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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Micom Communications Corp.

Serial Nos. 74/494,266 and 74/495,088

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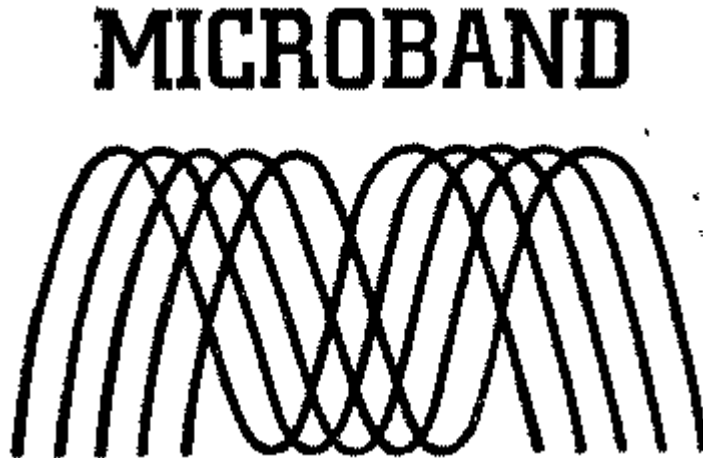
Before Cissel, Seeherman and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Micom Communications Corp. has filed trademark applications to register the marks MICROBAND and MICROBAND ATM for "apparatus for wide area network telecommunications systems using cell relay and frame relay technologies to manage a combination of voice, synchronous and asynchronous data and local area network (LAN) data from different

multiplexers in a network to maintain a high efficiency in the network over a wide range of variable line rates.”¹

In both cases, 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 marks so resemble the mark MICROBAND and design, as shown below, previously registered for “telecommunication services,”² that, if used on or in connection with applicant’s goods, the marks would be likely to cause confusion or mistake or to deceive.



Applicant has appealed in both cases. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested in either case. In the interest

¹ Respectively, Serial Nos. 74/494,266, filed February 25, 1994, and 74/495,088, filed February 28, 1994, both in International Class 9 and based on the assertions of bona fide intentions to use the marks in commerce.

² Registration No. 1,101,742 issued September 5, 1978, to Microband Corporation of America, in International Class 38. (Section 8 affidavit accepted.)

of judicial economy, as the issues in these two appeals are identical and the facts are similar, we consider the appeals together. In each case, we affirm the refusal to register.

In a likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. We consider, first, the similarities between the parties' marks. Registrant's mark consists of the term MICROBAND in a non-distinctive script above a series of wavy lines. Applicant's marks have no design element and consist, in the one case, of the term MICROBAND and, in the other case, of the term MICROBAND followed by the letters "ATM."

The Examining Attorney contends that the word MICROBAND is the dominant portion of registrant's mark; that there is no evidence to suggest that MICROBAND is other than a strong mark in connection with the services identified in the registration; that there is no support for applicant's contention that the design portion of the registered mark represents the letter "M"; that applicant's marks are virtually identical to the word portion of registrant's mark; and that the letters "ATM" "have little significance in altering the commercial impression of the applicant's mark [MICROBAND ATM]." Applicant contends that registrant's mark is, in fact, MICROBAND M, and that the "M" design

portion of registrant's mark is the dominant portion of the mark.

In determining the similarities between the marks of the parties, we must compare the marks in their entireties. However, we are guided, equally, by the well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood 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).

We conclude that MICROBAND is the dominant portion of registrant's mark. The word portion of a mark comprised of both a word and a design is normally accorded greater weight because it would be used by purchasers to request the goods. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). Such a conclusion is warranted in this case as the stylized script in which the word MICROBAND appears in registrant's mark is non-distinctive; the placement of the wavy line design serves to underline, and thus emphasize, the word portion of registrant's mark even though, as applicant notes, the wavy line design in

registrant's mark may be slightly larger than the word MICROBAND; and any connotation to the wavy line design likewise supports and emphasizes the word portion of registrant's mark.³ The design aspect of registrant's mark has less impact than the word portion on the overall commercial impression of the mark.

Applicant's mark, MICROBAND, is identical to the dominant word portion of registrant's mark. Additionally, we find that MICROBAND is the dominant portion of applicant's mark, MICROBAND ATM. There is no evidence that ATM is other than an arbitrary combination of letters in connection with applicant's goods as identified and, as such, ATM would be perceived as modifying MICROBAND. Thus, the dominant portion of applicant's mark, MICROBAND ATM, is also identical to the dominant portion of registrant's mark.

The record contains no evidence regarding the meaning or connotation of applicant's and registrant's marks. However, we take judicial notice of the following definitions:⁴

micro- *combining form* (1)(a) little, small, minute; (b) exceptionally little, abnormally small.

band *n.* ... (8) (a) a specific range of wavelengths or frequencies, as in radio broadcasting or sound or light transmission; (b) any of the stripes or colors in a spectrum.

³ It is likely that the design may be perceived as either echoing the "M" in MICROBAND, suggesting a radio or other type of waveband, or underlining the word MICROBAND with an abstract line pattern.

