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Mailed:
January 31, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DataMirror Corporation

Serial No. 76456629

John R. Garber for DataMirror Corporation

Angela M. Micheli, Trademark Examining Attorney, Law Office
101 (Ronald R. Sussman, Managing Attorney)

Before Seeherman, Quinn and Hairston, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

DataMirror Corporation has appealed from the final
refusal of the Trademark Examining Attorney to register
iREFLECT as a trademark for goods identified as:

Computer software to manage the
resiliency, high availability,
mirroring and performance of operating
systems software, application software,
database software and data.¹

¹ Application Serial No. 76456629, filed October 1, 2002, based on Sections 1(b) and 44(e) of the Trademark Act, with a right of priority of April 2, 2002 based on applicant's Canadian application filed on that date.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark REFLECT SYSTEMS, previously registered with the word SYSTEMS disclaimed for "computer hardware and software for content and data creation, distribution and storage,"² that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney filed appeal briefs. Applicant did not request an oral hearing.

Before turning to the substantive issue before us, there are some procedural points that we must address. First, although Office records indicate that applicant, on October 19, 2004, filed a response to the August 18, 2004 Office action in which the Examining Attorney initially refused registration on the basis of the cited registration, the response itself cannot be located in the office at this time. The Board attempted to obtain a copy of the response from applicant's attorney, but was advised that he could not locate the paper either. In the conversation with applicant's attorney he advised that this response contained only argument, and that applicant has made those arguments that it wishes the Board to consider

² Registration No. 2789812, issued December 2, 2003.

in its brief. Accordingly, it does not appear that there is any prejudice to applicant due to the unavailability of this response. Therefore, in the circumstances, we have decided the appeal without the benefit of this paper.

With respect to other procedural points, we note that with its appeal brief applicant has submitted new evidence in the form of third-party registrations, and has quoted extensively from press releases and the registrant's website, although the underlying documents were not previously made of record. The Examining Attorney has objected to our consideration of this material. The objection is well taken. Trademark Rule 2.142(d) provides that the record in an application must be complete prior to the filing of an appeal. Applicant cannot supplement the record by attaching new evidence to its brief, or by quoting the contents of such new evidence in its brief.³

Applicant has also referred in its brief to a registration and two applications that it owns for other "i" prefix marks. Although these applications/registration are not of record, the Examining Attorney has not objected to our consideration of them, and has discussed them in her brief. In view of her actions, we deem the information

³ Even if we were to consider this evidence, it would not change our decision in this matter, as discussed infra.

about them in applicant's brief to have been stipulated into the record, for whatever probative value it may have.

This brings us to the substantive ground of refusal—likelihood of confusion. Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the factor of the similarity of the marks. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d

1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, the dominant feature of the cited mark is REFLECT. SYSTEMS, which has been disclaimed, has far less source-indicating significance. Similarly, the REFLECT portion of applicant's mark has a stronger significance because it appears in all-capital letters, and therefore stands out from the "i", which is depicted in lower case and would be viewed as a prefix which simply means "Internet."⁴

Applicant does not dispute that REFLECT is the dominant feature of both marks. "The fact that REFLECT is the dominant feature of both marks..." Brief, p. 3. However, applicant argues that when the marks are compared in their entirety, they are not confusingly similar.

We disagree with this position. When the marks are compared in their entirety, and giving appropriate weight to the dominant portions of each, the word REFLECT stands out in both marks, such that the marks have strong visual similarities. The term REFLECT will also be pronounced the same in both marks, and although the additional elements in each mark result in a different number of syllables when

⁴ See the following definition which appears in NetLingo © 2002: "An 'I' placed before a word or phrase usually stands for 'Internet.'" The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

the marks are spoken, and different initial and ending sounds, these differences are not sufficient to distinguish the marks phonetically. As to connotation, again the presence of the word REFLECT, and the limited source-indicating significance of the additional elements in each mark, result in the marks in their entireties having a similar connotation. Although we recognize that there are specific differences in the marks, it must be remembered that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980). Accordingly, we find that the marks convey similar commercial impressions.

Applicant has cited two cases for the proposition that marks which have the same dominant feature but different descriptive features are not confusingly similar. However, in *E.J. Brach & Sons v. Brock Candy Co.* (Com'r Pats. 1958), in which an application for TASTE TREATS for candy was opposed by a company that had made prior use of CHOCOLATE TREATS for candy, the term TREATS was not, as applicant herein asserts, an arbitrary term, but was found to be

commonly used in connection with candy.⁵ In the present case, on the other hand, REFLECT appears to be an arbitrary term and there is no evidence in this record of third-party use, or of third-party registrations.⁶ Thus, the sixth du Pont factor favors a finding of likelihood of confusion in this case, and we must treat the cited registration as being entitled to a broad scope of protection.

