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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Robbins Research International, Inc.  
v.  
The Effective Edge, Inc.

Opposition No. 91169789  
to application Serial No. 76611298

Richard A. Clegg of Seltzer Caplan McMahon Vitek for Robbins  
Research International, Inc.

Randolph B. Houston, Jr. of Fortkort & Houston P.C. for The  
Effective Edge, Inc.

Before Drost, Kuhlke and Mermelstein, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On September 14, 2004, The Effective Edge, Inc.  
(applicant) applied to register on the Principal Register  
under Section 1(a) of the Trademark Act the mark GETTING THE  
E.D.G.E.<sup>1</sup> in standard character form for "educational  
services, namely, classes, workshops, seminars, lectures,  
training, and executive coaching in the fields of

<sup>1</sup> Applicant originally filed for GETTING THE EDGE in standard  
character or typed form and subsequently amended the mark to  
GETTING THE E.D.G.E. in standard character form on August 26,  
2005, in response to an Office action mailed on April 14, 2005.

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professional, organizational, and life skills development, and training materials used in connection therewith" in Class 41. The application alleges July 31, 2004, as its dates of first use anywhere and in commerce.

On March 15, 2006, after applicant's mark was published for opposition, Robbins Research International, Inc. (opposer) filed a notice of opposition to the registration of applicant's GETTING THE E.D.G.E. mark.

Opposer alleges that applicant's mark is similar to opposer's GET THE EDGE!<sup>2</sup> and ANTHONY ROBBINS GET THE EDGE<sup>3</sup> marks (both in typed or standard character form for "video and audio tapes<sup>4</sup> in the field of personal improvement" in Class 9) and that there is a likelihood of confusion among consumers under Section 2(d) of the Trademark Act. 15 U.S.C. §1052(d).<sup>5</sup>

Applicant denied the salient allegations of opposer's notice of opposition.

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<sup>2</sup> Registration No. 2641747 registered on October 29, 2002.

<sup>3</sup> Registration No. 2551974 registered on March 26, 2002.

<sup>4</sup> The identification of goods for Registration No. 2551974 adds the term audio "cassette" tapes.

<sup>5</sup> As summarized by opposer in its brief, "The sole issue is whether the opposition to Applicant's proposed registration of the mark 'GETTING THE E.D.G.E.' should be sustained under Section 2(d) of the Lanham Act, based on a likelihood of confusion with Robbins Research's previously registered marks 'GET THE EDGE!' and 'ANTHONY ROBBINS GET THE EDGE.'" Brief at 1.

The Record

The record consists of the pleadings; the file of the involved application; the testimonial deposition of Christina Randle, applicant's CEO, with exhibits; the testimonial deposition of Carolann Dekker, opposer's Vice-President of Marketing and Distribution, with exhibits; and opposer's notice of reliance on status and title copies of its registrations and applicant's responses to its interrogatories and requests for admissions.

PRELIMINARY MATTERS

In its reply brief, opposer objects to evidentiary materials filed by applicant as part of its appeal brief. Specifically, opposer asserts that the materials are untimely to the extent that they were not made of record during applicant's testimony period. We consider the admissibility of each of applicant's exhibits as follows.

Exhibit A constitutes applicant's Responses to Interrogatories. A redacted version of these responses was previously submitted by opposer on January 25, 2007, under a notice of reliance.<sup>6</sup> Thus, applicant may rely on Exhibit A to the extent that the unredacted responses are already in evidence via opposer's submission. See 37 CFR § 2.120(j)(7). However, applicant may not rely on the

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<sup>6</sup> Opposer's testimony period closed on January 29, 2007, pursuant to a consented motion to extend trial periods.

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redacted portions of the responses since applicant failed to properly introduce them into evidence during its testimony period. See 37 CFR § 2.120(j)(5).

Exhibit B constitutes a copy of the Office action in the presently opposed application. Since the file of the opposed application forms part of the opposition proceeding record without any action of the parties, Exhibit B is allowed, although that submission was unnecessary. See 37 CFR § 2.122(b)(1).

