOICE”. ...

As a result, the commercial impression can be: the musical sound produced by the vocal cord. ... Additionally, the commercial impression intended by the Applicant is of the Applicant himself ... which is very different than the commercial impression of the Cited Registrations, namely someone speaking on behalf of a geographic area.¹³

¹³ Applicant’s brief at 11-12, 7 TTABVUE 12-13.

Applicant is apparently relying on the definition of “voice” submitted with the request for reconsideration which offers “the party became the *voice of the workers*” as an example of use for the following definition of voice, “an instrument or medium of expression.”¹⁴ We are not persuaded by the distinction Applicant makes. The definition offered by Applicant is the definition of “voice,” not the definition of “voice of.” Further, there is nothing in the example quoted by Applicant that requires the term “of” to follow “voice” in order to have the definition, “an instrument or medium of expression.” We see no reason why the same meaning of VOICE would not attach to all of the marks, particularly when they all involve broadcasting services.

Rather, we find Applicant’s mark to be similar to each of the cited marks. VOICE is the entirety of Applicant’s mark, and the dominant feature in each of registrant’s marks. VOICE is the most distinctive word in each of the cited marks. It is also the first term in each of the cited marks with trademark significance,¹⁵ and is the first term that consumers will perceive when considering the marks. *See Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Products Inc. v. Nice-Pak Products*,

¹⁴ October 15, 2015 Req. for Recon., TSDR 2.

¹⁵ The term THE in two of the cited registrations has no trademark significance.

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”).

We have found earlier in this decision that Applicant’s mark is suggestive of his services, and Applicant has submitted numerous third-party registrations to demonstrate that the term VOICE is a weak term in the broadcast area. Even if VOICE is a weak term in the broadcast area, there is no distinguishing term in Applicant’s mark to differentiate his mark from any of the cited marks, as there are with each of the cited marks. (The terms CHICAGO, ST. LOUIS and AMERICA function to differentiate each of the cited marks.) This is not a situation where Applicant has added terms to differentiate his mark from another mark. Rather, Applicant has stripped away all of the distinguishing matter from the cited marks, leaving the consuming public unable to differentiate his mark from any of the cited marks. In fact, Applicant’s mark may be viewed by consumers as a shortened form of any one of the cited marks.

In view of the foregoing, and particularly because Applicant’s mark is identical to the dominant term in registrants’ marks, we find that Applicant’s mark and the cited marks are similar in overall commercial impression.

The *du Pont* factor regarding the similarity of the marks favors a finding of likelihood of confusion.

Balancing the Factors

We have considered all of the arguments and evidence of record and all relevant *du Pont* factors. Regardless of the suggestive nature of the shared term VOICE, the

overall similarity of the marks for overlapping services that move in the same channels of trade to the same classes of customers renders confusion likely.

Decision: The refusal to register under Section 2(e)(1) is *reversed*. The refusal to register under Trademark Act § 2(d) is *affirmed*.