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**THIS DISPOSITION
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Paper No. 10
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RiverRock Systems, Ltd.

Serial No. 75/676,473

Roy W. Hardin of Locke Liddell & Sapp for RiverRock
Systems, Ltd.

M. Catherine Faint, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Walters, Chapman and Rogers, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

RiverRock Systems, Ltd. has filed a trademark
application to register the mark RIVERROCK RADIX for
"computer software and hardware for providing
telecommunications operations support, namely, customer
care, billing, rating, and provisioning functions."¹

The Trademark Examining Attorney has finally refused
registration under Section 2(d) of the Trademark Act, 15

¹ Serial No. 75/676,473, in International Class 9, filed April 7, 1999,
based on an allegation of a bona fide intention to use the mark in
commerce.

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U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered marks shown below, all owned by Radix Corporation, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Registration No. 1,026,998 for "designing and preparation of computer programs and the implementation and maintenance of computer systems"²:



Registration No. 1,632,970 for "computers, computer peripherals, computer operating programs, computer utility programs, computer programs for use in encoding, transmitting and processing data from remote locations, printers, optical character readers, bar code scanners, couplers, multiplexers, telephone modems, and interface cables"³:

² Registration No. 1,026,998 issued on December 9, 1975, in International Class 42. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Renewed for a period of ten years from December 9, 1995. The mark is lined for the color blue.

³ Registration No. 1,632,970 issued January 29, 1991, in International Class 9. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Renewed for a period of ten years from January 29, 2001.



Registration No. 1,637,427 for "computers, computer peripherals, computer operating programs, computer utility programs, computer programs for use in encoding, transmitting and processing data from remote locations, printers, optical character readers, bar code scanners, couplers, multiplexers, telephone modems, and interface cables"⁴:



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.

Our determination under Section 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). In

⁴ Registration No. 1,637,427 issued March 12, 1991, in International Class 9. Sections 8 and 15 affidavits accepted and acknowledged, respectively. Renewed for a period of ten years from March 12, 2001.

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 and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered marks, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression.

The Examining Attorney notes that applicant's and registrant's marks share the term RADIX. She contends that RADIX is the dominant portion of each of the involved marks; that applicant has merely added its house mark, RIVERROCK, to the dominant portion of registrant's marks, RADIX; and that the commercial impressions of the marks are the same. The Examining Attorney agrees with applicant that "radix" is a common term meaning "the base

of a number system,"⁵ but she contends that "radix" has no meaning in relation to computers or software and, thus, it is an arbitrary term in connection with applicant's goods and registrant's goods and services.

Applicant contends that the only common portion of the marks is the term "radix"; that RIVERROCK is the dominant portion of applicant's mark because it is the first term in the mark and it is fanciful; that the marks, considered in their entireties, including the stylized "R" and design portions of the registered marks, engender totally different commercial impressions; and that "radix" is a common term that is neither fanciful nor arbitrary.⁶

The 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 impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result.

⁵ We take judicial notice of the recited definition, from *Webster's Ninth New Collegiate Dictionary*, which is referenced in applicant's brief.

⁶ In its brief, applicant referenced third-party registrations and the Examining Attorney objected thereto on the grounds that the evidence is untimely and that a list of registrations is not the proper form for submission of such evidence. We agree with the Examining Attorney and have not considered this evidence. See Trademark Rule 2.142(d); and *In re Duofold*, 184 USPQ 638 (TTAB 1974).

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The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We agree with the Examining Attorney that the term "radix" is arbitrary as applied to the goods and services in this case. Applicant has provided no information or evidence, other than a definition of "radix" as a mathematical term, that suggests otherwise. The mere fact that "radix" is a mathematical term does not establish a suggestive or descriptive connotation of "radix" in connection with the goods and services involved herein. Further, we find it unnecessary to determine that one term is or is not dominant. Rather, considering the marks in their entireties, it is clear to us that the marks are substantially similar so that contemporaneous use on similar or related goods and

services is likely to cause confusion. Neither the term RIVERROCK in applicant's mark nor the design feature and term CORPORATION in the registered marks is sufficient to distinguish these marks.

Therefore, we turn our consideration to the goods and services involved in this case. The Examining Attorney contends that applicant's goods are related; that both applicant and registrant's goods include computer hardware and registrant's goods are not limited as to channels of trade or class of purchasers; that registrant's broadly identified computer software encompasses applicant's more narrowly defined software; and that registrant's channels of trade and classes of purchasers of its broadly identified goods and services encompass those of applicant's goods.

Applicant states that its goods are limited to products for the telecommunications industry; that its "focus is on writing and installing software"; and that applicant does not manufacture hardware, but merely provides hardware incidental to the installation of its software. Applicant contends that the registrant's goods consist principally of computer hardware, in particular, handheld hardware devices; that such devices are not directed to the telecommunications industry; and that any

software development is only to enable such devices to function. Applicant maintains that while both applicant and registrant produce goods "generally related to computer technology ... this similarity alone cannot establish a similarity of goods sufficient to find a likelihood of confusion." Applicant argues that the trade channels and purchasers of applicant's and registrant's goods are different because applicant's goods are directed to the telecommunications industry, whereas registrant's goods "are marketed to various industries."

The question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registrations, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood

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of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

While applicant correctly points out that its goods are specifically for the telecommunications industry, we cannot consider applicant's comments that its hardware is only incidental to the installation of its software. Applicant's goods, as identified include both hardware and software for the telecommunications industry. Similarly, the cited Registration No. 1,026,998 includes software design services and the two remaining cited registrations include both computer hardware and software. Registrant's goods and services are not limited to any particular industry and, thus, encompass such goods and services rendered to the telecommunications industry. Registrant's goods and services also could be reasonably construed as products

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and services that can be used in operations support. Therefore, based on the identifications of goods and services, applicant's goods are encompassed by registrant's goods and related to registrant's services.

We conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, and registrant's marks, their contemporaneous use on the overlapping and related goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

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