

03/02/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 11
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Midwest Wireless Communications, L.L.C.**

Serial No. 75/466,859

**Eric D. Paulsrud of Leonard, Street and Deinard for Midwest
Wireless Communications, L.L.C.**

**Howard Smiga, Trademark Examining Attorney, Law Office 102
(Thomas V. Shaw, Managing Attorney).**

Before Seeherman, Quinn and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Midwest Wireless Communications, L.L.C. has appealed from the final refusal of the Trademark Examining Attorney to register CLEARLY DIGITAL, with the word DIGITAL disclaimed, as a mark for telephone communication services for voice and data.¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on

¹ Application Serial No. 75/466,859, filed April 13, 1998, based on an asserted bona fide intention to use the mark in commerce.

the ground of likelihood of confusion with the mark CLEARLY DIGITAL (with the word DIGITAL disclaimed), registered for the following goods:

audio consoles comprising audio mixing devices for multiple audio sources and processors; broadcast studio workstations comprising computer hardware and operating software for broadcast information; AM, FM, and TV transmitters; radio and television excitors; and satellite earth stations comprising digital encoders and decoders.²

The appeal has been fully briefed.³ An oral hearing was not requested.

In determining whether there is a likelihood of confusion between two marks, we must consider all relevant factors as set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis under Section 2(d), two of the most important considerations are the similarities or

² Registration No. 2,103,879, issued October 7, 1997.

³ With its reply brief applicant has submitted several decisions of the Board which are marked "Not Citable as Precedent," and asked us to consider them as precedent, relying on a decision by the 8th Circuit in **Anastasoff v. United States**, --F.3d --(8th Cir. 2000). In view of the fact that the Court of Appeals for the Federal Circuit, our principal reviewing court, continues to mark decisions "not citable as precedent," we decline to depart from the practice set forth in **General Mills Inc. v. Health Valley Foods**, 24 USPQ2d 1270, 1275, n. 9 (TTAB 1992). We would also point out that the principles enunciated in the cases applicant has submitted have also been stated in "published" decisions of the Board.

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dissimilarities between the marks and the similarities or dissimilarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the goods, the Examining Attorney has correctly noted that, in order to support a holding of likelihood of confusion, it is not necessary that the goods or services of the parties be similar or competitive. See **In re International Telephone & Telegraph Corp.**, 197 USPQ 910 (TTAB 1978). However, it must be demonstrated that the goods or services are related in some manner.

In this case, it appears that the basis for the Examining Attorney's assertion that applicant's services and the registrant's goods are related is that they both "relate to the communications industry." Brief, p. 6. It is well established, however, that it is not sufficient merely to find one term that may generically describe the goods and services. See **General Electric Company v. Graham Magnetics Incorporated**, 197 USPQ 690 (TTAB 1977); **Harvey Hubbell Incorporated v. Tokyo Seimitsu Co., Ltd.**, 188 USPQ 517 (TTAB 1975). The Examining Attorney also asserts that the "satellite earth stations comprising digital encoders and decoders" listed in the registration could be used to

provide the telephone communications services identified in the application.

It is clear from the registrant's identification that its goods are used by radio and television broadcasting studios and the like. Clearly these are expensive products which are bought by sophisticated and knowledgeable purchasers in those fields. They are not impulse purchases, but will be made with a great deal of care. Applicant's services, on the other hand, are telephone communications which are directed to the public at large. Applicant has explained that it is a regional telecommunications company which provides telecommunications services to individuals and businesses, and CLEARLY DIGITAL has been adopted as a mark for one of the communications packages it offers.

As far as we can tell from this record, the only consumers who might encounter both the registrant's mark for its goods and applicant's mark for its services are people in the broadcast industry or, perhaps, in the case of registrant's satellite earth stations, those in the telecommunications industry. However, those purchasers will be highly knowledgeable and sophisticated.

Such purchasers are not likely to assume that telephone communications services and the equipment which

is identified in the registrant's registration emanate from the same source merely because the same mark CLEARLY DIGITAL is used for both. Although there is no evidence of third-party use or registration of this mark, it is certainly highly suggestive for both applicant's services and registrant's goods. The word DIGITAL has been disclaimed in both marks, thus indicating its descriptive significance, while the word CLEARLY has an obvious laudatory suggestiveness. Because of this, sophisticated consumers are not likely to assume that all goods and services, however tangentially related to the communications field, emanate from the same source simply because they are offered under the same word mark. In this connection, we note that the Examining Attorney has provided no evidence, such as third-party registrations, to indicate that companies which offer telephone communications services also sell satellite earth stations, TV transmitters, and the like.

Accordingly, in view of the differences in the services and goods, the sophistication of the common class of purchasers, the care with which purchases are made, and the weakness of the cited mark, we find, on this record, that the Examining Attorney has failed to prove that

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applicant's mark, if used for its services, would be likely to cause confusion with the cited registration.

Decision: The refusal of registration is reversed.