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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Learning Annex, LLC
v.
The Energy Infuser, Inc.

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Opposition No. 91174964
to application Serial No. 78793138
filed on 1/17/2006

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Andrew L. Hyams, Esq. of Kerstein, Coren, Lichtenstein & Finkel LLP for Learning Annex, LLC.

Thomas F. Bergert of Williams Mullen for The Energy Infuser, Inc.

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Before Rogers, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Learning Annex, LLC (opposer) has opposed the application by The Energy Infuser, Inc. (applicant) to register the mark THE ENERGY ANNEX in standard characters on the Principal Register for services identified as "market research services; providing facilities for business meetings and market research; marketing consulting services" in International Class 35. The application was filed on January 17, 2006, and asserts first use of the mark anywhere

and first use of the mark in commerce in February of 2004.

As grounds for the opposition, opposer asserts priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Specifically, opposer asserts ownership of Registration No. 1233095 for the mark THE LEARNING ANNEX in standard characters on the Principal Register for services identified as "providing adult educational courses using independent contractors as instructors" in International Class 41. The registration issued on March 29, 1983. The registration claims a date of first use of the mark anywhere and first use of the mark in commerce in August of 1980. The registration includes a disclaimer of "LEARNING." The registration has been renewed.

Although opposer referred to dilution in the notice of opposition, opposer did not plead dilution adequately, among other reasons, because opposer failed to aver that opposer's mark had become famous before the claimed date of first use in the opposed application. *See* Trademark Act Section 43(c), 15 U.S.C. § 1125(c); *Toro Co. v. ToroHead Inc.*, 61 USPQ 1164, 1174 n.9. (TTAB 2001). More importantly, opposer did not address the dilution claim in either of its briefs. Accordingly, we conclude that, even if dilution had been properly asserted, opposer abandoned dilution as a ground.

Furthermore, as we discuss below, opposer failed to show that its mark is famous.

By rule the record includes the file related to the opposed application and the pleadings. Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b). Both opposer and applicant have submitted evidence through notices of reliance. Neither party took testimony. The parties have stipulated to the authenticity of documents produced in discovery, including documents in Opposer's Notice of Reliance, dated October 19, 2007, and the Internet evidence produced in Applicant's testimony period. In the stipulation, the parties also reserved the right to object to this evidence on grounds other than authenticity. We will address objections to evidence, as necessary, below.

Opposer and applicant have filed briefs. For the reasons stated below, we dismiss the opposition.

Opposer has pleaded ownership of its THE LEARNING ANNEX registration and made a copy of the registration of record.[1] Accordingly, opposer has established its standing. *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883 (TTAB 2008). *See generally Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987).

[1] Specifically, opposer submitted copies of electronic USPTO records related to the registration under a notice of reliance showing that the registration is valid and owned by opposer.

Priority is not at issue in this proceeding because opposer has made of record evidence that its registration for its THE LEARNING ANNEX mark is valid and subsisting. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Accordingly, we will proceed to consider opposer's likelihood of confusion claim. At the outset, we note that opposer bears the burden of proving its case by a preponderance of the evidence. *See*, e.g., *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ("[t]he burden of proof rests with the opposer … to produce sufficient evidence to support the ultimate conclusion of likelihood of confusion").

The opinion in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors to consider in determining likelihood of confusion. *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the services of the parties. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks."). The parties

have presented evidence and/or arguments related to additional factors, which we will discuss to the extent appropriate, but the factors focused on the similarity of the marks and the services are ultimately controlling in this case. As opposer correctly points out, "Not all of these [*du Pont*} factors may be relevant or of equal weight in a particular case. See In re Dixie Restaurants, Inc., 105 F.3d 1405, 1406-1407, 41 U.S.P.Q.2d 1531, 1533 (Fed. Cir. 1997)." Opposer's Brief at 6.

Because opposer places emphasis on the fame of its THE LEARNING ANNEX mark we will address that factor first. Also, as opposer correctly points out, fame may be a dominant factor in the likelihood-of-confusion analysis. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000). Opposer also correctly points out that famous marks receive a broader scope of protection than other marks. *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Neither applies, however, unless opposer offers sufficient evidence to establish the fame of its mark. *See*, *e.g.*, *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715 (TTAB 2007). In this case, opposer has failed to show that its THE LEARNING ANNEX mark is famous.

