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Mailed: May 9, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trend Electronics International, Inc.

Serial No. 77003068

Niti Duggal of Roy, Kiesel, Keegan & DeNicola for Trend
Electronics International, Inc.

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Office 102 (Karen M. Strzyz, Managing Attorney).

Before Zervas, Cataldo and Taylor, Administrative
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Trend Electronics International, Inc. has filed an application to register on the Principal Register the mark VISTA ACOUSTICS (in standard character format) for "audio and video electronic equipment for homes and vehicles, namely speakers, amplifiers, receivers, and audio and video controllers and control systems" in Class 9.¹ In

¹ Application Serial No. 77003068, filed on September 20, 2006, and based on an allegation of a bona fide intention to use the mark in commerce.

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response to a request from the examining attorney, applicant disclaimed the term "ACOUSTICS."

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered marks VISTA² (in typed format) and VISTA and design³, shown below,



both for "computer conferencing components, namely, computer hardware and software for distributing teleconferencing signals, video cameras, video monitors, speakers, video and audio recorders, computer keyboards, power supplies and microphones." The registrations are owned by the same entity.

When the refusal was made final, applicant requested reconsideration, which was denied by the examining attorney on September 7, 2007. Applicant subsequently appealed. Both applicant and the examining attorney have

² Registration No. 2919754, issued January 18, 2005.

³ Registration No. 2919755, issued January 18, 2005.

filed briefs.⁴ For the reasons discussed below, we reverse the refusal to register.

Before turning to the merits of this case, we must address an evidentiary matter. Applicant has made of record two lists of third-party applications and registrations (consisting of the serial and registration numbers, the mark, and whether the application is "Live" or "Dead") for marks containing the term "VISTA" obtained from the TESS database of the United States Patent and Trademark Office (USPTO). We observe that while this evidence is in an improper format, it nonetheless was timely filed and, moreover, because the examining attorney did not object to these lists or advise applicant that copies of the registrations were necessary, we will consider them as being of record. See TMBP § 1207.03 (2d ed. rev. 2004). However, a mere listing of third-party marks, without any accompanying indication of the goods and/or services associated therewith, has virtually no

⁴ The evidence attached to applicant's brief is the same as that previously submitted with applicant's request for reconsideration. Accordingly, it is already of record as part of the application file, and its submission was unnecessary. See *ITC Entertainment Group Ltd. v. Nintendo of America Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and is a burden upon the Board).

probative value. See TBMP § 1208.02 (2d ed. rev. 2004), and the authorities cited therein. Further, the expired registrations and pending and abandoned applications identified in the lists are also of no value. See *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”); *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003) (applications show only that they have been filed).

Turning to the merits of the case, 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Each of these factors may, from case to case, play a dominant role. *du Pont*, 476 F.2d at 1361, 177 USPQ at 567.

We first consider the similarity or dissimilarity of the goods which we think plays a dominant role in our analysis. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant’s

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application and the goods or services recited in the cited registrations. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ 2d 1715 (TTAB 1991). Further, we must keep in mind that there is no rule that (a) certain goods are per se related, and (b) that there must be a likelihood of confusion from the use of similar marks in relation to such goods. See e.g., Information Resources Inc. v. X*Press Information Services, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ2d 1169, 1171 (TTAB 1987) (regarding food products); and In re Quadram Corp., 228 USPQ 863, 864 (TTAB 1985) (regarding computer hardware and software); and In re British Bulldog, Ltd., 224 USPQ 854, 855-56 (TTAB 1984) and cases cited therein (regarding clothing).

Applicant's goods are identified as "audio and video electronic equipment for homes and vehicles, namely speakers, amplifiers, receivers, and audio and video controllers and control systems" and registrant's goods are identified as "computer conferencing components, namely, computer hardware and software for distributing teleconferencing signals, video cameras, video monitors,

speakers, video and audio recorders, computer keyboards, power supplies and microphones." Applicant argues that its goods are not closely related to registrant's goods.

Applicant specifically argues:

While both types of goods may be broadly classified as electronic products, a casual connection of this sort cannot justify a finding that the two are competitive or highly related as to likelihood of confusion.

... [T]he electronic products associated with registrant's marks are designed for computer-conferencing applications, and are *not* identical nor similar to the Applicant's electronic products designed for home entertainment or automotive applications. In today's modern era, electronic products and accessories have become highly advanced, and are finely [sic] tuned for specific and different applications, with customers being able to appreciate these differences.

(Brief, p. 13).

The examining attorney, by contrast, argues that:

Applicant's goods "audio and video electronic equipment for homes and vehicles, namely, speakers" are the same as registrant's goods "computer conferencing components, namely, ... speakers" because they encompass each other: applicant's goods as identified could be used for computer conferencing, and registrant's goods may be used anywhere that is normal for computer conferencing components, including homes (especially in home-office telework contexts) and vehicles. Applicant's contention that its and registrant's goods are restricted to very specific users, uses or markets is not supported by the straightforward language of the identifications.

