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Paper No. 10  
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vodavi Communications Systems, Inc.

Serial No. 75/750,917

John Burton of Greenberg Traurig, LLP for Vodavi  
Communications Systems, Inc.

Brendan Regan, Trademark Examining Attorney, Law Office 113  
(Meryl Hershkowitz, Managing Attorney).

Before Walters, Bucher and Bottorff, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register  
of the mark DVX PLUS MACH I, in typed form, for "key  
telephone system, namely, the proprietary control unit and  
associated station card,"<sup>1</sup> in International Class 9.

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<sup>1</sup> Application Serial Number 75/750,917, filed on July 2, 1999, was based upon a claim of use in commerce since November 1, 1998. While the original application listed the goods merely as "telephone systems," there appears to have been some confusion over whether the identification of goods was actually amended as required by the Office. In any case, it is clear from applicant's appeal brief and reply brief that applicant has now agreed to the exact wording of the identification of goods as required by the Trademark Examining Attorney, as set out above, so the requirement for an acceptable identification of goods is moot.

The Trademark Examining Attorney has refused registration on the ground that applicant's mark, as applied to the goods identified in the application, so resembles the mark DVX, which is registered in typed form for goods identified in the registration as "voice communication system for voice storage and forwarding, comprising - microprocessor and prerecorded programs therefor for connection to a telephone network,"<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d).

When the refusal was made final, applicant filed a notice of appeal and its appeal brief, the Trademark Examining Attorney then filed his brief, and applicant filed a reply brief. Applicant did not request an oral hearing.

After careful consideration of the evidence of record and the arguments made by applicant and by the Trademark Examining Attorney, we affirm the refusal to register.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood

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<sup>2</sup> Registration No. 1,291,946, issued on the Principal Register on August 28, 1984 [Section 8 affidavit accepted and Section 15 affidavit acknowledged].

of confusion. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §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).

We turn first to the similarity or dissimilarity and nature of the goods as described in the registration and application.

The identification of goods contained in the cited registration is "voice communication system for voice storage and forwarding, comprising - microprocessor and prerecorded programs therefor for connection to a telephone network."<sup>3</sup>

In examining applicant's goods, we note that they are identified as "key telephone system, namely, the proprietary control unit and associated station card." The evidence indicates that in the setting of a business or other enterprise,<sup>4</sup> a key telephone system refers to the

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<sup>3</sup> We understand this to be a computerized module providing voice-messaging capabilities to an existing telephone network.

<sup>4</sup> "The infinite DVX<sup>Plus</sup> Mach I is a digital telephone system designed to meet the needs of small size business offices..." Product Description Manual, p. 9-1 (December 1998).

phone handsets or other terminals and equipment that provide immediate access from all terminals to a variety of telephone services, and all of this without the assistance of a switchboard operator.<sup>5</sup> The identification of goods then goes on to specify the proprietary<sup>6</sup> control unit, which is also sometimes referred to as a Central Processing Unit (or just "CPU") or Key Service Unit ("KSU").<sup>7</sup> This unit is the heart (or brains) of an enterprise phone system, and connects the telephones or other terminals and equipment to the incoming lines from the telephone company.<sup>8</sup> It is also connected to accessories like paging amplifiers,<sup>9</sup> voice mail systems,<sup>10</sup> and music-on-hold sources.<sup>11</sup> Additionally, the identification of goods refers to the "associated station

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<sup>5</sup> "The system incorporates state-of-the-art digital technology for command and voice switching... The system achieves flexibility by employing a universal card slot architecture with Basic and Expansion cabinets. These cabinets house plug-in circuit boards that support different types of telephone instruments." Product Description Manual, p. 9-1 (December 1998).

<sup>6</sup> In this context, the word "proprietary" suggests that applicant manufactures the CPU and/or loads it with proprietary software, and hence perhaps this unit is not compatible with the phone systems of competing manufacturers (e.g., Lucent, Panasonic, Nortel, *et al.*).

<sup>7</sup> "Basic Key Service Unit (BKSU): The Mach I Basic Key Service Unit (BKSU) is a wall mountable cabinet that houses the following: ·Main CPU board ·System ROM ·System RAM ·Power supply ·Circuitry to support two 3x8 boards and the expansion cabinet with two 3x8 boards." Product Description Manual, p. 9-1 (December 1998).

<sup>8</sup> Installation Manual, p. 1-1 (December 1998).

<sup>9</sup> System Programming Manual, p. 2-24 (December 1998).

<sup>10</sup> System Programming Manual, p. 8-1 (December 1998).

card." Here "card" means "computer card."<sup>12</sup> Presumably, in order to ensure that a growing business can upgrade its telephone system, applicant offers the small business a base configuration for a beginning system that later can easily be expanded with the addition of various plug-in cards.<sup>13</sup>

As noted by the Trademark Examining Attorney, these goods are both items of telephone hardware. Applicant's specimens of record indicate that applicant's Mach I key systems can be programmed to integrate an external voice messaging system.<sup>14</sup> In the event that some or all of applicant's key systems do not include a voice messaging and forwarding capability, then the control units will likely be compatible with a variety of voice mail and forwarding systems manufactured and sold by others, such as registrant. Accordingly, we find that even if applicant's Mach I key telephone system does not include voice-

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<sup>11</sup> System Programming Manual, p. 2-28 (December 1998), and Product Description Manual, p. 2-39 (December 1998).