Finally, Exhibit C comprises a copy of applicant's prior registration for THE EFFECTIVE EDGE in standard character form for "educational services, namely, providing classes, workshops, seminars, lectures, training and executive coaching in the fields of professional, organizational, and life skills development; and distributing course materials in connection therewith" in Class 41.<sup>7</sup> Applicant failed to introduce the registration into evidence during its testimony period so it is unacceptable as untimely and is given no further consideration. See 37 CFR § 2.122(d). We add that, even if we considered the excluded evidence, it would not change the result in this case. Applicant's ownership of another registration for a different mark and evidence of how it actually uses its mark, to the extent that these limitations

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<sup>7</sup> Registration No. 3052555 registered January 31, 2006.

are not in its identification of goods, do not support an absence of a likelihood of confusion.

Priority

The question of priority is not an issue in this case because opposer owns, and has submitted status and title copies of, its two registrations upon which it can rely under Section 2(d). *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Likelihood of Confusion

The central issue in the current proceeding is whether there is a likelihood of confusion between applicant's GETTING THE E.D.G.E. mark and opposer's GET THE EDGE! and ANTHONY ROBBINS GET THE EDGE marks. As the plaintiff in an opposition proceeding, opposer has the burden of proving, by a preponderance of the evidence, its asserted ground of likelihood of confusion. *See Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989). *See also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

In likelihood of confusion cases, we consider whether there is confusion by analyzing the facts as they relate to the thirteen factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65

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USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we are mindful that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by comparing the services in the application with the goods in the registrations.

Applicant provides educational classes, workshops, seminars, lectures, training and executive coaching services in the fields of professional, organizational, and life skills development and provides training materials used in connection therewith. Opposer provides video and audio tapes in the field of personal improvement.

In support of its position, applicant asserts in its brief that "[t]here is no similarity between live, face-to-face training and coaching that is connected to a specific company-provided e-mail application and audiotapes, videotapes, CDs, and DVDs." Brief at 3. Applicant further argues that its services travel in trade channels different than those of opposer's goods since its services "are sold to corporations exclusively, who learn of Applicant and its

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services by means of referrals from past and existing clients of Applicant and Applicant's Web site, and Applicant's Services are conveyed by means of on- and off-site classes, workshops, seminars, lectures, and training and executive coaching sessions" whereas opposer's goods "are marketed, promoted, and sold to individual consumers through a television infomercial, on a television shopping network, on Opposer's and other Web sites, by direct mail, through an in-house sales team, and at Opposer's branded events." Brief at 3-4.

When we compare the goods and services, we must do so by considering them as they are described in the application and the registrations. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Since the limitations outlined by applicant in its brief do not appear in the identifications of goods and services, they are not relevant to a likelihood of confusion analysis and cannot serve to limit the nature of the goods and services or their channels of trade. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of

an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed").

Thus, in comparing the goods and services, we note that the fields of use are overlapping since "professional, organizational, and life skills development" include services that also are "personal improvement" services.<sup>8</sup> We further note that applicant's description includes goods in the nature of training materials used in connection with the services. Since there is no limitation as to the particular nature of the materials, applicant's description is certainly broad enough to encompass the same types of goods offered by opposer under its marks.

As to the services themselves, there is no limitation that the services are only provided live. Indeed, applicant's founder and CEO Christina Randle noted that applicant also offers its educational services online in a non-downloadable, pre-recorded format through its website:

Q. Okay. And what is Getting The Edge online?

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<sup>8</sup> We take judicial notice of the following definitions:  
*personal*: 1. Of or relating to a particular person. 2b. Done to or for or directed toward a particular person.  
*improvement*: 1a. The act or process of improving. b. The state of being improved. 2. A change or addition that improves.  
*American Heritage Dictionary of the English Language* (4<sup>th</sup> ed. 2000). *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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A. It is basically a -- just like our live training, except it's for -- it was designed at our customers' request so that seasonal employees or remote employees could learn -- or take the training on line. So it's a downloadable -- or it's a link -- it's not downloadable, but it's a link that they connect to to learn how to use Microsoft Outlook and learn our methodologies.