(Brief, at unnumbered p. 14). The examining attorney goes on to argue that applicant's remaining goods "audio and video electronic equipment for homes and vehicles, namely, ... amplifiers, receivers, and audio and video controllers and control systems" are related in commerce to registrant's "computer conferencing components, namely, ... video monitors, speakers, video and audio recorders, and microphones. In support of this contention, the examining attorney made of record six use-based, third-party registrations purportedly showing that various trademark owners have adopted a single mark for audio and video electronic equipment and computer conferencing components. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

In addition, the examining attorney submitted web pages from five manufacturers and retailers who offer such goods as video cameras, speakers, audio recorders and players, and video monitors as well as amplifiers, audio/video receivers and audio/video controllers. The websites include: <http://creative.com>; <http://>

circuitcity.com, <http://www.bhphotovideo.com>,
<http://www.walmart.com>, and <http://www.sonystyle.com>.

As regards the examining attorney's contention that some of the goods (speakers) are identical, we find that the examining attorney is reading the identifications too broadly. While "speakers" appear in both identifications, the identifications limit the parties' goods to particular uses. That is, applicant's speakers are identified as audio and video electronic equipment targeted for use in homes and vehicles while registrant's speakers are identified as components of computer conferencing equipment and targeted to computer based applications. We thus find the examining attorney's assertion that applicant's speakers could be used for computer conferencing too speculative in the absence of anything in the record to demonstrate such overlap in function. We hasten to add that in construing the plain meaning of the written descriptions, and in considering the arguments of applicant and the examining attorney on this issue, we have not permitted applicant to impermissibly restrict either its own or registrant's identifications of goods, which it may not do.

Looking at the third-party registrations relied upon by the examining attorney, we find that only two of the

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six recite goods of the type identified in both applicant's application and the cited registrations. The other four registrations do not recite both audio and video equipment targeted for use in homes and vehicles and computer conferencing components. The two relevant registrations are: Registration No. 3172651 which recites, *inter alia*, "audio and video components, namely speakers ... amplifiers ... [and] stereo speakers" and "computer speakers"; and Registration No. 3186248 which recites, *inter alia*, "audio speakers" and "computer monitors." These two third-party registrations are not sufficient to establish that applicant's audio and video electronic equipment for homes and vehicles, namely, speakers, amplifiers, receivers, and audio and video controllers and control systems are related to registrant's computer conferencing components, namely computer conferencing components, namely, computer hardware and software for distributing teleconferencing signals, video cameras, video monitors, speakers, video and audio recorders, computer keyboards, power supplies and microphones.

Similarly, we do not find the Internet evidence particularly probative of the relatedness of the goods. The first web page is from the Creative Worldwide website.

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The excerpt shows digital cameras and a list of other products, including, speaker systems and PC peripherals, presumably available through the site. However, it is unclear as to the nature of the PC peripherals and whether these goods are manufactured by a single manufacturer.

The second web page is from the Circuit City website. The excerpt shows different categories of goods, such as home theater systems, receivers, amplifiers and speaker systems presumably available for purchase. The excerpt does not, however, reference any computer components of any kind.

The third web page is from B&H Photo Video. The excerpt shows different categories of goods presumably available for purchase, including amplifiers and speakers. The excerpt also shows a menu topic entitled "Computers & Solutions." We cannot infer from the vague reference to computers that goods of the type identified in both applicant's application and the cited registrations are available via this site.

The fourth web page is from the Wal-Mart website. Again, the excerpt only references home theater goods. There is no evidence that audio and video electronic equipment for homes and vehicles and computer conferencing components are identified by the same marks. In addition,

from its web pages we observe that Wal-Mart is a third-party retailer that sells a wide variety of home theater goods manufactured by others as opposed to manufacturers of audio and video electronic equipment and computer conferencing components.

The last web page is from the Sony Style website. While there is a notation to computers on the reference bar, the only goods shown on the excerpt are home audio components.

As discussed above, we find no basis in this record for concluding that the goods of applicant and registrant are related or that the goods are such that they would likely to be assumed to emanate from a common source, because similar marks are used on them.

Further, while the identifications of the cited registrations do not explicitly limit the goods to commercial applications, as written, these types of goods ordinarily are intended for business uses.⁵ As such, there

⁵ The record also confirms that registrant's goods are not for home or vehicle use. Specifically, applicant submitted web pages describing registrant's goods wherein the applications were listed as:

- Video conferencing, collaboration, and data sharing for classrooms, large groups, executive board rooms and custom applications
- Meetings and distance learning sessions for corporations, government agencies, other enterprise organizations
- Distance learning for K-12, colleges and universities, adult education, continuing education and training

is little to no overlap in the channel of trade and classes of purchasers. Accordingly, this factor does not weigh in favor of finding a likelihood of confusion.

