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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Inspiration Software, Inc.

Serial No. 78734800

David P. Cooper of Kolisch Hartwell P.C. Inspiration
Software, Inc.

Mary D. Munson, Trademark Examining Attorney, Law Office
104 (Chris Doninger, Managing Attorney).

Before Walters, Kuhlke and Taylor, Administrative Trademark
Judges.

Opinion by Taylor, Administrative Trademark Judge:

Inspiration Software, Inc. has filed an application to
register on the Principal Register the mark INSPIRED (in
standard character format) for goods ultimately identified
as "computer software for use as a writing tool in
education" in Class 9.¹

The examining attorney has refused registration under
Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on

¹ Serial No. 78734800 filed October 17, 2005, and with an
allegation of a bona fide intention to use the mark in commerce.

Serial No. 78734800

the ground that applicant's mark, is likely to be confused with the registered mark INSPIRE (in typed form) for "computer software, namely, software for creating, editing, and annotating drawings and animations comprised of multiple drawings," in Class 9.²

After the refusal was made final, applicant appealed and requested reconsideration of the final refusal. On August 27, 2007, the examining attorney denied the request for reconsideration and the appeal was resumed. Applicant and the examining attorney filed briefs. For the reasons discussed below, we affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

² Registration No. 2949742 issued May 10, 2005.

Serial No. 78734800

We consider first the similarity of the marks. In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test under this *du Pont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the 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. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant's mark is INSPIRED and the cited mark is INSPIRE. We find these marks to be substantially similar in sound, appearance, and connotation and commercial impression. The only difference between them is the addition of the letter "d" to the end of applicant's mark, making it the past tense formative of the registered mark. This change in tense is not likely to be remembered by purchasers when seeing or hearing these marks at different

times. Nor does the tense change alter the meaning of the marks.³ See, e.g., *In re Dahiquist, Inc.*, 192 USPQ 237, 238 (TTAB 1976) ("The past tense, 'phased', of the verb of which 'phase' is the present tense and 'phasing' is the present participle, would, we think, convey to purchasers of, and dealers in, high fidelity sound reproduction equipment the same meaning or connotation as the words 'phase' and 'phasing'"). Herein, the commercial impression created by both marks is that the software sold thereunder will stimulate or bring about results.

Before leaving this discussion, we address applicant's contention that there is no likelihood of confusion because its applied-for mark, INSPIRED, is part of a family of marks owned by applicant which pre-dates registration of the cited mark. Applicant bases this claim on its ownership of two registrations for the mark INSPIRATION and an application for the mark INSPIREDATA. We find this claim unavailing. Notwithstanding the absence of proof of ownership of these registrations and application, mere

³ In this regard, we take judicial notice of the relevant definitions of "inspire" as meaning "[t]o stimulate to action; motivate" and "[t]o be the cause or source of; bring about" in The American Heritage Dictionary of the English Language (4th ed. 2000). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Serial No. 78734800

ownership of a registration or an application does not show that the public is familiar with the use of the marks shown therein. There is also no evidence in the record that demonstrates that applicant has a family of marks. Compare *J & J Snack Foods Corp. v. McDonald's*, 932 F.2d 1460, 18 USPQ2d 1899 (Fed. Cir. 1991). Moreover, even if applicant had proven the existence of a family of marks, this appeal involves the registrability of applicant's particular mark, INSPIRED. Applicant's ownership of other marks that resemble its applied-for mark are not relevant to the specific likelihood of confusion issue involving the registered mark INSPIRE. See, *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1737 (TTAB 2001); *Baroid Drilling Fluids v. Sun Drilling Products*, 24 USPQ2d 1048, 1052 (TTAB 1992); and *In re Lar Mor International, Inc.*, 221 USPQ 180, 183 (TTAB 1983).

We now turn to a consideration of the goods identified in the application and the cited registration. 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 application vis-à-vis the goods or services recited in the registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American*

Serial No. 78734800

Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). Further, it is a 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 the 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 would give rise, because of the marks used therewith, 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 the cases cited therein.