In its brief, opposer specifically identifies the following evidence to support its claim that THE LEARNING

ANNEX is a famous mark: (1) excerpts from Internet web pages allegedly showing references to THE LEARNING ANNEX in summaries of episodes of television programs, namely, *The Simpsons*, *Sex and the City* and *The Apprentice*; and (2) listings of results from searches conducted in the Google search engine for LEARNING ANNEX and ENERGY ANNEX.[2] The evidence is covered by the parties' stipulation as to authenticity. Although this evidence would not otherwise be appropriate for submission under a notice of reliance, we have accepted it into the record based on the stipulation. *Cf. Racciopp i v. Apogee, Inc.,* 47 USPQ2d 1368 (TTAB 1998).

Applicant argues that the evidence does not support opposer's claim that THE LEARNING ANNEX is a famous mark. Applicant states:

> … the television website pages are evidence, and not even direct evidence, that the term LEARNING ANNEX was referenced in those specific episodes of the three television programs identified. Such evidence does not show customer familiarity with the mark, nor actual sales. … Nor does such evidence show wide recognition by the general consuming public of the United States.

Applicant's Brief at 8.

As to the listings of search results, applicant argues, "The Internet search results are not of any probative value,

[2] Though opposer relies on listings of search-engine results for "ENERGY ANNEX," this evidence is irrelevant to the determination of the fame of THE LEARNING ANNEX mark.

because such lists do not show the context in which the term is used on the web page that could be accessed by the link…" *Id.*

The Internet excerpts regarding the television programs are brief, and generally cryptic. A narrative describing the *Sex and the City* episode states, "… Miranda asks her to go out for drinks but Carrie tells her that she has to stay in because (sic) agreed to teach a class at the Learning Annex about where to meet men in the city…" Opposer's Notice of Reliance, dated October 19, 2007. The excerpt related to *The Simpsons* states, "Tired of being called 'slow,' Homer signs up to teach a class at a learning annex, but the only way he can keep the class interested is to tell racy secrets about Marge and their bedroom antics." Another longer description of *The Simpsons* episode in the excerpt makes no mention of "learning annex." *Id.* The excerpt related to *The Apprentice* states, "The Donald explained that Kelly has learned much during his tenure and that this week's class was also about learning. 'The Learning Annex' is a continuing education program that holds about 8,000 classes a year. Each team was to create and teach a new Learning Annex class." *Id.*

These Internet excerpts are equivalent to hearsay and cannot be used to establish the truth of the facts asserted in them. They only show how "The Learning Annex" or "a

learning annex" have been used by others. The uses vary in character. The example describing the *Simpsons* episode, which refers to "a learning annex" in lower-case letters, may even suggest that the author considered the term descriptive or generic.

Furthermore, this evidence is wholly without a foundation. We have no direct evidence that the characters in the episodes actually used the words "learning annex" in dialog, or that "learning annex" was otherwise referenced. Presuming there were references, we have no way of knowing whether the references are, in fact, to opposer. Although opposer makes unsupported statements in its brief that these series are popular, and presumably viewed by large audiences, there is no testimony or other evidence to establish these facts. The Board does not take judicial notice of such facts, even where Homer Simpson and Donald Trump are involved. *Motion Picture Association of America Inc. v. Respect Sportswear Inc.*, 83 USPQ2d 1555 (TTAB 2007). We also concur with applicant's observation that, apart from all other issues with this evidence, by itself it does not show public recognition of opposer's mark. Thus, we conclude that this evidence is of little or no probative value with regard to the fame of opposer's THE LEARNING ANNEX mark.