<sup>12</sup> These are also referred to as "expansion interface board," "peripheral board," and "optional boards." e.g., Product Description Manual, pp. 9-2 and 9-3 (December 1998).

<sup>13</sup> See footnote 5, *supra*.

<sup>14</sup> "If installing a Mach I Voicemail system (and if default), skip directly to button 12 and enter voice mail ports... Up to eight Voicemail groups can be configured in the infinite DVX<sup>Plus</sup> Mach I system... An externally provided Voicemail system or Auto Attendant must be connected to the Mach I system for Voicemail or Auto Attendant operation..." System Programming Manual, pp. 8-1 and 8-2 (December 1998).

messaging hardware and software of the type sold by registrant, the items are used together quite frequently, and hence are closely related.

We turn then to the issue of whether applicant's mark and registrant's mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. 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 impression that confusion as to the source of the goods offered under the respective marks is likely to result. 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).

The whole of the registered mark is DVX. According to the record, this cited mark is not a known initialism but rather is an arbitrary set of letters with no apparent meaning as applied to telephone-related devices. Although applicant has argued that this term is weak, the evidence

of record does not support this conclusion. To the contrary, based upon this record, we must assume that DVX is a strong mark for telephone-related devices.

The Trademark Examining Attorney argues that applicant has merely taken registrant's mark and added the words "PLUS MACH I" to it. Applicant responds that the Trademark Examining Attorney has improperly dissected its composite mark, that the term MACH I is arguably more prominent than the designation DVX, and that when compared in their entirety, applicant's and registrant's marks are different in appearance, meaning, sound and overall commercial impression.

We agree with the Trademark Examining Attorney that the dominant feature in the commercial impression created by applicant's composite mark DVX PLUS MACH I is the initial term, DVX. Furthermore, applicant admits that the word "Plus" is "merely a connector" that contributes very little, if anything, to the commercial impression of applicant's mark, and hence cannot serve to distinguish applicant's mark and the registered mark in terms of their overall commercial impressions.

We also agree with the Trademark Examining Attorney's contention that the MACH I portion of applicant's mark is suggestive of a high speed of transmission for digitized

voice signals, which is likely to be an important feature of applicant's goods.<sup>15</sup> We find that as it is used in applicant's mark, *Plus* MACH I appears to modify the initial term, DVX. This perception of applicant's mark is specifically supported by the stylized form in which applicant actually uses this composite mark on the covers of its manuals:

  
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We also agree with the Court's statement in *Plus Products v. Plus Discount Foods, Inc. et al.*, 722 F.2d 999, 222 USPQ 373, 378 (2<sup>nd</sup> Cir. 1983), that "... [t]he term PLUS is an everyday word that indicates something added, and

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<sup>15</sup> We take judicial notice of the fact that the "mach number" is a relationship of the speed of an object compared to the speed of sound. Mach 1 suggests something that moves at the speed of sound. Webster's Third New International Dictionary of the English Language, (Unabridged 1993); The Random House Dictionary of the English Language, (2<sup>nd</sup> ed. Unabridged 1987).

<sup>16</sup> These specimens - important components of any trademark application based upon use in commerce - were part of the file from the filing date of this application. The formatting of the subject mark on the front covers of these manuals, and the usage of **DVX<sup>Plus</sup>** as used in the documentation throughout the specimens, are certainly subject to review by the Office. Accordingly, a new argument in support of the Trademark Examining Attorney's earlier conclusion is hardly an attempt "to raise new grounds for refusal on appeal." (Applicant's reply brief, p. 3).

While the frontispiece of each of applicant's three manuals incorrectly states that "DVX<sup>Plus</sup> is a registered trademark of VODAVI Communications System, Inc.," the specimens of record do suggest that applicant is marketing an entire family of digital telephone systems under the label **DVX<sup>Plus</sup>** (with the word "Plus" always formatted as an italicized superscript).

when applied to goods, it merely implies additional quantity or quality." Thus, the designation "Plus Mach I" is likely to be perceived, in connection with applicant's goods, as suggestive of the transmission speed of these goods.

The Trademark Examining Attorney argues that to the extent a consumer is acquainted with telephone hardware marketed under registrant's DVX mark, he or she will later, upon seeing similar telephone systems being marketed under applicant's "DVX<sup>Plus</sup> Mach I" mark, mistakenly assume this is yet another product from registrant. Given the seemingly arbitrary nature of the leading term "DVX" for these goods, we find that this is a compelling argument as to the similarity of the marks in appearance and connotation. Thus, we find that the overall commercial impression of applicant's mark ("DVX Plus Mach I") is substantially similar to the commercial impression of registrant's mark.

In conclusion, given the close relationship of applicant's goods and registrant's goods and the similar commercial impressions of the respective marks, we find that confusion is likely.

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