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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 Steck-Vaughn Company

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Serial No. 76339123

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Ava K. Doppelt and David L. Sigalow of Allen, Dyer,  
Doppelt, Milbrath & Gilchrist, P.A. for Steck-Vaughn  
Company.

Sharon A. Meier, Trademark Examining Attorney, Law Office  
116 (Meryl Hershkowitz, Managing Attorney).

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Before Hohein, Hairston and Holtzman, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Steck-Vaughn Company has filed an application to  
register POWER UP! BUILDING READING STRENGTH as a trademark  
for goods identified as "computer software and prerecorded  
audio tapes for teaching reading."<sup>1</sup>

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<sup>1</sup> Serial No. 76339123, filed November 16, 2001, based on  
applicant's allegation of a bona fide intention to use the mark  
in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C.

§1052(d), on the ground that applicant's mark, if used in connection with the identified goods, is likely to cause confusion or mistake or to deceive consumers, in view of the prior registration of the mark POWER UP! as shown below,

The image shows a stylized logo for "Power UP!". The word "Power" is written in a large, bold, cursive font. Below it, the words "UP!" are written in a smaller, bold, cursive font. The exclamation point is prominent.

for "computer programs and instruction manuals sold as a unit."<sup>2</sup>

When the refusal was made final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal.

At the outset, we note that applicant, for the first time with its appeal brief, submitted a copy of the file

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<sup>2</sup> Registration No. 1,337,661 issued May 28, 1985; Section 8 affidavit accepted; Section 15 affidavit received. Although the registration covers other goods and services, the refusal is based only upon the registrant's computer programs and instruction manuals sold as a unit.

wrapper and contents of the cited registration. Although Trademark Rule 2.142(d) provides that the record in the application should be complete prior to filing an appeal, the Examining Attorney has requested that we not exclude the evidence. (Appeal Brief, p. 10). In view thereof, we will treat the evidence as properly of record.

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. de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin with the goods of applicant and registrant. Applicant argues that the goods are different in nature because applicant's computer software is for teaching reading, whereas registrant's computer software is designed to provide "specialized business functions". (Brief, p. 8). Applicant submitted a copy of the file wrapper and contents of the cited registration in support of its contention. The problem with applicant's argument is that registrant's goods are not limited in the way applicant

suggests. We must consider registrant's goods as they are described in the registration and we cannot read limitations into those goods. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *In re Elbaum*, 211 USPQ2d 639 (TTAB 1981). When we consider registrant's goods as they are described in the registration, we find that they are broadly described such that they would include computer software for teaching reading. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). In view thereof, we find that applicant's and registrant's computer software products are legally identical, and that they would be offered in the same channels of trade to the same classes of purchasers, namely persons who teach reading, such as educators, as well as parents who wish to teach their children to read. Moreover, although applicant argues that registrant's computer software is designed to provide specialized business functions, as noted by the Examining Attorney, it appears from the contents of the cited registration that registrant's POWER UP! mark is also used with computer software for building vocabulary and learning math. Such computer software is clearly of a type that would be

offered in the same channels of trade and to the same classes of purchasers as computer software for teaching reading.

We turn next to a consideration of the marks, keeping in mind the well-established principle that when marks would appear on identical goods or services, the degree of similarity necessary to support a conclusion of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Also, to determine whether applicant's mark and the registrant's mark, when considered in their entireties, are similar in sound, appearance, connotation and commercial impression, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison. Rather, the question is whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to 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. *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 feature, and it is not improper to give weight to the dominant feature in determining the commercial impression created by the mark. In re National Data Corp., 173 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, due to the shared term POWER UP!, applicant's mark POWER UP! BUILDING READING STRENGTH and registrant's mark POWER UP! (stylized) have obvious similarities in sound, appearance and connotation. The phrase BUILDING READING STRENGTH is highly suggestive of applicant's computer software for teaching reading and therefore is entitled to less weight in our assessment of the likelihood of confusion. See In re National Data Corp., supra. Accordingly, we find that when considered in their entireties, the marks are highly similar in sound, appearance, connotation and commercial impression. Purchasers are likely to assume that the POWER UP! BUILDING READING STRENGTH computer software for teaching reading comes from the same source as the POWER UP! computer software, and that the phrase has simply been added to highlight the purpose of the goods.

Applicant contends that the purchasers of registrant's computer software are sophisticated, but this assertion is based on applicant's argument that registrant's goods are

restricted to computer software designed to provide specialized business functions. As noted above, registrant's identification is not limited in such manner. Furthermore, it appears from the file contents of the cited registration that registrant's mark is used with other types of computer software which may be offered to purchasers who are not necessarily sophisticated.

In sum, because of the similarity of applicant's and registrant's marks and the legal identity of applicant's and registrant's computer software, we find that there is a likelihood that purchasers would be confused if applicant were to use the mark POWER UP! BUILDING READING STRENGTH for its computer software for teaching reading.

**Decision:** The refusal to register is affirmed.