With respect to the conditions of sale, applicant argues that "the fact that these goods are [of] the type that [are] expensive and purchased infrequently ... supports the argument that the nature of the purchasing decision will be careful and sophisticated." (Brief, p. 14). Applicant supported its position with information obtained from registrant's website and an affidavit from its president, Mitch Irving, which tend to suggest that both applicant's and registrant's products are expensive and would be purchased with care. For example, registrant's goods are described as follows:

The Vista VX-P Media Station is based on the original VISTA VX line but feature a greater array of input/output options. In addition to the five cameras, the VX-P has three microphone inputs, an audio line in/out, VCR in/out and three USB ports. The device will work with wired or wireless LANs and uses the H.323 video protocol. The VX-P Media Station starts at \$14,500.

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- Videoconferencing platform for system integrators (Request for reconsideration, exh. F).

(Request for Reconsideration, exh. F). Also, Mr. Irving, in his affidavit, attests that applicant's goods are "relatively complex and expensive, costing up to hundreds of dollars." (Request for reconsideration, exh. J).

The examining attorney, in response, states that "[a]pplicant has supported this argument with evidence." (Brief, unnumbered p. 16). However, citing to *In re Decombe*, 9 USPQ 1812 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221USPQ 558 (TTAB 1983), she maintains that the fact that purchasers are sophisticated or knowledgeable in the field of electronic goods does not mean that they are knowledgeable in the field of trademarks or immune from source confusion; and that "the alleged computer savvy of the relevant consumers does not obviate the likelihood of confusion." (Brief, unnumbered p. 16).

While it is true that sophistication in purchasing decisions does not equate to knowledge in the field of trademarks, herein these purchasers are likely to be careful in their purchasing decisions, especially with regard to the purchase of registrant's computer conferencing components, which are expensive and would not be purchased on impulse.

This factor thus weighs in applicant's favor.

Applicant, relying on lists from a search of the TESS database for the term "vista" and results from a search of the Google search engine for the keywords "vista," "vista audio," "vista cameras," "vista amplifiers" and "vista receivers," contends that "the term VISTA is weak for the goods due to being diluted on the register for the goods" (*id.*), and because there is widespread third-party use of the term VISTA. This argument is unavailing. As previously explained, the listing of applications and registrations from the USPTO's TESS data base are of little to no probative value. Similarly, the results summaries from the Google search are of little value, except in a couple of instances where applicant submitted an entire web page, because there is insufficient information to determine how the terms are used in context. See *In re Fitch IBCA Inc.*, 64 USPQ 1058, 1060 (TTAB 2002). The two complete Internet references showing VISTA formative marks for related goods are not sufficient to support a finding that the term VISTA is weak for audio and video electronic equipment for homes and vehicles and/or computer conferencing components.

Accordingly, we find the *du Pont* factor of the number and nature of similar marks used on similar goods neutral.

Last, we consider the similarity of applicant's mark and the cited registered marks. Applicant argues that when the marks are viewed in their entirety, its mark differs from those of the cited registrations, in sight, sound and meaning.⁶ The examining attorney, by contrast, argues that when the marks are so viewed, they are similar. We agree with the examining attorney. Applicant's mark is VISTA ACOUSTICS. The registered marks are VISTA and VISTA and design. While there are differences between the marks, namely the addition of the term "ACOUSTICS" to applicant's mark and the stylization and the noticeable eye design in the cited VISTA and design mark, the marks share the dominant term VISTA. In particular, the dominant portion of applicant's mark is VISTA; as the descriptive term "acoustics" is subordinate in nature. In the VISTA and design mark, the term VISTA is the more dominant portion because the word portion is more likely to be impressed upon a purchaser's memory and used in calling for the goods. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001). Thus, due to the shared term VISTA, we

⁶ Applicant also asserts that the term VISTA is descriptive and not distinctive of either party's goods. Such a contention, particularly with respect to the cited marks, constitutes an impermissible collateral attack on their validity and will not be entertained in this appeal. See e.g., *In re Peebles Inc.*, 23 USPQ2d 1795 (TTAB 1992); and *In re C. F. Hathaway Co.*, 190 USPQ 343 (TTAB 1976).

find that applicant's mark is similar to the cited marks in appearance, sound and overall commercial impression.

In balancing the factors discussed above, we find that the examining attorney has not established that there is a likelihood of confusion between applicant's mark and the cited marks. Although the marks are similar, because the goods as identified are distinctly different and there is insufficient evidence to demonstrate that the goods are related, we conclude that purchasers and prospective purchasers of registrant's computer conferencing components, namely, computer hardware and software for distributing teleconferencing signals, video cameras, video monitors, speakers, video and audio recorders, computer keyboards, power supplies and microphones, as provided under its VISTA and VISTA and design marks, would not be likely to believe, if they encounter applicant's audio and video electronic equipment for homes and vehicles, namely speakers, amplifiers, receivers, and audio and video controllers and control systems, which are rendered under its VISTA ACOUSTICS mark, that the respective goods emanate from, or are sponsored by or associated with, the same source.

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Decision: The refusal to register under Section 2(d) of the Trademark Act is reversed as to both Registration No. 2919754 and Registration No. 2919755.