The examining attorney argues that there is a clear relationship between applicant's goods and the cited goods, as both parties' goods are computer software goods for document creation and manipulation. The examining attorney particularly argues that applicant "broadly identified the function of its computer software as a 'writing tool' such that its functions could include word processing, electronic mail and recording notes, among other things." (Brief at 4). The examining attorney further argues that computer software goods for use in writing and for use in drawing are the type of goods that frequently emanate from

Serial No. 78734800

the same sources. To support her position, the examining attorney made of record with her first office action copies of third-party registrations to show that various trademark owners provide, under the same mark, both computer software for writing functions and drawing functions. These third-party registrations may serve to suggest that the types of services involved herein are related services. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

These registrations include:⁴

Registration No. 2952957 for, *inter alia*, "computer software for use in word processing, for electronic mail, ... recording notes, ... image editing, graphics creation and editing, drawing, computer aided design and drafting, and creation of multimedia presentations";

Registration No. 2810630 for "computer software used for creating a virtual whiteboard on a computer screen

⁴ We note that four of these registrations are owned by the same entity.

Serial No. 78734800

for the purpose of drawing illustrations and writing text";

Registration No. 2940644 for *inter alia* "software for use in word processing, for electronic mail and scheduling, desktop publishing, image editing, graphics creation and editing, drawing, computer aided design and drafting [and] creation of multimedia presentations";

Registration No. 2890091 for, *inter alia*, "computer software for use in word processing, for electronic mail, ... recording notes, ... image editing, graphics creation and editing, drawing, computer aided design and drafting, and creation of multimedia presentations";

Registration No. 2958075 for, *inter alia*, "computer software for use in word processing, for electronic mail, ... recording notes, ... image editing, graphics creation and editing, drawing, computer aided design and drafting, and creation of multimedia presentations"; and

Registration No. 2950253 for, *inter alia*, "computer software for use in word processing, for electronic mail, ... recording notes, ... image editing, graphics creation and editing, drawing, computer aided design and drafting, and creation of multimedia presentations."

The examining attorney also introduced with her Final Office Action Internet evidence retrieved from a search of the website www.amazon.com [writing and drawing software] to show that computer software for use in both writing and drawing are offered under the marks, MICROSOFT[®], COREL[®] and ADOBE[®].⁵

⁵ See also, the web pages from www.corel.com, www.adobe.com/products/, www.microsoft.com/products/ and www.bestbuy.com.

Applicant, in urging that the refusal to register be reversed, argues that in a previous "settlement/co-existence agreement," "registrant agreed to limit the use of its mark to developer's toolkits that can be used to develop commercial custom software," and that applicant's "amended goods identification clarifies that there is substantial differences between applicant's writing tool software and its education market and registrant's 'developer's toolkits' that are not sold in the education market." (Brief at 2). Applicant did not, however, make of record a copy of the settlement/co-existence agreement.

As pointed out by the examining attorney, the registrant did not incorporate the asserted limitation in its identification of goods and, as previously noted, likelihood of confusion must be determined on the basis of the goods and services as they are identified in the application and the registration. *Canadian Imperial Bank v. Wells Fargo Bank*, supra. Herein, applicant's goods are identified as "computer software for use as a writing tool in education" and the goods identified in the cited registration are "computer software, namely, software for creating, editing, and annotating drawings and animations comprised of multiple drawings." We therefore are constrained to compare these identifications in determining

Serial No. 78734800

the issue of likelihood of confusion. See e.g., *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence).

Based on the identifications of record, we find that the third-party registrations and third-party uses are sufficient to demonstrate that applicant's computer software writing tool and registrant's computer software for manipulating drawings are related.

Further, in the absence of any limitations to the identification of goods in the cited registration, we must presume that registrant's software for manipulating drawings will move in all normal channels of trade, including the field of education, and will be used by all normal potential purchasers, including educators. *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Last, we are not persuaded by applicant's argument that there is no likelihood of confusion based on the earlier referenced prior settlement/co-existence agreement between applicant and registrant. First, as just stated, applicant did not make the agreement of record. Second, and more importantly, that agreement was not related to the marks involved in this proceeding, i.e., applicant's mark

Serial No. 78734800

INSPIRED and the cited mark, INSPIRE. Rather, as applicant indicated, that agreement addressed the likelihood of confusion between the cited registered mark and applicant's registered mark, INSPIRATION, for different goods and services. As such, even if the agreement were of record, it would have no probative value in this case.

In view of the foregoing, we conclude that prospective purchasers familiar with the registered mark INSPIRE for computer software, namely, software for creating, editing, and annotating drawings and animations comprised of multiple drawings would be likely to believe, upon encountering applicant's substantially similar mark INSPIRED for computer software for use as a writing tool in education, that such goods emanate from, or are sponsored by or affiliated with the same source.

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