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Mailed:  
January 30, 2003

Paper No. 18  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Amaranth Networks, Inc.

Serial No. 75/750,581

Mark B. Harrison and Jacqueline Levasseur Patt of Venable  
Baetjer Howard & Civiletti, LLP for Amaranth Networks, Inc.

Susan Kastriner Lawrence, Trademark Examining Attorney, Law  
Office 116 (Meryl L. Hershkowitz, Managing Attorney).

Before Walters, Bucher and Bottorff, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Amaranth Networks, Inc. seeks registration on the  
Principal Register for the mark AMARANTH NETWORKS as used in  
connection with "consulting services, namely consulting with  
small businesses and start-up companies with respect to  
computer servers and networking equipment," in International  
Class 35, and in connection with "hosting the web sites of  
others on a computer server for a global computer network;  
graphic design services; computer services, namely web sites

design and development, software programming for others," in International Class 42.<sup>1</sup>

The Trademark Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, when used on applicant's services, so resembles the following registered marks, all owned by the same registrant, as to be likely to cause confusion, to cause mistake, or to deceive:

- AMERANTH** Voice and data communications systems, data processing systems, inventory and cash management systems, security systems, and control systems, comprising computer hardware, transmitters and receivers [in International Class 9] <sup>2</sup>
- AMERANTH** Providing the integration of voice and data communications systems, data processing systems, inventory and cash management systems, security systems, and control systems, comprising computer hardware, transmitters and receivers [in International Class 41]<sup>3</sup>
- AMERANTH TECHNOLOGY SYSTEMS** Integration of voice and data communications systems, data processing systems, inventory and cash management systems, security systems, and control systems, all comprised of computer hardware, transmitters and receivers [in

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<sup>1</sup> Application Serial No. 75/750,581, filed on July 12, 1999, is based upon use in commerce under Section 1(a) of the Lanham Act. February 20, 1998 is alleged to be the date of first use of the mark anywhere and the date of first use of the mark in commerce. The word "Networks" is disclaimed apart from the mark as shown.

<sup>2</sup> Registration No. 2,308,861, issued on January 18, 2000.

<sup>3</sup> Registration No. 2,331,358, issued on March 21, 2000.

International Class 42]<sup>4</sup>

**AMERANTH  
TECHNOLOGY  
SYSTEMS**

Voice and data communications systems, data processing systems, inventory and cash management systems, security systems, and control systems, all comprised of computer hardware, transmitters and receivers [in International Class 9]<sup>5</sup>

When the refusal was made final, applicant filed a notice of appeal and two requests for reconsideration. The Trademark Examining Attorney rejected both requests for reconsideration. Applicant and the Trademark Examining Attorney filed appeal briefs, and applicant filed a reply brief. Applicant did not request an oral hearing.

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 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."

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<sup>4</sup> Registration No. 2,371,397, issued on July 25, 2000, having a disclaimer of the words "Technology Systems" apart from the mark as a whole.

<sup>5</sup> Registration No. 2,398,194, issued on October 24, 2000, having a disclaimer of the words "Technology Systems" apart from the mark as a whole.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a consideration of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, and connotation.

The test for likelihood of confusion is not whether the marks can be distinguished when compared side-by-side. Hence, the addition, deletion or substitution of words may not necessarily preclude a likelihood of confusion. Here, the dominant portion of applicant's mark is the leading word, "Amaranth." Applicant has agreed to disclaim the highly descriptive, if not generic, word "Networks" apart from the mark as shown. Similarly, the sole portion of two of registrant's cited marks is "Ameranth." For the other two cited registrations having composite marks, the highly descriptive, if not generic, words "Technology Systems" are disclaimed apart from the marks as a whole. The difference in appearance between registrant's marks and applicant's mark is negligible given that "Amaranth" and "Ameranth" differ only as to the substitution of one soft vowel for another vowel deep within an eight-letter word.

As to pronunciation, in the ordinary course of speech, it would be difficult for the speaker to enunciate, or the

listener to detect, a difference in the pronunciation of the words "Amaranth" and "Ameranth."

As to connotation, even accepting applicant's argument that the word "Amaranth" as used within its composite mark is a dictionary word, while registrant's spelling of "Ameranth," as used in its four cited registrations, appears to be a coined word, we suspect most consumers will not divine a difference in the meaning of these two slightly differently spelled words; nor is the average consumer likely to be familiar with the English-language word "Amaranth" in any context. Moreover, should the average consumers of these respective services know the meaning of the word "Amaranth" and notice this subtle replacement of a single letter in registrant's marks, both words appear to be arbitrary as applied to the identified goods and/or recited services. Hence, as to connotation, this slight and subtle difference cannot have a dispositive effect on our analysis of confusingly similar marks.