Q. ... Let me ask the question: is this something where somebody can conduct the on-line -- the Getting The Edge seminar through their computer?

A. Yes.

Q. Is there any videotape that they access?

A. They access tutorials and scenarios, graphics --

Q. Okay.

A. -- that help them learn the methodologies and apply that to Outlook...

Q. Okay. So the only -- the only time a seminar has been captured on some media, I guess, is your on-line seminar, which somebody can access by going to your website?

A. And purchasing it.

Randle deposition at 7, 29-30.

To the extent that applicant's educational services consist of pre-recorded content available for individual viewing, applicant's services are very closely related to opposer's goods. Indeed, the mere fact that applicant offers services and opposer offers goods is insufficient, in and of itself, to preclude a finding of likelihood of confusion. Consumers may be confused by the use of similar marks on or in connection with goods and with services featuring or otherwise related to those goods. *See In re*

*Hyper Shoppes*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (“biggs” (stylized) for general merchandise store services confusingly similar to BIGGS and design for wooden and upholstered furniture); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB for various items of clothing held likely to be confused with THE “21” CLUB in stylized form for restaurant services).

We next examine the marks in their entireties for similarities or dissimilarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

Applicant’s mark consists of GETTING THE E.D.G.E. in standard character form. Opposer’s marks consist of GET THE EDGE! and ANTHONY ROBBINS GET THE EDGE, both in typed or standard character form. Since the marks are in typed or standard character form, we must presume that there is no difference in the respective stylizations of applicant’s and opposer’s marks. See *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display”).

Looking to the words themselves, there are only very minor differences between GETTING THE E.D.G.E. and GET THE EDGE!. Phonetically, E.D.G.E. is equivalent to EDGE. See

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*Centraz Industries Inc. v. Spartan Chemical Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (There "is no correct pronunciation of a trademark, and it obviously is not possible for a trademark owner to control how purchasers will vocalize its mark"). Indeed, Ms. Randle admits in her deposition testimony that E.D.G.E. is pronounced the same as EDGE:

Q: The Effective Edge's application to register the mark Getting The Edge, the - that last word is pronounced "edge," isn't it?

A: Yes.

Q: Okay. So the fact it has periods between the letters in your registration application doesn't affect the way it's pronounced?

A: Correct.

Randle deposition at 19-20.

Since GET is the root form of GETTING, the appearance, connotation and commercial impression of GET THE EDGE (with or without the exclamation point) is highly similar to that of GETTING THE E.D.G.E. Applying the same analysis to ANTHONY ROBBINS GET THE EDGE does not dictate a different conclusion. It has often been held that marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases are common to the marks in question. See e.g., *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Therefore, the fact that opposer's mark contains ANTHONY

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ROBBINS is not sufficient to distinguish applicant's mark from opposer's mark. See *In re Dennison Mfg. Co.*, 229 USPQ 141, 144 (TTAB 1986), citing *Menendez v. Holt*, 128 US 514 (1888) ("it is a general rule that the addition of extra matter such as a house mark or trade name to one of two otherwise confusingly similar marks will not serve to avoid a likelihood of confusion between them"). Similarly, the deletion of wording from a registered mark is not sufficient to overcome a likelihood of confusion under Section 2(d). See *In re The United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE likely to be confused with CREST CAREER IMAGES).

While observing that "even a casual observer will note the common presence of the terms 'GET' and 'EDGE' in Applicant's Marks [sic] and Opposers Marks," applicant argues that its mark "present[s] a commercial impression that is quite distinct from that presented by Opposer's Marks." Brief at 2. However, applicant fails to substantiate or otherwise describe what those distinct commercial impressions may be.

Considering the relatedness of the goods and services, the overlapping channels of trade and the similarities between applicant's mark and opposer's marks, and mindful that any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant, see *Hewlett-*

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*Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002), we find that there is a likelihood of confusion when applicant's mark is used for its identified services in view of opposer's marks for their identified goods.

Decision: The opposition is sustained and registration to applicant of its mark is refused.