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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bright House Networks LLC

Serial No. 76663959

Pamela A. Rask of Sabin, Bermant & Gould for Bright House Networks LLC.

Michael Webster, Trademark Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

Before Hairston, Cataldo and Wellington, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

On August 1, 2006, Bright House Networks LLC applied to register the mark BRIGHT KIDS NETWORK and design, as reproduced below,



for "educational services in the nature of providing after-school programs for children and young adults

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featuring seminars, workshops and meetings" in International Class 41.<sup>1</sup>

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the mark THE BRIGHT KIDS RESOURCE, INC. (in standard character form) for "education services, namely, providing to parents of bright and highly able children intellectually stimulating resources, activities, seminars, and workshops in the field of parenting."<sup>2</sup> The cited registration is on the Supplemental Register. It is the examining attorney's position that applicant's mark so resembles the registered mark that, as used in connection with the identified services, it is likely to cause confusion, to cause mistake, or to deceive.

In addition, the trademark examining attorney has refused registration in view of applicant's failure to comply with the requirement for a disclaimer of BRIGHT KIDS NETWORK under Section 6(a) of the Trademark Act.

When the refusals were made final, applicant filed this appeal. Applicant and the examining attorney have filed briefs. We affirm the refusal based on a requirement

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<sup>1</sup> Serial No. 76639959, based on an allegation of a bona fide intent to use the mark in commerce under Section 1(b).

<sup>2</sup> Registration No. 3102488 issued June 6, 2006.

for a disclaimer; however, we reverse the refusal based on a likelihood of confusion.

As a preliminary matter, we note the examining attorney argues in his brief that applicant "has not provided any arguments in its brief or request for reconsideration in response to the disclaimer requirement." Brief, (unnumbered, p. 11). He concludes that applicant has "waived its position regarding the requirement." We disagree. In its brief, applicant states that it has "responded with arguments against the disclaimer, noting the overall mark in the context of [applicant's] services is at least suggestive." Brief, p. 5. And, in its concluding paragraph, applicant specifically requests the Board "to reverse the examining attorney's decision...to require a disclaimer of 'BRIGHT KIDS NETWORK'." Brief, p. 6. Based on these statements, we do not find that applicant has conceded the disclaimer requirement.

***Disclaimer***

As provided in Section 6(a) of the Trademark Act, the Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. A component of a mark is unregistrable if, when used in connection with applicant's goods or services, it is merely

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descriptive of the goods or services under Section 2(e)(1) of the Trademark Act.

The examining attorney argues that BRIGHT KIDS NETWORK is merely descriptive of applicant's services. In support of this contention the examining attorney submitted the definition of "bright"; copies of fifteen use-based, third-party registrations for marks used in connection with educational services, each of which includes a disclaimer of "NETWORK" or is on the Supplemental Register; and over a dozen article excerpts containing the phrase "bright kid(s)" used in the context of describing intelligent children.

Based on the evidence of record, we find that the phrase BRIGHT KIDS NETWORK is merely descriptive of applicant's educational services for children and young adults. Specifically, the phrase describes that applicant's services are geared to "bright kids" (or gifted and intelligent children) and involve or comprise a "network" (or interconnected group). As a result, we find that BRIGHT KIDS NETWORK merely describes a feature or characteristic of applicant's services, namely, that they provide an interconnected group of after-school programs for gifted children and young adults. Consumers of applicant's services, upon viewing applicant's mark in

connection with the recited services, would readily perceive the phrase BRIGHT KIDS NETWORK as describing the services.

In view of the above, we find the phrase BRIGHT KIDS NETWORK is merely descriptive of applicant's educational services. Accordingly, the phrase must be disclaimed.

***Likelihood of Confusion***

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In this case, we think the *du Pont* factor involving the strength of the cited registration, or rather the lack of strength, plays a significant role in our analysis. The cited registration, as noted above, is on the Supplemental Register. There is no question that a mark registered on the Supplemental Register may be cited as a Section 2(d) bar to the registration of an applicant's mark. See *In re The Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978); *In re Hunke & Jochheim*, 185 USPQ 188 (TTAB 1975). However, marks registered on the Supplemental Register are presumed

to have been (at least as of the time of registration) merely descriptive at a minimum, and they therefore are deserving of a lesser scope of protection than arbitrary or suggestive marks registered on the Principal Register. *Id.* As the Court explained in *Sure-Fit Products Company v. Saltzson Drapery Company*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958):

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

Accordingly, the level of descriptiveness of a cited mark on the Supplemental Register may influence the conclusion that confusion is likely or unlikely. Indeed, in such cases, the scope of protection accorded to them has been consequently narrow, so that likelihood of confusion has normally been found only where the marks and goods are substantially similar. *In re Hunke & Jochheim, supra.*; see also, *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Keeping the above in mind, we turn now to the *du Pont* factor involving the level of similarity or dissimilarity of the marks. We must determine whether applicant's mark,

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BRIGHT KIDS NETWORK (in stylized letters and with a design), and registrant's mark, BRIGHT KIDS RESOURCE, INC., when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression.

