

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB AUG. 6, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Helix Software Co., Inc.

Serial No. 74/301,200

Michael A. Cornman of Schweitzer, Cornman & Gross for
applicant.

Cheryl A. Butler, Trademark Examining Attorney, Law Office
108 (Thomas Lamone, Managing Attorney).

Before Quinn, Walters and Chapman, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Helix Software Co., Inc. has filed a trademark
application to register the mark shown below for "computer
programming services for computer users."¹ The application
includes a disclaimer of SOFTWARE CO. apart from the mark
as a whole.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the marks DOUBLE HELIX and HELIX, previously registered for "computer programs and program manuals, all sold as a unit, for use in data based management,"² that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.³

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

¹ Serial No. 74/301,200, in International Class 42, filed August 3, 1992, based on use in commerce, alleging dates of first use and first use in commerce of June 1, 1992.

² Respectively, Registration No. 1,643,484 issued May 7, 1991, and Registration No. 1,682,683 issued April 14, 1992, to Odesta Corporation (current owner of record is Software Technologies, Inc.). [Sections 8 and 15 affidavits accepted and acknowledged, respectively, in both registrations.]

³ The refusal to register was based, originally, on two additional registrations (Nos. 1,587,497 for HELIX VMX and 1,356,406 for ODESTA HELIZ). However, both of these registrations have been canceled and are no longer at issue. Thus, we disregard the discussion in the briefs regarding these marks.

In the analysis of likelihood of confusion in this case, two key considerations in this case are the similarities between the marks and the similarities between the goods and services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The Examining Attorney contends that HELIX is the dominant portion of both applicant's and registrant's marks. In this regard, the Examining Attorney indicates that, while the word HELIX "is not the sole dominant portion of applicant's mark," noting that the design element is distinctive, "HELIX is the dominant audio-literal source indicating portion of applicant's mark." She states that, because consumers will call for the goods or services in the marketplace by the word portion of the mark, the word HELIX in applicant's mark merits greater weight in determining likelihood of confusion. She adds that HELIX is an arbitrary term in connection to both applicant's services and registrant's goods. The Examining Attorney contends that "those who offer computer programming services often offer computer programs under the same mark and that applicant's services are related to registrant's goods." In support of her position, the Examining Attorney submitted copies of registrations, owned

by six different third parties, for marks registered in connection with both computer programs and computer programming services.

Applicant contends that HELIX is "a common geometric, anatomical, and architectural term"; "that it is not uncommon in industry in general and in the computer field as well"; and that it is no more dominant than the term DOUBLE in one of the cited registrations. Applicant argues that HELIX is not the dominant portion of its mark, rather, applicant's mark is distinguished from the registered marks because it consists of the unitary phrase forming its name, "Helix Software Co.," and the distinctive "H" design; and that these words and design form a unitary commercial impression. Applicant contends that it "offers consumers the service of customized computer programming [which is] clearly not closely related to the pre-recorded, non-customized programs supplied by the registrant"; and that its customized services are, likewise, distinct from the services identified in the third-party registrations.

Considering, first, the goods and services, we find the evidence of record sufficient to conclude that applicant's services are related to the goods identified in the cited registrations, and applicant has provided no evidence to the contrary. Consequently, if the respective

goods and services were to be sold under the same or similar marks, confusion as to source or sponsorship would be likely to occur. We are not convinced otherwise by applicant's arguments regarding the specific nature of its services or registrant's goods. We note that both applicant's services and registrant's goods are broadly identified and, thus, encompass both customized and non-customized goods and services. Further, we must presume that applicant's services and registrant's goods are sold in all of the normal channels of trade to all of the normal purchasers for such goods. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Turning to the marks, the proper test for determining the issue of likelihood of confusion is the similarity of the general commercial impression engendered by the marks. Due to the consuming public's fallibility of memory, the emphasis is on the likely recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975). Both applicant and the Examining Attorney recognize the well established principle that, in articulating reasons for

reaching a conclusion on the issue of likelihood of confusion, while the marks are compared in their entireties, including descriptive or disclaimed portions thereof, "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 consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). If both words and a design comprise the mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the goods and/or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

We agree with the Examining Attorney that HELIX would appear to be an arbitrary term in relation to applicant's services and registrant's goods; and that the word HELIX in each of the respective marks is clearly dominant and, further, identical. One of registrant's marks is the word HELIX alone. In the other of registrant's marks, the word

DOUBLE clearly modifies the word HELIX and, by its meaning, emphasizes the dominant word HELIX. Looking at applicant's mark, although we agree with applicant that the design element is not insignificant and additional wording is an element to be considered as part of the mark in its entirety, we find these elements insufficient to distinguish applicant's mark from registrant's marks. The wording SOFTWARE CO. is clearly merely descriptive of the services and the nature of applicant's company. The "H" design refers to and emphasizes the initial letter of HELIX.

Therefore, we conclude that the commercial impressions of applicant's mark, HELIX SOFTWARE CO. and "H" design, and registrant's marks, DOUBLE HELIX and HELIX, are sufficiently similar that their contemporaneous use on the closely related goods and services involved in this case would be likely to cause confusion as to the source or sponsorship of such goods and services.

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

T. J. Quinn

C. E. Walters

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board