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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

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Mailed: July 3, 2017

Opposition No. 91209226 (parent case)  
Opposition No. 91211213

*Premier Systems USA, Inc. and  
Olloclip, LLC (joined as party plaintiff)<sup>1</sup>*

*v.*

*DISH Network L.L.C.*

**Before Bergsman, Gorowitz and Goodman,  
Administrative Trademark Judges.**

**By the Board:**

These proceedings are before the Board for consideration of the January 16, 2017 motion for partial summary judgment filed by applicant DISH Network L.L.C. (“DISH”). The motion is fully briefed.<sup>2</sup>

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<sup>1</sup> The USPTO Assignment Branch records indicate a September 17, 2014 assignment of the entire interest in pleaded Registrations Nos. 4137064 and 4380611, from Premier Systems USA, Inc., to Olloclip, LLC, recorded December 22, 2015 at Reel/Frame 5696/0136. Accordingly, Olloclip, LLC is joined as a party plaintiff. TBMP § 512.01 (Jun. 2017).

<sup>2</sup> The Board has reviewed and considered the briefs on the motion, but we do not repeat or discuss all of the arguments and submissions, and do not address irrelevant arguments. *See Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

When referring to the record in an *inter partes* proceeding, parties should reference evidence by citation to the Board's TTABVUE docket electronic database by the entry and page number, e.g., 1 TTABVUE 2, to allow the reader to easily locate the cited material. *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

As brief background, DISH filed ten applications, based on a *bona fide* intent to use the mark in commerce pursuant to Trademark Act Section 1(b), to register the mark OLLO (standard characters) for:

- 1) “telecommunications equipment, namely, smartphones, wireless and mobile telephones for voice, data, image, graphic, audio, video and fax communications and electronic mail” in International Class 9;<sup>3</sup>
- 2) “telecommunication services, namely, transmission of voice, data, images, graphics, audio, and video by means of wired and wireless networks, communications networks, and global computer information networks; data communication services, namely, wireless data communications services; wireless telecommunications services, namely, wireless telephone services, wireless internet and text messaging services; wireless communication services for the purpose of transmitting voice, data, graphics, music, video, messages, images, and location information; providing computer communications and data transmission services via radio at remote locations; wireless transmission and networking of messages, communications and data; multi-channel, multi-point distribution services for the high speed, wireless transmission of voice, data, images, graphics, audio, video and faxes; wireless phone services; telephone and voice transmission services; providing high-speed wireless internet access; providing broadband internet access; providing multiple-user access to the internet, global computer networks, and electronic communications networks; providing access to world-wide information networks; webcasting audio and visual programming via local and global communications networks; television broadcasting and webcasting audio-visual programming; television broadcasting services via the internet, global computer networks, and electronic communications networks; electronic mail services; paging services; voicemail and caller identification services; voice messaging services for mobile phones; text and electronic messaging services delivered over a wireless telecommunications network; providing wireless telecommunications to a global computer network for internet browsing and e-mail messaging through a hand held device; communications services via handheld mobile devices, namely, personal communication services and telecommunication network services, including electronic mail, voicemail, automated dialing, message paging, message waiting, call logging and accessing global computer networks, the Internet, and communication networks” in International Class 38;<sup>4</sup>

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<sup>3</sup> Application Serial No. 85468629.

<sup>4</sup> Application Serial No. 85468715.

- 3) “satellite telecommunications services, namely, the provision and transmission of satellite and terrestrial telecommunications services; providing satellite and terrestrial services for mobile users for voice, data, audio, video, and fax communications” in International Class 38;<sup>5</sup>
- 4) “computer intercommunication services for the purpose of transmitting voice, data, graphics, music, video, messages, images, and location information” in International Class 38;<sup>6</sup>
- 5) “television broadcasting to handheld mobile devices, namely, mobile phones, smartphones, laptops and tablet PC’s” in International Class 38;<sup>7</sup>
- 6) “hand-held devices for wireless access to global communications networks” in International Class 9;<sup>8</sup>
- 7) “PC tablets, personal digital assistants, telephones, telephone modems and radio modems” in International Class 9;<sup>9</sup>
- 8) “accessories for mobile phones, namely, batteries; battery chargers; electric cigarette lighter adapters for land vehicles; hands-free headsets for mobile phones and hand-held devices; carrying cases and belt clips for electronic equipment, namely, mobile phones and hand-held devices” in International Class 9;<sup>10</sup>
- 9) “computer software for operating hardware, translating digital signals, transmitting digital data and signals, electronic messaging, data management, hardware and network security, and access to the internet for use in wireless communications systems; computer programs utilizing radio communications networks, local communication networks and wide area communication networks for the purpose of transmitting voice, data, graphics, music, video, messages, images, and location information; computer programs for facilitating wireless communication; computer programs for recording, processing, receiving, reproducing, transmitting, modifying, compressing, broadcasting, merging or enhancing data for use in wireless communications; compression software for voice, data, image, graphic, audio, and video transmissions” in International Class 9;<sup>11</sup> and
- 10) “leasing telecommunications equipment, components, systems and supplies; rental of communications apparatus equipment and of electronic mail-boxes; consulting and advisory services in the field of telecommunications, wireless communications, and communications

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<sup>5</sup> Application Serial No. 85976854.