⁴ *Webster's New World College Dictionary*, 3rd ed., 1997.

telecommunications n. communication by electronic or electric means, as through radio, telephone, telegraph, television or computers.

We have insufficient evidence to conclude that MICROBAND is an actual term used in the telecommunications field or that it is a commonly used term. However, in view of the definitions of "telecommunications" and of the component parts of MICROBAND, a consumer familiar with the field of telecommunications may understand the term MICROBAND to be at least suggestive of a characteristic of the wavelength or frequency used in connection with some telecommunications apparatus and/or services. Despite this, we cannot conclude on this record that the term MICROBAND is either merely descriptive or highly suggestive in connection with either applicant's or registrant's identified goods or services so as to warrant a conclusion that the marks may be distinguished by minor variations therein. See, e.g., *Plus Products v. Redken Laboratories, Inc.*, 199 USPQ 111, 116-117 (TTAB 1978) and cases cited therein at 117. Rather, in the cases before us, we find that, to the extent that one of applicant's marks includes the additional term ATM, or registrant's mark includes a wavy line design, such secondary characteristics would be perceived as minor variations of the MICROBAND mark.

Further, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a

side-by-side comparison. The issue is whether the marks create similar overall commercial impressions. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). Thus, as MICROBAND is the dominant portion of both parties' marks, we find that the overall commercial impression of applicant's and registrant's marks is substantially similar.

Turning our consideration to the goods herein, we begin with the premise that we must determine the issue of likelihood of confusion on the basis of the goods as set forth in the application and the cited registration. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

The Examining Attorney contends that "telecommunications" includes all modes of electronic or electric communication; and that registrant's broadly defined "telecommunications services" encompass those areas in which applicant's telecommunications systems would be involved. Applicant's goods are identified as apparatus for a specific type of telecommunications system and are limited as to the nature and function of the apparatus. Applicant contends that by so limiting its identification of goods, it has sufficiently distinguished its goods from registrant's services; that the classification of registrant's services in International class 38 and applicant's goods in International class 9 further distinguishes the parties'

goods and services; that the identification of registrant's services is inappropriately broad and, further, does not accurately reflect the actual nature of registrant's services; that applicant's goods are for use in a distinctly different field of telecommunications from the field in which registrant is involved and confusion as to source is unlikely among the sophisticated purchasers of the parties' goods and services; and that registrant may not be using its mark. In support of its contentions, applicant submitted a copy of a Business Information Report prepared by Dun & Bradstreet and dated January 27, 1995.

Applicant's contentions regarding the actual nature of registrant's services and the extent of its use of its registered mark are irrelevant in the proceeding before us. Such allegations are a collateral attack upon the validity of the cited registration, which matters are properly addressed before the PTO in a cancellation proceeding. *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971); *In re Peebles, Inc.*, 23 USPQ2d 1795 (TTAB 1992).

Likewise, it is irrelevant that applicant's goods 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).

In considering the goods and services of the parties herein, we are cognizant of the 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 thereon, 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.

As defined herein, "telecommunications" is an extremely broad term. Thus, registrant's services as identified cover the full range of telecommunications services. These services would necessarily involve telecommunications apparatus, including applicant's goods. The questions not answered by the record before us include whether the purchasers of telecommunications services also purchase the apparatus for telecommunications systems, in particular, goods of the type identified in the applications herein;

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and, if so, the extent to which purchases of registrant's services and applicant's goods involve careful consideration by sophisticated purchasers.

The Examining Attorney cites the Board's decision in *Corinthian Broadcasting Corporation v. Nippon Electric Co., Ltd.*, 219 USPQ 733 (1983), for the proposition that "telecommunications services and telecommunications goods [are] related for the purpose of determining likelihood of confusion." We emphasize that there is no *per se* rule in this regard. Rather, in each case we must determine the relationship between goods and/or services, if any, based on the record before us. In the cited case, opposer, the owner of a registration of the mark TVS for "television broadcasting services," opposed the registration of TVS for "transmitters and receivers of still television pictures." In finding likelihood of confusion based on the extensive *inter partes* record before it, the Board concluded:

purchasers of opposer's services and purchasers of goods encompassed by applicant's recitation of goods in its application would overlap and said purchasers would be likely to ascribe a common origin or sponsorship of the goods and services. While the respective purchasers of the goods and services may be sophisticated and discriminating, they are not immune from confusion as to the source or origin of products and services sold under the same marks.

Similarly, in this case, in view of the breadth of registrant's identified services and the nature of

applicant's goods, we believe that purchasers of applicant's goods and registrant's services are likely to overlap and to ascribe a common origin or sponsorship to the goods or services, regardless of the purchasers' level of sophistication or the degree of discrimination involved in such purchases. It is well established that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and, thus, we resolve any doubt that we may have as to likelihood of confusion against the newcomer and in favor of the registrant. See, *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308 (TTAB 1976).

We conclude that in view of the substantial similarity in the commercial impressions of applicant's marks, MICROBAND and MICROBAND ATM and registrant's mark, MICROBAND and design, their contemporaneous use on the telecommunications goods and services involved in this case would be likely to cause confusion as to the source or sponsorship of such goods and services.

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

R. F. Cissel

E. J. Seeherman

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board