

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Oral Hearing:
April 26, 2000

Paper No. 22
CEW

9/26/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trident Energy Corporation

Serial No. 75/243,677

Robert E. Bushnell, Esq. for applicant.

Andrew P. Baxley, Trademark Examining Attorney, Law Office
114 (Mary Frances Bruce, Managing Attorney).

Before Walters, Rogers and McLeod, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Trident Energy Corporation has filed a trademark
application to register the mark shown below for "business
management services in the field of oil and gas
exploration."¹

¹ Serial No. 75/243,677, in International Class 35, filed February 18,
1997, based on use in commerce, alleging first use and first use in
commerce as of May 1, 1989.



The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark shown below, previously registered for "storage of natural gas, and transportation of natural gas by pipeline," in International Class 39, and "retail and/or wholesale distributorship services in the field of natural gas," in International Class 42,² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

² Registration No. 1,992,811, issued August 13, 1996, to Cascade Natural Gas Corporation. The registration includes a disclaimer of NATURAL GAS CORPORATION and of the representation of the triangle and flame design.



Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, and an oral hearing was held.

Before we begin our analysis, we respond to applicant's arguments against finding a likelihood of confusion in this case based on its prior ownership of a registration for the same mark that is the subject of this application, and for the same services; however, that registration was canceled under the provisions of Section 8 of the Trademark Act. Applicant submitted with its supplemental brief a copy of the application prosecution history of cited Registration No. 1,992,811. Applicant points out that the mark in the registration cited herein initially was refused registration, under Section 2(d) of the Trademark Act, based on applicant's then-subsisting registration. The then-applicant submitted various

arguments against likelihood of confusion with the mark in this applicant's then-subsisting registration.³ Thereafter, the Examining Attorney handling that application withdrew the refusal of registration. Applicant argues, essentially, that, since the same marks and services are involved herein, we are required to find no likelihood of confusion in this case because of registrant's argument during the prosecution of its underlying application that confusion is not likely and its statements regarding the differences in the marks, services and purchasers; and because of the Examining Attorney's decision to withdraw the Section 2(d) refusal in that application.

However, we must make our determination based on the facts before us in this case. We consider registrant's arguments in its application as evidence illuminative of shade and tone in the total picture confronting us, but we do not consider it determinative. *See Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978); and *American Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793 (TTAB 1986). Further, the Board is not bound by the Examining Attorney's decision in the application

³ Although this evidence is untimely, the Examining Attorney does not object on this ground, but addresses the probative value of the evidence on other grounds. Thus, we consider the file history of the cited registration to be of record herein.

that resulted in the cited registration. Rather, the Board is bound to review all of the record in this application and reach a determination concerning whether the evidence, taken as a whole, supports the refusal made by the Examining Attorney or supports the applicant's argument for allowance of the application. *In re Avocet, Inc.*, 227 USPQ 566 (TTAB 1985). *See also In re AFG Industries, Inc.*, 17 USPQ2d 1162 (TTAB 1990); and *In re D. B. Kaplan Delicatessen*, 225 USPQ 342 (TTAB 1985).

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. *See, 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 in this case, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We consider, first, the services involved in this case, and we note that the question of likelihood of confusion must be determined based on an analysis of the

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services recited in applicant's application vis-à-vis the services recited in the registration, rather than what the evidence shows the services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services 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 each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The Examining Attorney contends that applicant's and registrant's services are sufficiently related that the relevant purchaser would believe that such services, if

identified by confusingly similar marks, come from the same or a related source; and that applicant's services are so broadly identified as to encompass business management services to all sectors of the oil and gas exploration industry, including the recipients of the services recited in the cited registration. In support of his position, the Examining Attorney submitted copies of third-party registrations containing business management services encompassed by applicant's recitation of services, as well as services identical to those in the cited registration.

Applicant argues that there is no relationship between the services; that the third-party registrations are of no relevance; that applicant's and registrant's services are rendered to "different groups of business entities"; and that "the nature of the services mandates substantial expense characteristic of sophisticated users over substantial periods of time."⁴

We find the third-party registrations made of record by the Examining Attorney adequate to establish that a

⁴ Applicant also argues that applicant's and registrant's services are unrelated because they are classified in different International Classes. It is irrelevant that applicant's and registrant's services are classified in different International Classes. The classification of goods and services in trademark applications is for the administrative ease of the PTO and is neither relevant to, nor determinative of, likelihood of confusion. *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992).

number of companies have registered marks for services the same as, or similar to, applicant's and registrant's recited services. Although these registrations are admittedly not evidence of actual use of the marks, they are sufficient to suggest that these various types of services may be offered by a single entity. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Thus, we find that applicant's and registrant's recited services are sufficiently related that, if used and registered in connection with confusingly similar marks, confusion as to the source of applicant's services would be likely. Applicant has made a number of assertions to the contrary that are purely speculation and unsupported by any evidence regarding the nature of the services, purchasers or trade channels in this field.

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 impressions that confusion as to the source of

the goods or services 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 the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The Examining Attorney contends that the marks herein have substantially similar commercial impressions because their design portions are essentially identical; and that the words NATURAL GAS CORPORATION in the cited registration are merely descriptive. Applicant, on the other hand, argues that the marks are visually different because the specific flame designs are quite different.

We agree with the Examining Attorney that the design elements of the two marks, namely the flame contained in a triangular carrier in each mark, are substantially similar. Applicant's contentions regarding the minute differences between the two flame designs are unpersuasive in view of

the fact that the proper test for determining the issue of likelihood of confusion is the similarity of the general commercial impression engendered by the marks. Due to the consuming public's fallibility of memory, the emphasis is on the likely recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975).

However, having said that the design elements are similar, we are mindful of the fact that a flame design in the natural gas industry is highly suggestive in connection therewith. Further, the triangular carrier for each design is not particularly unique or distinctive.

The registered mark includes, in a size equal to the design, the company name, CASCADE NATURAL GAS CORPORATION. While it is undisputed that NATURAL GAS CORPORATION is merely descriptive in connection with the services recited in the registration, there is no evidence indicating that CASCADE is other than arbitrary in connection with these services. When both words and a design comprise a mark, then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers

that would be remembered by them and would be used by them to request the goods and/or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). We find that CASCADE is the dominant portion of the registered mark and, thus, the overall commercial impression of the registered mark is different from that of applicant's mark.

Therefore, we conclude that in view of the differences in the commercial impressions of applicant's mark and registrant's mark, their contemporaneous use on the related services involved in this case is *not* likely to cause confusion as to the source or sponsorship of such services.⁵

⁵ We note that, based on the facts in a particular case, similarity of one element of the sight, sound and meaning trilogy may be determinative of likelihood of confusion. See *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 n. 4 (TTAB 1988).

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Decision: The refusal under Section 2(d) of the Act
is reversed.

C. E. Walters

G. F. Rogers

L. K. McLeod
Administrative Trademark Judges,
Trademark Trial and Appeal Board