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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 Tower Tech, Inc.

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Serial No. 75/698,975

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Scott R. Zingerman of Fellers, Snider, Blankenship, Bailey & Tippens, P.C. for Tower Tech, Inc.

Lynn A. Luthey, Trademark Examining Attorney, Law Office 102 (Thomas Shaw, Managing Attorney).

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Before Hohein, Bottorff and Holtzman, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Tower Tech, Inc. has filed an application to register the mark "TOWER TECH" for "evaporative and conductive heat transfer equipment, namely cooling towers, heat exchangers, industrial cooling water treatment units, and parts thereof" in International Class 11 and "cooling tower rental services, and

construction, erection, and maintenance of cooling towers" in International Class 37."[1]

Registration has been finally refused 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 and services, so resembles the mark "TOWERTECH," which is registered for "construction and maintenance services, namely building, inspecting, maintaining, upgrading and removal of towers and tower sites,"[2] as to be likely to cause confusion, mistake or deception. Registration also has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods and services, the mark "TOWER TECH" is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal under Section 2(d), but reverse the refusal under Section 2(e)(1).

Turning first to the refusal under Section 2(d), the determination thereof is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on

[1] Ser. No. 75/698,975, filed on May 6, 1999, which for both the goods and the services alleges a date of first anywhere and first use in commerce of October 1995.

[2] Reg. No. 2,353,414, issued on May 30, 2000, which sets forth a date of first use anywhere and first use in commerce of September 20, 1998.

the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and services and the similarity of the marks.[3] Here, inasmuch as the respective marks, when considered in their entireties, are virtually the same in appearance (differing only in the presence or absence of a space between the terms "TOWER" and "TECH") and are identical in sound, connotation and overall commercial impression,[4] it is plain that the contemporaneous use thereof in connection with the same or closely related goods and/or services would be likely to cause confusion as to their source or sponsorship. The focus of our inquiry in this case is accordingly on the similarities and dissimilarities in the respective goods and services.

Applicant argues, in this regard, that a review of the specimen of use, which it made of record from the file of the cited registration, shows that registrant "is in the business of construction and maintenance of communications towers, such as

[3] The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks."

[4] Applicant, we observe, has not raised any argument to the contrary.

cellular telephone, PCS and the like"[5] and that nothing in the recitation of services in such registration "refers to, relates to, or describes cooling towers." Citing Webster's Encyclopedic Unabridged Dictionary of the English Language (1996) at 2002 as authority that "the most common definition of a tower is 'a building or a structure high in proportion to its lateral dimensions, either isolated or forming part of a building,'" applicant further argues that "[t]his definition would certainly apply to communications towers of the type which relate to the services" identified in the cited registration. Applicant insists, in consequence thereof, that as set forth in such registration, registrant's services "apply by definition to communication towers."

By contrast, applicant contends that a cooling tower "is not truly a 'tower' at all when applying the definition of 'tower' as recited above" and that cooling towers "are not high

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[5] Such specimen, we note, is a letter from registrant's marketing director to a prospective customer in which registrant is described as "a newly founded tower construction and maintenance company" whose "major emphasis is in the repair and inspection of towers, any size, any type." Although specifically listing such services as "Wireless Communications," "Antenna Change Outs," "Lightning, wind damage repair," "Complete tower construction & tower maintenance," "Civil construction," "Post-construction inspections," "Routine scheduled maintenance," "Preventive maintenance," "Aesthetic maintenance," "General services including: Bulb & strobe light changes," and "Small repairs to towers, mounts, lightning problems, grounding, connectors on lines, jumpers on antennas, and hangers for coax lines," the letter also states that "[t]he above list is a mere sample list and does not limit our level of services."

(as compared to communications towers or skyscrapers) and, depending on how measurement is made, the lateral dimension is, in most cases, greater than or at least equal to its height." Applicant therefore concludes that "it would be erroneous to presume that the description of services" in the cited registration "would include cooling 'towers' such as contained in Applicant's recitation of goods and services."

Applicant additionally argues that "it is unlikely that a consumer could mistakenly believe that Applicant's [goods and] services emanate from the same source as the services" provided by registrant for the reason that:

> Typically, due to the specificity of the technology involved in communication towers as opposed to the specificity of the technology involved in the selection, purchase, and construction of cooling towers, and particularly the large cost involved in both, the purchaser of either a communication tower or a cooling tower would have a specialized need, coupled with a specialized knowledge of the respective technology involved. Accordingly, the respective purchasers would be sophisticated purchasers seeking a specific type of product and certainly not a casual purchaser.