For similar reasons, the second case that applicant relies on, Nestle Food Corp. v. Kellogg Co., 6 USPQ2d 1145 (TTAB 1988), is also distinguishable. That case involved the marks TASTER'S CHOICE for coffee and DINER'S CHOICE for tea and flour-based mixes. Contrary to applicant's statement, the Board found, on the basis of third-party registrations, that CHOICE was "not wholly arbitrary but, rather, has a somewhat laudatory significance as applied to the respective food products of these parties." Id. at

⁵ The issue of whether CHOCOLATE TREATS was an inherently distinctive mark for candy, or whether it had acquired distinctiveness, was never addressed.

⁶ As noted above, applicant attached to its appeal brief copies of third-party registrations which were found to be untimely and therefore not considered by the Board. Nonetheless, the Board notes that, although four registrations were submitted, they are all for the mark REFLECTION and REFLECTION SIGNATURE (not REFLECT) for computer programs in the field of communications, and are all owned by the same entity. The adoption by a single entity of the marks REFLECTION and REFLECTION SIGNATURE does not indicate that the term REFLECT has a particular significance in the computer industry, or that the registered mark should not be considered a strong mark that is entitled to a broad scope of protection.

1149. Again, there is no evidence in the present record of third-party registrations of REFLECT marks. And contrary to the present situation, the Board also found in the Nestle case that the marks were "distinguished easily in appearance, pronunciation, and meaning." Id.

Applicant claims that because it also owns a registration for the mark ICLUSTER, and applications for the marks IDELIVER and IMIRROR, consumers will associate the mark IREFLECT with those marks. Mere ownership of a registration or applications does not show that the public is familiar with the use of the marks shown therein. Certainly there is no evidence of record that demonstrates that applicant has a family of marks. Compare *J & J Snack Foods Corp. v. McDonald's*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991). Most importantly, the fact that an applicant owns other marks that resemble the applied-for mark does not entitle it to register a mark that is likely to cause confusion with a registered mark. *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992).

The factor of the similarity of the marks favors a finding of likelihood of confusion.

This brings us to a consideration of the goods. Applicant's goods are identified as "computer software to

manage the resiliency, high availability, mirroring and performance of operating systems software, application software, database software and data"; the registrant's goods are identified as "computer hardware and software for content and data creation, distribution and storage."

Applicant argues that, other than the fact that both goods are software, there are no other similarities between them. Specifically, it asserts that applicant's software is "data resiliency or data protection software" that "runs on computer systems that run Oracle relational databases. This software scrapes the log of an Oracle relational database on a source system, detects changes made to the Oracle relational database on the source system and then transmits those changes to one or more large systems where another component of the software makes the same changes to an Oracle relational database on the target." Brief, p. 7.

As for the registrant's goods, applicant points to statements made in the registrant's website, in material that is not of record, to characterize it as software that broadcasts video and multimedia over the Internet.

The problem with applicant's position, aside from the fact that the information about the registrant's goods, and much of the information about applicant's goods, is not of record, is that the question of likelihood of confusion

must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As noted, the goods in the cited registration are computer hardware and software for content and data creation, distribution and storage--the hardware and software are not limited to use in broadcasting video and multimedia over the Internet. As for applicant's software, applicant's website materials, which are of record, show that it is used for "high performance data distribution, data integration, and disaster recovery initiatives." It also "spreads processing loads and network dependencies across a number of servers and databases" and "can also be used for workload distribution and load balancing." Under the heading "Customer Benefits," the website also lists, inter alia, "High performance data distribution, data integration and workload balancing"; "Extreme scalability for high volumes of data"; "Real-time, log-based replication"; and "Distributed application support."

We note that applicant deleted from its original identification of goods software to manage the distribution of database software and data. Therefore, in our determination as to whether applicant's goods and those of the cited registration are related, we have not treated applicant's goods as including such software. However, it is clear from applicant's website that software that is used to manage the distribution of database software and data is related to computer software that manages the availability and performance of database software and data, and the latter software is currently identified in applicant's application.

It is a well-established principle that it is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

There is clearly a relatedness between computer software that manages availability of database software, and software for data distribution and storage, as the software is complementary in nature. And, as applicant's website materials show, computer software used for data distribution is closely connected to and/or can also manage availability and performance of database software and the like.

The factor of the similarity of the goods favors a finding of likelihood of confusion.

We recognize that the purchasers of applicant's and the registrant's goods must be considered sophisticated. However, as we have often stated, even careful and sophisticated purchasers are not immune from confusion. In this case, because of the similarities of the marks and the relatedness of the goods, we believe that the purchasers are likely to believe that applicant's and registrant's goods emanate from a single source.

Accordingly, after considering all the applicable du Pont factors, we find that applicant's use of its mark for its identified goods is likely to cause confusion with the cited registration.

Decision: The refusal of registration is affirmed.