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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Graphic Controls LLC

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Serial No. 78289575

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Susan M. Freedman of Nixon Peabody LLP for Graphic Controls LLC.

Amos T. Matthews, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).<sup>1</sup>

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Before Drost, Zervas, and Walsh, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 20, 2003, applicant Graphic Controls LLC applied to register the mark SURE CODE (in typed or standard character form) on the Principal Register for "printers, namely high resolution printers" in Class 9.<sup>2</sup> Applicant has also disclaimed the term "Code."

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<sup>1</sup> The electronic copy of the examining attorney's brief did not identify the examining attorney or the managing attorney, but this information is consistent with the previous information in the file.

<sup>2</sup> Serial No. 78289575. The application was based on applicant's assertion of a bona fide intention to use the mark in commerce. Subsequently, applicant submitted an amendment to allege use and

The examining attorney refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) on the ground that applicant's mark, when applied to its goods, so resembles the previously registered mark SUREPRINT (in typed or standard character form) for "computer programs to control printers" in Class 9 as to be likely to cause confusion.<sup>3</sup>

After the examining attorney made the refusal final, this appeal followed.

The examining attorney (Brief at 4) argues that:

Consumers are likely to view CODE as a highly descriptive term of applicant's printer, informing them of a characteristic or feature of the goods. As such it is not likely to be perceived as a source indicator. Although, the wording SURE CODE would be encountered by consumers on the goods in the marketplace, it is likely that they would remember and use SURE when referring to the goods. Consumers familiar with the cited mark, SUREPRINT, are likely to assume upon encountering applicant's mark, SURE CODE, for related goods that the owner of both marks is the same.

The examining attorney also submitted evidence to suggest that printers and computer programs for printers are related products.

Applicant maintains (Brief at 11) that "in light of the fact that the common term 'SURE' is weak and entitled

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asserted a date of first use and a date of first use in commerce of November 14, 2003.

<sup>3</sup> Registration No. 1,728,544, issued October 27, 1992, renewed.

to a narrow scope of protection, and that 'CODE' does not look or sound like 'PRINT,' the marks differ sufficiently in appearance such that consumer confusion is unlikely."

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973); Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must 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).

The first factor we will consider is the relatedness of the goods. In this case, applicant's goods are high resolution printers and registrant's goods are computer programs to control printers. Computer programs to control printers can be used to control applicant's high resolution printers. Indeed, applicant's brochure describes the "Software features of OBJInkDraw" on its "Sure Code™ 1000

Image Maker Printing System" so that software is an integral part of applicant's printers.

Furthermore, the examining attorney also included copies of registrations to show that the same entities have adopted a common mark for printers and software for printers. See, e.g., Registration No. 2,455,604 (printers and computer software for use in printing hardcopy output); No. 2,381,056 (label printer and computer software for creating slide labels); No. 2,718,634 (printers and computer software for control of operation of computer driven industrial printers); No. 2,809,185 (printers and computer software for print management); and No. 2,783,424 (printers and computer software for printer management and computer software for network management). These registrations suggest that the same source may provide both printers and computer software for printers. 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 also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

Therefore, we conclude that printers and computer programs to control printers are closely related. In addition, printers and computer programs for printers would likely be sold in the same channels of trade to the same purchasers who would be interested in software that controls printers.

The next factor we consider is the similarities and dissimilarities of the marks SURE CODE and SUREPRINT. We must consider whether the marks are similar in sound, appearance, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Both marks are shown in typed or standard character form so that there are no differences in the appearance or stylization of the words in the marks. The marks are similar because both marks begin with the same term SURE and the marks are different because applicant adds the term CODE while registrant's mark adds the term PRINT. Applicant has disclaimed the term CODE and the examining attorney has included evidence that supports the conclusion that the term "Code" is merely descriptive for printers. See, e.g., Client Server News, November 6, 2000 ("[T]here's a HP-VA printer initiative afoot to develop a 'scalable printing infrastructure for Linux' and promises more specs

and open source printer code in the future") and *InfoWorld*, August 10, 1998 ("An OS programmer had to write printer code").

In addition, the registrant's term "Print" for computer programs to control printers is at least very descriptive for printer computer programs. Descriptive terms, such as "Code" and "Print," are often not relied upon by purchasers to distinguish the sources of goods and services. See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'") and In re Code Consultants Inc., 60 USPQ2d 1699, 1702 (TTAB 2001) (Disclaimed matter is often "less significant in creating the mark's commercial impression"). We also note that the marks begin with the same non-descriptive term "Sure." Palm Bay Imports, 73 USPQ2d at 1692 ("VEUVE nevertheless remains a 'prominent feature' as the first word in the mark and the first word to appear on the label").

In another likelihood of confusion case, the Federal Circuit determined that the marks JOSE GASPAR GOLD and

GASPAR'S ALE were similar despite the fact that only the term "Gaspar" was common to both marks. In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("With respect to JOSE, the Board correctly observed that the term simply reinforces the impression that GASPAR is an individual's name. Thus, in accord with considerable case law, the JOSE term does not alter the commercial impression of the mark").