Such discriminating, sophisticated purchasers, applicant urges, therefore "would not be confused with regard to the source of

Applicant's goods and services as opposed to those services of the owner of" the cited registration.[6]

The Examining Attorney, on the other hand, argues that applicant's goods and services and registrant's services, as set forth in the application and cited registration, are identical

[6] Applicant also contends, in light of its claimed date of first use of October 1995 and the date of first use of September 21, 1998 set forth in the cited registration, that applicant and registrant "have co-existed for almost four years" and that, "[i]n that time, Applicant is unaware of a single incidence of actual confusion." Applicant maintains that while a "lack of actual confusion is not dispositive, it is the best evidence that confusion is not likely." However, as the Examining Attorney, citing Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990) and cases cited therein, points out in her brief, "[i]t is unnecessary to show actual confusion" inasmuch as "[t]he test under Section 2(d) of the Trademark Act is whether there is a likelihood of confusion."

Moreover, we note that applicant's contention regarding the lack of any instances of actual confusion is simply an argument by its counsel which is not supported by an affidavit or declaration from anyone associated with applicant who has firsthand knowledge of whether there have been any incidents of actual confusion as a result of the contemporaneous use of the marks at issue. There thus is no evidence of record as to the nature and extent of the use of the respective marks and there has been no opportunity to hear from the registrant on such point. In any event, even if we were to take counsel's argument as a true statement of fact, suffice it to say that while the absence of any instances of actual confusion over a significant period of time is, of course, a *du Pont* factor which is indicative of no likelihood of confusion, it is a meaningful factor only where the evidentiary record demonstrates appreciable and continuous use by applicant of its mark in the same markets as those served by registrant under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). In particular, there must be evidence showing that there has been an opportunity for incidents of actual confusion to occur. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Here, as indicated above, there is simply no evidence in the record, such as information concerning details of the nature and extent of the sales and marketing activities of applicant and registrant under their respective marks, from which it could be concluded that the asserted absence of any incidents of actual confusion is indeed a mitigating factor. Compare In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992).

in part, in that both include "construction and maintenance of towers," and are otherwise so closely related that confusion is likely when respectively offered under the marks "TOWER TECH" and "TOWERTECH." In particular, the Examining Attorney contends that "[i]t must be presumed that registrant's services include the applicant's services and related goods because the registrant's services are broadly stated." Thus, according to the Examining Attorney:

> The applicant provides cooling towers, as well as the construction and maintenance of cooling towers. The registrant's services, which include construction and maintenance of towers and tower sites, are broadly stated and could include cooling towers. Therefore, a consumer could mistakenly believe the goods and services emanate from the same source.

It is well settled that that the issue of likelihood of confusion must be determined on the basis of the goods and services as they are set forth in the involved application and cited registration. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the goods and services in the application at issue and in the cited registration are broadly described as to their nature and type, it is presumed in each instance that in scope the application

and registrations encompass not only all goods and services of the nature and type described therein, but that the identified goods move and the recited services are rendered in all channels of trade which would be normal for such goods and services and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Here, we agree with the Examining Attorney that registrant's recitation of services is broad enough to encompass a portion of applicant's services and that the former are otherwise closely related to applicant's goods and its other services. Specifically, we concur with the Examining Attorney that registrant's "construction and maintenance services, namely building, inspecting, maintaining, upgrading and removal of towers and tower sites" necessarily includes applicant's services of "construction, erection, and maintenance of cooling towers." The words "towers" and "tower" in registrant's recitation of services simply cannot be read, as urged by applicant, to encompass only communication towers (such as antennas) to the exclusion of cooling towers. Although applicant's particular cooling towers, as shown by the specimens of use submitted with respect to its "evaporative and conductive heat transfer equipment, namely cooling towers, heat exchangers, industrial cooling water treatment units, and parts thereof," appear to be no higher than they are wide, such goods

nonetheless are clearly "towers" in that they are at least several stories in height. Thus, while perhaps not "towers" in the strict sense of "a building or a structure high in proportion to its lateral dimensions, either isolated or forming part of a building," the dictionary cited by applicant, Webster's Encyclopedic Unabridged Dictionary of the English Language (1996) at 2002, also defines the term "tower" as "any structure, contrivance, or object that resembles or suggests a tower," which is plainly the case with applicant's goods. Applicant's cooling towers, therefore, must be considered to be a type of tower and a kind which is included within the "towers and tower sites" set forth in the recitation of registrant's services.

Moreover, the specimens of use with respect to applicant's "cooling tower rental services, and construction, erection, and maintenance of cooling towers" demonstrate without question that its cooling towers are indeed "towers" and are so referred to in the trade. Such specimens, which are in the nature of advertising brochures for its "Innovative Cooling Towers," state that applicant's "Accessory Equipment Division offers pumps, VFDs, automated isolation controls, separators, heat exchangers, and custom control panels to assure maximum tower efficiency"; its "Quality Assurance Program monitors each factory-assembled tower's fabrication"; its "[f]actory-assembled

towers are certified by the Cooling Tower Institute"; and its "preventive maintenance program assures peak tower performance throughout the lifespan of your investment."

