

**THIS DISPOSITION  
IS NOT CITABLE AS  
PRECEDENT OF  
THE TTAB**

Mailed: September 11, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Hola, S.A.  
v.  
Freedom Broadcasting of Michigan, Inc.

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Opposition No. 91161517  
to Application No. 78310031  
filed on October 6, 2003

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Michael J. Striker, Esq. for Hola, S.A.

Steven J. Nataupsky, Esq. and Tirzah Abé Lowe, Esq.  
for Freedom Broadcasting of Michigan, Inc.

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Before Seeherman, Walters and Grendel, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Hola, S.A. filed its opposition to the  
application of Freedom Broadcasting of Michigan, Inc.  
to register the mark HELLO WEST MICHIGAN for  
"television broadcasting," in International Class 38.<sup>1</sup>

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<sup>1</sup> Application Serial No. 78310031, filed October 6, 2003, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified services.

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's services, so resembles opposer's previously used and registered HELLO! and HOLA! stylized marks discussed below as to be likely to cause confusion, under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

Applicant, in its answer, denied the salient allegations of the claim and asserted laches as an affirmative defense.

#### *The Record*

The record consists of the pleadings; the file of the involved application; and status and title copies of registration nos. 1935065 and 2938383 submitted by opposer's notice of reliance.

Applicant submitted no testimony or other evidence. Both opposer and applicant filed briefs on the case and opposer filed a reply brief.

#### *Factual Findings and Analysis*

We begin by noting that in the notice of opposition opposer asserted ownership of two trademark registrations, nos. 1009686 and 1935065. Opposer then submitted a notice of reliance that made reference to one of the pleaded registrations, no. 1935065, and a third, unpleaded, registration, no. 2938383. However, with this notice of reliance opposer submitted a copy

of pleaded registration no. 1935065 and a copy of yet a fourth, unpleaded, registration, no. 2772805.

Opposer did not submit a copy of registration no. 2938383. Only registration no. 1935065 has been both pleaded and made of record. However, applicant did not object and, in fact, expressly acknowledged that the opposition is based on the two registrations actually in the record,<sup>2</sup> and specifically referenced the unpleaded registration that is in the record by both the mark and the registration number. Therefore, we find that the issue of likelihood of confusion based on unpleaded registration no. 2772805 has been tried by the implied consent of the parties, and deem the pleadings to be amended pursuant to Fed. R. Civ. P. 15(b).<sup>3</sup>

To summarize, the following two registrations are of record and have been considered as the only evidence, in addition to the pleadings and the file of the opposed application:

**Registration no.:** 1935065<sup>4</sup>

**Mark:**

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<sup>2</sup> On p. 2 of its brief, applicant states "[o]pposer based its opposition on its stylized mark HOLA! (Reg. No. 1935065) ... and its stylized mark HELLO! (Reg. No. 2772805)."

<sup>3</sup> In both its main and reply briefs, opposer references registration no. 2938383, which was neither pleaded nor made of record and has not been considered.

<sup>4</sup> Registration no. 1935065 issued November 14, 1995, to opposer. [Renewed; Section 15 affidavit acknowledged.]



**Goods:** "newspapers for general circulation, books about current events and general interest, and general feature magazines," in International Class 16.

**Statements:** The registration includes the following statements: "the mark is lined for the color red" and "the English translation of 'HOLA' in the mark is 'hello.'"

**Registration no.:** 2772805<sup>5</sup>

**Mark:**



**Goods:** "newspapers for general circulation, fiction books, and general feature magazines," in International Class 16, and "telecommunication services, namely, personal communication services," in International Class 38.

Because opposer's two registrations noted above have been made of record, and because opposer's likelihood of confusion claim is not patently frivolous, we find that opposer has established its standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's two registrations are of record, Section 2(d) priority is not an issue in this case as to the mark and goods

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<sup>5</sup> Registration no. 2772805 issued on October 14, 2003, to opposer.

covered by said registrations. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion under Section 2(d) must be 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 & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also *In re Azteca Restaurant*

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*Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Opposer contends that the dominant portion of both parties' marks is the word HELLO; that the WEST MICHIGAN portion of applicant's mark is geographically descriptive and, thus, of lesser significance; that the goods and services of the parties are "extremely similar," stating that "opposer's telecommunication services are clearly very similar to television broadcasting" (brief, pp. 3-4); and asserting that "television broadcasting is squarely within telecommunication services and personal communication services" (reply brief, p.2). Opposer requests that the Board take judicial notice of the purported fact that "newspapers and books and magazines are typically owned also by companies owning television stations" (brief, p. 4).

