

Oral Hearing:  
February 18, 1999

Paper No. 33  
CEW

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB SEPT, 8, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Motorola, Inc.  
v.  
Alliance Research Corporation

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Opposition No. 101,515  
to Application No. 74/663,884  
filed on April 20, 1995

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David C. Hilliard, John M. Murphy and Liisa M. Thomas of  
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson for  
opposer.

Matthew F. Jodiewicz, Esq. for applicant.

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Before Walters, Chapman and Bucher, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Motorola, Inc. filed its opposition to the application  
of Alliance Research Corporation to register the mark  
VIBRARING for "cellular accessories, namely, cellular  
telephone batteries containing circuitry that provides

notice of an incoming call useful in cellular communications systems," in International Class 9.<sup>1</sup>

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods so resembles opposer's previously used and registered mark VIBRACALL for "radio telephones, and accessories, namely, batteries, and battery chargers"<sup>2</sup> as to be likely to cause confusion under Section 2(d) of the Trademark Act.

Applicant, in its answer, denied the salient allegations of opposer's claim and asserted, essentially as affirmative defenses, laches, estoppel, acquiescence, unclean hands and fraud. As applicant has presented no evidence or testimony with respect to its asserted affirmative defenses, we have given these defenses no consideration.

*The Record*

The record consists of the pleadings; the file of the involved application; a certified status and title copy of Registration No. 1,984,583; the discovery depositions with

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<sup>1</sup> Application Serial No. 74/663,884, filed April 20, 1995, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods. Applicant filed an amendment to allege use of the mark in commerce, and specimens of use, on July 18, 1995, alleging dates of first use and first use in commerce as of June 27, 1995.

<sup>2</sup> Registration No. 1,984,583, issued July 2, 1996, in International Class 6, from an application filed on June 16, 1994.

exhibits by opposer of Gershon N. Cooper, applicant's president, Andrew W. Hollman, applicant's director of product development, and John Hastings, applicant's director of sales, all made of record by opposer's notice of reliance; and the testimony deposition by opposer of Tom J. Puchala, opposer's senior marketing manager in its U.S. group, with accompanying exhibits.

Opposer also filed, under notice of reliance, its answers to certain of applicant's interrogatories to opposer. As a party may not introduce into evidence its own answers to interrogatories, and applicant has not treated this submission as being of record, we have not considered this proffered evidence as part of the record. See, Trademark Rule 2.120(j)(5), 37 CFR 2.120(j)(5).

Opposer filed a brief and was represented at an oral hearing on this case. Applicant presented no evidence or testimony, filed no brief and was not present at the oral hearing.

*The Parties*

Opposer began manufacturing mobile telephones, principally for industrial use, in 1956. It began trials for cellular telephones in 1981 and offered its first commercial cellular telephone in 1983. Today, opposer manufactures cellular telephones and accessories, including

cellular telephone batteries. Opposer sells its products principally to carriers, *i.e.*, companies offering cellular telephone services, such as AmeriTech or Cellular One.<sup>3</sup> These carriers offer opposer's cellular telephones and accessories for sale under opposer's trademarks. Less than ten percent of opposer's sales are to retail marketers, such as Best Buy or Circuit City, and to consumers directly. Opposer manufactures a number of models of cellular telephones, each with different features and in different price ranges. Within its MicroTAC series of cellular telephones, opposer offers several phones with a built-in feature that causes the phone to vibrate, rather than ring, to signal an incoming call. This feature is identified by the trademark VIBRACALL and has been used by opposer on product packaging, instructional and promotional literature, and by opposer, carriers and retailers in advertisements to identify this feature in products sold from early 1993 to the present.<sup>4</sup> Opposer also manufactures various accessories, including batteries, for its cellular telephones, including those phones offering the VIBRACALL

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<sup>3</sup> Opposer submitted confidential information regarding its U.S. carrier market sales of cellular telephones containing the VIBRACALL feature. Suffice it to say that, for the period 1993 through 1997, sales were substantial and increased steadily over the period.

<sup>4</sup> Promotion of phones featuring VIBRACALL began in 1992.

feature. These accessories are available for purchase separate and apart from the cellular telephones.

Opposer's witness, Tom Puchala, testified that, at the time opposer introduced its first cellular telephone with the VIBRACALL feature, no other cellular telephone offered this feature.

Applicant<sup>5</sup> manufactures and sells accessories, including batteries, for cellular telephones. In June, 1995, applicant began manufacturing and selling a cellular telephone battery, identified by the trademark VIBRARING, that includes a feature that causes a phone to which the battery is attached to vibrate, rather than ring, to signal an incoming call. Applicant makes a number of models of this battery to be compatible with various manufacturers' cellular telephones, for example, phones by Motorola, Nokia, and Ericsson.<sup>6</sup> Applicant sells its VIBRARING products to carriers and retailers, with no direct sales to consumers. Applicant acknowledged that it directly competes with Motorola, opposer, in the cellular telephone accessories market.

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<sup>5</sup> Applicant is also referred to as Ora Electronics in the record.

<sup>6</sup> Applicant notes that it sells more Motorola-compatible batteries, opining that this reflects Motorola's larger penetration than its competitors in the cellular market.

Witnesses for both parties agreed that both applicant and opposer feature their products in the same publications and at the same trade shows, and that their products are available through the same retailers, including Best Buy and Circuit City. The evidence further establishes that both cellular telephones and accessories for such phones are advertised in the same advertisements; that applicant's product has been featured in the same advertisements as Motorola's cellular phones; and that a product's vibrating feature, whether it is a part of opposer's telephone or of applicant's battery, is often referenced in such advertising.

*Analysis*

Inasmuch as a certified copy of opposer's registration, which issued from its pleaded application, is of record, there is no issue with respect to opposer's priority. *King Candy Co., Inc. 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. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Key considerations in this case are the

similarities between the marks, the similarities between the goods and services, the channels of trade, and the class of purchasers. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

With respect to the goods of the parties, applicant's identified goods are identical to the cellular telephone batteries identified in opposer's registration. Additionally, since applicant's batteries are for use only with cellular telephones and, in fact, some of applicant's batteries are specifically intended for use with several models of opposer's cellular telephones, applicant's goods are closely related to, or complimentary of, opposer's cellular telephones.

The parties have essentially admitted that the channels of trade and class of purchasers for their goods are the same. Further, since both opposer's and applicant's identifications of goods are broadly worded, without any limitations as to channels of trade or classes of purchasers, we presume that the goods of applicant and opposer are sold in all of the normal channels of trade to all of the usual purchasers for goods of the type identified. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

We turn, next, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, 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, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See, Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well-established principle that, in articulating reasons for reaching a conclusion on the issue 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 consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).



In the case before us, applicant's mark, VIBRARING, and opposer's mark, VIBRACALL, are both two-syllable words beginning with the syllable VIBRA followed by the word, respectively, RING and CALL. While there is no question that VIBRA is suggestive of the vibrating feature of both parties' products, as applicant's director of sales, John Hastings, admitted, in the context of the parties' goods and marks the terms RING and CALL can be considered synonymous. We find the parties' marks to be substantially similar in sound, appearance, connotation and overall commercial impression.

Therefore, we conclude that, in view of the substantial similarity in the commercial impressions of applicant's mark, VIBRARING, and opposer's mark, VIBRACALL, their contemporaneous use on the identical and closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

*Decision:* The opposition is sustained.

C. E. Walters

B. A. Chapman

D. E. Bucher  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board