<sup>6</sup> Application Serial No. 85976855.

<sup>7</sup> Application Serial No. 85976856.

<sup>8</sup> Application Serial No. 85976972.

<sup>9</sup> Application Serial No. 85976973.

<sup>10</sup> Application Serial No. 85976974.

<sup>11</sup> Application Serial No. 85976975.

networks; computer intercommunication services, namely, the provision of consulting services in the field of wireless telecommunications; telecommunication services, namely, prepaid personal communication services” in International Class 38.<sup>12</sup>

Oloclip, LLC (“Oloclip”) opposes registration, setting forth in its operative pleading<sup>13</sup> the grounds of 1) likelihood of confusion, and 2) the applications are void *ab initio* for lack of a bona fide intent to use the mark in interstate commerce on or in connection with the identified goods and services as of November 9, 2011, the filing date of the opposed applications. The opposition is based on Oloclip’s “common law rights in the OLLOCLIP mark throughout the United States,” and ownership of two registrations for the mark OLLOCLIP (standard characters) for the following International Class 9 goods:

- 1) “lenses for cameras; lenses for cameras incorporated in mobile electronic devices,”<sup>14</sup> and
- 2) “carrying cases for mobile electronic devices.”<sup>15</sup>

DISH asserted a counterclaim for restriction or limitation of Oloclip’s pleaded registrations pursuant to 15 U.S.C. § 1068, Trademark Act Section 18.

DISH moved for partial summary judgment with respect to likelihood of confusion.

## **Analysis**

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<sup>12</sup> Application Serial No. 85977054.

<sup>13</sup> 30 TTABVue 13.

<sup>14</sup> Registration No. 4137064, issued May 1, 2012.

<sup>15</sup> Registration No. 4380611, issued August 6, 2013. In the original and operative pleadings, Oloclip pleaded parent application Serial No. 85351810, which matured to registration after this proceeding was instituted. The pleading of the application was sufficient notice to DISH. TBMP § 314 (Jun. 2017), and cases cited therein.

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute as to any material fact, thus leaving the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party moving for summary judgment has the burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1987). All evidence must be viewed in a light favorable to the nonmovant, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992). The Board may not resolve issues of material fact; it may only ascertain whether such issues are present. *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472; *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine dispute of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial. *Enbridge, Inc. v. Excelerate Energy Ltd P'ship*, 92 USPQ2d 1537, 1540 (TTAB 2009). The nonmoving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324. In general, to establish the existence of disputed

facts requiring trial, the nonmoving party “must point to an evidentiary conflict created on the record[,] at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant.” *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990).

### **DISH’s Motion – Likelihood of confusion**

The determination of likelihood of confusion involves an analysis of all of the probative facts in evidence that are relevant to the thirteen factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont* factors”). *See also*, *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1946 (Fed. Cir. 2006); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board looks to whether there are genuine disputes with respect to any of these factors which would be material to a decision on the merits. The two principal factors are the similarity or dissimilarity of the marks, and the similarity or dissimilarity of the goods and services, the latter being based on the identification of goods and services as stated in the applications and registrations at issue. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 16 USPQ2d at 1787.

Turning to the motion, DISH relies on an October 31, 2014 expert report of a survey conducted by Hal Poret, President of Hal Poret LLC, which was timely

disclosed on that date.<sup>16</sup> In his declaration and report, Mr. Poret states, *inter alia*, that he conducted an online survey of 1197 individuals who own an iPhone and have an interest in photography; that the survey employed the *Eveready* model in which respondents are shown a mark and asked questions;<sup>17</sup> and that the survey focused on the mark OLLO in connection with DISH's goods and services that are most similar to Olloclip's, namely, mobile phones, mobile phone accessories and wireless service plans.<sup>18</sup> DISH posits that the results show that "less than 10% of a prescreened selection of consumers already owning iPhones and interested in photography could even identify (Olloclip's) mark;"<sup>19</sup> and "no more than 0.5% of the survey universe confused mobile phones, wireless plans, or mobile accessories ... offered in connection with (DISH's) OLLO mark with the goods actually sold under the OLLOCLIP mark."<sup>20</sup>

Olloclip argues, *inter alia*, that the survey used an overbroad universe of participants inasmuch it did not discriminate between simple mobile device users who take pictures and video with their mobile devices, and those with an interest in photography who would likely use high quality, sophisticated cameras for which

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<sup>16</sup> 59 TTABVUE 42.