As to appearance and sound of the marks, the obvious similarity between the marks is the common element, BRIGHT KIDS, which appears first in both marks. However, considering the marks in their entireties, we must also take into account the dissimilarities, namely, the addition of RESOURCE, INC. at the end of the registered mark, and applicant's use of NETWORK at the end of its mark, the concentric circles design, and the boxed letters. We agree with the examining attorney that any differences in stylization or lowercase letters is immaterial inasmuch as the cited registration appears in typed letters and thus may be appear, in use, in lowercase letters or the same stylized format as applicant's.

In terms of connotation and commercial impression, we again find the respective marks to be similar to the extent that the common phrase, BRIGHT KIDS, will be understood as meaning intelligent or gifted children. However, we agree with applicant that when the marks are considered in their entireties and in connection with their respective

services, the connotations and commercial impressions are distinguishable. That is, registrant's mark connotes a "resource" or tool for parents in that registrant offers educational workshops and seminars on parenting gifted children; on the other hand, applicant's mark connotes a "network" or system by which it provides its after school educational programs for children and young adults.

On balance, we find that the marks are more dissimilar than similar. Accordingly, the first *du Pont* factor weighs against a finding of likelihood of confusion.

The second *du Pont* factor requires us to determine the similarity or dissimilarity of the services as recited in the application and in the cited registration. Here, we find that the services may be distinguished in that applicant is essentially rendering after school programs for children or young adults whereas registrant is rendering parenting workshops and seminars. The ultimate recipients of the educational services are certainly different. Obviously, the subject matter of the educational services will likewise be different, i.e., applicant's after school programs will not include parenting instruction. In this respect, we note there is no evidence to suggest that consumers would believe that the two services would be rendered by the same entity.

Nonetheless, as the examining attorney pointed out, there is some relationship between the services because they both involve providing educational services and, as the examining attorney pointed out, there is the possibility that parents may send their children to applicant's after-school programs while learning parenting skills for their "bright and highly able children" through registrant's workshops and seminars.

Ultimately, we find that the services of applicant and registrant are related. That factor weighs in favor of a finding of likelihood of confusion.

Under the third *du Pont* factor, we find that applicant's services and registrant's services would be marketed in the same trade channels and to the same classes of purchasers. There are no restrictions or limitations in the respective recitations of services, so we must presume that the services are marketed in all normal trade channels for such services and to all normal classes of purchasers for such services, namely, parents. The third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Weighing all of the evidence of record as it pertains to the relevant *du Pont* factors, and keeping in mind the narrowed scope of protection to be afforded weak marks

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registered on the Supplemental Register, we conclude that there is no likelihood of confusion. The marks are dissimilar when viewed in their entireties and as applied to the respective services. The services themselves, albeit falling under the umbrella of educational services, are also different in that applicant's educational services are for children and registrant's services are aimed at parents of highly able children. When we consider the narrow scope of protection to be accorded to the cited mark, and the cumulative differences in the marks and services, we find that there is no likelihood of confusion.

**Decision:** The refusal to register based on a likelihood of confusion with Registration No. 3102488 is reversed.

The requirement for a disclaimer under Trademark Act Section 6(a), and the refusal of registration in the absence of a disclaimer, is affirmed. However, if applicant submits the required disclaimer of BRIGHT KIDS NETWORK to the Board within thirty days, this decision will be set aside as to the affirmance of the disclaimer requirement, and the application then shall proceed to

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publication.<sup>3</sup> See Trademark Rule 2.142(g), 37 C.F.R.  
§2.142(g).

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<sup>3</sup> The standardized printing format for the required disclaimer text is as follows: "No exclusive right to use BRIGHT KIDS NETWORK is claimed apart from the mark as shown." TMEP § 1213.08(a) (4th ed. April 2005).