In consequence thereof, there is no reason not to presume that registrant's services, as broadly recited in the cited registration, are identical to applicant's services insofar as the construction and maintenance of cooling towers is concerned. Furthermore, in light of the overlap in such services, it is obvious that, inasmuch as applicant also offers "evaporative and conductive heat transfer equipment, namely cooling towers, heat exchangers, industrial cooling water treatment units, and parts thereof" and "cooling tower rental services," those goods and services are closely related to registrant's cooling tower "construction and maintenance services, namely building, inspecting, maintaining, upgrading and removal of [such] towers and tower sites."

We find, therefore, that contemporaneous use of the essentially identical marks "TOWER TECH" and "TOWERTECH" in connection with, respectively, applicant's goods and services and registrant's services would be likely to cause confusion. While such products and services would clearly be purchased by knowledgeable and sophisticated buyers only after careful consideration, it is well settled that the fact that customers exercise deliberation in choosing the goods and services at

issue "does not necessarily preclude their mistaking one trademark [or service mark] for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). Conditions are such that purchasers, despite the care exercised in the selection of applicant's goods and services and registrant's services, could reasonably assume, due to the virtual identity between applicant's mark and registrant's mark, that the goods and services emanate from the same entity.

Turning next to the refusal under Section 2(e)(1), it is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of such section, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant

attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

However, a mark is suggestive if, when the goods or services are encountered under the mark, a multi-stage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. See, e.g., In re Abcor Development Corp., supra at 218, and In re Mayer-Beaton Corp., 223 USPQ 1347, 1349 (TTAB 1984). As has often been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. See, e.g., In re Atavio, 25 USPQ2d 1361 (TTAB 1992) and In re TMS Corp. of the Americas, 200 USPQ 57, 58 (TTAB 1978). The

distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. See In re George Weston Ltd., 228 USPQ 57, 58 (TTAB 1985).

The Examining Attorney maintains that because "applicant's goods and services utilize cooling tower technology," it is therefore the case that "the mark TOWER TECH is merely descriptive of a feature or characteristic of the goods and services, and is unregistrable on the Principal Register." Citing, in support of her position, an excerpt which was made of record from the Acronyms, Initialisms & Abbreviations Dictionary (18th ed. 1994) at 3431, the Examining Attorney argues that "TECH is the recognized abbreviation of TECHNOLOGY" and that technology "is required for constructing and maintaining cooling towers." Relying, in addition, upon various stories which were made of record from a search of the "NEXIS" electronic database using the search request "'TOWER TECHNOLOGY' AND COOLING," the Examining Attorney further contends that "'tower technology' is a specific engineering discipline used in the manufacture, construction, erection, and maintenance of cooling towers" and, thus, the terminology "TOWER TECH" is merely descriptive of applicant's goods and services. Representative samples of such stories, which are set forth below (**emphasis added**), demonstrate however that it is actually

the phrase "cooling tower technology," rather than "tower technology" per se, which designates the engineering discipline or field pertaining to applicant's goods and services:

> "... Systems Inc. in Golden has been awarded a contract to supply its propriety [sic] fiberglass composite **cooling tower technology** for the Murray Gill Station in Wichita, Kan." -- Rocky Mountain News (Denver, Co.), December 6, 1998;
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> "Robert Burger is president of Burger Associates, Inc., consultants, engineers, and contractors specializing in **cooling towers**. .... The foregoing article is excerpted from '**Cooling Tower Technology**: Maintenance, Upgrading and Rebuilding', Third Edition, By Robert Burger ...." -- Energy User News, December 1998;
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> "**Cooling Tower Technology** Seminar and Conference, fossil Power Plants Business Unit, Nuclear Maintenance Applications Center and Nuclear Power Group ...." -- Electric Light & Power, July 1997;
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> "**Cooling Tower Technology** 1 is a [software] program to design and size cooling towers for typical process applications." -- Chemical Engineering, November 1995;
>
> "**Cooling Tower Technology** -- A Short Course, an instructional diskette by Robert Burger, Burger & Associates Inc. ...." -- Power, July 1994;
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> "Developments in **cooling tower technology** have quietly gained momentum in recent years. Now more choices stand ready to answer just about every need in the power generation industry." -- Power Engineering, June 1994; and

> "**COOLING TOWER technology**, an engineering discipline no more than 80 years old, did not become a science until the 1920s when Merkel and Tchebycheff performed their systematic studies. Investigations and integration formulas by these two pioneers laid the basis for modern day **cooling tower** heat transfer." -- Hydrocarbon Processing, December 1989.

