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Mailed: June 23, 2003
Paper No. 10
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dewey Data LLC

Serial No. 76/204,767

Thomas I. Rozsa of Rozsa & Chen LLP for Dewey Data LLC.

Monique C. Miller, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Seeherman, Hairston and Drost, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Dewey Data LLC has appealed from the final refusal of
the Trademark Examining Attorney to register the mark
DITTODRIVE for "computer hardware and computer software
which are both utilized for computer hard disk drive
protection, duplication and recovery."¹ Registration

¹ Application Serial No. 76/204,767, filed February 1, 2001,
alleging a bona fide intention to use the mark in commerce.

has been finally refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with the identified goods, so resembles the mark DITTO for "computer memory storage devices, namely tape drives; computer memory storage controllers; [and] computer memory storage tape cartridges,"² as to be likely to cause confusion, mistake or deception.

Applicant and the Examining Attorney have filed appeal briefs.³ No oral hearing was requested. We affirm the refusal.

It is the Examining Attorney's position that the marks are highly similar and that the goods are closely related. The Examining Attorney argues that "applicant has appropriated the registrant's mark in its entirety and has added the descriptive term DRIVE to the mark." (Brief, p. 4). Further, the Examining Attorney maintains that the goods of the parties are related as "they both involve computer hardware" and that "the functions of the goods are similar, as the applicant's goods involve 'protection,

² Registration No. 2,192,936 issued October 6, 1998.

³ The current Examining Attorney was not the original Examining Attorney in this case.

duplication and recovery' and the registrant's goods involve 'storage.'" (Brief, p. 8). Further, the Examining Attorney maintains that the applicant's and the registrant's goods are related and would travel in the same channels of trade. In support of the refusal, the Examining Attorney submitted copies of third-party registrations for marks which the Examining Attorney maintains "demonstrate registration of the same mark by a single entity [for] goods related to those of both the applicant and the registrant." (Brief, p. 8).

Applicant, in urging reversal of the refusal to register, argues that when the marks are considered in their entireties, they create different commercial impressions; that the Examining Attorney has improperly dissected the marks; and that the goods are very different in nature and travel in different channels of trade.

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. In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, two key considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort

Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

To determine whether the applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison. Rather, the question is whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to source of the goods offered under the respective marks is likely to result. Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another feature, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, we find that applicant's mark DITTODRIVE and registrant's mark DITTO are similar in sound, appearance, meaning and overall commercial impression. Applicant's mark encompasses the entirety of registrant's DITTO mark and, while it adds thereto the term DRIVE, such term is entitled to less weight because it is descriptive

in connection with applicant's computer hardware and software "utilized for computer hard disk drive protection."⁴ In view of the descriptiveness of the word DRIVE, it is the word DITTO which has the source-identifying significance in applicant's mark. Thus, the addition of DRIVE to applicant's mark does not distinguish the parties' marks. Further, we note that it is often the first part of a mark that is most likely to be impressed upon the mind of a purchaser and remembered. See *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).

Additionally, although neither applicant nor the Examining Attorney has discussed the connotation of the word "ditto," we take judicial notice of a dictionary definition to establish its meaning. The American Heritage College Dictionary (Fourth edition, 2002) defines the word "ditto" as "a duplicate; a copy." The word DITTO used with computer memory storage devices and computer hardware and

⁴ We grant the Examining Attorney's request to take judicial notice of The Computer Glossary definition of the term "drive." *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We decline the Examining Attorney's similar request to take judicial notice of The Computer Language Company Inc.'s on-line definition because it is not clear that this is a recognized dictionary. In re Total Quality Group Inc., 51 USPQ2d 1474, 1475-76 (TTAB 1999); In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

software used for, inter alia, duplication, would have the same meaning, i.e., to duplicate or make a copy of a file or disk. Therefore, these marks are similar in sound, appearance, meaning and commercial impression.

Applicant has cited a number of cases in which the addition of a term to another's mark has been found to avoid a likelihood of confusion. The cases cited by applicant are distinguishable from the present situation. The resulting mark in this case, DITTODRIVE, creates the same overall commercial impression as DITTO, as opposed to, for example, TIC TAC and TIC TAC TOE in *In re Ferrero*, 479 F.2d 1395, 178 USPQ 167 (CCPA 1973) and PEAK and PEAK PERIOD in *Colgate-Palmolive Co. v. Carter-Wallace, Inc.* 432 F.2d 1400, 167 USPQ 529 (CCPA 1970).

Turning next to the goods, the issue to be determined here is not whether the goods are likely to be confused but rather whether there is a likelihood that the relevant purchasers will be misled into the belief that they emanate from the same source. Thus, goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is enough that they 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 the goods. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

There is no per se rule that all computer products are related. Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1463 (TTAB 1992) ["All computer software programs process data, but it does not necessarily follow that all computer programs are related"].

Nonetheless, in this case, we find that applicant's and registrant's goods are sufficiently related. Applicant's hardware and software are used to protect, duplicate, and recover hard disk drives. Registrant's computer memory storage devices would include tape drives and tape cartridges that could be used to duplicate and protect files stored on a hard disk. Thus, registrant's and applicant's goods are more than simply computer hardware, they are products that could be used to accomplish the same functions, i.e., duplicating or protecting hard disk files. Indeed, since both applicant's and registrant's marks use the word "Ditto," meaning to duplicate or copy, the marks even suggest that the goods are used for the same purpose.

With respect to applicant's contention that the parties' goods travel in different channels of trade to different purchasers, applicant has submitted no evidence to support this contention. Even if such evidence were properly of record, it would not affect our decision herein. The question of likelihood of confusion must be determined on the basis of the identification of goods set forth in the subject application and the cited registration. *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

There are no restrictions in applicant's or registrant's identification of goods with respect to trade channels or purchasers. Thus, we must deem that both applicant's and registrant's goods travel through all the normal channels of trade to all the usual purchasers. Accordingly, we can draw no distinctions between the parties' channels of trade and purchasers, but rather must consider them to be the same. Indeed the purchasers would appear to be the same to the extent that both applicant's and registrant's goods would be sold to purchasers who need to protect or duplicate files on their disk drives.

In finding that the goods are related, we have given little weight to the third-party registrations submitted by

the Examining Attorney in an attempt to show a relationship between the goods. The problem with this evidence is that only two of the registrations are based on use and cover both types of goods involved in this appeal.⁵ In other words, only two of the registrations cover computer hardware and software products for hard disk protection, duplication and recovery, on the one hand, and computer memory storage devices, on the other hand. Also, we note that these two registrations are owned by a single entity.

Applicant also points to two applications that were originally brought to applicant's attention by the Examining Attorney. According to applicant, one (Serial No. 75/552,077) is abandoned and the other (Serial No. 75/686,996) has issued into Registration No. 2,488,461 for providing multiple user access to a global computer information network. Even if this registration were properly of record, it does not support applicant's position. The services in the registration are obviously very different from applicant's goods. Also, while third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, as

⁵ For example, Registration No. 2,481,358 covers, inter alia, "memory cards" and "printed material relating to computer hardware and software"; and Registration No. 2,303,386 covers, inter alia, "data storage recovery services" and "maintenance of computer hardware."

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indicated in *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), they may not be used to justify the registration of another confusingly similar mark.

Finally, to the extent that there may be any doubt on the issue of likelihood of confusion, we must resolve such doubt in favor of the registrant and prior user. See *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal to register is affirmed.