Applicant contends that it owned a prior registration no. 1763318 for the same mark and goods as its application herein, but that this registration lapsed due to applicant's failure to renew it; and that opposer's registrations were issued while applicant's prior registration was existing. Applicant further contends that, for opposer's registrations to issue at that time, the USPTO clearly

found no likelihood of confusion and the Board should follow this precedent set by the Trademark Office.

Regarding the marks, applicant argues that its mark and opposer's HELLO! mark are distinguished by the term WEST MICHIGAN in applicant's mark, and by the exclamation mark and stylized background with contrasting lettering in opposer's mark. Applicant argues that its mark is further distinguished from opposer's HOLA! mark by the red-colored background of that mark and by the fact that it consists of the Spanish term "hola," which allegedly creates a commercial impression different from applicant's HELLO WEST MICHIGAN mark. Applicant asserts, further, that HELLO and its Spanish equivalent, HOLA, are weak marks; and that opposer has submitted no evidence to support its contention that HELLO is the dominant portion of applicant's mark. Applicant contends that the parties' goods and services are significantly different and opposer has not established otherwise.

Regarding its laches defense, applicant relies on the case of *Aquion Partners L.P. v. Envirogard Products Ltd.*, 43 USPQ2d 1371 (TTAB 1997), and asserts that because its earlier registration that lapsed covered the same mark and substantially the same goods, and opposer failed to petition to cancel or

oppose that earlier registration, applicant relied on its rights to its detriment and opposer is estopped now from challenging the registration of applicant's mark for the identified goods. However, we reject applicant's affirmative defense without considering its merits because applicant failed to introduce any evidence of its alleged prior registration. We consider, next, the goods of the parties and find that the record is absolutely devoid of any evidence that would warrant a conclusion that there is any relationship between applicant's television broadcasting services and either opposer's publications in International Class 16 or its telecommunication services in International Class 38. We will not, as opposer requests, take judicial notice of any alleged common ownership of publications and television stations. This is clearly a factual matter that must be established by evidence. Similarly, it is not obvious, as opposer contends, and it is a matter for proof, that television broadcasting services and telecommunications services are similar or that broadcasting services are encompassed by "telecommunications services, namely, personal communications services." It appears to us that "personal" communications services, indicating a one-

on-one connection, are the direct opposite of "broadcast" services, which would be directed at a wide audience. Opposer has not met its burden of establishing that, if represented by confusingly similar marks, there would be any confusion as to the source of the goods and services involved herein.

Moreover, we do not agree with opposer that HELLO is the dominant portion of applicant's mark HELLO WEST MICHIGAN and, thus, the marks are confusingly similar. Regardless of whether WEST MICHIGAN may be a geographically descriptive designation, which we do not address herein, we find that the connotation of HELLO WEST MICHIGAN is as a greeting and it would be perceived as a unitary mark. As such, we do not find it to be similar to opposer's stylized HELLO! or HOLA! marks.

In conclusion, we find that opposer has not established a likelihood of confusion between its registered marks of record herein and the applied-for mark HELLO WEST MICHIGAN in connection with the respective identified goods and services.

We note that, while we have found that opposer has not established a likelihood of confusion, we were not persuaded by applicant's argument that the HELLO portion of the respective marks is weak. There is no

evidence of record of third-party use of HELLO marks, and we therefore accord opposer's marks the normal scope of protection otherwise afforded to registered marks and, further, note that even weak marks are entitled to protection against registration by a subsequent applicant of the same or similar mark for the same or closely related goods or services. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); *In re Colonial Stores*, 216 USPQ 793 (TTAB 1982). We also were not persuaded by applicant's argument that opposer's registrations issued while its prior registration was in existence. Not only, as noted above, is the fact of applicant's prior registration not of record, but the decision of an examining attorney is not binding precedent on the Board and, further, each case must be decided on its merits. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001)

*Decision:* The opposition is dismissed.