We will assume, without deciding, that for present purposes, the term "TECH" in applicant's mark would indeed be regarded by customers for its goods and services as signifying or immediately conveying the meaning of "technology." However, applicant's mark is "TOWER TECH," rather than "COOLING TOWER TECH," and the "NEXIS" excerpts relied upon by the Examining Attorney fail to demonstrate that the engineering discipline or field pertaining to applicant's goods and services is known or referred to as "tower technology." Instead, as noted above, they show that such body of knowledge is called "cooling tower technology."

Moreover, even if we were to assume that, in the context of applicant's goods and services, the terms "TOWER TECH" or "tower technology" would be regarded by purchasers and users of its goods and services as shorthand expressions for "cooling tower technology," we would still find that applicant's "TOWER TECH" mark is not merely descriptive of such goods and services. Specifically, while we disagree with applicant's assertions, for the reasons explained previously, that its goods

are not actually "towers" and thus are not merely described by the word "tower," we concur with applicant that, based on the rationale expressed in In re Hutchinson Technology Inc., 852 F.2d 552, 7 USPQ2d 1490, 1493 (Fed. Cir. 1988), with respect to the significance of the term "technology,"[7] the mark "TOWER TECH" as a whole is not merely descriptive of applicant's goods and services.[8] Applicant, relying upon such case as support for its

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[7] In the case of an application filed by Hutchinson Technology Inc. to register the mark "HUTCHINSON TECHNOLOGY" for "etched metal electronic components; flexible circuits; actuator bands for disk drives; print bands; increment discs; and flexible assemblies for disk drives," the court found, among other things, that (footnote omitted):

> "[T]echnology" is a very broad term which includes many categories of goods. The term "technology" does not convey an immediate idea of the "ingredients, qualities, or characteristics of the goods" listed in Hutchinson's application. Therefore, the term "technology" is not "merely descriptive" of Hutchinson's goods, and we conclude that the board's finding that the term "technology," standing alone, is merely descriptive of Hutchinson's goods is clearly erroneous. The board offered no ... evidence to support its findings on the effect of the inclusion of "technology" in Hutchinson's mark as a whole. Consequently, the board's findings on the effect of the inclusion of "technology" in the mark, as a whole, also are clearly erroneous."

7 USPQ2d at 1493. Curiously, we observe that the Examining Attorney has offered no argument to distinguish such case and, in fact, did not even mention it in her brief.

[8] Applicant, noting the inconsistency in "the lack of a rejection under Section 2(e)(1)" with respect to the "TOWERTECH" mark in the cited registration, additionally asserts that, while such "is not limiting, it should, at least, evidence the fact that at least one Examining Attorney would agree with applicant's position" that its "TOWER TECH" mark is not merely descriptive. Suffice it to say, however, that each case must be determined on its own merits and the allowance of the mark which is the subject of the cited registration, without resort to a showing of acquired distinctiveness under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), does not entitle

position, argues with respect to use of its mark in connection with its goods that:

> The word "technology" is ... not descriptive of any particular scientific or engineering discipline, nor does it particularly describe industrial cooling towers. The term "technology" is a very broad term which includes many broad categories of scientific and engineering disciplines ranging from the science of designing bowling balls to global positioning systems, but does not describe an ingredient, quality or characteristic of any one particular category of goods. Specifically, the term "technology" does not describe an ingredient, quality or characteristic of industrial cooling towers or their manufacture, construction, erection, and maintenance.

Accordingly, just as the court in *Hutchinson*, id. at 1492, found that "the fact that the term 'technology' is used in connection with computer products does not mean that the term is descriptive of them," the fact that applicant's goods and services obviously utilize various elements of cooling tower technology in the designing of the goods and the rendering of the services does not mean that the terminology "TOWER TECH" or "tower technology" is merely descriptive of any significant ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. The Examining Attorney,

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applicant to a finding that its mark is likewise registrable. See, e.g., In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the ...

moreover, has not identified any such specific aspect of applicant's goods or its services. At best, the terminology "TOWER TECH" is therefore no more than suggestive, rather than merely descriptive, of applicant's goods and services.

Finally, to the extent that we may nonetheless have any doubt about our conclusion that applicant's "TOWER TECH" mark is not merely descriptive of its goods and services, we resolve such doubt, in accordance with the Board's practice, in favor of applicant. See, e.g., In re Conductive Systems, Inc., 220 USPQ 84, 86 (TTAB 1983); In re Morton-Norwich Products, Inc., 209 USPQ 791 (TTAB 1981); and In re Gourmet Bakers, Inc., 173 USPQ 565 (TTAB 1972).

Decision: The refusal under Section 2(d) is affirmed, but the refusal under Section 2(e)(1) is reversed.

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allowance of such prior registrations does not bind the Board"] and In re Pennzoil Products Co., 20 USQP2d 1753, 1758 (TTAB 1991).