

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 13, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Smith Micro Software, Inc.**

Serial No. 75/076,684

George J. Netter, Esq. for Smith Micro Software, Inc.

Stacy J. Johnson, Trademark Examining Attorney, Law Office
113 (**Meryl Hershkowitz**, Managing Attorney)

Before Hanak, Bucher and Rogers, Administrative Trademark
Judges.

Opinion by Rogers, Administrative Trademark Judge:

Smith Micro Software, Inc. has filed an application to register AUDIO VISION as a trademark for goods identified by amendment as "software for a multimedia personal computer to establish two-way audio and video links over ordinary telephone lines between conferencing parties."¹

¹ Serial No. 75/076,684, filed March 21, 1996, based on applicant's allegation of a bona fide intention to use the mark on or in connection with the goods in commerce. During

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The basis for the refusal is that the mark AUDIOVISION has already been registered for a variety of computer hardware and software items², so that when applicant's mark is used on or in connection with the identified goods, it would be likely to cause confusion or mistake by consumers, or to deceive consumers as to the source of applicant's and registrant's respective goods.

Applicant appealed the refusal of registration and timely filed an appeal brief. An Examining Attorney subsequently assigned to handle the appeal requested a remand to submit additional evidence, which the Board granted. Applicant did not respond to the additional evidence made of record by the Examining Attorney during the remand. Though invited by the Board to do so, applicant did not file a supplemental brief. The Examining

prosecution of the application before the Examining Attorney, applicant entered a disclaimer of AUDIO.

² Registration No. 1,839,260, issued June 14, 1994, for "computer hardware; namely, computers, video digitizers, audio digitizers, analog to digital audio converters, National Television Standards Committee to red-green-blue synchronization video and signal converters, sync generators, video local area network controllers, video monitor controllers, monitors; computer programs for use in video editing; audio amplifiers and loud speakers." According to Office records, a combined affidavit of use and incontestability was filed with the Post Registration section, under Sections 8 and 15 of the Trademark Act, on July 15, 1999, although it has not yet been acted upon.

Attorney then filed a brief within the time set by the Board; an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on analysis of all of the probative facts in evidence that are relevant to factors bearing on the issue of likelihood of confusion. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In this case, key considerations are the similarities in the marks and relatedness of the goods.

The marks are identical in sound and, but for the space in applicant's mark, in sight. The marks are likely to create the same commercial impression on consumers; there is no evidence from which we can conclude otherwise, i.e., there is no evidence that differences in the goods of applicant and registrant would, when the marks are used on or in connection with those goods, give rise to different commercial impressions. The substantially identical nature of the marks is a fact which "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

We turn, then, to the goods. When marks are the same, or even nearly so, "it is only necessary that there be a viable relationship between the goods or services in order

to support a holding of likelihood of confusion." In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983). The likelihood of confusion analysis, in regard to the relatedness of applicant's and registrant's goods, must be determined on the basis of the goods as they are identified in the application and registration. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Since neither identification is restricted in any way as to channels of trade or classes of consumers, despite applicant's allegations to the contrary, the Board must assume that the goods could be offered through all normal channels of trade and to the usual classes of consumers for such goods. *Id.* In the absence of any evidence from applicant to support its argument that the involved goods move in different channels of trade, we agree with the Examining Attorney's conclusion that they travel in the same channels of trade to the same consumers. Moreover, while applicant argues that its goods are targeted to the home computer user, its own promotional literature, filed in response to the Examining Attorney's initial refusal of registration, establishes otherwise. Specifically, the literature states applicant's goods are "perfect for business and home use".

Registrant's goods include computers and monitors, without limitation as to type or use. Registrant's goods also include computer programs, albeit a specific type of program. Nonetheless, this illustrates that the same mark can be used to market both items of computer hardware and software.

In addition, applicant's software and some of registrant's hardware items, specifically, its computers and monitors, are complementary. A home or business user of a computer and monitor purchased from registrant, when confronted with applicant's software in the marketplace, may readily conclude that registrant is the source or sponsor of the software.

In short, we find a clear likelihood of confusion among consumers.

Decision: The refusal of registration is affirmed.

E. W. Hanak

D. E. Bucher

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial

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