Accordingly, considering applicant's mark, and the four cited marks of registrant, in their entireties, we find that the marks have substantially similar overall commercial impressions; and that confusion as to source or sponsorship is likely if used on similar or related goods and/or services.

We turn next to a consideration of the respective goods and services. The Trademark Examining Attorney argues that applicant's services are highly related to the goods and services of registrant. She notes correctly that the services of applicant and goods and/or services of registrant need not be identical or directly competitive in order to find a likelihood of confusion. Rather, they need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods and services come from a common source. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Coming Glass Works, '229 USPQ 65 (TTAB 1985); In re Rexel Inc., 223 USPQ 830 (TTAB 1984); Guardian Products Co., Inc. v. Scott Paper Co., 200 USPQ 738 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

In this context, the Trademark Examining Attorney argues as follows:

The applicant has "consulting services, namely consulting with small businesses and start-up companies with respect to computer servers and networking equipment; hosting the web sites of others on a computer server for a global computer network; graphic design services; computer services, namely web site design and development, software programming for others." The registrant's goods and services include

"voice and data communications systems, data processing systems, inventory and cash management systems, security systems, and control systems, all comprised of computer hardware, transmitter and receivers" and "providing the integration of voice and data communication systems, data processing systems, inventory and cash management systems, security systems, and control systems, comprising computer hardware and software, transmitters and receivers."

The applicant provides consulting services regarding computer servers and networking equipment. A "network" includes "a group or system of electric components and connecting circuitry designed to function in a specific manner," and "a system of computers interconnected by telephone wires or other means in order to share information ... ." The registrant's goods are clearly comprised of "networking equipment," while its services include integration of such equipment.

The term "integration" means, "putting diverse hardware and/or software components together to work as a system ... ." Thus, the applicant's services involve consulting in the field of the goods and services of the registrant.

Moreover, the Trademark Examining Attorney cites to the recital of both classes of services in the application as well as to the materials submitted with applicant's first request for reconsideration, for the proposition that applicant's services clearly involve more than consulting. She notes that according to applicant's own website, applicant provides "large scale network design and implementation," and that applicant's "expertise allows us to

integrate products and services to produce robust customer solutions." From this material, she argues that applicant provides consulting services as well as other goods and services to its customers, and that such goods and services might well overlap with those of the registrant.

Finally, to the extent they may not be overlapping, she takes the position that the services provided by applicant are in the normal field of expansion for the registrant, and must be considered as such in our determination under Section 2(d). In re General Motors Corp., 196 USPQ 574 (TTAB 1977).

In reviewing the constraints inherent in an *ex parte* appeal of this type, the Trademark Examining Attorney is correct in pointing out that any Board determination as to likelihood of confusion must be made based upon the goods and services as set forth in the actual application and registration(s). Applicant states that the "evidence of record shows that the registrant offers computer software to the hospitality and healthcare industries, and in particular, the registrant provides handheld computers to wait staff in restaurants and housekeeping staff in hotels to facilitate communication with other restaurants and hotel staff ... ." On the other hand, as noted by the Trademark Examining Attorney, the four cited registrations are not limited to a particular industry or personnel within an industry and, as identified,

encompass goods and services much broader than just the hospitality and healthcare industries. Extrinsic evidence attempting to establish the exact nature of the registrant's goods and services is not material because the Board must consider registrant's various goods and services as identified. See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 UPSQ2d 1813, 1815, (Fed. Cir. 1987); In re Continental Graphics Corporation, 52 UPPQ2d 1374 (TTAB 1999); In re Elbaum, 211 USPQ 639 (TTAB 1981). Accordingly, where, as here, the cited registrations describe the goods and services broadly without limitation, we must presume that the registrations encompass all goods and services of the type described. See Elbaum at 639.

While applicant's recital of consulting services explicitly limits its customers to "small businesses and start-up companies," registrant's goods and services otherwise remain unlimited in scope. Hence, according to trademark law and the logic of the relevant marketplace, we must presume herein that applicant's recited services are related to the goods and services of the registrant. Accordingly, we find that purchasers will encounter the goods and services of registrant as well as the services of applicant both being marketed with confusingly similar marks,

and will mistakenly believe that they are being provided by the same source.<sup>6</sup>

In response to applicant's caution that we must consider the realities of the marketplace, we conclude that the Trademark Examining Attorney has done just that. We do not find that the Trademark Examining Attorney has concluded that the services are related merely because of similar terminology as to computers, computer components and/or "network related" services.

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<sup>6</sup> From a sampling of third-party registrations attached to the Final Office action, the Trademark Examining Attorney argues that it is common for the same mark to be used in connection with the services of the applicant as well as on or in connection with the goods and services of the registrant.