With regard to the listings of search-engine results, this evidence also lacks significant probative value. Opposer points to the fact that a search for "LEARNING ANNEX" yielded 190,000 results and opposer makes the unsupported claim that the first 20 results refer to opposer. A search-result summary from an Internet search engine, such as Yahoo!® or Google®, that shows use of a term or phrase as the search query used by the search engine, is of limited evidentiary value. These summaries generally do not provide sufficient text within which to determine the nature and relevance of the term or phrase. *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002); *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002). Thus, they are considerably less probative than showing actual use of the term or phrase within the context of a website or webpage. The listings in the results are brief and truncated, and lack context. For example, the fifth-listed result states: "Ripoff Report Search Results: Learning Annex – Want Justice! The Ripoff Report allows you a central place to enter complaints about companies and individuals who are ripping people off." Opposer's Notice of Reliance, dated October 19, 2007. This is one of the first 20 results, which opposer claims, refer to opposer. We have no way of knowing, based on this record, whether this or any of the

other references are to opposer or not. Again, the necessary foundation is lacking.

We reject opposer's argument that this evidence differs from other similar evidence or cases. There is no significant difference between this case and other cases where we have determined that such evidence has limited probative value due to the lack of context. *See*, *e.g.*, *Motion Picture Association of America Inc. v. Respect Sportswear Inc.*, 83 USPQ2d at 1563 n.10; *In re Fitch IBCA, Inc.,* 64 USPQ2d at 1060.

We also reject the proposition, implicit in opposer's reliance on this evidence, that the mere appearance of something in search results, whether the first twenty results or later, indicates fame. For example, we simply have no way of knowing, based on this record, how these results were generated and ordered. Nor do we know whether the uses in question on the linked websites indicate public recognition of the relevant term.

In evaluating the fame factor we have considered not only the evidence discussed here, which opposer referenced specifically in its brief, but the entire record, including the example of opposer's advertisement/magazine. Conspicuous by its absence is any attempt by opposer to present a comprehensive record of the extent of opposer's use and promotion of THE LEARNING ANNEX mark, sales under

the mark, or any true measure of public awareness of the mark. In sum, we find that the quality and quantity of opposer's evidence falls far short of what is required here to show that THE LEARNING ANNEX is a famous mark.

We now turn to our analysis of the relationship between the parties' services. The services of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the services originate from or are associated with the same source. *See On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Furthermore, in this proceeding we must compare the services identified in opposer's registration and in the opposed application for purposes of this factor. *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 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.”).

Opposer’s registration identifies its services as “providing adult educational courses using independent contractors as instructors” in International Class 41. The services identified in the opposed application are “market research services; providing facilities for business meetings and market research; marketing consulting services” in International Class 35.

Opposer argues, “Both parties are in the education business. Applicant describes its services as ‘the right learning environment.’” Opposer’s Brief at 9. Opposer states further in the conclusion of its argument, “The Applicant has festooned the mark THE ENERGY ANNEX with the words ‘learning’ and ‘learning environment’ to describe the true nature of its services and to confuse the public into thinking that The Learning Annex has extended its line of services.” *Id.* at 13-14. Opposer also suggests the following “theory”:

> Applicant’s context for use of its mark is both revealing and alarming… the first two pages of Applicant’s “Energy Annex” website where Applicant uses the word “learning” **three** times, the first time juxtaposed a mere four words after the phrase “Energy Annex.” Applicant’s primary definition of the “Energy Annex” is that it is “an enhanced consumer learning environment.” By thoroughly draping THE ENERGY ANNEX mark with the word “learning” the Applicant is highjacking opposer’s THE LEARNING ANNEX mark through the back door.

Id. at 8.

Applicant argues that the services of the parties are not related because opposer failed to compare the services as identified in the application and registration at issue, among other reasons.

We conclude that the services are not related. Opposer largely disregards the directive, noted above, that we must consider the services as identified in the application and registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 16 USPQ2d at 1787. Furthermore, even if we were to consider opposer's other "evidence," we find nothing in the excerpts from applicant's website which contradicts the fact that applicant is rendering the services identified in the application. While the text may use the word "learning" here and there, we see nothing in this evidence to support opposer's position that applicant is "in the education business." More importantly, we find no support in this or any other evidence of record that the services identified in the application and registration are related. Accordingly, we conclude that the services are not related.