In this case, both marks begin with the term SURE. The fact that the next term is a different descriptive term in both marks does not lead us to conclude that the marks are not similar. Instead, we hold that the term "Sure" would dominate the marks. While the marks have obvious differences in their appearance and pronunciation, these differences would not be as significant as the similarities created by the identical common term. Furthermore, the meanings and commercial impressions of the marks are not dissimilar. While applicant argues that "SURE CODE connotes a product that *is sure to code* correctly while SUREPRINT connotes a product that *is sure to print*," it is also true that the term SURE CODE used on printers would likewise suggest that the printer code results in a printer that is sure to print. Therefore, the differences in the

meanings and commercial impressions of the marks are not very significant.

We also have considered applicant's citation to the case of In re Bed & Breakfast Registry, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986).<sup>4</sup> However, unlike this cited case, the term that the marks have in common here, "Sure," is not a descriptive term. Another case applicant relies on is In re Swenson Spreader Company, 222 USPQ 647 (TTAB 1984) in which the board found that the applicant's mark FIELD COMMANDER was not confusingly similar to the cited mark TURF COMMANDER. However, in that case, while the board did briefly discuss the differences in the marks, the board held that "[a]pplicant's goods [farming equipment] differ sufficiently from those of registrant [tractors and lawn mowers for industrial use]." 222 USPQ at 648. The facts of that case are not similar to the present case where we have found the goods to be closely related.

We conclude that, when we consider these marks in their entirety, the differences in appearance, pronunciation, meaning, and commercial impression are eclipsed by the similarities of the marks.

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<sup>4</sup> We have not considered the non-precedential board decisions that applicant has cited. TBMP 101.03 (2d ed. rev. 2004).

Applicant also maintains that concerning the cited registration, the "common term SURE is relatively weak and entitled to only a narrow scope of protection." Brief at 9. In support of its argument, it has provided copies of four registrations. The first is a registration (No. 2,835,419) that applicant owns for the mark SURE MARK for "high resolution printing ink." Another (No. 2,779,201) is for the mark SURELOAD for point-of-sale printers as well as software for operating point-of-sale printers. A third (No. 2,229,199) is for the mark SURE SECURE for printer ribbons and the fourth (Serial No. 78372875) is for the mark SURE-PAK for printers for printing labels for food products. The examining attorney's brief (p. 7) points out that Registration No. 2,229,199 was recently cancelled<sup>5</sup> and that Serial No. 78372875 has now issued as Registration No. 3,021,913. To the extent that applicant is using these registrations to prove that the cited mark is weak, we must reject this argument. "As to strength of a mark, however, registration evidence may not be given any weight." Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (emphasis in original). See

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<sup>5</sup> "[A] canceled registration does not provide constructive notice of anything." Action Temporary Services Inc. v. Labor Force Inc., 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989).

also AMF Inc. v. American Leisure Prods., Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them"). These registrations by themselves are not evidence that the term "Sure" is weak and only entitled to a narrow scope of protection. Also, the presence of these other registrations does not justify the registration of a mark that is otherwise confusingly similar to the cited registration. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987).<sup>6</sup>

In addition, applicant cites the case of Proctor & Gamble Company v. Johnson & Johnson Inc., 485 F.2d 1185, 205 USPQ 697 (S.D.N.Y. 1979), aff'd without opinion, 636 F.2d 1203 (2d Cir. 1980). In that case, the court found, inter alia, that there was no likelihood of confusion between plaintiff's SURE mark for deodorant and defendant's SURE & NATURAL mark for a menstrual protection shield. However, in that case, the court referred to the evidence that showed that the term "Sure," in that field, was weak:

The extent to which sure is used in advertising deodorant and other products is further evidence of the inherent weakness of the mark. P&G itself uses

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<sup>6</sup> We also add that applicant's ownership of a registration for SURE MARK for ink does not indicate that there is no confusion when applicant seeks registration for a different mark, SURE CODE, for different goods (printers).

the word sure throughout its advertising. Indeed, in order to establish its right to the Sure trademark, P&G had to defeat Carter Wallace's claim that its slogan "Use Arrid to be sure" entitled Carter Wallace to exclusive rights. Underlying the Ninth Circuit's decision in P&G's favor was its finding that sure is a common word frequently utilized in advertising by manufacturers of deodorants and kindred products.

205 USPQ at 707. Such evidence is not present in this case. Therefore, we cannot conclude that the term SUREPRINT is such a weak term that it is entitled to only a narrow scope of protection for computer programs to control printers.

When we consider the record and the relevant likelihood of confusion factors, we conclude that, when potential purchasers of printers and computer programs for printers encounter the marks SURE CODE and SUREPRINT for these goods, they are likely to believe that the sources of these products are in some way related or associated. As a result, there is a likelihood of confusion. We add that to the extent that we have had doubts, which we did, about the question of likelihood of confusion, we have resolved them in favor of the registrant and against the newcomer. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) and In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729, 729-30 (CCPA 1973).

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Decision: The refusal to register applicant's mark under Section 2(d) is affirmed.