In determining the similarity or dissimilarity and nature of the respective goods and services, we find this evidence corroborative of other evidence in the record. Specifically, the third-party registrations support the conclusion that the same source, using the same mark, may well be marketing computer hardware and software as well as providing services related to network integration and consulting. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"]. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

Applicant argues, in effect, that one could prove any two sets of goods or services to be "bedfellows" using such a technique. We agree with this position to the extent that the third-party registrations are multiple-class registrations reflecting the house marks of large corporations involved in a myriad of divergent and arguably unrelated fields (as that concept has developed under the Lanham Act). However, that does not correctly characterize the majority of the third-party registrations included in this record. The existence of some such registrations may well reduce, if not vitiate, the probative value of this corroborative evidence.

Turning to the du Pont factors dealing with the similarity or dissimilarity of established, likely-to-continue trade channels as well as the conditions under which and buyers to whom sales are made, we must presume that applicant's services and registrant's goods and services will move through all of the normal channels of trade to all of the usual purchasers for goods and services of the types identified. See Canadian Imperial Bank, *supra* at 1815. Hence, in looking to these two related du Pont factors, we conclude that the channels of trade and classes of purchasers (e.g., especially marketing directed toward "small businesses and start-up companies") will be the same.

Accordingly, we find that the du Pont factors dealing with the similarity of the involved marks and relatedness of the involved services/goods strongly militate in favor of a finding of likelihood of confusion. We have no probative evidence on which we could resolve any of the remaining du Pont factors in applicant's favor. Thus, we find that there is a likelihood of confusion and that the refusal of registration must be affirmed.

Finally, we turn to the last du Pont factor - any other established fact probative of the effect of use. It is true that another Trademark Examining Attorney approved for publication in the *Trademark Official Gazette* three more of

registrant's marks. These marks reflected trademark applications filed by registrant after applicant's involved application.<sup>7</sup> It is in this context that we address applicant's contention that this refusal under Section 2(d) of the Act should have been withdrawn when it became clear that three conflicting applications owned by the cited

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<sup>7</sup> These three registrations are identified in the record as:

(1) Reg. No. 2,504,253, issued on November 6, 2001, based upon an application filed on December 4, 2000 for the mark AMERANTH PUTS WIRELESS TO WORK as used for "computer software for the integration of wireless voice and data communications systems, data processing systems, inventory and cash management systems, handheld computer systems and networks," in International Class 9, and in connection with "providing the integration of wireless voice and data communications systems, data processing systems, inventory and cash management systems, handheld computer systems and networks," in International Class 42;

(2) Reg. No. 2,522,530, issued on December 25, 2001, based upon an application filed on March 20, 2001 for the mark AMERANTH WIRELESS AT WORK (special form drawing) as used in connection with "computer software for the integration and synchronization of wireless voice and data communications systems, data processing systems, inventory and cash management systems, handheld computer systems and networks," in International Class 9, and in connection with "providing the integration and synchronization of wireless voice and data communications systems, data processing systems, inventory and cash management systems, handheld computer systems and networks," in International Class 42.

(3) Reg. No. 2,594,006, issued on July 16, 2002, based upon an application filed on December 4, 2000 for the mark AMERANTH WIRELESS as used in connection with "computer software for the integration and synchronization of wireless voice and data communications systems, data processing systems, inventory and cash management systems, handheld computer systems, computer networks and the Internet," in International Class 9, and in connection with "providing the integration and synchronization of wireless voice and data communications systems, data processing systems, inventory and cash management systems, handheld computer systems, computer networks and the Internet," in International Class 42.

registrant, but filed after the instant application, were allowed to register over this application.

First, as the Trademark Examining Attorney pointed out in her response to applicant's second request for reconsideration, the determination herein as to likelihood of confusion cannot be affected by an arguably inconsistent decision made by another Trademark Examining Attorney with regard to applications filed after the application in question.

Although it is clear that examination of this application and registrant's subsequent applications was inconsistent, as the Trademark Examining Attorney has correctly pointed out, the Court of Appeals for the Federal Circuit has made clear that each case must be determined based on the merits of the record submitted in the application in question. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court. ... Needless to say, this court encourages the PTO to achieve a uniform standard for assessing registrability of marks. Nonetheless, the Board (and this court in its limited review) must assess each mark on the record ... submitted with the

application."]; In re Broyhill Furniture Industries Inc., 60 USPQ2d 1511, 1514 (TTAB 2001); and In re Pennzoil Products Co., 20 USQP2d 1753, 1758 (TTAB 1991).

Accordingly, we are constrained to review the record before us insofar as it bears on the various du Pont factors, and we cannot address that inconsistency in this appeal from the refusal in the involved application.

In conclusion, we find that in view of the substantial similarities in the involved marks and the relationship between the involved goods and services, the contemporaneous use of applicant's mark and registrant's cited marks is likely to cause confusion or mistake as to the source or sponsorship of such goods and services.

*Decision:* The refusal of registration is affirmed.