<sup>17</sup> See, e.g., *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd*, 115 USPQ2d 1816, 1829-30 (TTAB 2015), citing, *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976).

<sup>18</sup> 59 TTABVUE 20-21; Poret decl., ¶¶ 8, 9, 13.

<sup>19</sup> 59 TTABVUE 22; Poret decl., ¶ 16.

<sup>20</sup> 59 TTABVUE 12; 59 TTABVUE 22; Poret decl., ¶ 15.

Oloclip's goods are not designed.<sup>21</sup> Further, Oloclip submits website analytics to show that its target customer group is aged 25 - 34, and argues that the majority of DISH's survey participants were 35 and older.<sup>22</sup> Oloclip also maintains that DISH ignored the parties' overlapping goods. To show that the survey did not simulate a real purchasing environment, Oloclip submitted a declaration attesting to photographs taken in three stores, evidencing placement and sales of its products on shelves next to or near other related goods, mobile devices and accessories, and in close proximity to where wireless service plans are offered."<sup>23</sup> Oloclip also maintains that this dispute presents a case of reverse confusion, and that the survey method is known to not be designed to test for reverse confusion.<sup>24</sup>

## **Findings**

On this record, and drawing all inferences in the light most favorable to Oloclip, we find that DISH has failed to satisfy its burden of demonstrating that there is no genuine dispute of material fact that use of its mark OLLO on and in connection with its identified goods and services is not likely to cause confusion with Oloclip's use of its pleaded mark OLLOCLIP on the goods for which it is registered. At a minimum, Oloclip has set forth arguments and evidence to support its counterstatement of material facts relevant to DISH's survey. It raises issues of fact regarding the survey

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<sup>21</sup> 63 TTABVUE 15.

<sup>22</sup> 63 TTABVUE 57; Patrick O'Neill decl., ¶ 25; 63 TTABVUE 77, Exh. D.

<sup>23</sup> 63 TTABVUE 20, 26-49; Steven Lopez decl., ¶¶ 3, 6 and 8; Patrick O'Neill decl., ¶¶ 23 - 24.

<sup>24</sup> 63 TTABVUE 19-21.



findings and the survey itself, *i.e.*, whether the universe of participants accurately reflects Olloclip's consumer base; whether the survey replicates market conditions and an actual purchasing environment; and whether the method employed accounts for the existence of reverse confusion. These questions ultimately go to the probative value and weight to be given to DISH's expert's survey findings, and the validity of any conclusions drawn therefrom, and thus are material to the likelihood of confusion determination.<sup>25</sup>

Based on these findings, DISH's motion for partial summary judgment with respect to likelihood of confusion is denied.

The evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.14 (TTAB 2007); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). Moreover, the fact that we have identified certain issues that are in dispute should not be construed as a finding that these are necessarily the only issues which remain for trial.

The parties are allowed until thirty days from the mailing date of this order to serve responses to any outstanding discovery.

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<sup>25</sup> The Board notes Olloclip's request that the survey be excluded. Olloclip does not object to the expert report on procedural grounds (*e.g.*, as untimely), and has the opportunity to take discovery regarding the report. Furthermore, to the extent that DISH's expert report addresses issues to be considered in the likelihood of confusion analysis, the Board will weigh the relevance and probative value of it at trial, as appropriate.

## **Schedule**

Proceedings are hereby resumed. Discovery and trial dates are reset as indicated

below:

Discovery Closes	8/18/2017
Pretrial Disclosures Due for Party in Position of Plaintiff in Original Claim	10/2/2017
30-day Trial Period Ends for Party in Position of Plaintiff in Original Claim	11/16/2017
Pretrial Disclosures Due for Party in Position of Defendant in Original Claim and in Position of Plaintiff in Counterclaim	12/1/2017
30-day Trial Period Ends for Party in Position of Defendant in Original Claim, and in Position of Plaintiff in Counterclaim	1/15/2018
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Original Claim and in Position of Defendant in Counterclaim	1/30/2018
30-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Original Claim, and in Position of Defendant in Counterclaim	3/16/2018
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Counterclaim	3/31/2018
15-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Counterclaim	4/30/2018
Opening Brief for Party in Position of Plaintiff in Original Claim Due	6/29/2018
Combined Brief for Party in Position of Defendant in Original Claim and Opening Brief as Plaintiff in Counterclaim Due	7/29/2018
Combined Rebuttal Brief for Party in Position of Plaintiff in Original Claim and Brief as Defendant in Counterclaim Due	8/28/2018
Rebuttal Brief for Party in Position of Plaintiff in Counterclaim Due	9/12/2018
Request for Oral Hearing (optional) Due	9/22/2018

Generally, the Federal Rules of Evidence, Federal Rules of Civil Procedure and Trademark Rules of Practice apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).