Furthermore, with regard to the channels of trade for the respective services, opposer suggests that we must assume that channels of trade are identical because there are no stated restrictions. The unstated premise in

opposer's argument is that the parties' services are related, or even identical. In view of our conclusion, based on the respective identifications of services, that the services are not related, we likewise conclude that the channels of trade for the services are distinct. We have no evidence that opposer's adult educational courses are rendered through the same channels of trade as "market research services; providing facilities for business meetings and market research; marketing consulting services." On their face, the identifications indicate that the respective services are offered to different groups, businesses versus individuals pursuing adult education courses, and through different trade channels. In the absence of contrary supporting evidence, we conclude that the channels of trade are neither identical nor related.

Applicant also argues that, "Applicant's services are for sophisticated corporate purchasers and are not impulse purchases." Here also, opposer argues that, because there are not stated restrictions in either the application or registration, we must assume that the services "…are sold at all prices and to all potential purchasers." Opposer's Brief at 10. Neither party offered specific evidence related to this factor. While the identification of services in the application indicates that the services would be directed to businesses, we have no evidence

regarding the types or sophistication of those businesses. Furthermore, as the Board has often observed, even sophisticated purchasers are not immune from trademark confusion. *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). Accordingly, we conclude on this record that the sophistication of potential purchasers would not diminish the likelihood of confusion if any such likelihood might otherwise exist.

Opposer also argues that the absence of actual confusion here is not significant, though applicant did not discuss this factor. We agree with opposer. There is no evidence that there has been a true opportunity for such confusion. Therefore, we find this factor to be neutral in this case.

Finally we turn to consideration of the marks. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Opposer argues, "The parties' marks are similar in appearance. Both marks are three words, begin with THE and end with ANNEX." Opposer's Brief at 7. Opposer also argues that the additional word in each of the marks, LEARNING and ENERGY, are vague in that they do not refer to a precise,

tangible object. Opposer also argues that the marks are similar in meaning, in part, because applicant uses its mark in proximity to "learning," as we referenced above.

On the other hand, applicant argues that the marks differ, noting that "ANNEX," is the only word in both marks, other than the article "THE." Applicant also argues that the marks project different meanings due to the difference in meaning between "LEARNING" and "ENERGY." Applicant points to its use of the phrase, "… the Energy Annex has everything you need to energize your next project" as an illustration of this difference. Applicant's First Notice of Reliance, Publication 5.

Applicant later argues that ANNEX is a commonly used word in marks, and therefore, weak. In this regard, applicant also refers to certain third-party registrations, which it made of record, for marks which include ANNEX. *Id.*, TARR Printouts 1-7. However, None of these registrations cover educational services. Applicant did provide a few examples of web sites using ANNEX in connection with educational services: CLEARWATER ADULT EDUCATION CENTER and ACTURAS ANNEX; Max S. Hayes Adult Education Annex; The Enrichment Center Annex; and Jefferson Annex Adult Education Center. *Id.*, Publications 1-4. We have considered the third-party registrations and the Internet references as mere examples and find them

insufficient to conclude that ANNEX, or ANNEX marks, are weak marks in the education field. Thus, the evidence regarding the strength or weakness of opposer's THE LEARNING ANNEX mark has no bearing on our determination regarding either the similarity of the marks or likelihood of confusion.

Finally, we conclude that the marks, THE LEARNING ANNEX and THE ENERGY ANNEX, are not similar. There are obvious differences in appearance and sound between the marks. However, the most significant differences between the marks are the differences in connotation and commercial impression resulting from the LEARNING and ENERGY elements in the respective marks. In opposer's mark, LEARNING, which is disclaimed, conveys an obvious descriptive meaning in relation to opposer's adult education courses. In applicant's mark, ENERGY has no apparent descriptive meaning in relation to the services identified in the application. Rather, ENERGY, as used in applicant's mark, conveys a sense that applicant's services will "energize," inspire or otherwise enhance the customer's experience. In each of the respective marks, it is the words LEARNING and ENERGY which are dominant in conveying both the connotation and commercial impression of the respective marks.

In conclusion, we find that there is no likelihood of confusion between THE LEARNING ANNEX mark when used in

connection with "providing adult educational courses using independent contractors as instructors" and THE ENERGY ANNEX mark when used in connection with "market research services; providing facilities for business meetings and market research; marketing consulting services." We conclude so principally due to the "cumulative effect of differences in the essential characteristics of the [services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 USPQ at 29.

Decision: We dismiss the opposition.